

S. HRG. 112-113

**THE INDIAN REORGANIZATION ACT—75 YEARS
LATER: RENEWING OUR COMMITMENT TO
RESTORE TRIBAL HOMELANDS AND PROMOTE
SELF-DETERMINATION**

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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JUNE 23, 2011
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CONTENTS

	Page
Hearing held on June 23, 2011	1
Statement of Senator Akaka	1
Statement of Senator Barrasso	2
Statement of Senator Udall	29
Prepared statement	29
WITNESSES	
Echohawk, John E., Executive Director, Native American Rights Fund	47
Prepared statement	50
Finley, Hon. Michael O., Chairman, Confederated Tribes of the Colville Res- ervation	69
Prepared statement	71
Goldberg, Carole E., Jonathan D. Varat Distinguished Professor of Law, UCLA School of Law	21
Prepared statement	23
Heeley, Steven J.W., Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP	35
Prepared statement	36
Hoxie, Frederick E., Swanlund Chair/History Professor, University of Illinois .	3
Prepared statement	4
Keel, Hon. Jefferson, President, National Congress of American Indians	66
Prepared statement	68
Monette, Richard, Associate Professor of Law, University of Wisconsin Law School	41
Prepared statement	43
Rice, William, Associate Professor of Law, University of Tulsa College of Law	12
Prepared statement	13
APPENDIX	
Cromwell, Hon. Cedric, Chairman, Mashpee Wampanoag Tribe, prepared statement	77

**THE INDIAN REORGANIZATION ACT—75
YEARS LATER: RENEWING OUR
COMMITMENT TO RESTORE TRIBAL
HOMELANDS AND PROMOTE SELF-
DETERMINATION**

THURSDAY, JUNE 23, 2011

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. The Committee will come to order.

Aloha and welcome to the Committee's oversight hearing on the Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination.

Sometimes in Indian policy, it is necessary to look at the past in order to move forward. That is what we will be doing today by examining the original intent and legislative history of the Indian Reorganization Act and subsequent amendment to the Act.

When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination. Those fundamental goals still guide Federal Indian policy today.

When Congress amended the Indian Reorganization Act in 1994, it reaffirmed the original intent of the IRA and ensured that all tribes would be treated equally, no matter when their relationship with the Federal Government was recognized.

In addition, the Congress explicitly rejected the Department of Interior Solicitor's opinions implementing policies which divided tribes into separate classes. Since 1934, the IRA has stood as the bedrock of Federal Indian policy.

However, a Supreme Court decision in 2009 narrowly construed the text of the IRA and completely up-ended the status quo, which had existed for 75 years, contrary to Congressional intent, legislative history, and affirmative actions by the Administration.

I have a great deal of respect for the Supreme Court and the hard work that they do. However, when the court gets it wrong, it is the responsibility of Congress to fix it. That is why this Committee at its first business meeting in the 112th Congress passed a *Carciari* fix out of Committee. My *Carciari* fix bill does nothing more than to simply restore the status quo that existed for 75 years and affirms the original intent of the Indian Reorganization Act to restore tribal homelands and empower tribal governments to exercise self-determination.

My colleagues and I understand the importance of this bill to Indian Country and our Committee to doing everything we can to pass a clean *Carciari* fix this session of Congress.

At this point, I would like to ask Senator Barrasso if he has any opening statement to make.

**STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman.

Good afternoon and thank you for holding this hearing on the Indian Reorganization Act. I want to keep my remarks brief because we have three panels and eight witnesses who are here today to testify.

First, as always, I want to thank our witnesses for agreeing to assist the Committee in its inquiry into the Indian Reorganization Act. I know it is not easy for people to take time out of their regular lives not only to travel to the Nation's capital, which is obviously a great distance, but also to prepare their testimony. So we appreciate it very much.

I would like to make just a couple of comments regarding the subject of today's hearing as well, Mr. Chairman. I know and appreciate the importance of homelands to Indian people. Certainly, that concept, the concept of homelands, means many things and it captures many different values, historic, cultural, religious, spiritual and many other values.

Some of the witnesses here today will be speaking to these aspects of the Act. And I look forward to hearing what everyone has to say.

The Act addresses other issues as well, including the issue of governance. One very important provision of the Act establishes a process for tribes to organize under a new constitution. I understand that the two Wind River tribes in Wyoming chose not to adopt an Indian Reorganization Act constitution. However, many other tribes around the Country accepted the Act and adopted constitutions under this process.

So I would like to hear how these constitutions are working some 75 years after the fact. Are many of them still in effect? And if so, do they serve the tribes well? Or have tribes adopted changes to these constitutions to meet new challenges and new needs?

I ask these questions in part because the Committee has been looking at various aspects of trust land reform, and looking at modernizing the laws applicable to Indian trust lands. The HEARTH Act is an example of that, as is the Indian Energy Initiative that we have been working on. Those are a couple of things. These

measures would involve much greater control and involvement of tribal governments in trust land management.

So I would like to hear from tribes on these questions. And with that, I would like to thank you, Mr. Chairman, and thank the witnesses and look forward to the hearing today.

The CHAIRMAN. Thank you very much, Senator Barrasso, my friend and colleague, as we move this Committee.

With that, I want to welcome the witnesses. I appreciate that you have all traveled far to come here and look forward to hearing your testimony on this very important matter.

We have three panels to hear from today, so I ask that you limit your oral testimony to five minutes. Your full written testimony will be included in the record.

Also, the record for this hearing will remain open for two weeks from today, so we welcome written comments from any interested parties.

I want to, of course, move this along and say that we have a panel that can talk about the past and what it has been all about. We will hear from our distinguished panel.

I welcome our first panel of witnesses to the Committee today: Professor Frederick Hoxie, the Swanlund Chair and Professor of History at the University of Illinois; Professor William Rice, Associate Professor of Law at the University of Tulsa College of Law; and I also want to welcome Professor Carole Goldberg, the Jonathan D. Varat Professor of Law at the UCLA School of Law.

So that is our panel. Again, I want to welcome all of you.

Mr. Hoxie, will you please proceed with your testimony?

**STATEMENT OF FREDERICK E. HOXIE, SWANLUND CHAIR/
HISTORY PROFESSOR, UNIVERSITY OF ILLINOIS**

Mr. HOXIE. Thank you, Mr. Chairman. Thank you for this opportunity.

When Congress approved the Indian Reorganization Act in June, 1934 it articulated and advanced three broad goals. First, the IRA was intended to end allotment, the government program of individualizing and privatizing American Indian lands. As a national policy, allotment had been initiated in 1887 by the Dawes Severalty Act and had facilitated the transfer of tens of millions of acres of Indian land from native to non-native ownership.

While the consequences of this devastating loss continues to plague Indian people down to the present day, the IRA ended Federal support for the continued erosion of American Indian community resources.

Second, the IRA made possible the organization of tribal governments and tribal corporations. These provisions of the law created a mechanism by which native people might establish federally recognized entities that could govern, develop and speak for their communities. From 1934 onward, tribal governments would be a constant visible factor in policymaking.

Third, by ending the allotment policy and providing for the future development and even expansion of reservation communities, Congress endorsed the idea that individuals could be both U.S. and tribal citizens. For the first time in the Nation's history, the Federal Government codified in a general statute the idea that tribal

citizenship was compatible with national citizenship and that Indian-ness would have a continuing place in American life. This action brought forward a new generation of American Indian leaders.

Over the past eight decades, the implementation of the IRA has generally supported these three goals. The individualization of indigenous community resources has been halted. Tribal institutions have flourished. And Indian people have asserted themselves as citizens of and advocates for their tribe, without jeopardizing their status as citizens of this Nation.

As a consequence, in the years since 1934, despite periods when policymakers ignored Indian voices, and despite the persistence of discrimination, unacceptable rates of poverty and the ongoing crises in the delivery of social services, native people have not been viewed by policymakers as a vanishing or deficient people who must give up their traditional cultures and identities in order to become American.

Since 1934, Indians across the Nation have been free to be active citizens in their communities and to assert tribal interests and tribal rights without being labeled unpatriotic, backward or uncivilized. We have banished the long-held Indian Office view, neatly summarized by one Wisconsin Indian Agent a century ago, that Native Americans, “cannot improve in civilization and remain Indians.”

When assessing the implications of the United States Supreme Court’s 2009 decision in *Carrieri*, I hope the Members of this Committee will consider these original objectives of the Indian Reorganization Act. The passage of this statute marked an important turning point in the history of relations between the United States and America’s indigenous peoples. An ambitious Commissioner of Indian Affairs and an energetic new Administration worked collectively with a skeptical but cooperative Congress to forge a general statute that ended a half-century assault on Indian landholdings, initiated the creation of modern tribal governments, and called forth a new generation of Indian political leaders.

Spurred by the disastrous conditions created by the government’s own misguided policies over the previous 50 years, encouraged by Indian leaders, and framed by experienced legislators, the new law marked a brave decision to turn away from paternalism and to embrace a new Federal policy based on mutual respect and faith in the future of American Indians as citizens of tribes and of the United States.

In whatever reforms or initiatives you and your colleagues consider in the weeks ahead, I hope that you will both remember and honor your predecessors’ remarkable and courageous achievement.

Thank you.

[The prepared statement of Mr. Hoxie follows:]

PREPARED STATEMENT OF FREDERICK E. HOXIE, SWANLUND CHAIR/HISTORY
PROFESSOR, UNIVERSITY OF ILLINOIS

Like any statute, the Indian Reorganization Act (IRA) attracted support from legislators who did not agree with one another politically or on every aspect of policymaking. Nevertheless, when Congress approved this law in June, 1934, it articulated and advanced three broad goals. The clarity of those goals (and their persistence over the past eight decades) enables us to define quite clearly the core intent of this landmark legislation.

First, the IRA was intended to end allotment—the government program of individualizing and privatizing American Indian lands. As a national policy, allotment had been initiated in 1887 by the Dawes Severalty Act and had facilitated the transfer of tens of millions of acres of Indian land from Native to non-Native ownership. While the consequences of this devastating loss continue to plague Indian people in the United States down to the present day, the IRA ended federal support for the continued erosion of American Indian community resources.

Second, the IRA made possible the organization of tribal governments and tribal corporations. These provisions of the law created a mechanism by which Native people could establish federally-recognized entities that could govern, develop—and speak for—their communities. From 1934 onward, tribal governments would be a constant, visible factor in policymaking.

Third, by ending the allotment policy and providing for the future development, and even expansion, of reservation communities, Congress endorsed the idea that individuals could be both U.S. and tribal citizens. For the first time in the nation's history, the Federal Government codified in a general statute the idea that tribal citizenship was compatible with national citizenship and that “Indianness” would have a continuing place in American life. This action brought forward a new generation of Native American leaders.

Over the past eight decades the implementation of the IRA has generally supported these three goals: the individualization of indigenous community resources has been halted, tribal institutions have flourished, and Indian people have asserted themselves as citizens of, and advocates for, their tribes without jeopardizing their status as citizens of this nation. As a consequence in the years since 1934, despite periods when policymakers ignored Indian voices, and despite the persistence of discrimination, unacceptable rates of poverty, and ongoing crises in the delivery of social services, Native people have not been viewed by policymakers as a “vanishing” or deficient people who must give up their traditional cultures and identities in order to become “Americans.” Since 1934 Indians across the nation have been free to be active citizens in their communities and to assert tribal interests and tribal rights without being labeled unpatriotic, backward of “uncivilized.” We have banished the long-held Indian Office view, neatly summarized by one Wisconsin Indian agent a century ago, that Native Americans “cannot improve in civilization and remain Indians.”¹

In short, the IRA was intended to initiate a new era in which the United States would support Indian people and tribal communities as continuing and dynamic members of a modern American nation. This aspect of the law—together with the national government's pledge to sustain an ongoing and mutually-satisfactory relationship with Native tribes—remains its crowning achievement. The fulfillment of this goal is the reason, despite economic hardships and policy disputes, that the United States has been a model for other democracies struggling to forge fair, just, and mutually respectful relations with the indigenous communities within their borders.

Objective One: Stopping Allotment and the Individualization of Tribal Resources

The policymakers who crafted the Indian Reorganization Act were acutely aware of the devastating consequences of allotment. They understood that the previous generation of Indian Office and congressional leaders had been eager to accelerate the division of tribal lands and the removal of the restrictions the Dawes Act had originally placed on the sale and lease of individual allotments. Their predecessors had applauded in 1903 when the Supreme Court in *Lone Wolf v. Hitchcock* had endorsed Congress's “plenary authority” over Indian lands. That decision endorsed the unilateral abrogation of treaties and the rapid dissolution of collective landownership (something that had not been provided for in the original allotment law). “If you wait for the tribe's consent in these matters,” Commissioner of Indian Affairs William A. Jones declared at the time, “it will be fifty years before you can do away with the reservations.”² Jones's colleagues in Congress agreed, endorsing the removal of trust restrictions that would have kept allotments in Indian hands. Connecticut's senior Senator Orville Platt spoke for many when he declared that “the easiest Indians in the country to civilize” were those who had “no money, no funds, no land, no annuities.”³

¹ Annual Report of the Commissioner of Indian Affairs, 1875, 871.

² Quoted in Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Lincoln: University of Nebraska Press, 1984), 155.

³ *Ibid.*, 157–8.

Legislators in 1934 were aware that their predecessors' assumption that allotment—and even poverty—would spur Indian “progress” had proven tragically incorrect. Not only had the Indian estate shrunk from 151 million acres to 52 million acres between 1880 and 1933, but this transfer of assets from Indians to non-Indians had not produced economic prosperity—or even minimal security. In 1928, The Meriam Report, a federally-funded study of social and economic conditions among American Indians, found that “the overwhelming majority of Indians are poor, even extremely poor.” Among its findings:

Health: “The health of the Indians as compared with that of the general population is bad . . . [T]he death rate and the infant mortality rate are high. Tuberculosis is extremely prevalent.

Living Conditions: “. . . are conducive to the development and spread of disease . . . [T]he diet of the Indians is bad . . . [T]he use of milk is rare, and it is generally not available, even for infants.

Economic Conditions: “The income of the typical Indian family is low and earned income extremely low. . . . [T]he number of real farmers is comparatively small”

Seventy one percent of Indians reported a total income of less than \$200 per year; the commission also noted that some income statistics were so low as to be “unbelievable.”⁴

The appalling statistics in the Meriam Report proved that the rosy predictions of progress over the previous three decades had been both self-serving and wrong. As legislators and Indian Office leaders in the Hoover administration struggled to respond to the growing realization that a dramatic new policy initiative was needed, the Great Depression hit and conditions grew worse. Native Americans faced crushing hardship and even starvation. In 1931 the Indian Office—with no further resources of its own—was forced to call on the American Red Cross and the U.S. Army to supply food to needy Indians.

Franklin Roosevelt's inauguration in 1933 offered the prospect of change. Moreover, his appointment of long-time Indian Office critic John Collier to position of Commissioner of Indian Affairs indicated that a major new policy initiative would soon be forthcoming. Collier, an idealistic former New York City social worker, would serve as Commissioner of Indian Affairs for twelve years, longer than anyone in American history. Founder and president of the American Indian Defense Association (AIDA), the new commissioner had spent most of the 1920s rallying environmentalists, humanitarians and sympathetic politicians to the cause of protecting Indians from exploitation and abuse. His correspondents during that decade included the popular western writer Mary Austin, Roger Baldwin, the founder of the American Civil Liberties Union, progressive reformers Arthur Morgan, Robert Ely and Harold Ickes (a Chicago attorney who later became Roosevelt's Secretary of the Interior), and political insurgents Robert LaFollette and William Borah. The AIDA was generously supported by the General Federation of Women's Clubs and wealthy patrons in California and New York.

Collier's reform ideas were embodied in a legislative proposal drafted during the winter of 1933 by Felix Cohen and a team of lawyers in the Interior Department. The son of philosopher Morris Cohen, Felix held a law degree from Columbia and a Ph.D. in philosophy from Harvard and was deeply sympathetic to the commissioner's desire to use federal power to protect and rehabilitate Native communities. Cohen and Collier believed the most effective method for accomplishing this goal was an ambitious federal initiative to end allotment, sponsor federally-sanctioned tribal governments and promote indigenous leaders. They hoped that their reforms would stop the erosion of Indian resources while facilitating the consolidation of tribal land holding and the development of modern and productive tribal enterprises.

Collier's February, 1934, draft of the IRA ran to forty-eight pages and included provisions for a national court of Indian Affairs, and the granting of extensive governmental powers to the new reservation governments. Among the proposed powers were the authority to condemn reservation land owned by tribal members, the right to manage Indian Office personnel, and the privilege of selecting the particular federal services each community felt were most appropriate to their needs. Several congressional leaders and many in the Indian service responded to Collier's proposal

⁴Quoted in R. David Edmunds, Frederick E. Hoxie, and Neal Salisbury, *The People: A History of Native America* (Boston: Houghton Mifflin, 2007), 371. The original report is *The Problem of Indian Administration: Report of a Survey Made at the Request of Honorable Hubert Work, Secretary of the Interior* . . . (Baltimore: Johns Hopkins Press, 1928).

with shock, arguing that it represented too radical a shift from past practices. Collier responded to this criticism by organizing nine regional “Indian congresses” which were held during March and April, 1934. At these congresses—unprecedented in federal Indian policymaking—the commissioner and his representatives explained the provisions of the proposed law and tried to rally support for it from tribal delegates. The congresses revealed significant pockets of support for Collier’s bill among Indian communities, but they also generated new questions and concerns. What of existing business committees and tribal councils? How would the new law affect treaty rights and claims cases? And how would the rights of individual Indian landholders be protected from the power of the new tribal governments? In the wake of these meetings, Collier revised his bill and began negotiations with key congressional leaders.

Negotiations between Collier and Indian Affairs Committee leaders proceeded during April and May, and the bill won final approval on June 18. Throughout this process, Commissioner Collier retained his basic commitment to ending allotment and launching federally-recognized tribal councils that would empower American Indians to govern their own communities under federal supervision and launch new economic development initiatives. Everything else was negotiable. As Collier and congressional leaders struggled over the final bill, President Roosevelt, acting at the behest of Interior Secretary Harold Ickes, intervened with a letter stressing the urgency of the situation. FDR warned that if the negotiators failed to act, the nation would soon witness the “extinction of the race.” It was this image of a national tragedy of vanishing Indians that made the difference. Burton K. Wheeler, Chair of the Senate Indian Affairs Committee, told the President “something can be worked out” and a few weeks later the legislation was approved.

The final bill was less than half the length of the commissioner’s original draft but it embodied the key elements of Collier’s and Cohen’s original vision: the end of allotment, the creation of tribal governments, and an endorsement of tribal citizenship and tribal culture.⁵ The more controversial aspects of Collier’s original proposal—a national Indian court and expansive powers for tribal governments—had been jettisoned.

The three central elements of the IRA were also supported by ancillary New Deal programs. Both Collier and congressional leaders supported special programs within the Civilian Conservation Corps and the Works Progress Administration, for example, that created jobs on reservations for day laborers and construction crews. These programs stimulated local economies and built both new buildings and improved reservation infrastructure. Other agencies provided funding for reservation schools and conservation projects and medical facilities, while the Indian Office won a 30 percent in its annual budget.⁶ All of this activity provided new opportunities for tribal leaders and new forums for the discussion of the Native future within the United States.

Given the desperate circumstances that produced the IRA, it is not surprising that the new statute set an ambitious, national agenda for the rehabilitation of Indian communities. Indeed, at a May hearing shortly before the bill was approved, Collier explained the thinking behind the new law’s proposed Section Five which authorized the Secretary of the Interior to acquire land “for the purpose of providing land for Indians.” Through his many years of advocacy—and at the several regional congresses he had just completed—Collier had spoken about the suffering of Indian communities that had become landless during the allotment era. “Wandering bands of Indians who have no reservation at all,” he declared, would be helped and rehabilitated on new reservations. Following passage of the act, a number of groups who fit this description organized tribal governments under the IRA. These included a tribe that previously had had no resident agent (Saginaw Chippewa), a tribe whose lands had been largely abandoned (Pojoaque Pueblo), tribes that no longer controlled any trust land (Bay Mills), and long-neglected groups such as the Catawba Indian Tribe of South Carolina and the Alabama and Coushatta Indians in Texas. In the wake of the law’s passage, the Indian Office also created four new reservations in Nevada to accommodate tribes there.⁷

⁵The best recent analysis of the final bill and its relation to Collier’s original proposal is in Rusco, *A Fateful Time*, 255–281.

⁶Exact figures are difficult to retrieve, but the Indian Office budget for 1931 stood at \$28 million and the 1940 appropriation was \$37 million. See Philp, *John Collier’s Crusade for Indian Reform*, 96 and *The First American*, March 16, 1940, 5. Both figures are in current dollars; not adjusted for inflation.

⁷See Hearings on S.2744 and S.3645 Before the Senate Committee on Indian Affairs, 73rd Congress, 2 Session, 241 (1934). This aspect of the IRA is discussed at length in BRIEF OF

The intention of the IRA's framers to stop the erosion of tribal resources and begin the process of community rehabilitation is also made evident by the fact that in 1936, acting at Collier's request, Congress approved the Oklahoma Indian Welfare Act and the Alaska Reorganization Act. The Oklahoma law contained a version of the IRA's original Section Five, empowering the Secretary of the Interior to acquire land that "shall be taken into trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired . . ." ⁸ The Alaska Act was modified to fit the distinctive conditions in that territory, but the Commissioner declared that the law's purpose was consistent with the IRA: to protect Native groups "who in the past have seen their land rights almost universally disregarded . . . and their economic situation grow each year increasingly more desperate." ⁹

Recent critics have charged that the IRA did little to restore the millions of acres Indian people had lost during the four decades of allotment or to provide material assistance to Indian farmers who had been marginalized by their mechanized non-Indian neighbors. These critics add that the law did little to end the pernicious practice of leasing Indian lands to non-Native farmers, ranchers and mineral resource developers, a pattern that had begun in the early decades of the 20th century and which continues to siphon resources from tribal homelands. Many of these criticisms are warranted, but there can be no doubt that the first objective of the Indian Reorganization Act was to stop the dissolution of the Indian estate and to begin the process of community rehabilitation in every Native American community in the nation.

Objective Two: The Organization of Tribal Governments

Inspired both by his experience as a social worker in the immigrant neighborhoods of New York City in the first decades of the nineteenth century, and by his experience as an Indian policy activist in the 1920s, John Collier believed that the most effective agents of community development were leaders drawn from the community itself. In New York he had been an advocate of settlement house organizations and community celebrations of group identity. His Indian work had begun, famously, during a Christmas visit to Taos Pueblo in 1920. There he made what he called his "earth shaking discovery of American Indians." Witnessing winter ceremonies at this mountaintop village, he later recalled, he saw "face to face, primary social groups" that proved to him "deep community yet lived on in the embattled Red Indians." In the dozen years that followed, Collier held to that insight, insisting to paternalistic missionaries, authoritarian BIA officials and doubting legislators that Native communities—which had maintained their distinctive identities through centuries of assault and dispossession—represented a "new hope for the Race of Man." ¹⁰

It is easy at the remove of nearly a century to scoff at the image of an idealistic New York social worker falling in love with Indians in the winter chill of a Taos winter ceremony. But however romantic it may have been, Collier's Taos vision stayed with him until the day he died—ironically—at Taos, in 1968. More important, Collier's rejection of paternalism—the idea that white people knew what was best for Indians—set him apart from most of the major policy figures of his day. In 1920, missionaries and mission societies—all determined to replace Native "paganism" with Christianity—dominated Indian policymaking. Few of them took Collier seriously. Over the next decade, however, both the growth of popular interest in Native American culture, and the growing sense that authoritarian efforts to eradicate Indian lifeways were both unfair and doomed to fail, moved popular opinion in Collier's direction.

By the time John Collier and his congressional adversaries were negotiating the details of the Indian Reorganization Act, his idealistic rhapsodies had become mainstream. For one thing, the academic study of American Indians had revealed that earlier interpretations of Native culture as backward and primitive were incorrect. In the era of allotment, anthropologists had applauded the eradication of Indian cultures. John Wesley Powell, for example, the Smithsonian Institution's preeminent expert on Native Americans wrote a key congressional leader in 1880 that the only way the United States' "debt" to the Indians could be repaid was "by giving to the Indians Anglo-Saxon civilization, that they may also have prosperity and happiness under the new civilization of this continent." ¹¹

HISTORIANS FREDERICK E. HOXIE, PAUL C. ROSIER AND CHRISTIAN W. MCMILLEN AS AMICI CURIAE SUPPORTING RESPONDENTS, *Carcieri v. Kephthorne*, 07–526, 10–14.

⁸ U.S. Statutes at Large, 49:1967.

⁹ Quoted in Francis P. Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska, 1984) II, 971.

¹⁰ See John Collier, *From Every Zenith* (Denver: Sage Books, 1963), 126, 123, 119.

¹¹ John Wesley Powell to Senator Henry Teller, March 23, 1880, quoted in Hoxie, *A Final Promise*, 24.

By 1934 Powell's successors in museums and universities had come to believe that the peoples of the world had created a variety of distinct and worthy cultural traditions and that each deserved to be appreciated on its own terms. Franz Boas, the leading anthropologist of the day, expressed this view in a letter to President Roosevelt on the eve of his inauguration. Urging the President-elect to chart a new course in Indian affairs, Boas declared that throughout its history the Indian Office had continuously made "one fundamental error." It had failed "to understand the impossibility of overcoming the deep influence that the old ways of life still exert upon the Indian community. Whoever is in charge of the Bureau of Indian Affairs," he wrote, "ought to understand this fact."¹²

While many in Congress continued to support the work of missionaries and others who sought to "uplift" the nation's Indian communities, the Anglo-Saxon idealism of Powell and his contemporaries had largely vanished by the time of the New Deal. Burton Wheeler, Chair of the Senate Indian Affairs Committee, a former labor lawyer who had been Robert LaFollette's running mate on the Progressive Party ticket in 1924, was dubious about the effectiveness of Collier's ideas, but he had little sympathy for the commissioner's missionary critics. (One published an article in the *Christian Century* magazine entitled, "Does Uncle Sam Foster Paganism?"¹³) With the White House urging passage, Wheeler and his congressional colleagues scaled back many of the most ambitious features of Collier's original bill—and added an amendment excluding Oklahoma from its provisions—before agreeing to support it.

In the decade following the passage of the IRA, Senator Wheeler and other western legislators became critical of Collier and his administration of Indian Affairs. Many charged that the commissioner was a social engineer who was perpetuating Indians in a state of dependency. Others believed his programs were wasteful and too expensive. By the end of the 1930s, the commissioner became a lightning rod for opponents of the New Deal. But despite this shifting political climate, there was little appetite in Congress for a return to the authoritarian policies of the allotment era. Tribal governments were often hobbled by hostile BIA administrators and tiny budgets, but few in Congress questioned the value of Native organizations or the importance of some form of Indian participation in policymaking. Even the attacks on tribal governments that led to the termination of several tribes in the 1950s were predicated on the assumption that Indians should consent to any shift in their status. When termination was stopped and eventually reversed, its critics' most powerful argument was that Indian leaders and tribal organizations opposed it.

Despite disagreements among the authors of the IRA over the powers to be granted the new tribal governments, the law ratified a new consensus regarding the importance of tribal organizations and Indian leaders and underscored the necessity of involving Indian people in the formulation of policies affecting their communities. Debate over the scope of Indian and tribal leadership in policymaking continues into our own time, but the IRA defined for the first time a new, national approach to policymaking that would include Indian people and organizations regardless of their location or history.

Objective Three: Redefining Indian Citizenship

During his negotiations with Congress over his proposal, John Collier had agreed to an amendment mandating local referendums on the IRA before it could be implemented at any agency. This fact, together with the speed with which the IRA was proposed and passed, meant that the implementation of the new law would be marked by extensive, grass-roots debate and the involvement of tribal leaders from every corner of the nation.

At the time of the IRA's passage, hundreds of Indian leaders were prepared and eager to participate in these discussions regarding the future of their communities. During the previous two decades, most tribes had organized BIA-approved "business committees" or tribal councils. The Indian Office articulated no specific agenda for these groups and gave them little authority. Nevertheless, these organizations provided a forum and training ground for aspiring community leaders (and likely producing most of the participants in Commissioner Collier's "congresses" in the spring of 1934). In addition, by 1930 nearly two hundred cases had been brought to the U.S. Court of Claims by tribes charging federal officials with mismanagement of their resources or failure to pay damages under existing treaties and agreements. The most famous of these was *U.S. v. Sioux Nation* (filed first in 1923 and ultimately settled—in court—in 1980), but no matter their size or fame, each one

¹²Franz Boas to Franklin D. Roosevelt, March 16, 1933, quoted in Prucha, *The Great Father*, II, 939.

¹³Elaine Goodale Eastman, "Does Uncle Sam Foster Paganism?" *Christian Century* 51 (August 8, 1934), 1016–1018.

brought together generations of tribal leaders and allied lawyers to lobby, gather evidence and rally community support for the effort. For these reasons, an entire generation of energized Indian citizens stood poised to participate in the IRA implementation process, a process which dramatically energized the political life of Native America.

In the first year following the law's passage, the Crows and Navajos decided against organizing under the IRA. The largest Sioux reserves—Pine Ridge and Rosebud—voted narrowly to accept the new law in hotly contested balloting held during the same period. Among these larger tribes, opponents of the IRA focused their attacks on the BIA and its history of incompetence. Their complaints ranged from criticism of the campaign to reduce erosion on the Navajo reservation by reducing the size of family sheep herds, to divisions between older traditionalists and young, English speaking leaders, to concerns—expressed most vehemently among the Sioux, Crow and New York communities—over the impact of the new law on the force of existing treaties. But while the nature of this opposition varied, every community faced a similar dilemma: deciding between the promise of new federal programs and their accompanying subsidies for tribal development, and their longstanding distrust of Washington bureaucrats appearing to offer them once again a “solution to the Indian problem.”

During the New Deal years, the Indian Office sponsored a total of 258 reservation referendums on the IRA. Two-thirds of the tribes voted to accept the new law, but heavy negative votes among large tribes such as the Navajos and the Sioux meant that of the total ballots cast in all IRA elections, only 40 percent were marked “yes.” Still, this disagreement energized the political life of countless Native communities, creating challenges for older leaders and bringing dozens of younger men and women into the limelight. Among the latter group was D'Arcy McNickle, a young aid to commissioner Collier who had grown up on the Flathead Reservation in northwestern Montana. McNickle became the commissioner's most senior American Indian advisor. Over the course of the 1930s, he also became one of his agency's principal representatives in the campaign to win ratification of the IRA.

At first—probably because of his youth—McNickle was sent to remote communities where Indians were poor, vulnerable and likely to welcome the government's presence. He traveled to North Dakota to meet with the Missouri River tribes at Fort Berthold and with landless Crees and Ojibwes near Great Falls, Montana. He traveled to Iowa to meet with the tiny Sac and Fox tribe and to Maine where he discovered “a rather forlorn band of Algonquin-speaking Indians.”¹⁴

Wherever he traveled, McNickle presented himself as a loyal defender of the Commissioner's programs. He wrote in 1938, for example, that, “In years past, the seasons came and went.” McNickle wrote, but “this year, for some Indians, there is a difference.” The “difference,” he declared, was the Indian Reorganization Act under which “tribes have become organized . . . money has gone into tribal treasuries, land has been purchased, [and] students have secured loans to attend colleges.” He cited federal money distributed to tribes, land purchased by new reservation governments, and scholarships awarded to Indian students. “Something has started,” he observed, “and here is the general direction in which it moves.”¹⁵

But McNickle was not simply Collier's publicist. While he supported the administration's program, his rapid education in the daily reality of tribal life quickly pushed him in a more practical direction. Like other tribal leaders of his day, he found himself participating in an ever-widening public discussion of Indian affairs. He wrote in 1938, for example, that “What has been done is only a fragment of the task remaining.” The program, “is not a simple matter of organizing tribes and lending money to them,” he added. “They will need, for several years, as much encouragement and assistance as can be given them.” He cited the need for ongoing subsidies for tribal operations, money for land purchases, and support for tribal police and courts. In his view, the new law had initiated a process of community revitalization that was creating a rapidly-multiplying set of needs among the tribes. The assertion of these needs ran straight into—and over—the patronizing racial attitudes that had long pervaded Indian policymaking in Washington, D.C.

Looking back on the New Deal era from the perspective of the 1950s, McNickle wrote that “If one sees Indians as savages, or the often used euphemism “children,” perhaps no other view and no other course of action are possible than to work for

¹⁴ See Parker, *Singing an Indian Song*, 71–2 and D'Arcy McNickle, “In Maine,” *Indians at Work*, October 1, 1937, 15–18. McNickle's travels can also be deduced from his comments in a speech to the Missouri Archaeological Society. See D'Arcy McNickle, “The Indian Today,” *Missouri Archaeologist*, v.5, n.2 (September, 1939), 1–10.

¹⁵ D'Arcy McNickle, “Four Years of Indian Reorganization,” *Indians at Work*, v.5, n.11 (July, 1938), 4–11.

their extermination. . . . At the very heart of the Indian problem” he added, was “the need for land and [financial] credit.” Outsiders who did not understand this—even those who rhapsodized over the beauty of Indian ceremonies—condemned the tribes to a future of picturesque powerlessness—or worse.¹⁶ The IRA brought the tribes’ need for “land and credit” sharply into focus and initiated a rapid expansion of activism among Indian leaders at both the local and national level.¹⁷ The new law taught the nation a fundamental lesson that was news to many policymakers: Indians are not children.

D’Arcy McNickle’s career illustrates how dramatically the policymaking arena changed during the New Deal. He became a national figure in Indian affairs during the 1930s, and, in 1944, a central organizer of the National Congress of American Indians (NCAI). He remained a prominent figure in that organization well into the 1960s. He was also one of the principal organizers of the 1961 American Indian Chicago Conference—at that time the largest gathering of Native leaders ever held in North America—and a pioneer in the infant field of Native American Studies.

By the end of World War II, an entirely new community of Native leaders was coming onto the scene. Their activism had begun during the implementation of the IRA in the 1930s, but was also fueled in many cases by the confidence derived from service in World War II (and the GI Bill). Some older figures like McNickle or Ruth Muskrat Bronson of the NCAI presented themselves as brokers between local constituents and those who controlled federal agencies and resources, while younger tribal leaders such as the Coeur d’Alenes’ Joseph Garry or the Navajos’ Sam Akeah came forward as vigorous defenders of the relevance of Native traditions in the modern world. All were participants in a new conversation about the relationship of indigenous people to a complex industrial nation. Former Assistant Commissioner Graham Holmes confirmed this view when he observed at an event held in 1984 to mark the 50th anniversary of the law’s passage, that it fixed “forever . the rights of Indian tribes to have a government of their own.”¹⁸

The new generation of activists who emerged in the decades following 1934 established a new standard of citizenship for American Indians. Vocal in local tribal communities as well as in Washington, D.C., these activists would demand that they both be consulted as fellow U.S. citizens and recognized as representatives of indigenous communities with distinctive claims on the nation. Their lives embodied the dual citizenship they enjoyed as heirs of the New Deal era. While they recognized tribal and regional differences among themselves, they made no distinctions regarding their right to speak out on behalf of their tribes and of their rights as Americans. They were all modern Indians, heirs of the IRA.

Conclusion

When assessing the implications of the United States Supreme Court’s 2009 decision in *Carcieri v. Salazar*, I hope the members of this Committee will consider these original objectives of the Indian Reorganization Act of 1934. The passage of this statute, which occurred almost exactly seventy-seven years ago this week, marked an important turning point in the history of relations between the United States and America’s indigenous people. An ambitious Commissioner of Indian Affairs and an energetic new administration worked collaboratively with a skeptical, but cooperative, Congress, to forge a general statute that ended a half-century assault on Indian landholding, initiated the creation of modern tribal governments, and called forth a new generation of Native political leaders. Spurred by the disastrous conditions created by the government’s own misguided policies over the previous fifty years, encouraged by Indian leaders and their supporters in the academic and reform communities, and framed by experienced legislators, the new law marked a brave decision to turn away from paternalism and to embrace a new federal policy based on mutual respect and faith in the future of American Indians as citizens of tribes and of the United States. The new directions blazed with this law established a model for other nations to follow. Therefore, in whatever reforms or initiatives you and your colleagues consider in the weeks ahead, I hope you will both remember and honor your predecessors remarkable and courageous achievement.

¹⁶Harold E. Fey and D’Arcy McNickle, *Indians and Other Americans: Two Ways of Life Meet* (New York: Harper and Brothers, 1959), 146–7.

¹⁷The evolution of McNickle’s view of himself as an Indian advocate was also evident in his decision in 1939 to sign on to a separate statement issued by Indian delegates at a U.S.-Canadian conference on Indian policy. See Donald Smith, “Now We Talk—You Listen,” *Rotunda* (Fall, 1990), 48–52.

¹⁸Kenneth R. Philp, editor, *Indian Self Rule: First Hand Accounts of Indian-White Relations From Roosevelt to Reagan* (Salt Lake City: Howe Brothers, 1986), 90, 91. For a description of Seneca and Iroquois New Deal programs, see Hauptman, *The Iroquois and the New Deal*, 106–135.

The CHAIRMAN. Thank you very much, Mr. Hoxie, for your statement.

Mr. Rice, please proceed with your statement.

**STATEMENT OF WILLIAM RICE, ASSOCIATE PROFESSOR OF
LAW, UNIVERSITY OF TULSA COLLEGE OF LAW**

Mr. RICE. Thank you, Mr. Chairman, Mr. Vice Chairman. I very much appreciate the opportunity to testify today, and would like to note with appreciation your work on the *Carcieri* fix legislation as it has gone through, and all the hearings you have conducted on the Declaration on the Rights of Indigenous People.

They are intertwined with this idea of the IRA. The IRA was something of a precursor to this. Prior to this, Senator Dawes had come from Massachusetts where they had allotted the Wampanoags and others there and had applied these principles. And then they applied the principles of the allotment situation nationwide.

That purpose, as has been said by Professor Hoxie, was to distribute the tribal land base into individual Indians; to destroy tribal governments; and forcibly, if you will, bring the Indians into the American mainstream.

It did not work. The numbers that Mr. Collier brought to the Committee when he was advocating for this bill was that Indian tribes during the allotment era had lost over 90 million acres of property. There were whole tribes rendered landless; 90 percent of the lands of the Five Civilized Tribes in Oklahoma had been lost through the allotment process.

Even the numbers of acres remaining were, if you will, not a good indicator of what was left. He said to the Congress there were 48 million acres of land left. But of that 48 million, 20 million of that was in reservations that had not been allotted. Another 20 million was in desert areas where allotments were unfeasible. Seven million were already in such a bad inheritance situation that it was up for sale. They were trying to do everything they could do administratively to keep from selling it, but they really had no choice under the law. They would end up having to sell.

So almost all of the allotted areas were losing their lands and lost almost all of their lands. So it was a terrible time. It destroyed tribal government's ability to respond. It destroyed the Indian economy. Collier was quoted as saying that the Indian people in the Choctaw area in Oklahoma were surviving on \$47 per annum; \$47 a year as a per capita income in 1934. Now, that left those people without anything to eat.

And so this is the historical circumstance which the IRA was intended to address. It did this by doing two things. One was addressing the land issue. One was addressing the paternalism versus self-determination issue. On the land issue, the purpose was to, one, stop the loss of existing Federal Indian land; and second, to acquire mechanisms to restore Indian lands within the tribal homelands within the reservation.

The third was to put that all together into a system of tribal constitutions and charters where Indian tribes would have real authority over their area; real self-determination that the next Administration could not just change the policy and wipe out the trib-

al system. So that is what the constitutions and charters were intended to do.

Now, by doing that, they thought that they would give the tribe the real authority and real power. One of the things that was authorized was tribal land acquisition in section 17, explicitly authorized the tribal corporations to acquire land. Section 16 implicitly allowed tribal constitutional governments to acquire land.

And the fourth paragraph of section five required that all lands acquired pursuant to the Act should be taken in the name of the United States by the one that acquired it, and also to take that property and make it non-taxable so it would not be lost. The purpose of that was to provide protection for the tribe's title and to provide protection against State taxation.

So those were the primary things that this Act was designed to do to address the land issue. There were several sections that brought the land issue into a way of resolution. There were several sections that prevented further loss of tribal land. All of this was designed to improve tribal self-determination and to improve tribal land acquisition processes.

Thank you very much.

[The prepared statement of Mr. Rice follows:]

PREPARED STATEMENT OF WILLIAM RICE, ASSOCIATE PROFESSOR OF LAW,
UNIVERSITY OF TULSA COLLEGE OF LAW¹

Mr. Chairman, Mr. Vice Chairman, and Members of the Committee. I very much appreciate the opportunity to testify before this Committee today² at its Oversight Hearing on "The Indian Reorganization Act—75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination."

First I would like to note with appreciation recent Committee hearings on "Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples,"³ and "Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes"⁴ which concerned the land into trust issues created by the decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). I was glad to see that S. 676 favorably reported to the full Senate and join others in urging that it be promptly enacted. It seems to me that those matters are intertwined with the matters which are the focus of this hearing.

One primary purpose of the IRA was to protect and restore tribal homelands by stopping the loss of Indian lands, and by providing a number of mechanisms for the consolidation of existing lands and acquisition of additional lands upon which to rebuild strong viable Indian communities. A second primary purpose of the IRA was to require future administrations to honor the desires of Indian people for self-determination and self-governance by authorizing reorganized tribal governments and by creating effective federally chartered Indian business corporations to manage Indian assets and conduct Indian businesses. To support these primary objectives, the IRA contained provisions providing scholarships for higher education and providing Indian preference in government employment so that Indian people would have the technical and professional knowledge necessary to obtain Indian service jobs, govern themselves and their territories effectively, and operate businesses profitably. It also provided a system of credit in order for Indian people to obtain the resources necessary for these endeavors. I would like to address the historical rationale for the Indian Reorganization Act, its enactment, and implementation during the Roosevelt-Ickes-Collier administration. That will, I believe, give some foundation to the two suggestions that I will make to the Committee.

¹ Although I am a tenured law professor at The University of Tulsa College of Law, I am appearing before this Committee in my personal capacity as a recognized authority with a background of litigation, scholarship, commentary, and teaching in the field of Federal Indian Law. Prior to returning to law school as a professor in 1995, I spent over 16 years in the private practice of law representing Indian tribes and tribal businesses.

² Thursday, June 23 2011, 2:15 p.m., Senate Dirksen Office Building Room 628.

³ Thursday, June 9, 2011.

⁴ S. Hrg. 111-136, May 21, 2009.

Until the allotment period, Indian treaties with rare exceptions, drew boundaries between the United States and the Indian tribal nations, or ceded some tribal lands to the United States while reserving the remainder, or swapped lands with the United States with the new lands to be held as Indian lands are held as a treaty recognized title.⁵ Only a few of the several hundred treaties actually suggest that title to tribal lands was to be held “in trust” for the Tribe.⁶ With rare exceptions, federal statutes applicable within those Indian territories were aimed at controlling American citizens who were interacting in trade or other capacities with Indian people. Indian people, by and large, were not citizens of the United States absent naturalization but were governed by their own laws,⁷ and their land tenure systems were controlled by tribal, not federal or state law.⁸

The genesis of the Indian Reorganization Act can be traced back at least to the General Allotment Act of 1887.⁹ In the General Allotment Act of 1887, Congress for the first time generally imposed American real property and inheritance law upon many Indian territories,¹⁰ forced the division of the tribal domain amongst the individual citizens of tribes to be held by a United States title “in trust” for the individual allottee and their heirs, and created a fictitious “surplus” of land that the tribe could be required to sell.¹¹ The result was devastating to the Indian land base, and tribal authority over it as tribal land and property laws were displaced by those of the United States. In short, the idea of “trust land” and a non-Indian legal system was introduced into many reservations, usually then followed by an influx of non-Indian settlers as a result of the taking of the “surplus” lands that were “created” after the living individual Indians received an allotment. Though perhaps intended as a benevolent measure by some, the allotment system could not have been better designed to destroy tribal government, individualize tribal properties, and pave the way for assimilation of Indian people, forcibly if necessary, into the mass of American citizens. It was remarkably effective in converting Indian lands into non-Indian land.

In the Committee’s prior hearing, S. Hrg. 111–136, a chart at page two of the hearing transcript shows that in 1850 Indian people owned in excess of 330,000,000 acres of land. This acreage was reduced to 156,000,000 acres by 1881 according to that chart, a net loss during the later part of the treaty period of a bit over 50 percent of the Indian lands. According to information presented to Congress by Commissioner Collier during the hearings on the Wheeler-Howard Indian Reorganization Act, the administration placed the figure of tribal land ownership at the beginning of the allotment period in 1887 as 138,000,000 acres of land. By 1934, Indian land ownership had been reduced another two-thirds from 138,000,000 to 48,000,000 acres. But this did not tell the whole story. Even these shocking figures were misleading. Of the 48,000,000 remaining acres, some 20,000,000 acres were in unallotted reservations, another 20,000,000 acres were desert or semi-desert lands, and some 7,000,000 were in fractionated heirship status awaiting sale to non-Indians.¹² Between 1908 and 1934 ninety percent of the lands of the Five Civilized

⁵ G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. Rev. 811 (2006). In particular note the text of that article between pages 816–22 and 833–34 considering the language of various treaties between the United States and Indian tribes.

⁶ Treaty with the Senecas, Mixed Senecas and Shawnees. Quapaws, Arts. 16, 20, 6 Feb. 23, 1867, 15 Stat. 513; Treaty with the Delawares, July 2, 1861, 12 Stat. 1177 (requiring that if purchase money was not paid, land had to be returned to United States in trust for the tribe); Treaty with the Senecas, Tonawanda Band, Art. 3, 11 Stat. 735; 12 Stat. 991, November 5, 1857 (authority to repurchase lands from the holder of “the fee” who had previously purchased the Indian title).

⁷ *Elk v. Wilkins*, 112 US 94, (1884).

⁸ *Jones v. Meehan*, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49, (1899).

⁹ General Allotment Act of Feb. 8th, 1887, Ch. 119, 24 Stat. 388. For a scholarly view of this Act, see Judith Royster, *The Legacy of Allotment*, 27 AZSLJ 1 Spring, 1995.

¹⁰ See *Jones v. Meehan*, 175 U.S. 1, 24 (1899).

¹¹ Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C., repealed by the Indian Land Consolidation Act of 2000, 114 Stat. 2007).

¹² 12S. Comm. on Indian Affairs, Hearings on S. 2755: *To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise*, 73rd Cong., 2nd Sess. Part 1, Pages 17 (Feb. 27, 1934). [hereinafter Hearing on S. 2755, Part 1]; S. Comm. on Indian Affairs, Hearings on S. 2755 and S. 3645: *A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs*, 73rd Cong., 2nd Sess. Part 2, Page 58 (April 28, 1934) [hereinafter Hearing on S. 2755 and S. 3645, Part 2].

Tribes, some 13,500,000 acres, was lost when most of the restrictions against alienation and taxation of those lands were removed.¹³ Seventy-two thousand out of 101,000 Indians of the Five Civilized Tribes had been made landless by 1934, and were thrown in Collier's words "virtually into the bread line." The allotments which remained in Indian ownership were often held in a fractionated heirship where no owner of the land could use it. This resulted in a situation where the only administrative recourse was to sell the lands and divide the money, or lease the land to non-Indians and divide the lease money.

Of course the impact upon tribal economies, social, cultural, and governmental systems was devastating. Coupled with the vast discretion which Congress had placed in the Indian Office, including legal authority to simply ignore bonafide tribal leadership and governmental structures—sometime even appointing "tribal leaders" hand picked by the Secretary of the Interior,¹⁴ tribal lack of resources led to a situation where tribes effectively had few rights that were enforceable.¹⁵ Tribes could not hire an attorney to enforce their rights without administrative approval (even if they could pay the legal fee), and the administrative policy regarding what tribal organization would be "recognized" and what authority that organization would be allowed to exercise depended upon the notions of the person in the Secretary's office.

Providing significant limitations upon this administrative authority in favor of Indian self-determination was the second primary purpose of the IRA. Commissioner Collier explained the reason the administration promoted this second major feature of the IRA which was intended to address the sometimes benevolent but generally problematic federal Indian policy which prevented long term tribal planning and self-determination because policy changed with each new appointee to the position of Secretary of the Interior or Commissioner of Indian Affairs:

Paralleling this basic purpose [of reversing the allotment system] is another purpose just as basic. The bill stands on two legs. At present the Indian Bureau is a czar. It is an autocrat. It is an autocrat checked here and there by enactments of Congress; but, in the main, Congress has delegated to the Indian Office plenary control over Indian matters. It is a highly centralized autocratic absolutism. Furthermore, it is a bureaucratic absolutism.

The result is that if the Indians all over the country have had any rights it has been by the whim of the Indian Office or the Secretary of the Interior. If they are allowed to organize it is by our whim. That organization may be wiped out upon our whim. If they are organized, any authority they have is by our grace and particularly in the allotted areas our bureaucratic interference is carried up to the minutiae of life. They are embalmed in a fraternalism that does not do them any good. On the contrary, it poisons them.

Therefore we are seeking in title I of this bill statutory authority and direction to enable us to pass back to the Indians some measure of home rule and control over their own lives and domestic affairs. We recognize that that home rule cannot be accomplished through a blanket authority enacted by Congress, because conditions are infinitely diverse. Therefore, title I directs the Secretary of the Interior to proceed to issue a charter of self-government which may contain more or less power to the tribes; and what may be included within the charter is enumerated in title I.

But we do not leave to the Secretary of the Interior the final discretion to issue charters. No tribe takes a charter unless it wants to. If it wants to go on like it is going, it does so. If it does want a charter it petitions for it. . . . Such are the main purposes; the object in title I being to set up a graduated scheme whereby the Government may transfer its paternalism back to the Indians themselves; and unless something of the kind is enacted, all we can do at best is to go along as benevolent despots certain to be reversed by our successors who may be just as benevolent as we are, but who may have different ideas. It is a condition of total insecurity in which we are holding the Indians, and they cannot be expected to build their life up in the proper way in the absence of firm rights. They are entitled to constitutional protection, and they cannot have it except by statutory grant by Congress.

¹³H. Comm. on Indian Affairs, *Hearings on H.R. 6234: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes*, 74th Cong., 1st Sess. 9 (April 22, 1935). [hereinafter House Hearings on IRA.]

¹⁴Hearing on S. 2755 and S. 3645, Part 2, Pages 106-07 (April 28, 1934).

¹⁵*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

In a nutshell that is the bill. It has gone to the President, who has not sent a message about it but has authorized it to be stated that he will if it is necessary, and he has indicated his personal enthusiasm about it.¹⁶

The first target of the Wheeler-Howard Bill, then, was clearly the allotment system created by the General Allotment Act of 1887¹⁷ with its attendant evils of loss of tribal and allotted lands, fractionization of allotment titles, poverty, and political disunity.¹⁸ In order to protect the remaining Indian lands, Section 1 of the IRA prohibited further allotment of tribal lands, Section 2 extended the trust or restricted periods upon Indian lands until further action by Congress, Section 4 prohibited sales of lands except to the tribe or its members, and Section 16 allowed organized tribes to prohibit the sale or encumbrance of tribal lands or assets. In order to restore tribal homelands and provide a land base for the exercise of self-determination, Section 3 of the IRA authorized the Secretary to return surplus lands within reservations to tribal ownership, Section 4 encouraged transfers of allotted lands to the tribe or tribal corporation, and authorized exchanges of lands to consolidate Indian land holdings. Section 5 authorized the Secretary of the Interior to acquire land for Indians, and Sections 16 (by implication) and 17 (expressly) authorized organized and incorporated tribes to acquire land for Indians. According to the fourth paragraph of Section 5 of the IRA, title all these acquisitions was to be taken in the name of the United States in trust for the tribe or individual Indian, and all these acquisitions were to be exempt from state and local taxation.

The provision which became Section 5 of the IRA was originally found at Section 7 of Title III of the Wheeler-Howard Bill. In relevant part, original Section 7 of Title III provided:

SEC. 7. *The Secretary of the Interior is hereby authorized, in his discretion and under such rules and regulations as he may prescribe, to acquire, through purchase, relinquishment, gift, exchange, or assignment lands or surface rights to lands, within or outside of existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians . . .*

There is hereby authorized to be appropriated, for the acquisition of such lands . . . , a sum not to exceed \$2,000,000 for any one fiscal year. The unexpended balances of appropriations made for any one year pursuant to this Act shall remain available until expended.

*Title to any land acquired pursuant to the provisions of this section, shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, but title may be transferred by the Secretary to such community under the condition set forth in this Act. (emphasis added.)*¹⁹

Clearly, if this draft had been enacted as written, the plain language of this section would have made all appropriations authorized by the Bill available until expended, but would have authorized only lands acquired by the Secretary pursuant to this section to be taken in the name of the United States on behalf of Indians. There would have been no authority to take title to property in trust under any other section without a similar provision whether acquired by the Secretary, an organized tribe, federally chartered Indian corporation or anyone else. If this language had been enacted, the language of 25 C.F.R. § 151.3 stating that only the Secretary has authority to take land into trust for Indians would have been consistent with the statutory language.

But this language was not enacted.

¹⁶Hearing on S. 2755, Part 1 at 31. A reading of these entire hearings clearly indicatethat Collier's vision of "home-rule" for Indian tribes went beyond current "self-determination" and "self-governance" program management tools. The Constitutions and Charters of Tribes were to be binding on the Secretary, as binding as an act of Congress. See, S. Comm. on Indian Affairs, Hearings on S. 2047: *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes*, 74th Cong., 1st Sess. p. 27 (April 9, 1935), President Roosevelt did send a message supporting enactment of the Wheeler-Howard Bill. House Hearings on IRA at 233-34, May 1, 1934.

¹⁷Also referred to as the Dawes Act. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)). See, *Judith V. Royster, The Legacy of Allotment*, 27 AZSLJ 1, Spring 1995.

¹⁸See, The Purpose And Operation Of The Wheeler-Howard Indian Rights Bill. (S. 2755:H.R. 7902) (A memorandum of explanation respectfully submitted to the Members of the Senate and House Committees on Indian Affairs by John Collier, Commissioner of Indian Affairs) reproduced at Hearing on S. 2755, Part 1 at 16. The discussion of the Allotment Act commences at page 17 of the hearing transcript.

¹⁹House Hearings on IRA, Part 1, Page 9 (Feb. 2, 1934); Hearing on S. 2755, Part 1 at , Page 9-10, (Feb. 27, 1934.)

Prior to enacting the Bill, Congress changed the scope of these two provisions by limiting the authorization for “carry-over” appropriations to the appropriation authorized within that section for land acquisition, and expanded the requirement that acquisitions be done in the name of the United States (and the corresponding tax exemption) to include *all* acquisitions authorized by the Act, in the following language:

Sec. 5. *The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interests 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. For the acquisition of such, lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby appropriated, a sum not to exceed \$2,000,000 in any one fiscal year.*

The unexpended balances of *any appropriations made pursuant to this section shall remain available until expended.*

*Title to any lands or rights acquired pursuant to this Act 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.*²⁰ (emphasis added.)

In other words, prior to enactment, Congress revised these two provisions. With respect to “carry over” appropriations, Congress changed the words “this Act” to the words “this section.” With respect to requiring that title to lands and other property be taken in the name of the United States in trust and non-taxable status, Congress expressly changed the words “this section” to the words “this Act.” There is simply no interpretive rule which allows administrative or judicial revision of the statute in order to change the words enacted by Congress back to the words Congress rejected in their revision of this language. The requirement of the fourth paragraph of 25 U.S.C. § 465 that title to all land or property rights “shall be taken in the name of the United States” applies equally to every entity authorized by the Act to acquire such lands or rights, including incorporated tribes and federally chartered Indian corporations, and to every section of the Act authorizing an acquisition.²¹

The initial implementation regulations and historical records retrieved from the National Archives also support the view that these federal Indian corporate entities were understood to have authority to take title to the lands and other property they acquired in the name of the United States in trust for their corporation, tribe, or tribal members. The first volume of the Code of Federal Regulations, published in 1938, contained the following provisions:

25 C.F.R. PART 21—LOANS TO INDIAN CHARTERED CORPORATIONS

§ 21.21 *Title to property.* Except as otherwise provided for in the loan agreement between the corporation and the United States, all property purchased with credit revolving funds shall be purchased in the name of the United States in trust for the corporation.²²

PART 23—LOANS TO INDIAN COOPERATIVES, OKLAHOMA

§ 23.20 *Title to property.* The cooperative may be required to agree that the title to all property purchased with the loan, except property purchased for resale,

²⁰20 Act of June 18, 1934, 73d Cong., 2nd Sess., Ch. 576, § 5, June 18, 1934, 48 Stat. 984–988, now codified as amended at 25 U.S.C. § 465.

²¹The discretion accorded the Secretary in the first paragraph of Section 5 of the IRA appears to extend only to the decision to acquire some interest in land for the purpose of providing land for Indians. Once that discretion is exercised and the decision is made to acquire a tract or tracts of property, the plain language of the fourth section accords the Secretary no discretion as to how to take title to said lands. The Secretary must take the title to such property in the name of the United States in trust for the Indian, tribe, or federally chartered Indian corporation. The same rule would apply to tribal and corporate acquisitions. The 1990 amendment authorized leasing by tribal authority for periods not exceeding twenty-five years, an increase from the original ten year lease authorization. Act of May 24, 1990, Pub.L. 101–301, § 3(c), 104 Stat. 207.

²²25 C.F.R. § 21.21 (1938). It should be noted that Section 21.9 of the regulations prohibited the corporate borrower from obtaining loans for relending, and Section 23.26 prohibited cooperative associations from borrowing from anyone but the United States while they had an outstanding loan from the revolving fund. This effectively required them to acquire all their property in trust status.

shall remain in the United States in trust for the cooperative until the loan is repaid.²³

The standard forms used by the Indian Office are consistent with these requirements. The “Indian Chartered Corporation’s Application for Loan of Revolving Credit Funds” required that:

4. The corporation agrees that except as noted below, title to all property and increases therefrom, purchased with funds obtained under this application, will be taken or held in the name of the United States in trust for the corporation.”²⁴

This provision of the standard form of loan agreement appears to have been applied to loans to incorporated tribes throughout the United States and to cooperative associations in Oklahoma.

By letter dated April 2, 1947, Walter Woehlke signing for the Commissioner of Indian Affairs confirmed to the Caddo Indian Tribe of Oklahoma that “The credit regulations and instructions under which you are operating permit loans for the purchase of land. . . . A portion of the revolving credit funds now available was justified for loans to tribes for the purpose of purchasing land, particularly heirship lands, in the name of the tribe borrowing the money.”²⁵ On October 13, 1948, Mr. Zimmerman as Acting Commissioner of Indian Affairs returned an application from the Cheyenne and Arapaho Tribes for a \$300,000 loan to Mr. Trent, the Western Oklahoma Consolidated Agency’s Supervisor of Extension and Credit without approval.²⁶ In explanation, Mr. Zimmerman listed a number of deficiencies with the loan application, including: (1) using \$200,000 of the requested monies for land loans tied up too large a percentage of the money for long term debt, (2) the provisions describing the types of land loans to be made were too restrictive, and (3) “In section 4, provision is made that title to land purchased by the tribe will not be taken in the name of the United States in trust for the tribe. We do not know how title could be taken otherwise.”²⁷ Finally, the Kenwood Indian Cooperative Livestock Association was required to take title to the cattle it purchased in the name of the United States in trust for the Association,²⁸ and the Walters District Poultry Association took title to all of its property in the name of the United States in trust for the Association with the exception of “feed after fed.”²⁹

The only federal court decision revealed by research interpreting the fourth paragraph of 25 U.S.C. § 465 with regard to tribal and corporate property acquisitions supports the position that a tribe organized pursuant to the IRA, or an Indian corporation chartered pursuant thereto must take title to property it purchases in the name of the United States. In *Mescalero Apache Tribe v. Jones*, 411. U.S. 1.45 (1973), the Mescalero Apache Tribe protested the application of a state use tax assessment on the purchase of materials used to construct two ski lifts at its ski resort on off reservation leased lands, and sought refund of sales tax paid on basis of gross receipts of the ski resort from sale of services and tangible property. The Court held unanimously that the leasehold interest of the Tribe in nonreservation lands was protected from state taxation. by 25 U.S.C. § 465 as were the materials the tribe had purchased and attached to the lands. A majority held that the State could impose its income tax against the profits of the business because that was not a tax on the land and the business was outside the reservation. In short, the court held this leasehold interest was not taxable by virtue of § 465. If that portion of the fourth paragraph of § 465 prohibiting state taxation applies when an incorporated tribe acquires a lease, then the rest of that sentence requiring trust title must also apply to the tribe’s acquisition of land. There is a strong argument that regardless of whether title is taken in the form required by the fourth paragraph of 25 U.S.C.

²³ 25 C.F.R. 23.20 (1938).

²⁴ Form 5-806 (Revised), Approved by the Secretary of the Interior (March 11, 1940). National Archives and Records Administration (hereafter “NARA”), RG-75, Ft. Worth record center, Anadarko, Entry E-49, Box 1.

²⁵ NARA, RG-75, Ft. Worth, Anadarko, Entry E-49 Box 1.

²⁶ NARA, RG-75, Ft. Worth, Anadarko, Entry E-49 Box 1.

²⁷ *Id.* at page 2, paragraph 4. Since the plan to take title in fee was one reason to reject the application, the only reasonable interpretation is that title had to be taken by the incorporated tribe in the name of the United States in trust for the Tribe.

²⁸ NARA RG-75, Ft. Worth, Muskogee/5 Tribes, Entry E-579, Box 3, Extension and Credit, Hist Loan Cards 1945-65.

²⁹ NARA, RG-75, Ft. Worth, Anadarko, E-49 Records Relating to Indian Credit Assoc & Tribal Committees 1939-57 Box 3.

§ 465, title is held in the required form by operation of law regardless of the words on the instrument of conveyance.³⁰

Section 477 of Title 25 of the United States Code provides that “Any charter so issued shall not be revoked or surrendered except by Act of Congress.” Therefore, there does not appear to be any authority for the proposition that the Secretary may limit, rescind, or revoke any charter or power contained therein by regulations such as 25 C.F.R. § 151.3 or otherwise. The Secretary has recognized this as the law:

The attached Constitution and By-laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, adopted by popular vote on October 4, and approved by the Secretary of the Interior on October 28 has the force of law, superseding all departmental regulations and instructions that may be in conflict with any of the provisions of this document.

This document embodies the solemn pledges of Congress and of the Department of the Interior to the Indians of the Flathead Reservation, and all the activities of the Department affecting the Flathead Reservation must be carried out with firm regard for these constitutional provisions and by-laws.³¹

And, again:

Tribal constitutions and charters, when they have been adopted by popular vote and approved by the Secretary of the Interior in accordance with the Acts of June 18, 1934 (Indian Reorganization Act), May 1, 1936 (Alaska Act), or June 26, 1936 (Oklahoma Indian Welfare Act), have the force of law, superseding all Departmental regulations and instructions that may be in conflict with any of the provisions in those documents.³²

Commissioner Collier stated the fundamental proposition with respect to the authority of such constitutions and charters to Congress:

Commissioner Collier: Now, the act is extremely simple in this detail. It says that when they organize under the act, under the Thomas-Rogers bill, and adopt a constitution and bylaws by a majority vote, by a vote of the majority of the votes cast at a referendum, and when thereafter the constitution and by-laws are O.K.'d by the Secretary of the Interior, from that time forward, the Secretary may not change the constitution and bylaws except with the consent of the tribe itself through a majority vote. He is bound by the constitution and bylaws. *They are binding upon him, as binding as acts of Congress.* The tribe may change its constitution and bylaws. The tribe may abandon its constitution and go back to the old way. Of course, Congress may change them, but not the Department. It means that the Indian organization will have dignity, stability, and power.

Mr. Donahey. Is this the first time there, has been an act to embody that principle of Indian home rule?

Mr. Collier. The Wheeler-Howard Act (act of June 18, 1939 [sic], 48 Stat. L. 984) embodies it, and this act carries the same thing over to the Indians [in Oklahoma].³³ (Emphasis added.)

The Oklahoma Indian Welfare Act³⁴ extended the benefits of the IRA to all organized Indian Tribes in Oklahoma which choose to accept its provisions except the Osage.³⁵

³⁰ *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir., 1938); 25 U.S.C. § 177. Mesclero, *supra*.

³¹ John Collier, Commissioner of Indian Affairs to Division Chiefs of the Indian Office and to the Indian Service Employees of the Flathead Reservation, March 26, 1936, NARA, D.C. Branch, RG75, Entry 132-B Circulars, Orders, and other Issuances, 1877-1947, Box 25, Notebook 1.

³² Interior Department Order No. 556 on “The Conduct of Tribal Government,” Approved by Commissioner Myer, August 8, 1950, superceded in 64 IAM 1, Oct. 3, 1955, Page 1 of 14 reasserting the same language. NARA, RG-75, Ft. Worth, Anadarko, E-47, Box 1, Central files, Records Relating to Credit, 1948-62.

³³ S. Comm. on Indian Affairs, *Hearings on S. 2047: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for other Purposes*, 74th Cong., 1st Sess., p. 27 (April 9, 1935).

³⁴ Act of June 26, 1936, c. 831, 49 Stat. 1967 (25 U.S.C. § § 501 et. seq.

³⁵ *Sac and Fox Nation v. Norton*, 585 F.Supp.2d 1293 (W.D. Okla., 2006). “Since its approval by the President on June 18, 1934, the Indian Reorganization Act has been modified and extended on four occasions: . . . 4. By the Act of June 26 1936 (49 Stat. L. 1967), ‘An Act to promote the General Welfare of the Indians of the State of Oklahoma, and for other purposes,’ virtually all the features of the original legislation, from which the Oklahoma tribes were excluded by

As the foregoing shows, the historical record supports the proposition that the incorporated tribes have legal authority independent of the Secretary, and one could reasonably assert are required, to take title to their property in the name of the United States in trust for the proper beneficiary. Thereafter, those tribes by statute and constitutional or charter provisions would have full authority to own, hold, manage, operate, and dispose of such property within the limitations imposed by §477 and any additional restrictions negotiated in a constitution or charter of the incorporated tribe.

Simply stated it is not absolutely necessary that Tribes and individual Indians have “trust lands” in order for their lands to be “Indian lands” in the classical sense but federal recognition and protection of Indian lands is a key element. In order to rebuild tribal homelands and exercise the self-determination and self-government therein that this Committee supports, and which is clearly called for by the Declaration on the Rights of Indigenous Peoples, what is needed is ownership of the tribal homeland, jurisdiction over it, and exclusion of the jurisdiction of others to the extent necessary for Indigenous self-determination. This concept should by no means eliminate any number of cooperative agreements, joint projects or activities, and other relationships with federal, state, and local jurisdictions or other tribes based upon principles of mutual respect and free, prior, informed, and continuing consent. Whether this ownership is to be thought of as “trust lands” owned, held, controlled, and managed by the tribe or corporate entity under the IRA, or a recognized, compensable aboriginal title, or some form of restricted fee seems to be irrelevant.³⁶ It is the result which counts. The IRA and OIWA provide a tool by which progress may be made toward restoring sufficient tribal homelands for the restoration of vibrant sound sustainable tribal communities.

In this period of history, it is almost mandatory to address the fears of those who would object to Indians purchasing property because they dislike Indian gaming and economic development. While I do not think a full discourse on this question is called for here, I would make two simple points. First, the Supreme Court has already said in the *Mescalero* case that while off reservation interests in lands acquired by tribes under this authority are tax exempt, tribal activities upon such lands remain subject to significant state authority—which would preclude off reservation gaming on such lands absent additional federal action. Of course, on reservation acquisitions would be Indian country as defined in 18 U.S.C. §1151(a) which includes within the definition of Indian country all lands within the boundaries of any Indian reservation notwithstanding the issuance of any patent. The second point to make is that with respect to Indian gaming, Congress has already severely limited gaming on newly acquired properties to the extent necessary. 25 U.S.C. §2719. There is nothing in the IRA or OIWA which would change or affect the balance already set by Congress on acquisitions for gaming purposes.

Because of the historical termination era of the 1950s, Commissioner Collier’s implementation of the IRA was administratively abandoned without Congressional authority, and forces opposed to the IRA changed the BIA manual to refuse to recognize the right and obligation of the incorporated entities and tribes to take title to their property as provided in the IRA.³⁷ This termination era policy still prevails

section 13 of the Indian Reorganization Act, were made to apply to Oklahoma, along with additional supporting legislation.”

Report of Acting Secretary of the Interior to Senator Thomas, Chair of the Senate Committee on Indian Affairs dated April 28, 1937, National Archives and Records Administration (hereafter “NARA”), D.C. Record Center, Record Group 75, Entry 132-B Circulars, Orders, and other Issuances, 1877–1947, Box 25, Notebook 1. The only provision of the IRA not extended to the Tribes in Oklahoma was the right to vote to reject the IRA under Section 18. See generally, Sections 3,4, 5 of the OIWA, and numerous references and explanations in the legislative history of the OIWA. S. Comm. on Indian Affairs, Hearings on S. 2047: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes, 74th Cong., 1st Sess. (April 8, 9, 10, and 11, 1935) [Hereafter “Senate Hearings on OIWA”]; H. Comm. on Indian Affairs, Hearings on H.R. 6234: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes, 74th Cong., 1st Sess., (April 22 through May 15, 1935) [Hereafter “House Hearings on OIWA”]. See, Section 8 of the OIWA, 25 U.S.C. § 508 with respect to the exclusion of the Osage Nation.

³⁶25 U.S.C. §477 can also be thought of as creating a restricted fee by those who insist upon reading the fourth paragraph of Section 5 of the IRA as it was proposed instead of as it was enacted. 25 U.S.C. §177 can also be interpreted to create a restricted fee title whenever land is bought by any recognized Indian tribe.

³⁷Theodore H. Haas, Chief Counsel, United States Indian Service, TEN YEARS OF TRIBAL GOVERNMENT UNDER I. R. A., United States Indian Service Tribal Relations Pamphlet 1 at 5–6 (January 1947); Bureau of Indian Affairs Bulletin 335, Supp. 1, December 16, 1953. NARA RG–75, Ft. Worth, Muskogee/ 5 Tribes, E–579, Box 2, Extension and Credit, Hist Loan Cards 1945–65; Memo Dated June 11, 1954,

in the regulations of the Department, 25 C.F.R. § 151.3. To my knowledge whether that regulation may divest a tribe of its chartered powers has not yet been litigated. So, what is it that Congress can do to make progress toward the goals of the Declaration on the Rights of Indigenous Peoples, the aspirations of numerous Indian tribes, and resolving some of the issues facing the government and Indian people?

First, I would suggest that Congress encourage the Interior Department to return to the practice of the Roosevelt-Ickes-Collier administration who developed, enacted, and implemented the IRA by recognizing and supporting the authority of organized tribes and corporations to take title to their property in the name of the United States, and to control, manage, and operate it themselves within the limits set by 25 U.S.C. § 477. Should the tribe or corporation exceed its authority, the proper response would be for the government to sue to cancel the offending instrument, unless additional limited oversight authority has been freely agreed to by the tribe in its charter.

Second, Congress could provide authority to finally confirm the promise of the Self-Determination Act and Self-Governance Act that Tribes would in fact be able to negotiate real political and legal changes with a view toward recovering legal and political rights which they have been denied, or preventing the application of legislation which they deem inimical to their needs or way of life. This is the way of America—that legitimate government requires the consent of the governed. In the context of Indian tribes that first meant a treaty relationship. To the extent possible, the Declaration calls for the establishment once again of a consensual relationship, if not by treaty then by some other available means. The Indian Child Welfare Act's provisions authorizing tribes to reassume jurisdiction over Indian child custody proceedings, and the IRA's provisions which allowed each tribe to vote as to whether the IRA would apply on their reservation are examples of legislation that has provided a mechanism for tribal people and their leaders to have a direct and important say in the legal and political structure of the tribal homelands. Negotiation of tribal constitution and charter provisions would provide a mechanism for accomplishing such changes. I would encourage Congress to consider this opportunity.

Once again I thank you Mr. Chairman, Mr. Vice Chairman, and Members of the Committee for the opportunity to testify today, and look forward to any questions you may have.

The CHAIRMAN. Thank you very much, Professor Rice.
Professor Goldberg, please proceed with your statement.

**STATEMENT OF CAROLE E. GOLDBERG, JONATHAN D. VARAT
DISTINGUISHED PROFESSOR OF LAW, UCLA SCHOOL OF LAW**

Ms. GOLDBERG. Mr. Chairman, thank you very much for the opportunity to present this testimony today.

My goal today is to explain the overall purpose of the Indian Reorganization Act in so far as it illuminates the interpretive questions posed in the *Carcieri* case. And you have already heard two distinguished witnesses indicate what some of these broad policies are.

I want to underscore my agreement and to refer to some very prominent historians of the Indian Reorganization Act who have characterized the Act as embodying a Federal policy they call the "tribal alternative." And what this policy did was abandon the goal of assimilation in favor of the belief that Native American societies had a right to exist on the basis of a culture different from the dominant one in the United States, and this could only be achieved through establishment and reestablishment of the territorial basis for tribal self-determination. That was a key component of the purpose of the Indian Reorganization Act.

But I would like to focus specifically on how these broad purposes have implications for the interpretive question in *Carcieri*. And I am going to draw on an amicus curiae brief that I, along with other law professors, filed in that case trying to explain that history, and in particular focus on the question of whether a tribe

is considered “now under Federal jurisdiction.” The *Carcieri* decision says that we should focus on “now” as being 1934.

What I want to emphasize here is that misconstrues how the understanding was at that time in 1934 of what it actually meant to be recognized or not recognized under Federal jurisdiction. Because one of the things that we pointed out is that today it is pretty clear, Tribes are either on a list, they are recognized, or they are not on a list, they are unrecognized. Of course, that makes a huge difference, but this bright line, nearly permanent differentiation between recognized and unrecognized tribes, is actually of recent origin.

For the first 70 years of U.S. history, there actually was no such clear-cut concept. What happened is that Congress would pass laws that applied to Indian Country or Indian tribes or Indians, and then it was up to the Executive Branch or to the Federal courts to determine on an ad hoc basis to whom these statutes should be applied.

And not surprisingly, given that there weren’t a lot of definitions out there in the statutes, we draft statutes better these days, there was a lot of confusion about it. And basically as of 1934, the concept of recognition was really only beginning to take shape. It wasn’t universally applied or understood.

There was no comprehensive list of federally recognized tribes at the time of enactment of the IRA and no standard set of criteria other than one court decision, the *Montoya* case, that gave a rather open-ended definition of it.

So it is extremely unlikely that Congress in 1934 would have intended that recognition as of that time be the prerequisite for the Act to apply. And frankly, if you had interpreted the Act as applying as of that date, it is extremely difficult, if not impossible, to apply it based on that timing now, as we are nearly 100 years later.

In fact, as of 1934, there would have been an awareness that tribal status has never been static and those who drafted and passed the Act acted in a historical context in which tribal status and recognition were known to be fluid in nature. One of the examples I give in my testimony is the status of the Pueblo Indians, which according to the Supreme Court at one point rendered them not Indian and then in the U.S. Supreme Court’s later decision, they were found for purposes of the Federal liquor control laws to be Indians.

It is very important to understand this. At the time of the Floor debate and discussions of the IRA back in 1934, the Chairman then of the Indian Affairs Committee, Burton Wheeler, was concerned about this very problem and he was reassured by John Collier that if there was a change in status, that that would be reflected in the application of the IRA. And I quote this passage in my testimony to make that clear.

So I think it is very important to have this more flexible interpretation of the statute and if it needs to be incorporated in an amendment, I think that is the most desirable way for it to happen.

[The prepared statement of Ms. Goldberg follows:]

PREPARED STATEMENT OF CAROLE E. GOLDBERG, JONATHAN D. VARAT
DISTINGUISHED PROFESSOR OF LAW, UCLA SCHOOL OF LAW

Good afternoon, Chairman Akaka and distinguished members of the Committee: My name is Carole Goldberg and I am the Jonathan D. Varat Distinguished Professor of Law at UCLA School of Law, where I teach Federal Indian Law and Tribal Legal Systems, and serve as Director of our Joint Degree Program in Law and American Indian Studies. I am also a Justice of the Hualapai Court of Appeals of the Hualapai Tribe in Arizona, and a Presidential appointee to the Indian Law and Order Commission, which was authorized by the Tribal Law and Order Act of 2010. The views I am expressing in this testimony are my own as a scholar and teacher in the field of Federal Indian Law. In my 39 years as a professor, I have co-authored the 1982 and 2005 editions of *Cohen's Handbook of Federal Indian Law*, a casebook entitled *American Indian Law: Native Nations and the Federal System*, and numerous other books and articles on topics including the history of the Indian Reorganization Act. I was also one of twelve law professors who filed an amicus brief before the United States Supreme Court in the 2009 case of *Carciari v. Salazar*, relating the history of the Indian Reorganization Act, and its bearing on the questions of statutory interpretation presented in that case.

My goal today is to explain the overall purpose of the Indian Reorganization Act of 1934 (IRA), insofar as it illuminates the interpretive questions posed in *Carciari*. I will also suggest how the statute could be clarified to ensure consistency with that purpose.

I. Overall Purpose of the Indian Reorganization Act

Respected historical works agree that the primary purpose of the Indian Reorganization Act was to revitalize tribal governments by restoring land bases and enabling Native groups to organize governments that could wrest control over important decisions from the federal Indian bureaucracy. The most comprehensive study of the history of the Indian Reorganization Act, Professor Elmer Rusco's *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (2000), describes the Act as embodying a federal policy he calls "the tribal alternative," a term first coined by another distinguished historian of the IRA, Graham Taylor. According to Rusco, this new policy "abandoned the goal of assimilation in favor of the belief that Native American societies had a right to exist on the basis of a culture different from the dominant one in the United States." Land acquisition was always viewed as a key component in realizing this "tribal alternative." In the introduction to Title III, an early version of the Act made it clear that it was the "policy of Congress to undertake a constructive program of Indian land use and economic development, in order to establish a permanent basis of self-support for Indians living under Federal tutelage; . . . and to provide land needed for landless Indians and for the consolidation of Indian landholdings in suitable economic units."

Supporting the historians' analysis, the terms of the Act underscore the dual importance of land and self-government if Native nations are to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions. On matters affecting land and resources, the IRA prohibited future allotment; extended existing trust periods on already allotted lands; authorized the Secretary of the Interior to restore remaining "surplus" lands to tribal ownership; prohibited sale of tribal lands without the consent of the tribe; authorized acquisition of lands inside and outside existing reservations and the taking of such land into trust for the benefit of tribes; and allowed the Secretary to proclaim new reservations or expand existing ones. On matters affecting self-government, the IRA enabled any tribe "residing on the same reservation" to organize "for its common welfare" under constitutions approved by the federal government. To reinforce the view that these new constitutional governments would be exercising preexisting aboriginal self-governing powers, not newly conferred federal powers, the Act states that "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council" a set of specified "rights and powers." As historian Rusco observes, "This section makes it clear that the legal theory behind the IRA is that Native American governments established under its authority exercise aboriginal authority not withheld from them."

Legislative history of the IRA also supports the historians' reading of the Act. The House Report on the IRA confirms that Congress's purpose was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Both the House and Senate Reports indicate that Congress believed that a critical aspect of that broad goal was "to conserve and develop Indian lands and resources." As Senator Wheeler, one of the IRA's sponsors, said on the floor of the Senate, the provision for taking land into

trust would “provide land for Indians who have no land or insufficient land, and who can use land beneficially.”

Historian Elmer Rusco affirms that the terms of the IRA consistently incorporated the view of land as “vital to preserving the distinctive cultures and social structures that still characterized much of Native America.” In other words, rectifying unjust losses of tribal land through land restoration was powerfully linked to self-determination, self-governance, language revitalization, and cultural survival for Native peoples. Today, trust status is sought for lands where tribes are locating housing, medical clinics, education and early childhood programs, and government offices, among others uses vital to tribal self-determination. Trust status is used to afford protection to sacred and culturally significant sites that would otherwise become the targets for culturally destructive projects, such as the county waste dump proposed in San Diego County. All of these uses are fulfilling the original vision of the IRA, and all of these uses should be available to any tribe that is federally recognized at the time it seeks trust status for its lands under the IRA.

II. The Interpretive Questions Presented in *Carcieri*

Under the IRA, 25 U.S.C. § 465, the Secretary of the Interior is authorized to acquire lands for “Indians,” a term defined in 25 U.S.C. § 479 to include “all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*” (emphasis added) and all persons of at least one-half Indian ancestry. The IRA also states in section 465 that land may be taken into trust for an “Indian tribe or individual Indian,” and defines the term “tribe” in section 479 as “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” The question presented in *Carcieri v. Salazar* was how to interpret the phrase “now under federal jurisdiction.” Rhode Island argued that the IRA’s language allowing the federal government to acquire land and place it in trust applies only to Indian tribes that were both recognized and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. The Narragansett Tribe, whose land-into-trust request the state had challenged, advanced the view that the Act applies to tribes that are federally recognized as of the time the land acquisition and placement in trust occurs. The Court decided that a tribe’s status as of the date of enactment of the IRA was controlling. Exactly what form that status must take is unclear from the Court’s opinion, however, because the Court assumed, based on certain elements of the record, that the Narragansett Tribe was not “under federal jurisdiction” in 1934.

No matter how the term “now under federal jurisdiction” is construed and applied by the Department of Interior and the courts after *Carcieri*, the Court’s emphasis on the date of enactment of the IRA seriously misconstrues the broader purposes of the Act and the way federal-tribal relations operated during that time. There are no direct statements in the legislative history of the IRA that clarify this phrase. Writing in *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–1945* (1980), Graham Taylor observes, “What is a tribe? The Indian Reorganization Act did not seriously face this question. . . .” Rusco notes that the IRA “did define Indian and tribe, though ambiguously.” Nonetheless, an understanding of the legal and administrative context in which the IRA was drafted points to a way of interpreting these terms. Drawing upon the law professors’ amicus brief in *Carcieri*, I will explain how this understanding of the IRA and the circumstances of its enactment dictates a more flexible reading of the phrase “now under federal jurisdiction,” one that allows for changes in federal recognition of tribal status over time.

III. To Fulfill Its Purposes, The Ira Must Apply to any Tribe That is Recognized as of the Time the Act is Invoked

As I and the other Indian law professors pointed out in our amicus brief, today all Indian tribes fit into one of two categories: “recognized” or “unrecognized.” A recognized tribe is entitled to all of the benefits (health, education, etc.) extended by federal law to Indian tribes. Unrecognized tribes, on the other hand, are not entitled to most federal services and can obtain recognition only by prevailing in the difficult and lengthy administrative process contained in 25 C.F.R. Part 83, or, on rare occasion, through congressional legislation. But this bright-lined, nearly permanent differentiation between recognized and unrecognized tribes is recent in origin.

For the first 70 years of United States history, there actually was no concept of “recognized” versus “unrecognized” tribes. According to a highly respected historian of the federal recognition process, William W. Quinn, Jr., the terms “recognize” and “acknowledge” were almost exclusively used in the cognitive sense, indicating that a particular tribes was known to the United States. Congress enacted legislation that applied to “Indian country,” “Indian tribes,” “Indian nations,” “Indians,” “Indi-

ans not citizens of the United States,” “Indians not members of any of the states,” and the like. It was then up to the executive branch and the federal courts to determine, on an *ad hoc* basis, to whom these statutes should be applied.

If Congress or the executive branch had previously concluded that a tribe existed, federal courts generally refused to disturb this finding. Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribes as defined in particular statutes. In *Montoya v. United States* (1901), the Supreme Court eventually provided a definition of the terms “tribe” and “band”:

By a “tribe” we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a “band,” a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.

Not surprisingly, however, confusion still remained.

As Quinn points out in a 1990 article in the *Journal of Legal History*, by the early twentieth century, the concept of recognition of Indian tribes in the jurisdictional sense “was only beginning to take shape,” and it “was not universally applied, accepted or, frankly, understood.” No comprehensive list of federally recognized tribes was ever created prior to enactment of the IRA in 1934, and no standard criteria for determining whether to recognize an Indian tribe existed at that time. Thus, it is extremely unlikely that Congress would have intended the IRA to be interpreted to require formal federal recognition as of 1934 in order for provisions of the Act to apply. Furthermore, such an interpretation would make it extraordinarily difficult, if not impossible, to apply the Act nearly 100 years later.

In fact, tribal status has never been static, and those who drafted and passed the IRA acted in a historical context in which tribal status and recognition were known to be fluid in nature. In our amicus brief, the law professors provide numerous examples of congressional and judicial decisions reversing previous determinations of the status of individual tribes. Furthermore, the executive branch has often changed these determinations to reflect alterations in federal Indian policy and the fact that tribal groups survived despite policies intended to remove them from federal responsibility. A prime example are the Pueblo Indians of New Mexico, first found by the Supreme Court not to be Indians under the Nonintercourse Act, and forty years later found to be Indians for purposes of federal Indian liquor control laws that Congress had expressly extended to the Pueblos. Thus, tribal status was viewed as fluid, and the determination of which tribes existed was largely left to Congress and the Executive.

This history is essential to understanding the IRA’s definition of “Indian.” As originally drafted, this definition was to include “all persons of Indian descent who are members of any recognized Indian tribe.” Senate Indian Affairs Chairman Burton Wheeler, however, was concerned that this provision was too broad. He stated:

Chairman. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called “tribes” there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Wheeler obviously believed that once Indians had fully assimilated into white society, they should no longer be afforded the protection of the IRA even if they were currently under federal jurisdiction.

Commissioner of Indian Affairs John Collier responded to this suggestion, stating:

Commissioner Collier. Would this no meet your thought, Senator: After the words “recognized Indian tribe” in line 1 insert “now under Federal jurisdiction.” That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

It is as a result of this very exchange that the phrase “now under federal jurisdiction” was added to the IRA. In suggesting this language, Collier obviously intended that, if at a later date, Congress or the Executive Branch agreed with Senator Wheeler’s characterization of the Indians in question, and chose to terminate the government-to-government relationship with that tribe, it would no longer receive

the benefits of the IRA. Thus, “now” should refer to the date on which the Secretary of the Interior attempts to exercise his or her authority under the Act.

Another reason for taking a more fluid view of the timing of recognized tribal status, and not fixing it as of 1934, is that the Department of the Interior made numerous mistakes in identifying tribes in the immediate aftermath of the IRA. There was no comprehensive list of federally recognized Indian tribes in June 1934. It was only *after* the Act was passed that Commissioner Collier was given the daunting task of determining which Indian groups were or should be recognized tribes by the federal government and permitted to organize under the Act. Collier hastily compiled a list of 258 groups. This list is universally recognized to include serious omissions, and these mistakes should not be frozen into the IRA.

As the Indian law professors note in our amicus brief, nearly all of Commissioner Collier’s mistakes involved landless Indian tribes. This was no coincidence. The IRA, as originally enacted, only provided the right to organize a constitutional government, charter a corporation, or vote on application of the Act to any “Indian tribe, or tribes, residing on the same reservation.” Thus, Commissioner Collier logically began determining recognized tribes by referring to lists of federal land holdings set apart for Indians. For these reservation tribes, even if he mistakenly believed that they no longer maintained tribal relations (and therefore, could not be a recognized tribe) this error could be immediately remedied. The definition of “Indian” in the IRA also included descendants of previously recognized tribes that resided within the boundaries of an Indian reservation on June 1, 1934. Consequently, despite unrecognized status, their existing reservation permitted these Indians to organize under the IRA and immediately regain recognition.

For landless Indian tribes, there was no comparable escape hatch. Although the IRA provided for the creation of “new Indian reservations,” thus indicating a congressional understanding that landless tribes could take advantage of the Act, the *ad hoc* nature of recognition resulted in many of these tribes being overlooked. Even where landless tribes did come to his attention, Commissioner Collier often mistakenly determined that the tribe was no longer in existence. In 1975, Congress created the American Indian Policy Review Commission, which was charged with conducting the first comprehensive review of Indian affairs in almost 50 years. After two years of study, in its Final Report, the Commission identified dozens of tribes that had not been recognized by the federal government simply due to bureaucratic oversight. Litigation brought by east coast tribes in the 1970s, such as the successful suit by the Passamaquoddy Tribe of Maine, also highlighted the fact that there were tribes fully subject to federal responsibility under the Nonintercourse Act that were being denied protection by the Department of Interior.

Fortunately, since that time, many of these errors have been rectified, either through congressional legislation or through the administrative process for federal recognition first established in 1978. To prevail under that administrative process, found in 25 C.F.R. Part 83, a petitioning group must demonstrate that it satisfies each of the following criteria:

1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
2. A predominant portion of the petitioning group has existed as a distinct community from historical times until the present;
3. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
4. The petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity; and
5. The membership of the petitioning group is composed principally of persons who are not members of any other recognized Indian tribe.

Voluminous documentary evidence is required to satisfy these criteria. In fact, petitions for recognition take years to assemble and are typically supported by thousands of pages of historical documentation and expert reports.

The Office of Federal Acknowledgment—which has several research teams, each consisting of a cultural anthropologist, genealogical researcher, and an historian—evaluates these petitions, along with any information presented by other interested parties. While Commissioner Collier spent less than one year determining the status of nearly every tribe in the continental United States, an OFA team routinely spends one year or more on each documented petition before making a recommendation regarding the merits of that petition to the Assistant Secretary of Indian Affairs. After reviewing OFA’s recommendations, the Assistant Secretary will publish a final determination in the Federal Register. Since 1978, the Executive Branch has

used this process to grant recognition to 17 Indian tribes and deny recognition to more than 25.

These recognition decisions have definitively revealed several of Commissioner Collier's mistakes. In our amicus brief, the Indian law professors provide two detailed illustrations of such errors in the 1934 determinations, one involving the Cowlitz Indian Tribe of Washington, the other involving the Grand Traverse Band of Ottawa & Chippewa Indians of Michigan. In each instance, there was extensive documentation of the ongoing tribal organization and federal relations of the tribe, despite lapses in formal federal recognition. An illustrative statement appears in the Department of the Interior's decision acknowledging the Cowlitz: ". . . [T]he Department was mistaken when, in the 1920s and 1930s, it claimed that the Tribe no longer maintained its 'tribal organization.'"

These and other corrective determinations by the Department of the Interior are designed to undo injustices suffered by tribes that have been wrongly denied the benefits of federal recognition. As the sponsors of the IRA understood, key to rectifying these injustices is the ability to restore the territorial basis for tribal self-determination. Under Federal Indian Law, the trust status of land is a prime determinant of Indian country status, which in turn influences the geographic scope of tribal self-governing powers, and determines whether tribes will be shielded from state taxation and jurisdiction. It is the place where tribes can control their sacred, culturally significant sites, sustain their languages, and determine how resources should be developed and shared.

It would be a harsh and ironic outcome if tribes could succeed in the extremely onerous federal recognition process, only to find that they are unable to revitalize their communities and cultures through the establishment of a reservation consisting of land taken into trust under the IRA. For example, I have been working with and writing a book about a currently non-federally recognized group, the Fernandeno Tataviam Band of Mission Indians, whose ancestral territory is in the San Fernando Valley north of downtown Los Angeles. In their pending petition for federal recognition, they are seeking, among other things, to rectify injustices that occurred when their land in southern California was taken from them around the turn of the twentieth century. Should they eventually prevail in the federal recognition process, it would indeed be a fulfillment of the original purposes of the IRA for land to be taken into trust for them so that their tribal community can advance its culture and collective goals. To achieve that end, Congress should clarify that the provisions of the IRA apply to any tribe that is federally recognized as of the time the terms of the Act are invoked.

Conclusion

Chairman and members of this Committee, I appreciate this opportunity to testify on the history, significance, and purpose of the Indian Reorganization Act, especially as they bear on the interpretive issue presented in *Carcieri v. Salazar*.

I am happy to answer any questions whenever the time is appropriate. Thank you.

The CHAIRMAN. Thank you very much, Professor Goldberg, for your statement.

It is great to hear from you, our distinguished witnesses.

Professor Hoxie, in your testimony, you detailed a consultation process that John Collier and the Congress undertook prior to enacting the Indian Reorganization Act. During those discussions, did the Congress ever decide what it meant for a tribe to be under Federal jurisdiction?

Mr. HOXIE. No, they did not. The congresses were unprecedented inventions, really, of Commissioner Collier, who had proposed his legislation in January; had gotten a kind of chilly response from Congress. And as he began his negotiations and discussions with Congressional leaders, he organized nine congresses around the Country that were general invitations to Indian people in those regions.

They were held in every region of the Country. Most were chaired by Collier himself and some some of his staff chaired them. And they are remarkable events where he asked Indians what they

thought of this law and what they thought of the provisions. And he made revisions based on some of the complaints and suggestions and questions that people had.

But there certainly is no evidence that I am aware of that there was anyone checking people at the door; that there was a list or there was anything like that. This was an open consultation with Indian people and it brought a huge variety of people in all of the complex circumstances that have been referred to by the other witnesses to those meetings and with the intention of having the law obviously apply to all of them.

The CHAIRMAN. Thank you.

Professor Rice, in your testimony, you mentioned the recent hearing the Committee held on the United Nations Declaration on the Rights of Indigenous People. Do you think the policies in the Indian Reorganization Act and the U.N. Declaration are compatible when it comes to treatment of Indian lands and self-governance of indigenous peoples?

Mr. RICE. Mr. Chairman, I believe they can be made so. They are very, very close as we sit here and look at the text of the statute and we look at the text of the Declaration. The statutory authority in the IRA calls for self-determination by tribes, self-governance by tribes, and the recovery of tribal homelands that have otherwise been lost. The Declaration calls for those same things.

The way and the mechanisms that we go about doing those things may be subject to some adjustment and some of that adjustment is probably necessary on the administrative side and it could be encouraged by Congress in a number of ways. I will, of course, defer to the Committee on the best way to encourage that.

But self-determination in the sense of recovery and readjusting tribal homelands means that that authority should be in the hands of the tribe. If there are adjustments to be made in the way that allotments are held, these fractionated lands are to be turned over to tribal lands or otherwise some process with, that should be in the hands of the tribe. If land is to be recovered by the tribes within its reservation boundaries, its homeland area, the tribes should have the opportunity to do that themselves.

All of that, I think, was in the sights that Collier had. They were aware of where Collier was trying to go. And all of that, I believe, would be consistent with the Declaration on the Rights of Indigenous People, yes, sir.

The CHAIRMAN. Thank you.

Professor Goldberg, as a distinguished scholar, you have written extensively about criminal jurisdiction and law enforcement in native communities. What is the impact of the *Carcieri* case on public safety and law enforcement in native communities?

Ms. GOLDBERG. Thank you very much, Mr. Chairman.

As a presidential appointee to the Indian Law and Order Commission that was established under the Tribal Law and Order Act which the Congress passed last summer, I have a very deep interest in the potential consequences of the *Carcieri* decision for criminal justice in Indian Country.

I have also been conducting for the past several years, under the sponsorship of the National Institute of Justice in the U.S. Justice

Department, a major nationwide study of law enforcement and criminal justice in Indian Country.

I do have serious concerns that the *Carcieri* decision can lead to or has led to challenges to the appropriate Indian Country status of lands that have been taken into trust under long-prevailing policy of the Federal Government. And this type of questioning of the Indian Country status of lands that were taken into trust can very well lead to legal challenges in criminal prosecutions that have been brought in Federal court under Federal statutes such as the Major Crimes Act or the Indian Country Crimes Act.

So that the questioning of Indian Country status can in turn lead to questioning of prosecutions and even convictions that have already occurred in Federal court. And I think there is a public safety dimension to the *Carcieri* decision that warrants the consideration of this Committee.

The CHAIRMAN. Well, thank you. Thank you very much.

Let me now call on my colleague for any questions or remarks he may wish to make.

Senator Udall?

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Chairman Akaka. And thank you for organizing this hearing and the various panels that we are going to hear from today.

First of all, let me say I very much support your bill that you introduced to deal with this. I am a cosponsor of it. I believe a clean bill on the *Carcieri* fix is what needs to be done. So we need to move forward with that as expeditiously as we can. We almost had it done in the last Congress, as you know, and we are going to have to find out what those obstacles were that prevented it from occurring and try to make sure we get those out of the way so we can get this done.

I would ask consent to put my opening statement in the record and just go directly to questions.

The CHAIRMAN. Without objection, it will be included.

Senator UDALL. Thank you.

[The prepared statement of Senator Udall follows:]

I would like to thank the Chairman for holding this important hearing. The Indian Reorganization Act of 1934 was a monumental recognition of the rights of tribes to maintain and regain their lands. Land is a vital part of any society; it is the basis of economic development, social interaction, and often even identity.

As the members of the Committee and those participating on the panels and in the audience know, this right, laid out in the Indian Reorganization Act 75 years ago, has recently been called into question by the Supreme Court's decision on *Carcieri vs. Salazar*. Sadly, this decision has sent ripples through Indian Country as questions of litigation and federal recognition have reverberated in almost every Native American Community.

I applaud Chairman Akaka on his quick action this congress to introduce and pass out of Committee a bill to make a simple yet vital fix to the Indian Reorganization Act that would reverse the *Carcieri vs. Salazar* decision. I am a strong support of this bill (S. 676) and urge my colleagues in the congress to support this legislation as well.

Thank you, and I look forward to hearing from the witnesses on the panels.

Senator UDALL. In your testimony, many of you have indicated that the *Carcieri* decision will potentially lead to extensive litiga-

tion for numerous tribes. And I think, Ms. Goldberg, you talked a little bit about that in your last answer here. Could you estimate how many tribes would potentially have to engage in litigation? I mean, how big of a problem we are looking at here? Do any of you want to jump into that?

Ms. GOLDBERG. I think there may be other witnesses who are going to be testifying today who are going to have a better sense of that, but I couldn't give you a specific number.

Senator UDALL. But you believe, from your last answer, this has opened up a number of avenues for challenge under the Reorganization Act.

Ms. GOLDBERG. I have seen specific instances of it. There are matters that are before the Department of the Interior right now calling into question the appropriateness of land having been taken into trust in light of *Carciari*. And these would definitely include tribes that have been through the Federal recognition process through the Office of Federal Acknowledgment.

There are 17 tribes that have been acknowledged through that process, and I couldn't tell you at this moment how many of them are in the process of having land taken into trust or have had land taken into trust. That is certainly one touchstone, but there are others.

And I think there is certainly jeopardy in all of these instances.

Senator UDALL. So what you are saying is one of the creators of litigation is going to be if a tribe took land into trust, that now under this decision that can be challenged. And we all know how expensive it is to go through the trust process and that. So we are adding on top of that a very extensive litigation experience and that kind of thing.

Ms. GOLDBERG. I don't doubt that, and I think it will be happening at the administrative level, as well as in the courts.

Mr. RICE. Senator?

Senator UDALL. Yes, please, Mr. Rice.

Mr. RICE. I am sorry. If I could add something to that, my experience has been as a litigator before I was a law professor that people will find a way to bring these challenges when it is in their own best interest. And for these tribes, not only the ones that have been acknowledged since the 1934-area date, but for tribes who have simply renamed themselves in their constitutions; for tribes who have done exactly what these statutes and the IRA and the OIWA and the Alaska Act called on them to do, and that is to reorganize their government.

Sometimes, the Indians on one reservation would divide themselves into two tribes. Sometimes the two tribes on one reservation combined themselves into one tribe for purposes of these constitutions and charters. Were the now-reconstituted, reorganized tribe, was that tribe recognized in 1934? Do they have sovereign immunity? Do they have the right to pass statutes? Do they have the right to organize their political life and structure under the IRA?

I can see all of these questions being raised in litigation. I don't think very many tribes are safe, if you want my real belief. I think many tribes can win, but that is going to be after years of litigation and thousands and thousands of dollars of legal fees that tribes simply don't need to have to spend.

Senator UDALL. And they should be investing those dollars in things that they want to do for their tribes, rather than for lawyers and in court. Yes.

Mr. RICE. Absolutely. I hate to beat myself out of a legal fee or other lawyers out of a legal fee, but sir, to be honest with you, that money should go into health care. It should go into education for our grandchildren. It should go into other things besides having to litigate what should be an open-and-shut case.

It should be a summary judgment if anybody brings it, but now only Congress can give that to us.

Senator UDALL. Well, usually we think of court cases and decisions as trying to simplify things and not create more litigation. And that is just the opposite of what you are talking about here with this *Carcieri* decision.

Thank you, Chairman Akaka. I see my time has run out, so thank you.

The CHAIRMAN. We will have another round here, Senator Udall.

Professor Hoxie, you are well versed in the history of the Indian Reorganization Act and the intent of Congress in enacting that law. In your opinion, have the goals of the Indian Reorganization Act been achieved? In other words, do you see the Act as still necessary today or have its objectives been met?

Mr. HOXIE. I would say that the Indian Reorganization Act laid out a broad agenda for a fundamental shift in the way the United States interacted with Indian people and with Indian communities. And that broad shift involved creating a mutually respectful relationship on a cultural level, on a political level and on a legal level so that people could go forward and live together on this continent.

I think John Collier is often criticized for his very romantic and very wide-ranging views, but I think they are an element in this law. Many of his views were batted back and forth as he negotiated with Congress over the final structure of the law. But I think everyone involved in that action realized that they were acting at a moment of disaster. Indian people were literally starving in this Country at this time. They had lost tens of millions of acres of land. Their institutions had been undermined. There was no recognition for their integrity and their dignity.

This law was intended to reverse that process and chart a new course. Now, that course has had its ups and downs. A number of events have occurred in the last 80 years. So I would say, no, the law has not been fulfilled, but that vision of being able to live together in a mutually respectful way, to have Indian people be citizens of their own communities as well as citizens of the United States, and to organize their own governments and to live the way most other Americans live, that is with their own government, is something that has really become rooted and really become the foundation of Federal Indian policy.

So I don't think in that sense the IRA will ever become irrelevant because it really has set out that goal, but it has certainly not been fulfilled.

The CHAIRMAN. Thank you.

Professor Rice, in your research of the Indian Reorganization Act, did you ever come across documentation that indicated that Con-

gress intended the Indian Reorganization Act to exist only for a limited number of tribes or for a limited amount of time?

Mr. RICE. The short answer to that, Senator, is no. As has already been said, at the time there was no list of federally recognized tribes. There was no list of tribes under Federal jurisdiction. The policy and the practice of the previous Administrations within the Indian Office had been that when an individual or tribe lost their land, they were no longer considered as subjects for the Indian Offices to deal with.

And so they had whole tribes of people which Collier understood to be wandering tribes with no land base; with no doubt they were Indians, no doubt they were a tribe in constitutional terms. Certainly, Congress would have the right to control commerce with that Indian tribe, but they simply didn't know they were there.

I have seen in my research, in fact, questionnaires that the Indian Office central office sent out to all the superintendents asking specifically not only about the tribes that they were operating with and that they knew about, but what other groups of Indians are in your territory and in your area that are not landholders, that are not part of your situation as we understand it, but that need help.

They were searching for those. They got sociologists and anthropologists from the big universities to try to make a list of tribes, and I have seen those records in the National Archives. They simply didn't know who all the tribes were. Some had been dropped by the wayside by virtue of a treaty. Some had just lost their land and nobody knew where they were. Some had never had a treaty. Some had had treaties with States, but not with the United States.

So that is where my research has taken me. And this was supposed to be the new policy. It was supposed to move forward into the future. There were no time limits set on the IRA. The only time limit, in fact, was a one-year period which was later, I believe, extended to another year, for tribes to have an election to decide whether or not the IRA would apply to them, and that is the only real time limit that existed.

The CHAIRMAN. Thank you.

Professor Goldberg, in your testimony, you reference a conversation and a legislative record that centered on the meaning of the words "under Federal jurisdiction" in the Indian Reorganization Act. Do you think the court took the legislative history into account when it issued the *Carciari* decision?

Ms. GOLDBERG. Mr. Chairman, I think the Court took a very narrow view of the purpose of the Indian Reorganization Act. They focused almost exclusively on the repair of harm that was done through allotment, which was certainly one of the purposes of the Indian Reorganization Act, but to read that as the exclusive purpose of the Act I believe is not consistent with what is there in the legislative history.

And if you look at the passage that I provided, that is the exchange between Chairman Burton Wheeler and Commissioner John Collier, what it reflects is a view by Commissioner Collier that there really would be more flexibility in the application of the law.

And also, if you look at the broader purpose of the Indian Reorganization Act, as we have been stressing, it was about revitalizing tribal governments and enabling all tribes, not just allotted tribes, that had lost land to restore the territorial basis for self-determination.

This broader purpose can only be fulfilled by affording the opportunity for land into trust as of the time the action is proposed by the Federal Government. That is, whenever the tribe is deemed a recognized one by the United States.

The CHAIRMAN. Well, thank you.

I will ask for further questions from Senator Udall.

Senator UDALL. Thank you, Chairman Akaka.

Listening to all three of you talk about this, something went terribly wrong in the Supreme Court with the way they interpreted this piece of legislation, this law. And I want to try to get you to help me understand what happened in terms of what came out. I have been reading the comment, Ms. Goldberg, in your presentation and the questions back and forth with Collier on that.

Typically, 50 years ago, 60 years ago in the Supreme Court, the U.S. Supreme Court was the last bastion of native rights. I mean, you would have a case come up and the District Court would rule against native people and the Circuit Court would rule against native people, but the Supreme Court of the United States always seemed to come out on the side of Native people. They would very carefully analyze things and come out many, many times, in large percentages advocating, supporting, supplementing native rights.

What is it that has happened here, in your opinion, that they could get so far off the mark on this, missing the legislative history? What is going on?

Mr. Hoxie?

Mr. HOXIE. I am the non-lawyer here, so perhaps I could just make a brief comment.

Senator UDALL. That isn't just a legal question.

Mr. HOXIE. I guess my point is a fairly simple one, and that is that I think within the legal community, there are various rules for constructing congressional intent using the language of the statute. And one of my definitions of a historian is the historian is in the context business; is in the business of trying to get people to understand the setting in which a law was passed.

And so my brief answer is that I think there was so much attention on the intricacies of the language of the Act that there was no attempt made to step back and understand the context, the setting in which this statute occurred.

Senator UDALL. And that goes to what you were talking about as to where the tribes were historically at that point; that they were at this very low point; that all of these very negative things had happened in terms of legislation and allotments and on and on and on.

And unless you understand that context and you just go do your court analysis of the legislative history, you can't fit the two together in a correct way is what you are saying.

Mr. HOXIE. Exactly. And as I point out in my testimony, this allotment had all of these terrible effects, and then the Depression hit. And the United States was actually asking the American Red

Cross to come into communities to feed Indians because they were completely powerless to help them. This was a desperate moment.

Ms. GOLDBERG. If I may just add to that, one of the things that seems to be evident in some recent opinions of the United States Supreme Court is a departure from some very fundamental, what we call canons of construction, rules for interpreting statutes that have been part of U.S. Supreme Court doctrine since the early 1800s and Chief Justice John Marshall.

And what those canons dictate is that when a statute is presented to the court that is ambiguous, the terms are not clear, that all of the uncertainties or ambiguities are supposed to be resolved in favor of supporting outcomes that favor tribal self-determination and land rights.

And interestingly, I have found in some of the major historical studies of the Indian Reorganization Act some rather frank acknowledgment that there was some lack of clarity in the statute itself about these broader purposes. One historian, Graham Taylor, wrote, "What is a tribe? The Indian Reorganization Act did not seriously face this question, suggesting some ambiguity." Another historian, Elmer Rusco, wrote, "The Indian Reorganization Act did define 'Indian' and 'tribe,' though ambiguously."

Well, if there were such ambiguities, my view is that if you understand the context that it should have been clear to the Court, that the point in time where Federal recognition mattered was at the time the land was to be taken into trust, the time the action is proposed. But if there was any ambiguity, it should have been resolved in favor of the tribes, and the Court seemed to have lost sight of that.

Senator UDALL. And in the *Carcieri* case, they resolved it against the tribes.

Ms. GOLDBERG. Precisely.

Senator UDALL. Just the opposite as to the way the legislative construction is supposed to.

Ms. GOLDBERG. Precisely.

Senator UDALL. Yes. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Udall.

I want to thank this panel very much for your distinguished and expert opinions here on the bill. You can see where we are trying to reach in and understand what happened and what needs to happen now, to the point where if it requires any legislative action, we will be working on that.

But we want to really try hard to bring it about so that the indigenous people of our Country will be treated with justice and well.

So again, I want to thank this panel very much for coming and helping us in doing this. Thank you.

I would like to invite the second panel to the witness table. Serving on our second panel is Mr. Steven Heeley, a consultant for Akin Gump Strauss Hauer & Feld; and Professor Richard Monette, Associate Professor of Law at the University of Wisconsin Law School.

I want to welcome you both to the Committee.

Mr. Heeley, will you please proceed with your testimony?

**STATEMENT OF STEVEN J.W. HEELEY, POLICY CONSULTANT,
AKIN, GUMP, STRAUSS, HAUER & FELD, LLP**

Mr. HEELEY. Thank you, Mr. Chairman, Vice Chairman Barrasso, Senator Udall and other Members of the Committee on Indian Affairs. I am honored to be here today to present testimony before this Committee.

I will focus my testimony primarily on the 1994 amendments to the Indian Reorganization Act. Those amendments added subsections F and G to section 16 of the Act. Subsection F prohibits the Secretary of Interior and other departments of the Federal Government and agencies of the U.S. from promulgating any regulation that classifies, enhances or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized Indian tribes, by virtue of their status as Indian tribes.

Subsection G provides that any regulation, administrative decision or determination of a department or agency of the Federal Government that classifies, enhances or diminishes the privileges and immunities of an Indian tribe relative to other Indian tribes shall have no force and effect. These Amendments were adopted on the Floor of the Senate and became Public Law 103-263.

Early in the 103rd Congress, this Committee and the House Subcommittee on Native American Affairs determined that these amendments were necessary to curb efforts on the part of the Administration to classify or categorize Indian tribes as either historic, and therefore entitled to the full panoply of inherent sovereign powers not divested by treaty or congressional action; or created and therefore possessing limited sovereign powers derived primarily from Federal interests in benefitting Indians, not from their historical status.

This issue came to light when the Pascua Yaqui Nation, a federally recognized Indian tribe, submitted amendments to its tribal constitution under the IRA and the Department of Interior took that occasion to review the status of the nation and made the determination that it was not a historic tribe, but rather a created one. In making this determination, the Department applied the definition of a historic tribe, found and set forth in the Federal acknowledgment procedures.

It should be noted that the Federal acknowledgment procedures do not apply to federally recognized tribes like the Pascua Yaqui Tribe.

The position articulated by the Department of Interior was based on two solicitors' opinions. The first in 1934 that described in general terms the inherent sovereign powers of tribes, and a 1936 memorandum, a one-pager, that looked at two tribal constitutions to determine whether the powers enumerated in those constitutions were in fact powers held by those tribes.

The 1936 opinion forms the basis of this distinction articulated by the department that created tribes lack the full panoply of powers of other federally recognized Indian tribes. Specifically, they lack the power to condemn land, to regulate inheritance of tribal members' property, to assess taxes, and to regulate law and order.

Such an artificial distinction represents a significant departure from the Congressional intent and purpose of the IRA and is reminiscent of the very policies of assimilation that the IRA was in-

tended to address. In addition, the department's reliance on the 1936 memorandum is misguided since section 16 had been amended by Congress in 1988 to eliminate references to Indians residing on a reservation and clarify that any tribe was entitled to organize for its common welfare and to adopt a constitution and bylaws.

In enacting Public Law 103–263, Congress rejected the artificial distinction of historic and created tribes and made clear that any regulation, rule or administrative decision that classifies, enhances or diminishes the privileges and immunities available to a federally recognized tribe relative to other tribes shall have no force and effect.

These provisions were intended to void any past determination by the department that an Indian tribe was created and would prohibit those determinations in the future.

Congress' actions in the 103rd Congress was a reassertion of its plenary authority over Indian affairs and reflects the read-and-react interplay between Congress and the Administration in the articulation of Federal Indian policy where Congress is regularly called upon by Indian tribes to exercise its plenary authority in response to an overreaching administrative action.

In the 75 years since its enactment, the IRA has stood as an enduring bulwark against efforts to infringe upon and diminish the sovereign powers of tribes. When Congress has had to periodically revisit the Act to shore up or clarify certain provisions, as evidenced by the amendments in the 103rd Congress, the 108th Congress and the 100th Congress, the IRA continues to stand for the principles articulated by Congress those many years ago to revitalize tribal governments, to encourage tribes in the exercise of their inherent sovereign authority and powers of self-government, and to assist tribes in the restoration of their tribal land base and to promote tribal economies.

That concludes my statement. I would be happy to answer any questions, Mr. Chairman.

[The prepared statement of Mr. Heeley follows:]

PREPARED STATEMENT OF STEVEN J.W. HEELEY, POLICY CONSULTANT, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP

I would like to thank you Chairman Akaka, Vice Chairman Barrasso, and the other distinguished members of the Committee on Indian Affairs for the invitation to provide testimony on the Indian Reorganization Act.¹ I am honored to be here before you today. I have been asked to focus my testimony on the 1994 Amendments to the Indian Reorganization Act, which amended Section 16 of the Indian Reorganization Act to add subsections (f) and (g) to the Act.² Subsection (f) prohibits the Secretary of the Interior and other Departments and agencies of the United States from promulgating 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.”³ Subsection (g) provides that “[a]ny regulation, administrative decision, or determination of a Department or agency of the United States that classifies, enhances, or diminishes the privileges and immunities” of an Indian tribe relative to the privileges and immunities of other federally recognized Indian tribes shall have no force or effect.⁴ These provi-

¹25 U.S.C. § 461 *et seq.*

²25 U.S.C. § 476 (f)&(g), Public Law 103–263.

³25 U.S.C. § 476(f).

⁴25 U.S.C. § 476(g).

sions were added as a Senate floor amendment to S. 1654, the Technical Corrections Act of 1993, which became Public Law 103-263.

Early in the 103rd Congress, this Committee and the House Subcommittee on Native American Affairs determined that these amendments were necessary to curb efforts on the part of the Administration to classify or categorize Indian tribes as either "historic" and therefore entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or Congressional action or "created" and therefore possessing limited sovereign powers "derived from the primary federal interest in benefiting Indians, not from the historical status of the group."⁵ The Committees became aware of the evolving practice of the Department of Interior to classify federally recognized Indian tribes as either "historic" or "created" pursuant to Section 16 of the Indian Reorganization Act. This practice came to light as a result of the efforts of the Pascua Yaqui Nation of Arizona to amend their tribal constitution.⁶ In reviewing the proposed amendments to the tribal constitution, the Department of Interior took that occasion to review the status of the Pascua Yaqui Nation, a federally recognized Indian tribe, and made the determination that it was not a "historic" tribe but rather a "created" one. In making this determination, the Department applied the definition of a historic tribe set forth in the federal "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe"⁷ to the Pascua Yaqui Nation to determine whether it qualified as a "historic" tribe or a "created" one. It should be noted that the Federal Acknowledgement Procedures relied upon by the Department specifically exclude "Indian tribes, organized bands, pueblos, Alaska Native Villages or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs."⁸ As a federally recognized Indian tribe, the Pascua Yaqui Nation is specifically exempt from these procedures.

Once the Department had made the determination that the Pascua Yaqui Nation was "created" rather than "historic," the Department could then make a determination on whether the Pascua Yaqui Nation possessed the inherent sovereign powers set forth in its proposed amendments to its tribal constitution. In the Department of Interior's response to the Pascua Yaqui Nation, the Department discussed the distinctions between "historic" and "created" tribes:

The Department of the Interior's (Department) position on historic tribes versus adult Indian communities represents a longstanding interpretation of the law and historical factual differences between groups of Indians and the policies of the Department. Since the passage of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), the Department has held that adult Indian communities may not possess all of the same attributes of sovereignty as a historic tribe. . . . A historic tribe has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been removed by Federal law in favor of either the United States or the state in which the tribe is located. By contrast, a community of adult Indians is comprised of simply Indian people who reside together on trust land. . . . The authority of a community of Indians residing on the same reservation has been held generally not to include the power to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxed upon community member[s] or others, and the [r]egulation of law and order.⁹

⁵See page 12 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled "An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes" for the prepared statement of Carol A. Bacon, Director, Office of Tribal Services, Bureau of Indian Affairs.

⁶Both Committees also heard from a number of federally recognized Indian tribes in California, who had also been subject to the same administrative diminishment through reclassification by the Department of the Interior. See page 16 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled "An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes" for the exchange between Chairman Richardson and the Acting Director of the BIA Office of Tribal Services.

⁷25 C.F.R. § 83.1.

⁸25 C.F.R. § 83.3(b).

⁹December 3, 1991 Letter from Carol A. Bacon, Acting Director, Office of Tribal Services, Bureau of Indian Affairs, to the Honorable Arcadio Gastelum, Chairman, Pascua Yaqui Tribal Council.

The position articulated by the Department of the Interior was based on two Solicitor's Opinions interpreting Section 16 of the Indian Reorganization Act.¹⁰ The first Solicitor's Opinion was issued on October 25, 1934 by Solicitor Margold in response to inquiries at the time regarding what sovereign powers are possessed by Indian tribes and which powers can be incorporated into tribal constitutions and bylaws pursuant to Section 16 of the Indian Reorganization Act.¹¹ The opinion surveys a number of court decisions which recognize the various sovereign powers of Indian tribes as well as various statutory authorities articulating the powers of self-government of Indian tribes. Solicitor Margold opines that Indian tribes possess "those powers of local self-government which have never been terminated by law or waived by treaty."¹² The Solicitor concludes that included in the sovereign powers of Indian tribes is the power to adopt a form of government and procedures for the election and removal of tribal officers; to define membership; to regulate domestic relations of members of the tribe; to prescribe rules of inheritance with respect to personal and real property; to assess taxes; to remove and exclude non-members of the tribe from the reservation; to regulate the use and disposition of property within the reservation; to administer justice regarding all disputes and offences among members of the tribe; and to prescribe the duties and regulate the conduct of federal officials provided such authority has been delegated by the Department of the Interior to the Indian tribe.¹³

The second opinion providing the legal foundation for the Department's practice of administratively diminishing the sovereign powers of federally recognized Indian tribes through reclassification, is a one page memorandum to the Assistant Commissioner of Indian Affairs issued on April 15, 1936 regarding tribal elections on the proposed constitutions of the Lower Sioux Indian Community and the Prairie Island Indian Community in Minnesota.¹⁴ In its review of the proposed constitutions of both the Lower Sioux Community and the Prairie Island Community, the Solicitor's Office opines that:

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical Indian tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and its carrying on of business, and those which may have been delegated by the Secretary of the Interior.¹⁵

The Solicitor concludes that neither tribe possesses the power to condemn land of its members; to regulate the inheritance of tribal members' property; and to assess taxes.¹⁶ It is this opinion that forms the basis for the Department's efforts to administratively diminish the sovereign authority of certain federally recognized Indian tribes by reclassifying such tribes as "created" tribes. It is the height of irony that the Department relies upon the authorities contained in the Indian Reorganization Act, an Act intended to strengthen and revitalize tribal governments and to reverse the impacts of the federal policy of assimilation, to administratively diminish the sovereign authority of certain federally recognized Indian tribes. The views of the Department in advancing this artificial distinction between federally recognized Indian tribes represents a significant departure from the congressional intent and purpose of the Indian Reorganization Act and is reminiscent of the very policies of assimilation that the Indian Reorganization Act was intended to address. Further, the Department's reliance on the Solicitor's April 15, 1936 memorandum was misguided since Section 16 of the Indian Reorganization Act was amended by Congress in 1988 to eliminate the references to Indians residing on a reservation and clarify that "any Indian tribe is entitled to organize for its common welfare, and may adopt an appropriate constitution and bylaws."¹⁷

¹⁰ Id.

¹¹ Id.

¹² Page 36, Department of Interior Solicitor's Opinion issued on October 25, 1934, 55 I.D. 14; IDOINA 445; 1934 DOINA Lexis 260.

¹³ Id. at page 37.

¹⁴ Page 1, Department of Interior Solicitor's Opinion issued on April 15, 1936, 1 DOINA 618; 1936 DOINA Lexis 436.

¹⁵ Id.

¹⁶ Id.

¹⁷ 25 U.S.C. § 476(a), see P.L. 100-581.

In hearings before the House Subcommittee on Native American Affairs the Department of Interior relied on the April 15, 1936 memorandum to support its determination that the Pascua Yaqui Nation, as a “created” tribe, does not possess the inherent power to regulate law and order, except where that authority has been delegated by the Secretary. The Department found that the Pascua Yaqui Nation did not possess inherent sovereign powers, including the power to condemn land, to regulate inheritance of tribal member’s property, and to assess taxes.¹⁸ In rejecting the position advanced by the Department of Interior that the Pascua Yaqui Nation was a “created” tribe, the Congress enacted P.L. 103–357 to clarify that the Pascua Yaqui Nation “a historic tribe, is acknowledged as a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such tribal status.”¹⁹

This Committee and the House Subcommittee on Native American Affairs recognized that the issues confronted by the Pascua Yaqui Nation were not isolated, but part of a larger effort of the Department of Interior to apply this distinction of historic/created tribes to a large cross section of federally recognized Indian tribes. It had been the practice of the Department that when Indian tribes submitted proposed amendments to their tribal constitutions to the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, the Department would first determine if the Indian tribe was “historic” or “created.” Those Indian tribes determined to be “created,” like the Pascua Yaqui Nation, were found not to possess the full panoply of sovereign powers of other federally recognized Indian tribes. In testimony before the Subcommittee on Native American Affairs, Department of Interior witnesses testified that in addition to the Pascua Yaqui Nation there were a number of other “created” tribes, however, when requested by the Subcommittee to provide a list of “created” tribes, the Department could not.²⁰ In his floor statement during the consideration of S. 1654, Senator McCain comments on the Department’s classification of “created” tribes:

At the same time, the Department insists that it cannot tell us which tribes are created and which are historic because this is determined through a case-by-case review. All of this ignores a few fundamental principles of Federal Indian law and policy, Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government. In addition, neither the Congress nor the Secretary can create an Indian tribe where none previously existed. The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of Federal courts, acts of Congress, and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.²¹

In enacting P.L. 103–263 Congress reasserted its plenary authority over Indian affairs by prohibiting any departments or agencies of the Federal Government from promulgating any regulation, rule or make any decision or determination pursuant to the Indian Reorganization Act “that classifies, enhances, or diminishes the privileges and immunities available”²² to federally recognized Indian tribes because of their status as Indian tribes. In his floor statement during the consideration of S. 1654, Congressman Richardson discussed the threat presented by the Department’s administrative diminishment of Indian tribes:

“Mr. Speaker, there is great danger in a policy wherein the Department of the Interior and the Bureau of Indian Affairs are allowed to limit the inherent sovereign authority of Indian tribes by the Solicitor’s pen. If carried to an extreme,

¹⁸ December 3, 1991 Letter from Carol A. Bacon, Acting Director, Office of Tribal Services, Bureau of Indian Affairs, to the Honorable Arcadio Gastelum, Chairman, Pascua Yaqui Tribal Council.

¹⁹ 25 U.S.C. 1300(f)(a).

²⁰ See page 15 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled “An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes.”

²¹ Statement of Senator John McCain on the consideration of S. 1654, 140 Cong. Rec. S6146, May 19, 1994.

²² 25 U.S.C. § 476(f).

the Solicitor could by fiat significantly erode tribal sovereignty through a series of opinions and carry out his or her own termination policy. With the exception of the framework imposed by the judicial branch, the formulation of Indian policy is virtually the sole province of the Congress and Indian tribes. The Congress has never acknowledged distinctions in or classifications on inherent sovereignty possessed by federally recognized Indian tribes. Tribal sovereignty must be preserved and protected by the executive branch and not limited or divided into levels which are measured by the Bureau of Indian Affairs and the Department of the Interior. We must not revisit the darkest period of Federal Indian policy by allowing the termination of tribal sovereign authority through the implementation of the Bureau of Indian Affairs policy distinction between historic and created Indian tribes.²³

The Congress rejected the artificial distinction of “historic” and “created” tribes and made clear that any regulation, rule or administrative decision “that classified, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to other federally recognized Indian tribes . . . shall have no force and effect.”²⁴ The Congress intended these provisions to “void any past determination by the Department that an Indian tribe is created and would prohibit any such determinations in the future.”²⁵

The work of this Committee and the House Subcommittee on Native American Affairs during the 103rd Congress was not over as the Committees were presented with yet another effort by the Department to terminate and/or diminish tribal sovereign authority. The Secretary of the Interior is required to publish a list of federally recognized Indian tribes in the Federal Register. It had been the practice of the Secretary to publish the list at irregular intervals and leaving a number of federally recognized tribes off the list. In some cases this practice of leaving certain federally recognized tribes off the list was inadvertent and in others it was by design.²⁶ When an Indian tribe was not on the published list of federally recognized Indian tribes, it was no longer eligible for a range of federal programs and benefits not the least of which is program funding and services from the Bureau of Indian Affairs. In addition, most other federal agencies utilize the published list to determine tribal service populations and funding eligibility. Indian tribes left off the published list were denied federal benefits and services and their governmental status called into question. In response to the denial of services to federally recognized Indian tribes, the Congress passed the “Federally Recognized Indian Tribe List Act of 1994.”²⁷ This Act amended the Indian Reorganization Act to require the Secretary to publish a list of all federally recognized Indian tribes annually in the Federal Register.²⁸ The intent of the Congress underlying these amendments to the Indian Reorganization Act are set out in the findings which recognize Congress’ plenary authority over Indian Affairs and the federal trust responsibility to all federally recognized Indian tribes.²⁹ The findings also state that a federally recognized Indian tribe may not be terminated except through an Act of Congress.³⁰ The Act requires the Secretary to ensure the that list reflects all of the federally recognized Indian tribes eligible for the special programs and services provided by the United States to Indians because of their status as Indians.³¹ In his floor statement during the consideration of the Federally Recognized Indian Tribe List Act of 1994, Congressman Thomas expressed concern that the measure did not go far enough to prevent continued efforts by the Department to “de-list” or administratively terminate Indian tribes:

Mr. Speaker, I predict that our lack of action today will come back to haunt us. Although the findings section of the title makes clear that only Congress has the authority to derecognize a tribe, findings are not legally binding. Until we

²³ Statement of Congressman Richardson on the consideration of S. 1654, Cong. Rec. H3803, May 23, 1994.

²⁴ 25 U.S.C. § 476(g).

²⁵ Statement of Senator Daniel Inouye on the consideration of S. 1654, 140 Cong. Rec. S6147, May 19, 1994.

²⁶ The Committees heard from a number of federally recognized Indian tribes in California as well as the Central Council of Tlingit and Haida Indian tribes of Alaska that had been left off the published list and were being denied federal services.

²⁷ 25 U.S.C. § 479a & 479a-1; P.L. 103-454.

²⁸ 25 U.S.C. § 479a-1(b).

²⁹ P.L. 103-454, Section 103(1)&(2).

³⁰ P.L. 103-454, Section 103(4).

³¹ P.L. 103-454, Section 103 (8).

make the prohibition unequivocal and give it the force of law, we will continue to be faced with the prospect of the BIA usurping our authority.³²

The concerns expressed by Congressman Thomas regarding the Administration usurping Congress' plenary power are reflective of the "read & react" interplay between the Congress and the Administration in the articulation of federal Indian policy, where Congress is regularly called upon by Indian tribes to exercise its plenary authority over Indian affairs in response to an overreaching administrative action. A further example of this interplay between the Congress and the Administration occurred during the 108th Congress when Congress adopted amendments to the Indian Reorganization Act to make clear that Indian tribes retain their inherent sovereign authority to organize and adopt governing documents outside the authorities of the Indian Reorganization Act.³³

In the 75 years since its enactment, the Indian Reorganization Act has stood as an enduring bulwark against efforts to infringe upon and diminish the sovereign powers of Indian tribes. While Congress has had to periodically revisit the Indian Reorganization Act to shore up and clarify certain provisions of the Act as evidenced by the various amendments enacted in the 103rd Congress and again in the 108th Congress,³⁴ the Indian Reorganization Act continues to stand for the principles articulated by the Congress those many years ago: to revitalize tribal governments, to encourage tribes in the exercise of their inherent sovereign authority and powers of self-government, to assist tribe in the restoration of their tribal land base and to promote tribal economies.

This concludes my prepared statement. I would be happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you very much, Mr. Heeley, for your statement.

Professor Monette, would you please proceed with your statement.

**STATEMENT OF RICHARD MONETTE, ASSOCIATE PROFESSOR
OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL**

Mr. MONETTE. Good afternoon, Chairman Akaka, Senator Udall.

My colleague Robert Lyttle and I have assisted in advancing some 30 constitutions for tribes. I also had the luxury of being on staff on this Committee in 1988 when those amendments were made. I was the Director of Legislative Affairs down at the Department of Interior for the BIA in 1994 when that amendment was made. And I was Chairman of my own tribe in 2001 when that amendment was made. Those three amendments are, I think, all key here.

For the record, I was not here in 1934 when the IRA was adopted.

You have heard the story about the Solicitor's opinions from a couple of witnesses so I won't repeat those. Suffice it to say that as Steve has said, it fashioned over time this distinction between those tribes that were now under Federal jurisdiction and those tribes thereafter recognized. And as Steve says, it became a distinction classified as historic or non-historic or actually using the word created.

And in fact, I brought one of the letters from 1988 when those amendments were being talked about by this Committee. And there is a letter to the Ely Colony, and a sentence out of that letter

³² Statement of Congressman Thomas on the consideration of H.R. 4180, Cong. Rec. H10490, October 3, 1994.

³³ P.L. 108-204, Section 103.

³⁴ See P.L. 103-263, which added subsections § 476(f) & (g); P.L. 103-454, which added subsection § 479a and § 479a-1; P.L. 108-204, which added subsection § 476(h).

says, "The Ely Indian Colony is classified as a created tribe, as opposed to a historical tribe." It went on to explain that distinction.

And in the letter, they also said that the changes reflected that the BIA was making in the constitutions was to make the proposal legally and technically sufficient to conform with established bureau policy. And so those 1988 amendments actually took the word policy out of what the bureau was doing and said that the bureau's review of proposed constitutions and constitutional amendments were to be limited to Federal law and policy was to be disregarded. That is because this was one of the policies at play.

In 1994, it was even more on point, and just a little aside, I was drafting a constitution for the Wisconsin Winnebago wherein they changed their name to the Hochunk Nation. And we got some communication back from the department that they were going to be labeled a created tribe.

So when I got to be Legislative Affairs Director at the bureau and the Yacqui Tribe raised this issue, I called some of the people together to ask what should we do; Congress is going to want a hearing on this. In fact, Senator McCain had asked for a list, can you give us a list of these created and historic tribes so we know who it is we are talking about? They could not provide a list, of course.

But we did have a meeting, and I will go quickly. Four categories came up. One of them was, as a couple of witnesses have said, adult Indians of half-blood or more residing on the reservations. Frankly, that applied to most of the California rancherias where, for lack of a better term, remnants of some of the tribes were settled or herded together to form a rancheria and a recognized entity.

The second was where we had sort of a confederated or compound tribe like the Three Affiliated Tribes of the Fort Berthold Reservation, the Confederated Tribes of the Warm Springs Reservation. And that one is particularly key later on in the discussion.

Third was where we had a tribe removed and part of the tribe stayed back like the Oneida Tribe in New York, and part went to a State like Wisconsin, and the department said only one of them could be the historical tribe. The other one must be the created one.

And finally, as you have heard here, them saying any tribe that was recognized after 1934 was a created tribe.

And we had a meeting, and interestingly enough one of the directors of one of the departments down at the BIA was from the Three Affiliated Tribes and was not happy to learn that the department was treating his tribe as having less sovereignty than other tribes, and it helped to kick-start some of the discussion.

So the department came up and gave testimony to this Committee, and we included a statement that the department actually wanted to take out. The statement said that democracy requires us to hold that government is by the governed. That sovereignty derives from those over whom it is exercised. Imagine that, right, in America.

You would think that sentiment would have ended the discussion and eliminated the need for the Yacqui Elder to say, and I will paraphrase, but close with one of my favorite things I have ever heard.

It was to this Committee and he said, Senator, my people have but one creator, and in all due respect, you are not it.

[Laughter.]

Mr. MONETTE. So in short, the 1994 amendment was sort of like an equal footing doctrine, a 10th Amendment for tribes really to recognize that tribes, as the last panel said, have the right to form their own government and empower their government to do what it needs to do over them, like any other people on the planet.

So I would repeat here again today, democracy requires us to hold that government is of, for, and by the governed; that sovereignty derives from those over whom it is exercised. And I would be at a loss to try to decide whose version of democracy allows us to decide that any less for an Indian tribe.

[The prepared statement of Mr. Monette follows:]

PREPARED STATEMENT OF RICHARD MONETTE, ASSOCIATE PROFESSOR OF LAW,
UNIVERSITY OF WISCONSIN LAW SCHOOL

Good morning Chairman Akaka and Members of the Committee. My name is Richard Monette. My colleague, Robert Lyttle, and I have drafted either single constitutional amendments or total constitutional revisions for over thirty different tribes. Also, I worked for this Committee when the 1988 amendments were being legislated. In addition, I served as Director of the Office of Legislative and Congressional Affairs in the BIA when the 1994 Amendment to the IRA was enacted.

Thank you for inviting me to provide my views, specifically the opportunity to provide my perspective on the 1994 Amendment to the IRA and its relationship to the *Carcieri* case and other recent legal developments. Today, sadly, we are struggling with the unfortunate political realities of how to fix *Carcieri*. I say “unfortunate” because the 1994 amendment was intended to prevent *Carcieri*.

After Congress enacted the IRA, the Office of the Solicitor—DOI began to question the wording and intent of the Act, including the provision that it applied to Tribes “now under federal jurisdiction”. The Department concluded that Congress authorized reorganization of Tribes which had not historically been recognized in the same form and fashion. As a result, the Department labeled some Tribes as historic and others as not historic, or “created”, a distinction that cannot be justified, and should not be rationalized, by a Nation that purports to be the defender of democracy.

Over the years the historic versus created issue arose in four contexts in particular:

First, the IRA provided for the reorganization and recognition of adult Indians of half blood or more residing on the same reservation despite the fact that those adult Indians might actually represent many different tribes. This was the case with many reorganized California tribes where citizens of different tribes were settled onto single “rancherias”. Outside California, Tribes falling into this category were often labeled by the BIA as a Community or Colony. Obviously, given the unfortunate history of California in particular, these newly anointed IRA Tribes were not the same as the Tribe historically on those lands.

Second, the IRA contemplated reorganization and recognition for Tribes comprised of multiple pre-existing Tribes, where the entire population of two or more Tribes were settled onto one reservation. Examples include the Three Affiliated Tribes of the Fort Berthold Reservation, the Confederated Tribes of the Warm Springs Reservation, the Shoshone and Arapaho Tribes of the Wind River Reservation. As you can see, the moniker “Tribe of the such and such Reservation” identified these Tribes. Again, obviously these newly anointed IRA Tribes were not the same as the Tribe historically on those lands.

Third, the Secretary facilitated reorganization for Tribes split by America’s unfortunate Removal policy and now living on two or more reservations. Examples included the Oneida Nation in New York and the Oneida Tribe in Wisconsin, or the Choctaw Nation of Oklahoma and the Mississippi Band of Choctaw, or the Wisconsin Winnebago and the Nebraska Winnebago. Over the years, as illustrated in the Supreme Court case *United States v. John*, the Department took the position that only one of the resulting Tribes, either the removed or the un-removed Tribe, could represent the Tribe historically dealt with by the United States. Again, obviously these newly anointed IRA Tribes were not exactly the same as the Tribe historically on those lands, although in this instance the Department would have to

admit each consisted of distinct Tribes with which the Department historically dealt.

Fourth, the Department began to label or treat almost every newly recognized Tribe as “created” simply because the United States had not previously recognized them. Increasingly, in letters to the Tribes themselves and various papers, the Department resurrected the idea that a created Tribe had less sovereignty than an historic Tribe, particularly when it came to matters governing land.

In 1993 Robert Lyttle and I assisted in drafting the new current constitution for the Wisconsin Winnebago, wherein the Hochungra proudly changed their sovereign name from Winnebago—an Algonquin label—to their own name—the Hochunk Nation. The Tribe itself, now stable, progressive, and successful, will tell you the troubles it had prior to adopting a new constitution, so I will not labor the story here. Nonetheless, because the Hochungra peoples were subjected to official removal from Wisconsin, the Department threatened that the Hochunk Nation would be labeled “created”, arguing the historic group had been removed to Nebraska. Thus, according to the Department, the Hochunk Nation would be recognized with less sovereignty, less jurisdiction, less democracy. One can’t help but wonder if Nebraska Winnebago had reformed their constitution first, whether the Department would have labeled the Nebraska Winnebago created and the Wisconsin Winnebago historic. At best, the process was riddled with human intervention by career bureaucrats—at worst it was abuse of discretion.

This matter came to Congress’ attention again in 1994 when the Department treated the Pasqua Yaqui Tribe as a created Tribe. Senator McCain and this Committee requested a list of so-called “created Tribes” from the Department, but the Office of the Solicitor-DOI refused, rationalizing that the distinction was made on a case by case basis. During the course of those discussions, as Director of the Office of Legislative Affairs, I sat in departmental meeting when a certain DOI deputy solicitor stated that the Three Affiliated Tribes of the Fort Berthold Reservation is a created Tribe—the Tribe of which the Director of the Office of Tribal Government was a member. So imagine his shock and personal consternation learning that the Solicitor’s Office had concocted a legal theory leaving his own Tribe with less sovereignty than other Tribes.

As a result of those discussions the Department offered only irresolute testimony, but it could not bring itself to strike from its testimony a sentiment that some insisted it contain—that Democracy requires us to hold that government is by the governed, that sovereignty derives from those over whom it is exercised. That sentiment should have been the axiomatic end of story, eliminating the need for a Yaqui elder to testify, and I paraphrase: “Senator, my people have but one Creator, and in all due respect, you’re not it.”

Is Virginia an historic State but North Dakota only a “created” State? When the Union was formed was North Dakota “now under Federal jurisdiction”? Despite the obvious historical anomalies between States, North Dakota is an “historical State”, a full State of this Union. By virtue of the “Equal Footing Doctrine”, which applies the democracy and the 10th Amendment to after-admitted States, North Dakota is not “created”, but is imbued with the full breadth and panoply of sovereignty as any of the other State of this Union. Our democracy requires us to conclude that North Dakota’s 400,000 voters have as much sovereignty to provide their State as Virginia’s 4 million voters have to give their State.

In short, the 1994 amendment to the Indian Reorganization Act was a statement of the best that this Country’s democracy has to offer for Indian Tribes—a 10th Amendment and an equal footing of sorts. In defiance of the power of Congress, about one week after that amendment was signed into law the Offices of the Solicitor and Tribal Government sent out yet another “created Tribe” letter. So I repeat here today: Democracy requires us to hold that government is of, for, and by the governed; that sovereignty derives from those over whom it is exercised. Whose version of democracy allows us to reach any other conclusion when it comes to a recognized Indian Tribe?

The CHAIRMAN. Thank you very much, Professor Monette, for your statement.

My first question goes to both of you. What is your view on the Administration’s decision not to include any discussion of the intent of the 1994 amendments to the Indian Reorganization Act in their brief to the Supreme Court?

Mr. HEELEY. Mr. Chairman, Senator Udall, Members of the Committee, I found it curious in looking at the brief that there was

scant discussion of any of the subsequent amendments to the Indian Reorganization Act. As you heard from the earlier testimony and our testimony, the Congress has continually gone back to the IRA and had to address either actions or overreaches by the Administration or in some cases actions by the courts.

In the case of the 1994 amendments, it was intended to make clear that if a tribe is federally recognized, they possess the full panoply of powers of sovereign Indian tribes unless specifically divested by treaty or Congressional action. In fact, the amendments that were done in the 100th Congress were specifically designed to target and deal with the residency requirement that had been used to create this second lesser category of created tribes or adult Indian communities, to assert Congress' plenary power to say a federally recognized Indian tribe possesses the full panoply of sovereign powers unless they have been waived or unless they have been divested by the Congress.

The CHAIRMAN. Professor Monette?

Mr. MONETTE. Chairman Akaka, I think you almost want to attribute the best of intentions to them. So in that light, the brief did reference the 1994 amendment, as well as the others, but the 1994 one, which I think is more on point here, they only referenced it once on page 19, footnote seven, and really only one sentence that maybe gets about one-tenth of the way there. And I am not sure why.

What I did write in my written testimony is about a week after the President signed the 1994 amendments into law, the department, with the Solicitor's office and the Office of Tribal Government, sent out another created and historic tribe letter, just utterly disregarding what the president had just signed into law.

And so we called a meeting and called them together, and of course, they said, well, it was an oversight and it was already in the pipeline, et cetera. But don't underestimate how deep this distinction and this now under Federal jurisdiction thing flows in the department. And in fact, the person who is in there today leading these issues is also the person who helped to draft this 1988 letter and one of those people has been there since about 1973.

And they hold it sort of near and dear to their heart for some strange reason. And they are not going to let it go unless we make it perfectly clear. And the last time I took a stab at the first language, Steve might remember it. It is why sometimes they say that I pushed the envelope a little too far. The language was a little more clear, saying that it is crazy to say that there are created tribes, period.

When it got up to this more august and artistic body, it was re-drafted to have the privileges and immunities language, but I really don't think that is a defense of the Administration for not seeing that this is what it was intended to address. They really just missed the boat on it. I hate to attribute any bad intent to them, but, again, the Solicitor from that department who could have been helping with those arguments, who should have raised the issue with the Department of Justice, really holds it near and dear.

The CHAIRMAN. Thank you for that.

Mr. Heeley, do you think the court's decision in *Carciere* creates the very situation you intended to address in the 1994 amendments by effectively creating two classes of tribes?

Mr. HEELEY. Mr. Chairman, Members of the Committee, Senator Udall, I think that is problematic. I was Counsel for the House Subcommittee on Native American Affairs when the amendments were being developed and passed. And Congress was very clear in exerting its plenary authority to make clear that there should be no distinctions as between federally recognized tribes and the panoply of inherent sovereign powers that they exercise.

Subsequent amendments to the IRA also addressed the category of tribes that chose not to, as the Vice Chairman referenced, organize under IRA constitutions, and to make clear that federally recognized Indian tribes had the right to not adopt an IRA constitution if they so chose.

Thank you.

The CHAIRMAN. Thank you.

Senator Udall, any questions you may have?

Senator UDALL. I think I am okay, Mr. Chairman, on this panel. I am looking forward to the next panel.

The CHAIRMAN. All right. Thank you.

Senator UDALL. Thank you.

The CHAIRMAN. Mr. Monette, in your opinion as a former Department of Interior official, what impact will the *Carciere* case have on the trust relationship between the Indian tribes and the Department of Interior?

Mr. MONETTE. The potential impact is great. The impact was building when they were on a case-by-case basis deciding whether a tribe was now under Federal jurisdiction and thus historic, or thereafter recognized or otherwise acknowledged, and thus created.

And it makes a huge difference depending on who is writing the letter and who is reading it. This letter says that the created tribes don't have the power to condemn land of their members; to regulate the inheritance of property; to levy taxes.

Now, Congress passed, for example, the American Indian Probate Reform Act. I am guessing nobody up here thought we needed to make sure that the created-historic tribe distinction didn't put a wrinkle into that Act. Right? But it might now.

So really I think the ways that people could figure out how this distinction comes to bear is infinite. And there was a fellow that walked this area a couple hundred years ago. His name was James Madison. And he addressed an argument from some people that were basically saying that the original States and the subsequent States should be of a different level of sovereignty. And he argued, as you know, strenuously why States would want to join a union where they would be subordinate to their other sister States. And he carried the day with the 10th Amendment and the idea that sovereignty comes from those over whom it is exercised.

So whether Virginia has 4 million voters or North Dakota has 400,000 voters, they both have the same sovereignty to give to their government. And that applies to a tribe that has 40,000 people or 40 people. And that is the only logic that will allow 200 years of case law and principle be decided consistently, theoretic-

cally and logically consistently. And anything short of that is good maybe for lawyers, but nobody else.

The CHAIRMAN. I want to thank you very much, panel two, for your testimony, your statements and your answers to our questions. Both of you have been part of this history that has been unraveling here over the years and we look forward to continuing to work with you in trying to bring something about here.

Thank you very much for your testimony.

Mr. MONETTE. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to now invite the third panel to the witness table: Mr. John Echohawk, Executive Director with Native American Rights Fund; the Honorable Jefferson Keel, President of the National Congress of American Indians; and the Honorable Michael Finley, Chairman of the Confederated Tribes fo the Colville Reservation.

I want to welcome all of you to the Committee.

Mr. Echohawk, please proceed with your testimony.

**STATEMENT OF JOHN E. ECHOHAWK, EXECUTIVE DIRECTOR,
NATIVE AMERICAN RIGHTS FUND**

Mr. ECHOHAWK. Thank you, Mr. Chairman.

As you know and as Senator Udall knows, I am the Executive Director of the Native American Rights Fund. We are a national nonprofit legal organization dedicated to securing justice on behalf of Native American tribes, organizations and individuals.

Since 1970, we have undertaken the most important and pressing issues facing Native Americans in courtrooms across the Country and here in the halls of Congress. I am honored to have been invited to testify at this hearing today regarding the 75-year history of the Indian Reorganization Act and the severe negative impacts and adverse consequences to all of Indian Country in the wake of the United States Supreme Court's 2009 decision in the *Carcieri v. Salazar* case.

I have submitted written testimony that provides a little background information on the IRA. You have already heard today from a number of witnesses that at one time the IRA was recognized as sweeping legislation designed in 1934 to serve as the new foundational charter for this Nation's Indian policy.

In 1974, the United States Supreme Court in the *Morton v. Mancari* case noted, "the overriding purpose of the IRA was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."

My written testimony also provides detail regarding how the Supreme Court's decision in *Carcieri v. Salazar* in 2009 is becoming a proverbial wrench in this machinery, impeding the Department of the Interior from fulfilling its mission to fully implement the benefits of the IRA for all Indian tribes across this Country.

In my remarks today, I hope to shed a little light on specific litigation being brought by States, local governments and others raising challenges to applications to have the Secretary acquire lands into trust for the benefit of Indian tribes based on the court's ruling in *Carcieri*.

Included in my written testimony is a seven-page summary of current cases pending before the Federal courts, the Interior Board of Indian Appeals and the Bureau of Indian Affairs, which illustrates the far-reaching consequences and potentially devastating impacts of the *Carcieri* decision and the need for Congressional legislation to provide a clean fix which will make clear that it is and always has been Congress' intent to have all Indian tribes treated equally and fairly.

As the Chairman and the Members of this Committee are aware, on February 24, 2009, the U.S. Supreme Court issued its extraordinarily troubling decision in the *Carcieri* case, limiting the authority of the Secretary of the Interior under the provisions of the IRA. *Carcieri* involved a challenge by the State of Rhode Island to the authority of the Secretary to take land into trust for the Narragansett Tribe under the IRA. The Supreme Court held that the term "now" in the phrase "now under Federal jurisdiction and the definition of Indian" is unambiguous and limits the authority of the Secretary to only take lands into trust for those tribes that were under Federal jurisdiction on June 18, 1934, the date the IRA was enacted.

In *Carcieri*, the Supreme Court invoked a strained and circular reading of a few sentences in the IRA to create different classes of tribes. Given the fundamental purpose of the IRA, which was to organize tribal governments and restore land bases for tribes that had been torn apart by prior Federal policies, the Court's ruling is an affront to the most basic policies underlying the IRA.

Despite our best efforts, an amicus brief filed by Indian tribes, the National Congress of American Indians, Indian law professors, and even an historians' amicus brief spearheaded by Mr. Hoxie, who has testified here today, the Court simply ignored Congress' stated purpose under the pretext of interpreting the plain meaning of the word "now."

The Supreme Court's decision is destabilizing for a significant number of Indian tribes. For over 70 years, the Department of Interior applied a contrary interpretation that the phrase "now under Federal jurisdiction" means at the time of application.

The department has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under this interpretation of the IRA. Now, there are serious questions about the effect on long-settled actions, as well as on future decisions. If the decision is not reversed by Congress, the Interior Department will have to determine the meaning of "under Federal jurisdiction" in 1934, an uncertain legal question and one that makes little sense from a policy perspective.

By calling into question which federally recognized tribes are or are not eligible for the IRA's provisions, the court's ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

You have already heard today that the court's new interpretation of the IRA is squarely at odds with Congress' relatively recent direction to the Federal agencies that all tribes must be treated

equally regardless of how or when they received Federal recognition.

Thus, I do not need to repeat that testimony, but simply to impress upon the Committee that in order to reverse the damage being caused to Congress' overall Federal Indian policy by the *Carcieri* decision, an amendment to the IRA is necessary to make clear that its benefits are available to all tribes regardless of how or when they achieve Federal recognition.

As I mentioned earlier, I have attached to my written testimony a detailed summary of the litigation brought in the wake of the *Carcieri* decision. As you will notice during your review of this material, two petitions have already been filed in the Supreme Court seeking review of decisions by the U.S. Court of Appeals for the Federal Circuit which involve *Carcieri*-related claims. Although the Court denied review, those two cases illustrate how parties opposing Indian tribes sought to have the Supreme Court expand the types of *Carcieri*-related claims to include challenges first to lands already acquired by the Secretary in trust, and secondly, to the very nature of tribal existence, the old "historic" versus "created" tribe distinction that Congress addressed in the 1994 legislation.

The CHAIRMAN. Mr. Echohawk, will you please summarize your statement? All of your statement will be included in the record.

Mr. ECHOHAWK. I would like to bring, in closing, one case in particular to the attention of the Committee and that is the *Patchak v. Salazar* decision, a recent decision for the U.S. Court of Appeals for the D.C. Circuit which held in direct conflict with the 9th, 10th, and 11th Circuits that the *Carcieri* challenge to land already acquired in trust is not barred by the Indian lands exception to the waiver of immunity under the Quiet Title Act. And to even reach this unprecedented result, the D.C. Circuit had to first find that a non-Indian landowner is within the zone of interest created by the IRA and thus has standing to bring this *Carcieri* challenge.

This case is a prime example of how *Carcieri* may have a long-lasting adverse impact on all 565 federally recognized tribes and demonstrates the manner in which the lower Federal courts are following the lead of the Supreme Court and effectively terminating tribal sovereignty, contrary to the stated policies of the Congress.

It illustrates the very real potential for a constant spillover of the *Carcieri* decision, polluting other areas of law which traditionally protected the rights and interests of Indian tribes. The lower courts have not specifically decided the *Carcieri* challenge, but the D.C. Circuit's ruling has forced both the U.S. and the tribes to file their petitions later this summer to seek review in the U.S. Supreme Court.

[The prepared statement of Mr. Echohawk follows:]

PREPARED STATEMENT OF JOHN E. ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE
AMERICAN RIGHTS FUND

I. Introduction

Chairman Akaka and Distinguished Members of the Committee:

My name is John Echohawk. I am the Executive Director of the Native American Rights Fund (NARF) located in Boulder, CO. NARF is a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations, and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across the country, as well as here within the halls of Congress.

I am honored to have been invited here to provide testimony to the Senate Committee on Indian Affairs regarding the 75-year history of the Indian Reorganization Act (IRA), and the negative impacts and adverse consequences to all of Indian country in the wake of United States Supreme Court's 2009 ruling in *Carcieri v. Salazar*.

II. The Purposes and Legislative History of the Indian Reorganization Act Reinforce Congress' Intent to Extend Its Benefits to All Indian Tribes

The decades preceding the IRA were marked by the policy of assimilation and allotment. At that time, federal policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. See Francis Paul Prucha, *The Great Father* 609-916 (1984). In 1928, the Institute for Government Research, the predecessor to the modern day Brookings Institution, issued the *Problem of Indian Administration* or the *Meriam Report*, named after the report's editor Lewis Meriam. Lewis Meriam et al., Institute for Government Research, *The Problem of Indian Administration* (1928). The *Meriam Report* conveyed a particularly troubling portrait of Indian communities across the nation—pervasive poverty, health risks, weak economic prospects, and lack of access to educational opportunities. At the root of this social malaise, the *Meriam Report* found years of “past policies adopted by the government in dealing with the Indians . . . which, if long continued, would tend to pauperize any race.” *Id.* at 1.

As a first step, in response to the *Meriam Report's* findings, Congress passed the Leavitt Act, 25 U.S.C. § 386(a), authorizing the Secretary of the Interior to release tribes from any debts incurred from federal mismanagement of resources and construction projects on Indian lands. Congress then passed the Johnson-O'Malley Act, 25 U.S.C. § 452, which allocated funding to state and local governments that could better provide urgently needed educational and medical

services to Indians. After clearing past debts and establishing emergency services, Congress set about enacting legislation aimed at fostering tribal self-governance and lessening direct federal control.

The centerpiece of this effort was the Indian Reorganization Act of 1934 ("IRA"). Aptly termed the "Indian New Deal," the IRA provided a Congressionally-sanctioned vehicle for tribes to develop their own forms of government under constitutions approved by the Department of the Interior, and to manage their tribal resources to a previously unseen degree. The IRA repealed the General Allotment Act, and thereby terminated the allotment programs and policies that the *Meriam Report* had determined were poisoning tribal societies. The IRA refocused Congressional efforts toward acknowledging tribal governments, cultural pluralism, and Indian self-determination in the hope that these new programs would build Indian economies at a time when the country, as a whole, was struggling through the depths of the Great Depression.

The U.S Supreme Court has referred to the IRA as "sweeping" legislation that was part of the effort to undo a history of federal Indian policy marked by of poverty and lack of opportunity. The Court recognized that "[t]he overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Tribes were encouraged to "revitalize their self government through the adoption of constitutions and bylaws and through the creation of chartered corporations."

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973), which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal assistance. See 25 U.S.C. §§ 469-470, 476-478; Felix S. Cohen, *Handbook of Federal Indian Law* § 1.05, at 86 (2005 ed.).

And, Congress addressed the loss of Indian lands, including the loss of lands through allotment. See, e.g., 25 U.S.C. § 461 (prohibiting further allotment); § 462 (extending indefinitely restrictions on alienation); § 463 (restoring unsold "surplus" lands to tribal ownership); § 465 (providing land-in-trust authority). Up until *Carcieri*, the Department of the Interior applied these provisions broadly, taking lands—thousands of parcels covering millions of acres—in trust over the last 75 years for federally recognized Indian tribes.

III. The U.S. Supreme Court's New Interpretation of the Indian Reorganization Act Threatens to Destabilize the Foundational Charter of Federal Indian Policy

On February 24, 2009, the U.S. Supreme Court issued its extraordinarily troubling decision in *Carcieri v. Salazar*, limiting the authority of the Secretary of the Interior under the provisions of the Indian Reorganization Act. *Carcieri* involved a challenge by the State of Rhode Island to the authority of the Secretary to take land in to trust for the Narragansett Tribe under the IRA. The Supreme Court held that the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" is unambiguous and limits the authority of the Secretary to only take land in trust for Indian tribes that were "under federal jurisdiction" on June 18, 1934, the date the IRA was enacted.

Writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer and Alito, reversed the decision of the U.S. Court of Appeals for the First Circuit and held that "the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted." In concurrence, Justice Breyer wrote separately to make the point that Indian tribes federally recognized after 1934 may still have been "under federal jurisdiction" in 1934, particularly where the Interior Department made a mistake about their status or if there was a federal treaty in place. Justice Souter, joined by Justice Ginsberg, concurred in part (holding that the term "now" is unambiguous), but dissented to the Court's straight reversal, finding instead that the case should be remanded to the lower courts to provide an opportunity for the United States and the Narragansett Tribe to pursue a claim that the Tribe was under federal jurisdiction in 1934. Justice Stevens dissented from the majority's opinion finding "no temporal limitation on the definition of 'Indian tribe'" within the IRA.

In *Carcieri*, the Supreme Court invoked a strained and circular reading of a few sentences in the IRA to create different "classes" of tribes. Given the fundamental purpose of the IRA was to organize tribal governments and restore land bases for tribes that had been torn apart by prior federal policies, the Court's ruling is an affront to the most basic policies underlying the IRA.

The Supreme Court's decision threatens to be destabilizing for a significant number of Indian tribes. For over 70 years the Department of the Interior applied a contrary interpretation—that "now" means at the time of application—and has

formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. There are serious questions about the effect on long settled actions as well as on future decisions. If the decision is not reversed by Congress, the Interior Department will have to determine the meaning of "under federal jurisdiction" in 1934, an uncertain legal question and one that makes little sense from a policy perspective. By calling into question which federally recognized tribes are or are not eligible for the IRA's provisions, the Court's ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

The Supreme Court's new interpretation of the IRA is squarely at odds with Congress' relatively recent direction to the federal agencies that all tribes must be treated equally regardless of how or when they received federal recognition. In 1994, Congress enacted two amendments to the IRA, codified at 25 U.S.C. § 476(f) and (g), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes. These amendments clearly articulate a principle of administrative equality and expressly mandate a principle of non-discrimination that extends to *all* federally recognized tribes. As one cosponsor of the amendment explained, the "amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between

Indian tribes or classifying them based not only on the IRA but also based on any other Federal law." See 140 Cong. Rec. 11,235 (1994) (statement of Sen. McCain).

That same year, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act") in part to prohibit the Department of the Interior's attempts to impermissibly "differentiate between federally recognized tribes as being 'created' or 'historic.'" See H.R. Rep. No. 103-781, at 3-4. The List Act mandates that the Secretary publish "a list of all Indian tribes which the Secretary recognizes to be 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. The legislative findings in the List Act expressly contemplate the addition of tribes that had not previously been recognized. They note the Secretary's authority to recognize tribes pursuant to "the administrative procedures set forth in part 83 of the Code of Federal Regulations," 25 U.S.C. 479a. The findings also expressly state that Congress "has actively sought to restore recognition to tribes that previously have been terminated." *Id.*; 25 U.S.C. 479a-1(b) (requiring annual publication of list).

The List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when that tribe attained federal recognition. And the eligibility-for-benefits language of the List Act is substantially similar to the regulatory definition of "Tribe" adopted by the Secretary to implement his trust-acquisition authority under Section 5 of the IRA. See 25 C.F.R. 151.2(b) ("[a]ny Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"). Thus, until *Carcieri*, it

was appropriate to presume that Congress understood that, once a tribe was recognized, it would be eligible for trust acquisitions under Section 5 of the IRA.

Congress has also enacted 25 U.S.C. § 2202 which authorizes the Secretary to acquire land in trust for "all tribes." Although the principal purpose of this provision is to extend IRA benefits to tribes that voted under Section 18 to opt out of the IRA, it would be disheartening to believe that Congress would give those tribes a second chance to benefit from the IRA and intentionally deny those benefits to newly-recognized tribes.

These subsequent Congressional actions make clear Congress' intent that all tribes should be treated equally under the law. In order to reverse the damage to Congress' overall federal Indian policy, an amendment to the IRA is necessary to make clear that its benefits are available to all Indian tribes, regardless of how or when they achieved federal recognition.

IV. An Update of Litigation in the Wake of the Supreme Court's Decision in *Carcieri v. Salazar*

Below is a detailed case summary of litigation filed in the federal courts, in state courts and at the administrative level in the wake of the *Carcieri* decision. Thus far, the U.S. Supreme Court has denied two petitions seeking review of decisions by the U.S. Court of Appeals for the Federal Circuit which involved *Carcieri*-related claims. In *Rosales v. United States*, the plaintiffs attempted to use *Carcieri* to support their claims that the beneficial owners of certain lands held in trust for the Jamul Indian Village are the individual Indian families and not the Tribe which, according to the plaintiffs, was a "created tribe" not a "historical tribe."

In *Wolfchild v. United States*, the plaintiffs attempted to use *Carcieri* to support a similar argument that the Secretary was without authority to transfer certain lands in trust for what plaintiffs deem "post 1984 IRA non-tribal community governments." Although the Federal Circuit found that *Carcieri* did not apply, these cases illustrate the expansion of the types of *Carcieri*-related claims to include challenges to lands already acquired by the Secretary in trust for an Indian tribe, and may include challenges to the very nature of "tribal" existence.

The U.S. Court of Appeals for the DC Circuit has already heard two cases concerning *Carcieri*-related challenges. Of immediate concern is *Patchak v. Salazar* in which the DC Circuit held that a non-Indian landowner has standing under the IRA to bring a *Carcieri* challenge. And in direct conflict with the Ninth, Tenth, and Eleventh Circuits, the DC Circuit held that the *Carcieri* claim is not barred by the Indian lands exception to the waiver of immunity under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409(a). The status of the *Carcieri* challenge has not been decided, but the United States and the Tribe are expected to file their petitions this summer seeking review by the Supreme Court of the DC Circuit's decision in relation to the standing question and the QTA immunity issue. This case illustrates the very real potential for a constant "spill-over" effect of the *Carcieri* decision, polluting other areas law which have traditionally protected the rights and interests of Indian tribes.

In the federal district courts, *Carcieri*-related claims are being filed to challenge specific acquisitions of lands in trust for the benefit of Indian tribes the

Secretary has determined to have been "under federal jurisdiction" in 1934. The leading cases are *Clarke County v. Salazar* and *Grande Ronde v. Salazar* which were filed in the U.S. Federal District Court for the District of Columbia challenging the Secretary's decision to take land into trust for the Cowlitz Indian Tribe. Both complaints allege that, in spite of the Department's thorough analysis of the *Carcieri* decision and the meaning of "under federal jurisdiction," and its consideration of substantial evidence regarding the Tribe being under federal jurisdiction in 1934, the Secretary does not have authority to take lands in trust as an initial reservation for the benefit of the Cowlitz Tribe. This case illustrates the substantial costs being incurred and the significant delays that will be experienced by landless tribes seeking to exercise a degree of self-determination and economic self-sufficiency contemplated by the IRA and subsequent Congressional legislation.

Finally, questions surround the *Carcieri* ruling are delaying agency decisions and appeals at the Department of the Interior. Two cases in particular, *Village of Hobart v. Bureau of Indian Affairs* and *Thurston County v. Great Plains Regional Director*, which involve the Oneida Tribe of Indian of Wisconsin and the Winnebago Tribe of Nebraska, respectively, highlight the problem with the *Carcieri* ruling and the need for legislative clarification. Both tribes are on the 1947 Haas List as having recognized IRA constitutions, which demonstrates that the tribes fall under the Act. However, the plaintiffs in both argue that the tribes were not "under federal jurisdiction" in 1934.

CASE SUMMARYU.S. Supreme Court:

Rosales v. United States (Fed Cir. No. 2010-5028): On May 2, 2011, the U.S. Supreme Court denied review of a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which affirmed the decision of the U.S. Court of Federal Claims granting the United States' motion to dismiss claims which stem from a 15-year-old tribal election and membership dispute. The claims involved two parcels of land held in trust by the United States for the benefit of the Jamul Indian Village. The plaintiffs attempted to use *Carcieri* to support their claims that the beneficial owners of the trust lands are the individual Indian families, not the Tribe which, according to plaintiffs, "was a 'created tribe,' not a 'historical tribe,'" and not under federal jurisdiction in 1934. According to the Federal Circuit, *Carcieri* "has nothing to do with this case."

Wolfchild v. United States (No. 09-579); *Zephier v. United States* (No. 09-580): On April 19, 2010, the Supreme Court denied review of petitions from two groups of individuals who claim to be descendants of the "loyal" Mdewakanton Sioux seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which reversed the trial court's finding of breach of trust by the United States. Question Presented 1 of the *Wolfchild* petition stated: "After *Carcieri*, whether federal subject matter jurisdiction exists over Native American beneficiary claims of purported federal government violations of the 1934 IRA or other applicable federal statutes when post-1934 IRA non-tribal community governments are involved." In their Statement of the Case, the *Wolfchild* petitioners expand on their claim:

"[W]ith the Federal Circuit's disregard of the Supreme Court's holding in *Carcieri*, the Circuit's decision affects Native American rights nationwide in matters involving federal holdings of trust lands. In the instant matter the United States purchased lands and held them for the use of a statutorily-defined 'band' of Native Americans – the 1886 Mdewakanton. The United States later abrogated those obligations and now holds the same lands *in trust* to another group of Native Americans – Indian communities created after the passage of the 1934 IRA. Those post 1934 IRA non-tribal community governments exclude the original Congressionally-intended beneficiaries from any benefits to or derived from the lands held in trust for them. The Federal Circuit decision suggests – in contradiction to the IRA, 25 U.S.C. § 462 – that the Department of Interior does not need express statutory authorization before replacing Native American beneficiaries on Indian trust lands.

The concerns regarding these petitions increased when the Court requested a response from the U.S. after it had filed a waiver of its right to respond, and after the petitions had been scheduled for conference.

U.S. Courts of Appeals

Patchak v. Salazar (DC Cir. No. 09-5324): On March 28, 2011, the U.S. Court of Appeals for the D.C. Circuit denied the United States' and the Match-E-B-Nash-She-Wish Tribe's (Gun Lake Tribe) petitions for rehearing and rehearing en banc. Plaintiff alleged that the Tribe was not under federal jurisdiction in 1934 and, based on the U.S. Supreme Court's decision in *Carcieri*, the Secretary is without authority to take land in trust for the Tribe under 25 U.S.C. § 465, section 5 of the Indian Reorganization Act ("IRA"). The district court dismissed the challenge based on lack of prudential standing, finding that plaintiff is not an intended beneficiary of the IRA and thus not within the IRA's "zone of interests."

On review, the D.C. Circuit reversed the district court and held that Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has standing to bring a *Carcieri* challenge to a land-in-trust acquisition. The D.C. Circuit also reached the question of immunity under the Quiet Title Act (QTA) and held that Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the QTA, and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all "suits 'seeking to divest the United States of its title to land held for the benefit of an Indian tribe,' whether or not the plaintiff asserts any claim to title in the land." Any petition for writ of certiorari in the U.S. Supreme Court will be due June 27, 2011, unless an extension of time is sought and granted.

(Note: On August 10, 2009, the Secretary issued a Reservation Proclamation pursuant to 25 U.S.C. § 467, taking the lands in trust for the Match-E-B-Nash-She-Wish Tribe as their initial reservation.)

Big Lagoon Rancheria v. State of California (9th Cir. No. 10-17803): On December 12, 2010, the State of California filed a notice of appeal seeking review of the ruling of the U.S. District Court for the Northern District of California which granted the Tribe's motion for summary judgment, holding that the State acted in bad faith during negotiations for a tribal state gaming compact pursuant to the Indian Gaming Regulatory Act. One of the arguments raised by the State in its attempt to demonstrate good faith was its *Carcieri* argument—the State negotiated in good faith based on its need to preserve the public interest by keeping a gaming facility from being located on lands unlawfully acquired by the Secretary for the

Tribe under the Supreme Court's decision in *Carcieri*. The district court characterized the argument as a *post hoc* rationalization by the State of its actions which were concluded four months prior to the Court's decision in *Carcieri*. On February 22, 2011, the Ninth Circuit denied California's emergency motion to stay the further proceedings in the district court pending disposition of the appeals. At present, the parties are participating in the Mediation Program of the Ninth Circuit.

Butte County v. Hogan, (DC Cir. No. 09-5179): On July 13, 2010, the U.S. Court of Appeals for the D.C. Circuit issued its opinion setting aside the Secretary's decision to take land in trust for the benefit of the Mechoopda Tribe of Chico Rancheria. The D.C. Circuit remanded the case which is still pending before the Department of the Interior to address the "new" information provided by Butte County in relation to the Department's restored tribe/restored lands determination. The D.C. Circuit did not address the *Carcieri* issue raised within the appeal.

(Note: On appeal, Butte County raised the issue of whether the Secretary has authority to take land in trust for the benefit of the Mechoopda Tribe under the IRA. The United States argued that "*Carcieri* is clearly distinguishable." The United States characterized the holding in *Carcieri* as follows: "None of the parties contended that the Narragansett tribe was under federal jurisdiction in 1984, and the federal government had repeatedly declined to help the tribe between 1927 and 1937 because the tribe 'was and always had been, under the jurisdiction of the New England States, rather than the Federal Government.' There is no suggestion that the relationship between the United States and the Mechoopda Tribe is at all analogous to that. If Butte County believed *Carcieri* to be controlling despite several distinctions, Butte County should have provided *some* argument for that position.")

U.S. District Courts:

Clarke County v. Salazar (DC No. 1:11-cv-00278) and *Grande Ronde v. Salazar* (DC No. 1:11-cv-00284): On January 31, 2011, Clark County, City of Vancouver, Citizens Against Reservation Shopping, various non-Indian gaming enterprises and a number of individual landowners filed suit in the U.S. District Court for the District of Columbia against the Department of the Interior and the National Indian Gaming Commission challenging the decision by the United States to acquire land in trust for the benefit of the Cowlitz Indian Tribe. On February 1, 2011, the Confederated Tribes of the Grande Ronde Community of Oregon filed suit against the Department of the Interior also challenging the decision by the United States to acquire land in trust for the benefit of the Cowlitz Indian Tribe. The Clark County complaint states that "the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934." Therefore, under the Supreme Court's holding in *Carcieri*, the Secretary does not have authority to take

lands in trust for the Tribe and does not have the authority to proclaim such land as the Tribe's reservation. Grande Ronde challenges the trust land acquisition alleging in its complaint that the Cowlitz Tribe was neither "recognized" nor "under federal jurisdiction" in 1934 as required by the IRA.

Central New York Fair Business Assoc., et al. v. Salazar (NY-ND No. 08-CV-860): On March 1, 2010, the U.S. District Court for the Northern District of New York issued an order granting the United States' motion for partial dismissal of the complaint/amended complaint in a case which involves the May 2008 decision of the Department of the Interior to take approximately 13,000 acres of land in trust for the Oneida Indian Nation of New York. The motion to dismiss certain claims did not include the claim within the plaintiffs' amended complaint regarding the holding in *Carcieri*: "Plaintiffs assert that according to the administrative record the Oneida Indian Nation of New York was not a recognized Indian tribe in June 1934 'now under federal jurisdiction' as required by 25 U.S.C. § 479 of the [IRA]. The OIN is therefore not eligible for the benefits of the IRA that includes allowing the Secretary to take lands into trust under 25 U.S.C. § 465." On March 15, 2010, the plaintiffs filed a motion for reconsideration which the court denied on December 6, 2010. Plaintiffs requested discovery on their *Carcieri* related claims which were denied. Summary judgment motions are due on October 31, 2011.

Wilton Miwok Rancheria v. Salazar; Me-Wuk Indian Community of the Wilton Rancheria v. Salazar (CA-ND No. C-07-05706): In February 2007, the Me-Wuk plaintiffs filed suit in the U.S. District Court of the District of Columbia under the Rancheria Act seeking federal recognition of the Wilton Rancheria and requesting that certain lands be taken into trust. In May 2007, the Wilton Miwok plaintiffs filed similar litigation in the U.S. District Court for the Northern District of California alleging that they represented the Wilton Rancheria. The Me-Wuk case was transferred and the cases were joined by the District Court for the Northern District of California in November 2007.

In July 2009, the district court entered a stipulated judgment approving a consent decree in which the United States agreed to restore federal recognition to the Wilton Rancheria and to take certain lands in trust. In August 2009, the County of Sacramento and the City of Elk Grove moved to intervene, to vacate the judgment and to dismiss for lack of subject matter jurisdiction. In December 2009, the district court requested supplemental briefing from the proposed intervenors and the parties as to the relevance of the Supreme Court's decision in *Carcieri v. Salazar*. In short, the intervenors argue that, based on the record evidence in the case and the Supreme Court's holding in *Carcieri*, the Secretary of the Interior lacks authority to take land in trust for the Wilton Rancheria since the Tribe was "not under federal jurisdiction" in 1934. By Order dated February 23, 2010, the district court granted the motion to intervene and denied their motion to dismiss for lack of subject matter jurisdiction. The district court granted the intervenors' motion to

certify the jurisdictional issue for interlocutory appeal, which the Ninth Circuit denied on May 20, 2010. Since then, Wilton Rancheria and the intervenors have been working to reach a settlement, with negotiations on-going.

State Courts:

Jamulians Against the Casino et al v. Randell Iwasaki, Director of California Department of Transportation, et al. (Superior Court for the State of California in and for the County of Sacramento No. 84-2010-80000428)

In July 2010, a state court dismissed a lawsuit against various officials with the California Department of Transportation in which the Jamul Indian Village was identified as a real party in interest. Plaintiffs, a watchdog group formed for the sole purpose of opposing the Jamul Village's efforts to build a casino on its Reservation, sought to void a settlement agreement entered into between the Tribe and CalTrans relating to a dispute involving an encroachment permit issue. While the Complaint is largely focused on Plaintiffs' attempts to void the settlement agreement, Plaintiffs also make *Carcieri*-related allegations. Specifically, they alleged that the Tribe was not recognized in 1934 and that the Tribe's contention that its Reservation is held in trust by the United States for the benefit of the Tribe "conflicts with the Supreme Court's ruling in *Carcier v. Salazar*, __ U.S. __, 129 S. Ct. 1058 (2009), that the Secretary of the Interior's authority under IRA to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when IRA was enacted in 1934."

Interior Board of Indian Appeals:

Village of Hobart v. Bureau of Indian Affairs (BIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 11058, 11-083): On April 16, 2010, the Village of Hobart, Wisconsin, filed an administrative appeal of the Notice of Decision issued by the Regional Office of the Bureau of Indian Affairs of its intent to take several parcels of land into trust for the benefit of the Oneida Tribe of Indians of Wisconsin. In spite of the fact that the Oneida Tribe on the 1947 Haas list, the Village of Hobart argues that the Tribe was not "under federal jurisdiction" because their reservation was disestablished.

Thurston County v. Great Plains Regional Director (IBAI Nos. 11-081, 11-084, 11-085, 11-086, 11-087, 11-095, 11-096): Thurston County, Nebraska, has filed an administrative appeal of the Notice of Decision filed by the Regional Director of the Bureau of Indian Affairs of its intent to take several parcels of land in trust for the benefit of the Winnebago Tribe of Nebraska. In spite of the fact that the Winnebago Tribe is on the 1947 Haas List and the fact that the Tribe has been

located at all times since 1865 on reservation lands purchased by the United States, Thurston County argues that the Tribe was not "under federal jurisdiction" in 1934.

Preservation of Los Olivos v. Department of the Interior, (IBIA No. 05-050-1) (CA-CD No. 06-1502): On July 9, 2008, the U.S. District Court for the Central District of California remanded this case to the Interior Board of Indian Appeals. This case involves a challenge brought by two citizen groups from the Santa Ynez Valley to the IBIA's decision that the groups lacked standing to challenge the Department's decision to take land in trust for the benefit of the Santa Ynez Band of Chumash Mission Indians. In short, the district court vacated the IBIA order and remanded the case to the IBIA, requiring the IBIA to specifically "articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."

On February 8, 2010, the citizen groups filed their opening brief before the IBIA, not only addressing the issue of standing, but arguing on the merits that the Secretary does not have authority to take land in trust for the Tribe. The groups argue that the Supreme Court's decision in *Carcieri* "dramatically changed the legal landscape with respect to the power and the authority of the Secretary of the Interior and the BIA to take land into federal trust for Indian tribes." The groups provide exhibits—including a 1937 list which references "Santa Ynez" as having a reservation/Rancheria, but does not reference a particular "tribe"—all of which they allege lead "to the conclusion that the Santa Ynez Band was not a tribe under federal jurisdiction in 1934." On May 17, 2010, the IBIA partially remanded back to the BIA for the purpose of answering the *Carcieri* question.

California Coastal Commission and Governor Arnold Schwarzenegger v. Pacific Regional Director, Bureau of Indian Affairs (IBIA Nos. 10-023, 10-024): The Coastal Commission and Governor ("Appellants") filed an appeal to the October 2, 2009 decision of the Pacific Regional Director to take a 5-acre parcel in Humboldt County in trust for the Big Lagoon Rancheria. In their appeal, the Appellants refer to the U.S. Supreme Court's decision in *Carcieri* and allege that the Big Lagoon Rancheria was not under federal jurisdiction in 1934 and, therefore, the Secretary lacks authority to take lands in trust for the Tribe.

On January 28, 2010, the Assistant Regional Solicitor filed a Motion For Remand of Decision to BIA Regional Director, based on the January 27, 2010 memorandum of the Assistant Secretary of Indian Affairs. The Assistant Secretary directed the Regional Director to request a remand "from the IBIA for the purpose of applying the holding of *Carcieri v. Salazar* to your decision and to determine whether Big Lagoon was under Federal Jurisdiction in 1934." On February 19, 2010, the IBIA reversed the Regional Director's decision and remanded the whole decision back to the BIA.

Objections to Pending Applications Before the Department of the Interior:

Lytton Rancheria 92 Acre Fee to Trust Application: Letter dated October 8, 2009 (with attachments) from Andra Lynn Hoch, Legal Affairs Secretary, Office of the Governor, to Dale Morris, Regional Director, Bureau of Indian Affairs, opposing application based on Supreme Court's holding in *Carcieri*. Specifically, the letter states that based on the facts available to the Governor's office, "it appears that the Secretary lacks authority to take any land in trust under the provisions of 25 U.S.C. § 465. First, no claim has or could be made that Lytton existed as a tribe prior to European contact, or that Lytton is a successor-in-interest to a previously extant tribe Second, under the definition of a tribe set forth in 25 U.S.C. § 479 ("Indians residing on one reservation"), the United States could not have recognized the Indians living on the fifty acres near Lytton Road as a tribe, or asserted jurisdiction over them in 1934 because no Indians resided on the land in 1934."

United Keetoowah Band of Cherokee Indians v. Bureau of Indian Affairs: On September 10, 2010, Assistant-Secretary for Indian Affairs Larry Echohawk issued a decision in a case involving a free-to-trust application for 76-acres of land filed by the United Keetoowah Band of Cherokee Indians. In June 2009, the Assistant Secretary issued a decision taking jurisdiction from the IBIA over the Tribe's appeal from the Regional Director's denial of the application and stated:

The UKB application raises an issue that was not presented to or addressed by the *Carcieri* Court. The *Carcieri* Court had to decide whether the Secretary could take land into trust today for members of a tribe that was in existence in 1934, and still is, but that was not under federal jurisdiction in 1934. The UKB application raises the question whether the Secretary can take land into trust today for members of a tribe that was not in existence in 1934 if that tribe is a successor in interest to a tribe that was in existence and under federal jurisdiction in 1934. This question requires further consideration.

In the September 10, 2010, decision, the Assistant Secretary directs the Regional Director to allow the Tribe "to amend its application in one of the following ways: 1) continue to invoke my authority under Section 5 of the Indian Reorganization Act but seek to have the land taken in trust for one or more half-blood members who could later transfer their interest to the UKB; 2) invoke my authority under Section 3 of the Oklahoma Indian Welfare Act (OIWA) and seek to have the land held in trust for the UKB Corporation; 3) invoke my authority under Section 1 of the OIWA and supplement the record with evidence to show that the parcel satisfies the conditions of Section 1 [e.g. agricultural lands]."

The CHAIRMAN. Thank you very much for your statement.
And now, Mr. Keel, will you please proceed with your statement.

**STATEMENT OF HON. JEFFERSON KEEL, PRESIDENT,
NATIONAL CONGRESS OF AMERICAN INDIANS**

Mr. KEEL. Thank you, Mr. Chairman, Senator Udall.

Our predecessors had a shared vision for our future as Indian people. Indian reservations should be places where the old ways are maintained, our languages are spoken, and our children learn our traditions and pass them on to the next generation. They are places where there are fish in the stream and game in the field,

and food and medicines grow wild for harvest; places where our people can live and be Indian.

At the same time, this vision includes modern life, economic development to sustain our people; safety and respectful relationships with our neighbors; and the blessings of education, health care and modern technology to help us thrive.

This vision was shared by the U.S. Congress in 1934 when it passed one of the most important Federal laws in the history of our Country, the Indian Reorganization Act. With the IRA, Congress renewed its trust responsibility to protect and restore our tribal homelands and the Indian way of life.

Two years ago, our shared vision and the Federal responsibility to Indian tribes were threatened by the Supreme Court's interpretation of the IRA in *Carcieri v. Salazar*. Prior to 1934, the Federal Government policy toward Indian tribes was to sell off the tribal land base and assimilate Indian people. Kill the Indian and save the man was the slogan of that era.

The Federal Government did everything it could to disband our tribes, break up our families and suppress our culture. Over 90 million acres of tribal land held under treaties were taken, more than two-thirds of the tribal land base, and the remaining lands were often of little value for development or agriculture.

But in the 1930s, the assimilation policies were widely recognized as failures. The policies did little more than inflict great suffering on Indian people and dishonor our Nation.

In 1934, Congress rejected allotment and assimilation and passed the IRA. The clear and overriding purpose of Congress was to reestablish the tribal land base and restore tribal governments that had withered under prior Federal policy. The legislative history and the Act itself are filled with references to restoration of Federal support for tribes that had been cut off and to provide land for landless Indians.

A problem with our legal system is that lawyers sometimes lose sight of the fundamental purpose of the law, debate the meaning of a few words, and suddenly the law is turned on its head. Today, because of the *Carcieri* decision, we have opponents arguing that tribes are not eligible for the benefits of the IRA if they were not under active Federal supervision by the Bureau of Indian Affairs in 1934, or if they did not have lands in trust in 1934.

Both of these arguments are contrary to the basic purpose of the law to reestablish Federal support for tribes that had been abandoned or ignored by the BIA and to restore land to tribes that had little or no land.

Today, 75 years later, the IRA is as necessary as it was in 1934. The purposes of the IRA were frustrated first by World War II and then by the termination era. Work did not begin again until the 1970s with the self-determination policy, and since then Indian tribes are building economies from the ground up and they must earn every penny to buy back their own land.

Still today, many tribes have no land base and many tribes have insufficient lands to support housing and self-government and culture. We will need the IRA for many more years until the tribal needs for self-support and self-determination are met.

Two years have passed since the *Carcieri* decision and our fears are coming to pass. There are at least 14 pending cases where tribes and the Secretary of Interior are under challenge. There are many more tribes whose land-to-trust applications have simply been frozen while the Department of Interior works through painstaking legal and historical analysis.

We are seeing harassment litigation against tribes who were on treaty reservations in 1934 with a BIA superintendent. It is litigation merely for the purpose of delay. Land acquisitions are delayed. Lending and credit are drying up. Jobs are lost or never created.

We fear that this will continue to get worse until Congress acts. Even worse, that this decision will create two classes of Indian tribes: those who will benefit from Federal trust responsibility and those who will not.

I want to thank you, Mr. Chairman, for holding this hearing, and all the Members of the Senate Committee on Indian Affairs for your work to pass the necessary legislation that will address this pressing problem and return us to the understanding of the law that existed for 75 years prior to the Supreme Court's decision.

I am confident that we will succeed because our shared vision for the future of Indian people is the right one. We deeply appreciate your efforts on this issue and so many others.

Thank you very much.

[The prepared statement of Mr. Keel follows:]

PREPARED STATEMENT OF HON. JEFFERSON KEEL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Our predecessors had a shared vision for our future as Indian people. Indian reservations should be places where the old ways are maintained, our languages are spoken, and our children learn our traditions and pass them on to the next generation. They are places where there are fish in the streams and game in the field and our food and medicines grow wild for harvest—places where our people can live and be Indian.

At the same time, this vision includes modern life—economic development to sustain our people; safety and respectful relationships with our neighbors; and the blessings of education, healthcare and modern technology help us thrive.

This vision that was shared by the U.S. Congress in 1934 when it passed one of the most important federal laws in the history of our country—the Indian Reorganization Act. With the IRA, Congress renewed its trust responsibility to protect and restore our tribal homelands and the Indian way of life. Two years ago, our shared vision and the federal responsibility to Indian tribes were threatened by the Supreme Court's interpretation of the IRA in *Carcieri v. Salazar*.

Prior to 1934, the federal government policy toward Indian tribes was to sell off the tribal land base and assimilate Indian people. "Kill the Indian and Save the Man" was the slogan of that era. The federal government did everything it could to disband our tribes, break up our families, and suppress our culture. 90 million acres of tribal land that was held under treaties were taken, more than two thirds of the tribal land base, and the remaining lands were often of little value for development or agriculture. By the 1930s the allotment and assimilation policies were widely recognized as failures. The policies did little more than inflict great suffering on Indian people and dishonor on our Nation.

In 1934, Congress rejected allotment and assimilation and passed the IRA. The clear and overriding purpose of Congress was to re-establish the tribal land base and restore tribal governments that had withered under prior federal policies. The legislative history and the Act itself are filled with references to restoration of federal support for tribes that had been cut off, and "to provide land for landless Indians."

A problem with our legal system is that the lawyers sometimes lose sight of the fundamental purpose of a law, debate the meaning of a few words, and suddenly the law is turned on its head.

Today, because of the *Carcieri* decision, we have opponents arguing that tribes are not eligible for the benefits of the IRA if they were not under active federal supervision by the BIA in 1934, or if they did not have lands in trust 1934. Both of these arguments are contrary to the basic purpose of the law to re-establish federal support for tribes that had been abandoned or ignored by the BIA, and to restore land to tribes that had little or no land.

Today, 75 years later—the IRA is just as necessary as it was in 1934. The purposes of IRA were frustrated, first by WWII and then by the Termination Era. The work did not begin again until the 1970's with the Self-Determination Policy, and since then Indian tribes are building economies from the ground up, and must earn every penny to buy back their own land. Still today, many tribes have no land base and many tribes have insufficient lands to support housing and self-government and culture. We will need the IRA for many more years until the tribal needs for self-support and self-determination are met. Two years have passed since the *Carcieri* decision, and our fears are coming to pass. There are at least fourteen pending cases where tribes and the Secretary of Interior are under challenge. There are many more tribes whose land to trust applications have simply been frozen while the Department of Interior works through painstaking legal and historical analysis. We are seeing harassment litigation against tribes who were on treaty reservations in 1934 with a BIA Superintendent. It is litigation merely for the purposes of delay. Land acquisitions are delayed. Lending and credit are drying up. Jobs and opportunities are lost or never created. We fear that this will continue to get worse until Congress acts. Even worse, that this decision will create two classes of Indian tribes—those who will benefit from the federal trust responsibility and those who will not.

Thank you Chairman Akaka and Vice Chairman Barrasso, and all the members of the Senate Committee on Indian Affairs for your work to pass the necessary legislation that will address this pressing problem and return us to the understanding of the law that existed for 75 years prior to the Supreme Court's decision. I am confident that we will succeed, because our shared vision for the future of Indian people is the right one. We deeply appreciate your efforts on this issue and so many others.

The CHAIRMAN. Thank you very much, President Keel, for your testimony.

And now, Mr. Finley, will you proceed with your statement?

**STATEMENT OF HON. MICHAEL O. FINLEY, CHAIRMAN,
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION**

Mr. FINLEY. Thank you. [greeting in native language].

Thank you for calling this hearing today.

My name is Michael Finley. I represent the Colville Confederated Tribes of Northeast Washington State. I presently serve as Chairman. The Colville Tribes is a confederacy of 12 different distinct aboriginal tribes that have existed since time immemorial and today make up one tribe in Washington State.

Our original land base or original reservation that was created in 1872 by executive order included all the land within the United States that is bounded by the Columbia and Okanogan Rivers and was about 3 million acres. We lost half of that, roughly, in 1891 via an agreement called the McLaughlin Agreement, also known as the North Half Agreement to those at Colville. So in 1935, Colville was asked to take the vote on IRA and we were one of the few tribes that voted no, against accepting the IRA terms, by a vote of 562 no and 421 yes.

There was a lot of upheaval at the time because a lot of our tribal members, our elders who are around today share with us that the superintendent of BIA at the Colville Agency was telling many of our members that they need not show up to vote; that if they did not show up to vote that their vote would be accepted as a yes vote.

So consequently, many of our members didn't show up and IRA didn't pass. So we created a constitution in 1938 outside of the IRA and today we exercise our sovereignty and jurisdiction under that constitution.

Our elders also tell us that around that time, we had seen a lot of our lands moving out of trust into fee ownership to non-Indians following that 1935 vote. And many of those lands are cherished lands around our lakes and rivers and today around many of the larger municipalities that border our reservation. And so with that, we get this checkerboard effect across the Colville Reservation and it has created what I call a jurisdictional conundrum because of the difficulties that we have with exercising our jurisdiction and sovereignty on those lands around these municipalities.

Luckily, we do have a couple of cross-deputization agreements with the counties that lie within the Colville Reservation, that being the Okanogan and Ferry, but the larger cities, that being Cooley Dam and Omak, we don't have that. And so many of the times when we respond to a call, we don't have that necessary information that clearly identifies if it is fee or trust. We just respond to all the calls.

And so because of that, it stretches our resources thin. Sometimes we have only one officer at any given time on an area the size of 1.4 million acres, which is bigger than the State of Delaware. And so there may be a possibility that that officer is responding from one end of the reservation to the other just to get to find out that it is fee land involving a non-Indian.

As I stated, this has created a lot of problems for us. It has created what I call bad case law. We have expended an enormous amount of dollars trying to get this clearly identified through the appropriate courts and this question is raised through various means and times throughout the history since this was passed.

We have also had problems with the State of Washington with jurisdiction over Lake Roosevelt because the Bureau of Reclamation and the Federal Government sought to construct Grand Coulee Dam just before IRA was presented. And so we didn't have adequate representation as we walked through that process. And so consequently, we lost thousands of acres that are now inundated beneath the backwaters of Lake Roosevelt.

And so with that, we continue to have jurisdictional rows because there is clearly identifiable legislation that designates certain portions of that lake bottom under certain authorities. And so now because of that, we have the State of Washington asserting their jurisdiction wholly within the boundaries of the reservation because those backwaters go up certain tributaries of the Columbia River such as the Sanpoll and the Okanogan. And with that, we are continually trying to assert our jurisdiction or authority, but it has created an unfortunate situation and we are actually in litigation as I speak today with the State of Washington over certain portions of what they believe to be their authority.

So with that, I will close and I just want to thank the Committee for allowing me to speak today and to present our views and our hardships in Colville as a result of us not signing the IRA.

So thank you.

[The prepared statement of Mr. Finley follows:]

PREPARED STATEMENT OF HON. MICHAEL O. FINLEY, CHAIRMAN, CONFEDERATED
TRIBES OF THE COLVILLE RESERVATION

Good morning Chairman Akaka, Vice Chairman Barrasso, and members of the Committee. On behalf of the Confederated Tribes of the Colville Reservation ("Colville Tribes" or the "Tribes"), I would like to thank the Committee for convening this hearing on the Indian Reorganization Act of 1934 ("IRA") and allowing me to testify. My name is Michael Finley and I am the Chairman of the Colville Tribes and am testifying today in that capacity. In addition, I also serve as the Chairman for the Intertribal Monitoring Association on Indian Trust, a national organization comprised of 65 federally recognized tribes from all regions of the country.

Today, I am pleased to share the Colville Tribes' views and a bit of our history regarding the IRA. My remarks today will focus on the legacy that the Colville Tribes' 1935 IRA election has left on the Colville Reservation, specifically as it relates to our land and law enforcement.

The Colville Tribes and the IRA

Although now considered a single Indian tribe, the Confederated Tribes of the Colville Reservation is, as the name states, a confederation of 12 aboriginal tribes and bands from all across eastern Washington State. The present-day Colville Reservation is located in north-central Washington State and was established by Executive Order in 1872. At that time, the Colville Reservation consisted of all lands within the United States bounded by the Columbia and Okanogan Rivers, roughly 3 million acres. In 1891, the 1.5 million acre North Half of the 1872 Reservation was opened to the public domain. The Colville Tribes and its members possess reserved hunting, fishing and gathering rights on the North Half.

The Colville Tribes rejected the IRA in an election held in April 1935, with 421 adult members voting in favor and 562 against. Peter Gunn, President of an organized group called the Colville Indian Association, protested to Commissioner of Indian Affairs John Collier that the local superintendent misled eligible Colville Indian voters into believing that the withheld votes would be counted as votes in favor of adopting the IRA. Despite the protest, no new election was held. The Spokane Tribe, which was also under the supervision of the same superintendent, perhaps not coincidentally also voted to reject the IRA. Colville Indians ultimately voted to approve a non-IRA constitution in February 1938. That constitution established the Colville Business Council, the 14 member body that governs the Colville Tribes today.

The Colville Tribes today has more than 9,400 enrolled members, making it one of the largest Indian tribes in the Northwest. About half of the Tribes' members live on or near the Colville Reservation. Between the tribal government and the Tribes' enterprise division, the Colville Tribes collectively account for more than 1,700 jobs and is one of the largest employers in north-central Washington State.

The 1935 IRA election at the Colville Agency had long-term impacts on the Colville Reservation, many of which continue to this day. As the Committee is aware, Section 18 of the IRA provides that none of the provisions of the IRA apply to any Indian tribe where a majority of adult Indians voted against its application. Regardless of the integrity of our 1935 election, the outcome of that election meant that the IRA did not apply to the Colville Reservation.

Checkerboarded Jurisdiction and Public Safety

According to our elders, it was the years immediately following the 1935 IRA election that much of the valuable land on the Colville Reservation—specifically those lands adjacent to lakes and rivers—passed into non-Indian hands. This is one of the most visible legacies of the Tribes' rejection of the IRA because it has resulted in "checkerboarded" jurisdiction on many areas of the Colville Reservation.

The Colville Tribes possesses more trust land within its borders than many land-based Indian tribes, but this is only because the Colville Tribes has for the last several decades set aside funds from its own tribal timber sales to repurchase fee lands. Our checkerboarded areas today are near the more populated areas of the Reservation and in border communities. These also happen to be the areas where the Colville Tribes' police force receive the majority of its calls.

The Colville Tribes have been fortunate to have been able to enter into cross-deputization agreements with the two counties on the Colville Reservation that mitigate the checkerboarding issues to a certain extent. The largest community on the Colville Reservation, Omak, has its own police force and the Colville Tribes does not have a cross-deputization agreement with that police department. The Tribes similarly does not have a cross-deputization agreement with the Coulee Dam Police Department, which is another populated border town on the Colville Reservation.

In absence of a fast and reliable way to ascertain title of the land prior to responding to a call, the Colville Tribes' police force generally responds to all calls on the Colville Reservation out of an abundance of caution. The lack of cross-deputization agreements is most apparent when calls originate on fee land within these municipalities. Like many land based tribes, the Colville Tribes' police force has a very small number of officers to patrol a large area. In our case, we occasionally have only a single officer to patrol the entire 1.4 million acre Colville Reservation. In circumstances where the Colville Tribes responds to calls where it is later determined that these municipalities actually possess jurisdiction, it would not be inaccurate to describe these situations as a diversion of tribal resources. Again, the continued alienation of tribal land following the 1935 IRA election at least contributed to this problem.

Loss of Protection of Tribal Lands

The legacy of the Colville Tribes' 1935 IRA election is apparent in other areas besides mixed ownership of land within the Colville Reservation. The United States began construction on the Grand Coulee Dam in 1933, a massive project that would ultimately inundate thousands of acres of tribal land through the creation of its reservoir, Lake Roosevelt, and destroy the Tribes' traditional fisheries forever. Historians have observed that without the structure of the IRA, the Colville Tribes (and the Spokane Tribe) was at a disadvantage when dealing with the United States when Reclamation began the project. Instead, the tribes were almost entirely dependent on the Office of Indian Affairs to look out for their interests as the project was developed.

To this day, the Colville Tribes continues to have jurisdictional disputes with state and local officials on areas within the Lake Roosevelt management area. Some of these disputes are attributable to checkerboarding, others to the creation and management of the Lake itself by federal officials. All them in some way can be traced to the 1935 Colville IRA election.

Another unfortunate legacy of the IRA was the loss of lands in the North Half. Section 3 of the IRA authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands" that were formerly part of an Indian reservation but that had been open to disposal by the United States under any of its public land laws. For the Colville Tribes, this meant that our lands in the North Half generally remained unprotected from falling into non-Indian lands. Many of these lands had already been subject to claims under the 1872 Mining Act. Although the Secretary of the Interior took steps to protect these lands and Congress ultimately took action in 1956, the outcome of the Tribes' 1935 election complicated matters significantly.

Other Legacies of the IRA

For the Colville Indians and others that rejected the IRA, the ability to utilize certain IRA authorities remained in limbo for decades or, in some cases, still remain unclear. For example, it was not until passage of the Indian Land Consolidation Act in 1983 that Indian tribes that rejected the IRA were expressly allowed to have land taken into trust under Section 5 of the IRA, 25 U.S.C. § 465. Tribes that rejected the IRA would not be able to issue corporate charters under Section 17 of the IRA until passage of the 1990 amendments to the IRA. Although Congress has not explicitly addressed this issue, it was not until last year that the Department of the Interior reversed its prior position and concluded that the Secretary possessed the authority to proclaim reservations under Section 7 of the IRA for tribes that previously voted against it.

The Colville Tribes appreciates the Committee convening this hearing and is grateful to be able to share this history and perspective. At this time I would be happy to answer any questions that the Committee may have.

The CHAIRMAN. Thank you very much, Chairman Finley, for your testimony.

Mr. Echohawk, in your testimony, you indicate that the *Carcieri* decision threatens the validity of many legal existing arrangements between tribes and other businesses and even government entities. In your opinion, if Congress does not enact a *Carcieri* fix, what are the implications for tribes, businesses and neighboring communities?

Mr. ECHOHAWK. Mr. Chairman, I think as illustrated by these 14 cases that already exist out there over these *Carcieri*-related

issues, I think we would only see a proliferation of more lawsuits challenging all kinds of Federal and tribal actions that raise this *Carcieri* issue. I don't see any end to that.

The CHAIRMAN. Thank you.

President Keel, in your testimony you noted that there has been "harassment litigation" brought against tribes following the *Carcieri* decision. Can you elaborate on what you mean by harassment litigation and tell us what long-term impact you think this continued litigation will have on the tribes involved and Indian Country as a whole?

Mr. KEEL. Thank you, Mr. Chairman.

Right now, as I stated, there at least 14 cases that are pending. These cases really serve no purpose other than delaying the inevitable. One thing that does concern me is that these lawsuits seem to be frivolous, seemingly, as I said, for purposes of delay.

The long term effects of this litigation does concern me. The Federal courts are so unpredictable that every time a tribe subjects itself to the Federal courts, we have no idea what the outcome may be.

The other part of that is the cost, the tremendous cost to a tribe in resources to hire lawyers to fight these cases. The tribes would be better served if those funds and those resources were directed back into housing, health care, other social service needs rather than fight these frivolous lawsuits.

And as you have just heard, without a fix, the long-term process prognosis would be just a proliferation of these types of cases.

Thank you.

The CHAIRMAN. Thank you very much, President Keel.

Chairman Finley, your tribe has been very active in its efforts to restore your tribal homelands. Can you tell the Committee what benefits the tribe and your local communities have seen from reacquisition of your homelands?

Mr. FINLEY. Well, historically, the Colville Tribes are a forest products tribe, roughly 660,000 acres of our 1.4 million acres that is left remaining of our reservation is commercial timber property. And so we have diligently and aggressively been buying back land since the 1980s. Today, we are second in the Pacific Northwest of all tribes that retain trust ownership of our reservation, that being 1.2 million acres of the 1.4 million is in trust. And a lot of tribes in the Northwest don't have that luxury.

So since the 1980s, we have had an aggressive repurchase account wherein we use 10 percent of our profits from our timber sales to purchase our own lands. And so because of that, we have been able to employ a lot of our people in the woods. We have been able to repurchase those lands that have an enormous amount of timber on them. And that, in itself, creates the jobs that gets our people out in the woods and back to work.

The CHAIRMAN. Thank you very much.

Mr. Echohawk, what overall impact do you think continued litigation will have on the ability of tribes to govern, create jobs and provide for their membership?

Mr. ECHOHAWK. I think because they are going to be facing these challenges based upon *Carcieri*-related claims, their ability to address all of the primary functions of tribal governments will be lim-

ited. Their resources will be diverted to have to deal with this litigation over whether they were under Federal jurisdiction in 1934 as it relates to all kinds of decisions by the Federal Government that affect their tribal interests and decisions by the tribe itself that affect tribal interests as well.

It is just going to be a tremendous distraction that can only be fixed by this Congress with the *Carcieri* fix.

The CHAIRMAN. President Keel, in the last session of Congress, we approved the Cobell settlement. Part of that settlement is for tribes and individual Indians to consolidate and reacquire their lands. In your view, does that settlement reaffirm the intent of Congress and the Administration to encourage restoration of tribal homelands?

Mr. KEEL. Mr. Chairman, I believe that one of the most important features of the settlement itself was that it did set aside right at \$2 billion for the consolidation of those fractionated lands. And I believe that indicates that Congress is still committed to restoring those lands.

There was bipartisan support for that bill, so it wasn't a partisan bill. I think it does indicate that Congress still is committed to that original IRA concept.

The CHAIRMAN. Thank you.

Chairman Finley, if the tribes were to be limited in their ability to reacquire lands, what impact would that have on your ability to self-govern and provide for your tribal membership?

Mr. FINLEY. Our land base is what feeds our families. Without a land, we are not a people. And so I would say that because we are able to buy back land at a high rate, we are able to expand our jurisdiction and sovereignty.

In my earlier testimony, I alluded to the fact that we are having problems with exercising that jurisdiction over lands because of bad case law. And if we purchase that land back, we convert it to trust, then we now have complete control of that land and the right to govern and police our own.

However, I would urge the Committee, and I have been saying this for some time, that to totally fix the problem, to have criminal jurisdiction over non-members, we need an Oliphant fix, and you don't hear enough of that. We are talking about the welfare and safety of our people. And I think that until we get that, tribes can't truly exercise their sovereign jurisdiction over their lands whether it is fee or trust.

The CHAIRMAN. Thank you.

President Keel, there have been efforts that try to tie this issue to gaming and lands taken into trust for gaming purposes. What is your view on whether concerns about gaming are appropriate in the context of the *Carcieri* discussions?

Mr. KEEL. Thank you, Mr. Chairman.

They are clearly separate issues. Trust land acquisition is a fundamental right of Indian tribes, primarily for community needs, housing, natural resources protection, cultural activities, those things that have to do with an Indian tribe's identity.

Gaming is a separate issue. In fact, land acquisition is covered under the Indian Gaming Regulatory Act and it is a completely

separate issue. There are separate guidelines and separate tasks that are involved in the acquisition of land for gaming purposes.

I am not saying that gaming is not important, because it has become the life-blood of many of those communities. And I understand that Senator Feinstein has introduced legislation, and I applaud her for that, but I want to reiterate that that is a separate bill and it should be considered separately.

The CHAIRMAN. Thank you very much for that.

I want to tell you that we have had great witnesses today. All three panels have done well. Your testimonies have been valuable to us. We look forward to continuing to work with all of you on this.

Again, I want to say mahalo and thank you to the witnesses at today's hearing. This has been very informative and one that I felt we needed. We needed to air out the issues and get your feeling about it. So we needed to have it as the Committee moves to advance S. 676, our *Carcieri* fix language, through the Senate.

I think that what we heard today just illustrates that Congress was clear in its intent when it passed the Indian Reorganization Act in 1934, and again with the amended Act in 1994. And I think it is also clear that it is the responsibility of Congress to act when its intentions have been misconstrued by the court.

It was great to hear from you folks about what you think about these issues. Again, I am repeating, it will help us in our work here.

My colleagues and I on the Committee are committed to preserving the original intent of the Indian Reorganization Act to allow tribes to restore their homelands and exercise self-determination.

Again, mahalo, thank you to all of you who participated in today's hearing. And I want to remind you that the Committee record will remain open for two weeks from today. And I keep saying that because I want you to feel that you can respond to us with whatever your feelings are and we would be delighted to receive your responses.

Again, thank you very much and this hearing is adjourned.

[Whereupon, at 4:15 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. CEDRIC CROMWELL, CHAIRMAN, MASHPEE WAMPANOAG TRIBE

I thank the Committee for this opportunity to supplement the hearing record to provide additional context for the need for the 1934 enactment of the Indian Reorganization Act.

I appreciate the Committee's interest in reviewing the context of the Congress's intent when enacting the Indian Reorganization Act—to provide relief to tribes adversely affected by the prior policies that sought to dismantle tribal communities by destroying tribal land bases and traditional lifestyle.

The Mashpee Wampanoag Tribe, whose government to government relationship with the United States was reaffirmed in 2007, once occupied a large land area throughout eastern Massachusetts and into present day Rhode Island. Today, it lacks a single acre of federal trust land base. As many have stated, Congress intended, through the Indian Reorganization Act, to repudiate the process of allotting tribal land. To reach that goal, it empowered the Secretary of the Interior to acquire land in trust to begin to restore tribal land holdings. The confusion in the wake of the *Carcieri* decision is complicating our efforts to begin such restoration.

As others have testified, the process of allotting tribal lands was part of a massive effort to disrupt tribal common land tenure. It has its origins with the General Allotment Act of 1887, commonly referred to as the Dawes Act. Named after its principal sponsor, Massachusetts Senator Henry Dawes, the Act established the most powerful federal apparatus for dispossessing tribal communities of their lands. Senator Dawes was continuing an effort that had already proved successful in Massachusetts.

Decades before the General Allotment Act, the Mashpee Wampanoag Tribe was among the first to be harmed by allotment policy. Massachusetts was among the first states to use that strategy to separate the people from their homeland.

The Mashpee Tribe, as part of the Wampanoag Confederacy, once exercised control over a land area that extended from Cape Cod to the Blackstone River and Narragansett Bay in present day Rhode Island and up to the Merrimack River near present day Gloucester, Massachusetts. The spread of disease, colonization and English Settlement quickly decimated that base. Despite the trauma of first contact, years after the establishment of the Plymouth Colony, a remnant of tribal homeland was still protected.

For centuries after English settlement, the Mashpee Tribe still held approximately 55 square miles of land in common based on historic deeds to the Tribe. This was confirmed by deeds that the Plymouth Bay Colony reexecuted and recorded as Marshpee Plantation in 1671. The deeds provided that land could not be sold outside the Tribe without unanimous consent of the whole Tribe.

Through deed restrictions, Tribal lands were protected against alienation for two centuries, assuring that the Wampanoag had a secure, if diminished, homeland that was capable of housing our people and providing them with food from the land and the waters. The Colony and later the Commonwealth of Massachusetts respected the tribal right to possess the land until an 1842 Act of the General Court provided for the land to be divided up and then allotted in severalty to tribal members.

In 1869, two votes in Mashpee were held seeking the Tribe's consent to this allotment policy. Tribal voters twice rejected the proposal. However, in 1870, each tribal member over 18 received 60 acres of land—freely alienable and fully taxable. The effect of this law was to destroy the Tribe's reservation and deprive the Tribe of thousands of acres of tribal common lands. This single act by the Massachusetts legislature seriously wounded our Tribe.

The Mashpee experience thereafter foreshadowed the effect that the Allotment Act had throughout Indian country. Once lands were alienable, desperately poor tribal members would in short time lose their parcels. By 1871, outsiders had acquired control of the choicest plots of land in Mashpee, immediately clear-cutting much of the last remaining hardwood in Massachusetts. Speculative development

soon followed. Even though the Mashpee Tribe retained political control of the Town of Mashpee as long as outsiders were not permanent residents, the die was cast. By the late twentieth century, the Tribe had lost control of its land base.

As Mashpee development accelerated, the Tribe and its members continued to lose land, the environment continued to degrade, and the tribal members, forced out of Town government, received no benefit. Today, many tribal members cannot afford to live where their ancestors are buried, and we are struggling to overcome the barriers that the *Carcieri* case has imposed to our ability to restore even a small portion of our homeland.

Although we believe that the Secretary of the Interior retains the ability to take land in trust for our Tribe, the uncertainty surrounding the *Carcieri* decision has caused confusion as well as the promise of protracted and costly litigation when our initial reservation is approved.

The Mashpee Tribe was one of the first targets of the allotment policy that Massachusetts Senator Henry Dawes brought to bear on other tribes throughout the country. We now urge this Congress to take action to finish the job it started in 1934, and provide meaningful relief—to Mashpee and to other Indian tribes that have been harmed.

The Mashpee Tribe has been here long before 1934. Despite centuries of protecting our homeland from encroachment, we were devastated by the first impact of forced allotment. In 1934 Congress recognized that allotment was a failed policy, unfairly destructive of tribal communities. We suffered that harm before 1934 and continue to suffer from it today. We ought to benefit from the actions and the assistance that Congress promised in 1934. This Congress should stand by its promise, and enact the fix necessary to avoid the further harm posed by the flawed decision of the Supreme Court.

