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ON

"ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE IMPACTS OF THE *CARCIERI* AND *PATCHAK* DECISIONS"

BEFORE THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS

THURSDAY, SEPTEMBER 13, 2012

Good afternoon Chairman Akaka and distinguished members of the Committee. Thank you for inviting me here today.

This is my third time testifying before Congress about the U.S. Supreme Court's decision in *Carcieri v. Salazar*.[1] In 2009, when I testified before the U.S. House Committee on Natural Resources, I focused my attention on the decision itself, explaining why *Carcieri* was contrary to the legislative history of the Indian Reorganization Act (IRA), the circumstances surrounding the Act's passage, and 75 years of Executive Branch practice. Last year, I testified before this Committee on the impacts of the *Carcieri* decision, and I advocated for a clean fix. I began by explaining how the decision was contrary to Congressional policy that requires all federally recognized Indian tribes to be treated equally.[2] I also discussed how Congress has encouraged unrecognized tribes to pursue recognition through the Office of Federal Acknowledgement's administrative process, yet *Carcieri* disadvantages tribes that have followed this direction.[3] Finally, I emphasized that the impact of *Carcieri* was being felt by all tribes. Even Indian tribes that voted on acceptance of the IRA just months after its passage have faced frivolous litigation by states and local governments. While these trust acquisitions are delayed for years, new jobs are not created, and tribal economic development is stymied.

In this hearing, while I am willing to answer any questions you might have about my prior testimony, I will focus my attention on new developments that have occurred over the past year and matters that have not otherwise been covered by this Committee's very thorough May 17, 2012 report.

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

[2] Instead, the *Carcieri* decision creates two classes of tribes: those that were "under federal jurisdiction" in 1934, and those that were not. The benefits of the IRA, which are not limited to land acquisition, are now unavailable to the latter group.

[3] Nearly all of the tribes recognized directly Congress have express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Tribes who waded through the decades-long OFA process have no such insulation.

I. Current Interpretations of the IRA's Definition of Indian

The Indian Reorganization Act defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[4] In *Carcieri*, the Court decided that the word "now" referred to the time of the statute's enactment.[5] Therefore, to take advantage of the benefits of the IRA, an Indian tribe must prove it was "under federal jurisdiction" in June 1934. But *Carcieri* did not offer any guidance regarding how the phrases "recognized Indian tribe" or "under federal jurisdiction" should be interpreted. Instead, the majority opinion used a technical procedural rule to conclude that the Narragansett Tribe did not satisfy these restrictions.[6]

Now that more than three years have passed since the Court's decision, we are only just beginning to see how these phrases might be interpreted. The Department of the Interior's interpretation and reasoning can be found in the Record of Decision (ROD) it issued in conjunction with its decision to acquire land in trust for the benefit of the Cowlitz Indian Tribe.[7] In that ROD, the Department concluded that the term "recognized Indian tribe" referred to recognition in the cognitive sense (e.g., federal officials or anthropologists knew that an Indian tribe existed) rather than in the more formal, jurisdictional sense that it is commonly used today (e.g., the U.S. acknowledges a government-to-government relationship with the tribe), although proof of the latter would necessarily include proof of the former.[8] The Department also concluded that because the phrase "recognized Indian tribe" was not modified by the word "now," a tribe could satisfy this criterion by showing that the tribe was recognized as of the time the Department acquired the land for its benefit.[9]

Interpreting the phrase "under federal jurisdiction," proved to be more complicated. The Department now requires a two-part inquiry. First, at or prior to 1934, it must be shown that the federal government has taken action "for or on behalf of the tribe or in some instance tribal

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[4] 25 U.S.C. § 479.

[5] *Carcieri*, 555 U.S. at 382.

[6] The Bureau of Indian Affairs had not considered whether the Narragansett Tribe was under federal jurisdiction in 1934, because it believed that the IRA applied equally to all federally recognized tribes. Although this was not part of the agency's decision, and even though the merits of the issue had not been briefed or argued in the Supreme Court, the majority opinion resolved this issue against the Tribe. The State of Rhode Island made a bare assertion in its petition for certiorari that the Tribe "was neither federally recognized nor under the jurisdiction of the federal government" in 1934. The respondent's opposition brief did not contradict this assertion, so it was considered waived. *Id.* at 395-96 (citing U.S. Supreme Court Rule 15.2). Justices Souter and Ginsburg dissented on this point, indicating that they would have remanded the issue to the agency to determine whether the Narragansett were under federal jurisdiction in 1934. *Id.* at 400-01.

[7] U.S. Dep't of the Interior, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (Dec. 2010) (hereinafter, *Cowlitz ROD*). The Department has applied the framework it articulated in the Cowlitz ROD to other Indian tribes. *See, e.g.*, Letter from Acting Director of the Department of the Interior's Eastern Region to Tunica-Biloxi Tribal Chairman Earl Barbry (Aug. 11, 2011).

[8] *Cowlitz ROD* at 87-89. *See also* William Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 333 (1990).

[9] *Cowlitz ROD* at 89.

members . . . that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government."[10] Second, once the tribe has established that it was once under federal jurisdiction, it must demonstrate that this was still true in 1934. Still, the failure of the federal government to take any actions on behalf of a tribe during a particular time period does not reflect a loss of the tribe's jurisdictional status. Rather, there must be affirmative evidence that a tribe's jurisdictional status was terminated.

Finding and assembling the information necessary to satisfy this two-part inquiry is enormously time consuming and may require the tribe to review documentation over a 140-year period (from 1790, when the Trade & Intercourse Acts were enacted, until June 1934). It includes assembling documents demonstrating any federal actions taken to (1) enforce the Trade & Intercourse Acts within the tribe's territory, (2) approve contracts between a tribe (or tribal members) and non-Indians,[11] (3) prosecute a crime committed by an Indian under the Major Crimes Act, (4) educate tribal children at BIA schools, and (5) provide health care or other social services to tribal members.[12]

Federal records and correspondence needed to demonstrate these actions are scattered throughout the country in public archives and private collections. If, for example, you were looking for information on Michigan Indian tribes, at a minimum you would need to search the National Archives in Chicago, Illinois and Washington, D.C., as well as local historical societies within the State of Michigan. Historical correspondence from or to Indian agents' or superintendents' are usually filed in these locations in chronological order, without divisions for differing subject matter. Thus, a researcher would be compelled to search through decades of federal correspondence regarding all of the tribes in the region in the hopes of finding references to the tribe they are in fact researching. Particular record types may be even more challenging. BIA school records for Indian children are typically organized by the child's last name, not his or her tribal affiliation. Therefore, genealogies or periodic historic lists of tribal members may be needed to identify potentially relevant records. And since Indian children were sent to boarding schools throughout the country, this may require a researcher to visit document collections in additional locations. These brief examples demonstrate why it is neither easy nor straightforward to determine whether an Indian tribe was truly "under federal jurisdiction" in 1934.

Worse still, it is far too early to tell whether the Department's interpretation will be upheld by federal courts. While dozens of cases are pending, it will take at least another decade before the various federal circuits have developed a body of jurisprudence analyzing what "under federal jurisdiction" means in the IRA. Without a Congressional fix, Indian tribes and the

[10] *Id.* at 94.
[11] The Indian Contracting Act provided that all contracts between Indian tribes (or tribal members) and non-Indians were void unless approved by the Secretary of the Interior. 16 Stat. 544, 570-71 (1871).
[12] *See* Snyder Act of 1913, codified at 25 U.S.C. § 13.

federal government will waste needed resources assembling this information and fighting litigation that serves no current federal Indian policy.

II. The U.S. Supreme Court's Recent Decision in *Salazar v. Patchak*

This summer, the United States Supreme Court magnified the problem created by *Carcieri* with its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[13] Patchak, a private landowner, brought suit in 2008, arguing that the Secretary of the Interior had improperly decided to acquire land in trust for the Match-E-Be-Nash-She-Wish Band (also known as the Gun Lake Tribe). According to Patchak, the Tribe was not under federal jurisdiction in 1934, and therefore, the Secretary did not have the authority to take land into trust under the IRA. He sought a stay in the District Court to prevent the United States from acquiring the property in trust. But his motion was denied, and he did not appeal this decision. Instead, when his case was later dismissed on standing grounds, Patchak appealed to the U.S. Court of Appeals for the District of Columbia, and ultimately, the U.S. Supreme Court.

The U.S. Supreme Court held that Patchak satisfied the requirements of prudential standing by alleging that he was a nearby landowner and the Tribe's economic development plans for the parcel would cause him environmental, economic, and aesthetic harm. The respondents had argued that he was not within the statute's zone of interests because Section 5 of the IRA provides for land *acquisition*, and Patchak's injuries would be caused, if at all, by land *use*. The Court rejected this distinction, however, finding that the prudential standing test "is not meant to be especially demanding," and Patchak had demonstrated that he was arguably within the statute's zone of interests.

Additionally, the Court concluded that Patchak's case was not moot even though the land had already been taken into trust. Overturning 30 years of lower court decisions to the contrary, the Supreme Court held that if successful, Patchak's lawsuit could divest the federal government of title to the land. Because he was not claiming an ownership interest in the land himself, the Quiet Title Act's prohibition on such lawsuits did not apply.

Prior to *Patchak*, States and local governments seeking to challenge trust land acquisitions were required to file their lawsuits within 30 days.[14] If they did so, as a matter of policy, the Department routinely agreed to a voluntary stay, and the land would not be taken into trust until after the lawsuit had been fully resolved. If litigants missed this 30-day deadline, however, the land was taken into trust and all challenges to the acquisition were barred.

Following *Patchak*, the Department faces lawsuits from a broader array of interested persons—not simply States and local governments. Additionally, now a 6-year statute of

[13] 132 S.Ct. 2199 (2012).
[14] 25 CFR 151.12(b).

limitations most likely applies to trust acquisitions.[15] Even if a parcel of land has been held by the United States in trust for the tribe for years, litigants can bring suit to challenge that decision and seek relief that includes taking the land out of trust. Before *Patchak*, the *Carcieri* decision brought new trust acquisitions to a halt. After *Patchak*, tribes will be faced with a new wave of lawsuits seeking to take their land out of trust.

This decision will have profound impacts on Indian tribes. Projects financed and developed before the *Carcieri* decision was even issued are now at risk. If litigation is filed challenging the Secretary's decision to take land into trust, and that litigation proves successful, a tribe's business or housing project may now be outside of Indian country and subject to state law that could prohibit its continued operation or require the payment of property, sales, and other state and local taxes. The *Patchak* decision will also have a significant impact on new economic development. Will land lie fallow for six years after its acquisition? Or will tribes risk building a business on trust property that they could later be compelled to shut down if a lawsuit is filed years later? Will financial institutions finance through this risk?

Shortly after the *Patchak* decision was released, Fitch Ratings (one of the big three credit ratings agencies) noted that raising capital for Indian economic development projects "could become more difficult/expensive, as investors are likely to have heightened concern about potential challenges regarding land-into-trust decisions."[16] The ratings agency went on to state that the decision may "embolden additional parties to step forward to challenge land-into-trust decisions that took place within the last six years," and that there was "a fair amount of uncertainty" regarding when the six-year statute of limitations would be held to start running in such cases.[17]

In the past, Indian tribes were forced to access non-traditional sources of financing (e.g., private investor, developer) and pay extraordinarily high interest rates to acquire land, develop their business plans, and work through the administrative process of having that land taken into trust by the United States. Once the land was taken into trust, however, tribes were able to access the bond market to obtain the capital needed to construct and open their business. Then, after the business had been operating for a period of time, tribes could seek to refinance their debt through conventional bank loans. At each stage of this process, the interest rates offered to Indian tribes are lowered, because the legal and business risks continue to diminish. *Patchak* threatens to disrupt this process, because it allows the largest risk (land status and jurisdiction) to linger for years following the Secretary's decision.

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[15] *Patchak*, 132 S.Ct. at 2217 (Sotomayor dissenting).
[16] *Patchak Supreme Court Decision Has Mixed Credit Implications for Gaming Sector*, Fitch Ratings (June 19, 2012).
[17] *Id*.

For these reasons, it remains my hope that Congress will pass a clean fix that overturns *Carcieri v. Salazar* and reiterates its long-standing policy that all federally recognized Indian tribes should be treated equally, regardless of when or how they gained recognition.

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