TESTIMONY OF DONALD CRAIG MITCHELL BEFORE THE SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS OF THE HOUSE COMMITTEE ON NATURAL RESOURCES AT OVERSIGHT HEARING ENTITLED: COMPARING 21ST CENTURY TRUST ACQUISITION WITH THE INTENT OF THE 73RD CONGRESS IN SECTION 5 OF THE INDIAN REORGANIZATION ACT

July 13, 2017

Chairman LaMalfa, members of the Subcommittee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved with Native American policy and legal issues from 1974 to the present in Alaska, on Capitol Hill, inside the Department of the Interior, and in the federal courts. I first testified before the Committee on Interior and Insular Affairs (as the Committee on Natural Resources then was known) in 1977. That was forty years ago. Since then I have testified before the Committee and its Subcommittees approximately a dozen times, including when I was invited in 2009 and 2011 to discuss Carcieri v. Salazar, the 2009 decision in which the U.S. Supreme Court construed the intent of the 73rd Congress embodied in the first definition of the term "Indian" in section 19 of the Indian Reorganization Act (IRA), and in 2015 to discuss the changes Assistant Secretary of the Interior for Indian Affairs Kevin Washburn had proposed to the BIA's tribal recognition regulations, 25 C.F.R. 83.1 et seq.

I appreciate being invited back to discuss the need for the 115th Congress to amend sections 5 and 19 of the IRA.

With respect to that subject I would like to make two points.

1. **The Indian Commerce Clause of the U.S. Constitution grants Congress - not the Secretary of the Interior, and certainly not the (BIA) - exclusive plenary power to decide the nation's Indian policies. Congress exercises that power by enacting statutes. The U.S. Supreme Court has instructed that when an executive branch agency responsible for administering a statute determines the intent of the Congress that enacted it embodied in the statute's text, the agency must do so "with reference to the circumstances existing at the time of the [statute's] passage." In 2014 when she issued Solicitor's Opinion M-37029 (The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act) Department of the Interior Solicitor Hilary Tompkins disregarded that blackletter rule of statutory construction in order to produce a policy result of which the BIA approves, even though that result violated the intent of the 73d Congress embodied in the text of section 19 (and section 5) of the IRA.**

Section 5 of the IRA authorizes the Secretary of the Interior to acquire land "for the purpose of providing land for Indians." In turn, section 19 of the IRA contains three definitions of the term "Indian." The first definition states that "Indian" means persons of Indian descent who are members of "any recognized Indian tribe now under Federal jurisdiction." (emphasis added). On February 24, 2009 in its decision in Carcieri v. Salazar the U.S. Supreme Court held that,

contrary to the BIA's administrative interpretation, the 73rd Congress that enacted the IRA intended the word "now" to mean "the date of enactment of the IRA, i.e., June 18, 1934."

In Carcieri the State of Rhode Island had challenged the validity of a decision by the Secretary of the Interior to take the title to thirty-two acres of land into trust for the Narragansett Tribe pursuant to section 5 of the IRA. The members of the Narragansett Tribe did not become a federally recognized tribe until 1983 when Acting Assistant Secretary of the Interior for Indian Affairs John Fritz granted the members that legal status pursuant to an administrative process - codified at 25 C.F.R. 83.1 et seq. - that the BIA and the Office of the Solicitor invented in 1978. Because on June 18, 1934 the Narragansett Tribe did not exist, when the Carcieri litigation was in the lower federal courts the tribe admitted that it had not been "under Federal jurisdiction" on June 18, 1934. As a consequence, in Carcieri the U.S. Supreme Court held that the State of Rhode Island was correct that the members of the Narragansett Tribe were not "Indians" as the first definition in section 19 of the IRA defines that term. And because they were not, the Secretary of the Interior had no authority pursuant to section 5 of the IRA to take into trust the title to the thirty-two acres of land that was the subject of the lawsuit.

Between 1972 and 2009 Congress enacted statutes that created seventeen new federally recognized tribes, and between 1980 and 2009, in addition to the Narragansett Tribe, the BIA created fifteen other new federally recognized tribes utilizing its 25 C.F.R. 83.1 et seq. administrative process. Since the Secretary - aka the BIA - had used section 5 of the IRA to take the title to land into trust for a number of those tribes, at least ten of which were operating Las Vegas-style gambling casinos on the land, the Carcieri decision was problematical for those tribes because the decision suggested that the Secretary's acquisition of land for the tribes pursuant to section 5 of the IRA had been ultra vires.

A week after the U.S. Supreme Court issued the Carcieri decision, during its winter meeting in Washington, D.C., the National Congress of American Indians (NCAI) passed a resolution that condemned the decision and urged the 111th Congress to amend section 19 of the IRA to reverse its holding. In response, Representative Nick Rahall and Senator Byron Dorgan, the Democratic chairmen of the House Committee on Natural Resources and Senate Committee on Indian Affairs, announced that both committees would hold oversight hearings on the Carcieri decision.

The Committee on Natural Resources held its hearing on April 1, 2009. I was invited to testify to explain why the U.S. Supreme Court had correctly construed the intent of the 73rd Congress embodied in the word "now" in section 19, and Colette Routel, a professor at the University of Michigan Law School, was invited to testify to explain why I was wrong. That October Representative Tom Cole, a Republican member of the Appropriations Committee, and Representative Dale Kildee, a Democratic member of the Committee on Natural Resources, introduced H.R. 3697 and H.R. 3742, bills whose enactment would have amended section 19 in a manner that would have reversed the Carcieri decision.

That was four Congresses and more than seven years ago. Throughout that time NCAI and the BIA failed to persuade the Committee on Natural Resources to report Representatives Cole's, Representative Kildee's, or any other bill whose enactment would have amended section 19 and reversed the Carcieri decision. One reason why the Committee did not report a bill is that

Secretaries of the Interior Ken Salazar and Sally Jewell refused to provide the Committee the information the members needed to evaluate the effect of the Carcieri decision.

On November 4, 2009 the Committee held a hearing on H.R. 3697 and H.R. 3742. Prior to the hearing Representative Doc Hastings, at the time the Ranking Republican member, sent Secretary Salazar a letter in which he requested the Secretary to have the Department of the Interior's witness prepared to provide the Committee with answers to sixteen questions. One was: Has the Department determined which tribes . . . were not under federal jurisdiction on June 18, 1934?" Another was: "Does the Department agree that the Supreme Court's decision was correct as to the law, notwithstanding the long-standing policy of the Department?" (emphasis in original).[1] Pointedly ignoring that request, the Department's witness, Deputy Assistant Secretary of the Interior for Indian Affairs Donald Laverdure, answered none of those questions. Instead, in a letter dated January 19, 2010 the Legislative Counsel of the Department of the Interior informed Chairman Rahall that "the Department has not made, and does not intend to make, a comprehensive determination as to which federally recognized tribes were not under federal jurisdiction on June 18, 1934," that "the Department has not created a list of tribes negatively impacted by the Carcieri decision," and that "the Department has not undertaken a review of what land was acquired in trust for tribes that may not have been under federal jurisdiction on June 18, 1934."

NCAI and the BIA had better luck in the Senate with the Committee on Indian Affairs. In May 2012 the Committee reported S. 676, and in August 2014 reported S. 2188, bills Senators Daniel Akaka and Jon Tester, the chairmen of the Committee, sponsored during the 112th and 113th Congresses. But the Senate refused to consider either bill.

Solicitor's Opinion M-37029

After watching Representatives Cole and Kildee and Senators Akaka and Tester repeatedly fail to persuade their colleagues to pass a bill whose enactment would amend section 19 of the IRA and reverse the Carcieri decision, in 2014 Hilary Tompkins, the Solicitor of the Department of the Interior, decided to try and ameliorate on her own what she considered the adverse consequences of the decision.

Between February 24, 2009, the date the U.S. Supreme Court issued the Carcieri decision, and March 2013 Secretary Salazar - aka the BIA - took into trust for various tribes the title to more than 202,000 acres of land. In a letter dated March 20, 2013, Solicitor Tompkins explained how that was done as follows: "The [Supreme] Court did not elucidate th[e] phrase ["under Federal jurisdiction"] and, accordingly, the Department has utilized its expertise in interpreting and applying the temporal qualification . . . Each land-into-trust application has required the

[1] Letter from Doc Hastings, Ranking Republican Member, House Committee on Natural Resources, to the Honorable Ken Salazar, Oct. 30, 2009.

Department, based on advice provided by the Office of the Solicitor, to conduct an individualized legal analysis based on Carcieri."[2]

What legal standard did Solicitor Tompkins advise the BIA to apply to determine whether a federally recognized tribe that had submitted an application had been "under Federal jurisdiction" on June 18, 1934? On March 12, 2014 Solicitor Tompkins issued Solicitor's Opinion M-37029 in which she announced that she had instructed the BIA to apply a two-part test.

Part one requires the BIA to determine whether the evidentiary record demonstrates that "the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members - that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." (emphases added). If that evidentiary showing is made, part two requires the BIA "to ascertain whether the tribe's jurisdictional status remained intact in 1934."

It merits comment that after making the bald assertion in part one of her two-part test that "a course of dealings or other relevant acts for or on behalf of . . . tribal members" can establish the Federal Government's exercise of authority over the members' tribe Solicitor Tompkins did not explain how the BIA providing benefits to individual Indians - such as enrolling children at Carlisle or one of the other boarding schools the BIA operated - is evidence that Federal jurisdiction had been asserted over a tribe. Solicitor Tompkins's silence regarding that portion of her analysis is problematical because on June 19, 2017 Associate Deputy Secretary of the Interior James Cason issued a draft decision in which he determined that the Mashpee Wampanoag Tribe, which the BIA created in 2007 utilizing its 25 C.F.R. 83.1 et seq. administrative process, had not been "under Federal jurisdiction" on June 18, 1934. In that decision he concluded that "evidence of Mashpee student enrollment at Carlisle does not unambiguously demonstrate that such enrollment was predicated on a jurisdictional relationship with the Tribe as such. Without any other evidence that the federal government provided services to the Tribe, the Mashpee student records fall short of demonstrating that (sic) Tribe itself came under federal jurisdiction."

In 2014 in her decision in Confederated Tribes of the Grand Ronde Community v. Jewell[3] District Judge Barbara Rothstein deferred to Solicitor Tompkins and held that she had authority to interpret the intent of the 73rd Congress embodied in the phrase "under Federal jurisdiction" by inventing her two-part test.[4] Judge Rothstein also deferred to Solicitor Tompkins's assertion,

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[2] Letter from Hilary C. Tompkins, Solicitor, U.S. Department of the Interior, to Honorable Cedric Cromwell, Chairman and President, Mashpee Wampanoag Tribe, March 20, 2013.

[3] 75 F. Supp.3d 387 (D.C.D.C. 2014).

[4] In 2013 Secretary of the Interior Sally Jewell issued a record of decision in which she concluded that the Cowlitz Indian Tribe, which the BIA had created utilizing its 25 C.F.R. 83.1

which she subsequently announced in Solicitor's Opinion M-37029, that the 73rd Congress intended the phrase "any recognized Indian tribe now under Federal jurisdiction." (emphases added) in the first definition of the term "Indian" in section 19 of the IRA to allow a tribe that was "under Federal jurisdiction" on June 18, 1934 to be "recognized" at a later date.

In 2016 a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed Judge Rothstein's deferral to Solicitor Tompkins regarding those issues of statutory construction.[5] However, Solicitor Tompkins's statutory interpretations reflect a troubling (because potentially purposeful) disregard for the intent of the members of the Senate and House Committees on Indian Affairs who during the 73rd Congress reported the bills that would be melded by a Conference Committee on which many of those members served into the text of the IRA.

As noted, the first definition of the term "Indian" in section 19 states that "Indian" means persons of Indian descent who are members of "any recognized Indian tribe now under Federal jurisdiction." (emphases added).

Throughout the litigation that culminated in the Carcieri decision the State of Rhode Island asserted that the 73rd Congress intended that text to require an "Indian tribe" to have been both "recognized" and "under Federal jurisdiction" on the date of enactment of the IRA, i.e., on June 18, 1934. In that regard, in its petition for a writ of certiorari the State asked the U.S. Supreme Court to decide three questions. The first was: "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." (emphasis added). The Court granted the State's petition with respect to that question.

Because the federal respondents and the Narragansett Tribe had admitted that the tribe had not been "under Federal jurisdiction" on June 18, 1934, the U.S. Supreme Court decided the case exclusively on that ground. As a consequence, the Court did not consider the separate question of whether the 73rd Congress intended the phrase "recognized Indian tribe now under Federal jurisdiction" to require the Narragansett Tribe to have been "recognized" on that date. However,

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et seq. administrative process, had been "under Federal jurisdiction" on June 18, 1934. When the validity of that decision was challenged, after noting that "The parties agree . . . that under [section 19 of the IRA], the tribe, as opposed to its individual members, must be under federal jurisdiction," Judge Rothstein deferred to Solicitor Tompkins and concluded that "Nothing in [section 19 of the IRA] prohibits the Secretary from considering the relationship between the Federal government and individual Indians when determining whether the tribe itself was under federal jurisdiction in 1934." See 75 F. Supp.3d at 402-403. If, as Associate Deputy Secretary Cason in his draft decision now implies that it has, the Office of the Solicitor has concluded that it was error for Judge Rothstein to have accepted Solicitor Tompkins's assertion that school enrollment and other services the BIA may have provided to an individual Indian is evidence that the United States had asserted Federal jurisdiction over the tribe in which that Indian may have been a member, considerations of fundamental fairness mandate that Secretary of the Interior Ryan Zinke reconsider the Cowlitz record of decision.

[5] See 830 F. 3d 552 (D.C. Cir. 2016).

in a concurring opinion Justice Breyer mused that "The statute [i.e., the first definition of the term "Indian" in section 19] . . . imposes no time limit upon recognition."

Justice Breyer provided no rationale based on the history of the 73rd Congress's enactment of the IRA that supported the validity of that assertion. Nevertheless, in section F of Solicitor's Opinion M-37029 Solicitor Tompkins transformed Justice Breyer's dictum into a holding by announcing that "the IRA does not require that the agency determine whether a tribe was a 'recognized Indian tribe' in 1934; a tribe need only be 'recognized' at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust)."

Solicitor Tompkins based that conclusion regarding the intent of the 73rd Congress embodied in the text of the first definition of the term "Indian" in section 19 of the IRA on a snippet from the hearing record of the Senate Committee on Indian Affairs in which Wyoming Senator Joseph O'Mahoney volunteered his view of the status of the descendants of the Catawba Indians who resided on the border between North and South Carolina.

The result she announced in Solicitor's Opinion M-37029 regarding the date on which she believed the 73rd Congress intended to require an "Indian tribe" to have been "recognized" furthered a policy objective Solicitor Tompkins considered laudable because - when combined with the BIA's application of her two-part "under Federal jurisdiction" test - it authorizes the Secretary of the Interior to take into trust pursuant to section 5 of the IRA the title to land for most, if not all, of the more than thirty federally recognized tribes that did not exist in 1934. However, Solicitor Tompkins's interpretation of the intent of the 73rd Congress embodied in the text of the first definition of the term "Indian" in section 19 of the IRA reflects a (purposeful?) disregard for the views regarding federal Indian policy of the members of the Senate and House Committees on Indian Affairs who recommended the IRA to the 73rd Congress.

Since the U.S. Supreme Court issued the Carcieri decision in 2009, the Department of Interior has represented to the Committee on Natural Resources and to this Subcommittee that the members of the 73rd Congress intended their enactment of the IRA to signify the abandonment of assimilation as the objective of Congress's Indian policy. In 2009 when he testified in support of H.R. 3742 and H.R. 3697 Deputy Assistant Secretary of the Interior for Indian Affairs Donald Laverdure told the Committee: "Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of Allotment and Assimilation . . . ." (emphasis added). In 2011 when he testified in support of H.R. 1234 and H.R. 1291 Deputy Assistant Secretary Laverdure told this Subcommittee the same thing. And in Solicitor's Opinion M-37029 Solicitor Tompkins described the IRA as "a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy characterized by the General Allotment Act, which had been designed to 'put an end to tribal organization' and to 'dealings with Indians . . . as tribes.'" (emphasis added).

Those are self-serving misstatements of history because, while Commissioner of Indian Affairs John Collier and Assistant Solicitor Felix Cohen wanted Congress to abandon assimilation as the objective of its Indian policy, the members of the Senate and House Committees on Indian

Affairs during the 73rd Congress were, to the man and single woman,[6] committed assimilationists who agreed to Commissioner Collier's request that section 1 of the IRA prohibit the further allotment of reservations, not because they agreed with Collier that Congress should abandon assimilation as its policy objective, but because they had been convinced that allotting reservations had proven a bad strategy for achieving that objective.

For example, during the hearings the Senate Committee on Indian Affairs held on S. 2755, the bill Commissioner Collier sent to the Senate and of which Felix Cohen had been the principal draftsman, Senator Burton Wheeler, the chairman of the Committee, told Commissioner Collier: "Why shouldn't we take these Indians that want to come and go out there and give them a piece of land, and if they will go out and work that piece of land and do subsistence farming, and start the Indian out with something that he can work with on that piece of land, I think we will make a much better citizen out of him and a much better Indian out of him, and he will work into the life of the Nation. That is what we are seeking to do." (emphases added).[7] And during the Senate debate on a substitute version of the bill, when Utah Senator William Henry King informed Senator Wheeler that he had been told "the Indian Bureau has been very anxious for a measure of this character, fearing that the life of that organization might be ended in the near future should the Indians take upon themselves the responsibilities of citizenship," Wheeler responded: "On the contrary, this bill proposes to give the Indians an opportunity to take control of their own resources and fit them as American citizens." (emphasis added).[8]

Senator Wheeler's involvement in the 73rd Congress's enactment of the IRA is consequential because the Conference Committee he co-chaired based the text of the "Indian" definition in section 19 of the IRA on the text of the "Indian" definition in section 18 of the bill the Senate Committee on Indian Affairs reported.[9]

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[6] The single woman was Democratic Representative Isabella Greenway who in 1932 was the first woman elected to represent the State of Arizona in the U.S. House of Representatives.

[7] To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Comm. on Indian Affairs, 73rd Cong. 73-74 (1934)[hereinafter "1934 Senate Hearing"].

[8] 78 Cong. Rec. 11124 (1934). In 1924 Congress granted citizenship to "all noncitizen Indians born within the territorial limits of the United States" - see Pub. L. No. 68-175 (1924). In 1924 Senator Wheeler was a member of the Committee on Indian Affairs that wrote the Indian Citizenship Act - see 65 Cong. Rec. 156 (1923); S. Rep. No. 68-441 (1924) . So when he assured Senator King that participating in the programs the IRA would make available would fit Indians to become "American citizens" Wheeler knew they already were citizens. For that reason, it is reasonable to assume that what Wheeler meant was that their participation in the programs the IRA would make available would facilitate Indians to "work into the life of the Nation," i.e., to assimilate themselves into the mainstream American economy and popular culture.

[9] See H.R. Rep. No. 73-2049, at 8 (1934)("Section 19: The definitions contained in section 18 of the Senate bill were agreed upon").

Section 13(b) of Title I of S. 2755, the bill Commissioner Collier sent to the Senate and of which Felix Cohen had been the principal draftsman, defined the term "Indian" to mean "all persons of Indian descent who are members of any recognized Indian tribe, band, or, nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all persons of one fourth or more Indian blood . . . ."[10] (emphases added). That text suggests that Commissioner Collier and Felix Cohen believed that the only persons eligible to benefit from the provisions of the IRA were individuals of any degree of Indian blood quantum who resided on Indian reservations that existed on February 1, 1934, plus individuals who did not reside on a reservation but were of "one fourth or more Indian blood." That definition did not include within its purview individuals of less than one fourth Indian blood who did not reside on a reservation that existed on February 1, 1934.

After listening to Commissioner Collier explain its content, the members of the Senate Committee on Indian Affairs rejected S. 2755 and Chairman Wheeler appointed a subcommittee to write a new bill. But then Wheeler met privately with Collier and they worked out the general content of a new bill, which Department of the Interior attorneys (Felix Cohen?) then drafted, and Commissioner Collier sent to Wheeler.[11]

The text of the "Indian" definition in section 19 of that bill is identical to the text of the "Indian" definition in section 19 of the IRA, except it did not include the phrase "under Federal jurisdiction" and it included within the purview of the definition "persons of one fourth or more Indian blood."

When the Committee members marked-up the bill, at Senator Wheeler's request they amended the "Indian" definition by increasing the blood quantum requirement from one-fourth to one-half because, as Wheeler explained:

> I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people, coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my

[10] 1934 Senate Hearing, at 6.

[11] Id. at 237 (Senator Wheeler informing the other members of the Senate Committee on Indian Affairs: "I first appointed a subcommittee with the idea of taking the other bill [S. 2755] and amending it, but subsequently I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, but I want to go over it").

> judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than add to it. (emphases added).[12]

It is reasonable to assume that the vast majority of the members of most of the more than thirty Indian tribes Congress and the BIA created after the date of enactment of the IRA, and particularly the tribes the BIA created utilizing its 25 C.F.R. 83.1 et seq. administrative process, are individuals who each are of less than "one-half or more Indian blood."

The Cowlitz Tribe, which I previously have mentioned, is a representative example. In the nineteenth century Indians lived in villages along the Cowlitz River, a tributary of the Columbia River, which today demarks the boundary between the states of Washington and Oregon. In 2000 the BIA "recognized" the Cowlitz Tribe, and in 2002 reaffirmed that designation. When the BIA did so who were the members of the tribe? According to the BIA, that is no one's business but the tribe's. But in 1995 the BIA's anthropologist reported that 1,030 of the tribe's 1,577 members lived in 133 cities and towns throughout the state of Washington, and that the tribe's 547 other members lived in cities and towns in thirty-four other states as far east as Connecticut. The chairman of the tribe was John Barnett who said he was a Cowlitz Indian because he had a great-great grandmother who had been one. In 2015 the BIA took into trust for the Cowlitz Tribe pursuant to section 5 of the IRA a cow pasture located next to an off-ramp of Interstate 5 north of Portland, Oregon, as the tribe's "initial reservation." Today, no member of the Cowlitz Tribe resides on the reservation. Instead, three months ago the tribe opened the Ilani Casino on the property whose gaming floor contains 2,500 video gaming machines and seventy-five table games.

The members of the Senate Committee on Indian Affairs who wrote the "Indian" definition in section 19 of the IRA explicitly intended that individuals such as John Barnett not be "taken in under the provisions of the IRA." Nevertheless, in section F of Solicitor's Opinion M-37029 Solicitor Tompkins announced that the 73rd Congress intended such individuals to be taken in because the members of the Senate Committee on Indian Affairs intended the phrase "recognized Indian tribe now under Federal jurisdiction" to include within its purview Indian tribes composed of individuals of any blood quantum that were "recognized" after the date of enactment of the IRA. The panel of the U.S. Court of Appeals that decided Confederated Tribes of the Grand Ronde Community v. Jewell upheld Solicitor Tompkins's authority to reason to that result. But Solicitor Tompkins's interpretation of the intent of the 73rd Congress embodied in the "Indian" definition in section 19 of the IRA stretches credulity past breaking.

The reason it does is that the U.S. Supreme Court has instructed that the text of a statute is to be construed "with reference to the circumstances existing at the time of passage."[13] For that reason, it is ironic in the extreme that in his concurring opinion in Carcieri v. Salazar Justice Breyer accepted the proposition that the 73rd Congress intended the phrase "recognized Indian tribe now under Federal jurisdiction" to "impose[] no time limit upon recognition" because its "administrative practice suggests that the Department [of the Interior] has accepted this

[12] Id. at 263-264.

[13] United States v. Wise, 370 U.S. 405, 411 (1962).

possibility."[14] Justice Breyer deferred to the BIA's administrative practice because he believed "the Court owes the Interior Department the kind of interpretative respect that reflects an agency's greater knowledge of the circumstances in which a statute was enacted." (emphasis added).[15] But Solicitor Tompkins made no attempt to consider the circumstances in which the IRA was enacted before she reasoned to her interpretation of the intent of the 73rd Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" that she announced in section F of Solicitor's Opinion M-37029.

In summary, whether the members of tribes that Congress and the BIA created after the date of enactment of the IRA should be included within the purview of the first definition of the term "Indian" in section 19 of the IRA so that the BIA can acquire land for those tribes pursuant to section 5 of the IRA is a policy question. If the members of this Subcommittee determine that it is an appropriate policy outcome for members of tribes such as the Cowlitz Tribe to be included, they can recommend to the Committee on Natural Resources that the Committee report a bill to the 115th Congress whose enactment will amend section 19 to allow that result. But until and unless section 19 is amended, the members of those tribes are not section 19 "Indians." And because they are not, the Secretary has no authority pursuant to section 5 of the IRA to acquire land for their benefit.

2. **Section 5 of the IRA is an unconstitutional delegation of authority to an executive branch agency. The regulations the Secretary of the Interior promulgated while South Dakota v. Department of the Interior was being litigated do not cure the constitutional defect, nor do the Secretary's regulations establish substantive criteria that govern his exercise of the discretionary authority that section 5 delegates.**

Section 5 of the IRA authorizes the Secretary of the Interior to acquire land "for the purpose of providing land for Indians," and directs that the title to that land "be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." In 1990 the BIA announced that it had made a decision to take the title to ninety-one-acres of land into trust pursuant to section 5 for the Lower Brule Tribe of Sioux Indians.

The State of South Dakota challenged the BIA's authority under section 5 to do so, and in 1995 in South Dakota v. Department of the Interior a panel of the U.S. Court of Appeals for the Eighth Circuit issued a decision in that lawsuit in which the panel declared that section 5 is an unconstitutional delegation of authority to an executive branch department because the text of section 5 contains no judicially identifiable and enforceable standards that limit the BIA's exercise of the authority section 5 delegates. In so holding, the panel observed that:

> By its literal terms, the statute permits the Secretary [of the Interior] to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls.

[14] 555 U.S. at 398.

[15] Id. at 396.

> Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority . . . ."

After the State of South Dakota challenged the Secretary's authority pursuant to section 5 of the IRA to take the title to the aforementioned ninety-one-acres of land into trust, in 1991 the BIA published a proposed rule whose adoption as a final rule would amend regulations the BIA had promulgated in 1980 that created a cursory process for making section 5 land acquisitions. Five months before the panel issued its decision in South Dakota, in June 1995 the BIA published a final rule that promulgated the regulations. And five months after the panel issued its decision, in April 1996 the BIA published a final rule that amended its section 5 regulations again by adding a provision that required the BIA to publish in the local newspaper a notice of a decision to take the title to a parcel of land into trust and to not take the title into trust for thirty days in order to provide an opportunity for a lawsuit challenging the validity of the decision to be filed.

The Solicitor General then used the 1996 regulation as a pretext for requesting the U.S. Supreme Court to vacate the panel's decision in South Dakota and remand the BIA's decision that was the subject of the lawsuit to the Secretary of the Interior for reconsideration. Over the protestation of Justices Scalia, O'Connor, and Thomas,[16] a majority of the members of the Court agreed to do so.

On May 12, 2015 this Subcommittee held an oversight hearing regarding the "Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act." In his testimony, Assistant Secretary of the Interior for Indian Affairs Kevin Washburn, the first witness, pointed out that since the U.S. Supreme Court vacated the South Dakota v. Department of the Interior decision "every court to consider the issue has upheld the constitutionality of section 5 of the IRA in the face of a challenge to its lack of standards." Assistant Secretary Washburn also represented to the Subcommittee that "The Department's land-into-trust regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's discretionary authority to acquire land in trust." (emphases added).

Whatever the expressions of opinion of the lower federal courts regarding the constitutionality of section 5 of the IRA, until the U.S. Supreme Court grants a petition for a writ of certiorari that requires the Court to decide the question, whether section 5 is constitutional is an undecided question about whose answer Kevin Washburn, who is now a law professor, and I can continue to disagree. But what is not in dispute is that Assistant Secretary Washburn's representation to this Subcommittee that 25 C.F.R. 151.1 et seq. "establish[es] . . . substantive criteria to govern the Secretary's discretionary authority to acquire land in trust" was demonstrably false.

25 C.F.R. 151.10 directs the Secretary of the Interior to "consider" eight criteria before he decides whether to take into trust the title to land that is "located within or contiguous to an Indian reservation." And 25 C.F.R. 151.11 directs the Secretary to "consider" those criteria plus

[16] See Department of the Interior v. South Dakota, 519 U.S. 919 (1996).

two others before he decides whether to take into trust the title to land that is "located outside of and noncontiguous to the tribe's reservation."

But in both cases, after he "considers" the criteria, the Secretary may ignore any or all of the information his consideration generated and make any decision he wishes regarding whether to take the title to the land into trust. So contrary to Assistant Secretary Washburn's representation, on their face, 25 C.F.R. 151.10 and 151.11 do not establish substantive criteria that govern "the Secretary's discretionary authority to acquire land in trust."

It also merits mention that 25 C.F.R. 1.2 announces that "the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 C.F.R. in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." (emphasis added). Since 25 C.F.R. 151.1 et seq. is located in chapter I, if arguendo the criteria listed in 25 C.F.R. 151.10 and 151.11 are "substantive" because they somehow "govern" the Secretary's exercise of the discretionary authority that section 5 of the IRA delegates to take the title of land into trust, whenever he decides that doing so will be "in the best interest of the Indians" the Secretary may disregard any criterion he wishes, or, if need be, all ten of them.

In conclusion, the 73rd Congress enacted sections 5 and 19 of the IRA more than eighty years ago. During that time no succeeding Congress has revisited the policy rationale that underpins either section.

Whether in the first decades of the twenty-first century it is an appropriate policy result for section 5 of the IRA to continue to delegate the Secretary of the Interior unfettered authority to take into trust the title to land located outside the boundaries of Indian reservations that were in existence on June 18, 1934 is a question that merits public discussion. As are the questions of whether section 5 should be amended to include in the section's text judicially identifiable and enforceable standards to govern the Secretary's exercise of the land acquisition authority section 5 delegates, and whether it would be an appropriate policy result for the 115th Congress to amend section 19 of the IRA to expand the definition of the term "Indian" to include within the term's purview individuals of Indian descent who regardless of their degree of blood quantum are members of groups that, subsequent to June 18, 1934, Congress or the Secretary of the Interior (acting lawfully pursuant to authority that Congress has delegated to the Secretary in a statute) has designated as a "federally recognized tribe."

The Subcommittee's consideration of those and related policy questions regarding the IRA is decades past due.