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Can I Keep My Tipi Here? A Review of the Laws Governing Indian Land and how Congress can Resolve Indian Land Trust Issues in the Face of the Supreme Court's Decisions in Carrier and Patchak

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CAN I KEEP MY TIPI HERE? A REVIEW OF THE LAWS GOVERNING INDIAN LAND AND HOW CONGRESS CAN RESOLVE INDIAN LAND TRUST ISSUES IN THE FACE OF THE SUPREME COURT'S DECISIONS IN *CARCIERI* AND *PATCHAK*

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I. INTRODUCTION

The Yocha Dehe Wintun Nation,[1] a federally recognized Indian tribe,[2] wants to put land into trust for housing, cultural, governmental, and agricultural purposes to ensure the tribe's continued growth.[3] Before 2009, under the Indian Reorganization Act ("IRA"), which provides that the Secretary of the Department of the Interior ("Secretary") can place land into trust for Indians,[4] the Secretary would likely have considered the Yocha tribe's request and any concerns the local government may voice within thirty days' notice of the Secretary's decision to accept the request, before placing the land into trust.[5] Today, however, the Secretary must conduct a lengthy and costly, two-part analysis before deciding whether to take Indian land into trust. Further, the Secretary cannot disregard the concerns of private citizens who may have standing to dispute the placement of the land into trust.[6] Thus, tribes, like the Yocha, can no longer begin land development following the Secretary's trust approval without concern that courts may vacate the decision years later.[7]

In 2009, the United States Supreme Court's decision in *Carcieri v. Salazar*[8] reshaped almost eight decades of law developed under the IRA.[9] While the IRA empowers the Secretary to place land into trust for Indians, it defines *Indian* as any person of Indian descent who is a member of a recognized Indian tribe "now under federal jurisdiction."[10] In *Carcieri*, the Supreme Court interpreted *now* to mean "as of the time of the IRA enactment," which was June 18, 1934.[11]

Before *Carcieri*, the Secretary had approved requests for trust-acquisitions coming from any tribe federally recognized as of the time of

1. The tribe was originally named "Rumsey Indian Rancheria of Wintun Indians." *See* Bureau of Indian Affairs, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 75 FED. REGISTER 60810, 60813 (2010), http://www.bia.gov/idc/groups/xofa/documents/document/idc012038.pdf.

2. *Id.*

3. Don Frances, *Possible Yocha Dehe Wintun Nation tribal land expansion creates stir in Capay Valley*, DAILY DEMOCRAT (Feb. 6, 2013, 9:38 PM), http://www.dailydemocrat.com/news/ci_22535715/possible-yocha-dehe-wintun-nation-tribal-land-expansion.

4. 25 U.S.C.A. § 465 (West 2012).

5. 25 C.F.R. § 151.12(b).

6. *See generally* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012).

7. Stand Up for California! v. U.S. Dept. of the Interior, 919 F. Supp. 2d 51, 82 (D.D.C. 2013).

8. Carcieri v. Salazar, 555 U.S. 379 (2009).

9. *See* 25 U.S.C.A §§ 461–79 (West 2012).

10. § 479.

11. *Carcieri*, 555 U.S. at 395.

the request.[12] However, *Carcieri* now forces the Secretary to determine if a tribe was actually under federal jurisdiction as of the enactment of the IRA.[13] But this temporary solution is "time-consuming and costly" and does not address whether land already placed into trust will remain secure for tribes.[14]

In the years following *Carcieri*, demands for a legislative fix have reached a fever pitch, with many proposals to address the Secretary's authority in light of the *Carcieri* decision.[15] However, many of these proposals fail to address the major issue created by *Carcieri*—the status of tribal land already taken into trust.[16] Since *Carcieri*, tribes have faced litigation over lands put into trust because of a lack of proof affirmatively showing that they were under federal jurisdiction as of 1934.[17]

The Supreme Court's 2012 decision in *Pottawatomi Indians v. Patchak*[18] emphasized this issue by giving private citizens standing to dispute the Secretary's decision to put land into trust in the first place.[19] Even more significantly, because private citizens do not claim an interest in the Indian land itself, the Quiet Title Act does not apply.[20] Thus, a private citizen may potentially have up to six years to dispute the decision made by the Secretary, in stark contrast to the usual thirty days for challenges by state and local authorities.[21]

Together, *Carcieri* and *Patchak* have hindered recent tribal efforts to seek land security because these decisions make clear that the status of land already placed in trust is no longer secure.[22] These decisions have opened the floodgates to litigation challenging the

12. *Id.* at 407–08.

13. Larry Echo Hawk, Assistant Secretary of Indian Affairs, Statement before the Senate Committee: Impact of Carcieri v. Salazar on Native Americans (Oct. 13, 2011), http://www.doi.gov/ocl/hearings/112/CarcieriCrisis_101311.cfm (stating the "Department must examine whether each tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934.").

14. *Id.*

15. *See infra* Part V–A of this Comment, including Howard L. Highland, *A Regulatory Quick Fix for* Carcieri v. Salazar*: How the Department of Interior can Invoke an Alternative Source of Existing Statutory Authority to Overcome an Adverse Judgment Under the* Chevron *Doctrine*, 63 ADMIN. L. REV. 933, 935–36 (2011).

16. *See generally id.* at 935–37; Amanda D. Hettler, *Beyond a* Cacieri *Fix: The Need for Broader Reform of the Land-Into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377 (2011).

17. Stand Up for California! v. U.S. Dept. of the Interior, 919 F. Supp. 2d 51, 66 (D.D.C. 2013); New York v. Salazar, No. 6:08-CV-00644, 2012 WL 4364452, at *8 (N.D.N.Y Sept. 24, 2012).

18. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012).

19. *Id.* at 2210–11.

20. *Id.* at 2211.

21. *Id.* at 2218 (the dissent acknowledging that the majority's decision will allow claims pursuant to the IRA to be brought within the APA's six-year limitation, as opposed to the previous thirty-day period).

22. *Stand Up for California!*, 919 F. Supp. 2d at 82.

Secretary's authority to place land into trust for tribes, forcing tribes that rely on trust acquisitions for economic stability to prepare for costly litigation.[23]

This Comment will review the history pertaining to the role real property plays in Indian law policy and address the impact of recent Supreme Court decisions on the ability of tribes to put land into trust. Part II describes the history of the law governing Indian land up to, and including, the Marshall Trilogy, and explains the relative concept of tribal sovereignty. Part III reviews statutes governing Indian land after the Marshall Trilogy, and details the legal history around the Indian Reorganization Act. Part IV of this Comment explores how the Supreme Court's recent decisions have impacted the Indian land-into-trust process and explains the specific problems created by *Carcieri* and *Patchak*. Part V considers the proposed solutions to this impact, including legislative bills introduced since *Carcieri*, and suggests that the best solution to the uncertainty caused by *Carcieri* and *Patchak*, is for Congress to pass new legislation that reaffirms the Secretary's authority and expressly secures the land, once placed in trust, from future litigation.

II. Laws Governing Indian Land Prior to Marshall

American Indian law is a unique body of law that governs the special relationship and interaction between Indian tribes and the federal government and, particularly, the status of Indian tribes and which rules apply in any given situation.[24] Tribal status is of particular import because it affects the inherent rights of tribal sovereignty, which include the right to secure tribal development through land acquisitions.[25] The following section sets out the framework under which federal Indian law has developed.

A. *Pre-Revolutionary War Tribal Sovereignty*

Recognition of tribal sovereignty, in the territory that would become the United States, crystallized with the Proclamation of 1763, when King George effectively established that treaties with tribes were required to allow British settlement on native lands, in order to reduce the threat presented by natives.[26] The proclamation language indicated that the British believed native lands belonged to the Crown

23. *Id.*; *Salazar*, 2012 WL 4364452, at *8.

24. William C. Canby, American Indian Law in a Nutshell 1 (5th ed. 2009).

25. Mary Jane Sheppard, *Taking Indian Land Into Trust*, 44 S.D. L. Rev. 681, 682 (1999).

26. Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. Rev. 329, 329–30 (1989).

but recognized that natives had certain rights to the land they occupied.[27]

Before the Proclamation, the long history of violence between natives and settlers was caused primarily by one thing: the right to occupy land.[28] During that time, local colonial governments managed relations with Indian tribes and often interpreted a tribe's right to occupy land to include only the land a tribe actively and regularly cultivated, allowing local colonial officials to dispose of hunting land as they saw fit, without the need to negotiate with tribes.[29] Furthermore, local officials capitalized on Indian uprisings that came in response to these unfair interpretations by obtaining Indian land through conquest, which was "presumably pursuant to a defensive, legitimate war."[30]

In 1664, the Crown assigned a royal commission to investigate complaints brought by Indians.[31] Of note is the commission's opinion of a dispute between the Mohegan tribe and Connecticut colonials, in 1743, when the royal commission rejected the colonials' attack on the commission's authority to hear the case and held that Indian tribes "were distinct peoples subject neither to the laws of England nor of colonial courts."[32] The commission held that such disputes were to be resolved by the law of nations and were within the jurisdiction of the royal commission.[33]

The Proclamation established a boundary line around Indian land and required British subjects to obtain a special license from the Crown before acquiring any Indian land.[34] However, twenty years later, following the Revolutionary War, Great Britain ceded the land relating to the Proclamation to the United States.[35]

B. *The United States Constitution's Impact on Tribal Sovereignty*

The federal government's relationship with native tribes is mentioned three times in the United States Constitution.[36] Specifically, Article I, Section 2, Clause 3 explains that apportionment of representatives and taxes among the states excludes non-taxed Indians.[37] In addition, Article I, Section 8, gives Congress the power to regulate

27. *Id.* at 368.
28. *Id.* at 354.
29. *Id.* at 333.
30. *Id.*
31. *Id.* at 334.
32. *Id.* at 335–36.
33. *Id.* at 336.
34. *Id.* at 356.
35. Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448, 474 (W.D.N.Y. 2002).
36. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 2.
37. U.S. CONST. art. I, § 2, cl. 3.

"Commerce with Indian tribes," which it treats separately from states and foreign nations.[38] The third mention is in the Fourteenth Amendment, which amends the apportionment of representatives in Section 2 above.[39]

Not surprisingly, the federal government had to face the same responsibility as the Crown to resolve disputes arising from the competing interests between tribes and local authorities.[40] The federal government adopted policies similar to the Proclamation in the Indian Trade and Intercourse Acts, enacted from 1790 to 1834 in a series of six acts, which regulated commerce between Indians and non-Indians and prohibited the purchase of Indian land without the approval of the federal government.[41] But such prohibitions did not keep the Proclamation line that distinguished Indian country secure because the federal government signed treaties with the tribes to secure large amounts of Indian land for non-Indians, and before long, Indian country dwindled drastically.[42]

C. *The Marshall Trilogy Impact on Tribal Sovereignty*

In what has been dubbed the *Marshall Trilogy*, the Supreme Court, under Chief Justice John Marshall, decided three Indian cases over a nine-year period.[43] These three cases characterized tribes as "domestic dependent nations."[44] The Marshall Trilogy has "serve[d] as the legal foundation for federal Indian policy"[45] for many years and it eventually led to the development of the Indian land-into-trust process.[46]

In 1823, the plaintiff in *Johnson v. McIntosh*[47] claimed title to land under a purchase and conveyance from Indians, but the defendant claimed title under a grant from the federal government.[48] The Supreme Court held that titles to land under Indian conveyances were not legally valid because Indians only had a right of occupancy.[49] The Court determined that the United States had actual sovereignty over

38. § 8, cl. 3.
39. U.S. CONST. amend. XIV, § 2.
40. Clinton, *supra* note 26, at 364.
41. *Id.* at 369.
42. Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After* Massachusetts v. EPA, 29 STAN. ENVTL. L.J. 130, 151–52 (2010).
43. Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).
44. Fromherz & Mead, *supra* note 42, at 156–57.
45. *Id.* at 155.
46. *Id.*
47. *M'Intosh*, 21 U.S. at 543 (1823).
48. *See id.* at 543–44; Daniel G. Kelly, Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 657 (1975).
49. Kelly, *supra* note 48, at 657–58.

the land; thus, the federal government could grant American citizens land that the Indians still possessed.[50]

Later, in 1831, in the case *Cherokee Nation v. Georgia*, the Cherokee Nation sought to prevent the State of Georgia from removing the tribe from the lands it occupied within the state.[51] It was in this case that Chief Justice Marshall, writing for the majority, held that tribes lacked the standing to sue as a *foreign* nation, in the constitutional sense.[52] Instead, tribes were "domestic dependent nations" and their relationship to the federal government "resemble[d] that of a ward to his guardian."[53] Thus, the Court lacked original jurisdiction to hear the case.[54]

In the final case of the trilogy, *Worcester v. Georgia*,[55] the Chief Justice articulated the foundation of tribal sovereignty in the United States, and he laid out the relationship between the tribes and the states and the federal government.[56] Here, the Court reversed the conviction of a non-Indian missionary who had resided in Indian territory without a permit as required by state statute.[57] The Court recognized "federal supremacy over Indian land," and held that Georgia laws "had no force within the Indian territory."[58] Marshall explained that "Indian nations . . . retain[ed] their original natural rights, as the undisputed possessors of the soil,"[59] and that "only the federal government had the power to regulate tribes."[60]

III. Laws Governing Indian Land After Marshall

In 1871, Congress passed the Indian Appropriations Act,[61] which substituted statutes for treaties in governing the federal government's interaction with tribes, and which expressly stated that tribes would not be recognized as independent nations.[62] The government continued to struggle with the Marshall concept in regards to what rights and responsibilities the states and federal government owed the tribes. However, the Supreme Court established that Indian lands created a boundary that protected Indians from state jurisdiction but restricted constitutional benefits.[63]

50. *Id.* at 658; *M'Intosh*, 21 U.S. at 574, 587–588.
51. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
52. *Id.* at 20; Fromherz & Mead, *supra* note 42, at 156.
53. Fromherz & Mead, *supra* note 42, at 157; *Cherokee Nation*, 30 U.S. at 17.
54. Kelly, *supra* note 48, at 662–63.
55. Worcester v. Georgia, 31 U.S. 515 (1832).
56. *Id.* at 555.
57. Kelly, *supra* note 48, at 659–60.
58. *Id.* at 660.
59. Fromherz & Mead, *supra* note 42, at 157 (citing *Worcester*, 31 U.S. at 559).
60. *Id.* at 158.
61. *Id.* at 163.
62. *Id.*
63. *Ex parte* Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556, 572 (1883) (holding that the district court of Dakota lacked jurisdiction to convict Indian who committed mur-

When the Supreme Court upheld the Indian Appropriations Act in *United States v. Kagama*,[64] in 1886, concluding that the federal government had the power to govern tribes through acts of Congress, this reaffirmed the Court's embrace of the Marshall view on tribal sovereignty.[65] Congress was quick to utilize its newfound power as trustee to enact statutes that affected Indian land.

A. *Decimation of Indian Lands by Congressional Acts*

The first act affecting Indian land was the General Allotment Act of 1887,[66] also known as the Dawes Act,[67] which parceled out reservation land and allotted the land to individual tribal members while selling any "surplus"[68] land to non-Indians.[69] Individual Indians who received such allotments were made United States citizens after a period of "trust supervision, usually twenty-five years," becoming subject to state law rather than federal law.[70]

In 1906, Congress amended the Dawes Act, with the Burke Act, which gave the Secretary the power to remove land from trust before the trust's original expiration, if the Secretary declared the Indian holders of the land had become "competent and capable of managing [their] affairs."[71] In 1910, Congress enacted "An Act to Provide for Determining the Heirs of Deceased Indians, for the Disposition and Sale of Allotments of Deceased Indians, for the Leasing of Allotments, and for Other Purposes,"[72] which arguably superseded section 1 of the Dawes Act,[73] by empowering the Secretary to sell the land if

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der against another Indian within Indian territory); *see also* U.S. v. McBratney, 104 U.S. 621, 624 (1881) (holding district of Colorado lacks jurisdiction of non-Indian who murders another non-Indian within the boundaries of Indian reservation land); *see also* Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that notwithstanding a statute or treaty stating otherwise, Indians are not born a citizen of the U.S.; thus, the Fourteenth and Fifteenth amendments do not apply).

64. U.S. v. Kagama, 118 U.S. 375, 375 (1886).

65. *Id.* at 380, 382 (stating "perhaps the best statement of [the Indians'] position is found in the two opinions of this court by Chief Justice Marshall").

66. Brief for Amici Curiae National Congress of American Indians in Support of Defendants-Appellees at 3, Carcieri v. Salazar, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228.

67. *Id.*; Hettler, *supra* note 16, at 1383.

68. Clinton, *supra* note 26, at 375 (describing surplus land as "land not needed for fixed-acreage allotments").

69. Hettler, *supra* note 16, at 1383–84; *see also* Clinton, *supra* note 26, at 375 (stating "Indian land base shrank from 138 million acres in 1887 to 48 million acres in 1932.").

70. Clinton, *supra* note 26, at 375; 25 U.S.C.A. § 181 (West 2012).

71. Cass County, Minn. v. Leach Lake Band of Chippewa Indians, 524 U.S. 103, 103 (1998) (the Burke Act amended § 6 of the General Allotment Act).

72. The full name of the Act is the Native American Document Project, NADP Document A1910, http://public.csusm.edu/nadp/a1910.htm.

73. Jordan v. O'Brien, 9 N.W.2d 146, 148 (S.D. 1943).

he determined that any one of the allottee's heirs was incompetent.[74] A total of 118 Indian reservations were subject to the allotment process, which ultimately resulted in the loss of approximately two-thirds of Indian land.[75]

In *United States v. Sandoval*,[76] the Supreme Court upheld Congress's exclusive power to regulate and exercise the care and protection of Indian tribes.[77] The Court held that once Congress had begun to act as guardian of the tribes, it was up to Congress and not the courts to determine when the state of wardship would end.[78]

B. *Indian Reorganization Act of 1934*

In 1934, the Bureau of Indian Affairs director, John Collier, championed Indian rights by introducing the Indian New Deal to promote the revitalization of Indian culture and self-governance.[79] The IRA was the centerpiece of the Indian New Deal,[80] it prohibited new allotments of land, it extended the trust period for existing allotments, and it empowered the Secretary to take action to further protect Indian land interests.[81]

To further these goals, section 3 of the IRA authorized, but did not require,[82] the Secretary to restore the surplus lands that "remained in the hands of the United States" to tribal ownership.[83] Section 4 provided that the Secretary "may authorize voluntary exchanges of land of equal value,"[84] allowing the conveyance of restricted Indian land between Indians and non-Indians, but only with the Secretary's approval.[85] And section 5 of the IRA gave the Secretary express authorization to acquire land "for the purpose of providing land for Indians."[86] Section 5 provided the "title to any lands or rights acquired pursuant to this Act . . . shall be taken . . . in trust for the Indian tribe or individual Indian."[87] Once in trust, the land was not

74. NATIVE AMERICAN DOCUMENT PROJECT, NADP DOCUMENT A1910, 855–56, http://public.csusm.edu/nadp/a1910.htm.

75. Peter Scott Vicaire, *Two Roads Diverged in a Wood: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 50 JUDGES' J. 18, 20 (2011).

76. U.S. v. Sandoval, 231 U.S. 28 (1913).

77. *Id.* at 46.

78. *Id.*

79. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 582 (2009).

80. *Id*. at 579–80.

81. *Id.*

82. *Id.* at 580–81 (citing Hinton v. Udall, 364 F.2d 676, 679 (D.C. Cir. 1966)).

83. *Id.*

84. *Id.* at 581.

85. *Id.* at 581–82.

86. 25 U.S.C.A § 465.

87. *Id.*

subject to state laws, including state taxes.[88] Further, land held in trust could not be sold without an Act of Congress.[89]

Thus, the IRA effectively gave tribes an opportunity for stability in occupying and using land, in contrast to the years of decimation of tribal land ownership under the general allotment period. But it also resulted in a conflict of interest between tribes and states.[90] Tribes had one year to accept or reject the IRA.[91]

C. *Further Development of the Law Prior to 2009*

In the years following the IRA, case law developed to form the boundaries of tribal sovereignty and Indian rights to land; a boundary that would remain ill defined for years to come. In 1959, the Supreme Court granted certiorari in an Arizona case,[92] deciding the issue of whether a non-Indian, who operated a general store on an Indian reservation, could sue an Indian to recover the cost for goods sold to the Indian.[93] The Court reversed the Arizona court's ruling, holding that the tribal court had jurisdiction to handle the case and that only Congress could take the authority away from the tribe.[94]

However, Congress's responsibility to tribes remained unclear in 1968, when the Menominee tribe sought to hold the United States accountable for "destroying property rights conferred by treaty."[95] The Supreme Court denied the tribe compensation, holding that the tribe retained special hunting and fishing rights and that the tribe remained immune from the state's regulation.[96] The dissent accurately highlighted the tribe's formal termination and pointed to the statute's plain language, which was that upon termination "the laws of the several States shall apply to the tribe and its members."[97]

In contrast, two years later, the Supreme Court upheld a tribe's mineral interest in the Arkansas River bed because the United States had promised by treaty "no part of the land granted should ever be embraced in any territory or state."[98] And in 1978, the Court affirmed that while Indian nations were sovereign, their sovereignty was limited and subject to the whim of Congress.[99] It specifically held that only Congress had the power to completely invalidate the sovereignty

88. *Id.*
89. Sheppard, *supra* note 25, at 682.
90. *Id.*
91. 25 U.S.C.A. § 478.
92. Williams v. Lee, 358 U.S. 217, 217 (1959).
93. *Id.* at 217–18.
94. *Id.* at 223.
95. Menominee Tribe of Indians v. U.S., 391 U.S. 404, 413 (1968).
96. *Id.* at 414.
97. *Id.*
98. Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970).
99. U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

of the Indian nation.[100] Two years later, the Court held that tribal sovereignty was dependent on the federal government, not the states.[101] And in 1990, the Court held that tribes have the power to exclude people from tribal lands,[102] once again acknowledging tribes as sovereign nations apart from states, but subject to federal law.[103]

Congress clarified the relationship between the federal government and the tribes, and tribal land rights, by enacting several more statutes. In 1972, Congress enacted the Quiet Title Act ("QTA"),[104] a limited waiver of sovereign immunity for disputes regarding real property interests adverse to the United States, but it excluded Indian trust lands from the waiver.[105] In 1983, Congress enacted the Indian Land Consolidation Act ("ILCA")[106] in an effort to assist tribes with reacquiring their land base.[107] In 1994, Congress added two subsections to the IRA with the purpose of eliminating distinctions between federally recognized tribes regarding privileges and immunities available to the Indian tribe.[108]

Although the Supreme Court considered tribes sovereign nations, the federal government had the power to decide what that sovereignty meant.[109] While tribal governments had broad power to adopt and govern their own affairs within Indian land,[110] laws adopted by the tribes had to pass the review of the Bureau of Indian Affairs ("BIA"), a department within the Department of the Interior ("DOI").

IV. Recent Supreme Court Interpretation of Indian Law as it Pertains to Trusts

Initially, courts affirmed the view that only the federal government had the power to govern tribes, not states.[111] Over time, the courts continued to reduce tribes' sovereign authority, giving even more au-

100. *Id.*

101. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

102. Duro v. Reina, 495 U.S. 676, 696 (1990).

103. *Id.*

104. QTA is codified at 28 U.S.C.A. § 2409a (West 2012).

105. 28 U.S.C.A § 2409a; 28 U.S.C.A. § 2409(a); Patchak v. Salazar, 632 F.3d 702, 712 (D.C.C.C. 2011) (stating that the QTA "reflects a congressional policy of honoring the fed government's solemn obligations to Indians").

106. 25 U.S.C. §§ 2202–03 (2006).

107. §§ 2202–2204; *see* flyer, *available at* http://www.law.seattleu.edu/documents/indian-institute/doiindianlandconsolidact.pdf (ILCA focuses on acquiring fractionated land through purchase and then transfer of the deed to the tribe.).

108. Brief for Amici Curiae National Congress of American Indians in Support of Defendants-Appellees at 17–18, Carcieri v. Salazar, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228.

109. *See* U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

110. U.S. v. Kagama, 118 U.S. 375, 381–82 (1886).

111. *Id.* at 380.

thority to the federal government,[112] which has led to recent cases affecting Indian land trust acquisitions.

A. *Key Cases*

1. *Carcieri v. Salazar*

In 2009, the Supreme Court's interpretation of the IRA in *Carcieri v. Salazar* substantially shifted the stability that trust-status had brought to tribes.[113] The Court interpreted the IRA's definition of *Indian* as limited to only those tribes "now under federal jurisdiction."[114] Specifically, the Court held the tribe had to be under federal jurisdiction as of the time of the enactment of the Act in 1934,[115] in stark contrast to the decades of interpretation by both the Secretary and Congress.[116]

The *Carcieri* issue arose in 1992, when the Narragansett tribe of Rhode Island obtained thirty-one acres of land "for the purpose of constructing low-income housing for tribal members,"[117] and the question of whether the land would be subject to local regulations became relevant.[118] In response, the tribe asked the Secretary to place the land into trust.[119] The Secretary approved the request, and the federal district court affirmed it,[120] but *Rhode Island*[121] appealed the district court's ruling, claiming section 5 of the IRA was "an unconstitutional delegation of legislative authority."[122]

In 1983, the Narragansetts had become a federally recognized tribe, and, five years later, the Secretary placed the 1,800 acres of land into trust for the tribe.[123] However, the thirty-one acres at issue in *Carcieri* were not a part of the 1,800 trusted acres, but were "separated from those lands only by a Town road."[124]

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112. Plains Commerce Bank v. Long Family, 554 U.S. 316 (2008).

113. Stand Up for California! v. U.S. Dept. of the Interior, 919 F. Supp. 2d 51, 66 (D.D.C. 2013); New York v. Salazar, No. 6:08-CV-00644, 2012 WL 4364452, at *8 (N.D.N.Y Sept. 24, 2012).

114. *Carcieri*, 555 U.S. at 394.

115. *Id.*

116. U.S. v. Wheeler, 435 U.S. 313, 323 (1978); *Carcieri,* 555 U.S. at 391.

117. Brief for Respondents in Opposition at 3, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 225448.

118. *Carcieri*, 555 U.S. at 385.

119. Brief for Respondents in Opposition at 4, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 225448.

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

121. All parties opposing the Secretary's decision are hereinafter referred to as *Rhode Island*.

122. Brief for Respondents in Opposition at I., Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 225448.

123. *Id.* at 3.

124. Brief for the Federal Appellees at 8, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568225.

On appeal to the First Circuit, Rhode Island insisted that the Secretary had always interpreted the word *now*, in the IRA's Indian definition, to mean when the IRA was enacted in 1934,[125] and, thus, only tribes that were both federally recognized and under federal jurisdiction at that time were subject to the benefits of the IRA.[126] Rhode Island insisted that it was not until the 1970s that the Secretary began to place land into trust for tribes, who did not meet the IRA criteria, but that Congress specifically authorized these individual acquisitions outside the IRA authority.[127]

The Secretary responded that the Narragansetts were a federally recognized tribe, as evidenced by the tribe's continued existence since at least the 1600s, and as such the tribe was entitled to the benefits of the IRA.[128] Further, the Secretary insisted that the IRA did not require tribes to be both federally recognized and under federal jurisdiction in 1934.[129] The National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations ("National Congress") wrote a brief for amici curiae in support of the Secretary's decision to place the Narragansett tribe's land into trust.[130] In its brief, the National Congress argued that the term *now* referred to the "moment when the Secretary exercises her statutory authority,"[131] and it provided several case examples showing that *now* did not refer to statutory enactment but to the time the prescribed action took place.[132]

In January 2007, the First Circuit heard the case en banc.[133] Six months later, the majority affirmed the district court's findings and held that the term *now* was ambiguous; thus, the Secretary had authority, under the *Chevron* doctrine,[134] to interpret the word's meaning within the IRA.[135] Rhode Island petitioned for, and the Supreme Court granted, certiorari on the issue.[136]

125. State Appellant's Response to Amici Curiae at 1, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2005 WL 6119903.

126. *Id.* at 2.

127. *Id.*

128. Brief for the Federal Appellees at 12, Carcieri v. Salazar, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228.

129. State Appellant's Response to Amici Curiae at 6, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2005 WL 6119903.

130. Brief for Amici Curiae National Congress of American Indians in Support of Defendants-Appellees at *15, Carcieri v. Salazar, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228 (stating the Secretary's trust authority extends to the Narragansett tribe).

131. *Id.*

132. *Id.*

133. Carcieri v. Kempthorne, 497 F.3d 15, 15 (1st Cir. 2007).

134. Highland, *supra* note 15, at 939–40.

135. *Kempthorne*, 497 F.3d at 22.

136. Petition for a Writ of Certiorari at i., Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526), 2007 WL 3085107.

In the Supreme Court hearing, the Secretary protested the State's continued claims, contending that the Secretary had authority to take land into trust for a currently recognized *tribe*, and that the IRA defines *tribe* differently than *Indian*.[137] The IRA defines *tribe* as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation,"[138] but it does not include the phrase "now under federal jurisdiction," as used to define *Indian*.[139]

During oral arguments, the Supreme Court's focus was on the term *now*, and whether it restricted the trust benefits of the IRA to a "finite group."[140] Specifically, counsel for Rhode Island argued that the definition of *Indian* modified the definition of *tribe* because *tribe* referred to an *Indian tribe*.[141] Further, counsel argued that the IRA was a limited, remedial policy intended to compensate the Indians who were affected by the general allotment period.[142] Chief Justice Roberts, writing for the majority, found Rhode Island's counsel's "backward-looking perspective . . . to make perfect sense."[143]

In its opinion, the Supreme Court concluded that the IRA authorized the Secretary to take land into trust "for the purpose of providing land for Indians,"[144] but that *Indian* meant Indians "who are members of any recognized Indian tribe now under Federal jurisdiction."[145] The Court applied principles of statutory construction to determine whether *now*, as used in the statute, was ambiguous.[146] This was an important question, because if the statute was ambiguous, then the Court would be required to give deference to the Secretary's interpretation.[147]

The Court held, according to the statute, that the word *now* was unambiguous and limited the word *Indian*.[148] It therefore concluded that the statutory language limited the Secretary's authority to take land into trust.[149] Perhaps of greater consequence to the tribe was the Court's holding that the Secretary's failure to refute Rhode Island's claim that the Narragansett tribe "was neither federally recognized nor under [federal] jurisdiction"[150] in 1934 was reason alone to deter-

137. Brief for the Respondents at 12, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3883433.
138. 25 U.S.C.A. § 479 (West 2012).
139. *Id.*
140. Transcript of Oral Argument at 3–4, 14–15, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526).
141. *Id.* at 23.
142. *Id.* at 8.
143. *Id.* at 39.
144. Carcieri v. Salazar, 555 U.S. 379, 381–82 (2009) (citing 25 U.S.C.A § 465).
145. *Id.* at 388.
146. *Id.* at 387.
147. Highland, *supra* note 15, at 939–40.
148. *Carcieri*, 555 U.S. at 391.
149. *Id.*
150. *Id.* at 395–96.

mine the Secretary lacked the authority to take the thirty-one acres into trust.[151]

Immediate outcries to restore the tribes' security of trust-acquisitions were made, but, just three years later, the Court would further undermine tribal efforts for land stability.

2. *Pottawatomi Indians v. Patchak*

In June 2012, the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* Court clarified that the QTA did not prevent courts from removing tribal land from trust if the claimant holds no interest in the land, even if the challenge comes many years after its placement into trust.[152] Before *Patchak*, state and local governments were given notice when the Secretary was considering whether to put land into trust, and they had thirty days to file disputes of the acquisition with the DOI.[153] The Secretary would then put the acquisition on hold and take any disagreement to court.[154] *Patchak* opens the door to reversing trust acquisitions years after the court resolved potential disagreements.

Patchak involved a dispute regarding the Secretary's decision to take land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band"), also known as the Gun Lake Band.[155] The Secretary federally recognized the Band as an Indian tribe in 1999.[156] In 2001, the Band asked the Secretary to take a parcel of land into trust, but a non-profit organization challenged this request.[157] After the district court rejected the organization's challenge, David Patchak, a resident of the township where the parcel of land was located, filed suit opposing the Secretary's decision, more than three years after the Secretary's notice was given about putting the Band's land into trust.[158]

In Patchak's brief to the District of Columbia Circuit, his chief concern involved the tribe's proposed plans for the land, which included a gambling complex.[159] He argued that his three-year delay in filing suit was reasonable because it came in response to the Supreme Court's

151. *Id.* at 396.

152. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012); Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, at *8 (holding that *Patchak* indicated courts "do have the power to strip the federal government of title to land taken into trust . . . as long as the claimant does not assert an interest in the land.")

153. *Id.* at 2203.

154. *Cachil Dehe Band*, 2013 WL 417813, at *1–2.

155. Brief for Respondent David Patchak at 1, Patchak v. Salazar, 132 S. Ct. 2199 (2012) (Nos. 11–246, 11–247), 2011 WL 5548714.

156. *Id.* at 2.

157. *Id.* at 3.

158. *Id.* at 5.

159. Appellant's Corrected Final Reply Brief at 2, Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011) (No. 09-5324), 2010 WL 4569094.

decision to grant certiorari in *Carcieri*, and that the grant gave notice to both the Secretary and the Band that the Band may be "ineligible for an IRA land-in-trust acquisition."[160] Patchak maintained that his suit was not barred because the Administrative Procedure Act ("APA") waived the DOI's sovereign immunity.[161] Under the APA, the court had authority to set aside an agency's decision if "the agency's actions were not in accordance with law."[162] He claimed that the Band was not a federally recognized Indian tribe in 1934 and that he had an interest in enforcing the prescribed limit of eligible tribes under the IRA's land-in-trust acquisition; thus, he had prudential standing.[163]

Unsurprisingly, the Secretary agreed with the district court's finding that Patchak lacked prudential standing.[164] The Secretary maintained that the APA did not apply to the case because the QTA expressly forbade the relief Patchak sought.[165] The Secretary had already decided to take the land into trust before Patchak's suit.[166] The QTA "enacted a limited waiver of sovereign immunity [that] allow[ed] parties claiming title to real property adverse"[167] to the federal government, but it excluded claims that sought to divest the federal government's title to Indian trust lands.[168] The Secretary insisted the thirty days following the announcement to take the land into trust was the appropriate period of time that Patchak should have filed his suit.[169]

The circuit court agreed that Patchak had prudential standing and held that he also had Article III standing because the proposed casino's impact on his quality of life would be an "injury-in-fact fairly traceable to the Secretary's fee-to-trust decision."[170] The circuit court also held that the QTA's exclusion did not apply because Patchak's suit was not the sort of action applicable under the Act.[171] The court reversed the district court's judgment and remanded the case for further proceedings, but the Supreme Court granted certiorari at the Secretary's request.[172]

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160. *Id.* at 17–18.
161. *Id.* at 9–10.
162. New York v. Salazar, No. 6:08-CV-00644, 2012 WL 4364452, at *7 (N.D.N.Y Sept. 24, 2012) (citing 5 U.S.C. § 706(2)(A)).
163. Appellant's Corrected Final Reply Brief at 5–6, Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011) (No. 09-5324), 2010 WL 4569094.
164. Answering Brief of Defendants-Appellees (Final Brief) at 20, Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011) (No. 09-5324), 2010 WL 4569092.
165. *Id.* at 21–22.
166. *Id.* at 12.
167. *Id.*
168. *Id.*
169. *Id.* at 15–16, (the land had already been taken into trust by this point in the proceedings).
170. Patchak v. Salazar, 632 F.3d 702, 704 (2011).
171. *Id.* at 708.
172. *Id.* at 712–13.

Hearing much of the same arguments as the lower courts, the Supreme Court affirmed the circuit court's ruling and explained that there was a distinction between Patchak's claim and a QTA claim in that Patchak was not claiming an actual interest in the land.[173] The Court held that the QTA provisions did not apply in Patchak's case and that until Congress made a QTA-like judgment for suits like Patchak's, cases like his would fall "within the APA's general waiver of sovereign immunity."[174]

Following *Patchak*, litigation arose in courts that relied on *Patchak* standing grounds and on the *Carcieri* limits on the IRA.[175]

3. *New York v. Salazar*

Just three months after *Patchak*, a federal district court in New York consolidated several motions for summary judgment regarding the Secretary's decision to take land into trust.[176] The plaintiffs in five separate but related cases, ranging from the State of New York to New York residents, filed suits to dispute the Secretary's 2008 decision to place 13,000 acres of land into trust for the Oneida Indian Nation of New York ("OIN").[177] Over time, the OIN had purchased the land at full market value;[178] this was land that had previously been lost through agreements with the State.[179] The tribe acquired over 17,000 acres, 13,000 of which the Secretary approved to be placed into trust.[180]

On the heels of *Carcieri*, the *New York v. Salazar* plaintiffs filed suit alleging that the OIN was not a federally recognized tribe and was not under federal jurisdiction in 1934.[181] Further, the plaintiffs claimed that the land itself did not qualify for the IRA trust acquisition because the land had not been subject to the General Allotment Act, and that the Secretary's application of the IRA violated the Tenth Amendment.[182]

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173. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2206 (2012).

174. *Id.* at 2207, 2210.

175. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, *2–4 (explaining that the plaintiffs opposed Secretary's acquisition of land pursuant to the IRA and do not claim an interest in the land); New York v. Salazar, No. 6:08-CV-00644, 2012 WL 4364452, at *5, *8 (N.D.N.Y Sept. 24, 2012) (discussing the plaintiffs' claim that the IRA did not apply to the OIN).

176. *Salazar*, 2012 WL 4364452, at *1.

177. *Id.*

178. Brief in opposition at 8, Madison County v. Oneida Indian Nation of New York, 2013 WL 205941 (U.S.).

179. *Id.* at 5.

180. *Salazar*, 2012 WL 4364452, at *1.

181. *Id.*

182. *Id.* at *3, *5.

In determining whether summary judgment was appropriate, the district court considered the issue of whether the IRA applied to the OIN.[183] Unlike the *Carcieri* court, this court did not make the final determination of the tribe's 1994 status.[184] Instead, amidst strong arguments by both parties to the contrary, the district court remanded the case to the Secretary for additional investigation or explanation,[185] after determining that the Secretary had released his Record of Decision ("ROD") on the case prior to the *Carcieri* decision, and it lacked an analysis regarding the *Carcieri* issue.[186] Both parties expressed the futility of remanding the case to the Secretary for further analysis and agreed that the court should determine whether the tribe was under federal jurisdiction, as a matter of law, based on the facts provided by the parties.[187] But the court decided that it lacked the expertise to make such an analysis, instead expounding on the Secretary's expertise and special skills in making this determination.[188]

New York v. Salazar highlights the continued potential suits brought by numerous plaintiffs with *Patchak* standing, not only regarding the Secretary's authority to place Indian land into trust, but also regarding whether the Secretary's process for determining whether a tribe was under federal jurisdiction in 1934 should be subject to judicial review in each case.[189]

B. *The Effect on the Trust-Acquisition Process Under the IRA*

1. Impact on Trust Status

Before *Carcieri* and *Patchak*, the Indian land-to-trust process under the IRA had developed into a system that took place in three general steps.[190] In the first step, after a federally recognized tribe requested the Secretary to take Indian owned land into trust, the Secretary considered several factors, including: (1) the tribe's need for additional land; (2) how the tribe would use the land; (3) the acquisition's impact on the state and local government; and (4) the location of the land in relation to state boundaries.[191] When requested land is farther away from the boundaries of a tribe's reservation, the Secretary would give greater scrutiny to the request.[192]

183. *Id.* at *8.
184. *Id.* at *15.
185. *Id.* at *11.
186. *Id.* at *14.
187. *Id.* at *12.
188. *Id.* at *11.
189. *See* Stand Up for California! v. U.S. Dept. of the Interior, 919 F. Supp. 2d 51, 82 (D.D.C. 2013).
190. This is the Author's three-step generalization of the process based on the following case cites.
191. *Stand Up for California!,* 919 F. Supp. 2d at 57.
192. Sheppard, *supra* note 25, at 685–86.

In the second step, the Secretary would announce his decision after an extensive administrative review.[193] If the Secretary approved the request, the announcement notified state and local governments that they had a thirty-day period to provide written comments relating to the proposed acquisition. During this time, the Secretary voluntarily stayed the decision past the thirty-day window to put the land into trust until any disputes were resolved,[194] sometimes forcing tribes to wait years before land could be secure.

Finally, in the third step, notwithstanding judicial determinations to the contrary, the Secretary formally accepted the land into trust and tribes began following through on their plans for the land, reaping the benefits of trust-status security.

Carcieri affected the first step in this process. When a tribe requests that land be taken into trust under the IRA, the Secretary will have to determine whether the tribe is subject to the IRA.[195] This is a fact-intensive process, which can take a great amount of time and money from both the BIA and the tribes. Even when the Secretary determines the tribe was under federal jurisdiction in 1934, the Secretary faces the hurdle of litigation in the second step.[196]

Patchak affects steps two and three of the process; thus, propelling the Secretary to alter the second step.[197] The Secretary no longer follows the self-imposed stay, because the purpose of the thirty-day notice, and taking disputes to the courts, was to allow judicial review before transferring the title to the federal government due to the interpretation that the QTA prevented such a review once title was transferred.[198] After *Patchak*, this concern is no longer relevant because the *Patchak* court suggested that courts could vacate trust transfers after the land has been placed into trust.[199]

Subsequently, the third step, transferring the land into trust, can happen quickly once the Secretary makes the decision to accept the land.[200] However, tribes may find it more difficult to secure financing to begin building on the land, even after the trust transfer, because the

193. Petition for a Writ of Certiorari at 3, Patchak v. Salazar, 132 S. Ct. 2199 (2012) (No. 11-247), 2011 WL 3780730.

194. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, at *2.

195. *New York,* 2012 WL 4364452, at *9 (plaintiffs urged the court to consider several factors to determine whether the tribe is subject to the IRA based on *Carcieri* reasoning); *see generally* Carcieri v. Salazar, 555 U.S. 379 (2009).

196. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, at *2 (E.D. Cal. Jan. 30, 2013).

197. *Stand Up for California!,* 919 F. Supp. 2d at 60–61 ("BIA no longer following its self-stay procedure because . . . [*Patchak*] held that the [QTA] no longer bars challenges.").

198. *Id.*

199. *Id.* at 82 ("*Patchak* court suggested . . . that courts would retain jurisdiction to vacate a trust after it is consummated.").

200. *Id.*

previous trust security may take years after the transfer to bring to fruition.[201]

2. Federal Recognition Pertaining to the IRA

Resolving the Supreme Court defined limits under the IRA are not so easy because federal recognition has its own history. Early on, *federal recognition* was given to the tribes that the federal government had a relationship with and those tribes that were allowed to organize pursuant to the IRA.[202] The DOI did not develop a uniform process for determining federal recognition of a tribe until 1978.[203] Thus, the reliability of the process between 1934 and 1978 is questionable, which has been demonstrated by the Secretary's acknowledgment that there were tribes that had been previously recognized by the federal government but had been ignored while the BIA went through organizational changes in the past.[204] Thus, after the passage of the IRA, there were acknowledged tribes with limited legal rights that were not federally recognized until much later.[205]

Less than forty years later, the federal government terminated the wardship of several tribes because the tribes were found to be capable of self-government and no longer in need of federal supervision.[206] The loss of federal recognition led to the losses of tribal land once again for many tribes whose relationships were terminated with the federal government under this policy.[207] Only Congress can terminate the federal recognition of a tribe or restore recognition to a terminated tribe.[208]

In 1978, Congress gave the Secretary the power to recognize federal groups possessing sovereign authority, and eligibility for federal services.[209] The criteria for federal recognition was created by the DOI, not by statute,[210] and federal recognition required:

> (1) a tribe must have been identified as an American Indian entity since 1900; (2) it must comprise a distinct community and have existed as a community from historical times; (3) it must have political influence over its members; (4) it must have membership criteria; and (5) it must have a membership that consists of individuals who

201. *Stand Up for California!,* 919 F. Supp. 2d at 61.

202. Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 301 (2001).

203. Answering Brief of Appellees at 5, Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 170 (D.D.C. 2011) (No. 11-5328) 2012 WL 2675361.

204. Brief of Appellant Muwekma Ohlone Tribe at 13, Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 170 (D.D.C. 2011) (No. 11-5328) 2012 WL 2675362.

205. *Id.*

206. Brownell, *supra* note 202, at 303.

207. *Id.*

208. Williams v. Lee, 358 U.S. 217, 223 (1959).

209. 25 C.F.R. § 83.2.

210. Brownell, *supra* note 202, at 301.

> descend from a historical Indian tribe and who are not enrolled in any other tribe.[211]

Since then, Congress enacted the Federally Recognized Indian Tribe List Act ("Act") in 1994.[212] The Act required the Secretary to keep a list of all federally recognized tribes that were eligible for programs and services provided by the federal government based on their Indian status.[213] However, the list has never included the date the tribe became federally recognized.[214] Before *Carcieri*, this distinction may have meant little, but now, it is the critical issue in litigation regarding trust acquisitions under the IRA. One court described federal recognition as "recognition of a previously existing status,"[215] which supports the first factor the DOI considers in its process.

But the Secretary must now develop a process for what it means to be under federal jurisdiction in 1934. In one case, the Secretary has argued that if a tribe was given the option to vote on accepting the IRA in 1934 then the tribe was under federal jurisdiction at that time, regardless of whether the tribe voted against accepting the IRA.[216] Additionally, the Secretary has held out treaties that were in effect in 1934 as examples of a relationship between the government and the tribe for purposes of the IRA.[217] But whether these factors will be upheld as a reasonable means for determining what under federal jurisdiction means for the IRA is for the courts to decide.

V. Solving the Trust-Status Issue

Since the *Carcieri* decision, there have been calls for various *Carcieri* fixes, but these solutions fail to consider the full impact recent cases have made on the land-to-trust acquisition process.

A. *Proposed Solutions*

1. Agency Fix

Howard L. Highland has suggested using the *Chevron* doctrine to solve *Carcieri's* adverse effects.[218] Specifically, Highland suggested

211. *Id.* at 302 (citing 25 C.F.R. § 83.7 (a)-(f)).

212. Brief for the Federal Appellees at 15, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568225.

213. *Id.*

214. Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations in Support of Defendants-Appellees at 19, Carcieri v. Kempthorne, 497 F. 3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228.

215. Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations in Support of Defendants-Appellees at 13, Carcieri v. Kempthorne, 497 F. 3d 15 (1st Cir. 2007) (No. 03-2647), 2004 WL 5568228 (citing Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994)).

216. New York v. Salazar, No. 6:08-CV-00644, 2012 WL 4364452, at *10 (N.D.N.Y Sept. 24, 2012).

217. *Id.* at 11.

218. Highland, *supra* note 15, at 933.

that the Secretary should use the explicit delegation from alternative statutes to create regulations that fill the gap left by Congress to provide lands for Indians who were not under federal jurisdiction in 1934.[219] Highland relies on the fact that numerous statutes authorize the Secretary's trust acquisitions; thus, this solution would be quicker than waiting for "new regulations or to await corrective legislation."[220] *New York v. Salazar* supports Highland's premise that courts would affirm the Secretary's future decisions based on agency deference, but *Carcieri* provides little security that the Supreme Court will put as much weight in agency deference when it comes to statutory interpretation.[221] More importantly, Highland's solution does not prevent private citizens with prudential standing to file suits requesting courts to vacate trust transfers.[222]

2. Legislative Fix

Amanda D. Hettler pontificates that *Carcieri* created a "historic opportunity" for lawmakers to reform the entire land-to-trust process.[223] She expresses the inadequacies of the current process by relying on the little weight given to state and local governments.[224] She suggests the reform should effectively balance tribal and state interests, and that the Secretary's wide discretion should be remedied.[225] To further this goal, Hettler urges Congress to define "which lands may be taken into trust and for what purposes."[226] Additionally, she urges lawmakers to give clear guidance to the Secretary regarding "the relative weight the competing interests should have in the process."[227] Her proposed solution includes requiring the Secretary to give state and local governments more than thirty days to express their concerns.[228]

Hettler's solution fails to give the appropriate weight to the policy underlining the IRA and other federal Indian law statutes enacted since 1934. She considers the IRA in the same way Justice Roberts does; the backward-looking perspective makes perfect sense.[229] But tribal sovereignty requires certain duties and obligations on the part of the federal government until Congress determines that the relation-

219. *Id.* at 944–45.
220. *Id.* at 942.
221. Carcieri v. Salazar, 555 U.S. 379 (2009) (interpreting the word "now" to be unambiguous, rejecting the Secretary's interpretation).
222. Highland's review understandably does not account for the implications of *Patchak*, as *Patchak* was released a year following Highland's review.
223. Hettler, *supra* note 16, at 1377.
224. *Id.*
225. *Id.* at 1399.
226. *Id.* at 1399.
227. *Id.* at 1399–1400.
228. *Id.* at 1392, 1400.
229. *Id.* at 1402 (stating to "ensure that the [IRA] does not become [a program] that persists long after its purpose has been accomplished").

ship is at an end. Accepting land into trust for tribes is a part of the federal government's duty to protect tribes and affirm their sovereignty. If Congress were to follow Hettler's suggestions, the IRA would be at odds with other federal Indian laws.

G. William Rice recognized *Carcieri* has, or will, create a problem for hundreds of tribes that have placed land into trust, and will result in unending litigation regarding whether a tribe, on a case-by-case basis, falls within the terms of the IRA.[230] Rice proposed a two-part *Carcieri* fix.[231] The first part would be to allow all tribes to acquire lands as federally incorporated tribes; allowing the tribes to purchase and manage lands like other federally chartered organizations and subject the lands to the exclusive jurisdiction of the federal government and the tribe.[232] The second part simply purports to clean up the problematic language of the IRA.[233]

Like Highland's proposed solutions, Rice fails to consider the *Patchak* implications. In light of *Patchak*, a *Carcieri* fix must come from Congress.

B. *Pending Legislation*

Carcieri was decided during the latter part of the 110th congressional session, but no bills were presented to Congress for a legislative fix during that session. However, during the 111th congressional session, three bills were introduced to address the problematic IRA language.[234] The bills were separately introduced by Representatives Tom Cole, Dale Kildee, and Senator Byron Dorgan.[235] All three bills failed to contain language ratifying and affirming previous trust acquisitions,[236] but the bills proposed other similar changes in language: (1) making the definitions of the IRA "effective beginning" on the date of the enactment, (2) removing the limits created by "now under federal jurisdiction" and replacing the language with "any federally recognized Indian tribe," and (3) removing the definition for *tribe* and inserting an expansive definition of *Indian tribe* that includes any tribe the Secretary acknowledges.[237] Neither bill made it past being placed on the legislative calendar.

230. Rice, *supra* note 79, at 594.
231. *Id.*
232. *Id.* at 594–95.
233. *Id.* at 595.
234. S. 1703, 111th Cong. (2009); H.R. 3697, 111th Cong. (2009); H.R. 3742, 111th Cong. (2009) (all three bills have the same title, "To Reaffirm the Authority of the Secretary to Take Land Into Trust for Indians").
235. S. 1703, 111th Cong. (2009); H.R. 3697, 111th Cong. (2009); H.R. 3742, 111th Cong. (2009) (all three bills have the same title, "To Reaffirm the Authority of the Secretary to Take Land Into Trust for Indians").
236. S. 1703, 111th Cong. (2009); H.R. 3697, 111th Cong. (2009); H.R. 3742, 111th Cong. (2009); *see also* S. 676, 112th Cong. (2011).
237. S. 1703, 111th Cong. (2010); H.R. 3697, 111th Cong. (2010); H.R. 3742, 111th Cong. (2010).

Three legislative bills were before the 112th Congress to amend the IRA language.[238] S. 676 proposed to amend the IRA by replacing the language similar to the three bills in the 111th Congress, but this bill included a ratification and confirmation of prior decisions to take land into trust and would not affect existing federal laws or regulations relating to Indian tribes.[239] This bill is known as the Akaka bill, as it was introduced by Senator Akaka, and was unanimously approved by the Senate Committee on Indian Affairs.[240]

H.R. 1291 was introduced by Representative Cole and proposed the same language amendments as the bills in the 111th Congress, thus the bill did not include language protecting or confirming prior land-trust decisions.[241] This bill also included an Alaska-specific limitation, making Alaska an exception to the Secretary's discretion to put land into trust, which is understandably opposed by Indian Nations.[242] H.R. 1234, introduced by Representative Kildee, proposed amendments to the IRA language in the same way as the other two bills, but also: (1) included ratification and confirmation of prior land-trust decisions, (2) would not have affected existing federal laws, and (3) does not include an Alaska-specific provision.[243] H.R. 1234 had thirty co-sponsors.[244] Neither bill of the 112th congressional session made it past being placed on the legislative calendar.[245]

The 113th Congress has been even slower to present solutions to the *Carcieri* problem.[246] Representative Cole has made another attempt at corrective legislation with H.R. 279.[247] But this bill replicates the past bills proposed in the 111th Congress, which fails to firmly protect the Secretary's prior land acquisitions under the IRA.[248] Cole introduced this bill January 15, 2013, and the bill was referred to the Subcommittee on Indian and Alaska Native Affairs. Recently, Representative Edward J. Markey introduced H.R. 666[249] titled in a similar fashion as H.R. 279: "to reaffirm the authority of the Secretary to take land into trust for Indian tribes."[250] The bill was referred to the House Committee on Natural Resources.[251] H.R. 279 has ten co-

238. S. 676, 112th Cong. (2011); H.R. 1291, 112th Cong. (2011); H.R. 1234, 112th Cong. (2011).
239. S. 676, 112th Cong. (2011).
240. *Id.*
241. H.R. 3697, 111th Cong. (2010).
242. *Id.*
243. H.R. 1234, 112th Cong. (2011).
244. *Id.*
245. S. 676, 112th Cong. (2011); H.R. 1291, 112th Cong. (2011); H.R. 1234, 112th Cong. (2011).
246. H.R. 279 was not introduced until January 15, 2013 and H.R. 666 was introduced February 13, 2013.
247. H.R. 279, 113th Cong. (2013).
248. *Id.*
249. H.R. 666, 113th Cong. (2013).
250. *Id.*
251. *Id.*

sponsors, including Representative Kildee.[252] Following the pattern of bills proposed each year and the failure to enact any one of eight bills in the past three years, the likelihood of success for either of these two bills during the 113th congressional session seems dim.

C. *The Best Solution*

Unfortunately, the best solution still resides with our slow-reacting Congress. Considering alternative solutions proposed, tribes would be left with: (1) unsecure land already taken in trust because of potential plaintiffs with prudential standing, (2) a questionable mechanism for advancing tribal government and community, and (3) an unpredictable yet costly and timely process to get land taken into trust. As courts have pontificated throughout history, only Congress has the authority to make federal Indian law; thus, a complete *Carcieri*/*Patchak* fix must come from Congress.

Congress should approve a legislative bill proposing the same language as S. 676, which includes: (1) a modification of the problematic language, as explained in the previous Section, (2) the ratification and confirmation of the Secretary's prior actions under the IRA, (3) express limits to the amendment to the IRA and no other federal Indian law, except when laws specifically reference the IRA, and (4) a requirement that the Secretary provide a report assessing the *Carcieri* effects on tribes, and a list detailing the tribes affected by *Carcieri*. The repercussions of *Carcieri* demand the 113th Congress to provide legislation clearly expressing the Secretary's authority to take land into trust to provide for Indians. Enacting a statute without all of this provisional language will result in continued litigation and questioning of the Secretary's authority.

VI. Conclusion

Together, *Carcieri* and *Patchak* prevent tribes from seeking economic security under the IRA's land-into-trust provision. These decisions have forced the Secretary and tribes to engage in costly and timely historical research and litigation, which tribes can rarely afford. The history of federal Indian law tells us Congress has a fiduciary duty to Indians, and that Congress has the authority to empower or limit tribal sovereignty. Thus, Congress has a duty to answer the question of whether the Secretary has the authority to place land into trust for Indian tribes that were federally recognized after 1934. To answer this, Congress must enact a statute clearly expressing the authority of the Secretary to take land into trust for all federally recognized Indian tribes.

252. H.R. 279, 113th Cong. (2013).