

# Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak* Decisions

SENATE COMMITTEE ON INDIAN AFFAIRS' HEARING

SEPTEMBER 13, 2012

TESTIMONY OF PRESIDENT JEFFERSON KEEL  
OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

On behalf of the National Congress of American Indians (NCAI), thank you for the opportunity to provide our views regarding this critical topic. Three years ago the Supreme Court decision in *Carcieri v. Salazar* overturned a longstanding interpretation of the Indian Reorganization Act of 1934 and held that the phrase “Indian tribe now under Federal jurisdiction” limits Interior’s authority to acquire land in trust for Indian tribes. Three years have passed since the *Carcieri* decision, and there are at least fourteen pending cases where tribes and the Secretary of Interior are under challenge for placing land in trust for an Indian tribe. Much of this is harassment litigation against Indian tribes that were living on treaty reservations in 1934, and all of it is in conflict with broad federal constitutional jurisdiction over Indian affairs.

Recently, in *Match-E-Be-Nash-She-Wish Band of Potawatami v. Patchak*, the Supreme Court disregarded decades of interpretation of the Quiet Title Act (QTA) to permit retroactive challenges to the status of federal Indian trust land years after it has been place in trust. The *Patchak* decision demonstrates how destructive this *Carcieri* decision could become, and highlights the need for Congressional action to correct the definition of “Indian” within the IRA. NCAI strongly urges Congress to take action swiftly to prevent further harm to tribal lands and the many Indian people, tribal cultures, and tribal jobs that depend on tribal lands.

**BACKGROUND:** The Indian Reorganization Act of 1934 created a comprehensive plan for the future of Indian Nations. Turning away from the destructive practices of the past, Congress found that Indian lands should be protected and restored as places where tribal cultures and traditions are maintained. This plan also includes modern life: democratic and accountable tribal governments; economic development and jobs; respectful relationships with neighboring governments; and tribal institutions for education, healthcare and public safety. With the IRA, Congress renewed its trust responsibility to protect and restore tribal homelands and the Indian way of life.

Today, 78 years later – the IRA is just as necessary as it was in 1934. The purposes of the IRA were frustrated, first by WWII and then by the Termination Era. The work did not begin again until the 1970’s with the Self-Determination Policy, and since then Indian

tribes are building economies from the ground up and must earn every penny to buy back their own land. Still today, many tribes have no land base and many tribes have insufficient lands to support housing, self-government and culture.

### **TRIBAL LAND RESTORATION IS UNDER ATTACK**

- In *Carcieri v. Salazar* (2009), the Supreme Court overturned a longstanding interpretation of the Indian Reorganization Act of 1934 (IRA) and held that the phrase “now under Federal jurisdiction” limits the Department of Interior’s (DOI) authority to provide benefits under the IRA to only those tribes “under Federal jurisdiction” on June 8, 1934.
- Three years have passed since the *Carcieri* decision, and there are at least thirteen pending cases where tribes and the Secretary of Interior are under challenge. There is harassment litigation against tribes who were on treaty reservations in 1934. These legal challenges are pushing a restrictive interpretation in conflict with broad federal constitutional jurisdiction over Indian affairs. Land acquisitions are delayed. Tribal jurisdiction and law enforcement are threatened. Jobs are lost or never created.
- Recently, in *Match-E-Be-Nash-She-Wish Band of Potawatami v. Patchak* (2012), the Supreme Court disregarded decades of interpretation of the Quiet Title Act (QTA) to permit retroactive challenges to the status of federal Indian trust land many years after it has been placed in trust. The Supreme Court also broadened the scope of persons eligible to challenge land into trust decisions under the IRA. This decision opens the door to broad challenges to tribal trust land status by any party asserting a general interest.

### **TRIBAL PRIORITIES FOR PROTECTING THE FUTURE OF LAND INTO TRUST**

The authority of DOI to take land into trust for Indian tribes is one of the pillars of the United States’ trust responsibility towards Indian tribes. Without the ability to take land into trust, tribes are denied the opportunity to protect and develop their cultures and economies. Indian Nations urge Congress to support legislation that will fully restore Interior’s authority to take land into trust for Indian tribes.

- **S. 676** amends the IRA, replacing the language “any recognized Indian tribe now under federal jurisdiction” with “any federally recognized Indian tribe.” It also ratifies and confirms prior land into trust decisions, while clarifying that it will not affect existing federal laws or regulations relating to Indian tribes. S. 676 has been unanimously approved by the Senate Committee on Indian Affairs.
- **H.R. 1291** was introduced by Rep. Cole and amends the IRA, similarly confirming that the IRA applies to “any federally recognized Indian tribe.” This bill also includes an Alaska-specific limitation, which is opposed by

Indian Nations. This bill does not include language protecting or confirming prior land into trust decisions.

- **H.R. 1234** was introduced by Rep. Kildee and also amends the IRA to apply to “any federally recognized Indian tribe.” This bill does not include an Alaska-specific provision. It also ratifies and confirms prior land into trust decisions, while clarifying that it will not affect existing federal laws or regulations relating to Indian tribes. H.R. 1234 has 30 co-sponsors.

**Conclusion:** NCAI urges Congress to support legislation clarifying that the benefits of the IRA are available to all federally recognized tribes. Every time an Indian tribe acquires land, the tribe uses the land to build housing or a health clinic, to protect natural or cultural resources, or to pursue economic development that creates jobs for Indian people and their neighbors. Mostly importantly, restoring tribal lands helps to reverse centuries of federal policies that have prevented Indian Nations from reaching their potential. Thank you for your support on tribal land restoration.