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The Continued Impact of Carcieri on the Restoration of Tribal Homelands: In New England and Beyond

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INTRODUCTION

In 2009, the United States Supreme Court decided *Carcieri v. Salazar*,[1] a case involving the Department of the Interior's (the Department or Interior) authority under section 5 of the Indian Reorganization Act (IRA)[2] to acquire land into trust for the Narragansett Indian Tribe. Prior to the Supreme Court's decision, Interior had long interpreted the IRA as providing statutory authority to acquire land in trust for all federally recognized tribes. Following *Carcieri*, Interior must now determine whether an applicant tribe was "under federal jurisdiction" in 1934 in order to satisfy the IRA's

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

2. Indian Reorganization Act, ch. 576, § 5, 48 Stat. 984, 985 (1934) (codified at 25 U.S.C. § 5108) ("The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, . . . for the purpose of providing land for Indians . . . Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.").

first definition of "Indian"[3] and invoke section 5. Alternatively, the Department may find that a tribe satisfies another definition of "Indian" in the IRA or that there exists separate statutory authority authorizing the fee-to-trust decision, such as a later Congressional act extending the IRA to a specific tribe.

Carcieri has had a cascade of devastating effects across Indian country, as section 5 of the IRA is the primary mechanism by which tribes restore their ancestral lands. Tribes, Interior, and federal courts have grappled with the nebulous idea of what it means for a tribe to have been "under federal jurisdiction" in 1934, consuming limited tribal and Interior resources and upending an already burdensome trust acquisition process. Congress has repeatedly tried, and failed, to fix the issue legislatively by removing the problematic language from the statute. Larger concerns and misperceptions about the fee-to-trust process by state and local governments, other fee-to-trust opponents, and lawmakers on both sides of the aisle have torpedoed these Congressional efforts.

The authors here have already explored the first ten years following the *Carcieri* decision in depth in our article *Enough is Enough: Ten Years of* Carcieri v. Salazar.[4] For a reader who is unfamiliar with the *Carcieri* decision and its implications, we urge you to first read that piece. This Article is intended as a complement, identifying developments from the last several years during the change of presidential administrations. We also explore with particularity the situation of New England tribes who, due to their unique (and unlawful) subjugation to state authority, face a more difficult time showing the historical existence of federal jurisdiction. We conclude, yet again, that the best path forward is a legislative fix. As an alternative, we also support a regulatory proposal intended to formalize the Department's current approach to *Carcieri* and protect past and future fee-to-trust acquisitions made on behalf of tribal nations.

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3. § 19 (codified at 25 U.S.C. 5129) ("The term 'Indian' . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction.").

4. Bethany C. Sullivan & Jennifer L. Turner, *Enough is Enough: Ten Years of* Carcieri v. Salazar*,* 40 PUB. LAND & RES. L. REV. 37 (2019).

I. RECENT ADMINISTRATIVE DEVELOPMENTS

As detailed below, the Trump and Biden administrations have taken vastly different positions on fee-to-trust, generally, and in regards to *Carcieri* specifically. President Trump withdrew several pro-tribal Obama era Solicitor's Opinions, including on *Carcieri*, and revisited several *Carcieri* opinions for particular tribes from the Obama administration. In contrast, President Biden has prioritized restoration of tribal homelands and reinstated Solicitor's Opinions from the Obama administration. This whiplash has complicated the already cumbersome fee-to-trust process, as detailed below.

A. *The Trump Administration*

From the outset of the Trump administration, Interior Secretary Ryan Zinke made it abundantly clear that he viewed the restoration of tribal lands differently than his predecessor when he called for an off-ramp to trust lands so that tribes could become a corporation.[5] By the end of the Trump administration, the fee-to-trust process was in limbo, at best, or shambles, at worst. Trump decisionmakers imposed a new *Carcieri* framework that resulted in confusion regarding the process, settled *Carcieri* decisions being revisited unnecessarily, and off-reservation trust acquisitions languishing before the Assistant Secretary for Indian Affairs.[6]

1. M-37055 & the Four-Step Solicitor Procedures

As explored at length in our original article, the Obama administration, through M-37029, established a two-part framework for determining whether a tribe was under federal jurisdiction in 1934 (referred to throughout this Article as either M-37029 or the two-part framework).[7] M-37029 further opined that a tribe need not be

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5. *Secretary Zinke Advocates 'Off Ramp' for Taking Lands out of Trust*, INDIANZ (May 3, 2017), https://www.indianz.com/news/2017/05/03/secretary-zinke-advocates-offramp-for-ta.asp [https://perma.cc/4TYL-N7SS].

6. *See Trump Administration Erects New Hurdle for Off-Reservation Casinos*, INDIANZ (Apr. 13, 2017), https://www.indianz.com/IndianGaming/2017/04/13/trump-administration-erects-new-hurdle-f.asp [https://perma.cc/KF4V-2AEP].

7. Memorandum from Hilary C. Tompkins, Solic., Dep't of the Interior, to Sally Jewell, Sec'y, Dep't of the Interior (Mar. 12, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf

recognized in 1934, but rather, need only be recognized at the time of its application.[8] Every court to evaluate the two-part framework or a Departmental determination that a tribe was under federal jurisdiction in 1934 has upheld it.[9]

Despite the overwhelming success of the prior Administration's approach to *Carcieri*, in March 2020, the Department, acting through its Office of the Solicitor, re-evaluated its interpretation of the *Carcieri* decision and the IRA, ultimately withdrawing M-37029.[10] In contrast to the clear position taken in M-37029, the Department found a tribe must have been both recognized *and* under federal jurisdiction as of 1934. Specifically, the Department concluded "we interpret the entire phrase 'recognized Indian tribe now under federal jurisdiction' to include tribes 'recognized' in or before 1934 who remained under federal authority at the time of the IRA's enactment."[11]

Nonetheless, the Department specified "we do not take the view that Department officials must have been cognizant at the time of the IRA's enactment that a tribe was 'recognized' or 'under federal jurisdiction,'" acknowledging the Department may have taken subsequent action to correct past errors.[12] The Department further explained "[l]ike M-37029, we interpret 'recognized' . . . to mean something different from the modern concept of 'federally recognized.'"[13] The Department concluded this term should be understood in the political-legal, not ethnological, sense.[14]

[https://perma.cc/83LV-RYEJ] [hereinafter M-37029]; *see* Sullivan & Turner, *supra* note 4, at 77–83.

8. M-37029, *supra* note 7, at 24–25.

9. Sullivan & Turner, *supra* note 4, at 73.

10. Memorandum from Daniel H. Jorjani, Solic., Dep't of the Interior, to David L. Bernhardt, Sec'y, Dep't of the Interior & Tara M. Sweeney, Assistant Sec'y, Indian Affs. 2 (Mar. 9, 2020), https://www.doi.gov/sites/doi.gov/files/m-37055.pdf [https://perma.cc/8Q5E-U9NR]; Memorandum from Kyle E. Scherer, Deputy Solic., Indian Affs., to Daniel H. Jorjani, Solic., Dep't of the Interior 31 (Mar. 5, 2020), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/20200812_DEP_SOL_to_SOL_Slip_Pages.pdf [https://perma.cc/NML7-MELY] [hereinafter Mar. 5, 2020 Deputy Solicitor Memo].

11. Mar. 5, 2020 Deputy Solicitor Memo, *supra* note 10, at 31.

12. *Id.* at 31 n.255 (citing Cty. of Amador v. U.S. Dep't of the Interior, 872 F.3d 1012, 1023–24 (2017); Carcieri, 555 U.S. at 397–98 (Breyer, J. concurring)).

13. *Id.* at 31.

14. *Id.*

As a practical complement to its revised legal interpretation, the Solicitor's Office issued a four-step procedure (the Solicitor Procedures) for determining tribal eligibility.[15] The first three steps articulated different forms of dispositive or presumptive evidence satisfying a tribe's eligibility.[16] Step One solely considered whether Congress enacted legislation after 1934 making the IRA applicable to a particular tribe.[17] Step Two examined whether a tribe was under federal jurisdiction in 1934, as shown by contemporaneous evidence that the federal government exercised or administered its responsibilities over the applicant tribe or its members in 1934.[18] Dispositive evidence included: IRA Section 18 elections, IRA Section 16 constitutions, IRA Section 17 corporate charters, continued existence of ratified treaty rights, inclusion on the Department's 1934 Indian population report, federal efforts to acquire lands on behalf of the tribe in the years leading up to 1934, and inclusion in Volume V of Charles J. Kappler's Indian Affairs, Laws and Treaties.[19]

Step Three considered whether a tribe's evidence sufficiently demonstrates that it was "recognized" in or before 1934 and remained under jurisdiction in 1934.[20] Presumptive evidence included: ratified treaties still in effect in 1934; tribe-specific executive orders; and tribe-specific legislation, including termination legislation enacted after 1934 that acknowledges the existence of a government-to-government relationship with a tribe at the time of enactment.[21]

In the absence of dispositive or presumptive evidence under Steps One through Three, the Solicitor Procedures required weighing the totality of evidence under Step Four.[22] In other words, a tribe was required to submit evidence sufficiently showing that it

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15. *See generally* Memorandum from Daniel H. Jorjani, Solic., Dep't of the Interior, to Tara M. Sweeney, Assistant Sec'y, Indian Affs. (Mar. 10, 2020), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/20200812_DEP_SOL_to_SOL_Slip_Pages.pdf [https://perma.cc/SA4Y-GAXL] [hereinafter Solicitor Procedures].

16. *Id.* at 1.

17. *Id.* at 2.

18. *Id.*

19. *Id.* at 2–6.

20. *Id.* at 6.

21. *Id.* at 8.

22. *Id.*

was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. The inquiry was fact specific, without the same dispositive or presumptive categories of evidence outlined in Steps One through Three. Although Step Four lacked a list of relevant evidence, it did reference the evidence considered in the Part 83 acknowledgment process,[23] such as treaty relations, denomination as a tribe in a Congressional act or executive order, treatment by the federal government as having collective rights in lands or funds, and the existence of lands held for the tribe or its ancestors by the United States.[24]

There are obvious similarities between the *Carcieri* analysis required under the Trump-era Solicitor Procedures and that required under the M-37029 framework. For example, many of the same types of evidence are considered relevant and certain types of evidence, such as the holding of IRA Section 18 or Section 16 elections, were dispositive under both approaches. Yet, as mentioned above, one of the primary distinctions is the Solicitor Procedures' requirement that a tribe must have been federally recognized—as well as under federal jurisdiction—in 1934 to qualify under *Carcieri*. That said, it is not at all clear from the Procedures what types of evidence demonstrate recognition versus federal jurisdiction, and the inquiries seemed to be conflated in practice. The Solicitor Procedures also appeared to diminish the value of evidence that the United States provided services to *individual* tribal members. For example, the Procedures rejected the significance of BIA school records for Indian children unless the schooling was clearly provided for the benefit of their tribe, as well as the federal census records unless specifically generated by the Office of Indian Affairs pursuant to the Appropriations Act of 1884.[25] Moreover, as detailed below, tribes who spent years trying to demonstrate their "under federal jurisdiction" status through the original two-part framework

23. Tribes may be formally acknowledged through 25 C.F.R. Part 83. The regulations require tribes to make certain showings through the submission of detailed evidence in support. *See* 25 C.F.R. § 83.12(a).

24. Solicitor Procedures, *supra* note 15, at 9.

25. Mashpee Wampanoag Tribe v. Zinke, 466 F. Supp. 3d 199, 219 (D.D.C. 2020) (finding that the Department's negative determination for the Mashpee tribe, while issued under the M-37029 standard, "reflect[ed] some of the new standards" in the Department's Solicitor Procedures, such as the treatment of BIA school records and census records).

were forced to start over with a new test and a new showing of recognition.

Interior's new *Carcieri* analysis was viewed with skepticism and alarm by one federal district court judge, who concluded "I don't know how anyone could take that as guidance because it's incomprehensible and so convoluted that it couldn't guide any lawyer in the field."[26] Moreover, the shift to the Solicitor Procedures created confusion and frustration across Indian Country regarding the *Carcieri* process and the practical effect of the new framework.[27] Many wondered *why* the shift had occurred at all, given that there was no identified need to alter the two-part framework under M-37029, which had been afforded consistent deference by the federal courts.[28] Tribal leaders were further frustrated with the complete lack of government-to-government consultation between the Department and tribal nations before the Department unexpectedly changed its approach to *Carcieri*.[29] Ultimately, the new Procedures only served to muddle an already frustrating fee-to-trust process, and forced tribes to spend scant resources on trying to understand and satisfy the new requirements.

2. Decisions Issued Pursuant to the Solicitor Procedures

Although the new *Carcieri* interpretation and accompanying Solicitor Procedures brought much consternation, this framework was only in place for a year until the Biden Administration reverted to the M-37029 approach. While we do not examine every

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26. Transcript of Motion Hearing at 51, Mashpee Wampanoag Tribe v. Zinke, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242), ECF No. 71.

27. *See, e.g.*, Andrew Westney, *Tribes Unsure Where They'll Land with New DOI Trust Policy*, LAW360 (Mar. 25, 2020), https://www-law360-com.rwulaw.idm.oclc.org/articles/1256398/tribes-unsure-where-they-ll-land-with-new-doi-trust-policy [https://perma.cc/5ZDH-59LT].

28. *Id.*; *see also* Confederated Tribes of Grant Ronde Cmty. v. Jewell, 830 F.3d 552, 558 (D.C. Cir. 2016) (applying *Chevron* deference to the Department's two-part framework and its application to the Cowlitz tribe); Cnty. of Amador v. U.S. Dep't of the Interior, 872 F.3d 1012, 1031 (9th Cir. 2017) (upholding the Department's two-part framework and its application to the Ione Band of Miwok Indians), *cert. denied*, 139 S.Ct. 64 (2018).

29. Acee Agoyo, *Trump Administration Changes Course with Withdrawal of Pro-Tribal Homelands Policy*, INDIANZ (Mar. 10, 2020), https://www.indianz.com/News/2020/03/10/trump-administration-charges-course-with.asp [https://perma.cc/NY5P-TDE2].

determination issued pursuant to the Solicitor Procedures, we highlight some of the more notable determinations below.[30]

a. Catawba Indian Nation

Interior issued a *Carcieri* determination for the Catawba Indian Nation contemporaneously with the new Solicitor Procedures, ostensibly with the intent of illustrating the Department's new approach to *Carcieri*. The Catawba Nation has a long history of dealing directly with the State of South Carolina, although there had been periods of federal involvement, including meeting with first U.S. President, George Washington, and receiving federal appropriations from Congress to relocate the Nation into the Indian territory west of the Mississippi (this move was never effectuated).[31] Over time, the Nation lost vast swaths of its aboriginal and reservation lands and beginning in the late nineteenth century it sought federal assistance in bringing Nonintercourse Act land claims against the State of South Carolina.[32] These requests were denied, in part because the Commissioner of Indian Affairs erroneously viewed the Catawba as "state" Indians who were never recognized by the federal government.[33]

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30. The Trump-era Interior did create a much-needed centralized website where all its new *Carcieri* determinations were posted, which helped applicant tribes understand the new approach and developing precedent. *See Solicitor's Eligibility Determinations*, BUREAU OF INDIAN AFFS., https://web.archive.org/web/20210804150814/ https://www.bia.gov/bia/ots/fee-to-trust/solicitors-eligibility-determinations [https://perma.cc/VPN5-TT6Z] (last visited May 15, 2022). Although the new administration has re-instated M-37029, this webpage is still available. The new administration has apparently not continued the practice of posting its *Carcieri* determinations, as the website has not been updated since December 2020. We strongly urge them to do so, as well as prior determinations issued during the Obama administration. Not only does posting prior determinations provide a valuable resource for tribes submitting their own *Carcieri* documentation, but it also demonstrates the significant resources it takes to prepare such determinations.

31. Memorandum from Robert S. Hitchcock, Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Bruce Maytubby, Reg'l Dir., Bureau of Indian Affs. E. Region 2–4 (Mar. 10, 2020).

32. *Id.* at 4.

33. *Id.* at 4–5 (citing a letter from F.E. Leupp, Commissioner of Indian Affairs, dated January 23, 1906); *see also id.* at 5 (detailing a 1911 Commissioner's Annual Report that described the Catawba as having been "'more or less' independent of federal supervision, with South Carolina having 'assumed

Confusion over the Nation's jurisdictional status spurred the colloquy in Congress that led to the problematic addition of the word "now" to the IRA's definition of "Indian" right before the legislation was enacted.[34] Nonetheless, in 1944, the Department confirmed the Catawba Nation's eligibility to organize under the IRA.[35] In the 1970s, the United States brought Nonintercourse Act claims against the State of South Carolina on the Nation's behalf, but the failure of Congress to enact the proposed settlement prompted the Nation to pursue its own lawsuit against the State.[36] Finally, after years of litigation, Congress enacted the Catawba Indian Claims Settlement Act to resolve the land claims in 1993.[37]

Based on this history, the Department issued a positive *Carcieri* finding for the Catawba pursuant to Step One of the Solicitor Procedure. The Department found that the 1993 Settlement Act extended the IRA to the Nation. Specifically, section 9(a) of the Settlement Act provides that the Nation "may organize under the Act of June 18, 1934 [IRA]" and that the Nation "shall be subject to such Act except to the extent such sections are inconsistent with this subchapter."[38] Additionally, section 4(b) provides that the Nation "shall be eligible for all benefits and services furnished to federally recognized Indian tribes and their members because of their status as Indians."[39] The Department concluded the Settlement Act "expressly extended the benefits of the IRA to the Tribe" and its provision "make[s] clear these benefits include the ability to have the Secretary take lands into trust for the Tribe pursuant to Section 5 of the IRA."[40]

The Department further determined no other sections of the Settlement Act restricted or curtailed the applicability of IRA Section 5 to the Nation.[41] While the Settlement Act contained specific provisions governing the creation of a federal reservation and

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sovereign rights over the tribe and its former landed rights' without objection from the federal government").

34. *See id.* at 5–6; *see also* M-37029, *supra* note 7, at 10–12 (describing the colloquy in detail).

35. Hitchcock, *supra* note 31, at 6.

36. *Id.* at 7.

37. *Id.* at 8.

38. *Id.* at 10.

39. *Id.*

40. *Id.* at 11.

41. *Id.* at 15.

acquisition in fee of other properties (all within the State of South Carolina), the Department found these provisions not inconsistent with the extension of IRA Section 5 to trust acquisitions outside of South Carolina (the trust application was for a parcel in North Carolina).[42] Accordingly, the Department found the Nation satisfied Step One of the Solicitor Procedures and qualified for the IRA's trust land provision, at least for acquisitions outside of South Carolina.

b. Kickapoo Traditional Tribe of Texas

Another noteworthy *Carcieri* determination issued pursuant to the Solicitor Procedures was for the Kickapoo Traditional Tribe of Texas.[43] The Tribe originated from the Algonquin Kickapoo tribes of the Great Lakes region and migrated to what is present-day Illinois in 1765.[44] Following the Revolutionary War and the onslaught of settlers into their territory, the Kickapoo and other nearby tribes signed a treaty with the United States ceding approximately 3 million acres of land in exchange for annuity payments and other stipulations.[45] In 1819, the Kickapoo signed another treaty with the United States and removed to lands set aside in Missouri.[46] At this time, a band of Kickapoo moved south to Mexico near present-day Nacogdoches, Texas and were later joined by other Kickapoo.[47] Following the formation of the Republic of Texas and further migrations deeper into Mexico, in 1850 the Kickapoo and other Indians signed a treaty with Mexico securing 70,000 acres of land for the Indian signatories.[48] Nine years later, the Kickapoo were granted land in El Nacimiento, Coahuila (which remains part of Mexico today).[49] Although based in El Nacimiento, many Kickapoo members

42. *See id.*

43. *See generally* Memorandum from Nicholas M. Ravotti, Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Tara M. Sweeney, Assistant Sec'y, Indian Affs. (Dec. 16, 2020), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ots/pdf/Kickapoo_Traditional_Tribe_of_Texas.pdf [https://perma.cc/E6PS-R582].

44. *Id.* at 2.

45. *Id.*

46. *Id.*

47. *Id.* at 2–3.

48. *Id.* at 3.

49. *Id.*

began to travel to the United States as migrant farmers and by the 1970s, had created a semi-permanent encampment at the border town of Eagle Pass, Texas.[50] The Kickapoo residing at this encampment became known as the Texas Band of Kickapoo Indians and in 1983 Congress enacted the Texas Band of Kickapoo Indians Reservation Act, which allowed the Tribe to organize under the IRA.[51]

In its *Carcieri* determination, the Department found the Kickapoo Tribe satisfied Solicitor Procedures Step One due to the 1983 Act's extension of the IRA to the Tribe. Section 2 of the Act states that "services which the United States provides to Indians because of their status as Indians should be provided to [the Tribe's] members."[52] Section 5 of the Act explicitly made the IRA applicable to the Tribe, "[p]rovided, however, that [t]he Secretary is only authorized to exercise his authority under section 5 of [the IRA] with respect to lands located in Maverick County, Texas."[53] Because the property at issue in the Tribe's trust application was located in Maverick County, the Department determined the Secretary has authority to acquire land in trust for the Tribe under Section 5 of the IRA.[54]

Interestingly, however, at the beginning of its determination the Department said "[f]or the reasons explained below, we conclude that the Tribe was *not* under federal jurisdiction in 1934."[55] Yet the Department provided no reasons or explanation whatsoever to support its conclusion that Tribe was not under federal jurisdiction, focusing entirely on the Step One analysis. Perhaps the implication is that the Tribe lacked federal jurisdiction status due to its strong historic ties with Mexico near the time of the IRA's enactment in 1934. Or perhaps the conclusion was tied to the 1983 Act's apparent preclusion of Section 5 authority anywhere outside of Maverick County—although it is unclear how such preclusion is relevant to historical evidence of federal jurisdiction over the Tribe in 1934. In any event, the complete dearth of analysis leaves us without clues. Nor is it clear how this conclusory finding may impact any future trust applications by the Tribe for lands outside of

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 24.
54. *Id.* at 25.
55. *Id.* at 2 (emphasis added).

Maverick County, Texas given the Department's failure to satisfy the bare minimum of Administrative Procedure Act decision-making standards.[56]

c. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan

In 2014, Interior applied M-37029 and determined the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (Gun Lake Band) was under federal jurisdiction in 1934 and eligible to have land acquired in trust.[57] Notwithstanding its prior opinion, in 2020 Interior again took up the issue of whether the Gun Lake Band was eligible for trust land acquisition under Section 5 of the IRA.[58] Interior found that Gun Lake could not satisfy Steps One, Two, or Three, but that the cumulative weight of the Band's evidence satisfies Step 4. This appears to be the only time that Interior issued a determination pursuant to Step 4 of the Solicitor Procedures. Specifically, Interior cited (1) a long succession of treaties and other courses of dealing with the United States beginning in 1795; (2) Congressional action in granting jurisdiction over Potawatomi treaty claims; (3) the Department's establishment of the Taggart Roll, including Potawatomi, for distributing Court of Claims judgments; and (4) other miscellaneous actions and correspondence, including correspondence with Congress and Interior, a federally managed school, reports from social workers to federal agents regarding the band, and federal inquiries into the status of the Band.[59]

Interior also noted its finding the Gun Lake Band met the standard of "unambiguous previous federal acknowledgment" as part of the Part 83 process "carries significant weight" in its determination of whether the Band was recognized and under federal

56. *See generally* 5 U.S.C. § 557.

57. Defendant-Intervenor's Opposition to Plaintiff's Motion for Summary Judgment at 42–44, Patchak v. Jewell, No. 1:08-cv-01331-RJL (D.D.C. Dec. 4, 2014).

58. Memorandum from Brandon Sousa, Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Tara M. Sweeney, Assistant Sec'y, Indian Affs. 2 n.10 (Dec. 1, 2020), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ots/pdf/Match_e_be_nash_she_wish_Band_of_Pottawatomi_Indians_of_Michigan.pdf [https://perma.cc/KE8K-NP5S].

59. *Id.* at 27–28.

jurisdiction in 1934.[60] Interior rejected the relevance of evidence showing the Department tried to abandon its obligations to the Band in the 1930s, because "only Congress can dissolve the relationship between a tribe and the federal government once established."[61] This is noteworthy because it shows Interior treated such evidence as non-dispositive under the Procedures just as it did under M-37029. It is also an example of Interior issuing a new *Carcieri* determination for a tribe with an existing determination pursuant to M-37029, as further examined in the next section.

d. Redundant Determinations

The Solicitor's Procedures stated "[e]ligibility determinations rendered under Sol. Op. M-37029 remain in effect and need not be revisited."[62] However, less than three weeks after the issuance of the Procedures and its commitment regarding prior eligibility determinations, Interior issued an eligibility determination for the Grand Traverse Band of Ottawa and Chippewa Indians.[63] Grand Traverse was the subject of a prior favorable eligibility determination during the Obama administration, upheld by the Interior Board of Indian Appeals.[64] Although the Grand Traverse eligibility determination was issued prior to M-37029, it was consistent with its two-part framework,[65] as originally set forth in the Department's record of decision for the Cowlitz Indian Tribe.[66] Interior's Grand Traverse decision issued under the Procedures noted it relied on the same evidence presented by the Tribe for its previous eligibility determinations,[67] raising the question of why Interior resources were spent on a redundant twenty-seven-page opinion.

Less than two months later, Interior issued another eligibility determination for a group of tribes with an existing favorable

60. *Id.* at 28–29.

61. *Id.* at 29.

62. Solicitor Procedures, *supra* note 15, at 2.

63. Memorandum from Robert S. Hitchcock Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Tara M. Sweeney, Assistant Sec'y, Indian Affs. 1–2 (March 27, 2020).

64. Grand Traverse Cnty. Bd. of Comm'rs, 61 IBIA 273, 277 (2015).

65. Hitchcock, *supra* note 63, at 25.

66. Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark, County, Washington for the Cowlitz Indian Tribe 117 (Dec. 17, 2010) [hereinafter Cowlitz ROD].

67. Hitchcock, *supra* note 63, at 26.

determination under the Obama administration. Interior concluded all tribes in Oklahoma were eligible for trust acquisition, noting that its conclusion was consistent with the previous analysis relied on to find trust acquisition authority.[68] Four days later, Interior issued an eligibility determination for the Osage Nation, notwithstanding the fact that it had just determined they were eligible in its Oklahoma opinion and that the Obama administration had determined the Osage were eligible in 2011.[69]

Interior issued several other eligibility determinations for tribes for whom it had already determined it had trust acquisition authority, even noting that prior eligibility determinations had already been issued.[70]

Interior's decision to spend countless agency resources to reexamine and rewrite eligibility determinations, some of which had already been upheld on appeal, defies logic. Each new eligibility determination was dozens of pages and signed by multiple agency attorneys. Interior wasted agency resources and tribal resources better spent on providing services to members. Interior also opened the door to challenges by trust land opponents to what were settled determinations. Further, it is unclear why Interior abandoned its commitment not to revisit prior eligibility determinations.

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68. Memorandum from Chris King, Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Tara M. Sweeney, Assistant Sec'y, Indian Affs. 3 n.10 (noting previous eligibility determinations), 5 (noting they are consistent) (June 11, 2020).

69. Memorandum from Chris King, Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Tara M. Sweeney, Assistant Sec'y, Indian Affs. 1–2 (June 15, 2020).

70. *See, e.g.,* Sousa, *supra* note 58, at 2 n.10 (noting that Interior had previously issued a favorable eligibility determination for the Band pursuant to M-37029, but still issuing a 29 page legal opinion addressing the issue); Memorandum from John Costenbader, Att'y-Advisor, Pac. Sw. Reg'l Solic.'s Off., to Amy Dutschke, Reg'l Dir., Bureau of Indian Affs. Pac. Reg'l Off. 2–3 Oct. 15, 2020); No More Slots, 56 IBIA 233, 235 (2013) (noting that Interior's opinion that *Carcieri* did not limit Interior's authority to acquire land in trust for the Santa Ynez Band of Chumash Indians); Memorandum from Tony Sullins, Reg'l Solic., & Alex Dyste-Demet, Att'y-Advisor, Twin Cities Reg'l Solic's Off., to Tammie Poitra, Reg'l Dir., Midwest Region, Bureau of Indian Affs. 4–5 (Dec. 14, 2020); Village of Hobart, 57 IBIA 4, 5 (2013) (affirming the Regional Director's determination that she had authority to acquire land in trust for the Oneida Nation).

3. M-37064: Withdrawal of Fee-to-Trust Authority for Alaska

At the end of the Obama administration, Interior concluded in M-37043[71] that the Secretary of the Interior had authority to take Alaska lands in trust unconstrained by *Carcieri*, the Alaska Native Claims Settlement Act (ANCSA),[72] or the Federal Land Policy and Management Act (FLPMA).[73] M-37043 explained that amendments to the IRA extending certain provisions of the IRA, including section 5, to Alaska (Alaska IRA) authorized the Secretary to acquire land in trust for Alaska Native tribes regardless of whether they were under federal jurisdiction in 1934.[74] The Supreme Court in *Carcieri* cited the Alaska IRA as an example of a statute in which section 5 of the IRA applied to tribes regardless of whether they were under federal jurisdiction in 1934.[75] M-37043 followed changes to Interior's fee-to-trust regulations which eliminated a regulatory ban on trust land acquisition in Alaska, as well as robust tribal consultation on elimination of the ban and how the fee-to-trust process is best applied in Alaska.[76]

The Trump administration made clear from the outset that it had significant concerns about off-reservation trust acquisitions.[77] On June 29, 2018, the Trump Administration withdrew M-37043, pending further review and consultation with Indian tribes "on an

71. Memorandum from Hilary C. Tompkins, Solic., Dep't of the Interior, to Sally Jewell, Sec'y, Dep't of the Interior (Jan. 13, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf [https://perma.cc/6XTA-HPNP] [hereinafter M-37043].

72. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h).

73. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. §§ 1701–1787).

74. M-37043, *supra* note 71, at 10–11.

75. Carcieri v. Salazar, 555 U.S. 379, 392 & n.6 (2009).

76. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76895 (Dec. 23, 2014); Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,649 (May 1, 2014).

77. *See Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Hearing Before the H. Subcomm. on Indian, Insular and Alaska Native Affs.*, 115th Cong. 5 (2017) (statement of James Cason, Acting Deputy Secretary, U.S. Department of the Interior); *Doubling Down on Indian Gaming: Examining New Issues and Opportunities for Success in the Next 30 Years: Hearing Before the S. Comm. On Indian Affs.*, 115th Cong. 13 (2017) (statement of John Tahsuda III, Principal Deputy Assistant Secretary for Indian Affairs).

interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska," because M-37043 allegedly omitted analysis of post-ANCSCA legislation on the Department's authority to acquire land in trust in Alaska.[78]

Interior then held several consultation sessions regarding land in trust in Alaska between June 2018 and March 2019.[79] Tribes and tribal organizations overwhelmingly expressed support for trust land acquisition in Alaska, whereas the State of Alaska argued that Interior was without authority to acquire new land in trust in Alaska.[80] On January 19, 2021, the last full day of the Trump administration, Interior permanently withdrew its opinion on land into trust in Alaska, concluding the Department should not accept in trust any lands in Alaska pending resolution of "serious concerns over the scope of the Secretary's authority" to "accept land in trust . . . in Alaska."[81] Interior suggested the Alaska IRA's applicability "was limited to that time period when Alaska was a territory," and therefore the Alaska IRA could not support trust

78. Memorandum from Daniel H. Jorjani, Solic., Dep't of the Interior, to Ryan Zinke, Sec'y. Dep't of the Interior 4 (June 29, 2018), https://edit.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf [https://perma.cc/QTB3-MG99].

79. *Land-into-Trust in Alaska*, BUREAU OF INDIAN AFFS., https://www.indianaffairs.gov/as-ia/raca/regulations-development-andor-under-review/land-trust-alaska [https://perma.cc/46NV-VCMP] (last visited Apr. 22, 2022).

80. *See, e.g,* Letter from Vivian Korthuis, Chief Exec. Officer, Ass'n of Village Council Presidents, to Tara M. Sweeney, Assistant Sec'y, Indian Affs (Nov. 27, 2018), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/03-IRA_Assoc-of-Village-Council-Presidents_508.pdf [https://perma.cc/3WR3-GZVW] (expressing strong support for land into trust and M-37043); Written Comments from Central Council of Tlingit & Haida Indian Tribes of Alaska (Aug. 9, 2018), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/02-IRA_Tlingit%26Haida-Written-Comments-on-Alaska_508.pdf [https://perma.cc/W5NV-P5BG]; Letter from Kevin G. Clarkson, Att'y Gen. of Alaska, to Daniel H. Jorjani, Solic., Dep't of the Interior (Jan. 25, 2019), https://www.indianz.com/News/wp-content/uploads/2020/11/alaska012519.pdf [https://perma.cc/B49E-2TAB] (urging the withdrawal of M-37043). Comments from the consultation are available at https://www.indianaffairs.gov/as-ia/raca/regulations-development-andor-under-review/land-trust-alaska [https://perma.cc/37P6-AAPA].

81. Memorandum from Daniel H. Jorjani, Solic., Dep't of the Interior, to David Bernhardt, Sec'y, Dep't of the Interior 3 (Jan. 19, 2021), https://www.doi.gov/sites/doi.gov/files/m-37064-permanent-withdrawal-of-sol-op-m-37043-authority-to-acquire-land-into-trust-in-alaska.-01.19.2021-and-memo-executed.pdf [https://perma.cc/CY2P-KSRJ].

acquisitions now.[82] Interior also concluded "ANCSA's comprehensive statutory scheme . . . arguably left no room for the Secretary to create trust land outside of the settlement."[83]

With the withdrawal of the Solicitor's opinions establishing the two-part framework and concluding that there was land into trust authority in Alaska, the Trump administration left Interior's fee-to-trust process and authority in tatters. Alaska Native tribes had submitted numerous fee-to-trust applications in reliance on the removal of the regulatory ban on fee-to-trust in Alaska, now left to rot in purgatory.[84] Interior and tribes had spent years developing, and defending, fee-to-trust opinions based on the two-part framework, but were now forced to work within a framework described by one Federal court judge as "a joke," and "one of the worst written documents I've ever read from any government agency."[85] Moreover, given the flipflopping and the convoluted new framework, it was unlikely that courts would give the Solicitor Procedures, or their application, any deference.

B. *The Biden Administration*

As a Presidential candidate, Joe Biden campaigned in support of restoration of tribal homelands and a clean *Carcieri* fix.[86] These policy perspectives carry through the Biden administration's selection of top leadership at Interior, such as Bryan Newland as the Assistant Secretary – Affairs,[87] and the Biden administration's identification of "respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to

82. *Id.* app. at 17.

83. *Id.* app. at 26.

84. Written Comments from Central Council of Tlingit & Haida Indian Tribes of Alaska, *supra* note 80, at 1–2.

85. Transcript of Motion Hearing, *supra* note 26, at 51.

86. *Biden-Harris Plan for Tribal Nations*, JOEBIDEN.COM, https://joebiden.com/tribalnations/ [https://perma.cc/QV9M-AYLC] (last visited Apr. 22, 2022).

87. *See, e.g., Nomination of Bryan Todd Newland to Serve as Assistant Secretary for Indian Affairs, U.S. Department of the Interior: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 1 (2021) (statement of Hon. Brian Schatz, U.S. Senator from Hawaii).

Tribal Nations, and regular meaningful, and robust consultation with Tribal Nations" as priorities.[88]

On April 27, 2021, Interior issued M-Opinion 37070, which withdrew M-37055, as well as M-37054, which construed the second definition of "Indian" in the IRA.[89] Interior explained that M-37055 was issued without tribal consultation, and that it was therefore launching "meaningful and robust" consultation regarding the Department's interpretation of the term "Indian" in the IRA.[90] Interior reinstated M-37029 in the interim.[91]

Also on April 27, 2021, Interior issued M-Opinion 37069, which withdrew M-37064, regarding the Department's authority to acquire land in trust in Alaska.[92] M-37069 noted that M-37064 had ignored the Department's rulemaking extending land into trust authority under the IRA to Alaska.[93] In addition, M-37069 recommended BIA engage in tribal consultation on the Secretary's land into trust authority in Alaska.[94]

M-37070's commitment to engage in tribal consultation on legal opinions is noteworthy. Biden's Memorandum on Tribal Consultation, and Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, require consultation on "Federal policies with Tribal implications."[95] That term is defined to include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the

88. Joseph R. Biden, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/ [https://perma.cc/XX4K-2XRK].

89. Memorandum from Robert T. Anderson, Principal Deputy Solic., Dep't of the Interior, to Deb Haaland, Sec'y, Dep't of the Interior 1 (Apr. 27, 2021), https://doi.gov/sites/doi.gov/files/m-37070.pdf [https://perma.cc/B7QA-P8AU].

90. *Id.* at 2.

91. *Id.*

92. Memorandum from Robert T. Anderson, Principal Deputy Solic., Dep't of the Interior, to Deb Haaland, Sec'y, Dep't of the Interior 1–2 (Apr. 27, 2021), https://doi.gov/sites/doi.gov/files/m-37069.pdf [https://perma.cc/N42F-AWRX].

93. *Id.* at 1.

94. *Id.* at 2.

95. Biden, *supra* note 88; Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

distribution of power and responsibilities between the Federal Government and Indian tribes."[96] Legal opinions on Interior's land into trust authority undoubtedly have "substantial direct effects" on tribes, and it remains to be seen whether Interior will engage in consultation on other legal opinions.

By letter to tribal leaders dated March 28, 2022, Assistant Secretary – Indian Affairs Bryan Newland announced tribal consultations on proposed changes to the Part 151 fee-to-trust regulations.[97] Accompanying the consultation announcement was a proposed redlined revision of the 151 regulations.[98] These proposed revisions include, among other changes, new regulatory provisions that would formally embody the Department's *Carcieri* framework. The framework contained in these draft proposed regulations is an interesting hybrid of the two-part test from the Obama era M-37029 and the listing of conclusive and presumptive evidence from the Trump era Solicitor's Procedures.[99] It is an apparent attempt to capture the judicial deference afforded M-37029 (as well as the general support of M-37029 by Indian Country) while also weaving in the clarifying hierarchy of evidence from the Solicitor's Procedures. At the time of this Article, tribal consultations on the proposed regulations are ongoing. It is unclear whether Interior will adopt this regulatory proposal, in whole or in part, or what other steps it may take with respect to fee-to-trust, including the development of new policies and/or legal opinions.

II. RECENT LITIGATION UPDATES

Since 2009, *Carcieri* has resulted in dozens of federal court and Interior Board of Indian Appeals challenges.[100] However, besides the Mashpee litigation discussed at length below, only one other

96. Exec. Order No. 13,175, *supra* note 95, § 1(a).

97. Letter from Bryan Newland, Assistant Sec'y, Bureau of Indian Affs., to Tribal Leaders (Mar. 28, 2022), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/DTLL_Part-151-%26-293_Consultations_Signed_508.pdf.

98. Bureau of Indian Affs., REDLINE-25 C.F.R. Part 151 Consultation Draft (Mar. 28, 2022), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/25-CFR-Part-151_REDLINE-Consultation-Draft_Updated2022.03.28_508.pdf. [hereinafter 2022 Consultation Draft]

99. Id. § 151.4.

100. Sullivan & Turner, *supra* note 4, at 52–81 (summarizing *Carcieri*-related litigation).

federal court has addressed *Carcieri* since we published *Enough is Enough* in early 2019. On September 5, 2019, the Tenth Circuit Court of Appeals reversed a federal district court decision holding the corporate arm of the United Keetoowah Band of Cherokee Indians in Oklahoma needed to demonstrate it satisfied a definition of "Indian" in the IRA in light of *Carcieri*.[101] The Tenth Circuit agreed with the United States that the Oklahoma Indian Welfare Act extended the benefits of the IRA, including the ability to have land in trust acquired on their behalf, to "recognized tribe[s] or band[s] of Indians residing in Oklahoma," including UKB.[102] Accordingly, the Tenth Circuit concluded that UKB Corporation's trust land application did not implicate *Carcieri*.[103] The Cherokee Nation filed a petition for rehearing en banc, which was denied.

The Cherokee Nation also filed a petition for *certiorari* with the Supreme Court, which was also denied.[104] In its petition, the Cherokee Nation argued that the Oklahoma Indian Welfare Act's incorporation of the IRA included the definition of "Indian" from the IRA, and thus, UKB was still required to demonstrate that it was under federal jurisdiction in 1934.[105] The Supreme Court denied the petition.[106]

The Interior Board of Indian Appeals (IBIA) has only addressed *Carcieri* in one decision since early 2019. In *Shawano County v. Acting Midwest Regional Director*, the IBIA held that administrative collateral estoppel precluded Shawano County from relitigating whether the Stockbridge Munsee Community was under federal jurisdiction in 1934.[107] In a previous challenge to a fee-to-trust by

101. Cherokee Nation v. Bernhardt, 936 F.3d 1142, 1154–55 (10th Cir. 2019).

102. *Id.*

103. *Id.* at 1155.

104. Petition for Writ of Certiorari, *Cherokee Nation*, 936 F.3d 1142 (No. 19-937).

105. *Id.* at 14–15.

106. The Supreme Court also denied certiorari in a case filed by a citizen's group challenging a 2017 fee-to-trust decision for the Wilton Rancheria. Citing *Carcieri*, the citizen's group argued that the Secretary's authority to acquire land in trust is limited and does not extend to "Indians whose federal supervision was terminated by Congress." Petition for Writ of Certiorari at 8, 10, Stand Up For California! v. U.S. Dep't of the Interior, 994 F.3d 616 (D.C. Cir. 2021) (No. 21-696). The D.C. Circuit had upheld the Department's fee-to-trust decision. *Stand Up for California!*, 994 F.3d at 630.

107. Shawano Cnty., 67 IBIA 299, 308 (2021).

the County, the IBIA held that the Department had authority to acquire land in trust for the Tribe.[108] The IBIA therefore held that, as a party to the prior litigation, the County could not relitigate issues of fact or law that were "actually litigated and necessarily decided against the party in a valid and final judgment."[109] *Shawano County* is significant because it establishes that the IBIA will not reconsider a prior *Carcieri* determination, at least where the same party is challenging a tribe's "under federal jurisdiction" status.

Neither federal courts nor the IBIA have ruled on the validity of the Solicitor's Procedures, other than the judge's critical comments in Mashpee in oral argument. Nor have any courts or the IBIA considered any challenges to the reinstatement of M-37029.

III. RECENT LEGISLATIVE UPDATES

Congress remains unable to pass a clean *Carcieri* fix. In the 116th Congress, members of the Senate and House introduced clean *Carcieri* fixes. Congressman Cole sponsored H.R. 375 to amend the definition of "Indian" in the IRA to replace "any recognized Indian tribe now under Federal jurisdiction" with "any federally recognized Tribe."[110] The bill also revised the definition of "Indian tribe" to include "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."[111] H.R. 375 further provided that its effective date was June 18, 1934, the date of the enactment of the IRA, such that all trust acquisitions for any federally recognized Indian tribe would be reaffirmed.[112] On May 15, 2019, the House overwhelmingly passed H.R. 375 on a vote of 323 to 96, making up for previous, failed attempts at fixing *Carcieri.*[113] An opponent complained that passage of the bill would result in a "flood of new off-reservation casinos that cause harm to States and local communities."[114]

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108. Shawano Cnty., 53 IBIA 62, 82 (2011).
109. *Shawano Cnty.*, 67 IBIA at 307.
110. H.R. 375, 116th Cong. § 1(a)(1)(B) (2019).
111. § 1(a)(2).
112. § 1(a)(1)(A).
113. *See generally* H.R. 3697, 111th Cong. (2009).
114. 165 CONG. REC. 3815 (2019).

The House sent H.R. 375 to the Senate, where it died in the Committee on Indian Affairs. Separately, Senator Tester introduced an identical fix, which also did not advance out of the Committee on Indian Affairs.[115]

In 2019, the House also overwhelmingly passed an act to reaffirm the Mashpee Reservation as trust land and to ratify the actions of Interior to accept the land in trust.[116] The act was referred to the Senate, where it died. The 177th Congress has yet to consider a Mashpee *Carcieri* bill.

Representative McCollum introduced a clean *Carcieri* fix in the 117th Congress, which overwhelming passed the House on December 1, 2021, by a vote of 302 to 127.[117] H.R. 4352 replaced "any recognized Indian tribe now under Federal jurisdiction" with "any federally recognized Indian Tribe"; clarified that its effective date was June 18, 1934; and ratified past decisions challenged on the basis of whether the tribe was under Federal jurisdiction.[118] H.R. 4352 also clarified that it did not affect limitations imposed on the Secretary's authority by other laws.[119] The House referred the bill to the Senate, where it was referred to the Senate Committee on Indian Affairs. The Committee has not held a hearing or taken a vote. Separately, in the Senate, Senator Tester has introduced a clean *Carcieri* fix, but it has not advanced.[120]

At a Senate Committee on Indian Affairs hearing to consider Native Communities' priorities for the 117th Congress, the National Congress of American Indians reaffirmed its support for a clean *Carcieri* fix.[121] However, opposition remains entrenched in the Senate.

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115. S. 2808, 116th Cong. (2019).
116. H.R. 312, 116th Cong. (2019).
117. H.R. 4352, 117th Cong. (2021).
118. §§ 1(a)(1)(B), 1(b).
119. § 1(c)(1).
120. S. 1901, 117th Cong. (2021).
121. *A Call to Action: Native Communities' Priorities in Focus for the 117th Congress: Hearing Before the S. Comm. on Indian Affs.* 117th Cong. 4 (2021) (statement of Hon. Fawn Sharp, President, National Congress of American Indians).

IV. THE IMPACT OF *CARCIERI* ON NEW ENGLAND TRIBES

The *Carcieri* decision impacted all tribes by increasing the burden and cost of seeking to restore ancestral lands through the fee-to-trust process. Tribes located in New England face unique challenges given the long history of colonial, then state, oversight and oppression of native people within their borders, as well as illegal conveyances of tribal lands. The federal government often failed to intervene and exercise its plenary authority over Indian affairs, effectively sanctioning this unlawful power structure and theft of lands. As a result, for many New England tribes there simply are not the same indicia of federal jurisdiction in 1934 that exist for tribes in other regions of the United States. The following section explores the varied situations of the New England tribes and their options for acquiring additional lands in trust, whether through the IRA's definition of "Indian," as interpreted by *Carcieri*, or through subsequent extensions of the IRA via land claim settlement acts.

A. *The Mashpee Wampanoag Tribe*

The Mashpee Wampanoag Tribe (Mashpee or Mashpee Tribe) has been the subject of extensive proceedings concerning whether it qualifies for trust land acquisitions pursuant to the IRA. As detailed below, and initially discussed in our first article, the Department has issued three fee-to-trust decisions for the Tribe. The first two decisions, one favorable and one negative, were both litigated in the federal courts. Following reconsideration on its second remand, the Department recently issued its third decision, concluding that the Tribe is, in fact, eligible for trust land under the IRA.

1. Interior's 2015 Positive Determination for Mashpee Based on the Second Definition of "Indian."

The Mashpee Tribe has been in southeastern Massachusetts since time immemorial; their presence in the area was documented by European colonizers beginning in the 1600s.[122] Similar to other New England tribes, the federal government often left the Mashpee Indians to the authority of the Commonwealth of Massachusetts,

122. Record of Decision, Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe 62 (Sept. 18, 2015) [hereinafter Mashpee ROD].

only acting intermittently towards the Tribe and its members.[123] In 2007, the federal government finally recognized the Mashpee Tribe more formally through the Part 83 acknowledgment process.[124] That same year, the Tribe submitted an application for the Department to acquire in trust lands in the Town of Mashpee for governmental services, cultural preservation, and housing, as well as lands in the City of Taunton for a casino-resort. Eight years later, in 2015, the Department approved the Tribe's application.[125]

In contrast to the majority of the Department's fee-to-trust decisions, the 2015 Mashpee decision exclusively relied upon the authority stemming from the IRA's second definition of Indian: "[A]ll persons who were descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." As the language indicates, the IRA's applicability pursuant to this definition focuses on reservation residence in 1934, as opposed to membership in a tribe under federal jurisdiction (as contemplated by the first definition).

Since reliance on the second definition was novel, the Department undertook extensive analysis of the statutory language in its 2015 decision document. It found the language ambiguous in several respects, including whether the term "such members" incorporated by reference the entire first definition of Indian and, consequently, the *Carcieri* limitations.[126] To resolve these ambiguities, the Department considered the IRA's purpose, legislative history, implementation, and other tools of statutory construction.[127] The Department ultimately concluded that "such members" incorporates only "members of recognized Indian tribes" and not the phrase "now under Federal jurisdiction."[128] As a result, the Department found there was no need to evaluate whether the Mashpee Tribe was under federal jurisdiction in 1934 for purposes of applying the second definition of Indian.[129] Rather, the test was whether the

123. *See id.* at 117.

124. *Id.* at 4; Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8,007 (Feb. 22, 2007).

125. Mashpee ROD, *supra* note 122, at 136–37.

126. *Id.* at 80–81.

127. *Id.* at 81–92.

128. *Id.* at 93–95.

129. *Id.*

Mashpee Tribe consists of "descendants of members of a recognized Indian tribe who maintained residence within the boundaries of an Indian reservation as of June 1, 1934."[130] After examining the historical evidence, the Department concluded that Mashpee satisfied this definition and therefore the Department had authority under the IRA to acquire the trust lands.[131]

The Department's 2015 decision for Mashpee was successfully challenged in the U.S. District Court for the District of Massachusetts on several grounds, including its statutory interpretation of the second definition. Plaintiffs David Littlefield and other residents of the Town of Taunton opposed the Tribe's planned development and argued that the Mashpee did not meet the second definition of "Indian" in the IRA, because, in their view, it plainly incorporated the first definition.[132] They argued that "such members" refers to the entirety of the first definition, and therefore, in addition to meeting the second definition's residency requirements, Mashpee needed to show that it was under federal jurisdiction in 1934.[133] The court agreed with plaintiffs, finding that the second definition unambiguously incorporated the entire first definition, and no deference was due to Interior's interpretation under *Chevron*.[134] The court also suggested that Mashpee was not under federal jurisdiction in 1934—despite the fact that Interior had never decided the question—seemingly because the Tribe was not formally recognized until 2007.[135] At Interior's request, the court issued an order clarifying that it did not decide the jurisdictional issue, and remanded the matter to Interior for a determination on whether the Mashpee were under federal jurisdiction in 1934.[136]

Following the district court's decision, the Mashpee Tribe intervened as a defendant,[137] and then appealed the district court's

130. *Id.* at 101.
131. *Id.* at 120.
132. Littlefield v. U.S. Dep't of the Interior, 199 F. Supp. 3d 391, 394 (D. Mass. 2016).
133. *Id.* at 396.
134. *Id.* at 399–400.
135. *Id.* at 397.
136. *Id.* at 400.
137. *See generally* Littlefield v. U.S. Dep't of the Interior, 318 F.R.D. 558 (D. Mass. 2016).

decision to the First Circuit Court of Appeals.[138] Interior filed a notice of appeal, which it later dismissed.[139] On February 20, 2020, the First Circuit issued a decision upholding the District of Massachusetts' determination that the IRA's second definition of "Indian" unambiguously incorporated the entire first definition.[140]

2. The Department's 2018 Negative Determination under the First Definition of "Indian."

Following the District Court's remand, and now with Trump officials at the helm, the Department considered whether the Mashpee Tribe was under federal jurisdiction in 1934 for purposes of the first definition of "Indian." The remand proceedings included briefing on whether the exercise of jurisdiction over the Tribe by the Commonwealth of Massachusetts could be a "surrogate" for federal jurisdiction.[141]

On September 7, 2018, the Department issued its final decision finding that the Mashpee Tribe was not under federal jurisdiction in 1934.[142] The Department, acting through Assistant Secretary of Indian Affairs Tara Sweeney, concluded there was insufficient evidence of specific federal actions towards the Tribe before and during 1934.[143] In coming to this conclusion, the Department considered the following evidence proffered by the Mashpee Tribe:

- an 1820 report commissioned by the Secretary of War (who then had jurisdiction over Indian affairs) that included the Mashpee Tribe and recommended

138. Notice of Appeal, Littlefield v. U.S. Dep't of the Interior, No. 16-2484 (1st Cir. Dec. 12, 2016).

139. *See* Judgment Pursuant to 1st Cir. R. 27.0(d), *Littlefield*, No. 16-2481 (1st Cir. May 8, 2017), 2017 WL 10238203, at *1.

140. Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30, 37 (1st Cir. 2020) ("In our view, the word 'such' plainly refers to the words used in the entire prior definition of Indian to limit the members included in the second definition of Indian.").

141. Letter from James E. Cason, Assoc. Deputy Sec'y, Dep't of the Interior, to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe 2 (June 30, 2017), https://legacy-assets.eenews.net/open_files/assets/2018/05/23/document_gw_06.pdf [https://perma.cc/US93-AL4E].

142. Letter from Tara M. Sweeney, Assistant Sec'y, Indian Affs., to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe (Sept. 7, 2018) [hereinafter 2018 Mashpee Decision].

143. *Id.* at 28.

against their removal from their homelands in Massachusetts;[144]

- contemporary transmissions among federal officials (including Secretary of War John Calhoun and President Monroe) of a statistical report that generally—but not expressly—included the Mashpee, reiterating the recommendation against removal of tribes in some eastern states;[145]
- an 1851 report by U.S. Indian Agent Henry R. Schoolcraft surveying the condition of tribes in the United States and mentioning the Mashpee tribe;[146]
- an 1888 report by Alice C. Fletcher, prepared under the auspices of the Department of the Interior's Commissioner of Education, that described the Mashpee tribe's history;[147]
- a 1935 draft report on New England tribes prepared by Gladys Tantaquidgeon for the Office of Indian Affairs that detailed the Mashpee lands, education, health needs, and other facets of Mashpee life;[148]
- an 1890 Annual Report of the Commissioner of Indian Affairs that noted the Mashpee reservation in Massachusetts;[149]
- a 1940s title report prepared for condemnation proceedings brought by the Department of the Navy against lands for which Mashpee tribal members had some sort of easement to cross to gather seaweed and marsh hay;[150]

144. *Id.* at 20–22.
145. *Id.* at 22.
146. *Id.* at 23.
147. *Id.* at 23–24.
148. *Id.* at 24–25.
149. *Id.* at 25.
150. *Id.* at 26.

- Carlisle Indian Boarding School records from 1905–1918 documenting the attendance of Mashpee children;[151]
- And A 1910 federal Indian census (conducted by the U.S. Director of the Census as opposed to the Office of Indian Affairs) that listed Mashpee members.[152]

Despite the fact the Mashpee were included in numerous federal reports examining the Indian tribes and contemplating federal policy, the Department rejected the sufficiency of the evidence for showing federal jurisdiction. The Department crafted a new rule regarding "federal reports" (whatever that classification might mean), diminishing—or perhaps completely eliminating—the evidentiary value of a report unless it specifically resulted in direct federal action towards a tribe.[153] A federal decision of inaction, as was the case with the United States declining to impose the removal policy on Mashpee, was not sufficient.

The Department also rejected Mashpee's argument that certain legislation and legal principles, such as the Non-Intercourse Acts and the United States' assumption of the British Crown's obligations, created federal jurisdiction over the Tribe by operation of law.[154] The Department drew parallels to its previous rejection of Congressional plenary authority as a basis for demonstrating jurisdiction and further admonished that "the tribe cannot rely on an inchoate jurisdictional status as the basis for being under federal jurisdiction."[155]

However, the decision could have been worse for Indian country, generally. Interior declined to find that a state's historical

151. *Id.* at 27.

152. *Id.* at 28.

153. *See, e.g.*, *id.* at 24 ("While the Fletcher report does describe the Tribe's historical ties to its lands, it makes no assertion as to the Federal Government's role, if any, in establishing or maintaining such ties, and thus offers *no evidence* of the exercise of Federal authority over the Tribe or its members beyond the general principle of plenary authority.") (emphasis added); *id.* at 25 ("While the Tantaquidgeon report offers historical evidence of the Tribe's longstanding historical use and continued occupation of Tribal lands, *it provides little if any demonstration* of the exercise of Federal jurisdictional authority over the Tribe.") (emphasis added).

154. *Id.* at 13–15.

155. *Id.* at 14.

exercise of jurisdiction over a tribe implied or amounted to the surrender of federal jurisdiction over that tribe.[156] The opponents broadly asserted that all New England tribes had been subject to state jurisdiction—as evidenced by the peculiarities of colonial history and the power apportionment between the fledgling federal government and the colonies-turned-states—and, further, that all state jurisdictional tribes could not have also been under federal jurisdiction.[157] Had Interior taken the bait, this could have had potentially massive impacts for New England tribes, or even all tribes residing within the thirteen original colonies (now states). [158]

Moreover, Interior left open the possibility that a state's exercise of jurisdiction could be a surrogate for federal jurisdiction, as long as there is some evidence of "any Federal authorization, confirmation or ratification of state authority, or delegation of Federal authority to the state."[159] In this particular case, however, Interior found no such evidence and rejected the Tribe's argument that Massachusetts' exercise of jurisdiction was a surrogate for federal jurisdiction.[160]

3. Litigation of the Department's 2018 Negative Decision

The Mashpee Tribe challenged the 2018 decision in federal district court in the District of Columbia[161] and the group of local citizens represented by David Littlefield joined as intervenor-

156. *Compare id.* at 9 (summarizing plaintiffs' arguments that federal and state jurisdiction could not co-exist in the original 13 states) *with id.* at 20 (rejecting plaintiffs' broad assertion that the 13 original states maintained independent and exclusive authority over Indian affairs, instead focusing on whether Massachusetts's exercise of jurisdiction over Mashpee was coupled with federal participation or authorization).

157. *Id.* at 9–10 (summarizing the plaintiffs' position). As Interior states, "[t]hough it is somewhat unclear, the Littlefields appear to argue that the Commonwealth assumed authority over Indian affairs in the state directly from colonial authorities and exclusive of the Federal Government." *Id.* at 17.

158. *See id.* at 17 ("[T]he Supreme Court long ago held that the Continental Congress assumed management over Indian affairs 'first in the name of these United Colonies; and afterwards, in the name of the United States.'").

159. *Id.* at 20.

160. *Id.*

161. Complaint, Mashpee Wampanoag Tribe v. Zinke, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242).

defendants.[162] Following briefing on the merits, in March 2020, the Department withdrew M-37029 (i.e. the two-part framework) and implemented the new four-step Solicitor Procedures, as described *infra* in Section II.a.i. Interior did not notify the court of this development.

On March 27, 2020, in an unexpected blow to the Mashpee Tribe, the Department also directed the local BIA agency to remove from trust the Mashpee's reservation land in the Town of Mashpee and City of Taunton.[163] The Tribe responded by filing an emergency motion for a temporary restraining order and a preliminary injunction against the Department.[164] The court consolidated the hearing on the merits with the hearing on emergency injunctive relief.[165] Later, in response to independently learning about the Department's withdrawal of M-37029, the court ordered supplemental briefing on whether the administrative change should affect the court's deference to the Secretary's application of M-37029 to the Mashpee Tribe in its 2018 decision.[166] At this time, and in a highly unusual move, a collection of Congressional members—including then Representative, now Secretary of the Interior, Deb Haaland and Massachusetts Senators Elizabeth Warren and Edward J. Markey—filed an amicus brief supporting the Tribe. The Congressional amici challenged both the Department's attempt to remove the Mashpee lands from trust and the 2018 determination that the

162. Minute Order Granting Motion to Intervene, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242).

163. Letter from David Bernhardt, Sec'y, Dep't of the Interior, to Dir., Bureau of Indian Affs. and E. Reg'l Dir,, Bureau of Indian Affs. (Mar. 27, 2020), https://www.doi.gov/sites/doi.gov/files/uploads/littlefield-v-mashpee-wampanoag-indian-tribe-951-f.3d-30-1st-cir.-2020-signed-2020.03.27.pdf [https://perma.cc/XYM3-MHVU].

164. Plaintiff Mashpee Wampanoag Tribe's Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242).

165. Order Consolidating Hearings, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242).

166. Memorandum Opinion and Order at 2, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242) ("The Court frankly is shocked that the government did not bring this change to the Court's attention and discuss its relevance, or lack thereof, to the pending motions for summary judgment and preliminary injunction. The Court was left to discover this change on its own less than one week before oral argument on the very question of whether the agency's application of the M-Opinion was arbitrary, capricious, an abuse of discretion, or contrary to law.").

Tribe was not under federal jurisdiction as gross infringements upon Congressional authority.[167] They found that the Department had "not identified any congressional delegation of powers to *remove* the Tribe's land from trust" and rejected the notion that the IRA contains implicit authority to rescind an action properly delegated.[168] The Congressional members concluded:

> Simply put, Congress did not authorize the Secretary through the IRA, or any other provision of federal law, to remove the Tribe's land from trust. Therefore, by purporting to take Mashpee's land out of trust, the Secretary is brazenly invading the province of Congress and acting unlawfully.[169]

The Congressional amici further disputed the federal government's claim that the recent First Circuit decision on the IRA's second definition of "Indian"—invalidating the Department's 2015 positive determination for the Mashpee Tribe—required the Department to unwind the trust transfer.[170] The amici highlighted that the First Circuit decision did not actually order the Secretary to remove the land from trust and the decision was not final as there remained time for the Tribe to seek certiorari.[171] The amici also emphasized that in the instant litigation, the D.C. District Court had not yet opined on the validity of the Department's 2018 decision concerning its authority over the Mashpee pursuant to the IRA's first definition of "Indian," therefore there was still opportunity for the trust transfer to be deemed valid.[172]

The Congressional amici also denounced the Department's 2018 conclusion that the Mashpee were not under federal jurisdiction in 1934.[173] They argued that the administrative record contained clear and sufficient evidence of a jurisdictional relationship,

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167. *See generally* Brief of Members of Congress as Amicus Curiae in Support of Plaintiff, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d 199 (D.D.C. 2020) (No. 1:18-cv-02242). The signatories also included Massachusetts representatives Bill Keating, Lori Trahan, Ayanna Pressly, Joe Kennedy III, Stephen F. Lynch, James P. McGovern, and Katherine M. Clark.

168. *Id.* at 10 (emphasis in original).

169. *Id.* at 11–12.

170. *Id.* at 12.

171. *Id.*

172. *Id.*

173. *Id.* at 13–19.

specifically pinpointing pieces of evidence they believed the Department overlooked or undervalued in its 2018 determination.[174] The Congressional amici concluded the "Secretary has ignored Congress' clear recognition that the Tribe was under federal jurisdiction" and, by doing so, has "usurped Congress and its well-established plenary power to define the federal relationship with tribes."[175]

Following briefing, the District Court granted the Tribe's motion for summary judgment. The Court first considered whether the Department's changed approach to *Carcieri* impacted the level of deference owed to the legal framework in M-37029, but seemingly side-stepped the issue, leaving intact the *Chevron* deference previously applied by the D.C. Circuit.[176] The Court was nonetheless cognizant of how the standards embodied in the new Solicitor Procedure might have impacted the Department's analysis of the Tribe under the old M-37029 framework.[177]

The Court found the Department misapplied M-37029 by evaluating each piece of evidence in isolation rather than in concert,

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174. *See, e.g.*, *id.* at 16 (finding that the 1822 Morse Report "demonstrates that Congress recognized it had the authority to remove the Tribe" and that it is "unmistakable evidence that Congress considered the Tribe as remaining under federal jurisdiction"); *id.* (finding the 1935 Tantaquidgeon report probative where it was funded by congressional appropriations, prepared at the behest of the BIA, and used to develop policy and address the Tribe's educational needs); *id.* at 18 (finding that the attendance of Mashpee children at the Carlisle Indian School between 1905 and 1918 was a "clear exercise of federal authority over the Tribe's members" and relevant indicia of the Tribe's federal jurisdiction status); *id.* at 18–19 (finding the 1911 and 1912 BIA census for the Carlisle Indian School as "another clear indication that Congress and the Executive Branch recognized the Tribe was under its jurisdiction," and that the federal census prepared by the U.S. Census Office which listed Mashpee members was also probative and should have been considered in concert with the other evidence).

175. *Id.* at 18–19.

176. *Mashpee Wampanoag Tribe*, 466. F. Supp. 3d at 216 (citing Grand Ronde v. Jewell, 830 F.3d 552, 564–65 (D.C. Cir. 2016)). The court perhaps did not further question the appropriate level of deference because the Tribe itself did not challenge M-37029, only the way that it had been applied in the Tribe's circumstances, and the parties agreed that the withdrawal of the M-37029 and issuance of new guidance did not affect the court's analysis of whether M-37029 had been properly applied to the Tribe. *See id.* at 216–17.

177. *Id.* at 219 ("The Court agrees that some of the reasons that the Secretary provides in the 2018 ROD as to why the Mashpee's evidence is insufficient reflects some of the new standards recently issued in 2020.").

failing to consider certain evidence as probative, and treating certain evidence inconsistently with the Department's prior treatment of such evidence in *Carcieri* determinations for other tribes.[178] The Court contrasted the 2018 decision's repeated language that certain evidence "in and of itself" was insufficient with M-37029's acknowledgment that "a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction."[179] Regarding evidence that Mashpee children had been educated at a BIA school, the Court rejected the 2018 decision's conclusion that such evidence only concerned individuals and was not indicative of jurisdiction over the Tribe. The Court found that M-37029 "expressly allows for a federal action towards some tribal members—here, students—to service as evidence that supports a finding that a tribe as a whole was under federal jurisdiction" and that pursuant to a properly applied M-37029 framework, this is "strong probative evidence that the Mashpee was under federal jurisdiction."[180] The Court also found the Department's treatment of BIA school enrollment in this case inconsistent with the Department's prior *Carcieri* determination for the Cowlitz tribe, where BIA school enrollment records were expressly relied upon in support of finding federal jurisdiction.[181]

The Court also rejected the Department's dismissal of evidence that Mashpee students were included the 1911 and 1912 census prepared by the BIA Superintendent of the Carlisle School because the Department's repeated rationale—that it only concerned individuals and was not necessarily predicated on a jurisdictional relationship with the Tribe—was inconsistent with M-37029.[182] The Court also rejected the Department's dismissal of the 1910 Indian Population Schedule simply because it was prepared by the

178. *Id.* at 217–33.

179. *Id.* at 217–18; *see also id.* at 218 ("The Secretary's incorrect application of the M-Opinion – evaluating the evidence in isolation and failing to view the probative evidence 'in concert' – taints every category of evidence that the Secretary discussed in the 2018 ROD.").

180. *Id.* at 220. The Court further points to the fact that the BIA school records for Mashpee students enumerated their tribal affiliation. *Id.* at 222.

181. *Id.* at 221.

182. *Id.* at 225. Moreover, as the Court pointed out, the 2018 Mashpee Decision failed to reference or consider the 1912 BIA school census entirely. *Id.*

Director of the Census, as inconsistent with Departmental positive treatment of similar evidence for other tribes.[183]

The Court was similarly unpersuaded by the Department's minimization of federal reports that listed or described the Mashpee tribe on the basis that such evidence only showed the federal government's awareness of the tribe, as opposed to federal action towards the tribe.[184] For example, the Court found the 1820 Morse Report was "more than a mere 'compilation' of evidence; Reverend Morse made specific recommendations in his report about how the federal government should treat the various tribes, including the Mashpee Tribe."[185] Furthermore, the Court found the Department failed to properly consider whether the federal government's subsequent re-use of the Morse Report and the information gathered herein was probative of jurisdiction.[186] Similarly, the Court rejected the Department's rationale for dismissing the 1934 Tantaquidgeon report because it failed to show any "formal action" by a federal official "determining any rights of the Tribe."[187] The Court also rejected the Department's dismissal of the Commissioner of Indian Affairs' 1890 annual report since these annual

183. *Id.* at 226 ("Not only must the Secretary explain why it matters that the 1910 Indian Population Schedule was prepared by the Director of the Census [as opposed to the Office of Indian Affairs], he must also explain why inclusion in federal census counts was treated as probative evidence that a tribe was under federal jurisdiction in the Tunica Biloxi ROD but not for the Mashpee Tribe."). The Court also rejected the Department's argument, without further explanation, that census evidence is not probative unless prepared pursuant to the 1884 Appropriations Act. *See id.* at 226–27 (noting that in its prior decision for the Cowlitz tribe, the Department had relied on census evidence not prepared pursuant to the 1884 Act, even treating it as unambiguous evidence of jurisdiction).

184. *Id.* at 228–33.

185. *Id.* at 229 (quoting the 2018 Mashpee Decision). The Court also noted that the Morse Report was analogous to a federal report and census relied upon by the Department in finding federal jurisdiction over the Ione Band. *Id.* at 229–230.

186. *Id.* at 230–31.

187. *Id.* at 232 (quoting the 2018 Mashpee Decision). The Court determined that "the M-Opinion does not require evidence that a federal official expressly determined any rights of a tribe for he evidence to be probative of a tribe being under federal jurisdiction." *Id.*

reports had been relied upon as probative of jurisdiction in other Departmental decisions.[188]

The Court did not, however, impose a blanket rule that inclusion on any type of federal report is probative evidence. It left intact the Department's rejection of an 1885 report, commissioned by the Senate, on Indian education that described the Mashpee tribe's history.[189] It is not entirely clear why the Court distinguishes the 1885 education report from the others, although it may be that the Court viewed the other federal reports as resulting in funding decisions, informing policy development, or looking more akin to census/statistical compilations relied upon in other *Carcieri* determinations. The Court also left intact the Department's rejection of other types of evidence, including the 1940s title report prepared for the Department of the Navy's condemnation proceedings that noted an easement used by Mashpee tribal members.[190] In conclusion, the Court remanded the question of whether the Mashpee Tribe was under federal jurisdiction to Interior, where it remains pending.[191]

Concurrent with its opinion on the merits of the case, the Court issued a separate order imposing a temporary stay on the Department to prevent it from taking the Mashpee lands out of trust until the Department had issued a new decision on remand.[192] The Department had argued that the First Circuit decision concerning the second definition of "Indian" vis à vis Mashpee amounted to a mandate requiring the Department to remove the underlying lands from trust.[193] The Court disagreed, finding: "[n]othing in the First Circuit's opinion goes beyond the remedy that the district court already had ordered: a remand to the agency. There is no language in the First Circuit's opinion that instructs the Department to

188. *Id.* at 233 (citing an earlier Departmental finding of jurisdiction for the Oneida Nation of Wisconsin).

189. *Id.* at 233–34.

190. *Id.* at 234–35.

191. *Id.* at 206.

192. *See* Memorandum Opinion and Order, *supra* note 163. Interestingly, in its decision on the merits the Court denied the Tribe's request for a preliminary injunction as moot, but then appeared to determine later that same day that the Department might act to reverse the trust acquisition and therefore there was a need to maintain the status quo during the remand proceeding, hence the separate opinion and order. *Id.* at 2.

193. *Id.* at 4.

immediately remove the land from trust."[194] The Court further found any agency action here to change the status quo while the Department was still considering the issue on remand would result in irreparable harm to the Tribe.[195] The Court cited the Tribe's "loss of sovereign authority over the Tribe's historic lands" as the "most obvious harm" and found that the nature of such harm cannot be "calculated in terms of money."[196] The Court further determined there was no public interest or potential harm to the defendant United States and the private citizen defendant-intervenors from maintaining the lands in trust during remand that could outweigh the Tribe's irreparable injury.[197]

Finally, the Court did not squarely address arguments about the Department's process for removing lands from trust, and whether it has the statutory authority to do so. Nonetheless, the Court noted "these doubts raised by the Tribe and Members of Congress as to whether Congress has ever authorized such action certainly weigh in favor of maintaining the status quo for now" and "[a]s always, there is a weighty interest indeed in requiring the Executive Branch of government to comply with the law."[198]

4. The Department's 2021 Positive Determination Pursuant to the First Definition

On its second remand, now in the Biden administration, the Department considered much of the same evidence but came to a very different conclusion. The Department found the federal government's jurisdiction over the Tribe began as early as 1820, when

194. *Id.* a 5.

195. *Id.* at 5–7.

196. *Id.* at 6 (quoting the Tribe's briefing on a temporary restraining order and preliminary injunction). The Court further determined that "[i]f the land is taken out of trust, then the Mashpee Tribe will lose its sovereignty over the land in its entirety. The total loss of sovereign authority, self-government, and jurisdiction over the land is unquestionably an irreparable harm." *Id.* at 6-7.

197. *Id.* at 7–9. The Court found that the United States' "argument that it needs to take the land out of trust now in order to account for the state and local interests in Massachusetts rings hollow." *Id.* at 8. The Court also rejected defendant-intervenors' argument that removing the land from trust would provide "assurances that the casino will not be constructed, thereby preserving the [defendant-intervenors'] community and way of life," given that there could only be certainty once the Department completed a new decision on remand. *Id.* at 8–9.

198. *Id.* at 9.

it considered removal of the Tribe to the western territories, and remained intact as of 1934 since Congress never terminated jurisdiction over the Tribe nor was there evidence that the Tribe's jurisdictional status was "otherwise lost."[199]

In contrast to the negative 2018 decision, the Department found that the collection of evidence from the 1820s showing the United States' consideration of the Tribe in its removal policy plainly amounted to an exercise of federal jurisdiction, despite the fact it ultimately chose not to remove the Tribe.[200] The Department concluded "[t]he Morse report and federal officials' subsequent reliance on it, provide probative evidence that the Federal Government actively considered the Mashpee within its jurisdiction and subject to the removal policy, but chose instead to affirmatively protect the Tribe's occupancy of its land."[201] This analysis seems to dovetail with the decision's inclusion of a thorough analysis of the reservation-like status of Town of Mashpee and its long historical importance to the Tribe.[202] While the Department did not consider the reservation directly within the two-part test, it found that the Tribe's "continuous occupation of this land is a fundamental feature of its history and provides the backdrop for understanding the Tribe's relationship with the federal government and subsequent federal exercises of jurisdiction."[203]

The Department also relied heavily on the attendance of Mashpee children at the federally operated Carlisle Indian School

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199. *See generally* Letter from Bryan Newland, Assistant Sec'y, Indian Affs., to Brian Weeden, Chairman, Mashpee Wampanoag Tribe (Dec. 22, 2021) [hereinafter 2021 Mashpee Decision]. This decision "confirmed" the original 2015 Record of Decision to accept the Mashpee and Taunton parcels in trust for gaming but amended the sections concerning the statutory authority (i.e. the *Carcieri* analysis) and the initial reservation determination pursuant to the Indian Gaming Regulatory Act.

200. *See id.* at 12–16. In comparison, the 2018 Mashpee Decision found that "[t]he Morse Report shows that the Federal Government did little more than consider the Tribe, along with tribes across the United States, as *potentially* subject to the exercise of the federal Indian authority, in this case for the purpose of removal and resettlement"). 2018 Mashpee Decision, *supra* note 142, at 21 (emphasis in original).

201. *Id.* at 15–16.

202. *Id.* at 9–12.

203. *Id.* at 12. The Department expressly declined to find that the Tribe's occupation of its reservation-like town in 1934 constitutes dispositive evidence of federal jurisdiction. *Id.*at 12 n.97.

between 1905 and 1918 to demonstrate that federal jurisdiction had attached prior to 1934. This analysis is significant because it more fully elaborates on the federal policy underlying the Indian boarding school era and the United States' attempt to eviscerate tribal community and culture by forcing separation and acculturation onto tribal children.[204] In doing so, this decision more clearly establishes the connection between federal supervision over individual Indian children and the exercise of federal jurisdiction over the tribe as a whole. The Department also appears to have elevated the evidentiary value of boarding school attendance records where such attendance demonstrate comprehensive federal control over all aspects of a tribal child's life, as well as federal efforts to hasten "the end of tribes and tribal communities."[205]

The 2021 decision also took a different approach to federal reports. The 2018 decision rejected such reports as only demonstrating federal awareness of the Tribe, as opposed to federal action toward the Tribe. The 2021 decision, however, found these same documents to "provide probative evidence that the Federal Government was not only aware of its jurisdiction over the Tribe, but, pursuant to that authority, took affirmative actions to document the Tribe's living conditions, document their numbers and propose plans for improving the Tribe's status as part of the federal government's implementation of federal Indian policy."[206] Similarly, the 2021 decision found that inclusion of Mashpee members on census records helped inform federal policy and action.[207] Therefore, while inclusion of a single federal report or census may not "in and of itself" establish jurisdiction, the evidence viewed in concert, and in the larger context of federal policymaking, is probative.

Perhaps the most important part of the 2021 decision was its conclusion that federal jurisdiction over the Mashpee remained intact in 1934, despite the high degree of oversight from the Massachusetts state government and contemporaneous statements from

204. *See id.* at 16–19 (explaining how the Indian boarding school system was designed to "further the federal Indian policy of the time by indoctrinating children perceived as being too 'Indian' or too connected to tribal culture" and referencing various scholars and sources, such as appropriations language and agency education circulars).

205. *Id.* at 19.

206. *Id.* at 20.

207. *Id.* at 23–24.

federal officials disclaiming their jurisdiction over the Tribe.[208] Regarding the state jurisdictional issue, the Department reiterated the principle that the "paramount federal authority over Indian affairs extends to all states, *including the original thirteen*."[209] Further, this federal authority "cannot be constrained or supplanted by state activity or policy and federal jurisdiction is not surrendered through acquiesce."[210] Perhaps this conclusion would differ had the federal government never actually exercised its jurisdiction over the Mashpee Tribe, but the Department found that the record sufficiently demonstrated the exercise of federal jurisdiction, even if not consistent over the years.[211]

Moreover, the Department found that statements by federal officials in the 1930s disclaiming jurisdiction over the Mashpee tribe were not in and of themselves dispositive of the Tribe's jurisdictional status.[212] To start, only Congress may terminate tribes—federal officials lack this authority.[213] Instead, as the 2021 decision explains, these letters are "best characterized as reflections of evolving federal policy, practical constraints on implementing the IRA, and factual mistakes, rather than termination" of the Tribe's jurisdictional status.[214] In other words, these letters were a result of the federal practice of deferring to the original states in their handling of Indian affairs, the financial realities of the Great Depression era, and internal agency ignorance or mistake as to its previous work and relationship with the Tribe.[215] But because Congress itself had never "adopted or considered any termination legislation regarding the Tribe and the Tribe maintained a continuous tribal existence during the 1930s," the Department found the

208. *See id.* at 25–30.

209. *Id.* at 29 (emphasis added).

210. *Id.* at 30.

211. *Id.* at 29–30.

212. *Id.* at 27–29.

213. *Id.* at 27 ("Federal officials, moreover, lack the authority to terminate tribal existence, whether through express action or neglect."); *id.* at 29 ("Furthermore, the United States has plenary authority over tribes and their members, and only Congress can terminate such authority.").

214. *Id.* at 27.

215. *Id.* at 27–28. For these same reasons, the Department rejected the idea that the federal government's failure to hold an IRA Section 18 election at the reservation-like Town of Mashpee indicated that the Tribe's jurisdictional status had been terminated. *Id.* at 26.

weight of the evidence demonstrated that jurisdiction remained intact in 1934.[216]

5. Takeaways from the Mashpee Proceedings

Several major points can be drawn from the protracted agency decision-making process and litigation concerning the Mashpee. First, the 2021 Mashpee Decision obviously sets helpful precedent for other New England tribes sharing a similar history. Moreover, this agency decision is undergirded by the analysis and findings in the D.C. District Court decision. However, the 2021 Mashpee Decision is virtually guaranteed to be litigated and plaintiffs will almost certainly choose the District of Massachusetts as their preferred venue for filing suit. The District of Massachusetts and the First Circuit generally have not shown themselves to be a favorable forum to the Mashpee Tribe's "federal jurisdiction" status or to the Department's interpretation of its authority pursuant to the IRA.[217]

Moreover, the Trump era frolic and detour into the four-step Solicitor Procedures may undercut the strong judicial practice of deferring to the Department's *Carcieri* determinations, although the recent reinstatement of M-37029 may increase the likelihood of deference. It is possible that litigation on the 2021 Mashpee Decision could give rise to a circuit split on the Department's two-part framework, with the First Circuit striking it down as an unreasonable interpretation of the statute, while the D.C. Circuit and Ninth Circuit have upheld that framework.

The second important point is that it will be difficult for the Department to reverse a trust acquisition without: 1) a congressional act clearly authorizing the Department's action, or 2) a federal court order enjoining the Department to do so. In other words,

216. *Id.* at 29.

217. In addition to affirming the District Court's overturning of the Department's positive 2015 decision, the First Circuit has noted in unrelated litigation that it does not believe the Mashpee Tribe was under federal jurisdiction in 1934, basing this conclusion on the fact that the Tribe did not receive its Part 83 acknowledgement until 2007. *See* KG Urban Enterprises v. Patrick, 693 F.3d 1, 11 (1st Cir. 2012) ("Neither the Mashpee nor the Aquinnah, the two federally recognized tribes in Massachusetts, were federally recognized in 1934, raising the serious issue of whether the Secretary has any authority, absent Congressional action, to take lands into trust for either tribe.") (internal citations omitted).

a court order invalidating the underlying decision to acquire the land in trust, without injunctive relief, will likely not suffice. It may also be, at least according to the Congressional members represented as amici in the Mashpee D.C. district court litigation, that the Department cannot reverse a trust acquisition until all appeals have been exhausted, including review or denial of *certiorari* at the Supreme Court level.[218]

B. *Narragansett Indian Tribe*

As far as we are aware, the Narragansett Indian Tribe has not attempted to obtain trust lands under section 5 of the IRA following the Supreme Court's conclusion in *Carcieri* that the Tribe was not under federal jurisdiction in 1934. Since neither the United States nor the Narragansett Indian Tribe actually briefed the issue,[219] however, nor was there an underlying Departmental determination on the issue, it is possible the Department could consider issuing a comprehensive analysis of the Tribe's jurisdictional status pursuant to the two-part framework. Such an analysis should rely heavily on the fact that Narragansett children attended BIA schools in the early 1900s,[220] as evidence of boarding school attendance is an increasingly important demonstration of federal jurisdiction.[221] The Department would nonetheless have to overcome the substantial hurdle of the *Carcieri* Court's reliance on Supreme Court Rule 15.2, which allowed it to accept as true any uncontested statements of fact or law made in the petition for a *writ of certiorari*.[222]

218. *See* Brief of Members of Congress as Amicus Curiae in Support of Plaintiff, *supra* note 167, at 13.

219. *See* Carcieri v. Salazar, 555 U.S. 379, 395 (2009) ("None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934.").

220. *Carlisle Indian Industrial School (1879-1918),* CARLISLE INDIAN INDUS. SCH., https://home.epix.net/~landis/tally.html [https://perma.cc/2JRG-PMD5].

221. This is consistent with the 2021 Mashpee decision and is further underscored by now Secretary Haaland's creation of a Federal Indian Boarding School Initiative. *See Secretary Haaland Announces Federal Indian Boarding School Initiative,* U.S. DEP'T OF THE INTERIOR (June 22, 2021), https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative [https://perma.cc/V42H-9SPN].

222. *Carcieri*, 555 U.S. at 396 ("[T]he petition for writ of certiorari filed in this case specifically represented that '[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government.' Respondents' brief in opposition declined to contest this

Moreover, the court noted there was evidence in the record that the Narragansetts could not show they were under federal jurisdiction in 1934, and cited to the Final Determination of Federal Acknowledgement of the Tribe from 1983.[223] In addition, Justice Souter in dissent noted he would have supported a remand to allow Interior and the Tribe to address the question, but his position was not accepted by the majority.

Unlike the land claims settlement acts for some other New England tribes, discussed in more detail below, the Tribe's settlement act did not specifically or generally extend the benefits of the IRA to the Tribe. The Rhode Island Indian Claims Settlement Act was enacted by Congress in 1978 to resolve the Tribe's Non-Intercourse Act claims to land in the City of Charleston, Rhode Island.[224] The Act resulted in the transfer of 1,800 acres to a state law corporation, consisting primarily of tribal representatives, and the lands were to remain subject to state jurisdiction.[225] At the time of the Act, the United States did not formally recognize the Tribe. Nonetheless, the Act contained a provision stating that should the Department of the Interior subsequently acknowledge the Tribe, the settlement lands would be restricted from alienation.[226] Five years later, the Department of Interior formally acknowledged the Tribe through the Part 83 procedures and shortly thereafter acquired the settlement lands in trust for the Tribe.[227]

Unfortunately, there is no language in the Narragansett's settlement act that supports an argument it extended the IRA to the Tribe. Moreover, there are individuals on the First Circuit who have already voiced their opinion that Section 5 of the IRA does not apply to the Tribe. In the First Circuit decision prompting the Supreme Court's review in *Carcieri*, then Circuit Judge—now Chief Judge—Jeffrey R. Howard, authored a dissent to the majority's affirmation of the Department's authority to acquire trust land for

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assertion. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case.").

223. *Id.*

224. Pub. L. No. 95–395, § 2, 92 Stat. 813 (1978).

225. *Id.* §§ 7, 9.

226. *Id.* § 8(c).

227. *See Carcieri*, 555 U.S. at 384–85; Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983).

the Tribe under the IRA. Judge Howard disagreed, instead viewing the settlement act as implicitly repealing or extinguishing the Tribe's right to acquire trust land under the IRA because such a right would run counter to the conditions of settlement.[228] Whether others on the First Circuit would agree remains to be seen. Nonetheless, any Departmental decision to acquire trust land for the Tribe, whether based on an extension of the IRA through the settlement act or a full "under federal jurisdiction" analysis, may be met by a skeptical, if not hostile, appellate court.

C. *Other New England Tribes*

Beyond the Mashpee and Narragansett tribes, there are seven other New England tribes: the Mashantucket Pequot Tribal Nation, the Wampanoag Tribe of Gay Head (Aquinnah), the Mohegan Tribe, the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs. These tribes, with their own histories that in some ways mirror and in some ways differ from Narragansett and Mashpee, have also sought trust land acquisition. These tribes and their relative circumstances are described in more detail below.

1. The Mashantucket Pequot Tribal Nation

The Mashantucket Pequot Tribal Nation is located in southeastern Connecticut. Like other New England tribes, the Nation's ancestral members struggled to maintain their traditional lands upon contact by European colonizers and the foundation of the United States.[229] In 1976, the Tribe filed a lawsuit claiming that in 1855, the State of Connecticut had illegally transferred 800 acres of land out of the Tribe's possession, in violation of the Nonintercourse Act.[230] The lawsuit clouded title to several hundred acres of land in and around the town of Ledyard and eventually prompted the parties to settle.[231] The settlement terms were embodied in an

228. Carcieri v. Kempthorne, 497 F.3d 15, 48–51 (1st Cir. 2008) (Howard, J., dissenting).

229. *Tribal History*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, https://www.mptn-nsn.gov/tribalhistory.aspx [https://perma.cc/9Z2S-WN6B] (last visited Oct. 17, 2021).

230. *Id.*; *see also* Connecticut v. U.S. Dep't of the Interior, 228 F.3d 82, 86 (2nd Cir. 2000).

231. *Id.*

act of Congress called the Mashantucket Pequot Indian Claims Settlement Act, which provided formal federal recognition of the Tribe and mechanisms for reacquiring portions of the Tribe's ancestral lands.[232]

The Settlement Act extinguished the Tribe's claims in exchange for the establishment of a $900,000 settlement fund to be used for purchasing new lands for the Tribe.[233] It provided that newly acquired lands purchased with settlement funds would be held in trust by the federal government on behalf of the Tribe so long as such lands were located within a designated area surrounding the Tribe's existing reservation, referred to as the settlement lands.[234] Lands outside the designated settlement lands that were acquired with settlement funds could only be held in fee simple by the Tribe and remained subject to State jurisdiction.[235] Additionally, the Settlement Act stated "[e]xcept as otherwise provided in this Act, all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the Tribe."[236] Similarly, the Act provided "[n]otwithstanding any other provisions of law, the Tribe and members of the Tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes as of the date of enactment of this Act."[237]

The Tribe's Settlement Act extended the IRA, including the Section 5 provision for trust acquisitions, to the Tribe, as repeatedly recognized by the Department.[238] This conclusion is not altered by

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232. Pub. L. No. 98-134, 97 Stat. 851 (1983).

233. *Id.* §§ 4, 5.

234. *Id.* § 5(b)(7); *see also Connecticut v. U.S. Dep't of the Interior*, 228 F.3d at 86.

235. Pub. L. No. 98-134 § 5(b)(8); *Connecticut v. U.S. Dep't of the Interior*, 228 F.3d at 87.

236. Pub. L. No. 98-134 § 9(a).

237. *Id.* § 9(b). The Settlement Act also expressly acknowledged that "[t]he State of Connecticut has provided special services to the members of the Western Pequot Tribe residing within its borders. The United States has provided few, if any, special services to the Western Pequot Tribe and has denied that it had jurisdiction over or responsibility for said Tribe." *Id.* § 2.

238. *See* Memorandum to from Daniel H. Jorjani, Solic., Dep't of the Interior, to Tara M. Sweeney, Assistant Sec'y, Indian Affs. 2 n.6 (Mar. 10, 2020) (referencing the Mashantucket Pequot settlement act as an example of a later Congressional extension of the IRA); Memorandum from Robert S. Hitchcock,

the Settlement Act's restrictions preventing lands located outside of the designated settlement lands area purchased with settlement funds to be held in trust. The Second Circuit determined those restrictions pertain only to lands acquired with settlement funds, therefore lands purchased by the Tribe using other funds are subject to the Department's typical fee-to-trust process under IRA section 5, regardless of their location.[239]

2. The Wampanoag Tribe of Gay Head (Aquinnah)

The Wampanoag Tribe of Gay Head, often referred to as Aquinnah, is located on the island of Martha's Vineyard in Massachusetts. The Tribe shares a common heritage with the Mashpee tribe, as both descend from the Wampanoag people and both have a long history of subjection to the Commonwealth of Massachusetts.[240] Although the Aquinnah have maintained their tribal community in Martha's Vineyard post-European contact, the Tribe's landholdings were nonetheless reduced and in the 1970s the Tribe filed a Nonintercourse Act lawsuit claiming the illegal dispossession of its lands in the Town of Gay Head.[241] The lawsuit resulted in a settlement amongst the parties that was formalized in

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Att'y-Advisor, Branch of Env't & Lands, Div. of Indian Affs., to Bruce Maytubby, Reg'l Dir., Bureau of Indian Affs. E. Region 10 nn.85–86 (Mar. 10, 2020) (citing a Departmental trust acquisition made for the Mashantucket Pequot in 2017 that found that the "IRA applied to [the] Tribe as a law of general application under the [Settlement] Act").

239. *Connecticut v. U.S. Dep't of the Interior*, 228 F.3d at 88 ("Whether or not [lands purchased with non-settlement funds] are within settlement land boundaries, the Settlement Act does not apply. The Tribe may apply to the Secretary to take them into trust under the 1934 IRA, and the Secretary's decision will be governed by the considerations outlined in the relevant regulations. Nothing in § (b)(7) supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds.").

240. *Wampanoag History*, WAMPANOAG TRIBE OF GAY HEAD AQUINNAH, https://wampanoagtribe-nsn.gov/wampanoag-history [https://perma.cc/5B7Z-X4JW] (last visited Oct. 17, 2021).

241. *See* Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 2, 101 Stat. 704 (1987); *see also* Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 853 F.3d 618, 621–22 (1st Cir. 2017) (describing the background of the Settlement Act in the context of determining whether the Indian Gaming Regulatory Act applies to Aquinnah settlement lands).

Congress' enactment of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act in 1987.[242]

The 1987 Settlement Act confirmed the Tribe's existence as an Indian tribe with a government-to-government relationship with the United States and set forth several mechanisms for reacquiring portions of the Tribe's ancestral lands.[243] It extinguished the Tribe's land claims in exchange for the creation of a multi-million dollar settlement fund to purchase lands for the Tribe, in addition to lands donated by the Town of Gay Head.[244] The settlement lands were to be held by the United States in trust for the Tribe, although still subject to state and local jurisdiction, in addition to limited tribal jurisdiction.[245] The Settlement Act resulted in the conveyance of approximately 485 acres of trust land to the Tribe.[246]

Unlike the settlement acts for certain other New England tribes, Aquinnah's Settlement Act did not contain language expressly or implicitly extending the IRA to the Tribe. The closest provision was in Section 12, which provided "[f]or the purpose of eligibility for Federal services made available to members of federally recognized Indian tribes, because of their status as Indians, members of this tribe residing on Martha's Vineyard, Massachusetts, shall be deemed to be living on or near an Indian reservation."[247] This, unfortunately, falls short of an extension to the Tribe of "all laws and regulations of the United States of general application to Indians or Indian nations," much less an express extension of the IRA.

Accordingly, it appears the only way the Aquinnah could acquire additional trust lands beyond those provided in its settlement act is if it satisfies the IRA's definition of "Indian" by showing that it was under federal jurisdiction in 1934. Aquinnah's situation is significantly boosted by the 2021 positive Departmental decision for

242. Pub. L. No. 100-95, 101 Stat. 704.

243. *Id.* §§ 2, 6. The Aquinnah Tribe had already been federally acknowledged by the Department under the Part 83 process earlier that same year. *See* Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4,193 (Feb. 10, 1987).

244. *Id.* §§ 3–6.

245. *Id.* §§ 6, 9.

246. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d at 622.

247. Pub. L. No. 100-95 § 12.

Mashpee.[248] However, the First Circuit has already noted its assumption that the Aquinnah was not under federal jurisdiction in 1934.[249] Yet this assumption was in the context of litigation brought by a gaming developer concerning the validity of Massachusetts' gaming license tribal preference and neither the Tribe nor the Department were a party.[250] Moreover, the Court's statement was based on the faulty assumption that the Tribe's formal federal acknowledgement in 1987, pursuant to Part 83, somehow precludes a finding of federal jurisdiction over the Tribe in 1934.[251] This runs counter to the Department's Two-Part Framework and relevant federal caselaw and should not carry any weight in a Departmental *Carcieri* determination for the Tribe.[252]

In any event, Aquinnah Chairwoman Andrews-Maltais has implored Congress to move forward with a clean *Carcieri* fix, stating such legislation would "correct the wrongs, and injustice that has been imposed upon our Aquinnah Wampanoag People and all Indian People since the disastrous Supreme Court decision in the *Carcieri v. Salazar* case in 2009."[253]

3. Mohegan (Connecticut)

In the 1970s, the Mohegan Tribe of Indians of Connecticut filed suit against the State of Connecticut in Federal district court seeking possession of 2,500 acres of land they alleged were conveyed in

248. The Aquinnah Tribe even participated in the Mashpee remand proceedings resulting in the negative 2018 Departmental decision for the Mashpee Tribe. *See* Mashpee 2018 Mashpee Decision, supra note 142, at 5.

249. KG Urban Enterprises v. Patrick, 693 F.3d 1, 11, 22 (1st Cir. 2012) ("Neither the Mashpee nor the Aquinnah, the two federally recognized tribes in Massachusetts, were federally recognized in 1934, raising the serious issue of whether the Secretary has any authority, absent Congressional action, to take lands into trust for either tribe.") (internal citations omitted).

250. *See generally id.* at 4.

251. *Id.* at 11 n.8 (citing the Aquinnah and Mashpee tribes' respective acknowledgement determinations).

252. The same point holds true for the Mashpee tribe, who were also subject to this erroneous conclusion by the First Circuit.

253. Press Release, Cheryl Andrews-Maltais, Chairwoman, Wampanoag Tribe of Gay Head, Senate Bill 2808, https://www.warren.senate.gov/imo/media/doc/Chair%20II%20Senator%20Warren%20Statement%20S%202808%20Cacieri%20Fix.pdf [https://perma.cc/C666-AKDT] (last visited Oct. 18, 2021).

violation of the Indian Non-Intercourse Act.[254] The State of Connecticut, the Town of Montville, and the Mohegan Tribe entered into a settlement agreement to resolve the land claims, and resolve jurisdictional and gaming issues.[255] In 1994, to implement the settlement, Congress enacted the Mohegan Nation of Connecticut Land Claims Settlement Act of 1994. The Mohegan Act provided mandatory trust acquisition authority for lands identified in the Act, to be the Tribe's initial Indian reservation.[256] Nothing in the Act precluded acquisitions pursuant to other authority, including section 5 of the Indian Reorganization Act. Unlike the Mashantucket Pequot Settlement Act, nothing in the Mohegan Act extends section 5 to the Mohegan. Therefore, a determination of whether the Tribe meets one of the definitions of "Indian" in the IRA would be required to support an acquisition under section 5 of the IRA.

4. The Maine Tribes (Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians, Aroostook Band of Micmacs)

In the 1970s, the United States filed suit against the State of Maine on behalf of the Passamaquoddy Tribe and Penobscot Nation alleging that numerous transactions in which the tribes ceded their land to Massachusetts and Maine violated the Indian Nonintercourse Act, and were therefore void.[257] At issue were over twelve and a half million acres of Maine land, nearly two thirds of Maine.[258]

To resolve the land claims, in 1980, the United States, Maine, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, entered into a settlement, codified by Congress through the Maine Indian Claims Settlement Act (MICSA), Pub. L. No. 96-420, 94 Stat. 1785 (1980). MICSA ratified the Maine Implementing Act, Me. Rev. Stat. Ann. Tit. 30, §§ 6201–

254. *See generally* Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980).

255. Pub. L. No. 103-377, 108 Stat. 3501, § 2(a) (1994).

256. *Id.* § 5(a).

257. Joint Tribal Council of Passamaquoddy Tribe v. Norton, 528 F.2d 370, 373 (1st Cir. 1975).

258. Granville Ganter, *Sovereign Municipalities? Twenty Years after the Maine Indian Claims Settlement Act of 1980*, *in* ENDURING LEGACIES, NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES, at 29 (Bruce E. Johansen, ed., 2004).

14, the state statute addressing the relationship between the State and the tribes.[259] MICSA extinguished the land claims, established a $27 million dollar settlement fund to be held in trust for the Passamaquoddy Tribe and the Penobscot Nation, and a $54.5 million dollar land acquisition fund.[260] The land acquisition fund supported, *inter alia*, the acquisition of up to 150,000 acres of land each to be held in trust for the Passamaquoddy Tribe and the Penobscot Nation.[261]

MICSA also barred land acquisitions for tribes or Indians in Maine pursuant to other statutory authority, providing "[e]xcept for the provisions of this subchapter, the United States shall have no other authority to acquire lands of natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine."[262] MICSA also limited the applicability of Federal Indian law in Maine, providing:

> [N]o law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.[263]

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259. 94 Stat. 1785, §§ 2(b)(3), 6(b)(1) (1980). MIA generally treats the Passamaquoddy Tribe and the Penobscot Nation as municipalities under State law. 30 M.R.S. § 6206(1) ("Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.").

260. 94 Stat. 1785 §§ 4, 5.

261. *Id.* § 5(c).

262. *Id.* § 5(e).

263. *Id.* § 6(h). Another section, further limits the applicability of Federal law, providing "The provisions of any Federal law enacted after October 10,

Subsequently, a separate settlement act, afforded the Aroostook Band of Micmacs "the same settlement provided to the Houlton Band" in MICSA (collectively, the "Maine Settlement Acts").[264] The Aroostook Band Act provided the tribe with a $900,000 land acquisition fund to acquire land in trust, and provided "[f]or the purposes of application of Federal law, the Band and its land shall have the same status as other tribes and their lands" under MICSA.[265]

In dicta, the Second Circuit Court of Appeals has held MICSA "decisively supplants the Secretary's authority to take land into trust under the 1934 IRA beyond that expressly contemplated by the Maine Settlement Act."[266] The court distinguished MICSA from the Connecticut Indian Claims Settlement Act, which the court reasoned did not preclude trust land acquisition under section 5 of the IRA.[267] In its opposition to a petition for certiorari filed by the State of Connecticut, the United States agreed with the Second Circuit's interpretation of MICSA, asserting that MICSA "contain[s] an express prohibition on the exercise of the Secretary's general Section 5 authority to take non-settlement lands into trust for the Indian Tribes covered by that Act."[268]

Because MISCA contains its own land acquisition provisions, and explicitly bars the Secretary to acquire lands in trust pursuant to other statutory authorities, *Carcieri* is inapplicable in Maine. However, there is renewed interest in Maine in revisiting MIA. The Task Force on Changes to the Maine Indian Claims Settlement Implementing Act established by the State Legislature recently recommended that MIA be amended to permit Maine tribes to acquire

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1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." *Id.* § 16(b).

264. Pub. L. 102-171, 105 Stat. 1143, § 2(a)(5) (1991).

265. *Id.* §§ 5, 6(b).

266. Connecticut v. U.S. Dep't of the Interior, 228 F.3d 82, 90 (2d Cir. 2000).

267. *Id.*

268. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief of the United States in Opposition, *Connecticut v. U.S. Dep't of the Interior*, No. 00-1032 (2d Cir. 2000).

trust land pursuant to the Indian Reorganization Act in a manner equivalent to that enjoyed by other tribes.[269]

V. RECOMMENDATIONS AND OPINIONS

As we argued in *Enough is Enough*, the only way to address *Carcieri* once and for all is for Congress to enact a clean *Carcieri* fix. Until that point, *Carcieri* issues will continue to consume limited tribal and agency resources, and slow down and in some cases prohibit altogether the restoration of tribal homelands.

As noted above, a clean *Carcieri* fix passed Congress in 2019, and then again in 2021. However, both times it was referred to the Senate, which took no action. The Senators from Rhode Island have consistently opposed a clean *Carcieri* fix since *Carcieri* was decided and have also opposed Congressional efforts to reaffirm the status of Mashpee trust land.[270] It seems unlikely they will allow a clean *Carcieri* fix to move forward in the Senate.

Assuming Congress fails to enact a clean *Carcieri* fix, the next best option is for Interior to enact a regulatory fix memorializing the two-part framework set forth in M-37029. An M-Opinion, such as M-37029, formally institutionalizes Interior's legal interpretations "on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary."[271] An M-Opinion is not a formal adjudication and does not go through public notice and comment.

Federal courts have held that M-Opinions are not entitled to *Chevron*[272] deference, and are at most entitled to the lesser

269. ME. OFF. OF POL'Y & LEGAL ANALYSIS, TASK FORCE ON CHANGES TO THE MAINE INDIAN CLAIMS SETTLEMENT IMPLEMENTING ACT 56–57 (Jan. 2020).

270. *See, e.g*, '*Carcieri Fix*' *Uncertain*, GLOB. GAMING BUS. MAG. (Aug. 2, 2010), https://ggbmagazine.com/article/carcieri-fix-uncertain [https://perma.cc/7W6C-KYDP]; Sam Houghton, *Tribal Senate Bill in Waiting*, ENTERPRISE (Feb. 1, 2019) https://www.capenews.net/mashpee/news/tribal-senate-bill-in-waiting/article_100b3b4b-f898-54af-a1ff-fb392aa141b5.html [https://perma.cc/E2PP-ZU8P].

271. 209 Department of the Interior D.M. 3.2(11) (2020).

272. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

Skidmore[273] deference.[274] Under *Chevron*, a court will defer to an agency's interpretation of an ambiguous statute Congress charged it to administer if it is based on a "permissible construction of the statute."[275] Under *Skidmore*, an agency interpretation is "entitled to respect," but only to the extent that the interpretation has the "power to persuade."[276] Courts will consider "the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments."[277]

However, courts have applied *Chevron* deference to Interior's two-part framework where applied in a fee-to-trust determination for a particular tribe. In upholding the two-part framework, the Court of Appeals for the District of Columbia Circuit applied *Chevron* to Interior's interpretation of "recognized Indian tribe now under Federal jurisdiction" and concluded it was "bound to defer to [Interior's] reasonable interpretation of the statute it is charged to administer."[278] A federal district court in New York likewise applied *Chevron* to the two-part framework, in rejecting a challenge to a fee-to-trust determination for the Oneida Nation of New York.[279] In ruling on a challenge to a fee-to-trust application for the Ione Band, the Ninth Circuit declined to rule on whether

273. Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

274. McMaster v. United States, 731 F.3d 881, 891-92 (9th Cir. 2013) (concluding that an M-Opinion on the patenting of mining claims was only entitled to *Skidmore*, and not Chevron deference); Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 833-34 (10th Cir. 1997) (declining to afford Chevron deference to an M-Opinion in the absence of a rulemaking process or an adjudication, but concluding that the M-Opinion could, but did not in this case, warrant deference); Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 2019 WL 2635587, at *14 (S.D. Cal 2019) (declining to afford an M-Opinion Chevron deference, and concluding that it was not persuasive and would not be afforded "much deference"); Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F.Supp.3d 469, 478-80 (S.D.N.Y. 2020) (declining to even afford an M-Opinion Skidmore deference because the opinion was unpersuasive).

275. *Chevron*, 467 U.S. at 843.

276. *Skidmore*, 323 U.S. at 139-40.

277. Cmty. Health Ctr. V. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002) (citing United States v. Mead, 533 U.S. 218, 228, 234-35 (2001)).

278. Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell, 830 F.3d 552, 563 (D.C. Cir. 2016).

279. Cent. N.Y. Fair Bus. Ass'n v. Jewell, No. 08-660, 2015 WL 1400384, at *7 (N.D.N.Y. 2015), *aff'd* 673 F. App'x 13 (2d Cir. 2016).

Chevron deference applied because "we reach the same conclusion as the agency even without it."[280]

Given Interior's recent flipflopping on the meaning of "recognized Indian tribe now under federal jurisdiction," however, it is possible a court may determine not to afford interpretations articulated through M-opinions any deference.[281] In the Mashpee case, for example, the court ordered supplemental briefing on the level of deference owed to Interior given its unexpected change from the two-part framework to the Solicitor Procedures, but the court did not go as far as to eliminate deference in its final decision.[282] Accordingly, to ensure its interpretation is entitled to deference, we urge Interior to institutionalize it through notice and comment rulemaking under the Administrative Procedure Act (APA).[283] A reviewing court "must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."[284] Published regulations are subject to the rigors of the APA, including notice and comment procedures, and are more likely to receive *Chevron* deference than informal adjudications.[285]

Moreover, institutionalizing the two-part framework through regulation would make it more difficult for the next administration to reverse it. An M-Opinion does not require public notice or comment and can be overruled by the next Solicitor. Rulemakings that have a substantial impact on tribes require tribal consultation pursuant to Executive Order 13175, as well as robust notice and comment procedures under the APA.[286] Following tribal consultation,

280. Cnty. of Amador v. U.S. Dep't of Interior, 872 F.3d 1012, 1025 (9th Cir. 2017).

281. Nat. Res. Def Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d at 478 (noting that the fact that an M-Opinion was "a recent and sudden departure from long-held agency positions backed by over forty years of consistent enforcement practices" weighed against affording it any deference);

282. *See* Mashpee Wampanoag Tribe v. Bernhardt, 466 F. Supp. 3d 199, 209 (D.D.C. 2020); *id.* at 216 (citing Grand Ronde v. Jewell, 830 F.3d 552, 564–65 (D.C. Cir. 2016)).

283. 5 U.S.C. §§ 551–559.

284. Christensen v. Harris Cnty., 529 U.S. 576, 586-87 (2000).

285. United States v. Mead, 533 U.S. 218, 226-27 (2001); *Christensen*, 529 U.S. at 587. *See also* Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49 (2004) ("formal adjudications and interpretations promulgated by an agency pursuant to notice-and-comment rulemaking are generally accorded *Chevron* deference.").

286. 5 U.S.C. § 553.

Interior would publish a proposed rule in the Federal Register and incorporate any comments into a Final Rule published in the Federal Register.

Interior's fee-to-trust process is codified at 25 C.F.R. Part 151. Interior has recently proposed draft regulations to clarify that a tribe is eligible to have land acquired in trust on its behalf when it is Federally recognized at the time of its application and (1) there is specific statutory authority authorizing Interior to acquire land in trust on behalf of the Tribe, (2) the tribe was under federal jurisdiction in 1934, as determined by the existence of conclusive or presumptive evidence identified in the draft regulations or, in the absence of such evidence, application of the two-part framework set forth in M-37029.[287] We strongly support the memorialization of the two-part framework in regulation. We recommend that, in the event Interior proceeds with finalizing the consultation draft, that the preamble to the regulation should include the historical analysis set forth in M-37029; whereas the regulatory text would set forth the two-part test. The preamble should also explain why each type of evidence is relevant, noting relevant court cases. Evidence particularly relevant to New England tribes could be noted, such as enrollment of children at boarding schools and inclusion of tribes in federal reports developed to inform Indian affairs policy and actions. The removal of tribal children to send them to boarding school is an extraordinary assertion of federal power over the tribe that weighs heavily in favor of a determination that a tribe was under federal jurisdiction.

Along with formalizing the two-part framework in notice-and-comment rulemaking, the Department should shift the evidentiary burden for *Carcieri* determinations. This is not reflected in the current consultation draft. Currently, the onus is on tribes to submit all relevant historical documents and accompanying legal analysis to prove its jurisdictional status. The Department then considers the submitted materials and issues a determination. This process is antithetical to the Department's trust responsibility towards

287. 2022 Consultation Draft § 151.4. Although not enumerated in the 2022 Consultation Draft, examples of tribe specific legislation include 49 Stat. 1967, § 1 (1936) (Oklahoma Indian Welfare Act); 25 U.S.C. § 5119 (Alaska IRA); Pub. L. 100-89, 101 Stat. 666 (1987) (Ysleta del Sur Pueblo); Pub. L. 100-139, 101 Stat. 823 (1987) (Cow Creek Band of Umpqua Tribe of Indians); Pub. L. 92-470, 86 Stat. 783 (1972) (Tonto Apache Tribe).

tribes, which should include, at a minimum, shouldering the responsibility for amassing the historical record for a *Carcieri* determination. Second, the records most relevant to the inquiry are federal records and, as such, are housed in federal archives and maintained by federal employees. There is a certain irony to requiring tribes (or their historians) to travel to federal archives to pull federal records, which are then submitted back to the federal government via federal officials at the Department. At the very least, if the evidentiary burden is to remain with tribes, the Department should earmark funds to be distributed to tribes that would cover the significant cost of hiring historians and lawyers to compile their *Carcieri* materials.

Through its consultation draft, Interior has also attempted to implement other changes to streamline its fee-to-trust process as well. Tribes have complained the process is overly burdensome, resource intensive, and takes too long.[288] Interior often takes years to process fee-to-trust applications. Interior has attempted to address this by requiring BIA to issue a decision on a fee-to-trust request within 120 days after issuance of a notice of a complete acquisition package. A complete acquisition package includes, *inter alia*, completion of environmental review and receipt of comments from state and local governments. Interior has also attempted to improve the process by establishing a presumption that acquisitions within reservation boundaries will be approved, and establishing different processes for within reservation boundaries, contiguous, off-reservation, and initial acquisitions.

Although an improvement, in our view, the proposed changes to the regulations do not go far enough. As noted above, Interior needs to do more to address the significant burden placed on tribes by having to prepare *Carcieri* analyses. In addition, we offer the following suggestions to further improve the process:

1. Imposing timelines on BIA to (a) notify state and local governments having regulatory jurisdiction over the land to be acquired upon receipt of an

288. *See, e.g Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act*, *supra* note 77, at 14–15 (statement of Hon. Kirk Francis, President, United S. & E. Tribes).

application; and (b) notify applicants that an application is incomplete.

2. Establishing a process to appeal from BIA inaction on a fee-to-trust application that mirrors that of the process established in the leasing regulations at 25 C.F.R. 162. The leasing regulatory process seeks to hold BIA officials accountable by permitting appeals to their immediate supervisors.
3. Deleting the requirements in draft section 151.3(b), and reiterated in subsection (b) in 151.9–151.12, assuming that they are intended to serve as a proxy for the existing "need" requirement. Acquisition of land in trust is always necessary to facilitate tribal self-determination, and land need not only be acquired on or adjacent to reservations. Rather, a tribe should be required to simply state the purpose of the acquisition.
4. Clarifying the National Environmental Policy Act process, including what level of NEPA review is required for different types of acquisitions and who prepares the relevant documents. In addition, NEPA compliance is often the most time-consuming part of the trust acquisition process, and therefore requiring BIA to issue a decision within 120 days after the NEPA process is concluded may not in fact do much to expedite the process.
5. Considering the practical reality that four different tracks for fee-to-trust applications, depending on where the land is located in relation to a tribe's existing land base, may be very difficult to administer. Such a system is likely to create distractions and confusion both within the BIA and externally.
6. Deleting the requirement that Interior consider whether BIA is equipped to discharge the additional responsibilities resulting from trust acquisition. It is unclear what this even means, and if trust acquisition is otherwise necessary to restore

tribal homelands or for other important purposes, the burden should be on BIA to resolve this issue.

7. Establishing a separate section for mandatory acquisitions.

CONCLUSION

The *Carcieri* decision continues to cast a pall throughout Indian country. It will take political courage and quite frankly, a more meaningful sense of the trust responsibility, for Congress to carry through a true legislative fix. In the meantime, we see indicia of hope in the current administration and in the hard work and battles already won by tribal nations.