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MEMORANDUM

TO: National Congress of American Indians
National Indian Gaming Association

FROM: Richard Guest, Staff Attorney, Native American Rights Fund

RE: September 2014 Update of Litigation in the Wake of the U.S. Supreme Court's Decision in *Carcieri v. Salazar*

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## U.S. Supreme Court:

***Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*** **(Nos. 11-246 and 11-247)** – On June 18, 2012, the Court announced its decision and held: (1) Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA; and (2) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has prudential standing to bring a *Carcieri* challenge to a land-in-trust acquisition. In an opinion authored by Justice Kagan, the Court (8-1) found that the APA generally waives the immunity of the United States from any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under the color of legal authority." 5 U.S.C. § 702. According to the Court, Patchak's *Carcieri* claim fits within this waiver of immunity.

In her dissent, Justice Sotomayor states: "After today, any person may sue under the APA to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land." Justice Sotomayor points out that the Court's decision works against the one of the primary goals of the IRA—new economic development and financial investment in Indian country. Now, trust land acquisitions for the benefit of Indian tribes will be subject to judicial challenge under the APA's six-year statute of limitations—not the 30-day period provided for under the regulations—substantially constraining the ability of all Indian tribes to acquire and develop lands. NCAI and many tribes worked with the Department of Interior on

proposed amendments to 25 CFR 151.12(b) to require land to trust opponents to exhaust administrative remedies within 30 days, which will alleviate some of the harms caused by the Patchak decision. After an extended review and comment period, the proposed rule was finalized by the Department on November 13, 2013. See 78 Fed. Reg. 67928 (November 13, 2013).

On September 4, 2014, Judge Leon, U.S. District Court for the District of Colombia, held a conference with the parties to determine the status of the litigation. In the two years since the Supreme Court's decision, Mr. Patchak has failed to prosecute his claims through the lower court. Mr. Patchak informed the court that he is now requesting a monetary settlement from the Tribe. Judge Leon expressed his frustration with the delay and has directed the parties to file a scheduling order within 10 days, with motions for summary judgment due in 90 days.

**U.S. Courts of Appeals**

***Big Lagoon Rancheria v. State of California* (9th Cir. No. 10-17803)** – On June 11, 2014, the U.S. Court of Appeals for the Ninth Circuit issued an order granting the Tribe's petition for rehearing en banc. The order also vacated the 2-1 decision of the three-judge panel which reversed the district court order granting summary judgment in favor of the Big Lagoon Rancheria in its bad faith lawsuit against the State of California under the Indian Gaming Regulatory Act (IGRA). The order required all the parties to submit copies of the original briefs filed in the case, and oral argument has been set for September 17. 2014. The court has granted the United States' motion to participate as amicus curiae in oral argument in support of the Tribe. The en banc panel includes Chief Judge Kozinski, along with Judges Pregerson, Reinhardt, O'Scannlain, Graber, Fletcher, Paez, Bybee, Smith, Christen, and Nguyen.

Background: At the district court level, the State had attempted to demonstrate good faith by arguing *Carcieri*—the state's need to preserve the public interest by keeping a gaming facility from being located on lands unlawfully acquired by the Secretary of the Interior for a tribe that was not "under Federal jurisdiction" in 1934. The district court characterized the argument as a *post hoc* rationalization by the State of its actions which were concluded four months prior to the Court's decision in *Carcieri*.

However, on appeal the two-judge majority held that a tribe must have jurisdiction over "Indian lands" in order to file suit to compel negotiations under IGRA. Specifically, the tribe must have jurisdiction over the Indian lands upon which the gaming activity is to be conducted. In its view—based on an incomplete factual and historical record developed through briefing on cross-motions for summary judgment—the majority found that the eleven-acre parcel taken into trust by the United States in 1994 were not "Indian lands" since Big Lagoon was not a tribe "under Federal jurisdiction" in 1934. Therefore, the State is under no obligation to negotiate in good faith with Big Lagoon. The dissent argued that the eleven-acre parcel are Indian lands under IGRA based on precedent within the Ninth Circuit, and that the State could not collaterally attack the status as trust lands years after its administrative and legal remedies had expired.

In response to the petition for rehearing en banc, the Tribal Supreme Court Project coordinated the preparation and submission of the NCAI, USET and Navajo Nation Amicus Brief, the California Indian Legal Services and California Association of Tribal Governments letter brief and the Amicus Brief of the United States which were all filed on March 18, 2014. On April 14, 2014, Big Lagoon filed a citation of supplemental authorities, citing the decision by the U.S. District Court for the Middle District of Alabama in *Alabama v. PCI Gaming (Poarch Band)* which rejected the Ninth Circuit panel's reasoning and holding in *Big Lagoon*.

***State of Alabama v. Poarch Band of Creek Indians* (11th Cir. No. 14-12004):** On July 7, 2014, the State of Alabama filed its opening brief before the U.S. Court of Appeals for the Eleventh Circuit seeking reversal of the April 10, 2014, decision of the district court which granted the Tribe's motion to dismiss based on the doctrine of tribal sovereign immunity. On July 14, 2014, the State of Michigan, joined by Arizona, Kansas, South Dakota and Utah, filed an amicus brief in support of Alabama. On August 18, 2014, the Alabama Citizens Action Program (ALCAP), an inter-denominational ministry self-described as "Alabama's Moral Compass," filed an amicus brief in support of Alabama. The Tribe's response brief was granted and the brief was filed on September 10, 2014. No date for oral argument has be set.

In this case, the State of Alabama is asking the federal courts to declare tribal gaming a "public nuisance" and to permanently enjoin the tribe from operating its gaming operations. Within their complaint, based on the Supreme Court's decision in *Carcieri,* the State alleges that the Secretary of the Interior was without authority to take the lands in trust since the Poarch Band was neither recognized or under federal jurisdiction in 1934. Thus, according to the State, the tribe's casinos are not properly located on "Indian lands" as required under IGRA. In the lower court, the United States had filed an amicus brief in support of the Tribe's motion to dismiss, and the State of Michigan had filed an amicus brief in support of Alabama. In its Memorandum Opinion and Order, the district court rejected all of the State's arguments, and soundly rejected the Ninth Circuit's reasoning in the *Big Lagoon* case.

***Butte County v. Hogen*, (DC Cir. No. 09-5179):** On January 24, 2014, Kevin Washburn, Assistant-Secretary–Indian Affairs, issued the Record of Decision (ROD) in relation to the application submitted by the Mechoopda Tribe of Chico Rancheria to acquire 626.55 acres of land located in Butte County California in trust under Section 5 of the Indian Reorganization Act (IRA). *See* 79 Fed. Reg. 6917. Back on July 13, 2010, the U.S. Court of Appeals for the D.C. Circuit had issued its opinion setting aside the Secretary's initial decision to take the land in trust and remanded the case to the Department of the Interior to address the "new" information provided by Butte County in relation to the Department's restored tribe/restored lands determination under the Indian Gaming Regulatory Act (IGRA).

In addition to its determination that the Tribe qualifies as a "restored tribe" and that the trust lands qualify as "restored lands" under IGRA, the Department applied its two-part inquiry developed after *Carcieri* to determine that the Mechoopda Tribe was "under Federal jurisdiction" in 1934. *See* ROD at 28-37. On February 28, 2014, the United States filed a notice of its

compliance with the remand order in the U.S. District Court for the District of Colombia (Case No. 1:08-cv-00519). **As of September 15, 2014, no further filings are reported on the docket.**

**U.S. District Courts:**

***Stand-Up for California v. Department of the Interior* (DC-DC No. 12-2039):** In this consolidated action, the plaintiffs are challenging the decision of the Secretary of the Interior to acquire a 305-acre parcel of land in Madera County, California in trust on behalf of the North Fork Rancheria of Mono Indians. On January 29, 2013, the district court issued an order denying the plaintiff's motion for preliminary injunction. In its analysis of whether to issue a preliminary injunction, the court concluded that the plaintiffs are not likely to succeed on the merits of their *Carcieri* claims based, in part, on the fact that "a majority of the adult Indians residing at the [North Fork] Tribe's Reservation voted to reject the IRA at a special election duly held by the Secretary on June 10, 1935," as well as the original purchase of Rancheria lands by the United States for the Tribe in 1916. On December 16, 2013, the court granted the United States motion to remand and stay the proceedings which was extended until May 5, 2014. On May 23, 2014, the plaintiffs filed their Second Amended Complaint, and on June 9, 2014, the Tribe and the United States filed their Answers. **As of September 15, 2014, no further substantive filings are reported on the docket.**

***Jamul Action Committee v. Stevens* (ED-CA No. 2:13-cv-01920):** On September 15, 2013, the Jamul Action Committee (JAC), a non-profit organization of citizens living in and around the rural unincorporated town of Jamul, California, filed a complaint against the National Indian Gaming Commission (NIGC) and the Department of the Interior (DOI) challenging the Indian lands determination issued by the NIGC on April 10, 2013, on behalf of the Jamul Indian Village. In their complaint, the plaintiffs allege that, under *Carcieri,* the Secretary of the Interior is without authority to take land in trust for the Jamul Indian Village which was neither recognized nor under federal jurisdiction in 1934. On February 27, 2014, the JAC filed its First Amended Complaint. On March 17, 2014, the United States filed its Motion to Dismiss. On April 24, 2014, the Jamul Indian Village filed a Motion for Leave to file an Amicus Brief which was granted. **On August 5, 2014, the court granted the U.S. motion to dismiss with leave to amend. On August 26, 2014, the JAC filed its Second Amended Complaint. The U.S. requested and was granted an extension to file its Response to the Second Amended Complaint. The court has now scheduled its next Status Conference for January 22, 2015.**

***Cherokee Nation v. Jewell* (ND-OK No. 12-493):** On August 12, 2013, U.S. District Court for the Northern District of Oklahoma granted the Cherokee Nation's motion for a preliminary injunction to prevent the Department of the Interior from taking 2.03 acres of land in trust for the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB). The Cherokee Nation had filed suit challenging the Department of the Interior's July 30, 2012 decision to acquire the parcel in trust, asserting that because "UKB was not federally recognized until 1946, the Secretary cannot . . . accept the [land] into trust under *Carcieri*." The UKB intervened and sought a stay of the order which was denied by the district court. The Department of the Interior and the UKB sought a stay of the order granting the preliminary injunction from the U.S. Court

of Appeals for the Tenth Circuit which was denied on August 26, 2013. On December 11, 2013, the parties filed a joint motion to expedite briefing which was granted. The Cherokee Nation filed its opening brief on December 11, 2013, and the United States filed its response brief on January 3, 2014, and Cherokee Nation filed its reply brief due on January 17, 2014. **A hearing on the merits was held before Judge Frizzell on July 25, 2014, and a transcript is available on PACER. On September 8, 2014, the parties submitted their Proposed Findings of Facts and** Conclusions of Law.

***County of Amador v. Salazar* (ED-CA No. 2:12-cv-01710) and *No Casino in Plymouth and Citizens Equal Rights Alliance v. Salazar* (ED-CA No. 2:12-cv-1748):** On June 27, 2012, the County of Amador filed a suit for declaratory and injunctive relief in the U.S. District Court for the Eastern District of California against the Department of the Interior challenging the May 24, 2012 Record of Decision (ROD) taking 228 acres of land in to trust for the benefit of the Ione Band of Miwok Indians. On June 29, 2012, No Casino in Plymouth and Citizens Equal Rights Alliance filed a suit against the Department also challenging the ROD. On July 24, 2012, a case related order was issued and both actions were assigned to a Judge Mendez, and then reassigned to Judge Nunley. Among their many claims, the plaintiffs contend that the Secretary is without authority under *Carcieri* to take land in trust for the Ione Band of Miwok Indians since the tribe did not exist as a "recognized Indian tribe" in 1934 and were not "under federal jurisdiction" in 1934. On September 12, 2013, the U.S. District Court for the Eastern District of California granted the Ione Band of Miwok Indians' motion to intervene, and the tribe filed its answer on November 27, 2103. On January 24, 2014, the court issued its Pretrial Scheduling Order, and the Plaintiffs filed their Motion for Summary Judgment on May 1, 2014. On July 10, 2014, the U.S. and the Tribe filed their Opposition and Cross-Motions for Summary Judgment. **On September 4, 2014, the Plaintiffs filed their Reply in Support of their Motion for Summary Judgment and Response to the U.S. and Tribe's Cross-Motions for Summary Judgment.**

***Confederated Tribes of Grand Ronde, Clark County, et al., v. Jewell* (DC-DC No. 13-cv-00849 and 13-cv-00850):** On June 6, 2013, the Confederated Tribes of Grand Ronde and Clark County both filed new complaints against the United States Department of the Interior which have been consolidated. The complaints include allegations that the Department's May 2013 ROD decision is arbitrary and capricious based on *Carcieri*, among other things. On August 13, 2013, the court granted the Cowlitz Tribe's motion to intervene. The consolidated cases are assigned to Judge Rothstein, and both the government and the plaintiffs have agreed to an expedited briefing schedule in exchange for a limited self-stay of the trust acquisition (until March 31, 2014). On September 23, 2013, motions for summary judgment were filed by Grand Ronde and Clark County. Responses and cross-motions by the Department and the Cowlitz Tribe were filed on November 6, 2013. Plaintiffs' opposition and reply briefs were filed on December 11, 2013, and the U.S. and Tribe filed their reply briefs on January 29, 2014. On February 24, 2014, the court issued its order granting the motions seeking leave to file amicus briefs. The Chinook Nation filed an amicus brief in support of the plaintiffs. The Jamestown S'Klallam Tribe and USET, the Samish Indian Nation, and the Confederated Tribes of the Warm Springs Reservation filed amicus briefs in support of the defendants. On May 7, 2014, the Cowlitz Tribe filed a motion requesting a status conference. **As of September 15, 2014, no further filings are reported on the docket.**

Background: On January 31, 2011, Clark County, City of Vancouver, Citizens Against Reservation Shopping, various non-Indian gaming enterprises and a number of individual landowners filed suit in the against the Department of the Interior and the National Indian Gaming Commission challenging the Record of Decision ("ROD") issued by the Department of the Interior to acquire land in trust for the benefit of the Cowlitz Indian Tribe (the "Cowlitz Parcel"). On February 1, 2011, the Confederated Tribes of the Grande Ronde Community of Oregon filed a separate suit against the Department of the Interior also challenging the ROD. The Clark County complaint stated that "the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934." Therefore, under the Supreme Court's holding in *Carcieri,* the Secretary does not have authority to take lands in trust for the Tribe and does not have the authority to proclaim such land as the Tribe's reservation. Grande Ronde challenged the trust land acquisition alleging that the Cowlitz Tribe was neither "recognized" nor "under federal jurisdiction" in 1934 as required by the IRA. The Cowlitz Tribe successfully intervened in both cases.

On June 20, 2012, Clark County, *et al.,* and Grande Ronde each filed their motion for summary judgment. On July 19, 2012, the United States filed a motion to stay and a motion to remand the case back to the Department for reconsideration of the ROD in light of information provided by the plaintiffs in connection with their summary judgment motions. On August 29, 2012, the court denied the motions of the United States finding that "[n]either a remand nor a stay...is necessary to enable the federal defendants to review and reconsider the [ROD]." Instead, the court simply extended the deadline for the Department and the Tribe to file their responses to the summary judgment motions which are now due on October 5, 2012. On October 1, 2012, the Department issued a "Notice of Filing Supplemental ROD" which incorporated a "Revised Initial Reservation Opinion" which set forth the Secretary's reasons for determining that the Cowlitz Parcel qualifies as the Tribe's initial reservation.

On March 13, 2013, the U.S. District Court for the District of Colombia issued an order dismissing these cases. In its order, the court denied the plaintiffs' motions to strike the Supplemental ROD, remanded the action to the Department with instructions to rescind the 2010 ROD, and required the Department to issue a new ROD within sixty (60) days. On May 8, 2013, the Department published notice in the Federal Register of the April 22, 2013 decision of the Assistant Secretary—Indian Affairs to rescind the 2010 ROD and to issue a new ROD announcing the decision "to acquire in trust approximately 151.87 acres of land in trust for the Cowlitz Indian Tribe and issue a reservation proclamation under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465 and 467. We have determined that the Cowlitz Indian Tribe's request meets the requirements of the Indian Gaming Regulatory Act's ''initial reservation'' exception, 25 U.S.C. 2719(b)(1)(B)(ii), to the general prohibition contained in 25 U.S.C. 2719(a) on gaming on lands acquired in trust after October 17, 1988. The land is located in Clark County, Washington, and will be used for gaming and other purposes."

***State of New York, et al. v. Salazar, et al.,* (ND-NY No. 6:08-CV-00644); *City of Oneida v. Salazar, et al.,* (No. 5:08-CV-00648); *Upstate Citizens for Equality, Inc., et al. v. United States of America, et al.,* (No. 5:08-CV-00633); *Town of Verona, et al. v. Salazar, et al.,* (No. 6:08-**

**CV-00647)*; and Central New York Fair Business Association, et al., v. Salazar, et al., No.* (ND-NY No. 6:08-cv-660):** On May 16, 2013, Governor Cuomo announced that the State of New York and the Oneida Nation had reached a broad settlement agreement that would resolve the litigation, along with a number of other matters. However, on June 12, 2013, the Cayuga Nation filed a motion to intervene in the federal district court to challenge the settlement agreement, primarily on the grounds that its geographic exclusivity provision violates its rights under federal law. By order dated August 9, 2013, the court granted the Nation's motion to intervene "for the sole purpose of permitting it to lodge objections to the parties settlement agreement; and that neither the intervention of the Cayuga Indian Nation, nor any of its objections to the proposed settlement agreement shall preclude the approval of such agreement if the court otherwise finds it acceptable." On September 25, 2013, the Stockbridge Munsee Band filed its motion to intervene, claiming an ownership interest in some of the lands that are the subject of the settlement agreement. On December 12, 2013, counsel for the Oneida Nation filed a joint letter motion informing the court that the parties had reached settlement and that all the parties (including the United States) had executed a Rule 41 stipulation of dismissal. On December 20, 2013, the Cayuga Indian Nation filed its response to the joint letter, and the parties filed their briefs in opposition to the motion to intervene filed by the Stockbridge Munsee Band. On March 4, 2014, the U.S. District Court for the Northern District of New York issued an order dismissing the various motions to intervene and approving the Settlement Agreement which resolves both the trust litigation in the lower court and the tax foreclosure litigation pending before the U.S. Supreme Court. **On March 26, 2014, the U.S. Supreme Court dismissed the petition pursuant to Rule 46 and these matters are now closed.**

Background: On September 24, 2012, the U.S. District Court for the Northern District of New York issued a remand order in these five related cases which challenge May 2008 Record of Decision (2008 ROD) of the Department of the Interior to take approximately 13,000 acres of land in trust for the Oneida Indian Nation. The court remanded the 2008 ROD to the Department of Interior to further develop the record on whether the Department of Interior has statutory authority to take this land into trust pursuant to the Indian Reorganization Act (IRA). The court stated:

> In *Carcieri v. Salazar*, the Supreme Court concluded that the IRA limits DOI's trust authority to tribes that were federally recognized and under federal jurisdiction when the IRA was enacted in 1934. That is, the operative question for a court or the Agency in determining whether trust authority may properly be exercised is whether the tribe in question was federally recognized and under federal jurisdiction in 1934 – not whether the tribe was federally recognized and under federal jurisdiction at the time of the trust decision.
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> *Carcieri* is undoubtedly the law of the land, and the Court is bound by the Supreme Court's interpretation of the IRA therein and must ultimately assess DOI's ROD through this interpretive lens. On remand, therefore, the Court instructs DOI to assemble a record on the *Carcieri* issue and to consider this question in issuing a final ROD. Further, as addressed *infra* in the Court's

> discussion of the bias issue, DOI should be mindful of the paramount need for impartiality going forward.
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> Second, as to [the U.S. and the Tribe's] arguments that remand would be futile because the *Carcieri* issue is clear as a matter of law and that DOI could not possibly find otherwise, the Court remains unconvinced. By this stage in the litigation, much ink has been spilled by the parties on the historical relationship between the OIN, the federal government, and the ownership and inhabitation of large swaths of land in central New York.
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> Based upon the record before the Court and the daunting task of excavating and explicating historical understanding that the Court has undertaken, however, the Court is not convinced that the correct path is so obvious, that the *Carcieri* issue is so clearly resolved, or that any analysis so clearly favors [the U.S. and the Tribe] as to make a remand to the Agency an "idle and useless formality." [citations omitted].

**State Courts:**

***Rape v. Poarch Band of Creek Indians* (Supreme Court of Alabama No. 1111250):** On April 17, 2013, the Poarch Band of Creek Indians filed their response brief in a case pending before the Alabama Supreme Court on the question of tribal sovereign immunity from suit in an action brought by Mr. Rape over the malfunction of a slot machine at the tribe's casino. The Alabama Attorney General had filed an amicus brief in support of Mr. Rape making collateral arguments challenging sovereign immunity on the basis that the Poarch Band lacks proper federal recognition since only Congress has this authority, not federal agencies and that, under *Carcieri*, the federal government lacked authority to take lands in trust for the tribe. The National Congress of American Indians (NCAI) and the United South and Eastern Tribes (USET) filed an amicus brief in support of the Poarch Band. At present, all briefs and supplemental authorities have been submitted to the Alabama Supreme Court.

***Harrison v. Poarch Band of Creek Indians* (Supreme Court of Alabama No. 1130168):** On May 13, 2014, the Poarch Band of Creek Indians filed their response brief in another petition pending before the Alabama Supreme Court on the question tribal sovereign immunity. In this action, the plaintiff is seeking money damages against the Tribe under the Alabama Dram Shop Act. The *Carcieri* claims are identical to the claims brought by Mr. Rape in his action with the addition of arguments relying on the Ninth Circuit's decision in *Big Lagoon*. NCAI and USET have filed a joint amicus brief in support of the Poarch Band.

***Gilbert v. Poarch Band of Creek Indians* (Supreme Court of Alabama No. 1121411):** On May 23, 2014, the Alabama Supreme Court denied the petition for writ of mandamus filed by the Poarch Band of Creek Indians following the trial court's denial of the Tribe's motion to dismiss based on tribal sovereign immunity. The trial court found that the Tribe's agreement to maintain dram-shop insurance as a condition of receiving a liquor license for their casino constituted an express waiver of any immunity from suit based on a violation of Alabama's Dram Shop Act. In

an unusual development, Chief Justice Moore of the Supreme Court of Alabama wrote an 18-page special concurring opinion to the denial of the petition. He stated that the Tribe and its casino "do not have a clear legal right to sovereign immunity in an Alabama state court from a dram-shop action," and he chose to "write separately to examine the law on this question of first impression."

**Interior Board of Indian Appeals:**

***State of New York, Franklin County, New York, and Town of Fort Covington, New York v. Acting Eastern Regional Director (IBIA Nos. 12-006, 12-010)***: The State of New York and County and Town of Fort Covington filed an administrative appeal of the Notice of Decision issued by the Acting Eastern Regional Director for the Bureau of Indian Affairs to take 39 acres of land into trust for the benefit of the St. Regis Mohawk Tribe of New York. The 39-acre parcel is currently being used for a solid waste transfer station, and the application states that the property would continue to be used for this purpose. Although the St. Regis Mohawk Tribe is on the 1947 Haas list as a Tribe that voted to "opt out" of the provisions of the IRA, the Appellants argue that the Tribe was under State rather than Federal jurisdiction in 1934 and that the Supreme Court's decision in *Carcieri* therefore deprives the Secretary of authority to take land into trust for the Tribe under the authority of the IRA. The Appellant Town and County filed their revised opening brief on April 13, 2012. The BIA and Tribe filed their response briefs on June 15, 2012. The Appellant Town and County filed their response brief on July 13, 2012. **On June 11, 2014, the IBIA issued its Order affirming the Notice of Decision, concluding that the Tribe was under Federal jurisdiction in 1934 based on the Secretary calling for an election of the Tribe's members to vote on whether to opt out of the IRA, stating: "How the Tribe voted is irrelevant, because Congress, through the Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. 2201 *et seq.*, extended Section 5 of the IRA to those tribes that originally voted to opt out of the IRA.**

***Village of Hobart v. Bureau of Indian Affairs* (IBIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 11058, 11-083):** On May 9, 2013, the Interior Board of Indian Appeals issued its order in the consolidated administrative appeal of the Village of Hobart, Wisconsin to the Notice of Decision issued by the Regional Office of the Bureau of Indian Affairs of its intent to take several parcels of land into trust for the benefit of the Oneida Tribe of Indians of Wisconsin (57 IBIA 4). In spite of the fact that the Oneida Tribe is on the 1947 Haas list, the Village of Hobart argued that the Tribe was not "under federal jurisdiction" because their reservation was disestablished. In rejecting this argument, the IBIA determined the Oneida Tribe was under federal jurisdiction in 1934 based upon the fact the Tribe voted on application of IRA to the Tribe in 1934 and appears on the Haas List, the fact the United States held parcels of land in trust for the Tribe and tribal members in 1934, and the overall history of relations between the Tribe and the federal government. The IBIA remanded with instructions for the Regional Director to specifically address the village's claims regarding jurisdictional disputes, loss of tax revenues, and other concerns.

***Thurston County v. Great Plains Regional Director*** **(IBIA Nos. 11-031, 11-084, 11-085, 11-086, 11-087, 11-095, 11-096):** Thurston County, Nebraska, had filed an administrative appeal of the Notice of Decision filed by the Regional Director of the Bureau of Indian Affairs of its intent to take several parcels of land in trust for the benefit of the Winnebago Tribe of Nebraska. In spite of the fact that the Winnebago Tribe is on the 1947 Haas List and the fact that the Tribe has been located at all times since 1865 on reservation lands purchased by the United States, Thurston County argues that the Tribe was not "under federal jurisdiction" in 1934. On December 18, 2012, the IBIA issued its decision declining to consider the county's *Carcieri*-based arguments for failure to timely raise them before the Regional Director and raising them for the first time on appeal (56 IBIA 62). However, the IBIA vacated and remanded the decision to take certain parcels of land in trust on other grounds.

***Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*** **(IBIA No. 05-050);** ***No More Slots, Santa Ynez Valley Concerned Citizens, Preservation of Los Olivos and Preservaton of Santa Ynez v. Pacific Regional Director*** **(IBIA No. 12-140; 12-141; 12-148):** Background: On July 9, 2008, the U.S. District Court for the Central District of California remanded this case to the Interior Board of Indian Appeals (CA-CD No. 06-1502). The original case involved a challenge brought by two citizen groups from the Santa Ynez Valley to the IBIA's decision that the groups lacked standing to challenge the Department's decision in 2005 to take land in trust for the benefit of the Santa Ynez Band of Chumash Mission Indians (IBIA No. 05-050-1). In short, the district court vacated the IBIA order and remanded the case to the IBIA, requiring the IBIA to specifically "articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."

On February 8, 2010, the citizen groups filed their opening brief before the IBIA, not only addressing the issue of standing, but arguing on the merits that the Secretary does not have authority to take land in trust for the Tribe. The groups argued that the Supreme Court's decision in *Carcieri* "dramatically changed the legal landscape with respect to the power and the authority of the Secretary of the Interior and the BIA to take land into federal trust for Indian tribes." The groups provided exhibits—including a 1937 list which references "Santa Ynez" as having a reservation/Rancheria, but does not reference a particular "tribe"—all of which they allege lead "to the conclusion that the Santa Ynez Band was not a tribe under federal jurisdiction in 1934." On May 17, 2010, at the request of the Regional Director, the IBIA partially vacated its 2005 decision and remanded a single issue—whether BIA has authority to accept land in trust for the tribe under *Carcieri*.

On May 23, 2012, the Associate Solicitor for the Division of Indian Affairs signed an opinion confirming that neither *Carcieri* nor *Office of Hawaiian Affairs* limits the Secretary's authority to acquire land in trust for Santa Ynez. Under Federal jurisdiction was demonstrated by establishment of the Reservation in 1906, IRA vote in 1934, and BIA Census in 1934. On June 13, 2012, the Regional Director affirmed the original 2005 trust acquisition decision on the basis that *Carcieri* did not limit the Secretary's authority to acquire land in trust. Several parties filed Notices of Appeal with the IBIA challenging the Regional Director's Notice of Decision to take

land in trust of the Santa Ynez Band of Chumash Mission Indians. The Notice of Decision had advised potential appellants that any appeal must be filed with the IBIA within 30 days of receipt, and included the contact information and requirements for filing an appeal with the IBIA. On July 30, 2012, the IBIA received copies of Notices of Appeal from "No More Slots" and "Santa Ynez Valley Concerned Citizens." On August 8, 2012, the IBIA issued an order directing these parties to show cause, on or before September 10, 2012, why their appeals should not be dismissed as untimely. On August 16, 2012, the IBIA received a Notice of Appeal from "Preservation of Los Olivos" and "Preservation of Santa Ynez" ("POLO/POSY"). On August 21, 2012, the IBIA also ordered POLO/POSY to show cause, on or before September 20, 2012, why their appeal should not be dismissed as untimely.

On March 18, 2013, the IBIA issued its order holding: "None of the Appellants filed an appeal with the Board within the 30-day deadline, which is jurisdictional, and therefore we dismiss the appeals." 56 IBIA 233. On June 3, 2014, the IBIA issued its Order on Remand and Order Dismissing Appeal and Addressing the Merits in the Alternative. In short, the IBIA determined that, on remand from the original appeal, the appellants have failed to demonstrate that they have standing to challenge the fee to trust acquisition. Based on its concern that additional litigation is likely, and to reduce the possibility of further delay, the IBIA also addressed the merits of the claims, finding that the appellants did not demonstrate that the Notice of Decision "is arbitrary and capricious or that the Regional Director committed legal error or failed to support the Decision with sufficient evidence."

***California Coastal Commission and Governor Arnold Schwarzenegger v. Pacific Regional Director, Bureau of Indian Affairs*** **(IBIA Nos. 10-023, 10-024):** The Coastal Commission and Governor ("Appellants") filed an appeal to the October 2, 2009 decision of the Pacific Regional Director to take a 5-acre parcel in Humboldt County in trust for the Big Lagoon Rancheria. In their appeal, the Appellants refer to the U.S. Supreme Court's decision in *Carcieri* and allege that the Big Lagoon Rancheria was not under federal jurisdiction in 1934 and, therefore, the Secretary lacks authority to take lands in trust for the Tribe.

On January 28, 2010, the Assistant Regional Solicitor filed a Motion For Remand of Decision to BIA Regional Director, based on the January 27, 2010 memorandum of the Assistant Secretary of Indian Affairs. The Assistant Secretary directed the Regional Director to request a remand "from the IBIA for the purpose of applying the holding of *Carcieri v. Salazar* to your decision and to determine whether Big Lagoon was under Federal Jurisdiction in 1934." On February 19, 2010, the IBIA reversed the Regional Director's decision and remanded the whole decision back to the BIA (51 IBIA 141).

***Miami-Dade County v. Acting Eastern Regional Director, Bureau of Indian Affairs*** **(IBIA No.12-152):** Miami-Dade County appealed a July 27, 2012 decision by the Regional Director to approve the acceptance of 229.3 acres of land in trust for the Miccosukee Indian Tribe of Florida. After the county filed its opening brief, the Regional Director filed a request for a remand to allow him to address compliance with NEPA and the BIA's authority to accept land in trust with the framework set forth in *Carcieri*. On July 10, 2013, the IBIA issued its order vacating the

decision and remanding the case to the Regional Director to consider the *Carcieri* issue and other arguments raised by the County (57 IBIA 192).