ORAL ARGUMENT SCHEDULED MARCH 18, 2016

No. 14-5326
Consolidated with No. 15-5033

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

Plaintiff-Appellant,

CLARK COUNTY, WASHINGTON, *et al.*,

Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary of the Interior, *et al.*,

Defendants-Appellees,

COWLITZ INDIAN TRIBE,

Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:13-cv-849-BJR, Hon. Barbara J. Rothstein, Judge Presiding

BRIEF OF UNITED SOUTH AND EASTERN TRIBES, INC. AND JAMESTOWN S'KLALLAM TRIBE AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR-APPELLEE, SUPPORTING AFFIRMANCE

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Dated: December 24, 2015

DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Circuit Rule 26.1, the undersigned certifies that *Amicus* United South and Eastern Tribes, Inc. ("USET") is not a publicly held corporation, or a subsidiary or affiliate of any other corporation, and no publicly owned corporation owns more than 10% of its stock.

USET is an intertribal organization comprised of 26 federally recognized Tribal Nations in the southern and eastern United States. USET is dedicated to enhancing the development of federally recognized Indian Tribes, improving the capabilities of Tribal governments, and assisting the USET Members and their governments in dealing effectively with public policy issues and in serving the broad needs of Indian people.

DATED: December 24, 2015.

/s/ Elliott A. Milhollin
Elliott A. Milhollin

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STATEMENT OF INTEREST OF *AMICI*[1]

USET is a non-profit organization representing 26 federally recognized Indian tribes in 12 states stretching from Texas to Maine. Established over forty years ago, USET works at the regional and national level to educate federal, state and local governments about the unique historic and political status of its member Tribal Nations, and operates a number of programs for the benefit of its membership. Due to their location in the South and Eastern regions of the United States, the USET-member Tribal Nations have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties. One great consequence of this relationship has been the steady loss of tribal land.

USET-member Tribal Nations retain only small remnants of their original homelands today. Since the Indian Reorganization Act of 1934 ("IRA") was enacted, USET-member Tribal Nations have been able to purchase land and petition the Secretary of the Interior ("Secretary") to place that land into trust status for a wide variety of purposes. The interpretation of the IRA is therefore of special

[1] Counsel for United South and Eastern Tribes, Inc. and Jamestown S'Klallam Tribe authored this brief; no other party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

importance to USET and is an area of federal Indian law in which USET has developed particular expertise.

The Jamestown S'Klallam Tribe ("Tribe") is located in eastern Clallam County, Washington, on the Olympic Peninsula. Members of the Tribe were signatories to the Treaty of Point No Point in 1855, whereby the Tribe effectively ceded title to approximately 450,000 acres of land. The Jamestown S'Klallams received services from the Federal Government until 1953, at which point the Federal Government no longer "recognized" them. However, the Tribe maintained its cohesion and continued to be recognized as a distinct community by other S'Klallam groups and other Washington Indians. The Tribe began an effort to regain recognition in 1974, and on February 10, 1981, the Tribe was finally federally re-recognized. Since then, the Tribe has been working to rebuild some of the land base it lost by acquiring properties on the open market and placing those lands into trust status.

For the *amici*, the reacquisition and rebuilding of their homelands is of critical importance to achieving their goal of economic self-sufficiency as self-governing entities. The revenues generated from economic development enterprises on trust and reservation lands provide each tribe with the ability to strengthen its tribal

government, improve the quality of life of its members and provide capital for other economic development and investment opportunities.

Amici submit this brief pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b) with the consent of the parties.

SUMMARY OF ARGUMENT

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the phrase "now under Federal jurisdiction" in the IRA, Pub. L. No. 73-383, § 19, 48 Stat. 984 (codified at 25 U.S.C. § 479), meant that the Narragansett Indian Tribe, a USET-member tribe, had to demonstrate that it was "under Federal jurisdiction" at the time the IRA was enacted in 1934 in order to be eligible to have land taken into trust. The IRA authorizes the Secretary of the Interior to take land into trust for Indians, and defines "Indian" to include those tribes "now under Federal jurisdiction." *Id.* The narrow question addressed by the Court in *Carcieri* was whether the phrase "now under Federal jurisdiction" referred to 1934 when the IRA was enacted, or to the time the Secretary acts to take land into trust for a tribe. 555 U.S. at 382. The Court held that "now under Federal jurisdiction" referred to 1934. *Id.* The Court did not hold that a tribe must also have been "recognized" in 1934 when seeking to have land taken into trust today. It also had no occasion to explain what it meant to be "under Federal jurisdiction" in 1934 because it determined, based

on a concession made by the United States, that the Narragansett Indian Tribe was not "under Federal jurisdiction" in 1934.[2]

Amici submit this brief to provide this Court with our unique governmental perspective regarding the history and interpretation of the IRA that is not fully addressed in the briefs of the parties or other governmental *amici*.

ARGUMENT

I. THE DETERMINATION OF WHETHER A TRIBE WAS "UNDER FEDERAL JURISDICTION" IN 1934 MUST BE MADE AGAINST THE BACKDROP OF FEDERAL INDIAN LAW AND ACCOUNT FOR THE UNIQUE HISTORY AND CIRCUMSTANCES OF EACH TRIBE

The *Carcieri* decision left several questions unanswered, the "first and most pressing" of which "is what it means to have been 'under Federal jurisdiction' in 1934." *Stand Up for California! v. U.S. Dep't of Interior*, 919 F.Supp.2d 51, 66 (D.D.C. 2013). The answer to that question must be determined by the Secretary on

[2] The Court's holding with regard to the Narragansett Indian Tribe was not based on an application of the Tribe's factual circumstances. Rather, it relied on the fact that the petition for certiorari had asserted that the Tribe was not under federal jurisdiction in 1934 and that "[t]he respondents' brief in opposition declined to contest this assertion." *Carcieri*, 555 U.S. at 395-396. Because the United States failed to contest it, the petitioner's allegation was automatically accepted by operation of the Court's procedural rules. *Id.* ("Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case."). The Tribe, which was not a party to the case, had no opportunity to object to the petitioner's allegation or prove a factual basis for federal jurisdiction in 1934.

a case-by-case basis, and measured against the backdrop of well-established principles of Indian law, and the unique history and circumstances of each tribe and its relationship to the United States. Federal jurisdiction over Indian tribes is rooted in the Constitution, and has been given expression in federal statutes since the beginning of the Republic. It has been invoked to enact laws that divested tribes of much of their lands and destroyed their economies, and invoked again, as it was in the IRA, with the intent to reverse the disastrous effect of those prior laws.

The United States has established a wide variety of relations with tribes arising out of historical and other circumstances. In some cases, these relationships have been broad and all encompassing; in others they have been more limited. However the relationship is established and whatever its scope, though, any relationship with the United States can only be withdrawn by the United States. It is a longstanding principle of federal Indian law that once a tribe has been determined to come under the jurisdiction of the United States, it remains under the jurisdiction of the United States even though Congress may act to terminate the Tribe and render it ineligible to receive services and benefits generally available to Indian tribes.

A. The Indian Reorganization Act of 1934 Was Enacted to Strengthen Tribal Governments and Bring Economic Improvement to Indian Communities

Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Designed to improve governance in addition to restoring a land base, it replaced the assimilationist policy characterized by the General Allotment Act of 1887, 25 U.S.C. § 331 *et. seq.*, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." *United States v. Celestine*, 215 U.S. 278, 290 (1909). The Act was preceded by lengthy consultations with tribes, straw votes among tribal memberships, extensive public debate, and lengthy hearings before Congress.[3]

It authorized Indian tribes to adopt their own constitutions and bylaws, Pub. L. No. 73-838, § 16 (codified at 25 U.S.C. § 476)[4], and to incorporate for business

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[3] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. (1934); *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645*, 73d Cong. 2d Sess. (1934). *See also* S. Rep. 73-1080 (1934); H.R. Rep. 73-1804 (1934); H.R. Rep. 73-2049 (1934).

[4] Tribes had the sovereign authority to adopt constitutions and bylaws as a matter of tribal law prior to enactment of the IRA, and retain that authority today.

purposes, *id.* at § 17 (codified at 25 U.S.C. § 477). It authorized the Secretary to adopt regulations for forestry and livestock grazing on Indian units, *id.* at § 6 (codified at 25 U.S.C. § 466), make loans to Indian-chartered corporations "for the purposes of promoting … economic development," *id.* at § 10 (codified at 25 U.S.C. § 470), pay expenses for Indian students at vocational schools, *id.* at § 11 (codified at 25 U.S.C. § 471), give preference to Indians for employment in government positions relating to Indian affairs, *id.* at § 12 (codified at 25 U.S.C. § 472), and to proclaim Tribal lands as reservation lands, *id.* at § 7 (codified at 25 U.S.C. § 467). It also allowed tribes to decide, by referendum, whether to exclude their reservation from the IRA's application. *Id.* at § 18 (codified at 25 U.S.C. § 478).

In service of the broader goal of encouraging the Indian tribes "to revitalize their self-government" and to take control of their "business and economic affairs," Congress sought to "put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).[5] The IRA thus prohibited any further allotment of reservation lands, Pub. L. No. 73-838, § 1

[5] The federal policy of allotment resulted in the loss of 90 million acres of Indian lands. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2005 ed.). Since the IRA was enacted, only about 8 percent of those lands have been restored to tribal status. *Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Oversight Hearing Before the S. Comm. on Indian Affairs,* 111th Cong. (2009) (testimony of the National Congress of American Indians).

(codified at 25 U.S.C. § 461), extended indefinitely the periods of trust or restrictions on individual Indian trust lands, *id.* at § 2 (codified at 25 U.S.C. § 462), provided for the restoration of surplus unallotted lands to tribal ownership, *id.* at § 3(a) (codified at 25 U.S.C. § 463(a)), and prohibited any transfer of restricted Indian lands, with limited exceptions, other than to the tribe or by inheritance, *id.* at § 4 (codified at 25 U.S.C. § 464).

Section 5 of the IRA authorizes the Secretary to acquire lands "for the purpose of providing land for Indians," and provides that title to such lands "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." 25 U.S.C. § 465.

Section 19 of the IRA, in turn, defines "Indian" as follows:

> "[25 U.S.C.] § 479. Definitions.
>
> > "[a] The term 'Indian' as used in this Act shall include
> >
> > > "[1] all persons of Indian descent who are members of any recognized Indian tribe ***now under Federal jurisdiction,*** and
> > >
> > > "[2] all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and
> > >
> > > "[3] shall further include all other persons of one-half or more Indian blood . . . .

25 U.S.C. § 479 (emphasis and subparagraphing added).

The phrase "now under Federal jurisdiction" was added to Section 19 of the bill at the end of the Senate Committee on Indian Affairs hearing on the bill and enacted with limited discussion. Neither the text of the IRA nor its legislative history provide any explanation of what the phrase "now under Federal jurisdiction" meant. However, it is clear that satisfying the condition that a tribe be "now under Federal jurisdiction" involves a separate legal inquiry from meeting the condition of a "recognized Indian tribe."

B. Once A Tribe Is Under Federal Jurisdiction, It Remains Under Federal Jurisdiction Unless Explicitly Terminated By Congress Or Unless It Voluntarily Ceases Being A Tribe

Neither the text of the IRA nor the Supreme Court's decision in *Carcieri* define the phrase "under Federal jurisdiction." The Secretary's two-part formulation is fully consistent with the longstanding legal principle established by the courts that once a tribe has been determined to come under the jurisdiction of the United States, it remains under federal jurisdiction although it can be explicitly terminated by Congress or voluntarily abandon tribal relations.

By the time of the IRA, the disruptive effects of the allotment/assimilationist policy had spawned numerous challenges to continuing federal jurisdiction over a number of tribes. The Supreme Court uniformly rejected these challenges, insisting that federal jurisdiction continued unchanged, even as federal supervision shrank

and state authority expanded. *See Perrin v. United States,* 232 U.S. 478, 487 (1914) (upholding constitutionality of federal liquor law applied to lands ceded by the Yankton Sioux Tribe, where "the tribal relation has not been dissolved"); *United States v. Nice,* 241 U.S. 591, 597 (1916) (upholding constitutionality of federal liquor law notwithstanding citizenship of allottees); *Hallowell v. United States,* 221 U.S. 317, 323 (1911) (upholding constitutionality of federal liquor law to scattered allotments notwithstanding widely applicable state law otherwise); *United States v. Pelican,* 232 U.S. 442, 447 (1914); *Tiger v. Western Inv. Co.,* 221 U.S. 286, 298 (1911) (upholding constitutionality of federal prohibition against conveyance of allotment without secretarial consent).

In all such cases, the federal relationship had diminished in quality and extent due to prevailing federal policy, and yet the federal relationship continued. The Court applied the same rule in each case: "the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial." *United States v. Nice,* 241 U.S. at 591; *see also Tiger v. Western Inv. Co.,* 221 U.S. at 315 ("[I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained

over the Indian shall cease."). In *United States v. John*, the Supreme Court reaffirmed this principle when it held that "[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, *nor the fact that federal supervision over them has not been continuous*, destroys the federal power to deal with them." 437 U.S. 634, 653 (1978) (emphasis added); *see also Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (rejecting the argument that because the Tribe was not formally recognized, there was no trust relationship).

The rule reaffirmed in *John* remains the law today: even though Congress may terminate a tribe, a tribe that comes under the federal jurisdiction of the United States remains under the federal jurisdiction of the United States even if there have been periods where the United States failed to actively exercise its jurisdiction over the tribe.[6]

[6] To be sure, Congress's authority to place Indian tribes under its jurisdiction is not without limitation. *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that Congress cannot "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe").

II. THE IRA REQUIRES THAT A TRIBE BE A "RECOGNIZED INDIAN TRIBE" AT THE TIME THE LAND IS TAKEN INTO TRUST, NOT 1934

The IRA grants the Secretary of the Interior authority to take land into trust status for "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §§ 465, 479. In *Carcieri*, the Supreme Court concluded that the phrase "now under Federal jurisdiction" meant that an applicant tribe had to be "under Federal jurisdiction" at the time the IRA was enacted in 1934 in order to have land taken into trust. Nothing in the decision or the IRA suggests that an applicant tribe seeking to have land taken into trust today also must show that it was a "recognized Indian tribe" in 1934.

A. The *Carcieri* Decision Held That The Word "Now" Modifies The Phrase "Now Under Federal Jurisdiction" In Which It Was Included, Not The Phrase "Recognized Indian Tribe"

Nowhere in its statement of the question does the Court in *Carcieri* make reference to the phrase "recognized Indian tribe." The Court framed the question before it as follows:

> In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in § 479. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. The respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land

> into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.

Carcieri, 555 U.S. at 382.[7] The Court's ultimate holding in the case is similarly devoid of any mention of the meaning of the phrase "recognized Indian tribe." Rather, the holding mirrors the statement of the question: "for the purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." (*i.e.,* 1934). *Id*. The Court noted with approval contemporaneous correspondence from the Commissioner of Indian Affairs which summarized Section 19 of the IRA as including "all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act." *Id*. at 390 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)). This formulation, as understood by both the Act's contemporaries and the Court, ties the date of the Act only to "under Federal jurisdiction" and not "recognized Indian tribe." *See Carcieri*, 555 U.S. at 398 (Breyer, J., concurring) and 400 (Souter, J., concurring in part and dissenting in part).

[7] The Court's decision in *Carcieri* was based on the first of the three categories of "Indian" in § 479, as was the Secretary's decision in this case. Neither the Secretary's decision in the ROD nor the Court's decision in *Carcieri* implicate the other two categories of "Indian" set out in § 479.

B. Congress Did Not Impose a Temporal Limitation on Recognition In Section 479

Congress did not intend to prevent tribes that are recognized today and can demonstrate they were under federal jurisdiction in 1934 from having land taken into trust under 25 U.S.C. § 465. "Recognized Indian tribe" and "under Federal jurisdiction" mean two different things, and the legislative history of the IRA indicates that Congress added the phrase "now under Federal jurisdiction" as a separate requirement in addition to "recognized Indian tribe."

As originally drafted, Section 19 of the IRA would have applied to members of any "recognized Indian tribe," and did not include the modifying phrase "now under Federal jurisdiction."[8] The Senators understood the bill as drafted to cover all recognized tribes:

> Commissioner Collier. This bill provides that any Indian who is a member of a recognized tribe or band shall be eligible to Government aid.

[8] Section 19 of the bill under consideration at the May 17, 1934 hearing read, in relevant part, as follows: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood." *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645*, 73d Cong. 2d Sess. at 234 (1934).

> Senator Thomas of Oklahoma. Without regard to whether or not he is now under your supervision?
>
> Commissioner Collier. Without regard; yes. It definitely throws open Government aid to those rejected Indians.

To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645, 73d Cong. 2d Sess. at 80 (1934). Near the end of the hearing, the Senate considered whether the term "recognized Indian tribe" was over or under-inclusive. Senator O'Mahoney attempted to clarify that the term "recognized Indian tribe" would include all recognized tribes, and Chairman Wheeler responded that it would:

> Senator O'Mahoney: … The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe" – comma. There is no limitation of blood so far as that is concerned.
>
> Senator Frazier: That would depend on what is construed membership.
>
> Senator O'Mahoney: "The term 'tribe' wherever used in this act" – and that means up above – 'shall be construed to refer to any Indian tribe, band, nation, pueblo." …
>
> The Chairman: You would have to have a limitation after the description of the tribe.
>
> Senator O'Mahoney: If you wanted to exclude any of them you certainly would in my judgment.
>
> The Chairman: Yes; I think so. You would have to.

To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645, 73d Cong. 2d Sess. at 266 (1934). After the Chairman expressed concerns that the provision could include people who were no longer considered Indians, Senator O'Mahoney suggested that the Chairman's concerns could be addressed with new language. Commissioner Collier then suggested adding the phrase "now under Federal jurisdiction":

> Senator O'Mahoney: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner Collier: Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645, 73d Cong. 2d Sess. at 266 (1934). Although there is no further discussion on the matter and the hearing ended shortly thereafter, this colloquy demonstrates three things. First, that the word "now" was inserted as part of the phrase "now under Federal jurisdiction." Second, that whatever the intent of Congress in adding the phrase, "now under Federal jurisdiction," it was added

separately, and there is no indication that Congress intended the term "now" to modify the phrase "recognized Indian tribe" rather than "under Federal jurisdiction," the phrase in which it was included. Third, the hearing record demonstrates that, in many respects, the question of whether particular Indians were subject to federal law was not settled and remained to be resolved in the future.[9]

Since the IRA contemplated prospective recognition of Indian tribes, it cannot properly be understood to have required tribes to have been "recognized" in 1934 in order to be covered by its scope. Congress used two separate phrases – "recognized Indian tribe" and "now under Federal jurisdiction" – and each must be given effect.[10]

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[9] In its brief, the United States noted that the Senators referenced the Catawba Tribe, a USET-member Tribe, during this discussion. As Interior has repeatedly affirmed, the Catawba Tribe is eligible for IRA benefits. *See* Dept. of Interior Solicitor Op. No. M-37029 (March 12, 2014) ("Commissioner Collier's suggested language arguably sought to strike a compromise that addressed both Senators O'Mahoney and Thomas' desire to include tribes like the Catawba that maintained tribal identity [while excluding other tribes that abandoned tribal relations]."); *see also* 2 Dept. of Interior Solicitor Op. 1255-56 (1944) (affirming Catawba eligibility under the IRA); 2 Dept. of Interior Solicitor Op. 1261-62 (1944) (affirming Catawba eligibility under the IRA); Theodore Haas, *Ten Years of Tribal Government Under I.R.A.,* United States Indian Service 19, 22 (1947) (officially listing Catawba as reorganized under IRA).

[10] The term "recognized Indian tribe" had a different meaning in 1934 than it does today. In 1934, there was no list of federally recognized tribes, no formal requirements for recognition, and no standard criteria for recognition. As a result, Congress and the Executive branches of government historically made case-by-case determinations as to tribal status, which were generally seen as political questions not subject to judicial review. *United States v. Holliday*, 70 U.S. 407, 419 (1865). The modern concept of federally recognized Indian tribe was not

C. *United States v. John* Does Not Hold That a Tribe Must Demonstrate it Was Recognized in 1934 In Order to Take Land into Trust Today

In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court ruled that certain lands held by the United States in trust for the Mississippi Band of Choctaw Indians, a USET-Member Tribe, were Indian Country within the meaning of the Major Crimes Act, 18 U.S.C. § 1153, thus vesting criminal jurisdiction in the federal government. The State of Mississippi had argued that a 1944 proclamation by the Assistant Secretary of the Department of the Interior declaring the lands at issue to be a reservation "had no effect because the Indian Reorganization Act of 1934 was not intended to apply to the Mississippi Choctaws." *Id*. at 649. The Court responded as follows:

> Assuming for the moment that authority for the proclamation can be found only in the 1934 Act, we find this argument unpersuasive. The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood." There is no doubt that persons of this description lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior, at the time the Act was passed.

Id. at 649-50 (internal citations omitted) (brackets in original).

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developed until the late 1970s with the advent of the Department's recognition regulations, now codified at 25 C.F.R. Part 83, and the List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a-1).

The County and Grand Ronde argue, based on the bracketed "in 1934" in the above passage, that the Supreme Court has determined that a Tribe must have been recognized in 1934 in order to satisfy the IRA's first definition of "Indian." But the Court in *John* never considered the requirements of the first IRA definition of "Indian" or whether the Mississippi Choctaw satisfied them, because it was clear that the Mississippi Choctaw satisfied the *third* definition as "persons of one-half or more Indian blood."

The language upon which the County and Grand Ronde rely is taken from a passage of the opinion in which the Court is simply explaining that Mississippi's arguments regarding the IRA, even if accepted, would not change the Court's holding that the land was Indian Country. The Court did not explain whether the bracketed language reflected its own interpretation of the IRA or rather its characterization of the State of Mississippi's position, and the context leaves that unclear. What is clear is that the Court's actual holding did not hinge on any interpretation the IRA's first definition of "Indian," or even on the scope of the Assistant Secretary's authority under any other provision of the IRA. The Court did not, and surely did not intend to, provide any meaningful guidance in *John* on the scope or requirements of the IRA's first definition of "Indian." Indeed, the Court did not even cite *John* in *Carcieri*. The fact is that the Supreme Court has *never* held that a tribe must have

been recognized in 1934 under the first IRA definition of "Indian"; only that it must have been "under Federal jurisdiction" at that time. *Carcieri v. Salazar*, 555 U.S. 379 (2009).[11]

CONCLUSION

The Secretary's determination in this case should be upheld.

Respectfully Submitted,

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[11] The Court's decision in *John* suggests that, though not yet organized as a tribe under the IRA, the Mississippi Choctaw *were* under federal jurisdiction in 1934. *John*, 437 U.S. at 649, 650 n.20 (noting that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians *who were at that time under federal supervision*") (emphasis added). To the extent the County suggests that the Court in *John* relied on the IRA's half-blood provision because the Mississippi Choctaw "failed to satisfy" the federal jurisdiction requirement of the first definition, the County is simply wrong. Clark County Br. 14.

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Dated: December 24, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2010 in 14 Point Times New Roman.

/s/ Elliott A. Milhollin
Elliott A. Milhollin

CERTIFICATE OF SERVICE

I hereby certify that I electronically and hardcopy filed the foregoing with the Clerk of the Court using the appellate CM/ECF system on this 24 day of December, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elliott A. Milhollin
Elliott A. Milhollin