Supreme Court of the United States.
Walter ROSALES and Karen Toggery, Petitioners,
v.
UNITED STATES, Respondent.
No. 10-1103.
March 7, 2011.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

This Court holds that the Indian Reorganization Act ("IRA"), 25 U.S.C. §479, "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar ("Carcieri"),* 129 S.Ct. 1058, 1061 (2009), now followed by the District of Columbia Circuit in *Patchak v. Salazar ("Patchak"),* No.09-5324,2011 WL 192495 (D.C. Cir. 2011).

Here, the Federal Circuit held in conflict with these decisions, that whether the tribe was under Federal jurisdiction in 1934 was irrelevant, in determining whether the tribe became a beneficial owner of Indian trust land. The questions presented are:

1. Must a court decide whether a tribe was under Federal jurisdiction in 1934, whenever a tribe claims an interest in Indian trust land adverse to a state or individual's interest in that property?

2. Must a court decide whether a tribe was under Federal jurisdiction in 1934, when determining the timeliness of Petitioners' Tucker Act claims that the tribe never became a beneficial owner of Indian trust land?

3. Must a court decide whether a tribe was under Federal jurisdiction in 1934, in determining whether the tribe was a required, but absent party, claiming an interest in Petitioners' beneficial interest in trust property?

***II** PARTIES TO THE PROCEEDING

The caption of the case includes the names of all parties.

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***1** OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit, filed September 17, 2010, is set forth in the Appendix ("App.") at 1a-4a. The decision of the United States Court of Appeals for the Federal Circuit, denying panel rehearing, and rehearing *en banc*, filed December 8, 2010, is set forth at App.5a-6a. The decision of the United States Court of Federal Claims, reported at 89 Fed. Cl. 565 (2009), is set forth at App.7a-55a.

JURISDICTION

On December 8, 2010, the court of appeals denied Petitioners' timely petition for rehearing. App.5a-6a. The judgment sought to be reviewed was entered on October 14, 2009. App.7a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves U.S. Const. amend. V, the Indian Reorganization Act of 1934, 25 U.S.C. §465 and §479, and Rule 19 of the Rules of the Court of Federal Claims, the relevant portions of which are set forth verbatim at App.57a-65a.

***2** INTRODUCTION

This petition presents jurisdictional issues of enormous import to scores of states, hundreds of tribes, and hundreds of thousands of individual Indians and non-Indians across the country, as did the petition in *Carcieri*, concerning disputes among the states, individual Indians, and their tribes, as to the beneficial ownership of trust land throughout the nation. That is because the Federal Circuit has created a means to avoid this Court's holding in *Carcieri* and the District of Columbia's decision in *Patchak.* The allocation of civil and criminal jurisdiction between states and tribes over trust land is again no longer subject to a uniform rule of law, but the erroneous claims of any of the 306 tribes not under Federal jurisdiction in 1934.

The questions presented by this petition must be confronted so that this Court may restore uniformity in the rules to be applied to a tribe's claims to trust land, and may continue to prevent the loss of state sovereignty to Indian tribes that was not authorized by Congress.

STATEMENT OF THE CASE

Historical Background

1. Petitioners' Beneficial Interest in the Trust Parcel

Petitioners are Native American residents of San Diego County of one-half or more degree of Indian blood, enrolled members of the Jamul Indian Village, and the individual beneficial owners of trust land in San Diego ***3** County, known by the tax assessor parcel number, 597-080-04. Court of Appeals Appendix ("C.A.App."), 377.

On December 27, 1978, the prior fee simple owners granted the parcel to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.App.425. This deed was accepted by the government, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §465 and §479. This grant deed created the fiduciary duty and general trust responsibility of the government to protect the half-blood Jamul Indians' beneficial interest in the trust property, against all forms of alienation, trespass, and adverse claims, particularly from a tribe that was not under Federal jurisdiction in 1934. *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942); *United States v. Mitchell ("Mitchell II"),* 463 U.S. 206, 226, fn. 31 (1983), citing *Coast Indian Community v. United States ("Coast"),* 550 F.2d 639, 652, fn 41 (Ct. Cl. 1977), *aff'd*, 578 F.2d 1391 (Ct.Cl. 1978), and cases cited therein.

The government designated the individual Petitioners and their families then possessing and residing on the land, as the beneficial owners of the trust parcel, consistent with the federal regulations for unorganized groups of individual Indians, by locating said individual Indians on the parcel, building houses for them, providing for their needs, acquiescing in their continued presence on, and use of, the parcel for more than 28 years. *Coast*, at 644.

Such individual Indians are officially designated as the beneficial owners of trust property, as a matter ***4** of law, when the government openly and notoriously "locates" the individual Indians on the parcel, "acquiesces in their continued presence on and use

of" the parcel, allows them to inter their families' remains and funerary objects, below, on, and above the parcel, and "provides plaintiffs with services usually accorded to Indians living on" such property. *Coast* at 644. This "provides strong and uncontroverted evidence of their designation as the beneficiaries within the meaning of the deed… on such evidence, designation may be inferred by law." *Coast* at 644, citing *United States v. Assiniboine Tribe ("Assiniboine Tribe"),* 428 F.2d 1324, 1329-30 (Ct. Cl. 1970).

Coast, held on nearly identical facts, that the trust parcel in question, "was not acquired for a tribe, leaving only the possibility under the [IRA] that it was purchased for individual Indians." 550 F2.d 639, 651, n. 32, 213 Ct. Cl. 129, 172. Thereby, the parcel became "individually owned land," per 25 C.F.R. 161.1(b)(1975), 162.101 and 169.1(b) (2010), requiring consent of the individual beneficial owners before it can be lawfully transferred to any tribe. *Coast,* at 213 Ct.Cl. 129, 172-73.

The *Coast* deed "was conveyed to the United States: … 'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior…' " 550 F.2d 641-41. The Jamul deed was also conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.App.425.

***5** In *Coast*, the individual Indians in the unincorporated community association, having been found to be the beneficial owners of the property, also had to have the judgment awarding $47,500 to them as individuals amended so that they could transfer their individual interest in the $47,500 to their association, the Coast Indian Community. 550 F.2d at 641, 578 F.2d at 1391. Here, the designated individual Jamul Indians never transferred their beneficial interest in the trust parcel to the subsequently created tribe.

Just as with the Naragansett in *Carcieri*, and the Jamul tribe here: "The Coast Indian Community does not come within [the IRA] definition [of an Indian tribe under Federal jurisdiction in 1934], for it is not a tribe in the anthropological sense of the term, nor is it organized or a pueblo, nor were its members residing together on one reservation before or at the time of the Rancheria acquisition. The Rancheria, then, was not acquired for a tribe, leaving only the possibility under the Act that it was purchased for individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Coast Indian Community members," *Coast* at 651, n32, "and the members were the beneficial owners of the Rancheria,… [s]ince the Rancheria falls within the description of 'individually owned land' in 25 C.F.R. 161.1(b) (1975)." *Coast,* 213 Ct. Cl. 129, 163-64, 172-73.

Therefore, as in *Coast*, the trust parcel was not acquired for the tribe, leaving only the possibility under the Act that it was acquired for the individual Indians, including the Petitioners, and they are the beneficial owners of the trust parcel. As the beneficial owners of the ***6** trust parcel, the Petitioners were entitled to be secure in their homes, and to exclude all others, save the United States, from the trust parcel. *United States v. Buchanon,* 232 U.S. 72, 76-77 (1914).

Justice Breyer's concurring opinion in *Carcieri*, at 1070, and Justice Stevens' dissenting opinion, at 1074-75, acknowledge that individual Indians have often been designated as beneficial owners of trust property under 25 U.S.C. §465, citing 1 *Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974 (Mem. Sol. Int.),* pp. 706-707, 724-725, 747-748 (1979). "The Secretary has long exercised his §465 trust authority in accordance with this design… the Solicitor of the DOI repeatedly advised that the Secretary could take land into trust for…individual Indians who qualified for federal benefits by lineage or blood quantum…Unless and until a tribe was formally re-

cognized by the Federal government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold," [for example], "the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Inland Indians of Michigan." *Carcieri*, at 1070, 1074-75.

In fact, the DOI Solicitor's Memorandum Opinion concerning the St. Croix Chippewas, *Mem. Sol. Int.*, at 724, A456, and *Cohen's Federal Indian Law Handbook*, § 3.02, p. 146 (n99) Footnote 105 (2005), confirm that where the grant deed fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never consented to transfer their beneficial interest to any subsequently recognized tribe.

***7** With regard to the Mississippi Choctaw, the DOI Solicitor found that neither a grant deed that makes no mention of the tribe, nor a subsequently adopted constitution that makes no mention of the subject property, can "designate" a "tribe" that doesn't then exist as the trust property's beneficiary, since there was "in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe," at the time of recording of the deed. *Mem. Sol. Int.*, at 668. Similarly here, there was no existing tribe of Indians known as the Jamul Indian Village in 1934, or when the grant deed was recorded in 1978.

In 1936, the Solicitor describes the words that should have been used to put the property in trust for any subsequently recognized tribe of Choctaws: "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the act of June 18, 1934 (48 Stat. 984), and then in trust for such organized tribe." *Mem. Sol. Int.*, at 668. However, the deed did not contain these words.

There, as here, the government's 40 year open and notorious location of the individual Choctaw Indians on the subject property and acquiescence in their continued presence on, and use of, the subject property, meant that "only those individuals designated by the Interior Secretary were to have the benefit of this" designation, not a subsequently recognized tribe, and that a new grant deed was required to grant the subsequently recognized tribe beneficial ownership of the property. *Id.*

***8** In 1976, the Fifth Circuit held that since the relief Act did not contain the words: "until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe" or "then in trust for such organized tribe," the property remained in trust for the individual Indians, and not a subsequently recognized tribe. *United States v. State Tax Comm. of Mississippi ("Miss. State Tax Comm."),* 535 F.2d 300, 304 (5th Cir.1976). The absence of the words "then in trust for such organized tribe," meant that "only those individual [Choctaws] designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned." *Id.*

Since 1936 the DOI Solicitors have expressly instructed the BIA field superintendents: "In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case [as here] where the deed has already been recorded and accepted, it will be necessary to secure a new deed." *Mem. Sol. Int.*, at 668.

Here, the deed for the trust parcel was never transferred, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to lawfully transfer the property into trust for the tribe, after the tribe was recognized. Nor does it state: "and then in trust for such organized tribe." There was no transfer of the designation of the individual Petitioners' beneficial ownership of trust parcel to the subsequently recognized tribe, since such a

transfer still requires the consent of the individual Indian beneficial owners and the recording of a grant deed, and no subsequent grant deed has ever ***9** been recorded. *Coast,* 213 Ct. Cl. at 172-73, citing 25 C.F.R. 161.1(b)(1975); *Mem. Sol. Int.* at 668; *Coast,* 550 F.2d at 1391, requiring transfer of the individual Indians' beneficial interest to the subsequently recognized tribe.

Therefore, the holding in *Carcieri*, the government Solicitors' own memoranda, and the 32 year old precedent in *Coast*,[FN1] estop the government from denying that the parcel remains in trust for the designated "Jamul Indians of one-half degree or more Indian blood," including Petitioners, as a matter of law, since the tribe was not under Federal jurisdiction in 1934. This scenario has been repeated many times, with scores of tribes, and thousands of individual Indian beneficial owners, which this Court acknowledged in granting *certiorari* in *Carcieri.*

> FN1. *Coast* has been steadily relied upon by this Court, *United States v. Mitchell (Mitchell II),* 463 U.S. 206, 226, fn. 31 (1983), the Federal Circuit, *Texas State Bank v. United States,* 423 F.3d 1370 (Fed. Cir. 2005), *Shoshone Indian Tribe of Wind River Res. v. United States,* 364 F.3d 1339, (Fed. Cir. 2004), *White Mountain Apache Tribe v. United States,* 249 F.3d 1364 (Fed. Cir. 2001), *Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996), more than 20 Fed. Cl. cases, including recently, *Osage v. United States,* 72 Fed. Cl. 629, 643 (2006), and *Innovair Aviation Ltd. v. United States,* 83 Fed. Cl. 498, 500 (2008), and the Ninth Circuit in *United States v. Wilson,* 881 F.2d 596, 599 (9th Cir. 1989).

2. The Tribe Was Not Under Federal Jurisdiction in 1934, and Never Acquired any Interest in the Trust Parcel

It is undisputed that the Jamul Indian Village was not under Federal jurisdiction in 1934. The December 27, 1978 grant deed was recorded nearly three years before the constitution of the Jamul Indian Village was adopted on July 7, 1981, and nearly four years before any acting ***10** deputy assistant secretary of the United States purported to recognize the creation of the Jamul Indian Village, on November 24, 1982. C.A.App. 425, 452; 47 Fed. Reg. 53132 (1982).

The trust parcel was not acquired for any Indian tribe, and has never been recognized by the government as being a parcel over which the entity, known as the Jamul Indian Village, has governmental power. Nor has it ever been lawfully subject to the exercise of any tribal governmental power. Congress has yet to recognize, and has never exercised federal jurisdiction over the Jamul Indian Village.

Nor could the trust parcel have been acquired for a tribe that did not then exist, leaving only the possibility under 25 U.S.C. §465, that it was acquired in trust for the individual Indians, including the Petitioners, then possessing and residing on the parcel, as recognized in *Carcieri*, at 1068, 1070, 1074-75, *Coast*, 644, 651, n32, *Assiniboine Tribe*, 690, *Miss. State Tax Comm.*, 304, and *Mem. Sol. Int.*, 668, 724, 747, and 1479.

On May 9, 1981, Petitioner Walter Rosales, Chairperson of those Indians seeking to adopt a constitution, certified on behalf of the election board, that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution. C.A.App.451. An acting deputy assistant secretary of Interior approved the constitution on July 7, 1981, but still did not recognize the existence of the tribe. C.A.App.452 On November 24, 1982, the BIA, and not Congress, first listed the Jamul Indian Village, as an Indian tribe, by publication in 47 Fed. Reg. 53132 (1982).

***11** Thus, the BIA Director of Tribal Services declared that the Jamul Indian Village is a "created tribe," not a "historical tribe," and therefore "not an inherent sovereign." C.A.App.467. It has yet to be

recognized by Congress, which still has never put the village "under federal jurisdiction," nor has Congress granted the village "jurisdiction" over the trust parcel, after 33 years. Only Congress has plenary power over Indian affairs, and therefore only Congress can create a tribe's jurisdiction.[FN2] *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998); *United States v. Sandoval,* 231 U.S. 28, 46 (1913), citing *United States v. Holliday,* 70 U.S. 407, 418 (1865). "An Indian tribe's jurisdiction derives from the will of Congress." *Kansas v. United States,* 249 F.3d 1213, 1229-31 (10th Cir. 2001).

FN2. *See for e.g.*, Pub. L. No. 92-470, 86 Stat. 783(1972), in which the Payson Community of Yavapai-Apache Indians was the first of only 16 tribes since 1934, which does not include the Jamul Indian Village, "recognized [by Congress] as a tribe of Indians within the purview of the Act of June 18, 1934."

The Jamul Indian Village is one of 88 "created tribes," which has ostensibly been given "executive recognition" by the BIA, without specific delegation by Congress, but has never been granted any jurisdiction over the trust parcel by either the BIA or Congress.[FN3]

FN3. *Full Committee Oversight Hearing on the "Supreme Court decision Carcieri v. Salazar Ramifications to Indian Tribes": Before the House Natural Resources Comm.*, 111th Cong., 1st Sess. (April 1, 2009)(written testimony of Donald Craig Mitchell, the former vice-president and general counsel of the Alaska Federation of Natives, and counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations), "…the Deputy Commissioner of Indian Affairs asserted that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to create new 'federally recognized tribes' in Congress' stead… However, those statutes contain no such delegation of authority. See William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition*, and 25 C.F.R. 83, 17 American Indian Law Review 37, 47-48 (1992)(5 U.S.C. 301 and 25 U.S.C. 2 and 9 discussed). *See also, Federal Recognition of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 14 (1978) (Letter from Rick V. Lavis, Acting Assistant Secretary, to the Honorable Morris Udall, dated August 8, 1978, admitting that 'there is no specific legislative authorization' for the Secretary's tribal recognition regulations)," found at resourcescommittee.house.gov., and 2009 WL 850102, *9 (F.D.C.H.).

***12** When the Jamul Indian Village was created it was a landless governmental entity. The Bureau of Indian Affairs, August 3, 2000 response to the Petitioners' Freedom of Information Act (FOIA) request, concedes that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of 1/2 degree (4.66 acres)," and that there is no record of the 1978 trust parcel being known as the Jamul Indian Village. C.A.App.429. This is consistent with the tribe's constitution, Article II, Territory, which fails to identify the trust parcel as within the territory of the Jamul Indian Village. C.A.App.442. Moreover, the United States did not have the authority to take the parcel into trust for the Jamul Indian Village, since it was not under Federal jurisdiction in 1934. *Carcieri* at 1061, 1064-5, 1068.

The BIA Director of Tribal Services further concluded on July 1, 1993:

The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery. On June 28, 1979, ***13** the United States acquired from Bertha A. and Maria A. Daley a portion of the land known as "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree or more Indian blood as the

Secretary of the Interior may designate."… The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934 [25 U.S.C. §465, and §479 respectively]…
The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise. A number of "tribes" have been created, from communities of adult Indians, or expressly authorized by Congress under provisions of the IRA and other Federal statutes. For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution and are considered to be IRA "tribes." However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. They are not an inherent sovereign. Rather, that entity is a created tribe exercising delegated powers of self-government. Such is the case with Jamul Indian Village. C.A.App.467.

***14** The Jamul Indian Village therefore has never had jurisdiction, nor lawfully exercised governmental power, over the trust parcel. There has never been a lawful transfer of the parcel to the subsequently recognized tribe. Nor has the government ever designated the subsequently recognized tribe to be the beneficial owner of the trust parcel. Hence, by 2007, neither the tribe, nor its tribal court, had jurisdiction over the trust parcel, and cannot have lawfully evicted the Petitioners.

The government has no evidence that the subsequently created "tribe," "Jamul Indian Village," was ever designated as the beneficiary of the trust parcel, nor that a grant deed ever lawfully transferred the parcel to the tribe. In fact, there is only evidence that the Secretary designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of the trust parcel by allowing them to reside upon the trust land for 28 years.

Thus, the government remains estopped to deny, that the "only possible" designation that exists in the grant deed, as a matter of law, is that the trust parcel was taken in trust for "individual" "Jamul Indians of one-half degree or more Indian blood," including the individual Petitioners and their families, as held in *Coast*, at 651, n32, *Miss. State Tax Comm.*, at 304, *Assiniboine Tribe*, at 1329-30, *Mem. Sol. Int.*, 668, 724, 747, 1479, and as acknowledged by *Carcieri* at 1061, 1064-5, 1068, 1070. The government failed to follow Congress' guidelines and its own *Handbook of Federal Indian Law* for recording a grant deed to a tribe, particularly since it was not allowed to hold land in trust for a tribe that was not under Federal jurisdiction in 1934. Therefore, the existing grant deed for the trust ***15** parcel only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Mem. Sol. Int.* at 668, 724, 747, and 1479; *Carcieri* at 1070; *Cohen's Handbook of Federal Indian Law ("Handbook"),* §3.02, p. 135 (2005).[FN4]

> FN4. Congress directed the Secretary of Interior to revise and republish *Cohen's Handbook of Federal Indian Law* in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), which is now published under contract by the University of New Mexico.

In fact, the Interior Solicitor specifically advised the BIA field personnel that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old-fashioned way by recording a grant deed to the subsequently recognized tribe. *Mem. Sol.* Int. at 668. No such deed was granted in this case.

The government's regulations provide that the trust parcel is "individually owned land," per 25 C.F.R. §161. (b)(1975), §162.101, §169.1(b) (2010), and its own Solicitor's memoranda require that the Peti-

tioners must consent to any transfer of their individual beneficial interest in the trust parcel to a subsequently recognized tribe, before the tribe acquires any jurisdiction over the parcel. *Coast,* 213 Ct. Cl. 129, 172-73; *Coast,* 578 F.2d 1391; *Mem. Sol. Int.* at 668.

Here, there is no evidence of any such consent by the individual half-blood Jamul Indians, including the Petitioners. Most importantly, the original deed was never corrected or altered, and the government never recorded any subsequent grant deed, transferring the individual ***16** Indians' beneficial interest in the trust parcel to any tribe, including the Jamul Indian Village. Nor could the government transfer the beneficial interest in the trust parcel to the subsequently recognized tribe, since it was not under Federal jurisdiction in 1934.

Where, as here, there was no such consent and no subsequent grant deed was recorded, the individual Petitioners' beneficial ownership of the trust property was not transferred to any subsequently recognized tribe, as a matter of law. *Coast,* 550 F.2d 639, 651, n.32; *Coast,* 213 Ct. Cl. 129, 172. "This approach has also been used for the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians." *Handbook*, §3.02, pp. 135, 146 (n99) Footnote 105 (2005); *Handbook*, Ch.1, §B2e, at p.15-16, fn 86 (1982), as acknowledged in *Carcieri* at 1070 and 1074-75, and *Mem. Sol. Int.* at 668, 706-707, 724-725, 747-748, 1479. Therefore, the tribe never acquired any interest in the trust parcel, which remains in trust for the Petitioners' possession, use and quiet enjoyment.

3. The Government Failed to Protect Petitioners' Beneficial Interest in the Trust Property after November 12, 1992

The government first failed to protect Petitioners' beneficial interest in the trust property, after November 12, 1992, when the Petitioners' mobile homes were destroyed. C.A.App.493-95.

The first time the tribe claimed, and the government acknowledged the tribe's claim, that the trust parcel was not beneficially owned by the Petitioners, was on ***17** February 5, 2001, when they jointly issued a Notice of Land Acquisition Application for the neighboring parcel. C.A.App.144; 73 Fed. Appx. 913-14.

Thereafter, the government has continuously breached its fiduciary duty and general trust responsibility to the Petitioners by failing to: (1) enforce the Petitioners' beneficial interest in the grant deed for the trust parcel; (2) block the Petitioners' eviction from the trust parcel; and (3) seek the return of the possession, use and quiet enjoyment of the trust parcel to the Petitioners. *Jones v. United States,* 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986).

Since then, Petitioners have repeatedly demanded, and the government has continuously refused, to protect their beneficial interest in the trust property. As a result, the government has breached its fiduciary duty, and the trust parcel has been taken from the Petitioners without just compensation.

On March 10, 2007, Petitioners were forcibly removed from their residences at gunpoint, against their will, after they were beaten and pepper sprayed in violation of their rights under the U.S. and California Constitutions, and completely deprived of the use and quiet enjoyment of their beneficial interest in the trust property. On March 12, 2007, the Petitioners' homes were illegally demolished by bulldozers.

Court of Federal Claims Proceedings

On November 12, 1998, Petitioners' timely filed their original claims in the United States Court of Federal Claims for the government's breach of its fiduciary duty ***18** to protect their beneficial interest in the trust property, and for the taking of their beneficial interest in the trust property without due process.

On July 15, 2008, Petitioners filed a supplemental complaint in the Court of Federal Claims, which was amended on June 24, 2009, alleging subsequent acts by the government breaching its fiduciary duty and constituting a further taking. On August 12, 2008, the government filed a Notice of Related Case, noting that both the original action, and the subsequent supplemental action, alleged claims that the government had failed to enforce the Petitioners' beneficial ownership of the land at issue, breaching its fiduciary duty and constituting a taking of the property. Petitioners moved to consolidate the two cases.

On October 1, 2008, both cases were transferred to Court of Federal Claims Judge Lawrence Block, since they involved common issues of fact and law, concerned the same parties and claims regarding the same parcel of land, and since transfer would be likely to conserve judicial resources and promote an efficient determination of both actions.

On October 7, 2009, the Court of Federal Claims granted the government's motion to dismiss both actions for lack of jurisdiction, finding that they both "arise out of a common set of facts and implicate similar principles of law," that Petitioners' claims were not filed within six years of the tribe's constitution being approved in 1981, and that the tribe was a required, but absent party, pursuant to R.C.F.C. Rule 19. App. 9a, 31a, 46-48a.

***19** Federal Circuit Proceedings

On November 25, 2009, Petitioners timely filed a notice of appeal of the Court of Federal Claims' joint order dismissing both actions.

The Federal Circuit affirmed the Court of Federal Claims' dismissal, labeling it nonprecedential, "primarily on the basis of the opinion of that court," reported at 89 Fed. Cl. 565 (2009), "with the following additional statement: … *Carcieri*, however has nothing to do with the present case." App.2a.

Petitioners' timely petition for panel rehearing, and rehearing *en banc*, was denied on December 8, 2010. App.6a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit decided an important issue of federal law in a way that conflicts with, and allows any of 306 tribes to avoid, this Court's decision in *Carcieri v. Salazar ("Carcieri"),* 129 S. Ct. 1058, (2009), and the District of Columbia Circuit's decision in *Patchak v. Salazar ("Patchack"),* No. 09-5324, 2011 WL 192495 (D.C. Cir. 2011).

1. The Federal Circuit's Decision Conflicts with this Court's Decision in *Carcieri v. Salazar*

Contrary to the Federal Circuit's decision, App.2a, *Carcieri* has everything to do with this case. The Federal Circuit erroneously dismissed Petitioners' claims that the United States breached its fiduciary duty to protect Petitioners' beneficial interest in trust property from ***20** erroneous claims of an Indian tribe not under Federal jurisdiction in 1934. This dismissal is in conflict with this Court's holding that the government cannot hold land in trust for an Indian tribe not under Federal jurisdiction in 1934. *Carcieri*, at 1068.

The Federal Circuit employed the wrong legal standard to dismiss Petitioner's claims for lack of jurisdiction, erroneously holding that whether the tribe was under Federal jurisdiction in 1934, was not relevant in determining: (1) whether the limitations period of the Tucker Acts had run, or (2) whether the tribe was a required, but absent party, claiming an interest in the Petitioners' trust property. App.2a.

Had the Federal Circuit followed *Carcieri*, Petitioners' claims could not have been dismissed under the Tucker Acts' statutes of limitation, since the Federal Circuit was required to decide that the tribe was not under Federal jurisdiction in 1934, and therefore could not have made an adverse claim to Petitioners' interest in their trust property, more than 6 years before Petitioners filed their claims on

November 12, 1998.

Similarly, Petitioners' claims could not have been dismissed for lack of jurisdiction under R.C.F.C, Rule 19, since the tribe had no interest in Petitioners' trust property, having not been under Federal jurisdiction in 1934, and was therefore not a required or indispensable party.

***21** A. *Carcieri* Precludes the Government's Erroneous Claim under the Tucker Acts' Statutes of Limitation

The government concedes that the Tucker Acts' 6 year limitation period begins to run on these claims from the government's first breach of its fiduciary duty to protect the Petitioners from any adverse claim to their beneficial ownership interest in the trust property. 28 U.S.C. §1491 and §1505; *Jones v. United States,* 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd* 801 F.2d 1334, 1335-36 (Fed. Cir. 1986).

The dismissal of Petitioners' claims for lack of jurisdiction was based upon the erroneous finding that the Petitioners' claims accrued when the tribe's constitution was adopted in 1981, more than 6 years before Petitioners' claims were filed on November 12, 1998.

However, neither the Federal Circuit nor the Court of Federal Claims explains how the tribe acquired any interest in the trust parcel by adopting a constitution that does not mention the trust parcel, particularly, when the tribe was not under Federal jurisdiction in 1934, and when the government concedes that there is "no record of the 1978 trust parcel being known as the Jamul [Indian] Village." C.A.App.429. Nor can they explain why they were not bound by this Court's holding in *Carcieri* at 1068, that the government cannot take land into trust for a recognized tribe that was not under Federal jurisdiction in 1934.

Had the Federal Circuit followed *Carcieri*, the government's breach of its fiduciary duty could not have been held to accrue when the tribe's constitution ***22** was adopted in 1981, as the government erroneously argued, since the tribe never received any interest in the Petitioners' beneficial ownership of the trust property in 1981 or any other time. The government's breach of fiduciary duty could only have occurred when the government failed to restore the Petitioners' use of the trust property, within the Tucker Acts' 6 year limitation period after November 12, 1992, when their mobile homes were destroyed.

By failing to follow *Carcieri*, the Federal Circuit and the Court of Federal Claims erroneously held that Petitioners' breach of fiduciary duty claims arose when the government claimed to have somehow transferred the trust property without a grant deed to the tribe, upon the tribe's recognition in 1981. App. 2a, 29a-31a.

However, there is no evidence of any such transfer, and the Federal Circuit's decision allows the tribe to avoid *Carcieri* and make its claim to the trust property without proving it. By employing the wrong standard of proof, the Petitioners were denied their interest in the property that was taken in trust for the individual "Jamul Indians of one-half or more Indian blood," which includes Petitioners.

There is no dispute that the Jamul Indian Village was not under Federal jurisdiction in 1934. The government concedes that the tribe was not under Federal jurisdiction until July 7, 1981, when its constitution was approved.

Similarly, there is no dispute that the deed to the trust parcel was recorded on December 27, 1978. C.A.App.425. The 1978 grant deed doesn't mention the tribe, and was recorded 4 years before the tribe was recognized by the ***23** Executive Branch, but not Congress. C.A.App.425 and 452. The tribe's constitution identifies no territory, but that known as the Jamul Indian Village, C.A.App.442, and the government concedes that it has "no record of the 1978 trust parcel being known as the Jamul [Indian] Village." C.A.App.429.

Most importantly, there is no evidence of any subsequent transfer of the trust property to the tribe. Thus, Petitioners' claims arose when the government first failed to protect Petitioners' mobile homes from being destroyed, after November 12, 1992.

The adoption of the tribe's constitution on July 7, 1981, is the only act that the government strains to say asserted an adverse claim to Petitioners' beneficial ownership of the trust parcel, more than six years before Petitioners' claims were timely filed in 1998. However, there is no evidence in the record referring to the trust parcel as being within the tribe's constitutional jurisdiction of the Jamul Indian Village. C.A.App.429. The tribe built no structure on the trust parcel. There is no evidence that the tribe ever took any action with regard to any possession, use, or control of the trust parcel, until the Petitioners' mobile homes were wrongfully removed and the government failed to restore Petitioners' mobile homes between November 12, 1992 and November 12, 1998.

Nor is there any evidence in the record that the government or any of the individual "Jamul Indians of one-half or more Indian blood," ever transferred the individuals' beneficial ownership interest in the trust parcel to any tribe. Even though Walter Rosales held the ballot box for the adoption of the constitution as Chairman ***24** of the Election Board on May 19, 1981, there is no evidence in the record, nor any section of the Indian Reorganization Act, 25 U.S.C. §465 et seq., that provides that anyone intended the adoption of the constitution to automatically transfer the individual Indians' beneficial ownership of the trust parcel to the Indian's tribe.

There is also no evidence that any of the individual half-blood Jamul Indians ever consented to such a subsequent transfer, which is required before the government can lawfully transfer the individuals' beneficial interest in the trust property to the tribe, as recognized in *Carcieri*, at 1070, 1074-75, 1068, *Coast,* 550 F.2d 639, 644, 651, n32, *Coast,* 213 Ct. Cl. 129, 172-73, *Coast,* 578 F.2d 1391, *Assiniboine Tribe*, 690, *Miss. State Tax Comm.*, 304, and *Mem. Sol. Int.*, 668, 724, 747, and 1479.

Just as this Court has repeatedly found that courts must presume Congress says what it means, and means what it says, in a statute, *Carcieri* 1066-67, citing *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992), this Court also said what it means, and means what it said, when it held that the federal government cannot hold land in trust for a tribe that was not under federal jurisdiction in 1934.

Since there is no evidence in the record that the Jamul Indian Village ever lawfully acquired any interest in the trust property, the Federal Circuit's dismissal for lack of jurisdiction must be reversed, pursuant to this Court's holding in *Carcieri.* In addition, since the Federal Circuit wrongfully found that whether the tribe was under federal jurisdiction in 1934 was irrelevant, its resulting erroneous conclusion that Petitioners' claims were untimely filed, ***25** must also be reversed, because there is also no evidence in the record that the government breached its fiduciary duty to protect the Petitioners' interest in the trust property more than 6 years before Petitioners claims were filed on November 12, 1998, when they were evicted from their mobile homes.

B. *Carcieri* Precludes the Government's Rule 19 Claim that the Tribe was a Required, but Absent Party.

Had *Carcieri* been followed, Petitioners' claims also could not have been dismissed under Rule 19 of the Rules of the Court of Federal Claims, since the tribe could not have been a required party (or a "necessary and indispensable" party under the old terminology[FN5]), having never lawfully acquired any interest in the trust property. By failing to follow *Carcieri*, the Federal Circuit erroneously affirmed the Court of Federal Claims' refusal to exercise jurisdiction under Rule 19, based upon the government's erroneous claim that the tribe was a required, but absent party, because of the alleged, but unproven, transfer of the beneficial ownership of

the trust property to the tribe, even though it was not under Federal jurisdiction in 1934.

> FN5. As this Court acknowledged in *Republic of Philippines v. Pimentel,* 553 U.S. 851, 855-56 (2008), three relevant stylistic changes were made to Fed. R. Civ. P., Rule 19, that leave the "substance and operation of the Rule…unchanged," which were also adopted by the R.C.F.C. in 2008.

Because this Court holds that a tribe, not under Federal jurisdiction in 1934, cannot lawfully acquire any beneficial ownership of trust property, *Carcieri* 1068, the tribe here cannot be a required party, because ***26** it is undisputed that the tribe was not under Federal jurisdiction in 1934, and therefore did not lawfully acquire any interest in the trust property in 1981, or at any other time. *Republic of Philippines v. Pimentel,* 553 U.S. 851, 867 (2008), acknowledging that an absent party may not be a required party when asserting a frivolous claim. By virtue of this Court's holding in *Carcieri*, the tribe cannot make a nonfrivolous claim to the trust property, because it is not a beneficiary in a common trust over the property. *Id.*, at 870, distinguishing conflicting claims by beneficiaries to a common trust.

A tribe is not a "required" party in a lawsuit against the government for money damages, where it does not have a direct interest in the trust property. *United Keetoowah Band of Cherokee Indians of Okla. v. United States ("UKB"),* 480 F.3d 1318, 1326-27 (Fed. Cir. 2007); *Kansas v. United States,* 249 F.2d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe a required (formerly "indispensable") party; *Karuk Tribe of Cal. v. United States,* 27 Fed. Cl. 429, 431-32 (1993), denied intervention because "the interest that the applicant-interveners assert is not direct… The direct result of a judgment in favor of the plaintiff in this case would only be a monetary award from the government to the plaintiff… Here, the plaintiffs are…suing only to recover damages from the government for having excluded them from possession of the reservation."

In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier,* 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had ***27** a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land; *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996)(same). A "legally protected interest" excludes those "claimed" interests that are "patently frivolous." *UKB,* at 1325, quoting *Davis v. United States,* 192 F.3d 951, 958-59 (10th Cir. 1999); *Shermoen v. United States,* 982 F.2d 1312, 1318 (9th Cir. 1992). Thus, the Federal Circuit's decision also conflicts with these Circuit definitions of what constitutes a sufficiently direct legally protected interest, and when a tribe's alleged interest was patently never acquired.

Moreover, the Federal Circuit was not entitled to affirm the Court of Federal Claims' refusal to exercise jurisdiction under R.C.F.C., Rule 19 on the basis of issue preclusion, App.2a, 33a, for two reasons. First, the dismissals in *Rosales VII* and *IX*, [FN6] due to an absent required party under Rule 19 were without prejudice, and therefore not adjudications on the merits. *Costello v. United States,* 365 U.S. 265, 286-87 (1961), citing *Hughes v. United States,* 71 U.S. (4 Wall.) 232, 237 (1866). Second, this Court fundamentally changed the law concerning beneficial ownership of Indian trust property in *Carcieri*, thereby precluding the application of issue preclusion, since Petitioners' claims were based upon new facts, arising from the government's subsequent breaches of its fiduciary duty, all of which occurred following the ***28** Petitioners' single claim for a trust patent in *Rosales VII*, and the personal injury claims in *Rosales IX. Bobby v. Bies,* 129 S.Ct. 2145, 2152-53 (2009); *Montana v. United States,* 440 U.S. 147, 162 (1979); *Commissioner v. Sunnen,* 333 U.S. 591, 599-600 (1948).

> FN6. These cases, *Rosales v. United States*

("Rosales VII"), No. 01-951 (S.D. Cal. Feb. 14, 2002) ("*Rosales VII*"), *aff'd on other grounds*, 73 F.Appx. 913 (9th Cir. 2003); *Rosales v. United States ("Rosales IX"),* No. 07-624, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed*, No. 08-55027 (9th Cir. Aug. 12, 2009), are referred to in the same manner as the Court of Federal Claims' decision, App.9a, fn.2.

This Court clearly sets out *Carcieri*'s fundamental change in the law, and alteration of the government's erroneous practice for 75 years to take land into trust for many of the 306 tribes that were "not under Federal jurisdiction" in 1934. *Carcieri* at 1065, "the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment."

Now that this Court has fundamentally changed the law, and holds that the government cannot hold land in trust for a tribe that was "not under Federal jurisdiction" in 1934, since the Jamul Indian Village was "not under federal jurisdiction," and did not exist in 1934, the Jamul Indian Village never acquired a beneficial ownership interest in the trust parcel, at any time. The parcel was only taken into trust for individual "half-blood Jamul Indians," including the Petitioners, who have never transferred that interest to the tribe.

Nor does the tribe have a "legally protected interest" in the Petitioners' claims for money damages, as in *UKB*, caused when their beneficial interest in the trust parcel was taken at the point of a gun, and their homes were bulldozed without compensation. Therefore, the tribe is neither a "required" party, under R.C.F.C. Rule 19, as amended, nor a "necessary and indispensable" party, under the former Rule 19, and the Federal Circuit and Court of Claims' dismissal under Rule19, must be reversed.

***29** 2. The Federal Circuit's Decision Conflicts with the District of Columbia Circuit's Decision in *Patchak v. Salazar.*

The Federal Circuit's decision also conflicts with *Patchak v. Salazar,* No. 09-5324, 2011 WL 192495 (D.C. Cir. 2011), which follows *Carcieri*, and holds that a court must determine whether a tribe was under Federal jurisdiction in 1934, in determining jurisdiction over the Petitioners' claims that the tribe did not acquire any interest in the trust property, since the government cannot hold property in trust for a tribe that was not under Federal jurisdiction in 1934. *Id.*, at *3.

Here, the Federal Circuit should not be permitted to dismiss Petitioners' claims without a trial, and without deciding whether the tribe lawfully acquired any interest in the trust property, in conflict with *Carcieri* and *Patchak*, because it is undisputed that the tribe was not under Federal jurisdiction in 1934. *Devlin v. Scardalletti,* 536 U.S. 1, 6 (2002), *certiorari* is granted where there is disagreement among circuits as to an important federal question.

3. Whether a Tribe has Lawfully Acquired an Interest in Trust Property is an Important Federal Question

The Federal Circuit's decision, as does *Carcieri*, affects the members of as many as 306 tribes that were not under Federal jurisdiction in 1934,[FN7] 54% of all ***30** federally recognized tribes throughout the nation, and the approximate 930,000 non-Indian and Indian citizens who reside on the remainder of 48 million acres of Indian trust property in nearly all of the states,[FN8] 500,000 of whom are individual beneficial owners of such property,[FN9] as are Petitioners here.

FN7. Compare, Commissioner of Indian Affairs John Collier's list of 258 tribes under Federal jurisdiction in 1934, acknowledged by Justice Breyer in *Carcieri* at 1069, with the current list of 564 tribes at 74 Fed. Reg. 40,218 (2009).

FN8. Brief of the States of Arizona, Nevada, New Mexico, South Dakota, Utah, Washington, and Wyoming in Support of

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation,* 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), 1987 WL 880161; and Brief of the National Association of Counties as Amicus Curiae in Support of the Petition for a Writ of Certiorari, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation,* 492 U.S. 408 (1989) (Nos.87-1622, 87-1697 & 87-1711), 1987 WL 880371; and *Cohen's Handbook of Federal Indian Law* §1.04, p. 82 (2005).

FN9. *Pueblo of Laguna v. United States,* 60 Fed. Cl. 133, 138 (Fed. Cl. 2004).

If the government and the tribe are allowed to avoid the holding in *Carcieri*, whenever a tribe claims an interest in trust property adverse to Petitioners' beneficial interest in that property, by employing the wrong legal standard to have Petitioners' claims dismissed for lack of jurisdiction, any of the 306 tribes not under Federal jurisdiction in 1934 may avoid *Carcieri*, by similarly having the courts use the wrong standard as to whether the tribe was under Federal jurisdiction in 1934, and thereby divest the states of their sovereignty over such property and thousands of beneficial property owners of their individual ownership interests.

By failing to abide by this Court's decision in *Carcieri*, and affirming the Court of Federal Claims' dismissal ***31** of Petitioners' claims without even citing *Carcieri*, the Federal Circuit has allowed any of the 306 tribes not under Federal jurisdiction to claim that they acquired an interest in a state's property more than 6 years ago, and thereby preclude the true individual owners from having the merits of their beneficial ownership determined.

However, that is not the law, as decided by this Court in *Carcieri*, and followed in *Patchak.* Whenever a tribe claims an interest in trust property adverse to a state or an individual's interest in the trust property, this Court must require all courts to determine whether a tribe was under Federal jurisdiction in 1934, particularly when determining the timeliness of Petitioners' claims that the tribe never acquired an interest in the trust property. Otherwise, any of the 306 tribes not under Federal jurisdiction in 1934 will be allowed to merely assert such an interest, and shield the falsity of their claim from a proper determination on the merits, as happened here.

Following *Carcieri*, the government must remain liable for breaching its most exacting of fiduciary duties and failing to protect the Petitioners' interest in their trust property from erroneous claims by a tribe not under Federal jurisdiction in 1934, that this Court now holds has no interest in the trust property. *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942); *United States v. Mason,* 412 U.S. 391, 398 (1973); *United States v. Mitchell (Mitchell II),* 463 U.S. 206, 226, fn. 31 (1983), citing *Coast*, at 652; *Jones v. United States,* 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986).

Even though the Federal Circuit's decision is labeled nonprecedential, such a label does not hide the split in the Circuits, nor an error in conflict with this Court's ***32** decisions. Affirming an erroneous decision that failed to comply with this Court's decision in *Carcieri*, without correcting the error, leaves that *ratio decidendi* to be used by any of the 306 tribes not under Federal jurisdiction in 1934 to continue to erroneously claim an interest in trust property, that this Court holds was never acquired. Such nonuniformity in conflict with this Court's holding in *Carcieri* must not be perpetuated.

"With the increased use of unpublished and summary decisions in federal and state intermediate appellate courts…the Court grants *certiorari* to review unpublished and summary decisions with some frequency. See *Kane v. Garcia Espitia,* 126 S.Ct. 407 (2005); *Dye v. Hofbauer,* 126 S.Ct. 5 (2005); *Illinois v. Fisher,* 540 U.S. 1174 (2004);

United States v. Flores-Montano, 541 U.S. 149 (2004)." Eugene Gressman, *Supreme Court Practice*, §4.11, p.263 (2007). As noted by Justice Stevens, unpublished decisions require greater scrutiny, because "occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Jeffrey Cole & Elaine Bucklo, *A Life Well Lived: An Interview With Justice John Paul Stevens*, 32 Litigation 8, 67 (Spring 2006).

As noted by Circuit Judge Davis in this era of electronic publication of all decisions, whether labeled nonprecedential or not: "we provide an incentive to counsel…to cite to the district courts the full panoply" of prior cases, leaving the trial court to select "whatever doctrine fits the court's fancy, whether or not correct under settled law." *Riley v. Dozer Internet Law PC,* 377 Fed.Appx. 399, 410-11 (4th Cir. 2010)(J. Davis, dissenting). Hence, nonprecedential cases in conflict with this Court's ***33** decisions must still be affirmatively overruled to secure national rights and the uniformity of judgments.

CONCLUSION

Therefore, *certiorari* should be granted to allow this Court to resolve the split among the Circuits, and to prevent a procedural end run of its holding in *Carcieri.* A tribe must first be determined to have been under Federal jurisdiction in 1934, before a court may properly resolve a dispute among the state and Federal governments, individual Indians, and the tribe, as to the beneficial ownership of trust property anywhere in the nation.

After losing their homes at gunpoint, due to an unfortunate string of judicial errors employing the wrong legal standard to dismiss Petitioners' claims for lack of jurisdiction, Petitioners remain entitled to a decision on the merits, enforcing the law of the land as decided by this Court in *Carcieri*, which bars the tribe's claims to any interest in the trust parcel.

Rosales v. U.S.
2011 WL 826337 (U.S.) (Appellate Petition, Motion and Filing)

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