UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et. al.*,

Defendants.

CIVIL ACTION NO.: 1:16-cv-10184-WGY

Amicus Brief Supporting Defendants' Motion for Summary Judgment

(Leave to file granted on July 21, 2016)

USET SOVEREIGNTY PROTECTION FUND, INC.,
***AMICUS BRIEF* SUPPORTING**
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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SUMMARY OF INTEREST OF *AMICUS*

The USET Sovereignty Protection Fund, Inc. ("USET SPF") is a non-profit organization representing 26 federally recognized Tribal Nations in the south and eastern regions of the United States.[1] USET SPF works at the regional and national level to educate federal, state and local governments about the unique historic and political status of its member tribes. Due to their locations, USET SPF-member nations have the longest continuous direct relationship with the United States government, dating back to the earliest treaties. One major consequence of the longevity of this relationship has been the steady loss of tribal land.

USET SPF-member nations retain only small remnants of their original homelands today. As a result, the provisions of the Indian Reorganization Act of 1934 ("IRA") are of particular significance and importance to them. Since the IRA was enacted in 1934, USET SPF-member nation have been able to purchase land and petition the Secretary of the Interior to place that land into trust status for a wide-variety of purposes. The interpretation of the IRA is therefore of special importance to USET SPF and is an area of federal Indian law in which USET SPF has developed particular expertise.

For USET SPF members, the reacquisition and rebuilding of their homelands is of critical importance to achieving their goals of self-governance and economic self-sufficiency. Lands

[1] The USET-member Tribal Nations include: Eastern Band of Cherokee Indians; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; Seminole Tribe of Florida; Chitimacha Tribe of Louisiana; Seneca Nation of Indians; Coushatta Tribe of Louisiana; Saint Regis Mohawk Tribe; Penobscot Indian Nation; Passamaquoddy Tribe – Pleasant Point; Passamaquoddy Tribe – Indian Township; Houlton Band of Maliseet Indians; Tunica-Biloxi Tribe of Louisiana; Poarch Band of Creek Indians; Narragansett Indian Tribe; Mashantucket Pequot Tribal Nation; Wampanoag Tribe of Gay Head (Aquinnah); Alabama-Coushatta Tribes of Texas; Oneida Indian Nation; Aroostook Band of Micmacs; Catawba Indian Nation; Jena Band of Choctaw Indians; Mohegan Tribe; Cayuga Nation; Mashpee Wampanoag Tribe; and Shinnecock Indian Nation. They can be found in Maine, New York, Massachusetts, Mississippi, North Carolina, South Carolina, Florida, Louisiana, Alabama, Rhode Island, Connecticut and Texas.

placed into trust under the IRA largely define the geographic reach of reserved powers of inherent sovereignty. In addition, 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.

INTRODUCTION

In 1934, 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). This "sweeping" legislation manifested a sharp change of direction in federal Indian policy. *Id*. 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). By restoring land bases for tribes, the IRA was intended to improve tribal governance and tribal economies.

Section 5 of the IRA authorizes the Secretary to acquire lands "for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 19 defines "Indian" to include, *inter alia*: "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation ...." 25 U.S.C. § 479.

Although this case involves the IRA's second definition of "Indian," a proper construction of the first definition is necessary since plaintiffs seek to incorporate the entire first definition

into the second through the phrase "such members." USET SPF will focus its brief on this issue. The first definition has two distinct criteria—the person must be a member of "any recognized Indian tribe," and the tribe must be "now under Federal jurisdiction." While the Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that "now under Federal jurisdiction" referred to 1934, it did not decide whether a tribe had to have been recognized in 1934. Proper construction of the first definition shows that the word "now" limited only "under Federal jurisdiction" and not "any recognized Indian tribe." This distinction supports the argument of the United States that "such members" in the second definition only refers to the first criteria ("any recognized Indian tribe") in the first definition, and does not refer to the second criteria ("now under Federal jurisdiction" meaning in 1934).

ARGUMENT

THE FIRST DEFINITION IN THE IRA REQUIRES THAT A TRIBE BE A "RECOGNIZED INDIAN TRIBE" AT THE TIME THE LAND IS TAKEN INTO TRUST, NOT 1934, AND *CARCIERI* DOES NOT HOLD OTHERWISE

A. The *Carcieri* Decision Held That "Now" Modifies the Phrase "Under Federal Jurisdiction," Not the Phrase "Recognized Indian Tribe"

In *Carcieri*, the Supreme Court considered whether the Secretary of the Interior had authority to take land into trust for the Narragansett Indian Tribe. The Court addressed the narrow question 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.[2] The Court framed the question before it as follows:

[2] The Court 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. Its 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 respondent United States declined to contest this assertion. *Carcieri*, 555 U.S. at 395-96. The petitioner's allegation

> [W]e 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.

Although the Court in *Carcieri* held that a tribe must demonstrate that it was "under Federal jurisdiction" in 1934 before it qualifies to take land into trust today, nothing in the Court's decision or the text or legislative history of the IRA indicates that a tribe must also demonstrate that it was a "recognized Indian tribe" in 1934 in order to take land into trust today. Nowhere in its statement of the question does the Court make reference to the meaning of the phrase "recognized Indian tribe." 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: " We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395.

As explained in concurring opinions in the *Carcieri* decision, the terms "recognized Indian tribe" and "now under Federal jurisdiction" historically had two separate meanings, and must be given separate effect. In his concurrence, Justice Breyer noted that "recognized" and "under Federal jurisdiction" were not synonymous and that "[t]he statute, after all, imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring). Similarly,

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was, therefore, accepted by operation of the Court's procedural rules. *Id.* Furthermore, 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. Indeed, Justices Souter and Ginsberg noted that the parties simply did not understand that the issue was present. The two justices dissented from the Court's straight reversal and stated that they would have remanded the case so that the United States and the Tribe would have the opportunity to argue that the Tribe was "under Federal jurisdiction." 555 U.S. at 401.

Justices Souter and Ginsberg distinguished "recognition" and "under Federal jurisdiction" in a separate concurrence:

> The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time. See Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

Carcieri, 555 U.S. at 400 (Souter, J., concurring in part and dissenting in part).

District courts agree that *Carcieri* did not resolve the meaning of the phrase "recognized Indian tribe." *Confederated Tribes of Grande Ronde Community of Oregon v. Jewell*, 75 F. Supp. 3d 387, 398 (D.D.C. 2014) ("The *Carcieri* majority makes no attempt to interpret what the word 'recognized' means, and instead concerns itself solely with the interpretation of the phrase 'now under Federal jurisdiction.'"); *Stand Up for California! v. U.S. Dep't of Interior*, 919 F. Supp. 2d 51, 69 (D.D.C. 2013) (*Carcieri* "left unanswered ... what the meaning of 'recognized Indian tribe' is; and ... whether a tribe must have been 'recognized' in 1934 to be eligible for trust land"); *Sandy Lake Band of Mississippi Chippewa v. United States*, 2012 WL 1581078 at *8 (D. Minn. May 4, 2012), *aff'd as modified*, 714 F.3d 1098 (8th Cir. 2013).

B. The "Now Under Federal Jurisdiction" Requirement is Separate and Apart From the "Recognized Indian Tribe" Requirement, and It Does Not Impose A Temporal Limitation On Recognition

Congress did not impose a temporal limitation on recognition in § 479, and did not intend to prevent tribes that are unambiguously 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."

The phrase "now under Federal jurisdiction" was added by Congress as an additional requirement to the clause containing the phrase "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."[3] 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.
>
> 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.

AR001540 (*Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. 2d Sess. at 80 (May 17, 1934)). As stated in *Confederated Tribes of Grande Ronde*, "[t]his discussion among the Committee suggests, therefore, that the term 'recognized tribe' includes Indians who were not under the Indian Bureau's supervision in 1934." 75 F. Supp. 3d at 399.

Commissioner of Indian Affairs John Collier suggested the "now under Federal jurisdiction" language at a later Senate hearing in order to satisfy a concern raised by Senators

[3] 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." AR001694 (*Hearing on S. 2755 and S. 3645, Before the S. Comm. on Indian Affairs*, 73 Cong. 2d Sess. at 234 (May 17, 1934)).

that the provision as drafted was overbroad. At the May 17, 1934 hearing, Senator O'Mahoney attempted to clarify that the term "recognized Indian tribe" would include all recognized tribes, and Chairman Wheeler responded that it would, unless a limitation were added:

> 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.

AR001726 (*Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs* at 266). Senator O'Mahoney then suggested that the Chairman's concerns could be addressed with new language, and Commissioner Collier 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.

AR001725 (*Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs* at 266).

Although there is no further discussion on the matter, 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.[4] 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.[5]

The Department of Interior has construed the "recognized Indian tribe" requirement as separate from the "now under Federal jurisdiction" requirement, and as not requiring recognition as of 1934. The district courts that have considered the Department's position have upheld it. *Confederated Tribes of Grande Ronde*, 75 F. Supp. 3d at 401 ("the term 'recognized' does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term. ... [T]his Court finds the Secretary's interpretation of 'recognized' to be reasonable and defers to it."); *Central New York Fair Business Ass'n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. 2015) (*citing id.*). *See also Stand Up for California!*, 919 F. Supp. 2d at 70 (court did not decide whether Indian tribe had to have been recognized in 1934, instead upholding Department's

[4] Further, as noted in the United States' Memorandum of Law, there was no indication in the hearing record that the addition of the phrase "now under Federal jurisdiction" was intended in any way to add to or limit the existing (and unchanged) second definition. United States' Memorandum of Law in Support of United States' Motion for Partial Summary Judgment, Doc. 56, at 12.

[5] Following the IRA's enactment, the status of many tribes remained uncertain. Typically, these questions were resolved by the Department, through Solicitor's opinions. *See Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring) (referencing post-IRA Solicitor's opinions regarding the Stillaguamish, Mole Lake, Grand Traverse Band of Ottawa & Chippewa Indians, Shoshone, St. Croix Chippewas, and Nahma and Beaver Indians). This evolving process underscored that "recognition" of a tribe need not precede the IRA. This understanding was made explicit in a landmark Solicitor's Opinion issued shortly after enactment of the IRA in 1934, which detailed the inherent powers of Indian tribes preserved by the IRA. As the Solicitor there emphasized, these powers apply "to all Indian tribes recognized now *or hereafter* by the legislative or the executive branch of the Federal Government." Opinion of the Solicitor on Powers of Indian Tribes, 55 Decisions of the Dep't of the Interior at 14 (opinion of Oct. 25, 1934) (emphasis added), *reprinted in* 1 U.S. Dep't of the Interior, Opinions of the Solicitor of the Dep't of the Interior Relating to Indian Affairs 1917-1974 at 477 (1970).

decision to acquire trust land for tribe on grounds that "'recognized Indian tribe' in the IRA refers to recognition in the cognitive or quasi-anthropological sense," and that tribe was recognized in the cognitive sense in 1934).

Conclusion

For these reasons, the first definition of eligible Indians under section 479 must be construed to contain two separate and distinct phrases, and "such members" in the second definition should be properly construed to incorporate "recognized Indian tribe" but not "under Federal jurisdiction." As the United States demonstrates in its brief, Mashpee Wampanoag clearly meets the second category thus construed.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth J. McEvoy, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 21st day of July, 2016.

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