

**SUPREME COURT REVERSAL OF *CARCIERI*:
IMPLICATIONS FOR REAFFIRMED MICHIGAN INDIAN TRIBES**

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Our tribe exists. We have been here long before the coming of the Europeans. Since the treaty making time we have not gone away or stopped being a tribe. There has never been an express action of Congress nor a history which terminated our tribe. We still live, work and raise our children in the same lands we occupied before the United States existed.

Frank Ettawageshik, Chairman of the Little Traverse Bay Band of Odawa Indians²

I. INTRODUCTION

The Supreme Court has granted certiorari in the case of *Carcieri v. Kempthorne*. This case arises out of the First Circuit where an en banc court issued a divided opinion that upheld the District Court for the District of Rhode Island in favor of the Narragansett Indian Tribe of Rhode Island (“Tribe”).³ The Supreme Court will decide two issues on appeal: 1) “[w]hether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934,” and 2) “[w]hether an act of Congress extinguished aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.”⁴ This paper analyzes Rhode Island’s (“the State”) primary argument that the Secretary of the Interior (“Secretary”) lacks the legal authority to take land into trust for the recently recognized Narragansett Tribe under the Indian

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² *Michigan Indian Recognition, Hearing Before the Subcommittee on Native American Affairs of the Comm. on Natural Resources*, 103rd Cong. 1st Sess. 125 (Sept. 17, 1993) [hereinafter *Michigan Indian Recognition*] (statement of Hon. Frank Ettawageshik, Chairman of the Little Travers Bay Band of Odawa Indians).

³ *Carcieri v. Kempthorne*, F.3d 15 (1st Cir. 2007); *Carcieri v. Kempthorne*, 290 F.Supp.2d 167 (D.R.I. 2003).

⁴ *Carcieri v. Kempthorne*, Petition for a Writ of Certiorari at i.

Reorganization Act (“IRA”), Section 5, because, the IRA’s statutory definition of “Indian” is only available to those tribes federally recognized in 1934. Additionally, this paper examines potentially detrimental effects of a Supreme Court reversal of *Carcieri* in the context of barring Michigan Indian tribes not recognized in 1934 from participation in the trust land acquisition process under IRA, Section 5.

From a tribal advocacy position, it is important to first consider whether *Carcieri* reversal can be narrowed to mitigate any potentially harmful effects for tribes not recognized after 1934. On petition for writ of cert, the State appropriately narrows the outcome to affect only those states with similar congressional settlement or extinguishment provisions, which would include Alaska, Maine, Massachusetts, and Connecticut.⁵ The Court of Appeals also narrowly frames the issue, by stating “the Settlement Act’s provisions applying state civil and criminal law and jurisdiction on the Settlement Lands is limited on its face to the Settlement Lands and cannot reasonably be interpreted to extend to other lands in Rhode Island.”⁶ Nor should it be applicable to other lands outside of Rhode Island. The First Circuit opinion also bolsters a narrow interpretation of *Carcieri* based on congressional legislation:

[T]he Settlement Act, neither explicitly bars by its terms the Secretary’s actions, not implicitly repeals or constrains the Secretary’s authority under the IRA to place land into trust for the Tribe. While the State apparently failed to anticipate this particular problem at the time of the settlement, the Settlement Act did not specifically contemplate the event of federal recognition of the Tribe and did not

⁵ *Id.* at 25-26; Note 13 reproduced: *See, e.g.* Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §1603(a),(b) (extinguishing aboriginal title in most of Alaska); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §1723(b) (extinguishing all aboriginal title in Maine) and 25 U.S.C. §1723(c) (extinguishing all Indian claims “based on any interest in or rights involving” land in Maine); Massachusetts Indian Claims Settlement of 1987, 25 U.S.C. §1771b(b) (extinguishing aboriginal title of the Wampanoag of Gay Head); Mashantucket Pequot Indian Claims Settlement Act of 1983, 25 U.S.C. §1753(c) (extinguishing any Pequot “interest in or right involving” land); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 24 U.S.C. §1775 b(d)(1)(A) (extinguishing Mohegan aboriginal title) and 25 U.S.C. §1775b(d)(1)(B) (extinguishing and other Mohegan claims to lands in Connecticut, including any claim or right based on recognized aboriginal title).

⁶ *Carcieri v. Kempthorne*, No. 03-2647, at 5 (1st Cir. July 20, 2007) (497 F.3d 15 (1st Cir. 2007)); *Carcieri v. Kempthorne, Petition For a Writ of Certiorari to the United States Supreme Court* (No. 07-526) at 25. Granted cert on February 25, 2008.

restrict the Secretary's power, should the Tribe be recognized, to take land into trust outside of the settlement lands. We are not free to reform the Act. If aggrieved, the State must return to Congress.⁷

The emphasis the First Circuit placed on the details of the Settlement Act should not be lost on appeal. From an Indian law perspective, Congress has legislated with respect to the Narragansett Tribe, and the Court ought to defer to the terms of the Settlement Act. Any deviation from the First Circuit's analyses implies judicial disregard of congressional intent and principles of plenary power with respect to Indian tribes. Accordingly, Supreme Court reversal of *Carcieri* should be limited to those similarly situated tribes with congressional settlement agreements.⁸

The mere fact *Carcieri* was granted cert based on the State's attack of the IRA is raising concern in Indian country that this case is part of a larger, politically fueled assault on tribal sovereignty. If the lower court ruling in favor of the Tribe is overturned, then broad precedent will be established to effectively bar all tribes not recognized in 1934 from the BIA land-to-trust process. These concerns are valid when considering the predominately conservative composition of the current Supreme Court, along with the Court's history of overruling cases granted cert. Additionally, sixteen State Attorney Generals from states across the country have collectively joined against tribes to support Rhode Island.⁹ Since the majority of these states lack settlement agreements with tribes, this could be an indicator that *Carcieri* holdings have the potential to be broadly construed.

⁷ *Carcieri* at 9 (1st Cir. 2007).

⁸ *Id.*

⁹ *Carcieri v. Kempthorne, Brief of the States of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah as Amici Curiae in Support of the Petitioners.* (The State's petition for writ of cert frames the issues in the context of the "future allocation of civil and criminal jurisdiction between the states and tribes over a potentially unlimited amount of land hangs in the balance," in direct contravention to the general rule that states do not have jurisdiction over Indian land. (*Carcieri* Petition for a Writ at 2.) This perspective directly violates the general rule that state's lack jurisdiction over Indian land under *Worcester v. Georgia*, 31 U.S. 515 (1832), and *Williams v. Lee*, 358 U.S. 217 (1959)).

Numerous tribes throughout Indian country will be affected by a *Carcieri* reversal. Out of the 562 federally recognized tribes,¹⁰ there are potentially as many as one hundred tribes that were not recognized in 1934.¹¹ This is more than three times the original number of thirty-one affected tribes that was first reported by the amicus filed in support of tribes by the National Congress of American Indians (NCAI).¹² NCAI's analysis was limited to available data from 1961 to 2000.¹³ Alaskan tribes would be not implicated because the IRA expressly includes these tribes into the statutory definition of "Indians."¹⁴

II. CARCIERI V. KEMPTHORNE

A. FACTS OF THE CASE

It is often said that bad facts make bad law. The facts in this case must be considered in the light of the adversarial nature between the parties. The First Circuit classified the relationship between the Tribe and the State as, "fraught with tension."¹⁵ This tension became violent in 2003, when the Rhode Island state police raided the Narragansett's smoke shop and beat tribal

¹⁰ *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, Federal Register: April 4, 2008 (Vol. 73, No. 66).

¹¹ Fletcher, (To be determined by ongoing research at the Michigan State University College of Law, Indigenous Law and Policy Center).

¹² *Carcieri v. Norton*, Brief of Amici Curiae National Congress of American Indians, Individual Tribes, and Tribal Organizations Supporting Defendant-Appellees and Opposing Rehearing En Banc, No. 03-2647, at 3 (2005). (The Amici note that the GAO report is under inclusive. *GAO Report, Indian Issues: Improvements Needed in the Tribal Recognition Process*, GAO-02-49 (Nov. 2001), Appendix I.)

¹³ *Id.*; *United States Bureau of Indian Affairs*, 68 Fed. Reg. 68180 (2003) (Tribes recognized since 2003 are not included.)

¹⁴ 25 U.S.C. § 479 ("For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians." Additionally under § 473a, those Alaskan tribes recognized after 1936 have additional consideration in the statute, "Application to Alaska - Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: Provided, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.")

¹⁵ *Carcieri* at 15 (1st Cir. 2007); *Narragansett III*, 449 F. 3d at 30-31, (The court refers to the ongoing smoke shop case involving state police beating tribal members and criminal prosecution of these members.)

members.¹⁶ When considering the State's conduct, Professor Robert N. Clinton noted that the Supreme Court "is creating a climate which gave Rhode Island officials the belief that they could do what they did, which is not a healthy development."¹⁷ Not only has this tension developed into violence on the Narragansett reservation, it now sets the stage for this case that will ultimately lead to precedent that will dictate how the BIA fulfills its trust responsibility to hundreds of tribes throughout the country.

The Narragansett Indian Tribe initially organized as a state chartered corporation in 1934.¹⁸ In 1975, the Narragansetts sued the State to recover lands that had been acquired in violation of the Intercourse Act.¹⁹ As part of settling this suit, the Tribe and State entered into a Joint Memorandum of Understanding (JMOU) for settlement lands in 1978.²⁰ The State created an Indian corporation to hold the 1800-acre settlement land in trust for the tribe. In exchange, the Tribe gave up aboriginal title to other lands within the State.²¹ In 1983, the Tribe was formally federally recognized through the BIA.²² In 1988, Congress codified the terms of the JMOU between the Tribe and State and took the settlement lands into trust pursuant to Part 151 regulations, under Section 5 of the IRA.²³ The Tribe's Indian-held state corporation established in 1934 held the settlement lands in trust, but conveyed these lands to the Tribe after federal recognition. The Tribe in turn conveyed the land to the BIA to place into trust. The BIA

¹⁶ Matthew L.M. Fletcher, *The Power to Tax, The Power to Destroy, and the Michigan Tribal-Tax Agreements*, 82 U. DET. MERCY L. REVIEW, at 1 (2004-05).

¹⁷ *Id.*; citing Michael Corky, *Indians Say It May Be Fighting Again*, Providence (R.I.) J., Aug. 25, 2003 at A1, available at 2003 WL57186504 (quoting Robert N. Clinton, law professor, Arizona State University Law School).

¹⁸ *Id.* at 10. (Author attempted, but could not ascertain whether the Tribe sought IRA recognition in 1934.)

¹⁹ *Id.*; Indian Nonintercourse Act, 25 U.S.C. §177.

²⁰ *Id.* at 10.

²¹ *Id.* at 15.

²² *Carcieri* at 3 (1st Cir. 2007); *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177 (1983).

²³ *Id.* at 11; 25 U.S.C. 1708

preserved the State's jurisdiction under the Settlement Act and the JMOU, so these trust lands remain subject to State law pursuant to 25 U.S.C. § 1708(a).²⁴

In 1991, the Tribal housing authority purchased thirty-one acres of fee land and proceeded to transfer to this land to the Tribe in 1992. The Tribe sought to put this land into trust for use as part of the Tribe's housing project.²⁵ The Tribe proceeded to build houses on this land without seeking approval or permits from either the local municipalities or the State. The Tribe argues these parcels had been taken into trust and are exempt from State and local law. Litigation ensued and the Narragansett Indian Tribe lost.²⁶ The Tribe continued to appeal to the Secretary to take these thirty-one parcels into trust, and in 1988, the Secretary finally placed this land into trust.²⁷ The BIA's decision was affirmed by the Interior Board of Indian Appeals.²⁸ The State first brought suit in District Court after exhausting federal administrative remedies.²⁹ The District Court ruled in favor of the BIA.³⁰ After losing, the State appealed to the First Circuit, which affirmed the District Court's decision.³¹ Now the Supreme Court must decide whether the Secretary has the statutory authority to take land into trust for the Narragansett Tribe because they were not federally recognized in 1934.

B. STATE ATTACK OF THE INDIAN REORGANIZATION ACT

The IRA of 1934³² was enacted under the legal authority of the federal trust obligation to Indian tribes established through treaties with tribes, Article I, § 8 of the Constitution, federal

²⁴ *Id.* at 11; *Narragansett I*, 19 F.3d at 689, 695 n. 8.

²⁵ *Id.* at 12.

²⁶ *Id.* at 13; *Narragansett II*, 89 F.3d at 922.

²⁷ *Id.* at 14.

²⁸ *Town of Charleston v. E. Area Dir., Bureau of Indian Affairs*, 35 I.B.I.A. 93, 106 (2000).

²⁹ *Id.*

³⁰ *Carcieri v. Kempthorne*, 290 F.Supp.2d 167 (D.R.I. 2003).

³¹ *See Carcieri* (1st Cir. 2007); *Carcieri* (D.R.I. 2003).

³² 25 U.S.C. §§ 461-479.

statutes, and federal common law.³³ Congressional passage of the IRA represented a change federal policy towards tribes because it sought to “establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically.”³⁴ Congress intended for the IRA to mitigate further loss of Indian land after allotment era policies by: 1) ending allotment,³⁵ 2) restricting alienation of Indian lands,³⁶ and 3) restoring surplus lands to tribes.³⁷ Additionally, the IRA codifies legal authority for the Secretary to put into trust “any interest in lands, water rights, or surface rights to lands, within or without existing reservations... for the purpose of providing land to Indians.”³⁸ Since Congress gave the Secretary this authority under Section 5, millions of acres of land have been put into trust for tribes across the country.³⁹

As part of their analysis, the First Circuit initially examined the plain text of Section 5 and Section 19 of the IRA.⁴⁰ Under Section 5, “[t]he Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.”⁴¹ Section 5 is examined in the context of the statutory definition of “Indians,” based on the State’s argument that a plain reading of Section 5 expressly grants the Secretary authority to take land into trust is limited to these statutory “Indians.”

³³ See 25 U.S.C.A. § 1901 (1)-(2) (1978); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); Trust relationship with tribes based on Constitution Art, I, § 8, cl. 3; Art. II, § 2, cl. 2.

³⁴ *Carcieri v. Kempthorne, Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations in Support of Defendant-Appellees*, April 20, 2004 at 4, quoting *Morton*, at 542 (1974).

³⁵ 25 U.S.C. § 461.

³⁶ 25 U.S.C. § 462.

³⁷ 25 U.S.C. § 463.

³⁸ 25 U.S.C. § 465.

³⁹ *Brief for Amici Curiae National Congress of American Indians*, at 6 (April 20, 2004).

⁴⁰ 25 U.S.C. § § 465, 479.

⁴¹ 25 U.S.C. §465.

Section 19 defines, “‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.”⁴² After looking to the plain text, the First Circuit looked to context, how Congress use the term *now* in other statutes, legislative history, and policy.⁴³

Based on this analysis, the First Circuit rejected the State’s interpretation of the IRA and applied the two-step *Chevron* analysis to find first that the statute appropriately ambiguous, and second, that the BIA’s interpretation of *now* under the statute was reasonable.⁴⁴ The First Circuit gave the BIA *Chevron* deference. This high level of deference available to Executive agencies is based largely on the rationale that agencies develop the required expertise needed to interpret statutes and fulfill congressional intent within their respective administrative subject areas. The First Circuit accepted the general rationale behind *Chevron* deference because the BIA is the agency with the most experience and expertise in fulfilling the federal trust obligation to Indian tribes. This challenge to the Secretary’s authority falls directly within the scope of fulfilling this federal trust responsibility to tribes. From a purely administrative law perspective, *Chevron* deference was appropriately applied in the lower court.

The First Circuit also addresses the State’s myriad of creative constitutional arguments. Each of these arguments examined different approaches to challenging the Secretary’s land-to-trust authority. According to the State, the Secretary land-to-trust process violated the Indian Commerce Clause, the Tenth Amendment, and the federal Enclave Clause.⁴⁵ The State’s federal

⁴² 25 U.S.C. §479. (emphasis added).

⁴³ *Carciari* at 20 (1st Cir. 2007).

⁴⁴ *Id.* at 18.

⁴⁵ *Id.* at 8.

enclave argument based on Art. 1 § 8, cl. 17 of the Constitution is misplaced. The State asserts Section 8 mandates the “consent of the legislature of the State” to place land into trust for the Tribe.⁴⁶ Not only does this argument disregard fundamental principles of federal Indian law jurisprudence, it is not applicable. The federal Enclave Clause is specific to federal lands that Congress obtains “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”⁴⁷ As the Mississippi Band of Choctaw amicus correctly points out, “the Narragansett Tribe’s 31 acres in question were not acquired for the erection of forts, etc., but [rather for providing Tribal housing] ‘for the purpose of providing land to Indians,’ 25 U.S.C. § 245.”⁴⁸ Furthermore, jurisdiction over federal enclaves and Indian reservations is generally a matter of federal and Constitutional law.⁴⁹ The State also misread the applicability of *U.S. v. John* to this case. The Mississippi Band of Choctaw Amicus illustrates this flawed reasoning by illustrating that the *John* court, “rejected the ‘federal enclave’ clause argument that State consent is required before exclusive federal “Indian Country” jurisdiction can be created by taking land unto trust under § 5 of the IRA.”⁵⁰ Again, the notion that the federal government has to gain state consent to act on behalf of Indian tribes is contrary to principles of federal Indian law and Supremacy.⁵¹

The *Carcieri* facts are specific to the Narragansett Tribe, and should not be used establish precedent for those tribes who do not meet any of the exceptional circumstances to challenge the

⁴⁶ *Carcieri v. Norton, Brief Amicus Curiae of the Mississippi Band of Choctaw Indians filed with Consent of all Parties in Support of Defendant-Appellees and for Affirmance*, No. 03-2647, at 6 (April 26, 2004) [hereinafter *Mississippi Band of Choctaw Indians Amicus*], quoting U.S. CONST. art. I, § 8, cl. 17.

⁴⁷ U.S. CONST. art. I, § 8, cl. 17.

⁴⁸ *Mississippi Band of Choctaw Indians Amicus* at 6.

⁴⁹ See *Id.*; citing U.S. CONST. art. I, § 8, cl. 3 (not 17) (Indian Commerce Clause, which give Congress the power “to regulate Commerce.. with the Indians.”); See also 18 U.S.C. § 1152 (The Indian Country Crimes Act applies general criminal laws to federal enclaves and Indian Country).

⁵⁰ *Mississippi Band of Choctaw Indians Amicus* at 7. (“The *John* decision thus leaves no room for the argument that the state must consent before land can be taken into trust for a Tribe under § 5 of the IRA.”); *U.S. v. John*, 437 U.S. 634 (1978).

⁵¹ See *Worcester v. Georgia*, 31 U.S. 515 (1832), (Established early on that states do not have authority over tribes, unless 1) tribes consent through treaty or 2) act of Congress); See also *Williams v. Lee*, 358 U.S. 217 (1959).

Secretary's trust authority because of the Rhode Island Settlement Act. Although federal Indian law jurisprudence is based on precedent established in deciding a specific case for one tribe, courts ought to consider that each Indian nation has a unique historical relationship with the federal government. Noted Indian law scholar Vine Deloria, Jr. made an important criticism about the practice of grouping of Indian tribes throughout Indian law jurisprudence.⁵² Given the significant role of *Felix Cohen's Handbook*, Deloria argued that even the *Handbook*, "by reducing the complicated and diverse set of legal and policy outputs to an oversimplified and largely mythical set of principles and doctrines, unwittingly did a profound disservice to tribal nations and their legal relationship to the federal and state governments."⁵³

The diversity of these tribal-federal relations is affected by innumerable factors including, and not limited to: the federal budget, state politics, tribal leadership, geography, cultural beliefs, disease epidemics, and even weather. The BIA officials chose not to visit, and consequently not recognize, various Michigan Indian tribes because of the cold weather. Yet, when Indian tribes seek federal recognition, or as in the case of the Michigan tribes – seek reaffirmation, then at last the intricate historical details associated with the tribal-federal relationship are scrutinized. It is important for this Supreme Court to consider the significant role of this tribally specific history in their analysis because each and every Indian law case they decide binds every one of the 562 recognized Indian nations.

⁵² Felix S. Cohen, Ed. by David E. Wilkins, *On the Drafting of Tribal Constitutions*, at xvii (2008); Vine Deloria, Jr. *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, AZ. L. REV. 31, 204 (1989).

⁵³ *Id.*

III. IMPLICATIONS FOR MICHIGAN INDIAN TRIBES

Presently, there are twelve federally recognized tribes in Michigan.⁵⁴ Michigan tribal history presents unique circumstances. As James Keedy, of Michigan Indian Legal Services stated, “In Michigan, it has always been clear that whether a particular tribe is federally recognized is an accident of history.”⁵⁵ Of the twelve Michigan tribes, four were federally recognized through the IRA, four were recognized or reaffirmed through congressional legislation, and four were administratively acknowledged. Three tribes recognized by the state of Michigan are still in the process of seeking reaffirmation and clarification of their relationships with the federal government.

After the IRA was enacted, many Michigan Indian tribes petitioned to be recognized by the federal government.⁵⁶ Only four of the Michigan Indian Tribes were recognized through the IRA in 1934. These were the Keweenaw Bay Indian Community Lake Superior Band of Chippewa Indians, Bay Mills Indian Community, the Hannahville Indian Community, and the Saginaw Chippewa Indian Tribe.⁵⁷ Tribes located in Lower Michigan were denied IRA reorganization because “a BIA official decided that, since the federal government lacked funds during the Great Depression to purchase land and provide services.”⁵⁸ There is evidence that although these tribes were eligible to organize under the IRA, the decision was made by BIA administrators to conserve financial resources and deny federal recognition for the remaining

⁵⁴ *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, Federal Register: April 4, 2008 (Vol. 73, No. 66).

⁵⁵ *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services) October 3, 2007.

⁵⁶ *Michigan Indian Recognition*, (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁵⁷ Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.*, at 17 (1947).

⁵⁸ *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services.) October 3, 2007.

Michigan tribes.⁵⁹ The following section describes the administrative termination of these Michigan Indian tribes.

A. TRIBES NOT RECOGNIZED IN 1934 BECAUSE OF ADMINISTRATIVE TERMINATION

Nine Michigan Indian tribes signed treaties with the government and were still illegally terminated by the BIA. Deloria described these administrative terminations as “a clear case of malfeasance and misadministration in the dealings of the United States with Indian Nations.”⁶⁰ Six of these tribes have been recently reaffirmed though the BIA’s federal acknowledgement process or congressional legislation. Tribes currently seeking reaffirmation include the Burt Lake Band of Ottawa and Chippewa Indians, Grand River Bands of Ottawa, and the Swan Creek Black River Confederated Ojibwa Tribes.⁶¹ These six Michigan tribes were not federally recognized in 1934 and would likely be barred from the federal land-to-trust process if *Carciari* is reversed. If the three state recognized tribes were to be federally reaffirmed in the future, these tribes would be precluded from the Secretary’s land-to-trust process.

The misadministration Deloria referred to began with Henry Schoolcraft, federal negotiator of the 1836 Treaty, who created the Ottawa and Chippewa Nations of Indians (OCNI) organization as a mechanism to more efficiently deal with the numerous tribes in Michigan.⁶² These treaty negotiators also employed the practice of consolidation of tribes as a means of manipulation, so that if one tribe was not in agreement, the negotiators would move on to deal

⁵⁹ *Michigan Indian Recognition*, (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁶⁰ *Michigan Indian Recognition* (Additional material submitted for the hearing record from Vine Deloria, Jr., professor of law, political science, history and religious studies, University of Colorado at Boulder, and member, Standing Rock Sioux Tribe of North Dakota: Letter to Chairman Richard dated September 14, 1993, regarding H.R. 2376).

⁶¹ Stephen L. Pevar, *American Civil Liberties Union Handbook: The Rights of Indians and Tribes*, 3rd Ed. at 404 (2002); *H.R. 2822, To Reaffirm and Clarify the Federal Relationship of the Swan Creek Black River Confederated Ojibwa Tribes as a Distinct Federally Recognized Indian Tribe, and for Other Purposes*, No. 105-116, October 7, 1998. (http://commdocs.house.gov/committees/resources/hii51984.000/hii51984_0.htm).

⁶² *Michigan Indian Recognition*, (Prepared statement of James A. Bransky and William J. Brooks and attachments); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d 960, 961 -962 (Mich. 2004).

those tribes more willingly to compromise.⁶³ For the most part, the Ottawa and Chippewa Nations did not appreciate being combined for the purposes of negotiation.⁶⁴ The last treaty the United States entered into with these tribes through the OCNI was the 1855 Treaty of Detroit, which allotted land to individual tribal members, but also served to disassociate the OCNI as an entity.⁶⁵

This dissociation of the OCNI was merely the recognition of these Michigan Indian tribes as distinct nations, no longer to be dealt with collectively, since the treaty “expressly acknowledged the right of the various bands and communities to ‘arrange matters between themselves and the United States.’”⁶⁶ This breaking apart of the OCNI was seen as a remedy to address the tribal complaints about the federal unification of these distinct tribal political units.⁶⁷ At all times, these tribes retained their political and cultural identities.

Regrettably, the Office of Indian Affairs and the BIA’s incoming Secretary of the Interior deliberately construed the Article V dissolution language of the 1855 treaty as outright federal tribal termination.⁶⁸ The BIA “ignor[ed] the historical context of the treaty language.”⁶⁹ This intentional malfeasance was based on “federal disinterest in expending money on their behalf

⁶³ Matthew L.M. Fletcher, *Politics, History, and Semantics: the Federal Recognition of Indian Tribes*, N.D. L. REV., Vol. 82(2) 487-518, 503 (2006), quoting *Michigan Indian Recognition*, (prepared statement of Dr. James M. McClurken).

⁶⁴ *Grand Traverse Band* at 962 (Mich. 2004).

⁶⁵ *Michigan Indian Recognition*, (1993) (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁶⁶ *Id.*, quoting 11 Stat. 621, art. V.

⁶⁷ *Grand Traverse Band* at 962 (Mich. 2004).

⁶⁸ *Michigan Indian Recognition*, (1993) (Prepared statement of James A. Bransky and William J. Brooks and attachments); Matthew L.M. Fletcher, *Politics, History, and Semantics: the Federal Recognition of Indian Tribes*, N.D. L. REV., Vol. 82(2) 487-518, 503 (2006).

⁶⁹ *Id.*, quoting *Grand Traverse Band*, 369 F. 3d at 961-62 (citing Letter from Secretary of the Interior Delano to Comm’n of Indian Affairs, at 3 (Mar. 27, 1872)).

than on treaty language construction.”⁷⁰ Deloria correctly frames the political implications of this administrative ineptitude in his support letter for congressional recognition under H.R.2376,

The actions of the federal bureaucracy in denying the immediate recognition to these bands of Odawa have destroyed the logical symmetry of treaty law and have placed Congress in the embarrassing position of allowing low level federal employees to negate deliberate acts of previous Congresses. The peril to existing federally recognized Indians nations is apparent: if low level bureaucrats can deny recognition to treaty signatories, the whole edifice of treaty and trust relationships depends on the emotional state of clerks in a minor federal agency and there is no law except the personal whims of the bureaucracy.⁷¹

Again, these Michigan Indian tribes continued to be distinct, self-governing nations, regardless of this illegal administrative termination and continued loss of land through corruption and federal mismanagement.⁷²

The nine tribes, six recognized and three not recognized, were terminated through the BIA’s misinterpretation of Article V are examined briefly. These affected Michigan tribes include the Grand Traverse Band, the Little Traverse Bay Band, the Little River Band, the Pokagon Band, the Nottawaseppi Huron Band, the Match-E-Be-Nash- She-Wish Band of Pottawatomi Indians of Michigan (“Gunlake”), the Burt Lake Band of Ottawa and Chippewa Indians,⁷³ the Grand River Bands of Ottawa, and the Swan Creek Black River Confederated Ojibwa Tribes. The federal reaffirmation process for each of these tribes follows in chronological order according to the year of federal reaffirmation.

⁷⁰ *Id.* at 504; See *Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgement of Recognition as an Indian Tribe*, at 8 (May 19, 1978).

⁷¹ *Michigan Indian Recognition*, (1993) (Additional material submitted for the hearing record from Vine Deloria, Jr., professor of law, political science, history and religious studies, University of Colorado at Boulder, and member, Standing Rock Sioux Tribe of North Dakota: Letter to Chairman Richard dated September 14, 1993, regarding H.R. 2376).

⁷² *Michigan Indian Recognition*, (1993) (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁷³ The Burt Lake Band of Ottawa and Chippewa Tribal Website, (2008) <http://www.burtlakeband.org/portal/index.php>.

The first of the administratively terminated Michigan Indian tribes to be reaffirmed occurred on May 27, 1980 when the Grand Traverse Band were acknowledged by the Secretary pursuant to the federal acknowledgment process 25 C.F.R. Part 54 (now 25 C.F.R. Part 83).⁷⁴ The Grand Traverse Band had a government-to-government relationship with United States from 1794-1872 until administratively terminated in 1872.⁷⁵ After the Grand Traverse Band was recognized, land was taken into trust by the Secretary on January 17, 1984.⁷⁶ The tribe was classified as “restored” under the Indian Gaming Regulatory Act, where the court acknowledged the unique historical context of improper administrative termination, and that the federal acknowledge process was to “undo” the effect of the improper administrative action and to resume a proper government-to-government relationship between the Band and the federal government.”⁷⁷

Other administratively terminated tribes had to go to Congress for reaffirmation and clarification of their tribal status. The Little Traverse Bay Band,⁷⁸ the Little River Band of Ottawa Indians,⁷⁹ and Pokagon Band of Pottawatomi⁸⁰ were “recognized tribes through treaties and a longstanding subsequent relationships with the federal government... [that] federal

⁷⁴ 369 F.3d at 962 (Mich. 2004); *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services) October 3, 2007, at 2.; *Proposed Findings for Acknowledgment of the Grand Traverse Band*, 44 Fed. Reg. 60171, October 18, 1979.

⁷⁵ *Id.* at 504; *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d 960, 962 (Mich. 2004).

⁷⁶ *Id.*

⁷⁷ *Id.* at 965 (Mich. 2004). (“The undisputed history of the Band's treaties with the United States and its prior relationship to the Secretary and the BIA demonstrates that the Band was recognized and treated by the United States. Both prior to and after such treaties, until 1872, the Band was dealt with by the Secretary as a recognized tribe. Only in 1872 was that relationship administratively terminated by the BIA. This historical recognition by Congress through treaties (and historical administration by the Secretary), subsequent withdrawal of recognition, and yet later re-acknowledgment by the Secretary fits squarely within the dictionary definitions of “restore” and is reasonable construed as a process of restoration of tribal recognition. The plain language of subsection (b)(1)(B)(iii) therefore suggests that this Band is restored.”).

⁷⁸ Little Traverse Bay Band of Odawa Indians, *A Tribal History Of The Little Traverse Bay Bands Of Odawa Indians*, (2008), <http://www.ltbbodawa-nsn.gov/TribalHistory.html>.

⁷⁹ *Id.*

⁸⁰ Pokagon Band of Pottawatomi Indians, *Tribal Website Homepage*, (2008), <http://www.pokagon.com/>.

agencies have abandoned their trust responsibility without congressional approval.”⁸¹ Both Little Traverse Bay Band and the Little River Band were federally reaffirmed when P.L. 103-324 was signed on Sept. 21, 1994.⁸² Congress recognized that these tribes should be reaffirmed based on their relationship with the government and considered that these tribes were signatories to a number of treaties with the United States, including the 1836 treaty of Washington⁸³ and the Detroit treaty of 1855.⁸⁴ Little Traverse Band and Little River Band ceded land in both the Upper and Lower Michigan peninsulas to have reservations established through treaties.⁸⁵

The Pokagon Band of Pottawatomi Indians was federally recognized in 1994 when P.L. 103-323 was signed.⁸⁶ The Pokagon Band was recognized through a complementary bill along with the bills to reaffirm Little Traverse Bay Band and Little River Band in 1993. Congress relied on the notion that “prime indicia of federal recognition is the execution of a treaty.”⁸⁷ The Pokagon Band had been executing treaties with the United States since the 1795 Treaty of Greenville.⁸⁸

The Nottawaseppi Huron Band of Pottawatomi⁸⁹ received restoration of their federal acknowledgement on December 19, 1995.⁹⁰ The Nottawaseppi Huron Band, along with other

⁸¹ *Michigan Indian Recognition*, (1993) (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁸² *Id.*

⁸³ Treaty of Washington, Mar. 28, 1836, 7 Stat. 491.

⁸⁴ Treaty of Detroit, July 31, 1855, 11 Stat. 621.

⁸⁵ *Michigan Indian Recognition*, (1993) (Prepared statement of James A. Bransky and William J. Brooks and attachments).

⁸⁶ *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services) October 3, 2007.

⁸⁷ *Michigan Indian Recognition*, (1993) (statement of James Keedy, Michigan Indian Legal Service).

⁸⁸ Fletcher at 508 (2006); See Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49,54; James Clifton, *The Pokagons, 1683-1983*.

⁸⁹ Nottawaseppi Huron Band of Pottawatomi Indians, Pine Creek Indian Reservation, *Tribal History*, (2008), <http://nhbpi.com/>.

⁹⁰ Nottawaseppi Huron Band of Pottawatomi Indians, *Historical Timeline of the Nottawaseppi Huron Band of Pottawatomi*, at 1 (2008), http://nhbpi.com/HP_Timeline.pdf.

Michigan tribes ceded lands Southwest Michigan during the 1821 and 1833 Treaties.⁹¹ This cession led to the formation of the Nottawaseppi Reservation in St. Joseph County.⁹² In 1840, members of the Band were removed to Kansas, but many escaped and returned to Michigan.⁹³ In 1845, the Band acquired the deed to the Pine Creek reservation which was held in “passive trust” by the state.⁹⁴ After reaffirmation, the tribe purchased 155 acres of land in Fulton, Michigan.⁹⁵

The Gunlake Band was reaffirmed through the BIA federal recognition process on August 23, 1999.⁹⁶ Gunlake retained legal title to some of their original reservation in common and through individual title.⁹⁷ Their 360-acre reservation was stripped by Michigan state court in 1884.⁹⁸ Like other tribes, Gunlake missed the opportunity to reorganize under the IRA. Indian Affairs officials did not include tribal members, and reported there were no Ottawa in Lower Michigan.⁹⁹ Before 1992, the tribe never sought federal recognition based on “a long standing Grand River Band philosophy of refusing to submit its sovereign status to any Federal or State agencies... [so] none of the Grand Rivers have filed for Federal Acknowledgement until now.”¹⁰⁰ Gunlake relied on their participation in the 1836 Ottawa Treaty and the Compact of June 5, 1838 in addition to numerous other treaties to assert grounds for federal recognition.¹⁰¹

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ GAO Report at 25-26.

⁹⁷ *Michigan Indian Recognition*, (1993) (statement of Mr. D.K. Sprague, Tribal Chairman of Grand River of Ottawa Indians); (The Match-E-Be-Nash- She-Wish Band of Pottawatomi Indians, are also known as Gunlake. This tribe was part of the Gun Lake Band of Grand River Ottawa Indians which is reflected in the legislative history by Chairman Sprague’s testimony).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Michigan Indian Recognition*, (statement of Mr. D.K. Sprague, Tribal Chairman of Grand River of Ottawa Indians) (1993).

¹⁰¹ *Id.* at 172.

Gunlake is currently in the process of land-to-trust acquisition through the Secretary which was recently affirmed by the DC Circuit Court of Appeals.¹⁰²

Michigan has three recognized tribes that have not been recognized by the federal government. The Burt Lake Band of Ottawa and Chippewa Indians, also historically known as the Cheboiganing Band, are in the process of seeking federal reaffirmation. This process is underway. On April 17, 2008, the House Resources Committee approved H.R. 1575 for the purposes of reaffirming and clarifying Burt Lake Band's relationship with the federal government.¹⁰³

B. CONSOLIDATED TRIBES NOT RECOGNIZED

Two Michigan Indian tribes were not recognized because they were consolidated with other tribes. The Sault Ste. Marie Tribe of Chippewa Indians¹⁰⁴ were federally reaffirmed on September 7, 1972 after a series of meetings and a letter from an assistant solicitor in the Department of the Interior.¹⁰⁵ The Sault Ste. Marie are also signatories of the 1836 Treaty of Washington,¹⁰⁶ and the 1855 Treaty of Detroit.¹⁰⁷ Land was taken into trust for the Sault Ste Marie Tribe in March of 1974. The tribe adopted their constitution in November 1975.

The Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") is the other of the two tribes not recognized in 1934 because they were consolidated with the Keweenaw Bay.

¹⁰² *MichGO v. Kempthorne*, No. 07-5092 (D.C. Cir. April 29, 2008).

¹⁰³ *H.R. 1517, To Reaffirm and Clarify the Federal Relationship of the Burt Lake Band as a Distinct Federally Recognized Indian Tribe, and for Other Purposes*. 110th Cong. (2008).

¹⁰⁴ Sault Tribe of Chippewa Indians, *Cultural Division, Historical Preservation & Outreach: Sault Tribe History*, (2008) (http://www.saulttribe.com/index.php?option=com_content&task=view&id=29&Itemid=205).

¹⁰⁵ *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services) at 2 (2007).

¹⁰⁶ Matthew L.M. Fletcher, *Politics, History, and Semantics: the Federal Recognition of Indian Tribes*, N.D. L. REV, Vol. 82(2) 487-518, 502 (2006); GAO Report at 25-26.

¹⁰⁷ *Id.*

¹⁰⁸ LVD was reaffirmed when Congress passed the Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, which recognized LVD as separate from the Keweenaw Bay Indian Community when P.L. No. 100-420 was signed in 1988.¹⁰⁹ This separate recognition process was started in 1960 when LVD began to reorganize as a separate and distinct Band. In the 1970s, LVD purchased fifteen units of housing at the north end of the Village of Watersmeet and another 20 housing units during the early 80's.¹¹⁰

IV. CARCIERI REVERSAL SHOULD NOT APPLY TO THESE TWO CLASSES OF TRIBES

This section of the paper examines legal arguments that distinguish these two classes of Michigan Indian tribes from being bound by a Supreme Court reversal of *Carcieri*. It would be improper to bar these tribes from the BIA land-to-trust process because they were not recognized under the 1934 IRA. These tribes faced unique historical circumstances. Their longstanding status as treaty tribes was stripped when they were illegally terminated by the BIA, yet these tribes remained recognized by Congress throughout subsequent years. Michigan Indian tribes fought uphill battles to reaffirm their status with the federal government, and just as these past injustices are being addressed, the land-to-trust process these tribes employ is now under attack. Legally, these tribes should have been federally recognized in 1934 under the IRA. Michigan Indian tribes had numerous treaties with the United States government and sustained ongoing relationships with the federal officials despite their illegal administrative termination. These tribes should not continue to pay for the mistakes of the federal government.

¹⁰⁸ *Lac Vieux Desert Tribal Website, A Brief History of the Lac Vieux Desert Tribe*, available at: <http://www.lvdtribal.com/modules.php?name=Content&pa=showpage&pid=5>

¹⁰⁹ *H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act Hearing Before the House Natural Resources Committee*, (prepared statement by James A. Keedy, Executive Director of Michigan Indian Legal Services. October 3, 2007, at 2.

¹¹⁰ *Lac Vieux Desert Tribal Website, A Brief History of the Lac Vieux Desert Tribe*, available at: <http://www.lvdtribal.com/modules.php?name=Content&pa=showpage&pid=5>

Further, the BIA is unique among the federal agencies because of their federally mandated fiduciary duty to Indian tribes. As such, any state assault on the BIA's authority to administer this fiduciary duty, including the limitation on land to trust should be examined within the context of the federal trust relationship.¹¹¹ There is no legal basis for characterizing Michigan Indian tribes as unrecognized in 1934, and doing so would only exacerbate political harm and foster federal misadministration.

A. ALL EXECUTED TREATIES

Acting under the authority of the Article VI of the Constitution, the United States government made treaties with Indian tribes until 1871.¹¹² The legal effect of these agreements between sovereigns required that "all treaties made, or which shall be made, under authority of the United States shall be the Supreme law of the land; and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."¹¹³ In reality, Indian treaties have not been fully recognized as the supreme law of the land. Yet, these treaties serve as legal authority to illustrate the federal government's earliest recognition of these tribes as sovereign entities and have been the basis for Michigan tribes to argue for federal reaffirmation.

The Senate asked James Keedy, of MILS, why some Michigan Indian treaties were recognized under the IRA, and others were not. According to Keedy, the treaty process among the Michigan tribes was so "haphazard, some groups with the same treaty are recognized, some aren't, some under the IRA are, some aren't."¹¹⁴ This haphazardness has led to disparate

¹¹¹ See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). See also Getches et al, *Federal Indian Law*, 5th Ed. at 350 (2005); See *Navajo Nation v. United States*, No. 2006-5059 CA Fed (Decided September 13, 2007).

¹¹² See 25 U.S.C. § 71.

¹¹³ U.S. CONST. art VI, cl. 2.

¹¹⁴ *Michigan Indian Recognition*, (1993) (statement of James Keedy, Michigan Indian Legal Services).

treatment for similarly situated treaty tribes and inappropriate termination of the federal trust responsibility.

The United States government acquired land from tribes through numerous treaties to establish the state of Michigan.¹¹⁵ Michigan Indian tribes also signed treaties that ceded lands outside of the current Michigan boundaries, since it was all Indian land first.¹¹⁶ On November 17, 1807, the United States government signed the Treaty of Detroit with the Michigan Chippewas, Ottawas, Pottawatomis, and Wyandots; these tribes ceded large portions of southeastern Michigan.¹¹⁷ On September 24, 1819, the United States signed the Treaty of Saginaw with the Saginaw Chippewa; the tribe ceded portions of land in the middle of the Michigan's Lower Peninsula.¹¹⁸ On August 29, 1821, the United States signed the Treaty of Chicago with the Chippewas, Ottawas, and Pottawatomis; these tribes ceded portions of southwestern Michigan.¹¹⁹ On September 20, 1828, the United States signed a treaty with the Pottawatomis that ceded lands also in southwestern Michigan.¹²⁰ During the 1830s, Congress passed the Indian Removal Bill, which called for tribes to be removed from Michigan.¹²¹ Tribes resisted removal and continued to negotiate treaties with the United States. On March 28, 1836,

¹¹⁵ Patrick Russell Le Beau, *Rethinking Michigan Indian History*, at 57 (2005), (“The 1795 Treaty of Greenville, the 1807 Treaty of Detroit, the 1815 Treaty of Spring Wells, the 1819 Treaty of Saginaw, the 1821 Treaty of Chicago, the 1836 Treaty of Washington, the 1842 Treaty of La Pointe conveyed the lands that would be the state of Michigan to the United States of America.”).

¹¹⁶ *Id.* at 196; See also Willis Frederick Dunbar, *Michigan: A History of the Wolverine State*, Grand Rapids: William B. Erdmans Publishing, at 44 (1970); J.W. Powell, ed., *Eighteenth Annual report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896-97, Schedule of Indian Land Cessions*, U.S. Government Printing Office, Washington, 1899) at 654-796. (Complete list of Michigan Indian Treaties: 1795, Treaty of Greenville, Ohio; 1807 Treaty of Detroit, Michigan; 1817 Treaty of Miami of Lake Erie; 1818 Treaty of St. Mary's Ohio; 1819 Treaty of Saginaw, Michigan territory; 1820 Treaty of Michillimackinac; 1827 Treaty of St. Joseph, Michigan Territory; 1828 Treaty of St. Joseph River; 1832 Treaty of Tippecanoe River, Indiana; 1833 Treaty of Chicago, Illinois; 1836 Treaty of Washington, D.C. (March 28); 1836 Treaty of Washington, DC (May 9); 1836 Treaty of Cedar Pointe, Wisconsin Territory; 1837 Treaty of Detroit, Michigan; 1842 Treaty of La Pointe, Wisconsin Territory).

¹¹⁷ Le Beau at 100 (2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

the United States signed the Treaty of Washington with Ottawas and Chippewas; the tribes ceded larger portions of northern and western Michigan and eastern portions of Michigan's Upper Peninsula.¹²² On October 4, 1842, the United States government signed the Treaty of La Pointe with the Chippewas, and the tribe ceded land in western Upper Peninsula.¹²³ The United States signed the last of the treaties with the Ottawa and Chippewa on July 31, 1855, and with another band of the Chippewa on August 2, 1855.¹²⁴ These final Treaties of Detroit with the Chippewa and Ottawa rescinded removal language and introduced allotment.¹²⁵

A socio-historical study conducted by Martin J. Reinhardt examined the language related to educational provisions in twenty-six treaties that Michigan Indian tribes signed.¹²⁶ The analysis in this study is incorporated into this section as it applies to identifying which tribes were party to specific treaties, all to demonstrate that numerous treaties were negotiated with Michigan Indian tribes. The research in this study not only examines the quantity of treaties, but also helps to establish the quality of the longstanding treaty making tradition between the United States and the Anishinaabek Michigan Indian tribes. This extensive legacy of treaty negotiation

¹²² *Id.*

¹²³ *Id.* at 109.

¹²⁴ *Id.* at 101.

¹²⁵ *Id.* at 101.

¹²⁶ Martin J. Reinhardt, *A Comparative Socio-Historical Analysis of Treaties and Current American Indian Education Legislation with Implications for the State of Michigan; A Thesis in Educational Leadership Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy*, (2004). (Reinhardt asserts a correction to the number of treaties the Anishinaabek signed with the U.S. is twenty-six and not the twenty-two reported by the American Indian Policy Review Commission in 1976: 1) Treaty with the Wyandot, Etc., 1817; 2) Treaty with the Ottawa, Etc., 1821; 3) Treaty with the Chippewa, 1826; 4) Treaty with the Pottawatomi, 1826; 5) Treaty with the Chippewa, Etc., 1827; 6) Treaty with the Pottawatomi, 1828; 7) Treaty with the Chippewa, Etc., 1833; 8) Treaty with the Ottawa, Etc., 1836; 9) Treaty with the Chippewa (Detroit), 1837; 10) Treaty with the Chippewa (St. Peters), 1837; 11) Treaty with the Chippewa, 1842; 12) Treaty with the Pottawatomi Nation, 1846; 13) Treaty with the Chippewa of the Mississippi and Lake Superior, 1847; 14) Treaty with the Chippewa, 1854; 15) Treaty with the Chippewa, 1855; 16) Treaty with the Ottawa and Chippewa, 1855; 17) Treaty with the Chippewa of Saginaw, Etc., 1855; 18) Treaty with the Chippewa, Etc., 1859; 19) Treaty with the Ottawa of Blanchard's Fork and Roche De Boeuf, 1862; 20) Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 1863; 21) Treaty with the Chippewa-Red Lake and Pembina Bands, 1863; 22) Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, 1864; 23) Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 1864; 24) Treaty with the Chippewa-Bois Fort Band, 1866, 25) Treaty with the Pottawatomi, 1867; and 26) Treaty with the Chippewa of the Mississippi, 1867.) *Id.* at 194-98.

between Michigan tribes and the federal government supports the legal argument that these tribes should have been recognized under the IRA in 1934. The four tribes' treaties that were recognized in 1934 are not examined in detail, but are added when they share treaties with those tribes not recognized to show that similarly situated tribes were treated differently with respect to the same legal status.

According to the Reinhardt study, the Grand Traverse Band are included in nine of the twenty-six Anishinaabek treaties, these are the Treaty with the Wyandot, Etc., 1817, the Treaty with the Ottawa, Etc., 1821, the Treaty with the Chippewa, 1826, the Treaty with the Chippewa, Etc., 1827, the Treaty with the Chippewa, Etc., 1833, the Treaty with the Ottawa, Etc., 1836; the Treaty with the Chippewa (St. Peters), 1837, the Treaty with the Pottawatomi Nation, 1846, and the Treaty with the Ottawa and Chippewa, 1855.¹²⁷

The Little Traverse Bay Band and Little River Band are party to the same six of the twenty-six Anishinaabek treaties.¹²⁸ These treaties include the Treaty with the Wyandot, Etc., 1817, the Treaty with the Ottawa, Etc., 1821, the Treaty with the Chippewa, Etc., 1833, the Treaty with the Ottawa, Etc., 1836, the Treaty with the Pottawatomi Nation, 1846; and the Treaty with the Ottawa and Chippewa, 1855.¹²⁹

The Pokagon Band are included in the same seven treaties as the Gun Lake Band, and the Huron Pottawatomi (also Hannahville Indian Community).¹³⁰ These treaties include the Treaty with the Wyandot, Etc., 1817, the Treaty with the Ottawa, Etc., 1821, the Treaty with the Pottawatomi, 1826, the Treaty with the Pottawatomi, 1828, the Treaty with the Chippewa, Etc.,

¹²⁷ *Id.* at 208.

¹²⁸ *Id.* at 210.

¹²⁹ *Id.*

¹³⁰ *Id.*

1833, the Treaty with the Pottawatomini Nation, 1846, the Treaty with the Ottawa and Chippewa, 1855.¹³¹

The Sault Ste. Marie Tribe are included in the same eight treaties that Bay Mills Indian Community signed.¹³² These eight treaties include the Treaty with the Wyandot, Etc., 1817, the Treaty with the Chippewa, 1826, the Treaty with the Chippewa, Etc., 1827, the Treaty with the Chippewa, Etc., 1833, the Treaty with the Ottawa, Etc., 1836, the Treaty with the Chippewa (St. Peters), 1837, the Treaty with the Pottawatomini Nation, 1846, and the Treaty with the Ottawa and Chippewa, 1855.¹³³

The three additional administratively terminated Michigan tribes currently seeking reaffirmation share many of the same treaties with those recognized and reaffirmed tribes. The Burt Lake Band are included in the same nine treaties as Grand Traverse Band.¹³⁴ The Grand River Band are also in the process of seeking federal reaffirmation, and are included in the same treaties as Little River and the Little Traverse Bay Bands.¹³⁵ The Swan Creek / Black River Confederated Ojibway Tribes are included in twelve of the twenty-six Anishinaabek treaties.¹³⁶ These twelve treaties include, The Treaty with the Wyandot, Etc., 1817, the Treaty with the Chippewa, 1826, the Treaty with the Chippewa, Etc., 1827, the Treaty with the Chippewa, Etc., 1833, the Treaty with the Ottawa, Etc., 1836, the Treaty with the Chippewa (Detroit), 1837, the Treaty with the Chippewa (St. Peters), 1837, the Treaty with the Pottawatomini Nation, 1846, the Treaty with the Ottawa and Chippewa, 1855, the Treaty with the Chippewa of Saginaw, Etc., 1855, the Treaty with the Chippewa, Etc., 1859, and the Treaty with the Chippewa of Saginaw,

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 211.

¹³⁵ *Id.*

¹³⁶ *Id.*

Swan Creek, and Black River, 1864.¹³⁷ Regardless of being party to these twelve treaties, the Swan Creek / Black River Confederated Ojibway Tribes remain unrecognized by the federal government to this day.

Legally, these treaty tribes were recognized by the United States as independent sovereign Indian nations at the time these treaties were made. In exchange for selling their land to the federal government, Michigan tribes were to receive annuities, education, equipment, and reserved hunting and fishing rights in the areas of ceded land.¹³⁸ Early on, these tribes went to Congress annually to enforce the terms of their treaties.¹³⁹ In many instances, Congress recognized their obligations but did not act.¹⁴⁰ In addition to fighting for reaffirmation and federal recognition under these treaties, Michigan Indian tribes have had to litigate for recognition of rights to hunt and fish on historically tribal lands throughout the state which were explicit terms within their treaties.¹⁴¹

B. ILLEGAL ADMINISTRATIVE TERMINATION

Administrative termination of the Michigan Indian tribes was illegal because the BIA cannot “unilaterally terminate Indian tribes.”¹⁴² The BIA acted outside of the scope of their authority in 1872 when they terminated annuities, but this did not terminate the tribes.¹⁴³ According to the solicitor for the Department of the Interior’s 1976 letter, “tribal existence

¹³⁷ *Id.* at 211.

¹³⁸ Patrick Russell LeBeau, *Rethinking Michigan Indian History*, at 106.

¹³⁹ *Michigan Indian Recognition*, (1993) (statement of James Keedy, Michigan Indian Legal Service).

¹⁴⁰ *Id.* (“They finally got paid 1866 but not enough. It was not what their treaties provided. Then you have another 10, 12, 20 year period with every year coming to Congress and we have reports from the Senate and House committees finding our case favorable, but never acting on it.”)

¹⁴¹ See *State of Michigan v. William Jondreau*, 185 N.W.2d 375 (Mich. 1971). (Keweenaw Bay Indian Community exercise of their treaty right to fish in Lake Superior, free of state regulation was recognized by the Michigan Supreme Court); See also *U.S. v. State of Michigan*, 653 F.2d 277 (C.A. Mich. 1981). (Bay Mills, Sault Ste Marie, and Grand Traverse Bands’ treaty rights to fish in the Great Lakes under the 1836 Treaty of Washington is recognized in federal district court).

¹⁴² *Michigan Indian Recognition*, (1993) (statement of William J. Brooks).

¹⁴³ See *Grand Traverse Band*, 369 F. 3d at 961-62 (*citing* Letter from Secretary of the Interior Delano to Comm’n of Indian Affairs, at 3 (Mar. 27, 1872)).

continues until specifically terminated by Congress, and we can find no solid authority for the proposition that this Department can alone disestablish a tribe.”¹⁴⁴ Only Congress can legislate to terminate the federal trust responsibility stemming from treaty obligations the United States government made to a tribe. In addition to congressional plenary power over Indian affairs, the Supreme Court has also ruled that tribes recognized through treaty require congressional termination before they legally lose their status.¹⁴⁵

Article V of the 1855 Treaty did not legally terminate these tribes either. Secretary Delano’s letter to the Commission of Indian Affairs on March 27, 1872 incorrectly interpreted Article V, and should not have terminated Michigan Indian tribes because he lacked the inherent legal authority to make this decision. The court in *U.S. v. State of Michigan*¹⁴⁶ determined there was no change in the government-to-government relationship since the federal officials continued to engage with the Michigan Indian tribes, but now on an independent tribal community basis rather than the whole conglomerated OCNI.¹⁴⁷ Regardless of the continued government-to-government treatment of these tribes, the practical effects of administrative termination were increased poverty, continued loss of tribal land, and further depletion of tribal resources.¹⁴⁸

C. CONTINUED RELATIONSHIP WITH THE FEDERAL GOVERNMENT

Despite efforts to administratively terminate, or more precisely the government’s efforts to shirk their treaty obligations, these Michigan Indian tribes were still recognized by various governmental entities. Most significantly these Michigan Indian tribes were never congressionally terminated because Congress continued to recognize these tribes through

¹⁴⁴ *Id.*

¹⁴⁵ *See Menominee Tribe v. United States*, 391 U.S. 404 (1968).

¹⁴⁶ 471 F. Supp 192, 264-65 (1979).

¹⁴⁷ *Id.*

¹⁴⁸ *United States v. State of Michigan*, 369 F.3d 960, at 961 -962.

intermittent payment of treaty annuities and appropriations. Keedy testified about the Pokagon Band's documentation of this continued congressional recognition:

“You have documents going to Federal agents in the 1830s and 1840 saying that our annuities are not being paid. You have the group going to Congress in the 1840s and 1850s and 1860s, and you have Congressional reports of their visits saying that our annuities are not being paid. They finally got paid 1866 but not enough. It was not what their treaties provided. Then you have another 10, 12, 20 year period with every year coming to Congress and we have reports from the Senate and House committees finding our case favorable, but never acting on it.”¹⁴⁹

Another example of continued congressional recognition of these tribes arises out of the memorandum sent by Morris Thompson, Indian Affairs Commissioner.¹⁵⁰ Tribes in the Michigan Ottawa Association and the Grand River organization prepared tribal membership rolls.¹⁵¹ Commissioner Thompson noted that if these rolls were accepted by Congress, then these tribes would essentially be recognized.¹⁵² Congress not only accepted these tribal membership rolls, but they also made appropriations for the Michigan Ottawa through the Docket 40-K Grand River Judgment Fund Act based on these rolls.¹⁵³

Arguably LVD was independently recognized by the BIA on June 17, 1935. According to a 1947 report by Theodore H. Haas, Chief Counsel of the United States Indian Service, LVD voted to reorganize under the IRA were listed as L'Anse (although the Ontanagon - Keweenaw Bay Indian Community voted with L'Anse).¹⁵⁴ LVD as L'Anse, voted to 413 to 8 to reorganize under the IRA.¹⁵⁵ This example further illustrates the continued relationship with the federal government that Michigan Indian tribes retained, regardless of official positions to the contrary.

¹⁴⁹ *Michigan Indian Recognition*, (1993) (statement of James Keedy, Michigan Indian Legal Service).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Michigan Indian Recognition*, (1993) (statement of William J. Brooks).

¹⁵⁴ Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.*, at 17 (1947).

¹⁵⁵ *Id.*

Reaffirmed Michigan Indian tribes fought long and hard to reaffirm their status with the federal government. Throughout this arduous process of navigating federal bureaucracy, efforts to hold Congress accountable for broken treaties, and administrative abandonment, Michigan Indian tribes continued to be politically and culturally distinct nations.¹⁵⁶

D. NEED FOR DIFFERENTIAL BIA DEFERENCE

This final argument is more general, but ought to be considered on behalf of the Michigan Indian tribes because of the level of administrative misadministration that resulted in the illegal termination of these tribes. Indian tribes have been forced to deal with the federal government through first the War Department, and now the BIA. The State's attack on the BIA's authority to take land into trust for those tribes not formally recognized in 1934 does not consider the profound likelihood that these tribes were already consistently dealing with the federal government. The State's interpretation of the IRA disregards the American history of conquest, assimilation, and paternalism, which is now just being mitigated in this era of tribal self determination. If tribes have had to deal with the worst of the BIA from the beginning, why question their authority to deal with the tribes now?

Arguably, when the Supreme Court is considering Indian law cases, they ought to apply something more than *Chevron* deference. Granted, *Chevron* deference is significant in itself, but it should be supplemented with additional consideration to 1) the long history of the BIA has with Indian tribes, 2) the scope of the fiduciary obligation the BIA is responsible for

¹⁵⁶ Fletcher at 518 (2006) (“The Anishnaabe Children who are right now listening to stories about Sky-Woman and the Great Turtle; or the Anishnaabe tribal leaders who strive to make fair and just decisions regarding tribal land, the environment, reservation health care, law enforcement and public safety, gaming, and thousands of other decisions – these people know who they are. In the long and intertwined tendrils of history, federal recognition is not worth the paper it is printed on because Indian people don't need anyone else telling them who they are.”).

implementing, and 3) that these federal trust obligations are to be made members of a political class with unique relationships with the United States.¹⁵⁷

Federal agencies that deal with Indian tribes are subject to the Supreme Court's standard so that the federal government "has charged itself with moral obligations of the highest responsibility and trust."¹⁵⁸ Among the agencies that deal with tribes, the BIA is unique because of the agency's roots in facilitating the guardian-ward relationship and tribes as "domestic dependent nations." Although these paternalistic notions may have changed since there are more Indian employees at the BIA,¹⁵⁹ it is still important to emphasize this agency's longstanding history with Indian tribes and the level deference that should be afforded to the Secretary's authority.

Federal Indian law jurisprudence is based on commingling of federal authorities among all three branches of the government. The *Carciari* case illustrates how these commingled legislative, Executive, and judicial powers have culminated what may be a show down between congressional plenary power through the IRA and Settlement Act, the deference to Executive administrative agencies, and the Supreme Court as "federal Indian policymakers."¹⁶⁰ This attack on the Secretary's authority to place land into trust for tribes is part of larger ongoing battle

¹⁵⁷ U.S.C.A. § 1901 (1)-(2) (1978); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); Trust relationship with tribes based on Constitution Art, I, § 8, cl. 3; Art. II, § 2, cl. 2.

¹⁵⁸ Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, at 169, FN 207 (2006), quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); see also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("It is true that agencies of the federal government owe a fiduciary responsibility to Indian tribes."); Leonard M. Baynes, *Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications*, 56 ADMIN. L. REV. 263, 308 (2004) ("[P]ursuant to their trust responsibility, federal administrative agencies have to meet strong fiduciary standards in their dealings with American Indian unless Congress, through its plenary power, has expressly authorized the agency to depart from them.")

¹⁵⁹ Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, at 152 (2006) ("[M]ore than ninety percent of the BIA employees are Indians, including the most employees holding high-level policymaking position.")

¹⁶⁰ *Id.* at 134. ("Without a clear textual source of authority in the Constitution for Congress or the Executive to make federal Indian policy, the Court is not constrained from entering the realm of federal Indian policymaking.")

between states and tribes that is likely going to force more aggressive exercise of congressional plenary power if the Supreme Court agrees with the states' narrow reading of the IRA.¹⁶¹

V. **CONCLUSION:**

The Supreme Court must consider unique historical circumstances of Michigan Indian tribes before effectively barring these administratively aggrieved tribes from the federal land-to-trust process. Michigan Indian tribes have a distinct political history as treaty tribes that were illegally administratively terminated in a “situation [that] is not simply an injustice of major proportions, it is a travesty of logic that boggles the rational mind.”¹⁶² *Carciari* was correctly decided at the administrative appeals level, by the District Court, and by the First Circuit Court of Appeals. This case is not only without merit, it directly contravenes the BIA's authority to fulfill their federally mandated trust obligations to tribes. The BIA has to administer the same general federal fiduciary obligations to all tribes, regardless of the year the federal government finally got around to “formally recognizing” tribes. As demonstrated through Michigan Indian tribal history, an outright bar on land-to-trust for those tribes not recognized in 1934 would not only eviscerate fundamental Indian law and administrative law principles, it would demonstrate deliberate ignorance of hundreds of years of American history between Indian tribes and the federal government.

¹⁶¹ There is proposed legislation to apologize to tribes for “the many instances of violence, maltreatment, and neglect.” Chairman of the Little Traverse Bay Band of Odawa, Frank Ettawageshik commented on this proposed apology stating, “We're at the same time, realizing that these are just words on paper, and that there are actions we think that could be taken to follow up on this.” See CNN television interview with Frank Ettawageshik, Chairman of the Little Traverse Bay Band of Odawa (March 3, 2008) Transcript available at:

<http://www.cnn.com/2008/LIVING/studentnews/03/02/transcript.mon>; Pending amendment to HR 1328, the reauthorization of the Indian Health Care Improvement Act (IHCA) sponsored by Senator Sam Brownback.

¹⁶² Fletcher at 516 (2006) quoting *Michigan Indian Recognition* (Additional material submitted for the hearing record from Vine Deloria, Jr., professor of law, political science, history and religious studies, University of Colorado at Boulder, and member, Standing Rock Sioux Tribe of North Dakota: Letter to Chairman Richard dated September 14, 1993, regarding H.R. 2376).