

# ***Stand Up For California!***

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***A Catalyst for Reform, Restoring the Delicate Balance of  
Authorities between Tribes, States Rights and the Federal Government***

## **Introduction**

The *Carcieri v. Salazar* clearly provided a victory for the State of Rhode Island. For the rest of us it is a technical victory. It is a catalyst for necessary reforms at the federal level of government. This brief paper characterizes California's uniqueness. Moreover, attempts to pose some of the profound questions that California has been seeking the answers to. Any proposed "fix" must restore the balance of authorities between Tribes, the State of California and local governments. California needs a programmatic policy that to the greatest extent possible provides for all affected parties to participate in an open, fair and objective process.

- Section 5 of the IRA is a standardless delegation of power, providing authority to determine who writes the law, and thus indirectly what the law will be on particular plots of land. Should there be limitations on Secretarial authority and objective standards legislated for the fee-to-trust process?
- Should Tribal Governments continue to expand without limit? Should there be a means test or a cap on the land expansions of any tribal government?
- Should a tribe be able to purchase land, develop the land beyond a state or local government's environmental standard, and avoid taxation while using the local services of the surrounding tax-payers?
- Many of California's Rancherias have small populations and a few California tribes have one member. Would these small governments be viable sovereigns if they were "not" dependent upon the United States?
- A fix must include an improved and transparent process which provides: greater notification, access to applications, a reasonable time period to respond and standing for local government and citizens.
- Should all after-acquired lands in California for gaming be processed in accordance with a two part-determination?
- Should Congress legislate objective criteria for the acquisition of new land?

- What is the status of Indian lands upon which casinos are operating that have been transferred into trust by the Secretary of the Interior after 1934 for tribes who may not have been under federal jurisdiction? Is the land and casino taxable by the State and local governments? Should the State exercise civil regulatory authority over these lands and businesses?
- California raises thought provoking questions over the history of some of our states tribes when seeking to determine if a tribe was “*now under federal jurisdiction*”. What did “*under federal jurisdiction*” mean in 1934?
- It is well documented that Rancherias were established as federal lands for California Indians of no specific tribal affiliation. Rancherias became a home to a collection of persons of Indian ancestry not necessarily a group of persons from a continuously existing tribal political entity. Do these groups (collections of persons of Indian ancestry) have inherent sovereign powers? If so, how so?
- California Tribes seeking to expand land bases must be required to demonstrate the need or necessity for the acquisition of additional lands. The purpose for the acquisition must be stated. Any change in that stated purpose in future years must be revisited to ensure that the change does not result in significant negative unaddressed impacts to the shared resources of the regional areas affected by the change.

Presently, California Tribes have 12 pending gaming applications representing 1,966.78 acres and an additional 71 applications for 6,472.42 acres of contiguous and adjacent lands. The described use of the contiguous and adjacent lands is sometimes vague; ambiguously stated or more importantly its use is changed once in trust, often for gaming. Contiguous and adjacent lands meet the exception for gaming on after-acquired lands and should be considered a gaming acquisition. These transfers of land represent a significant impact to the administration of justice and loss of property and business revenue to state and local governments in California.

### **The Ruling and a “Necessary” Legislative Fix**

To the extent any legislation is offered to “fix” the decision in *Carcieri v. Salazar*, by authorizing the Secretary of Interior to take land into trust for a tribe that was not “under federal jurisdiction” in 1934, Congress should give pause, and consider the present need to develop a “Programmatic Policy”.

A legislative solution is necessary to provide guidance to the Department of the Interior which has created and sustained the current trust land system. The development of the trust land system has been on a case-by-case basis establishing weak procedure and ill-defined substantive standards. Since the Department has a special responsibility to Indians and tribes, and no particular obligations to states, local governments and communities, this explains why objective standards are necessary.

Changing only the word “now” to “now and hereafter” does not recognize the need for objective standards. Because of the costs and the impacts, Tribes must demonstrate need for additional

trust land which includes environmental protections for scarce shared resources. Objective standards are necessary.

### **A Programmatic Policy for California**

A “Programmatic Policy” is necessary to address the unique issues presented by California Native American governments and the impacts which land acquisitions create on surrounding jurisdictions and communities of non-Indian citizens. California needs a programmatic policy that provides a meaningful and open process for all affected parties to participate.

California is home to 108 Indian tribal governments. California’s tribal governments have the smallest population of enrolled tribal members approximately 32,000, as compared to other states. Yet, 58 of the 108 tribes operate 59 casinos and collect more than a third of the national tribal gaming industry revenue.

California has approximately 67 tribal groups seeking federal recognition. Eleven of these groups are in urban and metropolitan areas of Southern California. California has approximately 60 existing Rancheria tribal governments which the *Carcieri v Salazar* ruling now raises new and serious questions regarding federal recognition and land acquisitions.

Historically, Congress has recognized unique circumstances for certain states, such as Oklahoma or Alaska. For California, Congress enacted the 1864 Act, also know as the “Four Reservations Act,” that specifically stated that no more than four Indian reservations could be established within the State of California. This statutory limitation to four reservations within California was confirmed by the United States Supreme Court in the case of *Mattz v. Arnett*, 412 U. S. 481, 489 (1973). Thus, there can be no further reservations established within California in the absence of specific congressional authorization.

There have been some private bills establishing reservations for some California tribes. The most significant exception was the Mission Indians Relief Act of January 12, 1891, 26 Stat. 712, which provided for the establishment of a number of reservations for Mission Indians residing in Southern California. However, modern-day acts of Congress have been motivated by gaming interests.

In 1994, the Paskenta and the United Auburn Indian Community were congressionally restored. These Acts provided for the acquisition of trust lands at specific locations. In 2000, nine acres of land was designated for the Lytton Band of Pomo for a casino in the City of San Pablo. However, the Lytton Band was not recognized until 1937 so future land acquisitions will certainly be affected. In 2000, Congress enacted the restoration of the Federated Miwok of the Graton Rancheria. The congressional language authorized an unlimited mandatory acquisition of restored lands in all of Marin and Sonoma Counties. Three of the four are operating successful casinos. The Federated Miwok of the Graton are involved in litigation due to inadequacies in the environmental documents submitted in the fee-to-trust process for a gaming proposal.

The Congressional Acts of 1906 (34 Stat. 383) and 1908 (35 Stat. 70-76) were Appropriation Acts that provided money to purchase land for residential and agricultural use for “Indians of

California”, often of no specific tribal affiliation. Recent ethno-historic reports commissioned by California counties and even a 2004 Declaration of a BIA Pacific Regional Solicitor, (CIV.S-02-1818 GEB KJM) commonly find these were small family groups of totally unrelated racially mixed Indian and in some instances non-Indian families “administratively joined” together on land.

The IRA established the process for transferring land into trust. Indians that shared a common residence of a federal area, i.e. “Rancherias” were permitted to organize under the terms and conditions of the Act. However, the Congressional Act of June 18, 1934 only allowed, “Federally recognized Indian tribes or descendents of federally recognized Indian tribes residing on Reservations” to organize. Whatever the intent, it would appear that the BIA interpreted the IRA in California as applying to California Indians residing on Rancherias.

The position of the Bureau of Indian Affairs in current time has been that Rancherias are Reservations despite the many legal distinctions of their creation. Moreover, that Indians, heirs, or successor-in-interest living on Rancherias, small numbers of individuals who have achieved restoration through court stipulated judgments are considered and treated as recognized tribes even though the court made no independent findings.

It is a fact, that 60 Rancheria Bands in California have been established since 1906, by judicial and administrative actions. The arbitrary administrative actions of the BIA, unique federal Indian law specific to California and the state’s unique history of events in the development of statehood, make California unique in the nation.

Conclusion - Uncertainty over the Application of IRA
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The proliferation of off-reservation gaming has caused an ambiguity of not only the exceptions found in IGRA, but uncertainty over the application of the IRA to California Rancheria Tribes. This makes the recent ruling of *Carcieri* a catalyst for necessary rational reform to restore the delicate balance of authorities between tribes, states and the federal government. California needs a programmatic policy that to the greatest extent possible provides for all affected parties to participate in a constructive, fair and objective process.

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