

**TAXATION IN INDIAN COUNTRY AFTER *CARCIERI V. SALAZAR***

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Federally recognized Indian tribes are governments within our federal legal system.<sup>1</sup> Tribes have aboriginal sovereignty that provides them with inherent governmental powers, such as the power to tax.<sup>2</sup> Tribal sovereignty also protects tribes from state interference, such as state taxation of tribal lands.<sup>3</sup> Both the exercise of tribal governmental powers and the tribal immunity from state interference have a territorial component. This makes the status of Indian lands a critical inquiry into tribal/state relations.<sup>4</sup> Because of the importance of land

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1. See John E. Thorson, *Proceedings of the Symposium on the Settlement of Indian Water Rights Claims*, 22 ENVTL. L. 1009, 1023 (1992).

2. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (finding that the tribal power to tax is a “fundamental attribute of sovereignty,” and that tribes have always had a “broad measure of civil jurisdiction over the activities of non-Indians on reservation lands”).

3. See *In re The New York Indians*, 72 U.S. 761 (1866) (involving New York’s attempt to tax tribal lands still occupied by tribal members).

4. See, e.g., *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (involving Rhode Island’s assertion that lands placed in trust for the benefit of the Narragansett Indian Tribe were not trust lands because the Secretary of Interior lacked the authority to place the lands in trust; as a result, the housing project undertaken by the Tribe on these lands was subject to local land use regulations).

status in federal Indian law, especially in matters involving taxation, the decision of the U.S. Supreme Court in *Carcieri v. Salazar*<sup>5</sup> deserves special attention. In the *Carcieri* case, the Court held that the Secretary of the Interior did not have the statutory authority to place lands into trust on behalf of Indian tribes that were recognized after the enactment of the Indian Reorganization Act of 1934.<sup>6</sup>

Part I of this article discusses the *Carcieri* case. I criticize the Court's decision in part II, and explain how the Court reached its conclusion through sloppy statutory interpretation that ignored significant sections of text within the Indian Reorganization Act of 1934. Part III explores the breadth of the *Carcieri* decision and demonstrates that its holding is far reaching. With part IV, I consider the tribal, state, and federal tax consequences that occur when lands thought previously to be Indian trust lands take on a new status as non-trust lands that might be owned by the United States, by the individual tribe, or by a third party.

#### I. SUMMARY OF *CARCIERI V. SALAZAR*

Before the British colonization of New England, the Narragansett Indian Tribe occupied the greater part of what is now Rhode Island.<sup>7</sup> England and the Colony of Rhode Island dealt with the Narragansett Indian Tribe as an independent nation beginning in 1622.<sup>8</sup> The devastation of King Phillip's War in 1675 nearly destroyed the Tribe, which joined forces with the Niantic Tribe.<sup>9</sup> The Colony of Rhode Island asserted guardianship over the Narragansett Indian Tribe in 1709<sup>10</sup> and, almost two centuries later, terminated its relationship with the Tribe in 1880 when it enacted "detrribalization" legislation.<sup>11</sup> In 1934, Rhode Island again recognized the Tribe.<sup>12</sup> In the 1970s, the Tribe filed a land claim based on Rhode Island's violation of the

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5. *Id.*

6. *Id.* at 1060–61.

7. *See id.* at 1061. *See also* Narragansett Indian Tribe, Historical Perspective of the Narragansett Indian Tribe: Early History, <http://www.narragansett-tribe.org/history.html> (last visited Nov. 19, 2009).

8. Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177–78 (Feb. 10, 1983).

9. *See Carcieri*, 129 S. Ct. at 1061 n.1.

10. *Id.* at 1061.

11. *See id.*

12. Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. at 6177–78.

federal law that restricted state purchases of Indian lands.<sup>13</sup> This lawsuit led to federal legislation settling the Tribe's land claims case.<sup>14</sup> In 1983, the Tribe received federal recognition and became a federally recognized Indian tribe.<sup>15</sup>

In 1991, the Tribe's housing authority purchased thirty-one acres of land adjacent to the Tribe's 1800 acre reservation created by the settlement legislation.<sup>16</sup> The Tribe planned on constructing housing for tribal elders.<sup>17</sup> The local township, however, sought an injunction to stop the construction of the project because it did not comply with the township's land use regulations restricting development to one residential unit for every two acres of land.<sup>18</sup> The tribal housing project contemplated fifty units on the thirty-one acres.<sup>19</sup> The Tribe asserted that its newly acquired land was a dependent Indian community within the meaning of 18 U.S.C. § 1151 and, therefore, was exempt from the local regulations that would have imposed density restrictions.<sup>20</sup> The federal First Circuit Court of Appeals held that this thirty-one-acre parcel of land was not a dependent Indian community because the federal government did not own the land.<sup>21</sup>

At the beginning of the project, the Tribe had asked the Secretary of the Interior to accept the thirty-one-acre parcel in trust under 25 U.S.C. § 465.<sup>22</sup> This provision, enacted by section 5 of the Indian Reorganization Act of 1934, allowed the Secretary of the Interior to acquire lands on behalf of tribes as part of the process of partially restoring their land base.<sup>23</sup> After the conclusion of the litigation on the question of whether the thirty-one-acre tract was a dependent Indian community, the Secretary of Interior accepted the Tribe's request.<sup>24</sup> The township and the Governor of Rhode Island contested this federal action.<sup>25</sup> Before the U.S. Supreme Court, Rhode Island

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13. See *Carcieri*, 129 S. Ct. at 1061–62.

14. See *id.* at 1062.

15. *Id.*

16. *Id.*

17. See Narragansett Indian Tribe, Housing Department, <http://www.narragansett-tribe.org/housing-dept.html> (last visited Nov. 19, 2009).

18. *Carcieri v. Kempthorne*, 497 F.3d 15, 24 (1st Cir. 2007), *abrogated by* *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

19. *Carcieri*, 497 F.3d at 24 n.4.

20. See *id.*

21. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 921–22 (1st Cir. 1996).

22. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1062 (2009).

23. See *Carcieri*, 129 S. Ct. at 1066.

24. See *id.* at 1062.

25. *Id.* at 1060–61.

argued that the Secretary of Interior did not have the statutory authority to take the land in trust because the authority to do so applied only to those tribes that were federally recognized before enactment of the Indian Reorganization Act in 1934.<sup>26</sup>

The U.S. Supreme Court, in an opinion written by Justice Clarence Thomas, ruled that the legislation authorizing the Secretary of Interior to place lands in trust for tribes was limited to those tribes in existence on or before June 18, 1934.<sup>27</sup> As a result, the Court concluded that the thirty-one-acre parcel was not “Indian Country” and was, therefore, subject to state regulation.<sup>28</sup> The Court’s opinion is remarkably sloppy in its misreading of the federal statute. The Court glosses over the meaning and the importance of the word “includes,” misreads the applicable text of the Indian Reorganization Act, and thereby restricts the authority of the Secretary of Interior to take land into trust.

## II. CRITICISM OF THE DECISION IN THE *CARCIERI* CASE

My criticism of the *Carcieri* decision requires initial consideration of the legal context in which tribes find themselves. Federally recognized Indian tribes are governments within the federal legal system.<sup>29</sup> Their current sovereignty is actually their aboriginal sovereignty reduced by treaty, by federal legislation, or by necessary implication of their dependent status.<sup>30</sup> Congress, given its power over Indian affairs, has the authority to affirm, confirm, or restore the sovereignty of Indian tribes.<sup>31</sup> Most of the sovereignty that tribes have lost over the last thirty years, however, has resulted from decisions of the U.S. Supreme Court.

Beginning with *Oliphant v. Suquamish Indian Tribe*,<sup>32</sup> the Supreme

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26. *Id.* at 1061.

27. *Id.* June 18, 1934, was the date of enactment of the Indian Reorganization Act. *See* Indian Reorganization Act, ch. 576, § 5, 48 Stat. 985 (1934) (current version at 25 U.S.C. § 465 (2006)).

28. *Carcieri*, 129 S. Ct. at 1061.

29. *See* Thorson, *supra* note 1, at 1023.

30. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152–53 (1980) (discussing tribal sovereignty in relation to taxation, concluding that tribes have sovereignty “unless divested of it by federal law or necessary implication of their dependent status”).

31. *See* Lara v. United States, 541 U.S. 193, 200 (2004) (confirming the “plenary and exclusive” power of Congress over Indian affairs).

32. 435 U.S. 191, 206–08 (1978) (holding that a tribe had no criminal jurisdiction over a non-Indian who assaulted a tribal police officer on reservation lands).

Court handed down a series of decisions that have diminished tribal sovereignty without any apparent concern for its protection or its preservation as intended in the Indian Reorganization Act of 1934.<sup>33</sup> The case of *Montana v. United States* established that fee lands within reservations further limited tribal sovereignty, allowing a tribe to assert civil jurisdiction only if the tribe had a consensual relationship with a non-Indian or if tribal civil authority was necessary to preserve the tribe's political integrity.<sup>34</sup> In *Duro v. Reina*, the Court extended its holding in *Oliphant* and further restricted tribal criminal jurisdiction over non-member Indians.<sup>35</sup> In *Strate v. A-1 Contractors*, the Court treated a highway right-of-way the same as fee lands so that the restrictions in the *Montana* case applied and deprived a tribal court of civil jurisdiction over a lawsuit involving an automobile accident that took place within the tribe's reservation.<sup>36</sup> In *Nevada v. Hicks*, the Court restricted a tribal court's civil jurisdiction over a non-Indian who entered the reservation and allegedly committed a tort against a tribal member.<sup>37</sup> In *Atkinson Trading Co. v. Shirley*, the Court applied the *Montana* case to prohibit the Navajo Nation from imposing its hotel occupancy tax on a hotel that was located on fee land within the reservation when the hotel's owner did not have an agreement with the Tribe consenting to the tribal tax.<sup>38</sup>

The holdings in these cases, if extended to states, would yield ridiculous legal results. Under the rationales of *Oliphant* and *Duro*, states would be unable to assert criminal jurisdiction over non-residents. State courts, applying the holdings of the *Montana* and *A-1 Contractors* cases, would have no civil jurisdiction over transactions not occurring on lands owned by the state or even on federal highways constructed on state lands. If the holding in *Atkinson Trading Co.* applied to states, they would be unable to impose their taxes on people living on private lands. Imagine writing your state department of revenue and explaining that you want your state income taxes refunded to you because you live and work on private lands not

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33. For background on the Indian Reorganization Act of 1934, see Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 948 (2008), which describes how Congress intended to undertake efforts to promote tribal sovereignty and to help tribes regain some of their lost lands.

34. See 450 U.S. 544, 565–66 (1981).

35. See 495 U.S. 676, 688 (1990).

36. See 520 U.S. 438, 459 (1997).

37. See 533 U.S. 353, 359–69 (2001).

38. See 532 U.S. 645, 654–57 (2001).

owned by the state. Next time you stay in a hotel, ask the hotel clerk to remove the local hotel occupancy tax from your bill because the hotel is located on private lands that the state does not own. Under the reasoning of the *Hicks* case, states would have no civil jurisdiction over tort actions brought by state residents against non-residents, even if the tort was committed within the state on state lands.

This backdrop of Supreme Court disregard for tribal sovereignty is reflected in the rather shoddy statutory analysis of the Court in its *Carcieri* decision. The Indian Reorganization Act of 1934 undertook to undo only a small part of over three centuries of dispossession of Native Americans, especially the destructive effects of forty years of allotment and assimilation.<sup>39</sup> Congress concluded that the General Allotment Act had been a failure and that tribal sovereignty needed to be confirmed and restored.<sup>40</sup> Part of the restoration process involved reacquisition of the tribal land base that had been lost through allotment and other forces.<sup>41</sup> To accomplish this restoration policy, Congress gave the Secretary of the Interior the authority to acquire lands and to hold them in trust for the benefit of Indian tribes.<sup>42</sup> In its *Carcieri* opinion, the Court construed the statute's definition of "Indian" as excluding any members of tribes not recognized<sup>43</sup> by the federal government on or before the date of enactment of the Indian Reorganization Act.<sup>44</sup>

The land in trust provision is in section 5 of the Indian Reorganization Act and states:

The 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 . . . .

Title to any lands or rights acquired pursuant to this

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39. See Taylor, *supra* note 33, at 948–49.

40. *Id.* at 948.

41. See 25 U.S.C. § 465 (2006) (codifying section 5 of the Indian Reorganization Act, authorizing the Secretary of the Interior to reacquire Indian lands).

42. See *id.*

43. Actually, the Court and 15 U.S.C. § 479 use the phrase "now under Federal jurisdiction." I use the phrase "federally recognized Indian tribe" because the Department of Interior is now required to maintain a list of "federally recognized Indian tribes." See Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a–a-1 (2006).

44. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009).

Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.<sup>45</sup>

The text of the definition section, on which the Court based its decision in *Carcieri*, is contained in section 19 of the Indian Reorganization Act and states:

The term “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 . . . . The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.<sup>46</sup>

The key to the Court’s misreading of the statute is its overemphasis on the word “now.” The Court first should have focused on the word “include” instead of “now.” The word “include” is used pervasively in federal legislation to provide partial definitions of things that are specifically included, but without explicit limitation. The very beginning of the United States Code is a good example. In 1 U.S.C. § 1, Congress uses the word “include” time after time to bring things within a general definition without limiting the defined term to those things following “include” or “shall include:”

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular *include* and apply to several persons, parties, or things;

words importing the plural *include* the singular;

words importing the masculine gender *include* the feminine as well;

words used in the present tense *include* the future as well as the present;

the words “insane” and “insane person” and “lunatic” *shall include* every idiot, lunatic, insane person, and person non compos mentis;

the words “person” and “whoever” *include* corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” *includes* any person authorized by law to perform

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45. 25 U.S.C. § 465 (2006).

46. 25 U.S.C. § 479 (2006) (all emphases added).

the duties of the office;

“signature” or “subscription” *includes* a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” *includes* affirmed;

“writing” *includes* printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.<sup>47</sup>

The above definitions all operate in a way that adds items to the general definition. If Congress intends to limit a term to a precise and limited category of things or items, it uses the word “means.”<sup>48</sup>

Elsewhere in Title 25 of the United States Code, which contains the codification of the Indian Reorganization Act of 1934, we find additional examples of Congress using “includes” or “shall include” in an illustrative, as opposed to a delimiting, sense. In 25 U.S.C. § 443a, for example, a provision allowing transfers by the federal government of property to tribes defines “Indian” this way: “the term ‘Indian’ *shall include* Eskimos and Aleuts.”<sup>49</sup> Obviously, the statute allowing transfers of property to tribes also extends to tribes whose members are Indians, other than Eskimos or Aleuts. This example illustrates how a careless reading of this illustrative definition using “shall include” would lead to the erroneous conclusion that Congress intended to exclude tribes in the lower forty-eight states. It is apparent that Congress intended to include tribes from Alaska, along with those from the lower forty-eight states, and used an inclusive definition to accomplish its goal.<sup>50</sup>

One of the Court’s mistakes in *Carcieri* was to read “shall include” as “shall mean.”<sup>51</sup> In so doing, the Court unjustifiably limited the scope of the land-to-trust provision contained in the Indian Reorgani-

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47. 1 U.S.C. § 1 (2006) (all emphases added).

48. *See* *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008) (explaining that “includes” is a word of enlargement and not limitation whereas “means” imports an exclusive definition); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (stating that a definition that uses the word “means” excludes any other meaning that is not stated); *Groman v. Comm’r*, 302 U.S. 82, 86 (1937) (defining “means” as exclusive and “includes” as enlarging a term having a common meaning). *See also* 26 U.S.C. § 7701(c) (2006) (“The terms ‘includes’ and ‘including’ when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.”).

49. 25 U.S.C. § 443a (2006) (emphasis added).

50. *See Inter-Tribal Council of Nev. v. Hodel*, 856 F.2d 1344, 1351 (9th Cir. 1988), *cert. denied*, 493 U.S. 814 (1989) (ruling on a question of standing, the court acknowledged that a Nevada tribe could be eligible for a grant under 25 U.S.C. § 433a).

51. *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009).

zation Act. The Court justified its reading of “shall include” to mean “shall mean” because the list of three categories of Indians was comprehensive.<sup>52</sup> The Court’s logic, however, is flawed because members of tribes to be recognized in the future would be “Indians” under the generally accepted definition. Accordingly, the definition easily could be read as insuring inclusion of members of tribes recognized before enactment of the Indian Reorganization Act without excluding members of tribes that may be recognized in the future. This is entirely consistent with the statutory use of an inclusive, not delimiting, definition of the term “Indian.”

Instead of first focusing on “include,” the Court concentrated on the meaning of the word “now.”<sup>53</sup> The Court basically ignored the legislative history dealing with the insertion of the word “now” in section 19 of the Indian Reorganization Act. The legislative history clearly shows that the word “now” was added to section 19 as something of a political compromise over issues totally unrelated to the land-to-trust provisions.<sup>54</sup> The Court did not pay even minimal attention to this legislative history. Had it done so, the Court would have had to find that the word “now” lacked the definitional clarity that the Court supposed.<sup>55</sup> This lack of clarity makes the term “now” ambiguous in the context of section 19. Had the Court recognized this obvious ambiguity, it would have been required to give deference to the interpretation of the Department of Interior, which had consistently construed section 19 as not limiting the Secretary’s authority under section 5.<sup>56</sup>

Finally, as an explicit rule of statutory construction, Congress provides that “words used in the present tense *include* the future as well as the present.”<sup>57</sup> The Court might respond by asserting that only verbs have a tense. However, the text of the statute says “words” not “verbs.” And as the Court explained, “now” as an adjective or as an adverb imports a meaning “[a]t the present time.”<sup>58</sup> Accordingly,

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52. *See id.*

53. *See id.*

54. *See* *Carcieri v. Kempthorne*, 497 F.3d 15, 26–30 (1st Cir. 2007) (reviewing the confusing circumstances that led to the addition of the word “now”), *rev’d sub nom.* *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

55. *See Carcieri*, 129 S. Ct. at 1076 (Stevens, J. dissenting).

56. *See id.* at 1073–74.

57. 1 U.S.C. § 1 (2006) (noting also that the definitions used for statutory construction do not apply if the context indicates that use of the definitional rules would be inappropriate) (emphasis added).

58. *See Carcieri*, 128 S. Ct. at 1064 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1671 (2d ed. 1934) (alteration in original)).

“now” indicates the present tense and 1 U.S.C. § 1 defines the present tense as including the future as well as the present. Applying this Congress-made rule of statutory construction, the conclusion is obvious—“now” includes the future unless the context indicates otherwise. The Court did not persuasively show that the context of section 19 required a narrow reading of the word “now.” In fact, section 7 of the Indian Reorganization Act authorized the Secretary of the Interior to establish new reservations.<sup>59</sup> These new reservations undoubtedly would include tribes that had not been recognized before enactment of the Indian Reorganization Act. Section 7 provides a context from which we can safely and easily infer that “now” as used in section 19 includes members of tribes to be recognized in the future.

The Court’s final, biggest, and most obvious mistake in its interpretation of section § 19, was to ignore the definition of the word “tribe” contained in the same text that defines “Indian.”<sup>60</sup> In section 19, Congress defines “tribe” as “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”<sup>61</sup> The temporal limitation of “now” is not in the text of the definition of “tribe.”<sup>62</sup> The absence of “now” in the definition of “tribe” makes perfect sense because section 7 of the Indian Reorganization Act authorizes the Secretary of the Interior to establish new reservations.<sup>63</sup> These new reservations presumably would involve recognition of tribes after the date of enactment of the statute in 1934.<sup>64</sup> Accordingly, the definition of “tribe” obviously referred to those tribes already recognized as of the date of enactment of the statute together with newly recognized tribes that would have new reservations after the date of enactment. The Court’s use of the definition of the word “tribe” instead of “Indian” would have been a rational approach because the land-in-trust action undertaken by the Secretary of the Interior was for the benefit of the Narragansett Indian Tribe and not for individual owners. The beneficiary of the trust relationship was the tribe. Accordingly, the Court should have looked to the definition of the word “tribe,” the definition of which was not limited by the word “now.”<sup>65</sup> One could argue that this is an instance of the Court being

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59. 25 U.S.C. § 467 (2006).

60. *See* 25 U.S.C. § 479 (2006).

61. *Id.*

62. *See id.*

63. *See id.* § 467.

64. *See id.* § 461.

65. *See id.* § 479.

so *ad hoc* that it lost its ability to undertake fairly straight-forward legal reasoning.

Looking now at the specific facts in the *Carcieri* case, we see that the Department of Interior placed the specific land in trust for the Narragansett Indian Tribe,<sup>66</sup> not for individual members of the Tribe. The land-in-trust provision specifically allows lands to be placed in trust for tribes or for individuals.<sup>67</sup> To achieve its desired result, the Court basically applied the wrong rule. Had the Court applied the correct rule for tribes, the result would have been abundantly clear. Under the language of the statute, the Department of Interior clearly had and still has the authority to place land into trust for any Indian tribe without regard to the date of the tribe's federal recognition.

### III. BREADTH OF APPLICATION

The possible breadth of the application of the Supreme Court ruling in *Carcieri v. Salazar* is uncertain and unsettling. Under the holding of the case, all land-into-trust transfers for the benefit of tribes not recognized on or before the date of enactment of the Indian Reorganization Act are deemed to be invalid.<sup>68</sup> The invalidity of these transfers means that these "*Carcieri*" lands are not subject to tribal authority but instead are subject to state authority. For purposes of this article, the potential tax implications are striking.

As of the date of this article, there are 564 federally recognized Indian tribes.<sup>69</sup> On the date of the enactment of the Indian Reorganization Act, the United States recognized 292 tribes.<sup>70</sup> During the 1950s and 60s, the United States terminated federal recognition of many tribes.<sup>71</sup> Thirty-seven of these tribes have reestablished themselves through federal recognition.<sup>72</sup> With the admission of Alaska to the Union in 1959, more than 200 tribes were added to the list of

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66. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063 (2009).

67. See 25 U.S.C. § 465.

68. See *Carcieri*, 129 S. Ct. at 1068.

69. See TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REF. NO. 2007-10-007, A STATISTICAL PORTRAYAL OF FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS' TAX FILING CHARACTERISTICS FOR TAX YEARS 2000 THROUGH 2004 1 (2007) (noting 564 federally recognized Indian Tribes), available at <http://www.ustreas.gov/tigta/auditreports/2007reports/200710007fr.pdf>.

70. See GENERAL ACCOUNTING OFFICE, GAO-02-49, INDIAN ISSUES: IMPROVEMENT NEEDED IN TRIBAL RECOGNITION PROCESS 21 (2001), available at <http://www.gao.gov/new.items/d0249.pdf> (discussing federal recognition of Indian tribes).

71. See *id.* at 23.

72. See *id.*

federally recognized Indian tribes.<sup>73</sup> Since 1934, Congress has recognized sixteen tribes and the Department of Interior has recognized thirty-one.<sup>74</sup> For all tribes not recognized on the date of enactment of the Indian Reorganization Act in 1934 or that were terminated and then reestablished, special care must be taken to identify those lands that the Secretary of Interior may have placed in trust under the authority of section 5 of the Indian Reorganization Act.<sup>75</sup> After *Carciery* any and all of these lands previously viewed as under tribal authority are arguably under the authority of the state in which they are located.

The tax implications are mind-boggling. Section 5, for example, provides an explicit exemption from state and local taxation.<sup>76</sup> If section 5, because of the decision in *Carciery*, does not apply, then these lands may be subject to state property taxation.<sup>77</sup> Because the initial transfer in trust was invalid, the lands may have been subjected to state and local property taxation from the time of initial tribal ownership. Property tax liabilities may be limited by the applicable statute of limitations, but under the best of circumstances, this limits liability for the last three to six years.<sup>78</sup> Property taxes are not the only taxes that come into question.<sup>79</sup>

#### IV. TAXATION IN INDIAN COUNTRY AFTER *CARCIERI*

“[T]he power to tax [is] the power to destroy.”<sup>80</sup> For many governments, tax revenue is the lifeblood of the state.<sup>81</sup> Without the power to tax, many political entities could not exist. In our federal system, the three sovereigns—tribes, states, and the federal government—compete for the same tax base.<sup>82</sup> The power to tax, as a

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73. See *id.* at 23–24.

74. See *id.* at 24.

75. See 25 U.S.C. § 465 (2006).

76. See *id.*

77. See *infra* notes 134–57 and accompanying text.

78. See, e.g., R.I. GEN. LAWS § 44-5-23 (2009) (providing the assessor of property taxes with the power to assess back taxes for up to six years if the lands have previously escaped assessment of the local property tax).

79. See *infra* notes 158–68 and accompanying text.

80. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

81. See, e.g., U.S. CENSUS BUREAU, GOVS/09-2, QUARTERLY SUMMARY OF STATE AND LOCAL GOVERNMENT TAX REVENUE (2009), available at <http://www.census.gov/prod/2009pubs/qtaxbr-q092.pdf> (showing the major sources of and growth in tax revenues for state and local governments within the United States).

82. See, e.g., *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99–100 (2005) (holding that gasoline was subject to federal, state, and tribal fuel excise taxes

matter of fairness and pragmatism, has limits based on political boundaries<sup>83</sup> and on the political relationships of taxpayers.<sup>84</sup> Transactions taking place wholly outside of political boundaries are not subject to taxation by a government unless the taxpayer has a political relationship with the particular government.<sup>85</sup>

For example, Canada cannot impose its income tax on me if I am not present in Canada, earn no income there, have no economic connections with Canada, and am not a Canadian citizen. As it turns out, none of these conditions applies to me, and, as a result, I pay no income tax to Canada. However, if I lived in Canada, earned income there, or owned income-producing property there, then any of these conditions would enable Canada to assert its taxing power over me and my income.<sup>86</sup> An important ingredient in Canada's potential power to tax me is Canada's territory—its political boundaries. These boundaries determine when I am in or not in Canada and also whether I own property there.

As the U.S. Supreme Court has said, the “where” question is often critical when deciding whether a state or tribal tax is valid.<sup>87</sup> After *Carciari*, many tens of thousands of acres of land are not so clearly Indian Country anymore. This means that state taxation is less restricted and that tribal taxation is barred on these “*Carciari*” lands.

In the context of taxation in Indian Country, things get even more complicated because we have at least three potential governments trying to tax the same person, thing, or activity.<sup>88</sup> As between the federal and the state power to tax, some constitutional limitations apply, but basically both governments are largely free to tax the same thing.<sup>89</sup> For example, a state<sup>90</sup> and a federal fuel excise tax<sup>91</sup> applies to

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when sold at a tribal gas station owned by the Tribe and located on tribal lands).

83. Generally, this requires some nexus, connection, or minimum contacts with the taxing jurisdiction sufficient to justify taxation. See John A. Swain, *State Income Taxation: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 345 (2003) (discussing the constitutional nexus standard for state income tax and evaluating whether this standard reflects good tax policy).

84. See, e.g., *Cook v. Tait*, 265 U.S. 47, 56 (1924) (subjecting a person to the U.S. federal income tax solely on the basis of citizenship even though the taxpayer had no physical or economic presence in the United States).

85. See *id.*

86. See Canada Revenue Agency, Non-Residents of Canada, <http://www.cra-arc.gc.ca/tx/nrrsdnts/ndvdl/nnrs-eng.html> (last visited Nov. 23, 2009) (explaining circumstances when non-residents are subject to Canada's income tax).

87. See, e.g., *Wagnon*, 546 U.S. at 101–02.

88. See Taylor, *supra* note 33, at 918–20.

89. See, e.g., Scott A. Taylor, *The Importance of Being Interest: Why a State Cannot Impose Its Income Tax on Tribal Bonds*, 9 (2009), <http://works.bepress.com/cgi/>

the sale of gasoline. The same is true for tobacco products,<sup>92</sup> alcohol,<sup>93</sup> and income.<sup>94</sup> The federal government, however, does not have a property tax or a retail sales tax.<sup>95</sup> Most states, by comparison, do have property taxes and sales taxes.<sup>96</sup> As between and among states, rules have developed that eliminate multiple taxation.<sup>97</sup> As a result, just a single state income, property, or sales tax tends to apply.

As between tribes and states, less harmony prevails. States routinely assert their power to tax tribes and transactions taking place within Indian Country even when federal law often bars such taxation.<sup>98</sup> As a result, the same transaction may be subject to both a state and a tribal tax. When this happens, multiple tribal/state taxation of the same income or activity hurts on-reservation activity. For example, if both state X and tribe Y impose a \$0.20 per gallon tax on gasoline, then on-reservation gasoline will cost more because each gallon bears a \$0.40 tax whereas the gasoline sold off the reservation is subject to just a \$0.20 per gallon tax.<sup>99</sup>

#### A. *The Tribal Power to Tax*

A federally recognized Indian tribe has the power to tax.<sup>100</sup> This power is an inherent attribute of tribal sovereignty.<sup>101</sup> This tribal taxing power clearly extends to tribal lands located within a tribe's reservation boundaries and also extends off the reservation when the

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viewcontent.cgi?article=1003&context=scott\_taylor (discussing commerce clause limitations on state taxation).

90. See, e.g., N.M. STAT. ANN. §§ 7-13-1 to -18 (2009).

91. See I.R.C. § 4081(a)(1)(A)(iv) (2009).

92. See I.R.C. § 5701 (2009); N.M. STAT. ANN. §§ 7-12-1-7-12-19 (2009).

93. See I.R.C. § 5001 (2009); N.M. STAT. ANN. §§ 7-17-1-7-17-12 (2009).

94. See I.R.C. § 1 (2009); N.M. STAT. ANN. §§ 7-2-1-7-2-36 (2009).

95. See I.R.C. §§ 1-9834 (2009).

96. See CENSUS REPORT, *supra* note 81.

97. See Multistate Tax Compact, [http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/About\\_MTC/MTC\\_Compact/COMPACT\(1\).pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf) (last visited Dec. 10, 2009).

98. See, e.g., *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (describing Oklahoma's unsuccessful attempt to impose its fuel excise tax on the Tribe's gas station operated on the reservation).

99. See, e.g., *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (involving a case where gasoline was subject to state and tribal fuel excise taxes when sold at a tribal gas owned by the tribe and located on tribal lands).

100. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980) (finding that the tribal power to tax is a "fundamental attribute of sovereignty" and that tribes have always had a "broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands").

101. See *id.*

lands are held in trust by the United States.<sup>102</sup> Before the *Carcieri* case, lands that passed into trust were viewed as tribal lands. Consequently, the tribal power to tax extended to such lands. After *Carcieri*, the transfers into trust are viewed as invalid if the specific tribe was recognized after the enactment of the Indian Reorganization Act. These lands no longer have the status as tribal lands. Therefore, the tribal power to tax does not extend to them.

So for example, if a tribe has trust lands subject to the *Carcieri* opinion and if the tribe also has one or more tribal taxes, then the tribal tax on property or transactions located on these lands is arguably invalid. The initial question is whether the “*Carcieri*” lands are within or outside the tribe’s reservation boundaries. The lands in the *Carcieri* case were located just outside the reservation boundary of the Narragansett Indian Tribe, but could have been located within the reservation because the land-to-trust provision in the Indian Reorganization Act applies to lands whether on or off existing reservations.<sup>103</sup> If these lands are on the reservation, then the ownership of the lands is a critical question because the legal standard permitting tribal taxation hinges on ownership. On-reservation lands owned by a non-Indian and not subject to restriction are known as “fee lands” over which the tribe has a limited power to tax. If the lands are located outside the reservation and are not held in trust by the United States for the benefit of the tribe, then the tribe has no power to tax activities associated with those lands.<sup>104</sup>

In *Atkinson Trading Co. v. Shirley*,<sup>105</sup> the U.S. Supreme Court held that the Navajo Nation did not have the power to impose its hotel occupancy tax on tourists who visited a hotel built on fee land located within the Navajo Reservation.<sup>106</sup> In the *Atkinson* case, the land was fee land because the reservation boundary of the Navajo Nation was extended in 1934.<sup>107</sup> Following the reservation extension, owners of lands within the extension had the option of keeping their lands as “fee” lands or exchanging them for other federal lands located

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102. See *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997).

103. See 25 U.S.C. § 465 (2009), codifying section 5 of the Indian Reorganization Act of 1934, ch. 576, § 5, 48 Stat. 984, 985.

104. See, e.g., *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) (involving a case in which the taxpayer’s core theory was that the lands in question were outside the boundary of the Navajo Nation and, therefore, not Indian Country within the meaning of 18 U.S.C. § 1151).

105. 532 U.S. 645 (2001).

106. *Id.* at 659.

107. *Id.* at 648.

outside the new boundary of the Navajo Nation.<sup>108</sup> The original owner of the land was a non-Indian who operated a trading post and found that the extension of the reservation did not adversely affect the operation of his trading post.<sup>109</sup> He later sold the land to another non-Indian.<sup>110</sup> The new owner of the fee land built a hotel there.<sup>111</sup> The Navajo Nation imposed a hotel occupancy tax on all tourists staying in hotels located within the Navajo Nation.<sup>112</sup>

The hotel owner in the *Atkinson* case asserted that the hotel was located on fee land, and that the Navajo Nation's power to tax did not extend to fee land unless the hotel owner had a consensual relationship with the Navajo Nation.<sup>113</sup> The requirement of a consensual relationship comes from the Supreme Court's decision in *Montana v. United States*.<sup>114</sup> In the *Montana* case, the Court stated:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.<sup>115</sup>

In the *Atkinson* case, the Court ruled that the Navajo Nation could not impose its hotel occupancy tax unless the taxpayer entered into a consensual relationship with the Tribe.<sup>116</sup> The facts of the case showed that the taxpayer, Atkinson Trading Company, was a licensed Indian trader.<sup>117</sup> The Court, however, found that the licensed activity did not extend to the operation of the hotel.<sup>118</sup> The *Atkinson* case, then, suggests that tribes cannot impose tribal taxes on non-Indians within the reservation when the activity takes place on fee lands unless the activity is subject to some agreement between the taxpayer and the tribe.<sup>119</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 649.

114. 450 U.S. 544 (1981).

115. *Id.* at 565.

116. *Atkinson*, 532 U.S. at 656–57.

117. *Id.* at 656.

118. *Id.*

119. The *Montana* case is viewed as having two prongs regarding tribal authority over fee lands. The first prong involved tribal authority when the non-member and

On-reservation lands that are “*Carciere*” lands, however, require a different analytical approach. Initially, it is important to note that most tribes recognized after 1934 are not likely to have much or any fee lands located within their reservations’ boundaries because their reservations were probably established after the end of the allotment period. In rare cases where a tribe has “*Carciere*” lands within its reservation, the underlying owner is most likely going to be the tribe. In such cases, the land is fee land that the tribe owns and cannot be placed in trust because of the decision in the *Carciere* case. The Supreme Court has not yet answered the question of a tribe’s power to tax activity on such fee lands when the owner of the lands is the tribe. If we go back and look at the *Atkinson* case, and assume that the Navajo Nation bought the land and the hotel that Atkinson Trading Company owned, then the result is not so obvious if the land is not placed in trust under section 5 of the Indian Reorganization Act. In the *Montana* case, the Court made much of the fact that the land in question was not tribal land, implying that tribal ownership should make a difference.<sup>120</sup> Almost all tribal lands within reservations are held in trust by the United States for the benefit of the particular tribe. Fee lands owned by a tribe within its reservation are different from trust lands because the fee lands may be alienable without the consent of the United States.<sup>121</sup> Consequently, a taxpayer could argue that tribally owned fee land should be subject to the *Montana* limitations. Tribes, however, easily could argue that tribally-owned fee lands within their reservation are essentially the equivalent of trust lands.

On the other hand, when a tribe owns land located outside of a

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the tribe had entered into a consensual relationship. The second prong provided that a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566. The Court in the *Atkinson* case found that the taxpayer’s operation of a hotel did not threaten the political integrity, economic security, health, or welfare of the Navajo Nation. *Atkinson*, 532 U.S. at 657–58.

120. *Montana*, 450 U.S. at 565–66.

121. See *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113–14 (1998) (suggesting that fee lands acquired by a tribe and located on the reservation remain freely alienable if the lands had at one time been made freely alienable by Congress). *But see* 25 U.S.C. § 177 (2009), which provides that no “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution;” § 177 suggests that all lands owned by tribes have limited alienability.

tribe's reservation, such land and the activities taking place on it are not subject to tribal taxation unless the lands are held in trust by the United States.<sup>122</sup> The *Carcieri* case makes an important difference here because it cuts off a tribe's tax base. For those tribes with a very small land base, like the Narragansett Indian Tribe, economic development may be quite limited. If tribes can extend their land base, then economic development may lead to a productive tax base. With a productive tax base, a tribe can generate revenue to fund tribal programs that promote education, health, and general welfare. The *Mescalero Apache Tribe v. Jones*<sup>123</sup> case contains a factual situation that illustrates the negative implications of the *Carcieri* case. In *Mescalero* the tribe developed a ski resort that was a success. The resort and ski lifts were on federal lands located just outside the reservation.<sup>124</sup> As a result, the tribe did not have the authority to impose its own taxes on these activities. The state of New Mexico, however, did have the power to tax these activities even though undertaken by the tribe. Had these activities taken place within the reservation, the tribe would have been immune from the state taxes and would have been able to impose its own tax.<sup>125</sup>

In summary, the *Carcieri* case has the possible effect of precluding tribes from imposing tribal taxes within their reservations on transactions taking place on lands placed into trust if the particular tribe had not been recognized on or before the date of enactment of the Indian Reorganization Act in 1934. If the lands are located outside the reservation boundary, then the tribal power to tax almost certainly does not apply.

In instances where tribes have such lands and also have been imposing tribal taxes on transactions involving those lands, the taxpayers will very likely contest the taxes going forward and sue for refunds for taxes paid in the past. Tribes with tax systems impose limitations on claims for refunds so that taxpayers cannot file claims for refunds after a certain amount of time has passed from the time the return was filed or the tax was paid. In any case, tribes face the challenge of losing future tax revenue and the cost of paying claims for refunds. Tribes will be well advised to contest those refunds that are from periods where the statute of limitations has expired. In addition,

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122. See *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied* 520 U.S. 1139 (1997).

123. 411 U.S. 145 (1973).

124. *Id.* at 146.

125. *Id.* at 148.

tribes should consider the possibility of asserting the power to tax when the lands are within the reservation and owned in fee by the tribe. As I explained, the Supreme Court has not yet answered this question. The merits are on the side of the tribes because tribal ownership of the lands, even if not held in trust by the United States, represents an assertion of tribal sovereignty over territory. If the tribe owns the lands, it certainly retains the inherent authority to exercise political dominion, including the power to tax.

### B. *State Taxation*

State taxation of federally recognized Indian tribes, their lands, property, and activities has been a source of friction between tribes and states for a very long time.<sup>126</sup> This friction continues.<sup>127</sup> Likewise, state attempts to tax tribal members began in the nineteenth century<sup>128</sup> and continue into the twenty-first century, at least in cases involving Native Americans who live and work on reservations but are members of another tribe.<sup>129</sup> The *Carciari* case produces problems because tribes finding themselves with lands that they thought were held in trust and, therefore, immune from state and local taxation, may now find that state and local tax officials are eager to assert and collect current and back taxes. The power of a state to tax tribes and their members depends in large part on the definition of Indian Country. For purposes of federal criminal jurisdiction, Congress defines Indian Country in 18 U.S.C. § 1151 as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a

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126. See, e.g., *In re N.Y. Indians*, 72 U.S. 761 (1866) (involving New York's attempt to tax tribal lands still occupied by tribal members).

127. See, e.g., *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (dealing with attempts by the state of Kansas to impose motor fuel taxes on gasoline sold at a station owned by the tribe on its own reservation).

128. See, e.g., *In re Kan. Indians*, 72 U.S. (5 Wall.) 737 (1866) (holding that a county in Kansas could not tax the lands of individual tribal members granted by the United States under the terms of a treaty).

129. See, e.g., *LaRock v. Wis. Dep't of Revenue*, 621 N.W.2d 907 (Wis. 2001) (holding that Wisconsin's income tax applied to the income of a Native American who lived and worked on the reservation of a tribe of which she was not a member); Taylor, *supra* note 33.

state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>130</sup>

The U.S. Supreme Court, for purposes of limiting a state's power to tax, has adopted the Indian Country definition contained in 18 U.S.C. § 1151.<sup>131</sup> Although not explicitly confirmed by the U.S. Supreme Court, the Tenth Circuit Court of Appeals, in *United States v. Roberts*,<sup>132</sup> held that land transferred into trust and not located within a formal reservation would be Indian Country, either as an informal reservation or as a dependent Indian community.<sup>133</sup> The *Roberts* decision indicates that land placed in trust, even if located outside a tribe's formal or informal reservation, is treated as Indian Country for purposes of the federal common law rules that govern limitations of state taxation.<sup>134</sup> In general, a state's power to tax is much more limited when it reaches into Indian Country.<sup>135</sup> Conversely, this state power to tax, when exercised outside of Indian Country, is quite limited. In fact, the U.S. Supreme Court has concluded that the state power to tax tribes outside of Indian Country is permitted unless expressly prohibited by federal legislation.<sup>136</sup> After *Carcieri*, many transfers into trust under section 5 of the Indian Reorganization Act are not trust lands, and therefore, not Indian Country.<sup>137</sup> As a result, the federal Indian law exemption from state taxation does not extend to these lands.

In addition, section 5 of the Indian Reorganization Act contains its own explicit tax exemption. The language in section 5 provides that any lands taken in trust by the United States under the Indian

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130. 18 U.S.C. § 1151 (2009).

131. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (using the definition of Indian Country found in 18 U.S.C. § 1151 to limit Oklahoma's power to tax the income of tribal members).

132. 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

133. *Id.* at 1133.

134. *Id.* at 1131.

135. *See supra* note 121 and accompanying text.

136. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (allowing state income taxation of tribal members residing outside of Indian Country unless a federal law or treaty otherwise prohibits such taxation); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (allowing imposition of the New Mexico gross receipts tax on commercial activities of a tribally-owned ski resort conducted adjacent to, but outside, the reservation unless there is "express federal law to the contrary").

137. *See Indian Reorganization Act*, ch. 576, 48 Stat. 985 (1934) (current version at 25 U.S.C. § 465 (2006)); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009).

Reorganization Act “shall be exempt from State and local taxation.”<sup>138</sup> This specific exemption no longer applies to those lands governed by the *Carcieri* case. We should not forget that in *Carcieri*, the State of Rhode Island (and its political subdivisions) asserted regulatory control over the housing development that the Narragansett Indian Tribe undertook to build on the thirty-one acre tract that it had purchased from a private landowner.<sup>139</sup> The holding in the *Carcieri* case means that the Secretary of Interior did not have the authority to take the thirty-one acre parcel into trust for the benefit of the Tribe.<sup>140</sup> Because the transfer in trust is invalid, the Tribe remains the fee owner of land located outside its reservation.<sup>141</sup> The tax exemption language in section 5 of the Indian Reorganization Act does not apply to any of those lands placed in trust for tribes recognized after the passage of the Indian Reorganization Act in 1934.<sup>142</sup> As a result, the non-trust status of the thirty-one acre tract exposes these “*Carcieri*” lands to state and local property taxes.

The leading case on state taxation of tribal activities taking place outside tribal boundaries is *Mescalero Apache Tribe v. Jones*.<sup>143</sup> The *Mescalero* case involved a tribal enterprise located off of, but adjacent to, the Tribe’s reservation.<sup>144</sup> The Tribe had the right to use the off-reservation lands under a thirty-year lease it entered into with the U.S. Forest Service.<sup>145</sup> With the help of a federal loan, the Tribe built and operated a ski resort on these lands.<sup>146</sup> For the privilege of doing business in New Mexico, the state imposed its gross receipts tax on the Tribe’s sales of goods and services made in connection with the operation of the ski resort.<sup>147</sup> The U.S. Supreme Court held that a tribe going beyond its reservation boundaries (or outside of its Indian Country) is subject to state regulatory authority—including a state’s power to tax.<sup>148</sup> In *Mescalero*, the state’s gross receipts tax was upheld precisely because the lands on which the activity took place were

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138. 25 U.S.C. § 465 (2009) (codifying section 5 of the Indian Reorganization Act of 1934, ch. 576, § 5, 48 Stat. 984, 985).

139. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1059 (2009).

140. *Id.*

141. *Id.*

142. *Id.*

143. 411 U.S. 145 (1973).

144. *Id.* at 146.

145. *Id.*

146. *Id.*

147. *Id.* at 147.

148. *Id.* at 157–58.

located outside of the Tribe's political boundaries.<sup>149</sup>

By combining *Mescalero* with *Carcieri*, we may infer that a state can tax a tribal enterprise located outside of a tribe's reservation and not located on trust land set apart under section 5 of the Indian Reorganization Act. In the *Mescalero* case, New Mexico did not attempt to impose its property tax on the underlying lands owned by the United States because they were national forest lands. One may presume that New Mexico understood that lands owned by the federal government are immune from state property taxation.<sup>150</sup> However, New Mexico did attempt to impose its compensating use tax on the ski lift towers that were erected on the ski run.<sup>151</sup> The New Mexico compensating use tax is imposed on purchasers who acquire property from out-of-state sources.<sup>152</sup> The Court in the *Mescalero* case erroneously assumed that the federal lease of lands to the Tribe to construct the ski resort was covered by section 5 of the Indian Reorganization Act.<sup>153</sup> The Court then extended the property tax exemption in section 5 to the ski towers because they were affixed to the land and became part of the real property.<sup>154</sup> The Court reasoned that a state tax on the ski towers was effectively a tax on the land and, therefore, barred by section 5.<sup>155</sup>

After the *Carcieri* case, states undoubtedly will attempt to impose their property taxes on lands placed in trust for tribes that were not recognized on or after enactment of the Indian Reorganization Act. The state of the title might possibly cloud the question of whether state and local property taxes can apply. For example, if the United States continues to hold the property in trust for the benefit of the tribe, then the United States is the owner of that land. Conceivably, this could happen because the tribe transferred lands it owned to the Department of Interior with the expectation that these lands would be placed in trust under section 5 of the Indian Reorganization Act. The

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149. *Id.* at 148–49.

150. States, however, receive federal payments to compensate them for the tax-exempt status of federal lands. *See* 31 U.S.C. §§ 6901–6907 (2009) (codifying federal legislation enacting a program to compensate states for lost property taxes that result from the tax-exempt status of federal lands).

151. 411 U.S. at 158–59.

152. *See* N.M. STAT. ANN. § 7-9-7 (2009).

153. *See* 411 U.S. at 146. A close reading of the Court's opinion shows that the lands on which the ski resort was located were federal lands leased by the United States to the Tribe. If the lands had been a transfer in trust, then there would have been no term limitation.

154. *Id.* at 158.

155. *Id.*

United States, however, by virtue of the *Carciari* case, lacks the power to place the lands in trust under section 5 and to make them tax-exempt under the statute. Unless the United States conveys the lands back to the tribe, the United States continues to be the owner of the lands. Lands owned by the United States are exempt from state and local property taxes.<sup>156</sup> No federal statute appears to waive the federal immunity from state and local property taxation in circumstances similar or identical to the facts in *Carciari*.<sup>157</sup> In circumstances where the United States continues as the landowner, general federal immunity from state and local property taxation should apply. If a tribe gets a property tax bill, the tribe should just send it to the United States. The United States, then, as landowner, can assert its immunity. States and local governments that find that their taxing authority is barred by federal immunity for “*Carciari*” lands still held by the United States cannot claim federal payments for “entitlement lands” under the federal legislation meant to compensate local governments for their loss of property tax revenue.<sup>158</sup>

However, a tribe or third party may be viewed as the owner of these “*Carciari*” lands if the courts view the underlying conveyance as void or voidable under the theory that the parties understood that the United States had the power to place these lands in trust under the authority granted in section 5 of the Indian Reorganization Act. Clarity could be achieved if the United States conveyed the specific “*Carciari*” lands to each respective tribe or to the party that initially had transferred the lands to the United States for the purpose of placing them in trust. The Bureau of Indian Affairs (an agency within the Department of Interior), however, has undertaken no efforts to dispose of “*Carciari*” lands but instead has begun a consultation process to determine the best course of action.<sup>159</sup> The actions being

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156. See *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 258 (1985) (noting the “tax-immune status of federal lands” located within states). Presumably, the immunity of federal lands from state and local property taxes derives from *McCulloch v. Maryland*, 17 U.S. 316 (1819) (holding that states could not tax federal instrumentalities).

157. See *United States v. Lewis County*, 175 F.3d 671, *cert. denied*, 528 U.S. 1018 (1999) (dealing with a narrow federal statute authorizing state and local property taxation of lands owned by the federal Farm Service Agency). This author could find no federal statute allowing state taxation of lands owned by the federal government received from a tribe but not held in trust.

158. See 31 U.S.C. § 6901(1) (2009) (defining “entitlement lands” but not including lands held by the United States for the benefit of Indian tribes).

159. See PowerPoint Presentation of Larry Echo Hawk, Assistant Solicitor, and Hilary Tompkins, Solicitor, Department of Interior, <http://www.bia.gov/idc/groups/>

taken do not contemplate the return of “*Carcieri*” lands to tribes or to the original transferor.<sup>160</sup>

The primary difficulty here is determining which property law governs the transfer for purposes of determining the ownership interest of the land. Federal or state law may apply to determine the true owner of the “*Carcieri*” lands. Arguably, federal law should apply to govern the question of the title because both the United States and a particular Indian tribe have an interest in the “*Carcieri*” lands. In fact, any action to quiet title brought by a party other than the United States or the interested tribe may very well be barred on the theory that the United States has an interest in these lands. Congress has waived the sovereign immunity of the United States in quiet-title actions, but not when a tribe has a potential interest in the lands.<sup>161</sup> For this purpose, the applicable statute refers to “trust or restricted Indian lands.”<sup>162</sup> After the *Carcieri* case, viewing these lands as held in “trust” would be inappropriate given the Court’s reading of the Indian Reorganization Act as not extending land-to-trust authority to the Secretary of the Interior for tribes recognized after the Act was passed in 1934.<sup>163</sup> Accordingly, the question arises whether “*Carcieri*” lands should be viewed as “restricted Indian lands.”

Actually, federal legislation provides a strong argument that “*Carcieri*” lands are “restricted Indian lands.” The basis for this conclusion is found in the text of the modern version of the Indian Non-Intercourse Act.<sup>164</sup> The text of the current statute clearly states that

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public/documents/text/idc-002458.pdf (last visited Nov. 23, 2009).

160. *See id.*

161. *See* 28 U.S.C. § 2409a(a) (2009), which provides:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands . . .

162. *Id.*

163. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

164. 25 U.S.C. § 177 (2009). Section 177 provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and

no conveyance of lands owned by a tribe is valid unless entered into pursuant to a treaty.<sup>165</sup> This language appears to restrict the transfer of lands owned by any federally recognized Indian tribe whether the lands are located on or off the reservation. Whether tribally owned lands located off a tribe's reservation are "restricted" within the meaning of the modern Indian Non-Intercourse Act is entirely unclear.<sup>166</sup> The status of these fee lands owned by tribes and located outside reservations remains unclear with the result that actions to quiet title to "*Carcier*" lands may require one or more trips to the U.S. Supreme Court.

In summary, then, continuing ownership of the land by the United States, even after the decision in the *Carcier* case, provides immunity from state and local property taxation because these lands are owned by the federal government. If the particular tribe is the outright owner of the lands, then state and local property taxation is probably permitted because the lands are located outside the reservation. If ownership of the lands is unclear, then any party other than the United States or the particular tribe may be barred from determining title through a quiet-title action because the restrictions in the federal statute allowing quiet-title actions when the United States has an interest does not waive federal sovereign immunity if the

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adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Congress enacted the original version of the Indian Non-Intercourse Act in 1790. The relevant provision of the 1790 statute states:

And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. XXXIII, § 4, 1 Stat. 137, 138.

165. See 25 U.S.C. § 177 (2009).

166. Compare *Alonzo v. United States*, 249 F.2d 189, 195 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958) (finding that lands purchased by and owned in fee simple by the Pueblo of Laguna, a federally recognized Indian tribe, were restricted lands for purposes of 25 U.S.C. § 177), with *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 550 (1st Cir. 1997), *cert. denied*, 522 U.S. 913 (1997) (finding that fee lands outside the reservation and purchased by the tribe were not "tribal trust property" within the meaning of 25 U.S.C. § 81, which requires BIA approval of contracts with tribes involving "tribal trust property"). See *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (allowing state taxation of fee lands purchased by the Oneida Indian Nation and not placed in trust under section 5 of the Indian Reorganization Act under special circumstances where the formal reservation boundaries from 1795 had not been confirmed and the land claims of the tribe were subject to ongoing negotiations).

lands involved may be restricted Indian lands.<sup>167</sup>

State income taxation of a tribe is another matter. As a general rule, a tribe is immune from state income taxation for activities that it undertakes within its reservation or within lands deemed to be Indian Country of the tribe under 28 U.S.C. § 1151.<sup>168</sup> In the *Carciere* case, the Tribe's housing authority undertook its housing development on the lands in question.<sup>169</sup> It appears that the housing authority was a unit of the tribal government.<sup>170</sup> Arguably, the income earned by the tribal housing authority is income that is subject to the Rhode Island income tax.<sup>171</sup> Whether the housing authority is one of these business entities is unclear. If the Narragansett Tribe had incorporated its housing authority under section 19 of the Indian Reorganization Act,<sup>172</sup> then Rhode Island would be in a good position to argue that the housing authority is a corporation that, once it starts collecting rents from its tenants, has income subject to Rhode Island's corporate income tax.<sup>173</sup> Under the authority of the *Mescalero* case, states will likely assert the power to tax incomes earned by tribes or their legal entities on activities taking place outside of the tribes' reservation or outside their Indian Country.

The imposition of other state taxes on a federally recognized Indian tribe usually requires an inquiry into the legal incidence of a particular tax. If the legal incidence of a state tax falls on the tribe and if the activity takes place within the tribe's reservation or Indian Country, then the state tax is preempted as a matter of federal Indian

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167. See Scott A. Taylor, *The Native American Law Opinions of Judge Noonan: Do We Hear the Faint Voice of Bartolome de las Casas?*, 1 ST. THOMAS L.J. 148, 167–69 (2003).

168. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

169. See *supra* Part I.

170. See Housing Department, Narragansett Indian Tribe's Website, <http://www.narragansett-tribe.org/housing-dept.html> (last visited Nov. 23, 2009) (describing its housing projects, including the project for twelve one-bedroom units on the land in question subject to an agreement with the Town of Charlestown).

171. The Rhode Island income tax applies to individuals, corporations, and other business entities. See R.I. Stat. § 44-11-2 (2009) (corporate income tax); § 44-30-1 (2009) (income tax imposed on individuals, estate, and trusts).

172. See 25 U.S.C. § 477 (2009) (allowing the formation of federally chartered corporations that are wholly owned by the particular tribe that seeks the charter). See also Rev. Rul. 94-16, 1994-1 C.B. 19 (ruling that a section 17 corporation owned by a federally recognized Indian tribe is exempt from the federal income tax for income earned on or off the reservation but not providing any authority concerning state income taxation).

173. See R.I. Stat. § 44-11-2(a) (2009) (imposing a 9% tax on the net income of corporations); § 44-11-1(2) (defining a corporation as "every corporation," which presumably includes a corporation incorporated under section 17 of the Indian Reorganization Act and owned by an Indian tribe).

law unless a federal statute authorizes the imposition of the state tax.<sup>174</sup> *Oklahoma Tax Commission v. Chickasaw Nation* is the leading case on legal incidence. Determining legal incidence is not such an easy task, but in general, legal incidence falls on the person designated in the statute as the taxpayer responsible for collecting and paying the tax.<sup>175</sup> Because legal incidence is coupled with the location of the activity, a tribe's immunity from a state tax does not extend to off-reservation activities.<sup>176</sup> The facts in the *Chickasaw* case illustrate this principle quite well. The Chickasaw Nation owned and operated a gas station on tribal lands (within the Nation's Indian Country).<sup>177</sup> Oklahoma imposed a gasoline excise tax on the retail sellers of gasoline. Accordingly, the legal incidence of the fuel excise tax fell on the Chickasaw Nation.<sup>178</sup> Because of the legal incidence of the tax and the location of the activity, the state excise tax was preempted and, therefore, invalid.<sup>179</sup> If the Chickasaw Nation had been a tribe recognized after 1934, and if it had located its gas station on "*Carciere*" lands, then the location of the gas station would have been outside the reservation and outside Indian Country. In that case, then, Oklahoma's gasoline excise tax would have been valid.

After the *Carciere* case, state income taxation of members also becomes a critical issue. The residence of tribal members has a critical impact on whether a state can impose its income tax on them.<sup>180</sup> If a tribal member lives and works on the tribe's reservation or on off-reservation trust lands of the tribe, then a state cannot impose its income tax on that person.<sup>181</sup> However, if the person lives outside the reservation or not on trust lands, even though he or she may work on the reservation or have income derived from the tribe, a state is free to impose its income tax on a tribal member.<sup>182</sup>

The *Caciere* case is a good illustration of this principle allowing state income taxation of tribal members who do not live within Indian Country. Let us suppose that ten elderly tribal members live on the Narragansett Indian Tribe's housing development located on the

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174. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458–59 (1995).

175. *Id.* at 459.

176. See *id.* at 462–67.

177. See *id.* at 452–53.

178. See *id.* at 461.

179. *Id.* at 454.

180. See *id.* at 464.

181. See *id.*

182. See *id.*

thirty-one-acre tract of land that the U.S. Supreme Court found could not be held in trust under section 5 of the Indian Reorganization Act. Let us further assume that these ten tribal members receive modest distributions from the Tribe and that these distributions constitute income for federal income tax purposes. These ten tribal members, because they are living on lands outside the reservation of their tribe and outside what the Supreme Court has defined as the Tribe's Indian Country, must pay Rhode Island's income tax. If the tribal payments are relatively small, then the Rhode Island income tax on each of these tribal members may be zero or a small amount because the Rhode Island income tax is twenty-five percent of the federal income tax.<sup>183</sup> So, for example, if the federal income tax were \$1000, then the Rhode Island income tax would be twenty-five percent of this amount, or \$250. If, however, the payments by the Tribe were substantial, and if the resulting federal income tax were \$10,000 for a particular member, then the Rhode Island income tax for this tribal member would be \$2500. Whether state income taxation of these tribal members is justified when they have changed their residence by just moving across the road is questionable, especially if the tribe is providing all or most of the social services they need.

Housing for tribal members, especially for those tribes with a small land base, is a legitimate reason for expanding a tribe's land base. If the tribe in question is one that was recognized after enactment of the Indian Reorganization Act, then putting land into trust for such a tribe wanting to provide housing for members is not an attractive option if exposure to state income taxation would be costly for individual members. For those gaming tribes that make substantial per capita payments to members, exposure to state income taxation now arises if they find themselves living on "*Carcier*" lands. The income tax liability could be sizable because most of these individuals have not filed state income tax returns. Without having filed a return, these individuals are not protected by the statute of limitations. In most states, the statute of limitations against assessment of income taxes is a relatively long period if a return is not filed.<sup>184</sup> Interest on the unpaid income taxes will certainly increase the size of the liability.

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183. See R.I. STAT. § 44-30-2-1(1)(xii) (2009).

184. Compare N.M. STAT. ANN. 7-1-18(C) (2009) (providing a seven-year statute of limitations if the taxpayer does not file an income tax return), with I.R.C. § 6501(c)(3) (2009) (providing an unlimited period if the taxpayer does not file a federal income tax return).

### C. Federal Taxation

Federal income taxation in Indian Country remains largely unchanged after the *Carcieri* case. In general, federally recognized Indian tribes, their units of government, and their wholly owned corporations formed under section 17 of the Indian Reorganization Act are exempt from the federal income tax.<sup>185</sup> This exemption from income taxation applies whether the activities take place on or off the reservation of a tribe or within or outside its Indian Country.<sup>186</sup> Federal income taxation of tribal members is generally broad with a narrow exemption for income derived directly from tribal lands.<sup>187</sup> The exemption applies to timber, crops, cattle, oil and gas, and extraction of minerals.<sup>188</sup> Another exemption from the federal income tax applies for income derived from the exercise of treaty fishing rights.<sup>189</sup>

Tribal exemption from certain federal excise taxes depends on the underlying purpose of the activity. For example, exemption from the federal fuel excise tax requires that the use of the fuel be restricted to furtherance of an essential governmental function of the tribe.<sup>190</sup> Federal payroll taxes apply to tribes as employers, and the status of the lands where tribal employees work is irrelevant.<sup>191</sup> As a result, the *Carcieri* case does not change the imposition of these taxes.

Tribal bonds, however, are potentially affected. Tribes have the authority to issue three types of bonds. The first type is an “essential governmental function” bond where the proceeds are used to fund construction of roads, sewers, water systems, schools, health care facilities, and government buildings.<sup>192</sup> The statute authorizing the issuance of these bonds does not require that the proceeds be spent on projects within the reservation. The housing project undertaken by the Narragansett Indian Tribe in *Carcieri* probably would qualify for tax-exempt tribal bond financing because providing housing for the

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185. See Rev. Rul. 94-16, 1994-1 C.B. 19.

186. See *id.*

187. See *Squire v. Capoeman*, 351 U.S. 1 (1956) (extending a federal income tax exemption to the proceeds derived from cutting timber on allotted land held in trust for an individual Indian); see also Rev. Rul. 67-284, 1967-2 C.B. 55 (discussing the requirement that the income must be derived directly from the land).

188. See Rev. Rul. 67-284, 1967-2 C.B. 55.

189. See I.R.C. § 7873.

190. See *id.* § 7871(b).

191. See *In re Cabazon Indian Casino*, 57 B.R. 398, 403 (B.A.P. 9th Cir. 1986) (upholding the imposition of both FICA and FUTA taxes).

192. See I.R.C. § 7871(a)(4), (c)(1).

elderly would be viewed as an essential governmental function of the kind undertaken by state and local governments.<sup>193</sup>

The second type of tribal bond allows funding of manufacturing facilities owned by the tribe<sup>194</sup> and located on lands held in trust for the tribe by the United States.<sup>195</sup> It is possible that some tribes may have issued these bonds to fund manufacturing facilities located on “*Carcieri*” lands. If so, the bonds are no longer tax-exempt after the *Carcieri* case because the Secretary of Interior, according to the Supreme Court, lacked the authority to place the lands in trust under section 5 of the Indian Reorganization Act. The owners of these bonds are probably not in a position to know whether these bonds have lost their exempt status. The Bureau of Indian Affairs does not provide a list of “*Carcieri*” lands and may be unable to ever provide a complete list.

The third type of bond is relatively new.<sup>196</sup> Congress allowed the issuance of “tribal economic development bonds” in February 2009.<sup>197</sup> The proceeds from these bonds cannot be used to fund facilities located outside a tribe’s reservation.<sup>198</sup> As a result, the *Carcieri* case also has a negative impact on these bonds. Because the statute came into effect in February 2009, and because the Supreme Court issued its opinion in the *Carcieri* case on February 24, 2009, it is very likely that no tribal economic development bonds have or will be issued to fund the construction of facilities located on “*Carcieri*” lands.

Finally, two federal tax incentives are adversely affected by the *Carcieri* decision. The first is the Indian employment income tax credit.<sup>199</sup> This credit allows an employer to claim a substantial credit for employing Native Americans within Indian Country. The statute requires that substantially all of the work be performed on the reservation.<sup>200</sup> As a result, “*Carcieri*” lands would not qualify as a place of employment for purposes of this credit. This tax credit expires at the end of 2009.<sup>201</sup> The other tax incentive is rapid depreciation for facilities built on Indian reservations.<sup>202</sup> The definitions for an Indian

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193. *See id.* § 7871(e).

194. *See id.* § 7871(c)(3).

195. *See id.* § 7871(c)(3)(B)(iii)(I), (c)(3)(E)(i).

196. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, subtit. E, § 1402(a), 123 Stat. 351 (2009).

197. *See* I.R.C. § 7871(f).

198. *See id.* § 7871(f)(3)(B)(ii).

199. *See id.* § 45A.

200. *See id.* § 45A(c)(1)(B).

201. *See id.* § 45A(f).

202. *See id.* § 168(j).

reservation exclude “*Carcieri*” lands.<sup>203</sup> And like the Indian employment credit, the provision expires at the end of 2009.<sup>204</sup>

## V. CONCLUSION

The *Carcieri* case is troubling for two important reasons. First, it ruptures the goals of the Indian Reorganization Act which Congress intended as a way to reconstitute Indian tribes, to provide a basis for self-government, and to help them expand their land base. Second, the *Carcieri* case, because it involves so many tribes and so many transfers of land, will generate enormous amounts of litigation over regulation and taxation. Most tribes and states would rather go about the business of promoting economic development on and around Indian reservations so that tribal members and those non-members who work for tribal enterprises can go about the business of raising their families and attending to their children’s education, health, and general well being. Consequently, a statutory solution may be the best course of action to correct the Court’s erroneous decision in *Carcieri*. On September 24, 2009, North Dakota Senator Bryan Dorgan introduced such a bill in the United States Senate. This bill, if passed, would amend the Indian Reorganization Act to make clear that the Secretary of Interior does have the authority to place lands in trust for any and all federally recognized Indian tribes without regard to the date of their recognition.<sup>205</sup> Prospects for passage are uncertain given concerns over the bill’s possible effect on the expansion of Indian gaming.

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203. See I.R.C. § 168(j) (6).

204. See *id.* § 168(j) (8).

205. See S. 1703, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-1703>.