THE POST-*CARCIERI* STRUGGLE FOR TRIBAL LAND AND THE CASE OF THE MASHPEE WAMPANOAG

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INTRODUCTION[†]

All Americans are familiar with the myth that gave rise to Thanksgiving: when the Pilgrims arrived in eastern Massachusetts, they survived the winter because a group of friendly Native Americans taught them to grow corn and squash.[1] To celebrate surviving their first winter in the New World, the Pilgrims prepared a huge feast to share with the Wampanoag Tribe that made their survival possible.[2] Few, however, know of the Tribe's 400-year struggle to survive and preserve their land, culture, and customs.[3]

Before the Pilgrims arrived in Massachusetts, the Wampanoag was a federation of tribal bands that stretched from the greater Boston area to the southern coast of Rhode Island.[4] Among these bands, the Mashpee Wampanoag lived on the southern coast of Cape Cod.[5] Due to the Wampanoag's early contact with Europeans, the plague decimated the Tribe's population prior to the Pilgrims' arrival.[6]

Attacks on the Wampanoag's survival continued when the combination of disease and the devastation of King Phillip's War reduced the Wampanoag population to only about 400 by the end of the seventeenth century.[7] The Massachusetts government also threatened the Wampanoag's cultural

† In this Comment, the term "Indian" is used only in the legal context. The term "Native American" refers broadly to all indigenous peoples within the borders of the present-day contiguous United States.

1. *Compare Thanksgiving 2021*, HIST., https://www.history.com/topics/thanksgiving/history-of-thanksgiving (Apr. 16, 2021) (acknowledging that the Pilgrims' feast with the Wampanoag in 1621 is remembered as the first Thanksgiving celebration), *with* Maya Salam, *Everything You Learned About Thanksgiving Is Wrong*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/us/thanksgiving-myths-fact-check.html (describing how there is no evidence in Wampanoag oral history that tribal members attended the "first Thanksgiving," and explaining that many historians think the first Thanksgiving actually occurred in 1637 after the Pilgrims massacred the Pequot people).

2. *See* Salam, *supra* note 1.

3. *See generally* Elizabeth Coronado, *The Plight of New England Tribes Pursuing Federal Recognition*, 4 AM. INDIAN L.J. 546, 567–74 (2016) (describing the Mashpee Wampanoag's history and its long battle for official tribal recognition).

4. CHESTER P. SOLIZ, THE HISTORICAL FOOTPRINTS OF THE MASHPEE WAMPANOAG INDIANS 27 (2011).

5. *See id.*; *see also* IAN BARNES, THE HISTORICAL ATLAS OF NATIVE AMERICANS 35 (Sarah Stubbs ed., 2015) (depicting the geographical location of tribes in the early sixteenth century).

6. SOLIZ, *supra* note 4, at 32.

7. *Id.* at 44–45, 50–56 (explaining that King Phillip's War began after colonists killed three Wampanoags contrary to an earlier pact between the Wampanoag and the colonists, and describing the absolute devastation this war reaped on the Wampanoag and its allied tribes).

existence in the late seventeenth century when it placed the Mashpee Wampanoag on an "Indian Plantation" in the present-day town of Mashpee on Cape Cod.[8] The government assigned the Tribe white "overseers,"[9] who forced the Mashpee Wampanoag to attend Christian church and school while taking Mashpee Wampanoag land and leasing it to non-Wampanoags.[10] These practices continued throughout the eighteenth and nineteenth centuries, despite the Wampanoag supporting the American colonies during the Revolutionary War by enlisting in the colonial army and donating money to the cause.[11] It was not until 1861 that the state of Massachusetts finally extended full citizenship to the Mashpee Wampanoag people.[12]

During the mid-1900s, moreover, the Mashpee Wampanoag people faced redlining when banks refused to loan them funds to invest in buildings or businesses.[13] Consequently, the Mashpee Wampanoag had the lowest rate of economic growth of any incorporated community in Massachusetts during this time period.[14] Additionally, developers took Mashpee Wampanoag land to

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8. *Id.* at 58–59; *see also* Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 637 (discussing how Richard Bourne, a pastor who converted many Wampanoag to Christianity, secured a deed to Mashpee land and that its confirmation in 1671 by Plymouth colony established the Mashpee Plantation, the earliest form of the Tribe's reservation land).

9. SOLIZ, *supra* note 4, at 58. "Plantation" and "overseer" were the historical terms used at the time of the reservation's creation. *See id.* The racially-charged term "overseer" is still used in federal Indian law to describe administrative bodies—including the U.S. Department of the Interior (DOI)—that are responsible for managing reservations. *See* Ellen M. Burstein & Michelle G. Kurilla, *Coalition for a Diverse Harvard Seeks a Name Change for the Board of Overseers*, HARV. CRIMSON (July 17, 2020), https://www.thecrimson.com/article/2020/7/17/rename-the-overseers-campaign/ (explaining that the term overseer cannot be separated from its roots in slavery); *see also* Robert Becenti, *Contracting & Compacting Update*, TR. MATTERS, Fall 2015, at 2, https://www.doi.gov/sites/doi.gov/files/uploads/Trust%20Matters%20-%20Fall%202015.pdf (referring to the Office of the Special Trustee for American Indians (OST) as "overseeing" tribal agreements).

10. SOLIZ, *supra* note 4, at 58–59; *see also* Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England*, 99 HARV. L. REV. 703, 704 (1986) (explaining that the overseers had the power to rent Mashpee Wampanoag land, sell lumber from Mashpee Wampanoag land, and lease Mashpee Wampanoag children for labor).

11. SOLIZ, *supra* note 4, at 61; *see also* Torres & Milun, *supra* note 8, at 638 (describing how the Mashpee Wampanoag's white overseers were more authoritative under the Commonwealth of Massachusetts after the Revolutionary War than they were under British colonial rule).

12. SOLIZ, *supra* note 4, at 70. Massachusetts did not grant full citizenship to all Wampanoag bands until 1869. *Id.*

13. *Id.* at 81 ("[Redlining] referred to the drawing of a red line on a map to indicate an area where banks would not invest.").

14. *Id.* at 83; *cf.* Julie Flaherty, *Wampanoag Historian*, TUFTSNOW (May 30, 2012),

meet demand for summer homes,[15] and when the Tribe challenged the legality of these actions in *Mashpee Tribe v. Town of Mashpee*,[16] an all-white jury found that the Mashpee Wampanoag Tribe did not exist.[17]

The Indian Reorganization Act (IRA or Act) authorizes the U.S. Department of the Interior (DOI) to grant tribal recognition and take land and place it into federal trust for tribes that satisfy one of the Act's three definitions of "Indian."[18] Although the Mashpee Wampanoag applied for federal recognition[19] in 1975, the DOI's Bureau of Indian Affairs (BIA)[20] refused to acknowledge the request for over twenty-five years.[21] Finally, in 2007, the BIA

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https://now.tufts.edu/articles/wampanoag-historian ("Today, less than half the [T]ribe's 2,000 members have a high school diploma, and half live at or below the poverty line.").

15. *See* Brodeur, *supra* note 10, at 704 (noting that Massachusetts allowed the sale of all tribal land within its borders to non-Native peoples in 1869 "in response to whites' desire to purchase [tribal] lands").

16. 447 F. Supp. 940 (D. Mass. 1978).

17. *See id.* at 950; SOLIZ, *supra* note 4, at 88 (asserting that an all-white jury was not "a jury of [the Tribe's] peers"); *see also* Brodeur, *supra* note 10, at 705–06 (noting that the judge in *Mashpee Tribe* failed to investigate allegations of jury tampering and improperly allowed the jury to decide the issue of tribal status); Jo Carillo, *Identity as Idiom:* Mashpee *Reconsidered*, 28 IND. L. REV. 511, 511 (1995) (explaining that courts refused to deem the Mashpee Wampanoag a tribe because they considered the Tribe too assimilated).

18. Indian Reorganization Act (IRA), 25 U.S.C. § 5138; *id.* § 5129 (defining "Indian" as (1) "all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction," (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and (3) "all other persons of one-half or more Indian blood"). The DOI relied on the IRA's second definition of "Indian" to justify its decision to take the Mashpee Wampanoag's land into federal trust. BUREAU OF INDIAN AFFS., RECORD OF DECISION, TRUST ACQUISITION AND RESERVATION PROCLAMATION FOR 151 ACRES IN THE CITY OF TAUNTON, MASSACHUSETTS, AND 170 ACRES IN THE TOWN OF MASHPEE, MASSACHUSETTS, FOR THE MASHPEE WAMPANOAG TRIBE 79–80 (2015), https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031724.pdf.

19. Federal tribal recognition gives tribes the right to self-governance and enables them to acquire federal funding and services. *Frequently Asked Questions*, BUREAU OF INDIAN AFFS,, https://www.bia.gov/frequently-asked-questions (last visited May 18, 2021). It acknowledges an intergovernmental relationship between the United States and the tribal government. *See id.*

20. The Bureau of Indian Affairs (BIA), an agency within the DOI, is responsible for reviewing evidence to determine whether tribes are eligible for federal recognition and whether to place land in a federal trust for tribes. BUREAU OF INDIAN AFFS., U.S. DEP'T OF THE INTERIOR, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) 4 (2016), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.

21. SOLIZ, *supra* note 4, at 91–92; *see also infra* Section II.A (describing the Mashpee

federally recognized the Mashpee Wampanoag Tribe.[22] Then, in 2015, the BIA took two pieces of Mashpee Wampanoag land into a federal trust—one in Mashpee for residential use and one in Taunton for commercial use, specifically gaming.[23]

In 2016, Taunton residents filed a suit in opposition to the BIA's decision to put land into trust for the Mashpee Wampanoag, complaining that a casino would ruin the quiet, residential atmosphere of their neighborhood.[24] The U.S. Court of Appeals for the First Circuit ruled that it was outside the Secretary of the Interior's power to place the Mashpee Wampanoag's land in a federal trust because the Tribe did not qualify as "Indian" under the IRA.[25]

While the IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under [f]ederal jurisdiction,"[26] the Supreme Court ruled in *Carcieri v. Salazar*[27] that "now" refers only to tribes under federal jurisdiction in 1934, the year Congress enacted the IRA.[28] As a result of *Carcieri*, all tribes have experienced a slower, more congested process of applying for land-into-trust, with consequently significant litigation costs.[29] Furthermore, it is nearly impossible for tribes like

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Wampanoag's time and money investment in proving their tribal existence to the DOI).

22. SOLIZ, *supra* note 4, at 92.

23. BUREAU OF INDIAN AFFS., *supra* note 18, at 77–78 (concluding that placing these land parcels in a federal trust would increase the Mashpee Wampanoag's economic independence and self-governance, thereby expanding its ability to preserve Mashpee Wampanoag culture).

24. Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30, 33 (1st Cir. 2020); *Court Rejects Mashpee Tribe's Appeal of Land-in-Trust Ruling*, CAPE COD TIMES (Feb. 27, 2020, 10:35 PM), https://www.capecodtimes.com/news/20200227/court-rejects-mashpee-tribes-appeal-of-land-in-trust-ruling; *see also* Sean P. Murphy, *Taunton Property Owners Sue to Block Tribal Casino*, BOS. GLOBE (Feb. 5, 2016, 12:40 AM), https://www.bostonglobe.com/metro/2016/02/04/taunton-property-owners-file-lawsuit-block-tribal-casino-taunton/ysNp oe7y7mFUsGrdAmEyMP/story.html (noting that a casino developer who planned to build a casino in the neighboring town of Brockton partially funded the lawsuit despite the local residents' claim that a casino would drive down property values).

25. *Littlefield*, 951 F.3d at 37, 41.

26. 25 U.S.C. § 5129 (emphasis added).

27. 555 U.S. 379 (2009).

28. *Id.* at 395. In its Record of Decision explaining its authority to place Mashpee Wampanoag land in federal trust, the DOI refused to consider whether the Tribe could qualify under the IRA's first definition of "Indian." *See* BUREAU OF INDIAN AFFS., *supra* note 18, at 79–80.

29. *See generally* Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of* Carcieri v. Salazar, 40 PUB. LAND & RES. L. REV. 37 (2019) (analyzing the post-*Carcieri* increase in litigation stemming from multiple tribes' attempts to acquire tribal recognition and to have their tribal land placed in a federal trust, including litigation from the Cowlitz Indian Tribe, the Oneida Indian Nation, the Ione Band of Miwok Indians, and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians).

the Mashpee Wampanoag to acquire federal recognition if they have experienced the barriers of colonialism that lessen their ability to compile detailed evidence of their existence prior to 1934.[30]

On March 27, 2020, in the midst of the COVID-19 pandemic, the Secretary of the Interior ordered the BIA to revoke the Mashpee Wampanoag's land from its federal trust.[31] This constituted the first taking of reservation land since the Termination Era ended in 1959.[32] This taking of tribal land during a pandemic was especially cruel because tribal status provides access to federal programs, including COVID-19 relief.[33]

In response, the Mashpee Wampanoag filed suit in the U.S. District Court for the District of Columbia against the Secretary of the Interior, arguing that the taking of its tribal land will diminish tribal sovereignty, reduce tribal self-governance, eliminate access to federal programs including COVID-19 relief, and threaten the Tribe's ability to build low-income housing.[34] The court granted the Tribe's motion for summary judgment, returning the land to the Mashpee Wampanoag and remanding the case to the Secretary of the Interior to reconsider its tribal status as of 1934.[35] Although the DOI dismissed the appeal in February 2021, the DOI's fluctuation between attempting to strip the Mashpee Wampanoag of its land and tribal status to supporting the Tribe's

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30. *Id.* at 109–11.

31. Memorandum from the Sec'y of the Interior, U.S. Dep't of the Interior, to Director, Bureau of Indian Affs., regarding *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. 2020) (Mar. 27, 2020) [hereinafter DOI Memorandum on *Littlefield*], https://www.doi.gov/sites/doi.gov/files/uploads/littlefield-v-mashpee-wampanoag-indian-tribe-951-f.3d-30-1st-cir.-2020-signed-2020.03.27.pdf (revoking the Mashpee Wampanoag's land from federal trust in response to the U.S. Court of Appeals for the First Circuit's determination that the DOI lacked authority under the IRA).

32. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES (2014). The Termination Era began in 1948 and continued through the 1950s. Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, ADVOCATE, Jan. 2005, at 10. Termination Era policies aimed to "assimilat[e]" Native Americans. *Id.* Congress enacted statutes that stripped tribes of their federal tribal recognition and subjected many tribes—including those that were not stripped of their tribal status—to the state legal system, rather than their tribal legal system. *Id.*

33. U.S. DEP'T OF THE INTERIOR, CARES ACT OPERATION OF INDIAN PROGRAMS AND INDIAN EDUCATION PROGRAMS (2020), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/opa/pdf/FINAL-IA_CARES%20ACT_ProgramOperations_InfoSheet4.15.2020_508.pdf.

34. Mashpee Wampanoag Tribe v. Bernhardt, No. 18-2242, 2020 WL 3034854, at *3 (D.D.C. June 5, 2020).

35. Mashpee Wampanoag Tribe v. Bernhardt, 466 F. Supp. 3d 199, 236 (D.D.C. 2020); State House News Serv., *Judge Orders Trump to Reconsider Ruling Revoking Mashpee Wampanoag Reservation Status*, WBUR, https://www.wbur.org/news/2020/06/06/judge-reconsider-revoking-mashpee-reservation (June 6, 2020).

existence exemplifies that the tribal recognition and land-into-trust processes are heavily politicized depending on which administration is in power, thereby making it an incredibly uncertain process.[36]

The current system for federally recognizing tribes and placing land into federal trusts is ridden with uncertainty and inefficiency. The DOI's role in the tribal recognition process must be significantly altered to provide greater consistency and ensure tribes, such as the Mashpee Wampanoag, have the tools and resources to thrive. Part I of this Comment provides context and background on interpretations of statutes defining tribal status and land. Part II analyzes the DOI's actions and cases relevant to the Mashpee Wampanoag's fight for tribal status and land. Part III recommends the federal government refine the tribal recognition process to increase certainty and efficiency by enacting legislation or repealing *Carcieri*. Additionally, this Comment suggests restructuring DOI by removing the Office of Special Trustee for American Indians and establishing an Under Secretary, who is appointed with guidance from tribal members, to oversee the DOI's compliance with its federal trust duties.

I. THE AMBIGUOUS PROCESS OF TRIBAL RECOGNITION AND PLACING TRIBAL LAND INTO FEDERAL TRUST UNDER THE IRA AND *CARCIERI*

The IRA states, "[t]itle to land acquired by a tribe or tribal corporation . . . may, with the approval of the Secretary of the Interior, be taken by the United States in trust for the tribe or tribal corporation."[37] The purpose of placing Native land into federal trusts is to secure it against the risk of the government, non-Native developers, or potential homeowners taking it.[38] Throughout the Self-Determination Era,[39] lawmakers and policymakers have

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36. *See* Associated Press, *Mashpee Wampanoag Tribe Wins Legal Battle over Trump Administration Appeal, Will Keep Reservation Status*, BOSTON.COM (Feb. 20, 2021), https://www.boston.com/news/local-news/2021/02/20/mashpee-wampanoag-tribe-wins-legal-battle-over-trump-administration-appeal-will-keep-reservation-status (describing how the DOI dismissed the appeal in February 2021, approximately one month after President Biden took office).

37. 25 U.S.C. § 5138.

38. *See* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 513–14 (describing how statutes passed during the Self-Determination Era foster economic development, self-governance, and cultural preservation); *see also* Jennie Bricker, *This Land Is My Land*, OR. ST. BAR BULL., Aug./Sept. 2018, at 24, 27 (noting that when land is not in a trust and then taken from a tribe, it has profound effects related to loss of community, health, and identity); James K. Kawahara & Michelle LaPena, *Indian Country*, L.A. LAW., Jan. 2006, at 26, 28 (recognizing that tribal land is distinct from other types of property because it is communally owned and subject to the tribal government's laws).

39. Since the late 1960s, policies and laws have largely reflected the U.S. government's

prioritized tribal sovereignty and independence; thus, the process of placing tribal land into trust has been a key component of their work.[40]

Established in 1934, the IRA signified a shift toward policies that encouraged tribal sovereignty.[41] The Act defined the term "Indian" to include (1) "all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction," (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and (3) "all other persons of one-half or more Indian blood."[42] Several federal courts and subsequent DOI guidance have attempted to interpret ambiguous terms within this definition, including "now" and "under federal jurisdiction."[43]

A. Judicial Interpretation of "Now" in the IRA

In *Carcieri*, the Supreme Court interpreted the meaning of the term "now" contained in the IRA's first definition of "Indian," which includes "members of any recognized Indian tribe now under [f]ederal jurisdiction."[44] The Court examined whether "now" means the date the DOI took the land into trust or June 1, 1934, the date Congress enacted the IRA.[45] Ultimately, the Court determined that "now" refers to the day Congress passed the IRA, so members of any tribes that were under federal jurisdiction after June 1, 1934 do not meet the definition of "Indian."[46]

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goals to correct the wrongs of the Termination Era and increase tribal sovereignty and economic independence. *See* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 426–27 (2014). The Self-Determination Era further encourages the development of tribal laws and self-identification of tribal jurisdiction. *Id.*

40. *See, e.g.*, Ragsdale, *supra* note 38, at 513–14; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54, 120–22 (codified at 42 U.S.C. § 13701) (clarifying that tribes have criminal jurisdiction over non-tribal members who commit acts of violence against women while on tribal land); 25 U.S.C. § 1601 (affirming the United States' responsibility to provide tribes with the resources necessary to provide higher quality health services to their members).

41. *See* 25 U.S.C. § 5124. The passage of the IRA and repeal of the Allotment Act marked the end of the Allotment Era. Richard A. Eppink, *Allotment and Survivance: War Abroad and Collective Resistance at Home on Idaho's Reservations*, ADVOCATE, Nov.–Dec. 2018, at 37. During the Allotment Era, policymakers aimed to forcibly assimilate Native Americans partially by erasing reservation boundaries. *Id.* Reservations were divided into individual lots, many of which were then sold to white people to break up tribal land. *Id.*

42. 25 U.S.C. § 5129.

43. *See infra* Sections I.A, I.B, I.C.

44. Carcieri v. Salazar, 555 U.S. 379, 382 (2009); 25 U.S.C. § 5129.

45. *Carcieri*, 555 U.S. at 388.

46. *Id.* at 395; Noah Nehemiah Gillespie, *Preserving Trust: Overruling* Carcieri *and*

Using various tools of statutory interpretation, Justice Clarence Thomas concluded that "now" means as of June 1, 1934.[47] First, using dictionaries and earlier Supreme Court interpretations of "now," Thomas concluded that the word has the plain meaning of at the time the IRA was established.[48] Thomas then analyzed the IRA's legislative history, noting that earlier drafts of the IRA referenced events that were happening in 1934 in lieu of using the term "now."[49] Therefore, replacing those events with the term "now" demonstrated the Legislature's intent to define "now" as the time of the IRA's enactment in 1934.[50] Finally, Thomas pointed to a letter from the 1934 Commissioner of Indian Affairs, who stated that the definition includes "any recognized tribe that was under [f]ederal jurisdiction at the date of the Act."[51]

The Court's decision to define "now" to be as of 1934 has blocked many eastern tribes—which encountered Europeans for centuries before the U.S. government established the legal process of federal tribal recognition—from the ability to receive federal tribal recognition.[52] The Mashpee Wampanoag Tribe is among the tribes harmed by this decision, as it was forced to locate proof of its existence even as the United States continued to celebrate Thanksgiving year after year.[53] Ultimately, this decision has placed an unfair burden on tribes to acquire the time and money necessary to prove they existed to the government that colonized them.[54]

Carcieri has prompted a significant amount of litigation, both from tribes challenging the DOI's decisions that they are not eligible to receive land in a

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Patchak *While Respecting the Takings Clause*, 81 GEO. WASH. L. REV. 1707, 1716 (2013); *see also* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 541 (2013) (acknowledging that *Carcieri* limited the tribes and individuals that qualify as "Indian" to those that were federally recognized prior to 1934).

47. *Carcieri*, 555 U.S. at 382–83.

48. *Id.* at 388–89; *see also* Melanie Roccobene Jarboe, *Collective Rights to Indigenous Land in* Carcieri v. Salazar, 30 B.C. THIRD WORLD L.J. 395, 409 (2010) (noting that *Carcieri* limited the Secretary of the Interior's authority to place land into trust to tribes under federal jurisdiction in 1934).

49. *Carcieri*, 555 U.S. at 389.

50. *Id.*; *see also* Anna O'Brien, *Misadventure in Indian Law: The Supreme Court's* Patchak *Decision*, 85 U. COLO. L. REV. 581, 590–91 (2014) (explaining that the Secretary of the Interior could not take land into a federal trust for the Narragansett Tribe because they did not receive federal recognition until 1983, decades after the pre-1934 requirement that the Court interpreted "now" to mean).

51. *Carcieri*, 555 U.S. at 390.

52. *See* Coronado, *supra* note 3, at 560 (discussing the barriers that the Pequot Tribe faced in gaining federal recognition).

53. *See infra* Section II.A.

54. *See infra* Section II.A.

federal trust and from individuals opposing the DOI's decision to place land into a trust for particular tribes.[55] Not only is this continual litigation inefficient, arbitrary, and wasteful, but it also creates uncertainty regarding the legal acknowledgment of the existence of long-established tribes.[56] The Mashpee Wampanoag has been forced to expend considerable resources to fight for its tribal identity in the wake of the *Carcieri* decision, despite spending decades gathering evidence to receive federal recognition in the first place.[57]

B. Judicial Interpretation of "Recognized Indian Tribe" and "Under Federal Jurisdiction" in the IRA

The phrase "recognized Indian tribe now under [f]ederal jurisdiction" in the IRA's first definition of "Indian" has also been a source of significant statutory interpretation.[58] The U.S. Court of Appeals for the Ninth Circuit analyzed the phrase in *County of Amador v. United States Department of the Interior*.[59] The County of Amador challenged the DOI's decision to take land into trust so that the Ione Band of the Miwok Tribe could build a casino.[60] The County argued that "now under [f]ederal jurisdiction" modifies the phrase "recognized Indian tribe;" therefore, it claimed that a tribe must have been recognized in 1934 to satisfy the IRA's first definition of "Indian."[61] Conversely, the Ione and the DOI argued that "now under [f]ederal

55. Sullivan & Turner, *supra* note 29, at 92–93.

56. *Id.*; David Coventry Smith, *Defending Indian Lands After* Carcieri, *in* EMERGING ISSUES IN TRIBAL-STATE RELATIONS: LEADING LAWYERS ON ANALYZING THE ECONOMIC, CULTURAL, AND POLITICAL TRENDS AFFECTING TRIBAL-STATE INTERACTIONS 5–6 (2014) (discussing the historical cycle of the U.S. government improving tribal sovereignty only to later push for further assimilation to the detriment of tribes, and emphasizing that *Carcieri* had the anticipated effect of vastly increasing the quantity of state litigation against tribes); *Addressing the Costly Administrative Burdens and Negative Impacts of the* Carcieri *and* Patchak *Decisions: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 10–11 (2012) (statement of Hon. Jefferson Keel, President, National Congress of American Indians) (noting that in the three years following *Carcieri*, there were at least fourteen pending cases, and the longer and costlier the tribal land acquisition process, the more difficult it is for tribes to create health clinics, build housing, preserve culture, and add jobs).

57. *See* Sullivan & Turner, *supra* note 29, at 86–87; *see also supra* pp. 103–05 (discussing the years of work between the 1978 decision stripping the Mashpee Wampanoag of its "Indian" status and the 2007 DOI decision to reinstate it).

58. *See, e.g.*, Cnty. of Amador v. U.S. Dep't of the Interior, 872 F.3d 1012, 1021 (9th Cir. 2017) (analyzing whether a tribe must have been both "recognized" and "under federal jurisdiction" in 1934 to satisfy the IRA's definition of "Indian").

59. 872 F.3d 1012 (9th Cir. 2017).

60. *Id.* at 1014–15.

61. *Id.* at 1021.

jurisdiction" modifies "Indian tribe;" thus, the timing of the tribe's official federal recognition is irrelevant.[62]

The Ninth Circuit first examined the purpose and history of the IRA, finding that it intended to benefit tribes, as policy goals had shifted to reflect the new belief that tribes should exist.[63] Because "under federal jurisdiction" does not have a plain meaning on its face, the court further emphasized that deference should be given to the DOI's interpretations and actions.[64] The court ultimately held that the tribal recognition could occur "at any time . . . if it (1) *was* 'under [f]ederal jurisdiction' as of June 18, 1934, and (2) *is* 'recognized' at the time the decision is made to take land into trust."[65] Much like *Carcieri*, if this decision were binding throughout the United States, it would have had devastating consequences on eastern tribes, such as the Mashpee Wampanoag.[66]

C. DOI Guidance for the IRA

In an effort to reduce the ambiguity, and thus litigation, related to the phrase "under federal jurisdiction" in the IRA, the DOI twice issued memorandums to clarify its guidance.[67] In March 2014, the DOI issued a memorandum providing a two-part test to determine whether a tribe was "under federal jurisdiction."[68] Under the test, the tribe must first demonstrate that "there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction," and it must do so by demonstrating that the federal government had specific obligations to the tribe in 1934 or earlier.[69] Second, the tribe must show that its "jurisdictional status remained intact in 1934."[70]

In 2020, the DOI issued a memorandum revoking the two-part test.[71] It

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62. *Id.*

63. *See id.* at 1022–23 (explaining that the IRA marked the end of the Allotment Era).

64. *Id.* at 1026–27.

65. *Id.* at 1024.

66. *See supra* Section I.A.

67. *See* Memorandum from Off. of the Solic., U.S. Dep't of the Interior, to Sec'y of the Interior, U.S. Dep't of the Interior, regarding The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014) [hereinafter 2014 DOI Guidance], https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf; Memorandum from Daniel H. Jorjani, Solic., U.S. Dep't of the Interior on Procedure for Determining Eligibility for Land into Trust Under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act (Mar. 10, 2020) [hereinafter 2020 DOI Guidance], https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Procedures_for_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf.

68. 2014 DOI Guidance, *supra* note 67, at 19.

69. *Id.*

70. *Id.* at 18–19.

71. Memorandum from Off. of the Solic., U.S. Dep't of the Interior regarding Withdrawal

noted that despite the two-part test, there was a significant amount of uncertainty regarding what materials qualified as evidence that a tribe was federally recognized in or before 1934.[72] The earlier guidance caused tribes to expend significant "time and resources researching and collecting any and all evidence" of federal jurisdiction status prior to 1934, resulting in the submission of sometimes thousands of pages of documentation.[73] As a result, the DOI determined that the earlier test was "[in]consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase 'recognized Indian tribe now under federal jurisdiction.'"[74]

After withdrawing the 2014 guidance, the Solicitor of the DOI released new guidance outlining a four-part test to determine whether a tribe is eligible for federal recognition under the first definition of the IRA.[75] First, the tribe should examine whether any post-1934 legislation applies the IRA to the tribe seeking federal recognition, looking to *Carcieri* and the DOI for examples of satisfactory legislation.[76] If no such legislation exists, the tribe must provide evidence that the federal government administered its duties over the tribe under §§ 16, 17, or 18 of the IRA, treaty rights, the 1934 Indian Population Report, federal lands acquisitions, or Kappler's *Indian Affairs, Law, and Treaties*.[77] If no tribal evidence related to steps one or two exists, the DOI

of Solicitor's Opinion M-37029, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act" (Mar. 9, 2020), https://www.doi.gov/sites/doi.gov/files/uploads/m-37055.pdf.

72. *Id.* at 2.

73. *Id.*

74. *Id.*

75. 2020 DOI Guidance, *supra* note 67.

76. *Id.*; *see also* Carcieri v. Salazar, 555 U.S. 379, 392 n.6 (2009) (providing examples of satisfactory legislation, including 25 U.S.C. § 473a (Territory of Alaska); § 1041e(a) (Shawnee Tribe); § 1300b–14(a) (Texas Band of Kickapoo Indians); and § 1300g–2(a) (Ysleta del Sur Pueblo)); Memorandum from Off. of the Solic., U.S. Dep't of the Interior, to Sec'y of the Interior, U.S. Dep't of the Interior, regarding Authority to Acquire Land into Trust in Alaska 1, 4, 10–11 (Jan. 13, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf (explaining that the DOI has the authority to take land in Alaska into a federal trust because Congress specifically extended § 5 of the IRA to Alaska in 1936).

77. 2020 DOI Guidance, *supra* note 67. Section 16 of the IRA authorizes the Secretary of the Interior to call a tribal vote for a tribal constitution or tribal bylaws. 25 U.S.C. § 5123(c). Section 17 enables the Secretary of the Interior to incorporate a tribe if one-third of the tribe's adults petition for incorporation. *Id.* § 5124. Under § 18, the IRA does not apply to tribes where a majority of adults voted against its application. *Id.* § 5125. If a tribe is still engaged in treaty obligations, then it is eligible for federal recognition. *Id.* § 5128. The 1934 Indian Population Report was a census report of individual Native Americans. 2020 DOI Guidance,

must determine "whether an applicant tribe's evidence sufficiently demonstrates that it was 'recognized' in or before 1934 *and* remained under jurisdiction in 1934."[78] Finally, if none of the evidence described in the first three steps is available, the DOI examines the entire application holistically to determine whether a tribe was recognized in or before 1934.[79]

This new test is a strong first step toward increasing certainty and minimizing litigation costs; however, the fourth step is incredibly vague. Examining the application holistically will likely result in similar issues where tribes will need to expend considerable resources to compile every possible piece of evidence of their existence, consequently submitting thousands of pages of documentation to the DOI. Unless the tribe can provide any of the evidence described in the first three steps, its experience trying to acquire tribal recognition will likely remain inefficient. Although only time will demonstrate the true impact of these new standards, the ambiguity in the fourth step indicates that this new guidance will fall short in resolving the IRA's ambiguity. This new test will likely be used by the DOI on remand from the U.S. District Court for the District of Columbia's decision to determine whether the Mashpee Wampanoag can maintain some of its ancestral land in a federal trust.

Since Congress passed the IRA so long after Europeans began to commit physical and cultural genocide against the Mashpee Wampanoag, it is unlikely that the Tribe will qualify for federal recognition under the first two steps of the new DOI guidance. Thus, the Mashpee Wampanoag will likely need to produce comparable quantities of evidence to qualify for federal recognition under the 2020 guidance as it would have under the 2014 guidance.

II. THE DOI'S ACTIONS REGARDING THE MASHPEE WAMPANOAG

A. Unreasonable Delays in Responding to Federal Recognition and Trust Applications

The Mashpee Wampanoag first applied for federal tribal recognition in

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supra note 67, at 4. Federal lands acquisition refers to any significant efforts that the United States took to place land in a federal trust for a tribe in the years leading up to 1934. *Id.* at 5. The heavily utilized Volume 5 of Kappler's *Indian Affairs, Laws, and Treaties* includes materials related to Indian Affairs in the years just following the IRA's 1934 enactment. *Id.* at 6.

78. 2020 DOI Guidance, *supra* note 67, at 6. There are three methods to determine whether the United States recognized a tribe in or before 1934: (1) whether treaties were in effect in 1934; (2) whether there are Executive Orders pertaining to the tribe; or (3) whether there is legislation related to the tribe applying for federal recognition. *Id.* at 7–8.

79. *Id.* at 8.

1975.[80] The DOI finally granted the Mashpee Wampanoag federal tribal recognition in 2007.[81] Immediately thereafter, the Tribe submitted a fee-to-trust application requesting that the DOI put land in a federal trust, which the DOI eventually approved in 2015.[82] Due to unreasonable delays in responding to the Tribe's letter requesting federal recognition, the Pequot and Mohegan Tribes helped the Mashpee Wampanoag hire anthropologists, ethnographers, and legal experts to compile 54,000 pages of evidence collected over 400 years to validate its legitimacy.[83]

In 2001, Judge James Robertson noted that the delay in the DOI's decision was unreasonable, and in 2005, he helped establish a strict deadline for the DOI to release its decision.[84] Thus, after thirty-two years, the Mashpee Wampanoag gained tribal recognition, but only after considerable financial expense and the lucky support of a U.S. District Court judge.[85] The Mashpee Wampanoag is not the only tribe that the DOI has subjected to extreme delays in the federal recognition process.[86] For tribes that have been waiting for decades for the DOI to respond, they must also adapt to the changing landscape within Indian law and, most notably, the repercussions of the 2009 *Carcieri* decision.

B. Litigation Following the DOI's Decision to Place Land into Federal Trust

After the DOI approved the Mashpee Wampanoag's fee-to-trust application in 2015, the Tribe secured 151 acres of land in Taunton, Massachusetts and 170 acres of land in Mashpee, Massachusetts.[87] Since the DOI did not officially recognize the Mashpee Wampanoag as a tribe until 2007—long after the IRA's 1934 date of enactment—the Tribe relied on the

80. SOLIZ, *supra* note 4, at 90.

81. *Id.* at 92.

82. BUREAU OF INDIAN AFFS., *supra* note 18, at ii; BUREAU OF INDIAN AFFS., *supra* note 20, at 67 (describing that a fee-to-trust application must be a written request that the Secretary of the Interior take the land into trust for the applicant tribe or individual).

83. *See* SOLIZ, *supra* note 4, at 91–92 (detailing the Mashpee Wampanoag's use of the significant income that the Pequot and Mohegan Tribes acquired by operating casinos in Connecticut); *see also* Coronado, *supra* note 3, at 575.

84. SOLIZ, *supra* note 4, at 225.

85. *See id.*; *see also* Coronado, *supra* note 3, at 574–75, 577 (noting that the court did not consider the significant burden on the Mashpee Wampanoag to convert its oral history into a written record and that the Tribe was distinct from other tribes in that it was mostly able to stay on the same land despite immense pressure to leave).

86. *See* Coronado, *supra* note 3, at 560 (discussing the circumstances surrounding the Eastern Pequots' lack of response from the DOI despite filing a letter requesting federal recognition in 1978).

87. BUREAU OF INDIAN AFFS., *supra* note 18, at ii.

second definition of "Indian" under the IRA to file its request for the Secretary of the Interior to place land in a federal trust.[88] Because the Mashpee Wampanoag's tribal land was in a federal trust, the U.S. government had an obligation to protect reservation land, safeguard the Tribe's right to self-governance, and manage any resources on the land and tribal assets in the Tribe's best interest.[89]

In *Littlefield v. Mashpee Wampanoag Indian Tribe*,[90] residents of Taunton challenged the DOI's 2015 decision to place land into a federal trust for the Mashpee Wampanoag.[91] Throughout this litigation, the courts and the DOI determined that the Mashpee Wampanoag did not qualify as "Indian" under any of the definitions under the IRA.[92] Before the case arrived in the First Circuit, the U.S. District Court for the District of Columbia remanded the case to the Secretary of the Interior to determine whether the Mashpee Wampanoag qualified as "Indian" under the first definition of the IRA.[93] In 2018, the Secretary determined that the Mashpee Wampanoag did not qualify as "Indian" under the first definition.[94] However, the Secretary limited the 2018 decision to analysis of the Tribe's jurisdictional status in 1934 and did not revisit the 2015 conclusion that the Tribe qualified as "Indian" under the IRA's second definition.[95]

Subsequently, the First Circuit decided that the Mashpee Wampanoag Tribe

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88. *See id.* at 80 (acknowledging that the Mashpee Wampanoag has had control of the land granted to it for centuries and thus qualifies as "Indian" under the second definition of the IRA, which encompasses "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation").

89. *See* Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 276–77 (2003); *see also* Judith V. Royster, *Equivocal Obligations: The Federal-Tribe Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 333 (1995) ("This full trust relationship arises from comprehensive federal management of tribal assets, whether that management is established by comprehensive statutes and regulations or by actual pervasive federal control.").

90. 951 F.3d 30 (1st Cir. 2020).

91. *Littlefield*, 951 F.3d at 34; *see also* Murphy, *supra* note 24 (reporting that Taunton homeowners argued that building a casino would ruin the residential nature of their neighborhood).

92. *Littlefield*, 951 F.3d at 33–34.

93. *Id.* at 34.

94. *Id.*; Letter from Tara Sweeney, Assistant Sec'y for Indian Affs., U.S. Dep't of the Interior, to Hon. Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe 1 (Sept. 7, 2018), https://bloximages.chicago2.vip.townnews.com/capenews.net/content/tncms/assets/v3/editorial/a/2b/a2bbaabf-32dc-5a8d-a050-99abedaeb769/5b97e59502aa6.pdf.pdf.

95. *Littlefield*, 951 F.3d at 34; Letter from Tara Sweeney to Cedric Cromwell, *supra* note 94, at 28.

was not "Indian" under the IRA's second definition[96] based on its analysis of the word "such."[97] The court rejected the Tribe's argument that the word "such" is ambiguous and held that its plain meaning—based on dictionaries used at the time of the IRA's enactment—"limited the words it modified to those with characteristics just described."[98] The court concluded that the word "such" in the IRA's second definition modifies the phrase "any recognized Indian Tribe now under federal jurisdiction" from the first definition.[99] According to the court, the IRA's second definition "newly encompasses certain descendants of such members" included in the first definition.[100] Since the BIA improperly relied on the IRA's second definition to take the Mashpee Wampanoag's land into federal trust in its 2015 decision, the First Circuit concluded that the Secretary of the Interior could not place land into a federal trust for the Mashpee Wampanoag.[101] In response to *Littlefield*, the DOI revoked the Mashpee Wampanoag's tribal land from federal trust.[102]

In *Mashpee Wampanoag Tribe v. Bernhardt*,[103] the Tribe challenged the Secretary of the Interior's decision to revoke its land from federal trust in the U.S. District Court for the District of Columbia.[104] The court concluded that the Secretary incorrectly applied the DOI's two-part test[105] to determine whether the Tribe met the IRA's first definition of "Indian" in the 2018 decision.[106] Consequently, the court remanded the case to the Secretary to decide whether the land should permanently remain in a federal trust.[107]

After years of struggle leading up to the Mashpee Wampanoag's official tribal recognition in 2007 and years of battling *Carcieri*-created barriers in the courts, a change in administration has secured the Mashpee Wampanoag's

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96. 25 U.S.C. § 5129 (defining "Indian" as "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation").

97. *Littlefield*, 951 F.3d at 37; *see also* Justin Saunders, *Court Denies Mashpee Wampanoag Tribe's Land Into Trust Appeal*, CAPECOD.COM (Feb. 28, 2020), https://www.capecod.com/newscenter/court-denies-mashpee-wampanoag-tribes-land-into-trust-appeal/ (quoting Cedric Cromwell, Chairman of the Mashpee Wampanoag Tribe) ("Much of the case revolved around the ambiguity of two words—'now' and 'such.'").

98. *Littlefield*, 951 F.3d at 37–38.

99. *Id.* at 37.

100. *Id.* at 38.

101. *Id.* at 36–37, 41.

102. DOI Memorandum on *Littlefield*, *supra* note 31.

103. 466 F. Supp. 3d 199 (D.D.C. 2020).

104. *Id.* at 206.

105. 2014 DOI Guidance, *supra* note 67.

106. *Bernhardt*, 466 F. Supp. 3d at 236.

107. *Id.*

federal recognition status and trust land—at least for now. The courts and the DOI have issued conflicting decisions and interpretations, and the Mashpee Wampanoag remains in flux regarding U.S. acknowledgment of its identity and sovereignty. The system of tribal recognition and placing tribal land in a federal trust is time consuming, costly, litigation-heavy, and uncertain. Thus, Congress, the courts, and the DOI must reform these administrative processes to promote certainty, efficiency, and tribal self-determination.

III. RECOMMENDATIONS

The IRA contains considerable ambiguous language, which caused the DOI and federal courts to issue interpretations of various terms within the statute.[108] Despite these efforts, the tribal recognition and federal land trust processes remain uncertain and inefficient, creating harm by adding significant litigation costs, overextending judicial resources, and delaying or altogether denying tribes the benefits of holding their tribal land in a federal trust.[109] These realities are aptly apparent in the Mashpee Wampanoag's 400-year struggle first for federal recognition, and then for its tribal land to be placed in a federal trust.[110]

To prevent future harm to the Mashpee Wampanoag and tribes across the United States, the government must significantly reform its tribal recognition and federal land trust processes. First, Congress should bypass the DOI's role and pass a bill granting the Mashpee Wampanoag federal tribal status, and amend and supplement the IRA to resolve ambiguity and foster tribal sovereignty. Second, the judiciary should repeal *Carcieri*. Notably, the DOI's most recent guidance providing a four-part test to determine whether a tribe is considered "Indian" under the first IRA definition is a useful step working within the constraints of *Carcieri*. However, dismantling these constraints entirely would most effectively minimize ambiguity. Finally, Congress should restructure the DOI to include more tribal representation in its decisionmaking processes while reducing its paternalistic approach to overseeing the tribal recognition process and tribal lands.

A. Legislative Solutions

The simplest method to resolve this specific manifestation of tribal recognition uncertainty, as it pertains to the Mashpee Wampanoag, is for the Senate to pass the Mashpee Wampanoag Reservation Reaffirmation

108. *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379, 382, 395 (2009); *see also supra* Part I.

109. *See supra* Part II.

110. *See supra* pp. 102–07.

Act (MWRRA), which the House passed on May 15, 2019.[111] It reaffirms the Mashpee Wampanoag Tribe reservation as trust land in Massachusetts.[112] Additionally, it requires the dismissal of pending actions relating to the land and prevents the filing of new suits.[113] By passing this bill, the Mashpee Wampanoag would automatically retain its federal tribal recognition and, because Congress has plenary power, it would be nearly impossible for any entity to contest that decision.[114]

Similarly, Congress should amend the IRA's ambiguous definition of "Indian"[115] to expressly include every tribe, regardless of when the tribe received federal recognition. Defining "Indian" in this way would enable more tribes to secure land in federal trusts with the certainty that, once secured, the land would not be relinquished. With this modification, the Mashpee Wampanoag would be securely classified as a federally recognized tribe and would not face the potential threat of having its federal recognition stripped again in the future.

Alternatively, Congress should create legislation enabling the Secretary of the Interior to put land in a federal trust, regardless of when a tribe is federally recognized, to directly combat the uncertainty and ambiguity that have prevailed since *Carcieri*. Eliminating this ambiguity would also give the DOI and courts less room to interpret unclear terms. This would reduce the extent to which major tribal decisions are dependent on judges, different administrations' changing priorities, and even any particular Congress's tribal stance.[116] Resolving the IRA's ambiguity would provide more consistency and reduce discretion afforded to the DOI to alter tribes' ability to gain federal recognition and have their land placed in a federal trust.

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111. Mashpee Wampanoag Reservation Reaffirmation Act, H.R. 312, 116th Cong. (2019).

112. *Id.* § 2(a).

113. *Id.* § 2(b).

114. *See, e.g.*, United States v. Lara, 541 U.S. 193, 194 (2004) ("[T]he Constitution, through the Indian Commerce and Treaty Clause, grants Congress 'plenary and exclusive' powers to legislate in respect to Indian tribes . . . [and Congress and the Supreme Court] ha[ve] interpreted these plenary grants of power as authorizing it to enact legislation that both restricts tribal powers and, in turn, relaxes those restrictions.").

115. *See* 25 U.S.C. § 5129; *supra* Part I.

116. *See* Matt Irby, Comment, *The Opioid Crisis in Indian Country: The Impact of Tribal Jurisdiction and the Role of the Exhaustion Doctrine*, 43 AM. INDIAN L. REV. 353, 386–87 (2019) (describing how the government's constant policy and legislative changes negatively impact tribes because they weaken tribal governments and break tribes down only for the government to recreate their sovereignty according to the whim of the policy or legislative temperature); *see also* Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 265 (1996) (noting the DOI's compliance with Termination Era policies, even though they mostly originated in the legislature).

Even more broadly, Congress should pass legislation related to the government and tribes' guardian/ward relationship that would increase tribal self-determination. For example, Congress should ensure that tribes have complete control over the energy resources on their land.[117] With the ability to control the resources on their land, tribes would acquire a source of income that would increase their economic independence.[118] Similarly, enabling tribes, rather than the federal government, to manage their own trust assets would be an important step toward increased self-determination by increasing both tribes' financial independence and their separate tribal rule.[119] This would further reduce the power of the DOI, as it would no longer oversee the use of resources on tribal land in federal trusts. As a result, some of the remaining colonialist paternalism would be eliminated from its role.

Congressional solutions are likely, as the federal government has historically affirmed the importance of tribal sovereignty.[120] Because Congress provided some respite from a negative Supreme Court case in the past,[121] it could provide tribes with the same relief from the negative effects of the *Carcieri* decision.[122] Thus, by specifically addressing the Mashpee Wampanoag's struggle for sovereignty, clearly defining the IRA's ambiguous language, and passing legislation to undermine the strength of *Carcieri*, Congress could significantly

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117. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 452–53 (2017) (affirming that research demonstrates that strengthening tribal governments increases tribes' economic independence, which could be achieved through legislation giving tribes full control over the resources on their land and the agency to determine how to manage their trust assets).

118. *Id.* at 453.

119. *Id.*

120. *Id.* at 452 ("Congress has repeatedly recognized the federal obligation to promote tribal sovereignty."). *But see* Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 60 (2003) (acknowledging that the Supreme Court determined, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), that Indian tribes do not have criminal jurisdiction over non-Indians for three reasons: (1) "all three branches of the federal government shared a common historical understanding that tribes could not exercise criminal jurisdiction over non-Indians[;]" (2) the Suquamish Treaty indicated that tribal governments lack jurisdiction over non-Indians; and (3) tribal governments have only partial powers that are ultimately dependent on the U.S. government).

121. *See, e.g.*, *Oliphant*, 435 U.S. at 191 (evaluating a claim pursuant to the Indian Civil Rights Act of 1968 in the context of a reservation's sovereignty and jurisdiction over non-Indian criminal conduct).

122. *See, e.g.*, Violence Against Women Act, 34 U.S.C. §§ 12291–12512; Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified in scattered sections of 18 U.S.C. and 25 U.S.C.) (providing congressional relief to anti-tribe Supreme Court decisions).

increase tribal sovereignty and reduce tribal reliance on the DOI.

Although passing the MWRRA, and amending and supplementing the IRA, are crucial for the Mashpee Wampanoag's survival, even broader change is necessary to improve the tribal recognition process for all tribes. It is inefficient to rely solely on Congress to pass legislation to federally recognize individual tribes when Congress has delegated this role to the DOI.[123] Significant reliance on Congress indicates that the DOI is not functioning properly or fulfilling its federal recognition or trust responsibilities.[124] Tribal futures should not hang in the uncertain and slow congressional process. Therefore, legislative action must occur in conjunction with judicial and DOI reform to most effectively impact the tribal recognition and federal land trust processes.

B. Repealing Carcieri

The Supreme Court should repeal *Carcieri* to add certainty and efficiency to the process of placing and maintaining tribal land in federal trusts.[125] *Carcieri* has imposed enormous barriers on tribes attempting to acquire land in a federal land trust and caused years of unnecessary litigation, wasting resources and time.[126] Additionally, it has created uncertainty and allowed the DOI to exercise arbitrary decisionmaking.[127]

Although the Court's conservative majority may indicate that it is unlikely to repeal *Carcieri*, the 2019–2020 Supreme Court term demonstrated that some members of the current bench may lean pro-tribe.[128] In *McGirt v. Oklahoma*,[129] Justice Neil Gorsuch, a conservative originalist nominated by

123. *See, e.g.*, U.S. DEP'T OF THE INTERIOR, ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (2014), https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf (reaffirming the DOI's commitment to its trust responsibility).

124. *See id.* at 1, 5 (establishing guiding principles for the DOI to follow to uphold its "well-established" trust obligations).

125. Carcieri v. Salazar, 555 U.S. 379, 382–83 (2009).

126. *See* Sullivan & Turner, *supra* note 29, at 57–58, 92 (analyzing the increased litigation and uncertainty following the *Carcieri* decision).

127. *See id.* at 70–71 (describing the conflicting opinions among tribes on what the DOI's response to the *Carcieri* decision should be).

128. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2478–79 (2020) (holding that half of present-day Oklahoma is "Indian Country" and upholding the promise of land to Creek Nation). *But see* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020) (allowing a gas pipeline to pass through national forests in the Appalachian Mountains and Haliwa-Saponi, Lumbee, Monacan, and Rappahannock land).

129. 140 S. Ct. 2452 (2020).

President Trump, wrote for the majority in favor of Creek Nation—indicating that the 2019–2020 Supreme Court term favored tribal sovereignty.[130] However, the confirmation of Justice Amy Coney Barrett to replace Justice Ruth Bader Ginsburg may affect the outcome of future federal Indian law decisions.[131] Although judicial nominations can lead to unpredictable results, it is uncommon for conservative judges to write pro-tribe decisions.[132]

If the Supreme Court repeals *Carcieri*, it would remove a layer of ambiguity for the DOI in determining whether to accept tribes' petitions for federal recognition. Without the Court imposing the narrow interpretation of "now" to the IRA, the DOI would have more leeway to interpret "now" to mean at the current moment. Therefore, it would not need to conduct an inquiry into whether the tribes existed almost 100 years ago. Instead, the DOI could focus on whether the tribe legitimately exists today. This would reduce the tribe's expense of preparing vast documentation to prove its historic value and decrease the time it takes for the DOI to review tribal applications. Thus, repealing *Carcieri* would reduce the time and expense of the federal tribal recognition process while increasing its reliability.

C. Restructuring the DOI

Congress must significantly alter the DOI's role in the process of tribal recognition and placing tribal land in federal trusts to preserve tribes' ability to gain federal recognition and the resulting benefits of the federal trust responsibility. First, Congress should disband the DOI's Office of the Special Trustee for American Indians (OST)[133] per the continual request of

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130. *Id.* at 2482 (explaining that Congress's post-Trail of Tears 1832 promise to Creek Nation that the land in eastern Oklahoma would forever belong to the Tribe—which Congress reaffirmed in 1866—constituted a binding promise that the courts cannot ignore).

131. Memorandum from Joel West William, Senior Staff Att'y, Native Am. Rts. Fund, to Tribal Leaders of the Nat'l Cong. of Am. Indians regarding The Nomination of Amy Coney Barrett to the Supreme Court of the United States (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf?_ga=2.221841816.14651 75848.1602268586-1865702208.1602268586.

132. Stare decisis could present another barrier to the court—it is established practice for judges and justices to defer to previous decisions. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining stare decisis as "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation").

133. The American Indian Trust Management Reform Act of 1994 established the OST to manage and oversee the use of Native American trust assets. *About this Bureau*, BUREAU OF TR. FUNDS ADMIN., https://www.doi.gov/ost/about_us (last visited May 18, 2021). Because the goal is for tribes to manage their own trust assets to reduce paternalism and increase self-

Native American tribes.[134] Allowing tribes to control their own assets would increase their ability to self-govern, thereby achieving the major policy goals of the Self-Determination Era.[135]

To disband the OST, Congress needs to pass a bill revoking its establishment and explicitly giving tribes the ability to control their own trust assets without oversight.[136] Because the Senate is currently controlled by the Democratic Party, it is possible that a bill revoking the OST could pass right now. Additionally, Deb Haaland will serve as the first Native American Secretary of the Interior.[137] Her appointment may bode well for efforts to restructure the offices in the DOI, so dissolution of the OST may be more likely under her leadership.[138] Doing so will give tribes control over any money they make, thereby increasing their economic independence from the U.S. government and expanding tribal self-determination.[139]

Additionally, the Secretary of the Interior should utilize its authority under the Indian Trust Asset Reform Act and establish an Under Secretary to serve the BIA.[140] The President should seek guidance from tribal members when selecting BIA leadership and appoint a Native American to serve as the Under Secretary.[141] A Native American Under Secretary would be better equipped to represent tribal interests and ensure that administrative decisionmaking centers tribes. The Under Secretary would act as a liaison between tribes, the BIA, and other agencies within the DOI.[142]

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determination, there is no need for the OST.

134. *See Indian Trust Reform: Hearing on the Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of Funds and Natural Resources, Might Be Reformed Before the S. Comm. on Indian Affs.*, 109th Cong. 17–19 (2005) (statement of Darrell Hillaire, Chairman, Lummi Nation) (condemning the harm caused by the OST's mismanagement of tribal funds); *see also* Rey-Bear & Fletcher, *supra* note 117, at 454 (describing the concern that the OST has outlived its purpose).

135. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 1–2 (7th ed. 2017).

136. *See* Rey-Bear & Fletcher, *supra* note 117, at 454–55 (describing the need to remove the OST, which Congress could accomplish by leveraging its plenary power).

137. Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021, 10:59 AM), https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html.

138. *Id.*

139. *See* GETCHES ET AL., *supra* note 135, at 1–2.

140. Indian Trust Asset Reform Act (ITARA), 25 U.S.C. § 5633(a). The President appoints the Under Secretary by and with the advice and consent of the Senate. *Id.* § 5633(b).

141. *See* Rey-Bear & Fletcher, *supra* note 117, at 454.

142. *Id.* at 454–55; *see also* 25 U.S.C. § 5633(c) (outlining the Under Secretary's responsibilities).

The purpose of the Under Secretary would be to coordinate trust administration among all agencies under the DOI that have trust responsibilities.[143] The Under Secretary would consult with tribes about their own interests within the trust responsibility.[144] This would provide tribes with a more consistent voice within the divisions of the DOI that focus on trust responsibility, and those subagencies would also be more unified in meeting tribal members' needs.[145]

Additionally, the Under Secretary should oversee the tribal recognition and land-into-trust process performed by the Secretary of the Interior and the BIA.[146] By overseeing the DOI's trust activities, the Under Secretary could ensure that the DOI complies with its federal trust responsibilities.[147] By reforming the DOI's role in a way that centers tribes and Native Americans, its paternalistic overtures could instead align more strongly with policies of tribal self-governance and economic independence.

CONCLUSION

The Mashpee Wampanoag has been fighting for its land, culture, and ultimately survival since the Tribe first encountered Europeans.[148] After decades of fighting and finally receiving federal recognition and the right to hold land in a federal trust, the DOI attempted to revoke the Tribe's land from trust.[149] The Mashpee Wampanoag's struggle highlights the uncertain and arbitrary nature of maintaining tribal lands.[150] The IRA's ambiguity and the Supreme Court's decision in *Carcieri* have left tribes throughout the United States at risk of losing their land or being unable to acquire tribal land based on the year that they received official federal recognition.[151]

There is urgent need for reform to provide greater access to justice and dignity to not only the Mashpee Wampanoag but also tribes across the United States. First, Congress should address these wrongs by passing the MWRRA to ensure the Mashpee Wampanoag's survival, enacting legislation to clarify the definition of "Indian" under the IRA to include tribes federally recognized

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143. 25 U.S.C. § 5633; Rey-Bear & Fletcher, *supra* note 117, at 455.

144. 25 U.S.C. § 5633(c)(3) (requiring the Under Secretary to "provide regular consultation with Indians and Indian tribes that own interests in trust resources and fund accounts"); Rey-Bear & Fletcher, *supra* note 117, at 454–55.

145. Rey-Bear & Fletcher, *supra* note 117, at 454–55.

146. *Id.*

147. *Id.* at 455–56.

148. *See supra* pp. 102–07.

149. *See supra* pp. 104–07.

150. *See supra* Part II.

151. *See supra* Sections I.A, I.B.

at any point, and supplementing the IRA with new legislation to increase tribal sovereignty. Second, the Supreme Court should repeal *Carcieri* to alleviate the litigation costs and uncertainty it has caused. Lastly, Congress should restructure the DOI to reduce paternalism and maximize tribal self-governance. With these changes, the tribal recognition process will become more certain and efficient, while maximizing tribal sovereignty and economic independence.