



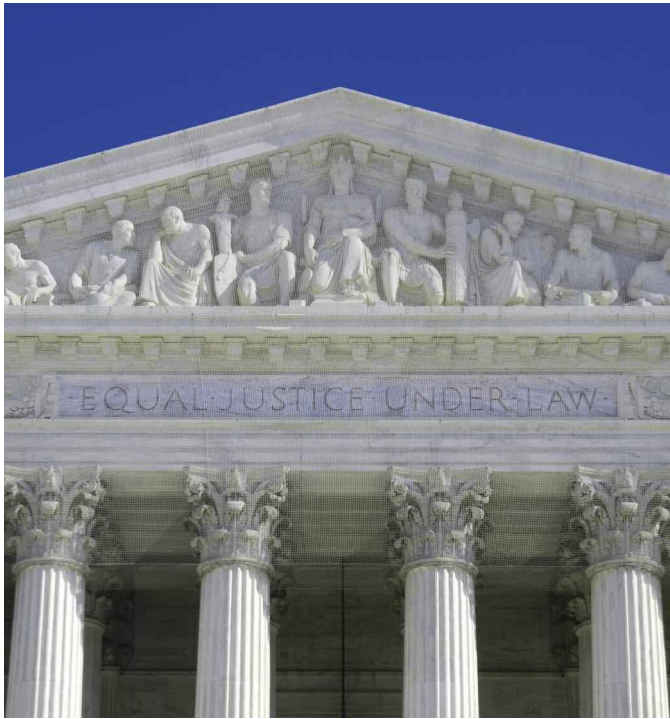
Land Into Trust Process After Carciari

By Andy Moore & Erin Elliott

I. Introduction

The Indian Reorganization Act (the “IRA”) authorizes the Secretary of the Interior to place land into trust “for the purpose of providing land for Indians.”¹ The opportunity to have federal land placed into trust is vitally important for the economic self-sufficiency of Indian tribes in the United States. Many people understandably equate the Department of the Interior’s (“DOI”) ability to place land into trust with tribal casinos, which is one of the primary purposes of the Secretary of Interior’s authority in many instances. But trust lands are not simply used for gaming purposes. As noted by Congressman Nick Rahall during a Congressional hearing on April 1, 2009:

Placing land into trust for an Indian tribe is an essential component of combating the situations experienced by Indian tribes as a result of their treatment by the United States of America . . . Land is an essential component of sovereignty for any government, including tribal governments. Not only does a land base help promote cultural preservation which is essential for the survival of a group of people, but it also affects the ability of a government to provide for its citizens.²



With its decisions in *Carcieri v. Salazar* in 2009 and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* in 2012, the United States Supreme Court restricted a tribe's ability to protect trust land. The *Carcieri* case analyzed the definition of "Indian" within the IRA. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934 . . ." ³ The Court interpreted the definition of "Indian" and the inclusion of the word "now" to mean a tribe that was under federal jurisdiction in 1934, the time the statute was enacted. By narrowly interpreting the definition of "Indian," the Court limited the DOI Secretary's authority to place land into trust for tribes under federal jurisdiction in 1934. However, in 1934, there was no definitive list of tribes "under federal jurisdiction." The Court did not further instruct as to what qualifies an Indian tribe as being "under federal jurisdiction," or what evidence the DOI should consider.

In the *Patchak* case, the Court ruled that the Quiet Title Act ("QTA") does not prohibit suits brought under the Administrative Procedure Act ("APA") by plaintiffs who do not assert property interest in that land, even though the QTA preserves sovereign immunity against claims that seek to regain title from the United States to trust land.⁴ As noted in Justice Sonia Sotomayor's dissent in the *Patchak* case, the decision would likely result in numerous suits being brought by plaintiffs who disagree with a tribe's proposed use for a parcel of land.⁵

II. Aftermath of *Carcieri* Decision

The *Carcieri* case was decided on February 24, 2009. A little more than a month later, on April 1, 2009, the United States House of Representatives Committee on Natural Resources conducted an oversight hearing related to the *Carcieri* decision. Congressman Rahall, the Chairman of the oversight hearing, noted that if the *Carcieri* decision stands unchallenged, "the consequences could be severe. The [DOI] will surely be bombarded with litigation challenging the status of lands . . . The mere existence of Indian housing, hospitals, schools . . . will be challenged, and Congress will have to enact legislation every time a tribe wants land placed into trust."⁶ Given the potential deleterious impact of the *Carcieri* decision, there has been a call for a *Carcieri* "fix." Bills have been introduced, but no legislative fix has passed. In fact, as recently as March 31, 2014, Senator Jon Tester of Montana introduced Senate Bill 2188, a bill to amend the IRA to apply it to all federally recognized Indian tribes regardless of when the tribe became recognized. However, as of July 31, 2014, Congress has not enacted a bill to address the issues created by the *Carcieri* decision.

III. The DOI Opinion

In this context, on March 12, 2014, the DOI addressed the *Carcieri* issue in a memorandum opinion (the "Opinion") which aimed to provide a meaning to the phrase "under federal jurisdiction" under the IRA.⁷ In its Opinion, the DOI asserts that the meaning of "under federal jurisdiction" is "a gap for the agency to fill" because the IRA does not unambiguously give meaning to the phrase.⁸ As the Opinion explains, the phrase "under federal jurisdiction" originated in a discussion regarding the meaning of the term "Indian" during the Senate Indian Affairs Committee hearing on May 17, 1934.⁹ During the hearing, Chairman Burton Wheeler, Democratic Senator from Montana, expressed that the definition of "Indian" should not be so overly-inclusive that it could include Indians who were essentially "white people."¹⁰ In response, then-Bureau of Indian Affairs Commissioner John Collier suggested that "now under federal jurisdiction" be added after the words "recognized Indian tribe."¹¹ No explanation was given as to what this phrase meant. Following the hearing, the Solicitor's Office prepared a memorandum recommending the phrase be deleted "because it was likely to 'provoke interminable questions of interpretation.'"¹²

Hoping to find some guidance as to the meaning of “now under federal jurisdiction,” the Opinion examines the policies under which the IRA was enacted. Around the time the IRA became effective, Indian tribes’ “economic conditions were unconscionable and Congress had sought to disband and dismantle tribal governance structures.”¹³ The DOI explained that the IRA’s land acquisition provisions are an effort to address the “dismal failure of the assimilation and allotment policy,” to economically rehabilitate the Indian tribes, and give the Indian tribes control over their property and affairs.¹⁴ Indeed, the IRA specifically states its purpose is to “conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.”¹⁵

The Opinion also examines Congress’ powers over Indian affairs. Beginning in 1790 with the Trade and Intercourse Act, Congress has asserted jurisdiction over certain interactions between Indian tribes and non-Indians.¹⁶ Through various other legislation (including the IRA itself) and Supreme Court cases such as *United States v. Kagama* (in which the Court held that Congress has “plenary authority” over Indians), the United States established the idea of federal supervision over Indian tribes. In 1887, Congress enacted the General Allotment

Act to divide tribally-owned lands among individual Indians in order to assimilate Indians into mainstream society, while the United States retained supervision over the lands. As the Opinion notes, this “left federal supervision over Indian lands firmly in place.”¹⁷

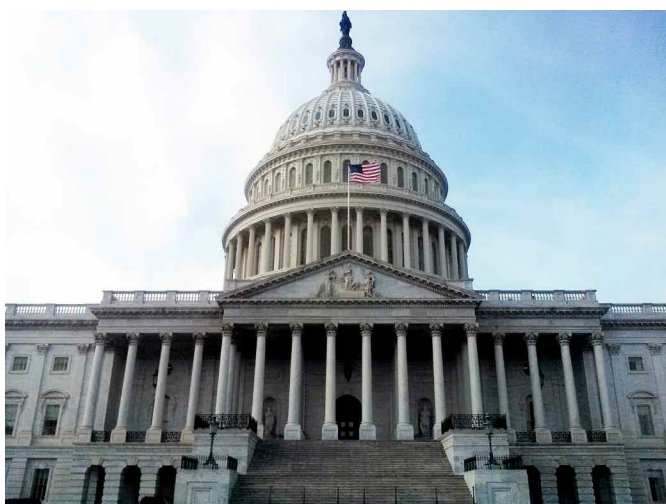
With this background in mind, the Opinion begins to dissect the meaning of “under federal jurisdiction.” The Opinion states that the *Carcieri* decision appears to direct the DOI “to point to some indication that in 1934 the tribe in question was in federal jurisdiction,” and therefore the DOI “will rely on evidence of a particular exercise of plenary authority, even where the United States did not otherwise believe that the tribe was under such jurisdiction.”¹⁸ The result is a two-part inquiry.

The Opinion identifies the first question as “whether there is a sufficient showing in the tribe’s history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had . . . taken an action or series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members - that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.”¹⁹ Evidence may include “the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions);



the education of Indian students at BIA schools; and the provision of health or social services to a tribe.”²⁰

The second question “is to ascertain whether the tribe’s jurisdictional status remained intact in 1934.”²¹ If the answer to the first question shows unambiguous evidence that the tribe was under federal jurisdiction in 1934, there is no need to proceed to this second question. The Opinion notes that “the Federal Government’s failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe’s jurisdictional status.”²² In fact, “the absence of any probative evidence that a tribe’s jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.”²³



IV. Conclusion

The DOI’s March 12, 2014 Opinion stresses that whether an Indian tribe was under federal jurisdiction in 1934 is a tribe-specific, fact intensive inquiry.²⁴ The Opinion points out that, because interpreting the phrase “under federal jurisdiction” is within the DOI’s authority, the Secretary’s “reasonable interpretation of the phrase should be entitled to deference.”²⁵ However, the *Carcieri* decision is still valid law and governs and influences how lower courts analyze and interpret the DOI Secretary’s authority to place land into trust for tribes. As noted by Brian Cladoosby, the President of The National Congress of American Indians, the Opinion “is encouraging, but *Carcieri* still stands . . . Tribes need a permanent, legislative solution . . . All tribes must be treated equally but as long as *Carcieri* is upheld, that is not possible and that is unacceptable.”

After being introduced on March 31, 2014, Senate Bill 2188 is progressing its way through the Senate. The bill has been discussed a couple of times by the United States Senate Committee on Indian Affairs. Congressional

action is necessary to make clear that the DOI has constitutional authority to regulate all Indian tribes, not just those under federal jurisdiction in 1934. As noted by Jerry Moran, Republican Senator from Kansas and one of the co-sponsors of Senate Bill 2188, the *Carcieri* decision created an unjust situation in which there are “two classes of Indians . . . those tribes recognized in 1934 and those recognized after. Tribes should no longer shoulder the burden of lawsuits and uncertainty that hinder their prosperity. The Secretary of Interior’s authority to take land into trust for all tribes is essential for economic development.”²⁶

Andy Moore is a Shareholder in Brownstein Hyatt Farber Schreck’s Las Vegas office. He is experienced in assisting clients with gaming regulatory and licensing matters before the Nevada Gaming Commission, Nevada State Gaming Control Board, and with liquor licensing matters before county and city licensing agencies in Nevada.

Erin Elliott is an Associate in Brownstein Hyatt Farber Schreck’s Las Vegas office where she assists on a broad range of gaming and licensing matters in the firm’s Gaming Law group.

¹ 25 U.S.C. § 465.

² Testimony from Congressional Oversight Hearing before the Committee on Natural Resources, April 1, 2009.

³ 25 U.S.C. § 479.

⁴ 132 S. Ct. 2199 (2012).

⁵ *Id.* at 2217-18 (Sotomayor, J., dissenting) (arguing that the Court’s decision will “create . . . perverse incentives for private litigants”).

⁶ *Supra*, note 2.

⁷ Memorandum from the United States Department of the Interior, Office of the Solicitor (March 12, 2014) (available at <http://www.doi.gov/solicitor/opinions/M-37029.pdf>).

⁸ *Id.* at 17.

⁹ *Id.*

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.* citing Pub. L. No. 73-383, 48 Stat. 984 (1934).

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ *Id.* at 19.

²² *Id.* at 20.

²³ *Id.*

²⁴ *Id.* at 19.

²⁵ *Id.* at 17.

²⁶ Tester and Moran Introduce Bill Supporting Restoration of Tribal Homelands, United States Senate Committee on Indian Affairs, Press Release (April 1, 2014) (available at <http://www.indian.senate.gov/news/press-release/tester-and-moran-introduce-bill-supporting-restoration-tribal-homelands>).