



CERF/CERA REPORT



MEMBER UPDATE

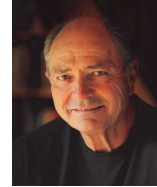
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News Flash
Judy Bachman - NY



Butch Cranford - CA

SCOTUS (Supreme Court of the United States) has **ACCEPTED** for Cert two cases whose outcome has a direct bearing on New York land status and ALL of Indian Country. Oklahoma v. Castro-Huerta 21-429 will be argued in late April. CERA/CERF has filed an amicus brief regarding the issues presented.

1. Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian Country and 2. Whether *McGirt v. Oklahoma* ... should be overruled (Land Status).

ALSO accepted is 21-376 *Haaland v. Brackeen*. The question presented is whether the Indian Child Welfare act assigns rights according to race in a manner forbidden by the United States Constitution.

Once again CERA/CERF are front and center before SCOTUS. We have filed our amicus brief on *Castro-Huerta* and will soon file one in *Brackeen*. We will be following both issues for final decisions and will keep you informed. In the meantime your help would be appreciated. If you are a member, please be sure your \$35.00 yearly dues are up to date. If you are not a member \$35.00 is all it takes to join. A tax deductible contribution to CERF of any amount is always welcomed.

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The IRA, Federal Law – The *Carcieri* Decision – DOI Interpretations – Administrative Fixes – Two-Part Inquiries – M-Opinions – More DOI Interpretations – More M-Opinions – Enough Already!!

In 2009 the Supreme Court decided *Carcieri v. Salazar* where plaintiff Rhode Island Governor *Carcieri*'s petition for writ of certiorari presented the Court with the following question about the 1934 Indian Reorganization Act (IRA). "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." The question was asked about the Secretary's authority pursuant to the definition of Indian in Section 19 of the IRA. The following excerpt is the first definition from Section 19 which is at issue in *Carcieri*.

Sec. 19. *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, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation,*

The Plaintiff, Governor *Carcieri*, argued the word "now" in the phrase "recognized tribe now under federal jurisdiction" required an Indian tribe to have been both recognized in 1934 and under federal jurisdiction in 1934. The federal respondents argued "now" could mean anytime after 1934.

The Supreme Court agreed with Governor Carcieri and decided “now” as used in the phrase “recognized tribe now under federal jurisdiction” in Section 19 meant in 1934.

Justice Thomas authored the 6 – 3 majority decision which found the statute, 25 U.S.C. §479, was unambiguous and Congress left no gap for the federal respondents to fill (interpret) and added Congress limited the statute by the word “now”.” The Court decided “now” as used in Section 19 meant in 1934 and with “now” limiting the statute, tribes must be recognized in 1934 and under federal jurisdiction in 1934 to be eligible for fee to trust. (25 U.S.C. §479 is now 25 U.S.C. §5129)

At Section IV, Justice Thomas summarized and concluded the Carcieri decision with the following.

“We hold that the term “now under federal jurisdiction” in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed. Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that “[i]n 1934, the Narragansett Indian Tribe ... was neither federally recognized nor under the jurisdiction of the federal government.” Pet. For Cert. 6. The respondents’ brief in opposition declined to contest this assertion. See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court’s Rule 15.2. We therefore reverse the judgment of the Court of Appeals. It is so ordered.”

Justice Thomas, in Section IV, specifically directs attention to the fact that the petition for writ of certiorari specifically represented that the Narragansett tribe was neither federally recognized in 1934 nor under federal jurisdiction in 1934 and that the federal respondents brief in opposition declined to contest that assertion. According to Supreme Court rules, the federal defendants, by declining to contest the questions presented to and accepted by the Court, allowed the Court to accept as fact that the Secretary had no authority pursuant to the Indian Reorganization Act (IRA) to acquire land for Indian tribes not recognized in 1934 and not under federal jurisdiction in 1934. This landmark decision sent shock waves through the Department of Interior (DOI), the Bureau

of Indian Affairs (BIA) and tribal leaders.

After *Carcieri*, the DOI quickly scheduled how to “fix” *Carcieri* consultations with tribal leaders in Sacramento, CA, in Minneapolis, MN, and in Washington, D.C. A review of the transcripts of those consultations indicate DOI and BIA Officials informed tribal leaders they would lobby Congress to “fix” *Carcieri*. Tribal leaders were assured the Department would administratively “fix” *Carcieri* if Congress failed to act.

After it became apparent that Congress was not going to “fix” *Carcieri*, DOI and BIA Officials introduced their “administrative fix” in a December 2010 Record of Decision (ROD) to acquire land in trust for a casino for the Cowlitz tribe. Their “administrative fix” ignored the unambiguous language of Section 19 (25 U.S.C. §5129) and the Supreme Court decision in *Carcieri* related to the phrase “recognized Indian Tribe now under Federal jurisdiction, ...” which required a tribe to be both recognized in 1934 and under federal jurisdiction in 1934. Instead they developed an “ambiguous” “two-part inquiry” for determining if a tribe was “under federal jurisdiction” in 1934 and ignored any inquiry related to a recognized tribe in 1934. The “two-part inquiry” from page 94 of the 2010 Cowlitz ROD is included below.

“Having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department’s early practices, as well as the Indian canons of construction, I construe the phrase “under federal jurisdiction” as entailing a two-part inquiry. The first question is to examine whether there is sufficient showing in the tribe’s history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe’s history prior to 1934, 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. Some federal actions may in and of themselves demonstrate that a tribe was at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.”

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealing with the tribe. Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, 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. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may, of course, be other types of actions not referenced herein that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe.

Once having identified that the tribe was under federal jurisdiction, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. It should be noted, however, that the Federal Government's failure to take any action 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. Moreover, the absence of any probative evidence that a tribe was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

This interpretation of the phrase "under federal jurisdiction" including the two-part inquiry outlined above, is consistent with the legislative history, which is discussed elsewhere in this memorandum shows that the phrase was meant to qualify the term "recognized Indian tribe," as well as with Interior's post-enactment practices in implementing the statute as discussed above.

The lack of any substantive specific criteria for what actions might establish a tribe was under federal jurisdiction allowed DOI and BIA Officials to "interpret" nearly any action taken by the

United States demonstrated a tribe was under jurisdiction. The first question should have been was the tribe recognized in 1934 which is easily answered as in 1934 a tribe was recognized as having a recognized "government to government" relationship in two unambiguous specific ways, with an Act of Congress and with a ratified treaty. This "two-part inquiry" "administrative fix" was used to take land into trust for the Cowlitz tribe which was recognized in 2002, just 68 years after the IRA was enacted in 1934.

Challenges in federal courts to the "two-part inquiry" failed to overturn the Cowlitz ROD and the DOI continued using the "two-part inquiry" as authority for approving fee to trust applications for other tribes not recognized in 1934, including a May 2012 ROD for the Ione Band allegedly recognized in 1994 with a memo. The Department's successful uses of the "two-part inquiry" resulted in the Solicitor finally issuing a 26 page M-Opinion, M-37029 formalizing the "two-part inquiry" in 2014.

The Ione Band's 2012 ROD refers to the 2010 Cowlitz ROD and included word for word the "Cowlitz two-part inquiry" included above. Nowhere in the Ione ROD is there any mention of any Ione Band recognition in 1934. Based on the *Carcieri* decision and the unambiguous definition of Indian at 25U.S.C.5129 the Ione Band is not eligible for fee to trust which is one of the legal challenges No Casino in Plymouth (NCIP) has again raised in federal district court with a May 2018 APA challenge to the May 2012 ROD.

NCIP initially challenged the 2012 ROD in June 2012 in federal district court which resulted in a decision NCIP appealed to the 9th Circuit in April 2016. In their reply brief the federal defendants included M-37029 as a reference document. NCIP challenged the inclusion of M-37929 because it did not exist in May 2012 when the Ione ROD was issued and was not part of the Administrative Record. The Ione ROD relied solely on the Cowlitz 2010 ROD "two-part inquiry" as the process used to determine Ione was "under federal jurisdiction" in 1934.

NCIP's 2018 APA challenge has not been decided. However, on March 9, 2020 the Solicitor withdrew the "Cowlitz two-part procedure" and M-37029 with M-37055. The Solicitor after reviewing the "Cowlitz two-part procedure" formalized in M-37029 concluded the following:

Considerable uncertainty remains, however, over what evidence may be submitted to demonstrate federal jurisdictional status in and before 1934. Because of this, many applicant tribes spend considerable time and resources researching and collecting any and all evidence that might be relevant to this inquiry, in some cases prompting submissions totaling thousands of pages.

To remove such uncertainties and to assist tribes in assessing eligibility, in 2018, the Solicitor's Office began a review of Sol. Op. M-37029's two-part procedure for determining eligibility under Category I, and the interpretation on which it relied. **This review has led me to conclude that Sol. Op. M-37029's interpretation of Category I is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."** Therefore, I hereby withdraw Sol. Op. M-37029." (*emphasis added*)

While it was not clear how this withdrawal might affect NCIP's lawsuit, it appeared to be good news since the Solicitor clearly stated the criteria from the "Cowlitz two-part procedure" and M-37029 was not consistent with the ordinary meaning, federal law, Congressional intent, or the Department's understanding of the phrase "recognized tribe now under federal jurisdiction" resulting in considerable uncertainty in the process. In a word the "two-part procedure" would be fatal to the approval of the Ione Band's fee to trust application. The court has taken no action on the MJP.

Then in April 2021, the Principal Deputy Solicitor suddenly withdrew M-37055 with M-37070 pursuant to a White House executive order.

Withdrawn according to the Principal Deputy Solicitor "Because there was no tribal consultation with respect to either of these Opinions, pursuant to delegated authority, I hereby withdraw ..., M-37055, and the procedures. This will allow the proper level of consultation to be conducted with Tribal Nations on this important issue. Furthermore, I am reinstating M-37029 in the interim."

Accordingly, I am recommending that the Bureau of Indian Affairs and the Office of the Solicitor schedule virtual consultation sessions with Tribal Nations within the next 90 days to engage in meaningful an robust consultation regarding the Department's interpretation of the term "Indian" as used in Section 19 of the IRA.

The 90 day interim for tribal consultation about the Department's interpretation of the term "Indian" is now a 300+ day interim and nothing has been reported or published related to any tribal consultations. It remains unclear what new "interpretation" of "Indian" the Department might develop and implement next since the Department admitted M-37029 and the "two-part procedure" were wrong for a variety of reasons. Not to detract from the exalted position of DOI, BIA and Solicitor seem to hold themselves but "Indian" is unambiguously defined in Section 19 of the IRA and in federal statute 25 U.S.C. §5129 according to the Supreme Court. The Supreme Court in its 2009 *Carciere* decision found the statute was "unambiguous" and the "Congress left no gap for the agency to fill – NO Interpretations needed by the Department!

Enough already!! There is nothing for DOI/BIA officials to "interpret" in Section 19's definition of Indian which includes the phrase "recognized tribe now under federal jurisdiction" which Congress has not changed since 1934. DOI and BIA officials need only to read and administer fee to trust applications pursuant to 25 U.S.C. §5129 as written and abandon their illegal "administrative fixes" and stop with the ever changing interpretations of "under federal jurisdiction" to make every group of "not recognized in 1934" Indians eligible for fee to trust.

More DOI/BIA questionable "interpretations," competing M-Opinions, or illegal "administrative fixes" are not needed to administer fee to trust applications pursuant to the IRA. All that is needed is for DOI/BIA Officials to comply with the Supreme Court's *Carciere* decision and administer the IRS's Section 19 definition of "Indian" as unambiguously written by Congress which is all that NCIP is seeking with its APA challenge in federal district court.

An Excerpt from “...and the Mille Lacs who have no reservation...”

Clare Fitz – MN

By 1925 when allotments actually started happening at Mille Lacs there were 1470 Mille Lac Indians living at White Earth and 292 living at Mille Lac. One might ask which group was the real Mille Lac band. The Consolidated Chippewa Agency in 1925 was made up of five reservations: White Earth, Leech Lake, Fond du Lac, Grand Portage and Bois Fort. The Non-Removal Mille Lacs were clearly part of the White Earth Reservation. There was no point of contact at Mille Lacs with even the rations furnished the Indians by the Government being administered through White Earth.

At the urging of Washington statisticians with the Bureau of Indian Affairs these smaller settlements were separated out for statistical purposes. Mille Lacs was one of these settlements and they became known in the records as “the homeless Non-Removal Mille lacs on Purchased Land.”

The first time in the annual reports that I found Mille Lacs listed as a reservation was in the 1935 report and even then they were categorized as “Non-Removal Mille Lacs – Purchased Lands.”

The Mille Lacs located at Mille Lac were clearly not recognized as a band or as a reservation on June 18, 1934. That was confirmed by Commissioner of Indian Affairs John Collier in 1937. Senator Elmer Thomas, who was the Chairman of the Senate Committee on Indian Affairs, requested that Collier provide a list of tribes covered under the Indian Reorganization Act. The list John Collier provided to the Senator enumerated the Minnesota Consolidated tribe as being made up of five reservations: White Earth, Leech Lake, Fond du Lac, Bois Fort and Grand Portage.

After the Indian Reorganization Act was passed and the Minnesota Chippewa were working on a constitution in 1936, their proposal listed six reservations: the list John Collier had provided plus Mille Lacs. One of the attorneys with the Bureau of Indian Affairs questioned whether Mille Lacs should be referred to as a reservation since they were referred to in the records as “purchased land” and not a reservation.

The Director of Lands replied to the solicitor that “these purchased lands may be considered as the reservation of the non-removal Mille Lac Indians.” [emphasis added]

So by 1937 they were listed in the annual report as “Non-Removal Mille Lac (Purchased Land) Reservation.”

And by 1938 it was “Non-removal Mille Lac Reservation (purchased lands.)”

Clearly this play on words was in the process of re-creating the Mille Lac Reservation.

I trust that you will conclude, as I have, that the Indians were treated very unfairly by many of the local people during this period in history. That was probably caused in large part by the panic experienced during the 1862 uprising. That we can’t change. But that certainly is not motivation for the federal Government to continue to treat them unfairly, and in so doing, involve non-Indians as well. All, I would contend, caused by the lust for power centered in our federal Government, of which tribal government is a part.

Yes, tribal governments operate under the charade of self-determination but in reality all they do is under the thumb of the federal Government and authorized by the War Powers that – contrary to President Lincoln’s wishes – have survived since the reconstruction days of the Civil War. It is time for the Indian people to be made full citizens of the United States with the full protection of the United States Constitution.

Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is, therefore CERF and CERA’s mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States.

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