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Carcieri – What Happened?

by Butch Cranford

In February 2009 the Supreme Court delivered its landmark fee to trust decision in a case brought by Rhode Island Governor, Donald Carcieri and the case is generally referred to as the *Carcieri* decision. The Governor presented several questions to the Court related to a fee to trust action taken by the United States to acquire property subject to the jurisdiction of the State of Rhode Island in trust for the Narragansett Indians. The Governor submitted a specific question asking whether the Secretary of Interior had authority to acquire land in trust for Indian tribes not recognized in 1934 and not under federal jurisdiction in 1934. His two part question was accepted by the Court.

The federal statute at issue was a specific portion of 25 U.S.C. § 479 (now §5123 - Section 19 of the Indian Reorganization Act which defined Indian and is included here.)

Section 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,....

Governor Carcieri believed this definition of Indian meant a tribe had to be recognized in 1934 and under federal jurisdiction in 1934 to be eligible for fee to trust pursuant to the Secretary's authority to acquire land in trust for Indians as was described at 25 U.S.C. §465 now §5108.

However, the defendant Department of Interior (DOI) argued the definition was ambiguous and subject to interpretation by the DOI. And the Department interpreted the word "now" in the phrase "now under federal jurisdiction" to mean any time after 1934. It is clear from the defendant's briefing that the (DOI) believed if it could convince the Court that "now" as used in the definition of Indian in Section 19 meant any time after 1934 its acquisition of trust land for a group of Indians not recognized and not under federal jurisdiction until 1983 would be upheld.

The Court's 6-3 majority decision was delivered by Justice Thomas on February 24, 2009 wherein the majority held that "now" as used in "now under federal jurisdiction" meant in 1934 when the IRA was enacted. The majority also held the phrase "recognized tribe now under federal jurisdiction" was not ambiguous and not subject to interpretation by the Department. In addition to holding that "now" meant in 1934 the Court held that "now" as used in Section 19 "limited" the entire statute which meant that "now" "limited" "recognized tribe" to 1934. ***Carcieri held that a tribe must***

have been recognized and under federal jurisdiction in 1934 to be eligible for fee to trust.

This landmark decision sent shockwaves through the DOI and Indian Country and tribes immediately began lobbying the DOI and Congress for a "fix" for the *Carcieri* decision. The DOI quickly scheduled and held Regional Consultations with tribes in Sacramento, Ca., Minneapolis, Mn, and Washington D.C. to receive feedback from the tribes. During these consultations the DOI assured the tribes the DOI would "administratively fix" *Carcieri* if Congress failed to act.

Congress did not "fix" *Carcieri* and then the Department ignored the *Carcieri* decision that the statute was unambiguous and claimed the phrase "under federal jurisdiction" was ambiguous and required interpretation by the DOI. The DOI just created its "administrative fix" for *Carcieri* and used it in December 2010 to approve a fee to trust acquisition for the Cowlitz Indians. This newly minted "fix" was

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labeled the "Cowlitz Two Part Procedure" for determining if a group of Indians were "under federal jurisdiction" in 1934. The DOI ignored the *Carcieri* holding that "now" limited recognized tribe to 1934 and determined that recognition was not required in 1934. Their definition of the meaning of "under federal jurisdiction" in the Cowlitz ROD took less than one page. The Cowlitz ROD was challenged in Federal Court and the D.C. District and D.C. Circuit Courts upheld the ROD. A Cert petition to the Supreme Court denied.

With its new "fix" approved by the D.C. Federal Courts, the DOI over the next 10 years continued to acquire land in trust for tribes not recognized in 1934 using their Cowlitz "administrative fix." From December 2010 to March 2014 the Department used the one page meaning of "under federal jurisdiction" from the Cowlitz ROD to justify its decisions. However, on March 12, 2014 Solicitor Hilary Tompkins unexpectedly issued M-Opinion; M-37029, wherein she needed a mere 26 pages to interpret "The Meaning of "Under Federal Jurisdiction" for purposes of the Indian Reorganization Act". The DOI has characterized M-37029 as memorializing the Cowlitz Two Part procedure despite M-37029 never mentioning the Cowlitz Two Part procedure.

Where was the Supreme Court's *Carcieri* decision that "now" limited recognized tribe to 1934? It was not found in any Federal Court decisions because unelected bureaucrats in the administrative deep state at the DOI simply ignored the Supreme Court's *Carcieri* decision and implemented an "administrative fix" to *Carcieri*. These unethical and unlawful actions by these bureaucrats were then af-

firmed and upheld by Federal Courts which also ignored the plain language of *Carcieri* which held “the statute was unambiguous” and then ignored the Court’s finding that “now” as used in the phrase “recognized tribe now under federal jurisdiction” meant in 1934 and that “now” limited the entire statute which meant it “limited” recognized tribe to 1934.

Based on my understanding of the questions accepted, the arguments presented and the content of the *Carcieri* decision I have often wondered why the Government based their argument on “now” meaning any time after 1934. I have concluded the Department was forced to argue “now” did not mean in 1934 because the Narragansett Indians were not recognized until 1983 and were not under federal jurisdiction until 1983. This conclusion is supported by Section IV of Justice Thomas’s majority decision which I include here.

*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. (Emphasis added)***

The obvious truth about the *Carcieri* decision is contained in Section IV wherein Justice Thomas clearly and succinctly informs that no party argued the Narragansett Tribe was under federal jurisdiction in 1934 and then he goes further to inform that the respondent’s brief did not contest Governor Carcieri’s assertion that the Narragansett Tribe was neither federally recognized nor under federal jurisdiction in 1934. By rule of Supreme Court, if the Defendant does not contest the question the Supreme Court accepts then the Defendant loses.

The bureaucrats in the Department proceeded to “administratively fix” *Carcieri* by erroneously determining the statute was ambiguous and determining recognition was not required in 1934 in order to continue taking land into trust for tribes not recognized in 1934. It did not matter that the Supreme Court had just decided the statute was UNAMBIGUOUS and recognition was required in 1934. As stated earlier this unlawful fraud was engaged in by bureaucrats at the Department for more than 10 years and affirmed by Federal District and Federal Circuit Courts.

However, in 2018 things began to change. The So-

licitor’s Office undertook a review of M-37029 in 2018 and on March 9, 2020 the Solicitor withdrew the Cowlitz Two Part Procedure and M-37029 with M-37055. The Solicitor found the Cowlitz Two Part and M-37029’s interpretation of Category 1 was “not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase “recognized Indian tribe now under federal jurisdiction”. In other words, not consistent with federal law, the Act of Congress, or the Department’s past policies and procedures related to the phrase “recognized Indian tribe now under federal jurisdiction”. For some reason the Solicitor failed to mention it was not consistent with the 2009 Supreme Court decision in *Carcieri*. To be blunt and to the point, the Solicitor withdrew M-37029 because it was unlawful, not consistent with anything, and wrong.

With M-37055 the DOI’s Solicitor admitted and revealed what had happened to the Supreme Court’s landmark *Carcieri* decision. It was unlawfully ignored by the DOI, the Bureau of Indian Affairs (BIA) and Federal Courts for more than 10 years. The action taken by the Solicitor with issuance of M-37055 exposed the unethical, unlawful, and corrupt actions and decisions engaged in by numerous DOI, BIA officials, and the Federal Courts.

Unethical bureaucrats at the DOI and BIA ignored the *Carcieri* decision for more than 10 years and not one of the many federal officials who are sworn to uphold and protect the Constitution, with the exception of the Solicitor and his withdrawal of M-37029 has taken any action to report, investigate or actually stop these illicit activities. Federal Judges have also ignored the plain language of *Carcieri* since 2009 with their affirmation of DOI’s final fee to trust decisions for tribes not recognized in 1934.

And in 2021 the DOI renewed its policy of ignoring *Carcieri* when the Principal Deputy Solicitor withdrew M-37055 and temporarily reinstated M-37029 with his issue of M-37070 on April 27, 2021. The following excerpt from M-37070 explains his action.

Because there was no tribal consultation with respect to either of these Opinions, pursuant to delegated authority, I hereby withdraw M-37054, 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. Neither the withdrawal of M-37055 and the Procedures, nor the reinstatement of M-37029 is intended to alter or otherwise affect any previous final agency action issued in reliance on M-37055. 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 and robust consultation regarding the Department’s interpretation of the term “Indian” as used in Section 19 of the IRA.

It is now December 2023 and no update on any tribal consultations have been published if any were ever actually

scheduled or held. It is not clear what if any policies and procedures are in place or in use by the DOI or the BIA related to fee to trust.

With the temporary reinstatement of M-37029, one thing remains crystal clear; it is business as usual at the BIA with corrupt bureaucrats still engaged in unethical and unlawful actions designed to ignore and subvert *Carcieri* despite the Solicitor exposing in M-37055 how the DOI and BIA unethically and unlawfully “administratively fixed” the Supreme Court’s *Carcieri* decision by just ignoring the plain language of the decision in order to illegally acquire land in trust for tribes not recognized in 1934.

Corrupt, unethical, unelected bureaucrats and uninformed, uninterested, unethical federal judges willing to subvert the law and corrupt justice is what has happened to the law enacted by Congress and decided by the Supreme Court with its landmark decision in Carcieri.

And it is still business as usual at the DOI/BIA and in Federal Courts

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.

Now that the 14th Amendment applies in Indian law, CERA and CERF need your help even more. Our “enemy” has always been the United States Department of Justice (USDOJ) and its desire to treat all American people as “Indians” to take away everyone’s rights and liberty. In 2022, the USDOJ got Congress as a “demonstration project” to give tribal courts in Alaska jurisdiction over non-Indians while limiting the rights of the non-Indians in tribal court to only those in the Indian Civil Rights Act (ICRA). The ICRA contains no enforceable rights. Congress added this new ICRA section, one year after the United States Supreme Court rejected the USDOJ position in *United States v. Cooley* (2021).

Now Indians and non-Indians alike can assert full constitutional rights in a tribal court. As Justice Kavanaugh summarized in a recent case requesting a stay of proceedings in Florida:

“To the extent that a separate Florida statute authorizes for the Seminole Tribe --and only the Seminole Tribe--to

*conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues. See *Students for Fair Admissions, Inc. v. Harvard College* (2023), *Adarand Constructors v. Peña* (1995).”*

The USDOJ is now trying to find their best case to reverse the 14th Amendment applying to Indian law. We are in a true showdown. We must win this fight against the USDOJ and make sure all Americans have full constitutional rights and equal protection of the law.



Message from your Treasurer

I have been a CERA board member for 25 years and the CERA/CERF treasurer for about 15 years. I feel I know many of you as I see and enter your names into our records, one, two, three and even 4 times a year when you send in your membership dues and donations.

THANK YOU!

I, like you, have been negatively impacted by Federal Indian Policy (FIP). It’s been a privilege to volunteer my time in my capacity as Board member/Treasurer, knowing that we are making progress in bringing FIP into check. Atty, Lana Marcussen’s article in the last issue of the REPORT, “WE DID IT!”, brought music to my ears!

At the same time it pains me to have to keep on asking you, our members and friends to please, please, please, keep on supporting our cause as we, “Now transition to applying the 14th Amendment, for the benefit of all Americans”. If you are 70 1/2, Consider following my lead by making donations through your IRA. The tax savings can be considerable. Your donation of any amount will be most welcome.

Once again, **THANK YOU** for your past support. We really appreciate it!

Curt Knoke, Treasurer

CERA Membership Dues - \$35/year

Send to: CERA

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YOUR SUPPORT WITH ANY AMOUNT IS VERY MUCH APPRECIATED!

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