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Interior's Carcieri Opinion Means More Diligence for Trust Land Development Projects

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The Office of the Solicitor of the Department of the Interior has issued a legal opinion (the "Opinion") to the Secretary of the Interior interpreting the statutory phrase "under federal jurisdiction" in the **Indian Reorganization Act,** 25 U.S.C. § 461 et seq. (1934), (the "IRA").[1] The Opinion is a result of the U.S. Supreme Court decision, ***Carcieri v. Salazar*****,** 555 U.S. 379 (2009) (hereinafter, "*Carcieri*"), which limited Secretarial authority to take land into trust for tribes to those tribes "under federal jurisdiction" in 1934. The Opinion advises the Department of the Interior ("Interior") that a tribe may be considered "under federal jurisdiction" in 1934 if it can show:

(1) 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 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 relevants 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 United States; and if so,

(2) the tribe's jurisdictional status remained intact in 1934.

Notably, the Opinion states that a tribe need not have been both under federal jurisdiction in 1934 and federally recognized in 1934 to be eligible to have land taken into trust on its behalf.

DISCUSSION

Background on the *Carcieri* Case

In the *Carcieri* decision, the Supreme Court held that the Secretary of the Interior ("Secretary") did not have the authority to take land into trust for the Narragansett Indian Tribe of Rhode Island ("Narragansett Tribe") under Section 5 of the IRA because the Narragansett Tribe was not "under federal jurisdiction" at the time the IRA was enacted in 1934. The Supreme Court's decision in *Carcieri* was based on the interpretation of two provisions of the IRA – the definition of "Indian" in Section 19 of the IRA and the authority of the Secretary to take land into trust under Section 5 of the

IRA. The Supreme Court interpreted the definition of the term “Indian” in Section 19 of the IRA to constrain the Secretary’s authority to take land into trust for Indians under Section 5 of the IRA. The Court concluded that the Secretary only has the authority to take land into trust for Indian tribes that were “under federal jurisdiction” in 1934.

The *Carcieri* decision did not determine what would be necessary for a tribe to demonstrate that it was under federal jurisdiction in 1934. Since the decision, Interior, with the Office of the Solicitor, developed a similar two-part inquiry, first used in a trust acquisition involving the Cowlitz Tribe of Washington in 2011, to interpret the phrase “under federal jurisdiction”. The Solicitor’s opinion made public on March 12, 2014, is Interior’s first formal guidance on how the agency will interpret the phrase “under federal jurisdiction” when making its trust land determinations.

Carcieri **Test: Step 1**

As noted above, the Opinion sets forth the following tribal specific two-part test for interpreting the phrase “under federal jurisdiction”: (1) is there a sufficient showing in the tribe’s history, at or before 1934, that the tribe was under federal jurisdiction; and if so, (2) did the tribe’s federal jurisdictional status remain intact as of 1934. In applying these inquiries, the Opinion indicates that to establish a “sufficient showing” the tribe was under federal jurisdiction, it will need some evidence or indicia that the United States exercised federal jurisdiction over the tribe at or before 1934.

Application of the first prong of the test will be fact and tribal specific and will require an analysis of the historic course of dealing between the federal government and a tribe. Examples of such evidence include, but are not limited to: (a) treaty-making with tribes, (b) contract approval for tribes or Indians, (c) enforcement of federal legislation applicable to tribes, such as enforcement of the Trade and Intercourse Acts, (d) education of Indian students, (e) provision of health or social services to a tribe, (f) administration of services by the Office of Indian Affairs with respect to a tribe and (g) adoption or rejection by the tribe of the IRA. In short, the tribe will need to demonstrate that at some point in its history either through one clear action by the federal government or through a series of actions or inactions by the federal government, the tribe was under federal jurisdiction.

Carcieri **Test: Step 2**

Once the tribe has shown that the tribe was, at or prior to 1934, under federal jurisdiction, the tribe will then need to show that its federal jurisdictional status remained “intact” in 1934. In considering the second prong of the test, the Opinion indicates that the Department of Interior may explore a universe of actions and inactions to ascertain whether such status remained in 1934. Significantly, in applying the second prong of the test, the Department of the Interior can look at both actions by the federal government and “inaction” by the federal government. For example, in some circumstances, the failure by the federal government to take any actions with respect to a tribe during a specified period does not necessarily reflect a termination of such tribe’s jurisdictional status. Further, even the federal government’s dormant exercise of federal jurisdiction over a tribe may be considered sufficient for such jurisdiction to remain intact.

The Opinion also provides that in some circumstances, evidence of the tribe being under federal jurisdiction will be so clear and unambiguous Interior will not need to further examine the tribe’s history prior to 1934, nor will Interior have to further inquire as to whether such federal jurisdiction remained “intact.” An example of such clear evidence is if a tribe voted to adopt or opt out of the IRA. Such clear evidence “conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction in 1934.”[2]

Finally, the Opinion clarifies that the relevant inquiry for Interior when taking land into trust is whether a tribe was considered to be “under federal jurisdiction in 1934.” The tribe does not have to prove that it was both “federally recognized in 1934” and “under federal jurisdiction in 1934.” It simply has to prove that it was “under federal jurisdiction in 1934” and that it is a federally recognized Indian tribe at the time the Secretary makes the trust land acquisition for the tribe.

Practical Implications of the Opinion

As noted above, Interior had developed a two-part inquiry following the *Carcieri* decision and used it in the Cowlitz Tribe’s acquisition in 2011. The Cowlitz acquisition was challenged in federal district court, and the proceedings have not yet culminated in any judicial review of the application of the test to Cowlitz. Thus, the Solicitor’s opinion does not signal a marked shift in Interior’s approach to trust land acquisitions but rather sets out the formal, legal reasoning and rationale for its two-part inquiry and provides tribes with examples of how the inquiry might be satisfied. Tribes now have formal guidance, and Interior now has additional support for its statutory interpretation.

The Opinion can be expected to have the most impact on tribes that were formally recognized by the United States after 1934 and are seeking trust land acquisitions. As a result of the *Carcieri* decision, such tribes now must make additional showings to Interior to satisfy the two-part test now set forth in the Opinion. This may be expected to add some time and cost to trust acquisitions, as the test is very tribal and fact specific and may in some instances require expert historical research and legal analysis by the tribe. Additionally for parties contracting or lending to recently recognized Indian tribes who are developing projects on tribal trust lands, such third parties will need to ensure that complete and thorough diligence is performed in connection with the *Carcieri* decision.

[1] The Office of the Solicitor provides legal advice and assistance to the Secretary of the Interior.

[2] *See* Theodore Haas, Ten Years of Tribal Government Under IRA (1947) (specifying, in part, tribes that either voted to accept or reject the IRA).

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