IMPACT OF THE *CARCIERI* DECISION

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I. Introduction

On February 24, 2009, the United States Supreme Court issued a landmark ruling reversing the Department of Interior's prior interpretation of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, and limiting the Secretary of Interior's ability to take land into trust on behalf of Tribes. *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). During the first wave of legal and tribal reaction to *Carcieri*, most analysis focused on how the limitation of the IRA land-into-trust mechanism would impact gaming and other economic development activities on newly-acquired Indian lands. However, during the recent hearing in front of the House Natural Resources Committee to consider the need for legislation to "fix" *Carcieri*, Indian law experts also discussed the broader impacts of the decision on tribal governance, criminal jurisdiction, and basic federal services. Although it is impossible to gauge how this decision will ultimately play out in Indian Country, these new discussions suggest that it will have wide-ranging impacts on both Tribes and non-Indian business partners.

II. Overview of the *Carcieri* Decision

Carcieri began as a dispute between the Narragansett Tribe and county governments in Rhode Island over whether the Tribe needed to comply with building codes on a newly-purchased, 31-acre tribal housing development tract adjacent to the Narragansett reservation. 129 S.Ct. at 1062. This dispute led the Tribe to apply to have the Department of Interior take the tract into trust under the IRA. *Id.* The Secretary of Interior agreed to take the tract of land into trust on behalf of the Tribe, which removed the tract from the county building codes, state tax laws, and other state regulatory processes. *Id.*

The state of Rhode Island responded by challenging the Secretary of Interior's approval of the Narragansett Tribe's land-into-trust application, claiming that the Secretary lacked authority under the IRA to take the tract into trust because the Tribe was under state jurisdiction when the IRA was passed in 1934. *Id.* at 1061-64. Rhode Island focused on the definition of "Indian" in the IRA statute, which includes "members of any recognized tribe <u>now</u> under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). Rhode Island argued that the underlined "now" limited the Secretary's trust authority to Tribes that: (1) currently enjoy federal recognition, and (2) were "under federal jurisdiction" in 1934, and that the Secretary had exceeded his authority by approving an application for a Tribe under state jurisdiction in 1934. The United States Supreme Court agreed. *Carcieri*, 129 S.Ct. at 1061-64.

The *Carcieri* decision does not, however, provide any clear answers on: (1) what "Indian" means under the IRA, or (2) which Tribes may still use the IRA land-into-trust mechanism. The phrase "under federal jurisdiction" is not defined in the majority opinion. The concurrence and dissent offer little guidance, suggesting only that the Secretary may interpret the phrase to include some Tribes that were not formally recognized in 1934. *Id.* at 1069-70 (Breyer, J., concurring).

III. Impact of *Carcieri* on Tribes and Business Partners

A. NARROW IMPACT: STATUS OF NEWLY-ACQUIRED LANDS

This decision will likely make it more difficult for Tribes to seek trust status for lands acquired outside the formal boundaries of their reservations (and potentially for tribal acquisition of allotments acquired within formal reservation boundaries). Although the Department of Interior Office of Solicitor has been tasked with developing the test for "under federal jurisdiction," Secretary Salazar has halted processing and/or finalizing land-into-trust applications for: (1) any Tribe that was restored or reaffirmed after June of 1934; (2) any Tribe that received its recognition through the federal acknowledgment process in 25 CFR Part 83; and (3) any Tribe that had any factual wrinkle or question about its jurisdictional status in 1934. *See BIA Weighs Land into Trust after Supreme Court Ruling* (Mar. 26, 2009) http://indianz.com /News/2009/ 013782.asp. The Department of Interior will still process trust applications for any Tribe with clear federal recognition status in and since June of 1934 and any Tribe that has a non-IRA statute authorizing the trust acquisition. *Id.*

1. Gaming

The most immediate impact of the *Carcieri* land-into-trust decision is its effect on tribal gaming activity. Because trust status for Indian lands is usually a precursor for gaining the necessary approvals under the Indian Gaming Regulatory Act ("IGRA"), Tribes that are no longer able to use the IRA land acquisition mechanism likely will need new, special legislation to conduct gaming activities on any newly-acquired, non-reservation lands.

2. Civil Regulatory and Tax Authority

Carcieri may also diminish tribal civil regulatory authority over the newly-acquired lands. States have already aggressively extended the reach of their regulations and taxes to newly-acquired, non-trust Indian lands. *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). If a Tribe is unable to obtain trust status for its newly-acquired lands, state regulations (particularly state environmental regulations and taxes) will likely apply to any activity conducted on those lands. A sudden inability to seek trust status will likely impact all economic development on newly-acquired lands, including fossil fuel and renewable energy development and retail and tourism services.

B. BROAD IMPACTS: NARROWED DEFINITION OF "INDIAN" UNDER THE IRA

Although *Carcieri* contains no language explicitly extending it beyond the land-into-trust context, it does narrow the *general* definition of "Indian" under the IRA. This means that any other provision of the IRA and any other statute or program that uses the IRA definition of "Indian" may no longer apply to Indians and Tribes that are deemed not "under federal jurisdiction" in 1934.

1. Governance

Tribes that have adopted constitutions or created businesses under the IRA after 1934 may no longer be protected by the law. This may impact the governmental authority or business structures for certain Tribes.

2. Criminal Jurisdiction

Because *Carcieri* narrows both the borders of "Indian Country" and the definition of "Indian" under the IRA, it may narrow the class of persons that can be haled into tribal and federal courts under the complex patchwork of criminal jurisdiction in Indian Country.

3. Services

Carcieri may affect the ability of Tribes to seek basic services usually provided to Indians by the federal government. Because many tribal services and advantages (including, for example, the BIA hiring preference) are tied to the definition of "Indian" under the IRA, many post-1934 Tribes stand to lose important governmental, health, employment, and educational services.

IV. Potential Solutions

There are at least two solutions that have gained traction in the legal news community since the announcement of the *Carcieri* decision. First, Secretary Salazar has stated that he supports the rights of "all tribes" to follow the land-into-trust process, and he may adopt a test that defines "under federal jurisdiction" expansively. However, the tenor of the *Carcieri* decision makes it very unlikely that a definition including all currently-recognized Tribes would pass subsequent judicial scrutiny, which means that some Indians and Tribes will still lose their rights under the IRA.

Second, Congress is now holding meetings to discuss the possibility of "fixing" the *Carcieri* problem by either removing the offensive "now" from the IRA "Indian" definition (which would allow any currently-recognized Tribe to enjoy protections and rights under the IRA) or passing more specific legislation that allows certain named Tribes (including the Narragansett Tribe) to put their lands into trust. During a hearing on April 1, 2009, the Democrats in the House Natural Resources Committee were receptive to such legislation, but have not yet proposed any specific legislative "fix." The Senate will hold hearings later this year to determine whether it will support legislation addressing the decision.

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