

Carcieri v. Salazar: Supreme Court Jeopardizes Indian Fee-to-Trust Land Acquisitions

By Claire J. Hur



The U.S. Supreme Court's February 24, 2009 ruling on *Carcieri v. Salazar* held that because the Narragansett Indian Tribe of Rhode Island, which did not gain federal recognition until 1983, was not under federal jurisdiction in 1934 when Congress enacted the Indian Reorganization Act, the Secretary of Interior

does not have the authority to take the tribe's land into trust. *Carcieri* could affect pending and future fee-to-trust applications for tribes that were recognized by the federal government after 1934. Further, the Supreme Court's ruling may encourage several states, local governments and private citizens to file lawsuits challenging fee-to-trust land acquisitions for dozens of tribes recognized after 1934.

The Indian Reorganization Act ("IRA") authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians." Ch. 576, 48 Stat. 985, 25

U.S.C. §465. 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*." 25 U.S.C. §479 (emphasis added). The Supreme Court held that the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the IRA's enactment.

Tribes that were federally recognized at or prior to the IRA's enactment in 1934 and that have placed land into trust are likely not affected by the *Carcieri* decision, as those tribes fall squarely within the Court's interpretation of §479.

Tribes that were not federally recognized until after 1934 but that have already placed land into trust are also likely unaffected by the *Carcieri* decision, as the federal Quiet Title Act of 1972 is the exclusive means by which adverse claimants can challenge the United State's title to real property, except trust or restricted Indian lands.

However, tribes that were not federally recognized until after 1934 and have pending or will have future fee-to-trust applications may be adversely affected by the *Carcieri* decision unless those tribes can prove they were "under Federal jurisdiction" in 1934. It is possible that a tribe that was not federally recognized before 1934 might still have been "under Federal jurisdiction" in 1934 "even though the Federal Government did not believe so at the time." Justice Breyer pointed out that the statute imposes no time limit upon recognition. For example, following the enactment of the IRA, the Department of Interior mistakenly left certain tribes off of a Department-compiled list of 258 tribes covered by the IRA. The Department later recognized some of those tribes on a showing that it should have recognized them in 1934. This circumstance has been sufficient to show that a tribe was "under Federal jurisdiction" in 1934, even though the Department did not know it at the time.

Further, even if a tribe was not recognized by the federal government until after 1934, it could still be considered to be "under Federal jurisdiction" for purposes of the IRA on grounds that implied a 1934 relationship between the tribe and the federal government that could be described as jurisdictional. Examples include: a treaty with the United States that was in effect in 1934; a pre-1934 Executive Order or Congressional appropriation; or enrollment as of 1934 with the Indian Office.

The *Carcieri* decision might very well affect dozens of tribes recognized after 1934 that are seeking fee-to-trust acquisition with the Secretary. And, not knowing how *Carcieri* will be applied by courts regarding the trust lands of *any* tribal government—whether or not the tribe was "under Federal jurisdiction" by 1934—all of Indian Country should join forces and request that Congress immediately define "now" as explicitly meaning tribes recognized in 1934 and beyond. The time for Indian Country to act is "now"!

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