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The *Carcieri* “Scam”

Butch Cranford – CA

In 2009 the Supreme Court delivered the landmark *Carcieri* decision with a 6 – 3 majority declaring that “now” as used in the phrase “recognized tribe now under federal jurisdiction” in Section 19 of the Indian Reorganization Act (IRA) meant in 1934, at the time of the enactment of the IRA.

In this article I will show how the Department of Interior (DOI) and Bureau of Indian Affairs (BIA) simply ignored the *Carcieri* decision and continued to take land in trust for tribes not recognized in 1934 using their “administrative fix” for *Carcieri*. A *Carcieri* “Scam” perpetrated by the DOI/BIA and facilitated by some Federal Courts.

Let’s begin with the IRA’s first definition of Indian in Section 19 which was the issue before the Supreme Court in *Carcieri* based on the question Governor Carcieri presented to the Supreme Court.

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. (Carcieri decided this definition)

This definition of the term Indian begins with “**all persons of Indian descent**” which Congress limited with the phrase “**who are members of any recognized Indian tribe.**” With this limiting phrase Congress excluded persons of Indian descent who were **NOT “members of any recognized tribe.”** Then Congress limited “**all persons of Indian descent who are members of any recognized tribe**” with the phrase “**now under federal jurisdiction.**”

In its administration of the Secretary of Interior’s exclusive authority to acquire land in trust for Indians pursuant to Section 5 of the IRA since 1934 the DOI routinely acquired land in trust for tribes not recognized in 1934 and not under federal jurisdiction in 1934. And on March 6, 1998 the Secretary acquired 31 acres in trust for the Narragansett tribe

which was recognized in 1983, 49 years after passage of the IRA.

Rhode Island Governor, Donald Carcieri, challenged the Secretary’s acquisition of 31 acres of land in trust for the Narragansett tribe based on the fact that the Narragansett’s were not recognized in 1934 and not under federal jurisdiction in 1934 as required by Section 19 of the IRA.

Governor Carcieri’s challenge failed at the Interior Board of Indian Appeals (IBIA), failed in Federal District Court and failed at the First Circuit Federal Court of Appeals. Governor Carcieri filed a petition for a writ of certiorari with the Supreme Court on October 18, 2007 and presented the following question which was accepted by the Court on February 25, 2008.

1. *Whether the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was neither federally recognized nor under federal jurisdiction at the time of the statute’s enactment.*

In response to the question presented by Gov. Carcieri, the Secretary and DOI or any of the amici declined to contest Governor Carcieri’s assertion that the Narragansett tribe was neither recognized nor under federal jurisdiction in 1934. Instead, the Federal response to the question presented by Governor Carcieri was to argue that “**now**” as used in the phrase “**now under federal jurisdiction**” meant any time after 1934 when a tribe was recognized.

In a 6 – 3 decision delivered by Justice Thomas, the Supreme Court decided “**now**” as used in the phrase “**recognized tribe now under federal jurisdiction**” meant at the time of the Act in 1934 and further decided that “**now**” limited the statute. The Supreme Court also found Section 19 to be unambiguous with Congress leaving no gap for the agency to fill. (Nothing for the DOI/BIA to interpret)

“Instead, Congress limited the statute by the word “now” and “we are obliged to give effect, if possible, to every word Congress used.” Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). ...But, as explained above, Congress left no gap in 25 U.S.C. §479 for the agency to fill.) Carcieri pg 11

Therefore, pursuant to the *Carcieri* decision, an Indian tribe had to be recognized in 1934 and under federal jurisdiction in 1934 to be eligible for fee to trust as summarized in Section IV of Justice Thomas’s majority opinion included below.

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 respondent’s 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)**

It is so ordered.

The DOI, BIA, and Indian Tribes immediately began lobbying Congress to “fix” the *Carcieri* decision due to its seriously limiting the Secretary’s authority to acquire land in trust for Indian tribes. Despite enormous pressure from the DOI/BIA and tribes Congress refused to “fix” *Carcieri*.

With no “fix” from Congress, the DOI in December 2010 created an “administrative fix” for *Carcieri* by claiming “**under federal jurisdiction**” was ambiguous even though the Supreme Court had found Section 19 to be “unambiguous.” DOI then interpreted the 1st definition to mean a tribe only needed to be under federal jurisdiction in 1934 to be eligible for fee to trust ignoring recognition in 1934. With this “administrative fix” the *Carcieri* “scam” was launched.

The DOI then began acquiring land in trust for tribes who were not recognized in 1934 using their “administrative fix” and Federal District Courts and Circuit Courts of Appeal have ignored the Supreme Court’s majority decision in *Carcieri*, deferred to the Department’s “administrative fix” interpretation, and facilitated continued use of the *Carcieri* “scam” by the DOI to take land in trust for Indian Tribes not recognized in 1934.

A summary of the DOI’s initial interpretation of “under federal jurisdiction” in the 2010 Cowlitz ROD by the Solicitor is included below.

In 2010, the Department of the Interior (“Department”) interpreted these phrases and other aspects of Section 19 in a record of decision for a fee-to-trust application submitted by the Cowlitz Indian Tribe (Cowlitz ROD). The Cowlitz ROD concluded that the phrase “under federal jurisdiction” was ambiguous and interpreted it to mean “an action or series of actions that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.” (emphasis added)

Supreme Court decisions do not matter at the DOI and BIA as evidenced by their creation of an “administrative fix” and their continuing acquisition of land in trust in violation of the IRA and contrary to the *Carcieri* decision. Federal courts then deferred to and upheld this agency “fix.” The “administrative fix” ignored the plain language of Section 19 as well as the Supreme Court’s *Carcieri* decision which requires recognition in 1934 and under federal jurisdiction in 1934 to be an Indian pursuant to the first definition. After prevailing several times in federal court with the “fix,” the Department formalized the very brief “Cowlitz two-part procedure” in a 26 page March 12, 2014 Solicitor Opinion, M-37029 and continued the “scam.”

However, in 2018 the Solicitor’s Office undertook a review of M-37029 and then withdrew M-37029 on March 9, 2020 with Solicitor opinion M-37055. The relevant portion of M-37055 is included below. (M-opinions are available on the DOI website at the Office of Solicitor)

To remove such uncertainties and to assist tribes in assessing eligibility, in 2018, the Solicitor’s Office began a review 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)

The Department's *Carcieri* "fix" was NOT CONSISTENT with the ordinary meaning (**plain language/grammar**), statutory context (**federal law**), legislative history (**intent of Congress**), or contemporary administrative understanding (**federal regulations**) of the phrase "recognized tribe now under federal jurisdiction." Not to mention it was not consistent with the **2009 *Carcieri* decision**. In a word, it was WRONG.

In a 31 page March 5, 2020 Memorandum to the Solicitor, the Deputy Solicitor, the Associate Solicitor, and Counselor to the Solicitor offered the following evidence to support the conclusion that M-37029 and the "Cowlitz two part procedure" were wrong.

"We differ from M-37029 to conclude that the phrase "now under federal jurisdiction" refers to tribes with whom the United States had clearly dealt on a more-or-less sovereign-to-sovereign basis or as to whom it had clearly acknowledged a trust responsibility in or before 1934."

"Category I provides that the term "Indian" shall include "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. 107 The adverb "now" forms part of the prepositional phrase "under federal jurisdiction," 108 which it temporarily qualifies. 109 Prepositional phrases function as modifiers and follow the noun phrase that they modify. 110 We therefore find that Category I's grammar supports interpreting the entire phrase "now under federal jurisdiction" as intended to modify "recognized Indian tribe.""

It is clear based on these statements from the Solicitor's Office that a tribe had to be "recognized in 1934" based on the decision in *Carcieri* where the Court found "now" unambiguously meant in 1934 and "now" limited the statute.

While the Solicitor admitted the "Cowlitz two-part procedure" and M-37029 was wrong he was unwilling

to review any of the "wrong" decisions reached by federal courts affirming the Department's "wrong" decisions to acquire land in trust for tribes not recognized in 1934. Those "wrong" decisions resulted in communities hosting Las Vegas style casinos subjecting them to increased crime, traffic, bankruptcies, and incidences of domestic violence. No mitigation, no apology for the "wrong" decisions, only a lifetime of injustice courtesy of the DOI/BIA for those communities.

With the issuance of M-37055 it was clear something had changed at the DOI but why initiate a review in 2018. Why would the Solicitor begin a review of the "Cowlitz two-part" and M-37029 in 2018 after it had prevailed in every federal court where it had been challenged and decided? And why would the review take until March 9, 2020 when M-37029 was withdrawn?

Based on my experience with a fee to trust in California and my knowledge of another fee to trust in Massachusetts I offer the following for consideration.

In the California case, the Solicitor thought the denial of a Cert Petition in September 2017 meant there would be no more challenges to that 2012 ROD. In the Massachusetts case, the Solicitor thought a 1st Circuit decision that a Massachusetts tribe, like the Narraganset Tribe was not under federal jurisdiction in 1934 was final. The Solicitor thought the M-37029 "administrative fix" *Carcieri* "scam" cases were final and it was time to bring the DOI's administration of fee to trust into compliance with federal law, federal regulations, and the *Carcieri* decision by withdrawing M-37029 and issuing new procedures under separate cover to guide Solicitor's Office attorneys in determining the eligibility of applicant tribes under Category I.

However, the Massachusetts Tribe managed to get their adverse decision remanded back to the District Court and challenges in federal court by Citizen Groups in both cases continue to the present. In Massachusetts, the Citizens' Group challenge has been limited by Court Order to arguing pursuant to M-37029. Department decisions using M-37029 have a 100% success in federal court except in the U.S. District Court of Massachusetts where this case is being heard on remand. It could be years before the case is settled as appeal to the 1st Circuit Court of Appeals is likely as well as Cert Petition to the Supreme Court which could take years.

In the California case, there were initially two challenges to a 2012 ROD approving a fee to trust for a casino. One challenge from the affected County and another from a Citizens Group. The County's challenge failed at the District Court, failed at the 9th Circuit, and their Cert Petition was denied by the Supreme Court in 2017. The Citizen's challenge also failed at the District Court but its appeal to the 9th Circuit resulted in an unpublished order from the Court wherein the District Court was ordered to dismiss the Citizens' challenge at the time of filing for lack of subject matter jurisdiction. The District Court complied with the order and the Citizens' challenge and their District Court decision no longer existed. Not all bad news because they could file a new challenge before the six year statute of limitations to file expired on May 24, 2018. The Citizens' Group filed a new challenge on May 22, 2018.

The 2012 ROD at issue in the California case used the "Cowlitz two-part procedure" to determine the Indians were under federal jurisdiction. The Citizen plaintiffs argue the Indians were not "recognized" in 1934 based on several undeniable documented facts. 1. The federal defendants decided in 1979 the Indians were not recognized but were eligible to file a petition for recognition using the new Part 83 regulations. 2. The Indians did not challenge this decision. 3. The Indians attended a Section 83 workshop and began preparing a petition and in 1989 informed the DOI their petition would be filed soon. 4. The Indians did not submit their petition and instead filed suit in Federal District Court in 1990 demanding the United States recognize them. 5. The DOI defended and informed the Court the Indians had never been recognized. 6. The Court granted Summary Judgment to the United States in a 1992 Order finding the Indians failed to provide any evidence they were recognized and that the Section 83 regulations were the sole administrative process for Indians to attain recognition. 7. The Court granted Summary Judgment to the United States in a 1992 Order finding the Indians failed to provide any evidence they were recognized and that Section 83 regulations were the sole administrative process for the Indians to attain recognition. 8. The Court issued a 1996 final decision in the 1990 litigation dismissing the Indians claims because the Indians had no recognizable tribal government. 9. Neither the 1990 Order or the 1996 Decision were appealed by either the Indians or the Federal defendants.

From these well documented events, it is obvious the Indians were not recognized in 1934. However, the Citizens' challenge to the ROD filed in May 2018 sat in Court for nearly two years with no action beyond scheduling a routine hearing on the dismissal of the Citizens' 7th claim on March 10, 2020. Prior to the hearing and unknown to the Citizens, the Solicitor had withdrawn the "Cowlitz two-part procedure" with M-37055 on March 9, 2020. The federal attorneys had an ethical obligation to inform the Court at the March 10 hearing of the withdrawal of the "Cowlitz two-part procedure" but did not. The Citizens' attorney eventually informed the Court of the withdrawal. Without the "Cowlitz two-part procedure" the 2012 ROD is a nullity and void.

While that was clearly the case, the Court took no action based on the withdrawal of the "Cowlitz two-part procedure" with M-37055.

The federal defendants then filed a Motion for Judgment on the Pleadings (MJP) in June 2020 claiming the 9th Circuit decision in the County case three years earlier settled all the issues in the Citizens' 2018 case. A legal impossibility and an unsupported false claim. (More details as to why this was legally impossible in the next Report.) The Citizen's opposed the MJP and waited with nothing from the Court for months. Finally, on May 11, 2022, the Court granted the Defendants MJP and the Citizens' appealed the decision to the 9th Circuit. Unless something unusual occurs this case will also be in the Courts for several years as well.

The *Carcieri* "fix" "Scam" was nearly complete except for the challenges filed by two Citizen Groups with ties to CERA. One in Massachusetts and one in California. Is there a co-ordinated effort by the federal defendants in these two cases based on the Solicitor's ill timed March 9, 2020 withdrawal of the "Cowlitz two-part procedure" and M-37029 with two cases still active? It now appears the Department wants and needs one more favorable final Federal Court decision in Massachusetts based on their "wrong" interpretation of Section 19 created in the "Cowlitz two-part procedure" and formalized in M-37029 and then cite all those "wrong" decisions to get one last "wrong" decision in the California case.

Some closing questions and thoughts. Where in the U.S. Constitution is Congress authorized to acquire land for Indians or any other group of people? I can find no authority for Congress to acquire land for Indians or any other group of persons in my Constitution but Congress claims to have delegated this “not in the Constitution” authority to the Secretary of Interior in Section 5 of the IRA. Justice Thomas often includes in his dissents that he cannot find any authority for the issue before the Court in his Constitution. So a final question for your contemplation. Are Acts of Congress claiming to delegate authority not in the Constitution to Executive Officers such as the Secretary of Interior an even bigger “SCAM”?
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Major Changes in Indian Law

Lana Marcussen - AZ

Major changes began by the U.S. Supreme Court with the decision in *Oklahoma v. Castro- Huerta*.

On June 29, 2022, Justice Kavanaugh issued the majority opinion in *Oklahoma v. Castro-Huerta*. The case concerned whether a non-Indian step father who severely abused his Indian daughter could be prosecuted by the State of Oklahoma following the decision two years earlier in *McGirt v. Oklahoma*. Justice Gorsuch for the majority in *McGirt* found that the Muscogee Creek reservation was still “Indian country” removing state jurisdiction. Criminal law enforcement in Oklahoma became a disaster after *McGirt*, with tribal members being the most affected. As usual, the federal government promised the tribal members that they would be able to step up their law enforcement and prosecutions to handle the new responsibility. Two years later, after inadequate federal funding and huge numbers of crimes against tribal members going uninvestigated, the State of Oklahoma decided to challenge the federal Indian policy assumptions that had created the *McGirt* ruling. Oklahoma in the *Castro-Huerta* case specifically claimed that the definition of Indian country in 18 U.S.C. §1152, known as the Major Crimes Act, did not remove state criminal jurisdiction as had been implied but never directly ruled on in several previous cases.

CERF wrote a very strong amicus curiae brief

(continued on pg. 6)

Year End Giving Perhaps you could help

Curt Knoke – WI

CERF/CERA continues to whittle away at poorly written Federal Indian policy.

While we can communicate with our Senators and Congresspersons, we have found that we are much more successful by advising judges that sit on the Supreme Court or other appellate courts through the tool of the amicus, or friend of the court briefs. These briefs can be expensive but the rewards justify the expense. CERA/CERF has prepared many briefs over the years often bringing to light little known nuances of the law that can make or break a case.

Please consider a tax deductible gift to Citizens Equal Rights Foundation (CERF) to help continue preparing these briefs. Any gift, large or small, will be very much appreciated.

For those larger gifts:

Even in Bear Markets, charitable giving can continue. Bear markets aren’t much fun for anyone. But that doesn’t mean your charitable giving commitments have to be put on hold. If you are like many donors, you are still looking for ways to support the organizations you care about that rely on your support to achieve their missions. Remember, not every stock is down. It’s still incredibly tax-efficient to donate highly appreciated stock to a charity instead of selling it outright, plus the capital gains tax is avoided. Don’t forget about the Qualified Charitable Distribution (QCD) either. You are still required to take Required Minimum Distributions (RMDs) from your IRA even in a down market, and the QCD can help offset this tax hit by allowing you to direct up to \$100,000 to a qualified public charity like CERF.

This is also a good time to make sure your estate plan is in good shape, including bequests you may wish to leave to CERF.

As always, the CERA/CERF Board thanks you very much for your past and continued support. Your continued support is so much appreciated.

THANK YOU.

agreeing with Oklahoma in the *Castro-Huerta* case that explained how the federal assumptions against concurrent state criminal jurisdiction had been wrongfully created with the 1871 federal Indian policy. The CERF amicus also explained how the jurisdictional situation could be remedied by putting the old decision of *Worcester v. Georgia* (1832) back into proper historical context. In *Worcester*, Chief Justice Marshall used international law and British law that had been rejected by our Constitutional Framers to create an extra-constitutional “trust” authority in the federal government that could override all constitutional law and individual rights. Prior to the Civil War, the *Worcester* decision was not only ignored by President Jackson but by every other Presidential administration of both political parties. Chief Justice Marshall went to such extreme lengths to remove the state court *Worcester* case into the federal court system with multiple rule manipulations that included Marshall himself taking the case as the federal trial court judge that the decision was never accepted by the political branches. The CERF amicus brief pointed out that the reason for these outlandish legal tricks was not to protect the Indians but was the potential for using the rationale of the decision to preserve slavery.

It has been well known for more than a hundred and seventy years that the *Worcester* rationale is the main legal precedent cited in the infamous *Dred Scott v. Sandford* (1857) decision that created a perpetual overriding federal trust to preserve slavery in the territories. It was technically the *Dred Scott* decision that unleashed the territorial war powers that had been so carefully confined by the Framers. As CERA and CERF have been arguing for thirty years now, it is these territorial war powers unleashed in the *Dred Scott* decision that form the basis of the 1871 Indian policy that treats the Indians as potential belligerents to keep them under the federal trust authority. If the Indians can be perpetually treated as federal wards then the federal government can continue to apply extra-constitutional territorial war powers against everyone else just as George III enforced against the Patriots of our Revolutionary War.

On June 29, 2022 the 1871 federal Indian policy was neutralized by the majority opinion that specifically found *Worcester v. Georgia* not to be the operable legal precedent, declaring that concurrent criminal jurisdiction is now the law across our entire nation, not just in Oklahoma. This puts back in place the original assimilation policy and sets the stage for the activation of the Fourteenth Amendment in federal Indian law as

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.

currently pending in *Haaland v. Brackeen*. The end of the 1871 federal Indian policy has other major effects as well like ending an argument in favor of race based affirmative action. Numerous federal laws like the Indian Child Welfare Act that is the subject of the *Brackeen* case now exist without any legal authority to back them up. CERA just filed a brief for our founder Charlotte Mitchell that uses the *Castro-Huerta* decision to show that there is no longer any legal basis for the federal reserved rights doctrine for tribal treaty or water rights. This argument does not attack tribal sovereignty in any way. As always, we are using the constitutional principles of federalism to confine the federal authority to only those powers acknowledged by the Constitution of the United States.

These changes are small in comparison to what will come when the Fourteenth Amendment is extended to federal Indian policy in *Brackeen* by the end of June 2023. Hundreds of federal laws exist today that use these extra-constitutional territorial war powers to interfere with or commandeer state jurisdiction. Most of our individual rights and liberties that include the right to own property all come from state authority. Being able to change how state authority was conferred by the Constitution can do things like change every private property land title in the state of New York as asserted in the New York Indian land claim cases brought by the United States Department of Justice (USDOJ) in the 1970’s. It was CERA and CERF using these arguments that ended the New York land claim cases by defeating the “unification theory” of title asserted in *Oneida Indian Nation v. City of Sherrill* in 2003. There are many more land and water cases in which the USDOJ is attempting to convert private property into federal property supposedly in “trust” for the Indians. Some federal cases assert Indian treaty interests, others federal statutes, but it all comes apart when equal protection applies.

Counsel for CERA believes that because the concurrent Criminal jurisdiction issue is already resolved, that the Supreme Court could issue a decision in *Brackeen* earlier than June. The oral argument in *Brackeen* is set for November 9, 2022 and will likely generate some media coverage. A decision could issue from the end of January 2023 until the end of the term in June 2023. Given how well the *Castro-Huerta* decision has been received throughout Indian country, the United States powers behind the 1871 Indian policy have to act fast and take some risks to preserve the extra-constitutional authority before the Fourteenth Amendment shuts off any further use of these powers forever.

CERA and CERF are being blamed for bringing about this substantial change in law. Never before have we needed your help more to not only preserve what we have started but to end these powers once and for all.

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We need your support!

News Flash!

The United States Supreme Court has accepted the case of *Arizona v. Navajo Nation* and the case of *Navajo Nation v. Haaland* for review this term. The *Arizona v. Navajo Nation* case will consider the Winters Doctrine which establishes “water rights” for Indian reservations and the *Navajo Nation v. Haaland* case deals with whether the trust obligates the United States to establish Winters Doctrine “water rights” for Indian reservations. The outcome of these cases promises positive implications for Mille Lacs and others.

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