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Indian Law and Gaming Practice Client Advisory

March 2, 2009



With *Carcieri v. Salazar*, the Supreme Court Sends Ripples of Shock & Fear Through Native Communities—Not All Oklahoma Tribes Should Worry

On February 24, 2009, the United States Supreme Court issued an opinion that has sent ripples of shock and fear through the Native community -- *Carcieri v. Salazar*. While the implications of this opinion are vast and negative for many tribes granted federal recognition after 1934, its effects on certain tribes, including those with land already taken into trust or located in Oklahoma, are not as clear.

In *Carcieri*, the Supreme Court was faced with how to interpret the definition of "Indian" in the Indian Reorganization Act of 1934 ("IRA"). The IRA authorizes the Secretary of the Interior to acquire land and hold it in trust for the purpose of "providing land for Indians." The IRA further defines "'Indian' as used in this Act" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood." The case before the Supreme Court did not involve the Indian blood provision, but instead turned entirely on whether the Narragansett Tribe was a "recognized Indian tribe now under Federal jurisdiction" under the IRA.

The Narragansett Tribe is a tribal community with a long and well-documented history in Rhode Island. Somewhat unusually, however, the Tribe was placed under the "formal guardianship" of the Colony of Rhode Island in 1709 and, as recently as 1937, was considered by the federal government to have been under the jurisdiction of the New England states, rather than the federal government. In 1983, the Narragansett Tribe finally secured federal recognition and had its land taken into trust. In the 1990s, the Tribe purchased an additional 31 acres for use as a housing project, and the Secretary took that land into trust for the Tribe pursuant to the IRA. Rhode Island appealed this decision to the federal courts. The Supreme Court, in a 6-3 decision, ruled that "now" as used in the IRA means the year 1934. As the Narragansett Tribe was an unrecognized tribe under state jurisdiction in 1934, the IRA did not authorize the Secretary to acquire lands in trust for the Tribe.

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What are the implications of this decision for other tribes? For tribes granted federal recognition after 1934 who seek to have lands placed into trust, the immediate effect is severe. However, there are several categories of tribes who are either unaffected by this decision or have a good argument that it does not apply to them. The first exception was explicitly noted in the majority opinion in *Carcieri* -- there are some tribes the Department of Interior has recognized since 1934, whose recognition legislation grants the Secretary the ability to take lands into trust for their benefit. Following this reasoning, it also appears that tribes organized pursuant to the Oklahoma Indian Welfare Act of 1936, which does not incorporate the IRA's definition of Indian, should have a strong argument that the Secretary's powers are not limited by *Carcieri*.

There may also be some tribes who could argue that they were under federal jurisdiction in 1934, even if not "recognized" -- this is the distinction made in Justice Breyer's concurrence. Whether the full Supreme Court would adopt this distinction is another question. Finally, as to lands already taken into trust and for which the administrative appeal process has passed, it is unclear how a complaining party would be able to place their claim before any court in the face of the United States' sovereign immunity. It is highly unlikely the United States would waive immunity to allow states or others to contest it placing land into trust for the benefit of a particular tribe, Indian family or individual.

Many groups have already vowed to lobby Congress to amend the IRA to remove the language relied on by the Court in *Carcieri*. If successful, the treatment of tribes would revert back to the preexisting norm, and the Secretary would be able to take lands into trust from any tribe recognized as of the date of the Secretary's decision. Congress could accomplish a technical amendment very easily which would effectively reverse the Supreme Court's new *Carcieri* rule.

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Do you have any thoughts or suggestions regarding Crowe & Dunlevy's Indian Law & Gaming Practice Group?

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"Indian Gaming & Beyond: Yesterday, Today and Tomorrow"

Dr. Alan Meister Updates Crowe's Indian Law & Gaming Practice Group, Clients & Friends

On February 24, 2009 Dr. Alan Meister, Vice-President of the Analysis Group in Los Angeles, led a seminar for Crowe & Dunlevy's Indian Law and Gaming Practice Group, clients and firm friends. Entitled "Indian Gaming & Beyond: Yesterday, Today, & Tomorrow," Dr. Meister traced the growth of Indian gaming, assessed trends, shared his research, forecasted growth and assessed regulatory and compact hurdles for the future. He highlighted the tremendous growth of Indian gaming within Oklahoma which now boasts more than 100 casinos, the largest recent growth within the United States.

Dr. Meister noted factors that create uncertainty for the future including legal challenges, legislation, regulations, increased competition and maturing markets. He highlighted efforts by tribes to diversify their tribal governmental revenue streams to secure future economic stability and noted the growth of non-gaming governmental revenue. Finally, Dr. Meister explained how economic analysis could benefit tribal governments and their economic enterprises in efforts to value, litigate, show economic impact, develop alternative economies including energy development and assess gaming market opportunities. Lawyers that attended enjoyed potential continuing legal education credit from participating bar associations.

Dr. Meister is a nationally-recognized economist who publishes a widely-regarded annual independent report entitled "Casino City's Indian Gaming Industry Report", now in its seventh edition. Retained by tribes, Indian gaming trade associations and even the National Indian Gaming Commission, Dr. Meister's Indian gaming research and analysis has helped quantify the benchmarks of Indian gaming growth and shape the debate regarding regulation and its economic impact. Dr. Meister is a member of the International Masters of Gaming Law and is a regular contributor to Gaming Law Review and Economics.

