Michigan State University College of Law

INDIGENOUS LAW & POLICY CENTER

OCCASIONAL PAPER SERIES

Toward an Administrative *Carcieri* Fix

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Indigenous Law & Policy Center Working Paper 2010-01

April 19, 2010

Executive Summary

This occasional paper discusses three points of law concerning the Supreme Court's *Carcieri* decision. The first section provides an historical analysis of the usage (or relevant omission) of the term "under federal jurisdiction." The second is a review of examples where an agency has responded to a Supreme Court decision by changing administrative rules. The third provides draft rules the Department could put in place to "fix" *Carcieri*. The intent of this memorandum is to give as much information as possible in order to formulate a white paper for distribution and online publication about administrative options for a Carcieri fix.

I. Introduction

The Supreme Court recently decided in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), that the Indian Reorganization Act (IRA) authorizes the Department of Interior (Interior) to takes lands into trust only for those Indian tribes that were federally recognized in 1934, when the IRA was passed. The Court determined that Interior lacked authority to take into trust lands in Rhode Island owned by the Narragansett Tribe, since the tribe was not federally recognized in 1934. 129 S. Ct. at 1061. Prior to *Carcieri*, Interior interpreted the IRA to authorize it to take into trust lands owned by any federally recognized tribe. *Id.* at 1064. The result of *Carcieri* is that Interior's authority to take lands into trust for any tribe recognized after 1934 is uncertain.

The *Cariceri* court based its decision on an interpretation of the text of two portions of the IRA: the purpose of the IRA's land trust program for Indians, 25 U.S.C. § 465, and how to determine who (or what) is an "Indian," § 479; *Carcieri* at 1061. The latter part defines Indian as "all persons of Indian descent who are members of any recognized tribe *now under federal jurisdiction*." § 479 (emphasis added). The former part states that the trust program is "for the purpose of providing land for Indians." § 479. The key of the Court's reasoning was defining the word "now," *Carcieri* at 1064, since that definition unlocked the meaning of "Indian." It held that "now" meant "in 1934, when the IRA was passed," and not "as of today." *Id.* at 1068.

Thus, only Indians who were under the "supervision" of the federal government in 1934 were actually Indians. Since the Narrangansetts were under the supervision of the state of Rhode Island in 1934, they weren't Indians in 1934, and the IRA land trust program is not available to them.

II. The Meaning of "Under Federal Jurisdiction" in 1934

A. The *Carcieri* Majority's Definition

The *Carcieri* majority did not define the term "under federal jurisdiction" in its opinion, nor did it lay out any criteria for its application. However, as noted above, the majority did hold that "now under federal jurisdiction" in 25 U.S.C. §479 unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934. *Carcieri v. Salazar*, 129 S. Ct. at 1068. Because the Narragansett Tribe was not, the majority held, the Secretary has no authority to take the 31 acres of land into trust today.

B. What "Under Federal Jurisdiction" Does *Not* Mean

"Under federal jurisdiction" does not mean federally recognized. Although there is no guidance in the majority opinion about what "under federal jurisdiction" means, the three concurring opinions (from Justices Breyer, Souter and Ginsburg) provide clear direction as to what it does not mean - that being, "federally recognized." Cowlitz Indian Tribe, *Fee-to-Trust Application ad Reservation Proclamation Request Submission on Carcieri's "Under Federal Jurisdiction" Requirement*, at 7.

Further, the term "under federal jurisdiction" may not always be subject to such strict temporal limitations.

> [A]n interpretation [of "under federal jurisdiction"] that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. That is because *a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time.*..And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934—even though the Department did not know it at the time. (Emphasis added)

Carcieri, 129 S. Ct. at 1069 (Breyer, J., concurring).

In his concurring opinion, Justice Breyer provided two examples where tribes were federally recognized after the enactment of the IRA in 1934 - the Stillaguamish of Washington

State and the Grand Traverse Band of Michigan. The Department of Interior did not recognize the Stillaguamish Tribe until 1976 even though the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded that land could be taken into trust for the Tribe. *Id.* at 1070. Justice Breyer also made reference to the Grand Traverse Band of Ottawa and Chippewa Indians, which achieved recognized in 1980, after over a century of losing its status as a federally recognized tribe. The tribe applied in 1934 and again in 1943 but was denied both times.

> Between 1872 and 1980, [Grand Traverse Band] continually sought to regain its status as a federally recognized tribe. The Band's efforts succeeded in 1980 when it became the first tribe "acknowledged" by the Secretary of the Interior pursuant to the federal acknowledgment process, 25 C.F.R. Part 54 (now 25 C.F.R. Part 83). The history of the Band's original recognition, executive termination and later re-recognition is essentially parallel to that of the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Little River Band of Ottawa Indians.

Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western Dist. Of Mich., 369 F.3d 960, 961 (6th Cir. 2004).

C. Plain Meaning of "Under Federal Jurisdiction"

According to the majority in *Carcieri*, "[t]he statutory text is plain and unambiguous" and must be applied "according to its terms." *Carcieri* at 1063. Because the language "under federal jurisdiction" is thought to be unambiguous, the Department does not necessarily need to research legislative history in order to define the phrase. *Cowlitz* at 13. On many occasions courts have interpreted unambiguous language consistent with dictionary definitions, specifically when defining the word 'jurisdiction.' The Grand Traverse Band of Ottawa and Chippewa Indians, *Submission on Carcieri's "Under Federal Jurisdiction" Requirement in Connection With Pending Fee-To-Trust Applications* (GTB Submission) at 4.

In defining "now," the *Carcieri* court looked primarily to dictionary definitions, one of those, being Webster's New International Dictionary (2nd ed. 1934). *Carcieri*, 129 S. Ct. at 1064. It defined "now" to mean "[a]t this time, or at the present moment" and noting that "'[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect ..." (emphasis added).

> According to that same dictionary "jurisdiction" is:
>
> 1. Law. The legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter; legal Power to interpret and administer the law in the premises. The jurisdictions of different courts are classified as: original or appellate; exclusive or concurrent; civil or criminal; common-law or equitable; in rem or in personam; etc.
> 2. Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.
> 3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.
> 4. Syn.—Jurisdiction, authority are often interchangeable. But jurisdiction applies esp. to authority exercised within limits; as, paternal authority is paramount within its jurisdiction. Cf. power, influence, ascendance. *Id.*

Additionally, Black's Law Dictionary from the IRA era defines "jurisdiction" as:

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal . . . .*Black's Law Dictionary* at 1038 (3rd ed. 1933).

While Black's Law Dictionary addresses the legal concept of "jurisdiction" in the context of the judicial branch, this definition is important because it underscores that in our American legal structure the jurisdiction of any branch of government ultimately is conferred upon that branch by the Constitution. *Cowlitz Submission* at 12. The Grand Traverse Bay *Carcieri* submission also notes that "other dictionaries from the time likewise defined 'jurisdiction' to refer to the power or authority of a sovereign entity. *See, e.g.*, The New Century Dictionary of

the English Language 888 (1929) (defining 'jurisdiction' in part as 'power or authority in general")." GTB Submission at 4.

In *United States v. Rodgers*, 466 U.S. 475 (1984), the Supreme Court interpreted the term "jurisdiction" as it appears in amendments to the federal criminal code that were enacted on the same day as the IRA. Noting that the statute before it did not define "jurisdiction" it looked to dictionary definitions and used the following:

> "Jurisdiction" is not defined in the statute. We therefore start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used…The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, *Webster's Third New International Dictionary* 1227 (1976) broadly jurisdiction as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.

Rodgers, 466 at 479.

"Jurisdiction" was commonly understood in 1934 as referring to the "power" or "authority" of a sovereign entity. Therefore, to be 'under federal jurisdiction' meant to be subject to the power or authority of the federal government." *GTB Submission* at 4.

> Additionally, "jurisdiction" is not always necessarily synonymous with "recognition."
>
> Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content…the Department of Interior has stated that *the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at the time.*

Carcieri, 129 S. Ct. at 1071 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (emphasis added).

The combination of the plain meaning of the word "jurisdiction," and the long line of cases that consider the matter make it reasonable to determine that plenary legal

jurisdiction is synonymous with Congress' well-established plenary power. *Cowlitz Submission* at 13. *See United States v. Quinn*, 27 F.Cas. 673, 679 (C.C.N.Y. 1870) ("there are numerous powers conferred by the constitution upon [C]ongress, which, for a time remained dormant in their hands . . . their neglect to exercise the power in no sort defeats the power itself."); *United States v. Nice*, 241 U.S. 591, 600 (1916) (Congress' constitutional authority over tribes is a continuing power which can be exerted at any time and in various forms during the continuance of the tribal relation); *United States v. John*, 437 U.S. 634, 653 (1978) (the fact that federal supervision over a tribe has not been continuous does not destroy the federal power [under the Indian Commerce Clause] to deal with them)

Additionally, today's definition of "jurisdiction" remains constant. *See Webster's Third New International Dictionary* 1227 (2002) (defining 'jurisdiction' as authority of a sovereign power to govern or legislate; power or right to exercise authority; sphere of authority).

D. Tribal Jurisdiction

i. Plenary power

Adopting the same legal analysis as it relates to tribal jurisdiction, it is clear that the federal government's jurisdiction over Indian tribes can be present whether or not it is being exercised. Federal agencies have concluded on numerous occasions that whether property or certain material is "under tribal jurisdiction is a legal question distinct from the factual question of whether that jurisdiction is being exercised." *Cowlitz Submission* at 17. Additionally, federal courts have agreed that the existence of jurisdiction is a matter of law. "Jurisdiction is not created by its exercise, but rather exists in its own right." *Id.* at 18. *See also Kansas v. United States*, 249 F. 3d 1213, 1229 (10th Cir. 2001).

When "[t]he federal government exercises jurisdiction over a tribe, such as including them on a list or providing services to the tribes members, it is indicating that they have federal jurisdiction over a particular tribe. *Cowlitz Submission* at 19. However, "the factual inquiry as to whether jurisdiction has been exercised cannot supplant the fundamental principle of law that Congress has continuous plenary jurisdiction over Indian tribes whether or not it is exercising that jurisdiction." *Id*.

ii. Congress, Not Courts

It was clarified in 1949 that Congress, not the courts, should determine whether and to what extent and for what time a distinctly Indian community will be recognized and protected by the federal government.

> The courts have held that it is up to Congress and the Department of the Interior and not the judiciary to determine whether a tribe exists. Of course, neither the Congress nor the Secretary of the Interior can act arbitrarily or unreasonably in this determination. That is, they cannot call a community or body of people an Indian tribe if there is no basis in fact for such a holding. On the other hand, Congress and not the courts will determine whether and to what extent and for what time a distinctly Indian community will be recognized and dealt with as a defendant tribe requiring the protection of the United States.

Theodore H. Haas, *Tribal Relations Pamphlets* 2, 25-26 (United States Indian Service 1949).

The control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs and the plenary power over tribal property has been frequently exercised by Congress. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1945) 94. *See also Roff v. Burney*, 168 U.S. 218 (1897); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *Blackfeather v. United States*, 190 U.S. 368 (1903); *Choate v. Trapp*, 224 U.S. 665 (1912); *Ex Parte Webb*, 225 U.S.

663 (1912); *United States v. Osage County*, 251 U.S. 128 (1919); *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442 (1920)

Justice Brandeis, speaking for the US Supreme Court in *Morrison v. Work*, 266 U.S. 481, 485 (1925) declared:

> It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under claim that the property is tribal, the powers of a guardian and of a trustee in possession.

A necessary corollary to this principle is that control of tribal land is a political function not to be exercised by the courts. The courts have usually denominated this power as political and not subject to the control of the judicial department of the government. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (sustaining the disposal of a reservation of an Indian tribe on the ground that it was a legitimate exercise of congressional power over tribal Indians and their property.)

E. Significance of the Omission of the Term "Now"

i. Mineral Leasing

As illustrated by the following excerpt, tribes that were not federally recognized under the IRA in 1934 were still allowed to receive federal benefits (in this case, securing mineral leasing charters) less than four years after the enactment of the IRA. Not all eligible tribes or groups of Indians elected to take advantage of § 17 of the IRA and secure charters under which they might lease lands for mining purposes so Congress enacted the *Omnibus Tribal Leasing Act,* which reads in part:

> *On and after May 11, 1938,* unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians *under federal jurisdiction,* except those specifically excepted from the provisions of law pertaining to

> mining, with the approval of the Secretary of the Interior, may be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians. . . . (Emphasis added)

The *Omnibus Tribal Leasing Act*, of May 11, 1938, 52 Stat. 347, §1; 25 U.S.C. §396(a) (1938); 42 C.J.S. *Indians* § 120 (2009).

The statutory language of that Act, enacted less than four years after the IRA, nowhere specifies any distinction between tribes "under federal jurisdiction" and tribes "**now** under federal jurisdiction." Rather, the introductory language, "[o]n or after . . ." is forward looking, leaving the availability open for tribes that may later become "under Federal jurisdiction," to enjoy the benefits from and protection of the federal government via that legislation.

There is no readily apparent reason why, as the Supreme Court held, Congress would purposefully make such a critically temporal distinction in defining what an Indian is for the purposes of the IRA's land trust program, when less than four years later, Congress would pass other legislation for the benefit of Indian tribes that clearly made no distinction between "now under federal jurisdiction" and "under federal jurisdiction."

This omission of the word, "now" is also evident in the actions of the Executive branch from that era.

ii. Executive Orders

In 1936, President Franklin D. Roosevelt authorized the extension of trust periods of "any Indian lands," making no mention of tribes neither "now under federal jurisdiction" or tribes "under federal jurisdiction." The text reads:

> [I]t is hereby ordered that the periods of trust applying to *any Indian lands, whether of a tribal or individual status*, which, unless extended, will expire during the calendar year 1938, be, and they are hereby, extended for a further period of 25 years from the date on which any such trust would otherwise expire. . . . (Emphasis added)

Exec. Order No. 7,464 – September 30, 1936.

President Roosevelt authorized an identical order a year later, Exec. Order No. 7,716 – September 29, 1937. Again, the land at issue was "any Indian land" with no mention whatsoever to a requirement that the lands be held by a tribe "under federal jurisdiction," let alone the more stringent requirement that the tribe had to be "now under federal jurisdiction." Further, it is interesting to note that in both Executive Orders, President Roosevelt did not even make a distinction between tribes and individual Indians, which would seem to undermine the *Carcieri* majority's unprecedented analysis of both 25 U.S.C. § 465 (the purpose of the IRA's land trust program for Indians) and 25 U.S.C. § 479 (how to determine who (or what) is an "Indian").

In the three-quarters of a century since the enactment of the IRA, until *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) neither Congress nor the Judiciary, nor the Executive, ever placed any emphasis on the word, "now" as the Supreme Court has interpreted it in *Carcieri*. This bolsters what Justice Stevens noted in his dissenting opinion:

> In sum, petitioners' arguments - and the Court's conclusion - are based on a misreading of the statute. "[N]ow," the temporal limitation in the definition of "Indian," only affects an individual's ability to qualify for federal benefits under the IRA. If this case were about the Secretary's decision to take land into trust for an individual who was incapable of proving her eligibility by lineage or blood quantum, I would have no trouble concluding that such an action was contrary to the IRA. But that is not the case before us. By taking land into trust for a validly recognized Indian tribe, the Secretary acted well within his statutory authority.

Id. at 1078.

As it has done before in *Duro v. Reina*, 495 U.S. 676 (1990), when Congress believes a US Supreme Court decision is in error, it has the power to "overrule" it by simply amending the legislation and fixing the judicial blunder.

III. Changing Administrative Rules Because of a Supreme Court Decision

A. Agency Authority to Promulgate Rules

An agency can change its rules at any time, and can even "overrule" the Supreme Court's interpretation of an agency rule by changing the rule. Any agency action must be found to be within the agency's discretion, and cannot fall outside statutory authority because only courts say "what the law is." Agencies faced with an adverse interpretation of a statute generally avoid allowing the case to reach the Supreme Court.

When the Supreme Court bases a decision on an interpretation of a statute, Congress can "overrule" the Court by changing the statute. Likewise, when the Court bases a decision on an interpretation of a statutorily authorized administrative regulation, an administrative agency can "overrule" the Court by changing the regulation, so long as the new regulation is also legal, *see, e.g.*, *Sierra Club v. Sigler*, 695 F. 2d 957, 973 (5th Cir. 1983) ([S]tatutes and regulations may overrule judicial precedent . . . . Of course, the regulation may not exceed the scope of its authorizing statute.).

An agency can make or change its rules at any time: before, after, and even during litigation of the rule. Agencies have inherent authority to amend their rules, *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1317 (D.C.Cir. 1995). The Administrative Procedures Act defines rulemaking to include the process for "amending, or repealing a rule," 5 U.S.C.A. § 551(5).

Agencies almost always change a rule before litigation reaches the Supreme Court, avoiding the risk of binding precedent that limits the agency's power. In *Dep't of Interior v. S.D.*, 519 U.S. 919 (1996), and *Lawrence ex rel Lawrence v. Chater*, 516 U.S. 163 (1996), agencies changed a regulation after the circuit court ruling, prompting the Supreme Court to grant certiorari, vacate the ruling and remand for reconsideration based upon the new rule. In the

former case, the 8th Circuit found that the IRA itself was unconstitutional, *S.D. v. Dep't of Interior*, 69 F.3d 878 (SD I) (8th Cir. 1995) (impermissible delegation from Congress to agency), but reversed itself ten years later after Interior allowed for judicial review of its trust decisions, and after other circuits found this fix to render the IRA constitutional, *S.D. v Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005).

Courts analyze administrative rulemaking for agency compliance with whatever authority Congress granted it. In addition, agency rulemaking must usually comply with the procedures of the Administrative Procedures Act. Courts have developed a common law of administrative rulemaking analysis, the "Chevron Framework," affording varying degrees of deference to an agency's own interpretation of the statute from which it draws its authority, see 3 ADMINISTRATIVE LAW AND PRACTICE § 12.32 (2d ed. 2009). The starting point of the deference analysis is the statute's ambiguity. If it is ambiguous, courts will allow agencies to fill the gap, *id.* If the statute is not ambiguous, then the court does not defer, *id.* In *Carcieri*, the Court found the IRA text to be unambiguous, 129 S. Ct. at 1065, and therefore did not defer.

An agency can overrule a court's interpretation of its regulations by making a new regulation, but an agency cannot challenge the Supreme Court's interpretation of a statute, since courts say what the law is. The *Carcieri* court interpreted the IRA, and any new rule or action by the Department of Interior must conform to it. Interior's new IRA rules should exploit any remaining ambiguity within the statute to allow a court to defer to the agency.

In regards to the interaction between branches of government when specifically dealing in Indian law, the drafter of the IRA, Felix Cohen, noted in his HANDBOOK OF FEDERAL INDIAN LAW 100 (1945) that:

> "[t]he interplay of the legislative and administrative branches of Government in Indian affairs has caused the frequent application of two rules of administrative law. The first is that if properly promulgated pursuant to law the rules and regulations of an administrative body have the force and effect of statutes and the courts will take judicial notice of them. The second principle is that courts and administrative authorities give great weight to a construction of a statute consistently given by an executive department charged with its administration, especially if it is a rule affecting considerable property or doubtful question. These rules are based on the theory that the failure of Congress by subsequent legislation to change the construction of administrative bodies charged with the administration of a statute constitutes acquiescence in the practical construction of a statute.

IV. Conclusion

The word "now" had been in the statute for seventy-five years before the Supreme Court determined that Congress meant it to have a drastically different meaning than has been accepted all these years yet never altered or even acknowledged. Because *Carcieri* deals directly with land trust issues pregnant with the potential for matters of "considerable property" the Supreme Court should have given great weight to the statute's construction as Interior has interpreted it in the last three quarters of a century. It gave none. Likewise, because of the three concurring opinions and pointed dissent in *Carcieri*, the issue clearly involves a "doubtful question." As such, Congress should remedy this Supreme Court error as it has already done with the Duro fix.

IV. Draft Rules to Fix Carcieri

What is the purpose of this part?

The Indian Reorganization Act of 1934 (IRA) provides the Bureau of Indian Affairs the authority to take land into trust for American Indian tribes who were under federal jurisdiction in 1934 when the IRA was enacted (25 U.S.C.A. 465, 1934). This part contains procedures that the Department of the Interior will use to determine what tribes were under federal jurisdiction on June 18, 1934.

How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of Land Acquisitions (25 CFR 151). In addition, the following terms have the meanings given in this section.

BIA means Bureau of Indian Affairs.

IRA means the Indian Reorganization Act of 1934, as amended and codified at 25 U.S.C.A. 465.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed trust lands are located.

Secretary means the Secretary of the Interior or authorized representative.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

An Indian tribe under federal jurisdiction means the tribe is able to show; 1) it was federally recognized in 1934, 2) it has been a party to a treaty with the United States, 3) it has been the beneficiary of a pre-1934 congressional appropriation, or 4) enrollment with the Indian Office as of 1934.