

June 29, 2009 Tribal Consultation re: *Carciari*
Hilton Mall of America Hotel, Ballroom #1
3800 American Boulevard East, Bloomington, MN

U.S. Department of the Interior Panel:

Larry Echo Hawk, Assistant Secretary – Indian Affairs
Hilary Tompkins, Solicitor
George Skibine, Acting Principal Deputy Assistant Secretary – Indian Affairs
Jerry Gidner, Director, Bureau of Indian Affairs
Vicki Forrest, Deputy Director - Trust Services, Bureau of Indian Affairs
Darren Pete, Congressional Liaison – Indian Affairs

Moderator:

Paula Hart, Acting Director, Office of Indian Gaming

Assistant Secretary Echo Hawk opened the consultation and thanked everyone for attending. The Assistant Secretary noted that this is the first of his official consultation meetings, and is an important consultation to guide future action on addressing the Supreme Court's *Carciari* decision. While there has been a desire to move faster in addressing the effects of the decision, Secretary Salazar was not willing to take action until the political team was in place and was frustrated that the confirmation process took as long as it did. The key people are now on board at Interior. Assistant Secretary Echo Hawk committed to personally attending each of the three *Carciari* consultations to listen to tribal leaders' input. Secretary Salazar gave clear marching orders to address *Carciari* quickly. As such, Interior will present a position statement to Secretary Salazar as soon as possible, but no later than mid-July. Interior representatives are here today to listen to the tribes' input in anticipation of presenting that position statement.

Solicitor Hilary Tompkins presented a brief statement of her background – she is Navajo, but was adopted and raised in New Jersey by Anglo parents. She attended Dartmouth College, then served as tribal court advocate on Navajo, then attended Stanford Law. As an attorney, she worked for the U.S. Department of Justice and then worked for Sonosky Chambers representing tribes in New Mexico. In that position, she personally prepared fee-to-trust applications on behalf of tribal clients. She then worked for New Mexico Governor Bill Richardson, and ultimately became his chief counsel. These experiences will inform her analysis in her current position as Solicitor. This is day eight in her new position as Solicitor. She is humbled and honored to sit with tribal leaders today and is here to listen. Addressing *Carciari* is a priority in the Office of the Solicitor.

Bureau of Indian Affairs (BIA) Director Jerry Gidner discussed the March 2009 memorandum that had been sent from Central Office to the Regional Directors. The point of the memorandum was to start collecting data that BIA already had, to allow BIA to begin analyzing the impact of the decision as it moved forward on fee-to-trust applications. The memorandum directed the Regional Directors to move forward on applications and to consult with the Field Solicitor if there was any question as to whether a the tribal applicant was under federal jurisdiction in 1934. Interior is not preparing a list of tribes that were under, or not under, federal jurisdiction as of 1934. The data collection was solely to prepare to evaluate the impacts of different courses of action and provide sufficient evidence to take action on applications.

Acting Principal Deputy Assistant Secretary George Skibine stated that the purpose of the consultation is to hear tribes' views on the appropriate action Interior should take in response to the *Carciari* decision. As a point of reference, he presented a slide outlining two main options, as follows:

Legislation

1. Should the Dept only propose retroactive legislation that only protects land already acquired in trust?
2. Should the Department only propose prospective legislation to confirm the right of all federally recognized tribes to acquire land in trust?
3. Should the Department propose both retroactive and prospective legislation?
4. What form should legislation take (amendment to IRA or new authority) and what should it say?

Regulations

1. Should the Department revise 25 CFR 151 to define the term "under federal jurisdiction in 1934"?
2. What should a revision say?

Principal Deputy Assistant Secretary Skibine noted that Interior is currently involved in litigation defending its decision to take land into trust on behalf of the Gun Lake Tribe, which was recognized under part 83 process. Interior's defense is based on the argument that the Quiet Title Act protects the title to the land. If we win, this will moot, to a large degree, the need for a retroactive fix; however, an outcome is likely several years away. If we pursue prospective legislation, such legislation would clarify that Interior has legal authority to take land into trust for tribes not under federal jurisdiction in 1934. NCAI representatives have stated their concern that Interior's pursuit of regulatory changes may lessen the pressure on Congress for a legislative fix. The benefit of regulations would be that courts would grant *Chevron* deference to Interior's interpretation, as stated in the regulation. Deputy Director – Trust Services, Vicki Forrest, and Director, Office of Regulatory Affairs and Collaborative Action, Michele Singer, would be involved in the development of any regulations. If the consensus is to move forward with amendments to 25 CFR 151, Interior will hold separate consultations on what the revisions should say.

Moderator Hart then welcomed comments from tribal leaders.

Chairman Norman Deschampe, Grand Portage Band of the Minnesota Chippewa

- Each band of my tribe has had a relationship with the Federal Government since the 19th century; however, the fact that the Secretary clearly has IRA authority to take land into trust for my tribe does not mean that we are not concerned about the effect of this decision on other tribes. For example, a local county recently asserted that Fond du Lac was not under federal jurisdiction in 1934 because the tribe's constitution was not approved until 1936. Fond du Lac replied to the county, citing its historical relationship and the fact that the tribe held its election in 1934, persuading the county to drop its objections.
- The *Carciari* decision allows Interior to develop list of tribes under federal jurisdiction. We urge you to consult with tribes in the development of any such list.
- Eliminating the obstacles posed by *Carciari* is vital to tribal sovereignty for other bands of our tribe and other tribes.

Marge Anderson, Chief Executive, Mille Lacs Band of Ojibewa

- Immediate action is needed without legislation.

- The Mille Lacs Band was a party to treaties in the mid 1800's, Congress enacted several statutes specifically addressing the band, and there are hundreds of rolls and other documents, recognizing the Mille Lacs Band and making clear that the Band was under federal jurisdiction in 1934; however, the Band is not specifically listed in IRA list of 1937.
- Interior should recognize that the 1937 and 1947 IRA lists are not comprehensive lists. Many tribes were under federal jurisdiction in 1934, but just chose not to reorganize under the IRA. Interior can make this clear without federal legislation.

Henry M. Buffalo, Fond du Lac Band of Chippewa Tribe and Red Cliff Band of Lake Superior Chippewa

- Fond du Lac has faced challenges from Saint Louis County. During a working session of the Saint Louis County Board, questions arose regarding Fond du Lac's reacquisition of lands. In the county, tribes have first right of refusal on tax forfeited lands. The attorneys for Saint Louis County used *Carcieri* as a basis for objecting to Fond du Lac's fee-to-trust acquisitions because our tribal constitution was enacted after 1934. The tribe responded with citations of relationship dating back to 1800's and informed the county that if they rely on *Carcieri*, they are doing so based on faulty information, and the tribe will seek penalties if proceed to Federal Court. On June 19, Saint Louis County withdrew its *Carcieri* objections based on the tribe's explanation.

Councilperson Phyllis Davis, Match-E-Be-Nash-She-Wish (Gun Lake) Tribe

- Our tribe received federal acknowledgement through the part 83 process. We were the last tribe in Michigan to acquire a land base. We had submitted a fee-to-trust application in 2001 for acreage within our aboriginal lands, which was an industrial zone containing a vacant building. In 2005, we received a final determination to acquire land into trust and have since undergone more than three years of litigation. On January 30, 2009, the land was finally placed into trust. The land will be used for economic development, and the Governor and other stakeholders support the acquisition. We are concerned that this small parcel may be the only land we can get.
- *Carcieri* diminishes Interior's authority and drastically affects Interior's ability to assist tribes with econ development and sovereignty. Interior should support a legislative effort to fix *Carcieri*.

Lori Nelson, Vice President Lower Sioux Indian Community

- We are asking to be united as one tribe and for officials to hear us and recognize us. Adding "now and thereafter" to the IRA would help us resolve the decision.
- Since the day Europeans arrived, it has been subtle termination. We deserve to be recognized as tribal entities with sovereign rights. We can work together as nation-to-nation, nation-to-states, and we can resolve this together.

Tribal Chairman Arlyn Ackley, Sokaogon Chippewa Community of Wisconsin

- This is more like a hearing before Congress. I thought we came here to discuss resolutions. Treat us as government equals. The last time I had a consultation, it was with Ada Deer and we sat around a table and talked.
- We acquired land in 1937 and formed a constitution under the IRA to be equal. I'm disappointed that the Solicitors and people who defended Narragansett lost. Now, all tribes have to defend ourselves.
- Legislation is the only way to go. Regulations aren't working for the tribe.

- If we had fought together as one tribe, we wouldn't be in this situation. Interior needs to do a better job for us.
- Consultation works a lot better when all are sitting in a circle or square.
- When we had BIE consultations, there was no follow-up. I suggest that afterward, there be some give-and-take.
- Having panel on higher level gives impression that being looked down upon. It feels like school principals. Consultation should be more face-to-face with tribal leaders. A roundtable would be better consultation.

Solicitor Tompkins and Assistant Secretary Echo Hawk

- We also feel uncomfortable with the room arrangement. We did not mean to offend anyone by it, but hope that it doesn't chill the discussion.

There was a consensus to move forward with the consultation without taking the time to rearrange the room, but Interior agreed to take the comments into consideration for the future. The format had been for Ms. Hart to call three tribal leaders at a time to come up to the microphone to present their statement. Once the discussion of the room arrangement occurred, Ms. Hart welcomed speakers to provide their comments more informally, but asked that speakers continue to state their names

Thomas Van Zile, Treasurer Mole Lake Band of Chippewa

- Our tribe has a pending fee-to-trust application that began the process prior to the *Carcieri* decision. According to the memorandum to Regional Directors, no final decision should be made on pending fee-to-trust applications, and no deeds should be approved. How will that affect our tribe's application?

BIA Director Gidner

- I am not familiar with your particular application but will look into each to see if the transaction is feasible in light of *Carcieri*, and will coordinate with the Regional Office and Field Solicitor.

Patrick McCoy, Potomac Nation, Pamunkey Indian Tribe in Virginia

- On the idea of fixing this with a revision to part 151... revising regulations is a difficult endeavor, and if were to do it, it would be challenged. So the smarter, though more difficult, route is legislation. We ask that any legislative fix not leave out tribes that are not today federally recognized.

Chair Lewis Taylor, St. Croix Chippewa Indians

- Thank you for bringing *Carcieri* to our attention, and for consulting in Minneapolis area. We currently have fee-to-trust applications in process and have questions about it.
- Indian status is based on the Indian tribe you affiliate with. The St. Croix Tribe was recognized and counted as part of Indian Civil Rights Act.
- We need legislation to provide Interior with authority to take land into trust for all tribes. We have the right to go back to ancestral homeland and preserve our lifeways.

President Rodney Bordeaux, Rosebud Sioux Tribe

- I'm concerned about the instability the *Carcieri* decision will create. There is a lot of anti-Indian sentiment. Rosebud entered into treaties with the Federal Government in the 1800's, so there is no question we are under federal jurisdiction.

- We originally had 3.2M acres, but by the time of the IRA had only 500k. In addition to our treaties, legislation specific to Rosebud was passed in 1963, allowing the sale or mortgage of isolated tracts to purchase lands within land consolidation area.
- I'm concerned about former treaty lands, in the Black Hills, and sacred land, at Bear Butte, that we're trying to restore and keep from getting developed. Some of the Western Attorneys General are advocates for taking away Indian rights. A lot of legal aid attorneys that become anti-Indian law.
- We would like DOJ to be involved with the tribes' effort to work with Interior on *Carcieri*.
- The Department should pursue both prospective and retroactive legislation. This can be accomplished by amending the IRA to take out "now under federal jurisdiction."
- Allow all tribes to obtain rights, including those not currently federally recognized.
- We need a policy that treats all tribes as under federal jurisdiction, rather than a regulation.
- The United States has not lived up to its responsibility to restore a reservation land base and other goals of the IRA. Only 8% of tribal lands have been restored.

Peter S. Yucupicio, Pascua Yaqui Tribe of Arizona

- We were recognized after 1934. We think without the ability to provide and have lands put into trust, tribes would not be able to provide for members (by providing such things as a health care center, gym, or senior living facilities, for example). However, we have 202 acres for 15,000 members and need more land. We just donated money to surrounding jurisdictions to ensure children in Tucson area have computers, etc. , and have been a good neighbor to surrounding jurisdictions, but are concerned about what this decision means for our ability to acquire trust land.
- Some tribes didn't wish to be recognized under the IRA due to prejudices.
- We believe Interior already has the authority to take land into trust. We will submit our position paper. Once a tribe is federally recognized, it must come with everything that historical tribes have.

Ron Tehassi Hill, Oneida Nation

- We support a legislative fix. We will be monitoring for activity regarding this decision. The *Carcieri* decision evidences the Supreme Court's misunderstanding of Indian law. The United States as a whole is Native American land.

President Wilfrid Cleveland, Ho-Chunk Nation

- Our nation has submitted position papers, but would also like to comment today.
- The *Carcieri* decision has come at a time when there is a new president who has promised to indigenous people both dialogue and change for the betterment of future generations.
- The Supreme Court decision may be a vehicle for big business to take land that they had thought was useless, but now may see as valuable given the potential for renewable energy.
- Termination did not succeed; we're still here. Prior to 1934, there were censuses and treaties, with all tribes under federal jurisdiction, so it is confusing that the Supreme Court can misinterpret the IRA.
- We support a legislative fix and the NCAI language for such a fix. We put our trust into you, as representatives of the President, that we will get some feedback to foster dialogue.

Chief Glenna Wallace, Eastern Shawnee Tribe of OK

- Ours is one of the oldest tribes in the United States. Our land was taken from us in 1832, and we were forcibly removed from Ohio to Oklahoma. Thirty percent of our people died on that journey. Almost 40 tribes exist in Oklahoma, and we were technically recognized in 1936. We are in your hands, we trust you, and we ask that you go back and defend our cases. The *Carcieri* case is wrong.

Michael Anderson, Counsel, Match-E-Be-Nash-She-Wish (Gun Lake) Tribe

- “Under federal jurisdiction” is equivalent to Congress’s plenary jurisdiction. The only way to achieve a prompt solution is to have the Secretary issue a statement (or have the Solicitors issue a decision) that all tribes are under federal jurisdiction and invite tribes to supplement their applications in anticipation of litigation. This is the only response that could be done quickly.
- The other option is to interpret “under federal jurisdiction” for each individual tribe based on treaty history, letters, and other documents, but this would create false distinctions between tribes, which Congress tried to eliminate with Federal Lists Act. I don’t trust that Interior attorneys would not create false distinctions.
- I would urge that only federally recognized tribes are the subject of any analysis regarding jurisdiction.
- Interior should limit *Carcieri* to the facts of Narragansett because the parties had not briefed the issue. If Narragansett had briefed the issue, they may have been able to show they were under federal jurisdiction.

Solicitor Tompkins

- Consider how a broad “under federal jurisdiction” interpretation would treat PL 280 tribes or others that have submitted themselves to state jurisdiction.

Assistant Secretary Echo Hawk

- In *Lone Wolf v. Hitchcock*, the Supreme Court ruled that Congress had power to ignore treaty rights because Congress had plenary authority. Plenary means absolute and unqualified. In the *United States v. Kagama*, the Supreme Court ruled that Congress had power to exercise jurisdiction over Indians in tribal areas under the Major Crimes Act, through a guardian wardship power.

Andrew Adams III , St. Croix Chippewa Indians of Wisconsin

- *Carcieri* is an example of bad facts making bad law – Narragansett never had a treaty with the United States. The equal footing doctrine requires new states to be treated the same as existing states. Applying this to tribes, all federally recognized tribes should be treated the same regardless of their unique histories.
- With regard to St. Croix, it wouldn’t make sense for Congress to pass legislation appropriating funds in 1919 if it didn’t consider the tribe to be under federal jurisdiction.
- Any legislative or regulatory fix has to be holistic. Just as when the Supreme Court issued the *Duro* decision, Congress enacted the *Duro* fix, and it was upheld afterward.

Patty Marks, Private Tribal Attorney

- Treaty tribes were not left out of the IRA. Only Congress can terminate a treaty. So how do you go out of federal jurisdiction? There are so many fact-driven patterns. What is published in books and in Interior documents is inaccurate. We have had difficult time convincing the Solicitors in past that these are serious issues, that they should get back to what the law says,

and stay away from some abstract piece of paper in which someone in BIA said that a tribe shouldn't be recognized.

- For example, fourteen treaty landless tribes were not even afforded a visit, only because the Department ran out of money.
- Is the Interior making a separation of powers argument?

Solicitor Tompkins

- Until Congress does something under its plenary power, as long as tribe continues to exist and abides by treaty, the tribe exists.

Patty Marks, Private Tribal Attorney

- In the case of some treaty tribes, BIA simply stopped attending meetings and treating the tribe as if it exists. I am worried that people that don't have the facts, and do incomplete research, will conclude that a tribe was not under federal jurisdiction. The fact that someone screwed up by not including a tribe on the list should not be dispositive.

Judy Shapiro, Legal Counsel, Rosebud Sioux

- In the *Kagama* case, the Supreme Court said that states are the "deadliest enemies" of the tribes. Traditionally, the worst fights have been between jurisdictions. The Articles of Confederation gave states authority over tribes. The founders of the United States recognized that was a failure and instead established a federal trust responsibility. The basic premise of the federal acknowledgment process is that, if a tribe can prove that it was under federal jurisdiction, it was a tribe. A tribe once recognized is not "created;" rather, it is a correction of an error. To create a list that leaves those tribes out again is to create another error.
- If there is going to be an administrative process to address the *Carciari* decision, it will be an enormous burden over years. Is Interior committed to pushing for legislation?

Solicitor Tompkins

- I don't think it's an impossibility that Interior will pursue legislation, but it remains to be seen what form it will take. We are not precluding it as a possible solution.

Assistant Secretary Echo Hawk

- I interpreted Salazar's stance as him being ready to go to Congress. However, if we pursue a legislative fix, there are dangers that await in Congress. The bill could be amended through the process of becoming law. Do tribes share that concern or is it important enough to risk that?

[Inaudible – Will be cross-referenced with transcript], Oneida Nation

- We are a treaty tribe established in 1800's and are concerned with a legislative fix, because of the risk of amendments that may affect tribes' tax status and other issues. We are concerned that if a legislative fix attempts to treat all tribes equally, localities will try to obtain a veto power over fee-to-trust transactions.

Patrick McCoy, Potomac Nation, Pamunkey Indian Tribe in Virginia

- If Interior were to interpret "under federal jurisdiction" to include all tribes, it would invite litigation. Legislation is the better route.

Michael Anderson, Counsel, Match-E-Be-Nash-She-Wish (Gun Lake) Tribe

- We support legislation, but are pessimistic about Congress doing it this year. There have been two hearings so far with no legislation introduced, so we probably won't see a bill this year. So Interior will have to make decisions on pending applications in the meantime. We need an administrative solution now—whether it be a statement by the Secretary or Solicitor— or it will delay economic development.

Patrick McCoy, Potomac Nation, Pamunkey Indian Tribe in Virginia

- Interior could pursue a legislative fix while Interior processes fee-to-trust applications. Possibly put some on hold if they raise *Carciari* concerns (although that makes distinctions we are trying to avoid).

Darren Pete, Congressional Liaison – Indian Affairs

- To get a legislative fix moving, Interior would write a letter to members of Congress, and find a sponsor for the bill (Dorgan, e.g.). But any legislation does open the door to states and others to attach other things to the bill. We also need a unified front from the tribes. Legislation won't move forward if some tribes are subtly lobbying not to do a fix. If it's a stand-alone bill, it can move through the House. But need something on the floor now; otherwise, representatives will be focused on reelection.

Acting Principal Deputy Assistant Secretary Skibine

- Interior is not putting a hold on processing FTT applications, and Interior has authority to determine for itself what under federal jurisdiction means. Interior will defend the lawsuits based on the Quiet Title Act.

Solicitor Tompkins

- If we define "under federal jurisdiction," then we will be sued. But if we go to Congress and have Congress clarify our authority, then there will be more certainty and less litigation.

[Inaudible – Will be cross-referenced with transcript], Ho-Chunk Nation

- Our nation was never deprived of recognition, as we were recognized through formal acts of Congress.
- I'm curious to see that what is happening is similar to what had happened during Dawes Act. We had a similar economic situation. I look at this as an opportunity for renewable energy and tax credits. Looking at the Nation's debt, states and the Federal Government should be negotiating with us, not attacking us.
- We can submit ideas to Interior on legislation. I am disappointed that draft legislation hasn't been submitted to the tribes yet.
- It would be nice to have staff present ideas in a new direction. When Collier came in, he introduced change. I would recommend this administration take the opportunity to present change for the better.

Sheldon Peters Wolf-Child, Lower Sioux (Mdewakanton Dakota) Reservation

- In 1805, our Chief signed the first treaty for our nation. In 1862, we had an uprising. In 1863, Congress passed legislation to remove the Dakota from Minnesota. Congress passed a second Act in 1863, which provided that those who didn't fight in the war of 1862 could have acreage in Minnesota, but even they couldn't receive the acreage until 1886. We believe the 1863 Act established jurisdiction, but we did not receive IRA land until 1936. What is our status?

United Tribes of North Dakota

- Will a transcript be made available to tribes and tribal leaders, along with documentation provided here by tribes? How long will tribes have to respond?

Moderator Hart

- The transcript will be posted on the BIA Web site. Please submit your comments by mid-July to make sure your comments are considered. We usually establish a comment deadline of 30 days after the last consultation, but we want to move quickly in this case. A clear statement to the President would make a big difference politically and would help move process forward, but it must be a clear, unequivocal statement.
- You can mail comments to Paula, Interior, MS 3657, Washington, DC, or email her at paula.hart@bia.gov.

Solicitor Tompkins

- This has been educational and helpful. I appreciate you working with us and sharing your thoughts.

Assistant Secretary Echo Hawk

- Thank you for your input. We will arrange things differently for the future. It was stiff at first, but felt better toward the second part.