

May 12, 2009 USET *Carcieri* Strategy Session

Earl Barbry Sr., Chairman of the Tunica-Biloxi Tribe of Louisiana, opened the session with a brief welcoming statement.

Brian Patterson, President of the United South and Eastern Tribes (USET) thanked the Department of the Interior for its support of the land-into-trust process before the Supreme Court. President Patterson asked for Interior's continued support in the form of an administrative interpretation that would consider all tribes currently recognized to be "under federal jurisdiction" for the purposes of the IRA. President Patterson noted that, regardless of how *Carcieri* is interpreted, there will be litigation from States and localities.

Michael Cook, Executive Director of USET, served as moderator of the panel, which included:

- Paula Hart, Acting Chief of Staff for the Assistant Secretary-Indian Affairs
- Phil Hogan, Chairman, National Indian Gaming Commission
- Mark Van Norman, Executive Director, National Indian Gaming Association
- Charles Hobbs, Partner, Hobbs Straus, Dean & Walker LLP
- John Dossett, Counsel for National Congress of American Indians.

Cook opened the panel by stating that it is his hope that the strategy session sends a message from Indian Country that there is a need for action. He noted that tribal leaders should work with Interior as a member of the team to come up with a strategy for addressing the *Carcieri* decision.

I. Paula Hart, Acting Chief of Staff for the Assistant Secretary-Indian Affairs

Hart provided her remarks, giving a brief chronology of events and indicating that the input received from the strategy session will be considered to prepare for consultation sessions. In response, the following comments were received.

- Councilman Hiawatha Brown, Narragansett Tribe:
 - Consultation should be initiated on the east coast. Narragansett is dealing with settlement issues and the impacts of the *Carcieri* decision are most applicable to settlement.
 - Interior needs to take a strong position on the *Carcieri* decision. The decision stripped Interior of its authority to take land into trust. Over the past 2 months, Interior has been spinning its wheels without taking definitive action. The ball should not stop merely because an Assistant Secretary is not yet in place.
 - Once an Assistant Secretary is in place, Interior should not follow its usual course, acting in such a rush that tribes are left in the dark.
 - Tribal leaders also need to take action and stop spinning their wheels. Since the Supreme Court handed down the decision, groups like NCAI and USET have held meetings and conference calls, but all the talking has not led to action.

- We are not concerned about the impact on gaming; any such impact is residual.
- Neither Congress nor the Court is a friend of tribes. We are waiting for Interior to make a decision. As this issue was coming to a head, Interior should have had some idea of the outcome and should have been prepared for a positive outcome or negative outcome.
- Mashpee Wampanoag Tribe
 - What is Interior's position at this point?
- Interior response (Hart):
 - Interior plans to consult with tribes before taking a definitive position.
- Mashpee Wampanoag Tribe
 - Interior should have a position given the fact that the Supreme Court restricted its authority. While the challenge was to a specific tribe, the effect was to limit Interior's authority. We would expect that Interior would want to fight vehemently for their authority. We are not hearing that Interior adamantly opposes the decision.
 - We are disappointed that strategy for the *Carciere* court case was not consulted on.
 - With regard to the data call to Bureau of Indian Affairs Regional Directors (RDs), Central Office should have had that information overnight, given that this is the electronic age. Additionally, tribes should not be required to provide this information.
 - All of Interior's energy should be focused on getting Interior's authority restored.
- Interior response (Hart):
 - Interior has many attorneys working on getting a grasp of the effects of the *Carciere* decision. The BIA regions responded within a week with the requested information. We have to now take the information and work through it all. We want to make sure when we come out with the position, it is the best decision that is most defensible in future litigation.
 - The Office of the Solicitor (SOL) is coming up with a legal strategy. As far as court case itself, SOL and the Department of Justice (DOJ) concur on that information. They are looking at the meaning of "now" and "under federal jurisdiction." Interior's ultimate position may not be able to meet the needs of all.
- Mashpee Wampanoag Tribe
 - We want consultation in the northeast. (Someone seconded).
- Interior response (Hart):
 - Consultation is being planned. Every tribe in the country wants consultation to be held in a location convenient to them. We want to give

opportunity for all tribes who may be affected. We chose Minneapolis because it is a central location, and Sacramento because there are many tribes in that area, but we are not closing the door on holding consultation in other regions.

- Mashpee Wampanoag Tribe
 - Tribes in northeast have different issues from tribes in south. It is not a matter of convenience, it is a matter of moving process forward.

- [Unkown Male]
 - Today's discussion is a step in the right direction. As tribes, we do not know the best approach to fix the problem – in Congress, Interior, or at the administration level.
 - Regarding the BIA RD letters, some RDs were sending the letters to tribes to collect the information, but I do not know anyone from eastern region who has received such a letter. Confusion arose from thinking that if you received the letter, you were on “the list” of potentially affected tribes.

- Interior response (Hart):
 - The letter was intended to direct RD's to gather information for their region. One RD (Stanley Speaks) had forwarded it to tribes.
 - Note: Francis Charles, Chairwoman, Lower Elwha Klallam Tribe, stated that her tribe did not receive letter from RD Stanley Speaks. Hart agreed to confirm whether a letter was sent.

- Brown, Narragansett
 - We oppose Interior collecting data regarding which tribes are affected because Interior is compiling information that States can use against the tribe and easily gain access to through a Freedom of Information Act request.

- Interior response (Hart):
 - We have been careful to not compile a list; the information is readily available with the regions.

- Brown, Narragansett
 - The fix to *Carciari* is simple, and does not require consultation. The fix is to amend the statute to put all tribes under the jurisdiction. Lawyers may benefit from more complicated solution.
 - Consultation is not necessary for the fix, because consultation, over the years, has not resulted in what tribes have expressed they want.
 - If Interior believes consultation is needed, Interior should hold a consultation following the Senate Committee on Indian Affairs hearing on *Carciari* because that is when tribal leaders from across the country will be in Washington, DC.

- We do not need consultation to know opposition; we need action. The *Carcieri* decision should be unacceptable to the Secretary and Indian Affairs.
- We have to have our rights defended. There is still a troubled relationship between the Federal Government and tribes. The Federal Government should defend tribes the way they are supposed to.
- Cedric Cromwell, Chair, Mashpee Wampanoag Tribe
 - The east coast has been impacted greatly by the *Carcieri* decision.
 - We need new language in the Indian Reorganization Act saying “now and hereout.”
 - While working on getting the new language in the IRA, we need an administrative fix for each tribe; however, this is time consuming and expensive because it will be challenged in court.
- [Unknown]
 - Is Interior consulting with the Department of Justice on their position?
- Interior response (Simermeyer):
 - Interior is working with the Department of Justice.
- [Unknown]
 - We request consultation following the May 27 Senate Committee on Indian Affairs hearing.

II. Phil Hogan, Chairman, National Indian Gaming Commission

Congress is waiting for the position of the Interior, as determined by the new political appointees. The National Indian Gaming Commission (NIGC) is not driving policy with regard to responding to *Carcieri* because this is an issue broader than gaming. NIGC is continuing to focus on its jurisdiction and is working with Interior to speak with one federal voice regarding “Indian lands,” in accordance with the memorandum of agreement.

The *Carcieri* decision was based on construction of a statute that could have been better written. We need to get the statute amended, but carefully to avoid future pitfalls. We want to have best and brightest working on fixing this decision to ensure that we are on solid footing. NIGC will participate in any future consultations.

Paula has eloquently portrayed how this has come together in an awkward time in DC. New political appointees understand the gravity of the decision. We want Indian gaming to be the economic tool Congress intended. In sum, we need a legislative fix, but we need the right people in there to pursue it.

- Mashpee Wampanoag Tribe
 - The “Washington shuffle” becomes frustrating.

- The Federal Government tries to hold pan-Indian consultations, but this is similar to asking France to speak on behalf of all of Europe. Consultation must be structured regionally so people with like minds and like issues can be heard once at a time.
- Tribes should be able to acquire in trust any land they hold in fee.
- Brown, Narragansett
 - The Federal Government is not upholding the fiduciary responsibility it owes to tribes.
 - Tribal chairmen are on the same level as a President or Senator.
 - The fix is simple – change the Indian Reorganization Act
 - Indian nations need to come together with one voice, or we will be dissected. The intent of gaming was never to pit tribes against each other, but that is what has happened.
 - We are hopeful that with the new administration, we will at least be able to get our foot in the door over the next four years. We were set back under the Bush administration.
 - It is not right that one tribe has all the money to hire attorneys, while others don't. Indian Country has little voice as to who the political appointments are. These are some of the things Indian people have to consider.
- Allan Parker, former Chief Counsel to temporary select Committee of Indian Affairs in 1978 when Narragansett Claims Act passed and staff director to Senator Inouye when he took over as chairperson to Senate Committee of IA (when IGRA passed and *Duro* fix to criminal laws).
 - The *Duro* fix was simple amendment attached to appropriations bill. Look to the simplest solution, which would be for Congress to amend the IRA and strike the word “now.” The leadership here should agree to propose to Congress and Interior to restore the law as it stood before the *Carcieri* decision. By restoring the law as it stood, we avoid having to interpret what other effects the decision may have. Leave for other venues and other times proposing to the Congress that they do other things.
 - Senator Inouye has expressed an offer to accommodate tribes to look for a vehicle for such language coming through committee. In the absence of such a vehicle, it would be appropriate to present this simple amendment to both Committees, and request that they act as quickly as possible with the intention of restoring the status quo.

[Break]

Brian Patterson, USET President stated his hope that this meeting sends a statement to the representatives of Interior to carry back to DC that tribes expect Interior to unite with tribes in one voice on this issue.

III. Mark Van Norman, National Indian Gaming Association

NIGA is looking forward to working with new political appointees. Indian tribes need a land base to exercise sovereignty, to have a place to carry out traditions and tribal functions. The *Carcieri* decision was a semantics problem, because Narragansett is a tribe that pre-exists the U.S., and yet we have a question on whether under federal jurisdiction. The U.S. Constitution establishes that all tribes are under the umbrella of jurisdiction.

We need to know the effects of the *Carcieri* decision on both lands already taken in trust and lands to be taken into trust. With regard to lands already in trust, Interior has the option of arguing that the Quiet Title Act applies, and is doing so in the Gun Lake litigation. This should be the position Interior takes in every case in which land currently in trust is challenged. The Quiet Title Act establishes sovereign immunity with regard to Indian land and a 12-year statute of limitations. Additionally, only those who claim an interest in the lands should have standing under Quiet Title Act.

Going forward, I agree with the others that we need to remedy the decision through legislation—adding “and hereafter” that should remedy the opinion. We need to have a hearing in the Senate regarding the language immediately and send message to Interior that we want legislation now.

If we have the opportunity to add legislation into an existing bill, we should. It will never pass as a stand-alone bill. We should decide on language in Indian Country.

There is no need for list, given the Quiet Title Act defense. We may want an SOL opinion saying that the Quiet Title Act protects land already taken into trust from third party challenges. In the long run, we are going to need legislation because the other result will be a tribe that wants to expand housing, create hospital, create wildlife refuge, build parking lot for gaming facility, may not be able to acquire land into trust.

NIGA has unanimously passed a resolution that the United States must protect lands under the Quiet Title Act and that there is a need for legislation.

- Francis Charles, Chairwoman, Lower Elwha Klallam Tribe
 - DOI has a responsibility to the tribes to delete the word “now” and replace with “now and hereafter.”
 - We are constantly fighting to defend our land. I would like to challenge the government for what has been promised us in the treaties and what has since been taken from us.
- Brian Patterson, USET President
 - Perhaps we need to consider parallel long-term and short-term approach.
- [Unknown male]
 - It is important to do everything we can. Tell Interior to support the Quiet Title Act with the Department of Justice.

- We should include language in an appropriations bill that we know will pass.
- Narragansett
 - While QTA may protect us now, there's no guarantee that courts will continue to protect us on this basis. We cannot take anything for granted, so we need to also work on a legislative fix.
- Pleasant Point
 - As long as we are under someone else's laws rather than our own, we have to do the best with the system we're in currently.

IV. Charles Hobbs, Partner, Hobbs Straus, Dean & Walker LLP

I recommend that someone in Indian Country file a brief with the Secretary giving him a sound legal analysis of issues and recommendation of action, and continue to process applications for land into trust until Congress acts. If Congress fails to act, then the courts will address. The legal brief would govern period between now and when Congress acts to address issue.

The problem is a failure to equally protect tribes. By 1970, the Secretary of the Interior had interpreted "now" to mean any time, giving equal footing to all tribes. The U.S. Constitution has a provision saying that all states are on equal footing regardless of when they join the union; this rational should apply to tribes too.

Carciari started with the state having jurisdiction over 1,800 acres of land the tribe owned because of a settlement. The Supreme Court left open what "under federal jurisdiction" means. The brief could assert that the Constitution's Indian Commerce Clause establishes jurisdiction over all Indians. If the Secretary bought that theory, he could say that he interprets it in that manner. Then all tribes would be on an equal footing. That wouldn't solve problem for good because someone would litigate that. Only Congress can take the permanent action necessary, but the Secretary could act on this interpretation in the meantime.

V. John Dossett, Counsel for National Congress of American Indians

Interior should, pending a legislative fix, make the best possible decisions for all tribes. NCAI is optimistic that a legislative fix can happen. The chairmen of the committees are good friends of Indian Country and are on the record as being supportive of a legislative fix.

In order to get rider on an appropriations bill, we will need Senate leadership. Once the Assistant Secretary is in place, Secretary Salazar will be consulting with Senate colleagues to get them on board.

Delete "now" and additional sentence to make sure past are secured.

Tribes should consider meeting with Senator Inouye and Secretary Salazar because a personal meeting is more effective.

Office of the Solicitor career staff helped created this problem (Scott Keep has been on the opposite side of many of these issues), so we do not want career staff making decisions until new Solicitor is on board. The Office of the Solicitor had stated that only a retroactive fix was needed, and that the Quiet Title Act defense may not hold up.

NCAI is concerned that the letter to Regional Directors put the burden of collecting information on the tribes.

The Constitution states that all tribes are under federal jurisdiction; therefore, the burden would be on challenger. There are a series of old cases where question arose whether people who were allotted were Indians, and the Supreme Court repeatedly said that even after citizenship, a person can still be Indian and under federal jurisdiction. All tribes are under jurisdiction as long as they did not cease relations with the Federal Government. Because of the continuous existence requirement for recognition through the part 83 process, it would appear that all tribes recognized via this process are under federal jurisdiction in 1934. The decision is a significant limitation on those who haven't made it through the process because of this requirement.

NCAI recommends tribes: (1) arrange meeting with Senator Inouye; (2) commission a legal memorandum to Hillary Thompkins as an analysis alternative to that provided by career Office of the Solicitor personnel; and (3) encourage Secretary Salazar to move forward on legislative fix even while holding off on administrative.

There is no need to consult on legislative fix; tribes are clear on what they want.

- Brown, Narragansett
 - You are the first person who has given us some hope as to direction. We have 100 attorneys involved in this. Every impacted tribe has an attorney, and the attorneys' views are conflicting. We need to have one voice, as tribal leaders. Tribal leaders need to take back the reins. Whatever mechanism we need to make sure NCAI and USET are taking the lead, that their respective attorneys are part of the team, we need to do.

- Judy Shapiro, Counsel for [Patula Band?], Oklahoma
 - The Band had an appeal pending before the IBIA to take land into trust when the Supreme Court issued the Carcieri decision. The Regional Director issued a statement that the Band was not "under federal jurisdiction" and requested that IBIA dismiss the case. We need to ensure that Interior is not hurting tribes' interests while resolution to this matter is pending.

The session ended at approximately 12:45 p.m.