Carcieri v. Salazar

For more than 70 years, the Secretary of the Department of the Interior has acquired land in trust for tribes pursuant to section 5 of the Indian Reorganization Act of 1934 ("IRA"), for any federally-recognized Indian tribe The Supreme Court decided Tuesday in *Carcieri v. Salazar*, however, that the Secretary's IRA authority is limited to acquiring land in trust for only those tribes "under federal jurisdiction" in 1934. By a 6-3 vote, the Court concluded that the Department cannot acquire land in trust for the Narragansett Tribe of Rhode Island because the Tribe was not under federal recognition when the IRA was enacted.

Carcieri v. Salazar thus represents a very significant victory for state and local governments fighting trust acquisitions for newly-recognized tribes within their jurisdiction and calls into question scores of acquisitions that have been made over the last seven decades. The scope of that victory, and its implications for Indian country, however, are not immediately clear.

The first question is one raised by the concurring opinions regarding the meaning of the phrase "under federal jurisdiction." The majority opinion notes that the petition for certiorari specifically represented that "in 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." Thus, the majority opinion never addresses the question of what "under federal jurisdiction" means for the purposes of the IRA. The two concurring opinions, however, focus on the question of what "under federal recognition" means and suggest that "under federal jurisdiction" does not require formal recognition. Instead, a tribe may have been "under federal jurisdiction" in 1934 if that tribe maintained treaty rights with the federal government, was the beneficiary of a congressional appropriation, was enrolled with the Indian Office as of 1934 or if the Department recognizes that tribe continuously existed (which, incidently, is a requirement of the federal recognition process). In fact, the concurring opinions suggest that a tribe may have been "under federal jurisdiction" even if the federal government is ignorant of the tribe's existence.

The second question relates to what remedies are available for land that was improperly placed in trust for tribes not "under federal recognition" in 1934. Depending on what the meaning of "under federal jurisdiction" is ultimately determined to be, there are likely to be many dozens of trust acquisitions that are potentially legally vulnerable. It may be difficult to challenge old trust acquisitions due to the Quiet Title Act, which provides that the federal government does not waive its sovereign immunity from suit for land to which the government has title, thus issue has not been yet been tested in court and there may be other remedies available for such acquisitions.

To avoid having to litigate these issues, tribal groups are already seeking legislative fixes to the *Carcieri* decision. Without such a fix, the case is likely to spawn substantial litigation. For example, although it is unlikely that the Court would ultimately determine that the phrase "under federal jurisdiction" is significantly broader than (or not co-extensive with) the category of federally-recognized tribes,[1] the concurring opinions invite litigation of the issue on a case-by-

[1] Both the majority opinion and the dissenting opinion by Stevens suggest that "under federal jurisdiction" requires federal recognition.

case basis. Further, tribal groups with legally questionable trust land will want to protect their interests in such land by having Congress enact legislation validating prior acquisitions.

Client specific analysis