

Fee-to-Trust:

Carciari, Litigation and Best Practices

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- **DIA counsels the Office of the Assistant Secretary – Indian Affairs; Bureau of Indian Affairs (BIA); Bureau of Indian Education**
- **Four branches, 33 attorneys**
 - **Branch of Environment & Lands**
 - **Branch of Tribal Government Services**
 - **Branch of Trust Services**
 - **Water & Power**
- **Branch of Environment & Lands**
 - **Land Claims, Trust Land Acquisitions, Federal Land Transfers, Environmental Issues, Reservation Boundaries, Trust Land Leasing and Realty, Natural Resources Management, Gaming, Indian Roads, Alaska**

Overview

- ***Carcieri* Developments**
 - 2014 M-Opinion
 - Handbook Update
 - *Patchak Patch*
- **Fee-to-Trust (FTT) Litigation Update**
 - **Federal Courts: Evolving *Carcieri* Arguments**
 - Recent FTT acquisitions
 - Challenges to decades-old acquisitions
- **Best Practices**

Carcieri v. Salazar (2009) Overview

- The Supreme Court held that “now” in the Indian Reorganization Act’s (IRA) first definition of Indian meant 1934:
 - “The term ‘Indian’ . . . shall include all persons of Indian descent who are members of any recognized Indian tribe **now** under federal jurisdiction”
 - Therefore, in order for the Secretary to take land into trust for a tribe under the first definition of Indian in the IRA, she must make a determination that the tribe was under federal jurisdiction in 1934

Carciari M-Opinion (2014)

- Solicitor issued M-37029 on March 12, 2014 (available at <http://www.doi.gov/solicitor/opinions/M-37029.pdf>)
- The *Carciari* M-Opinion:
 - Formally makes two-part test binding on the Department of the Interior (DOI)
 - Identifies examples of evidence that establish “under federal jurisdiction”
 - Explains distinction between “under federal jurisdiction” and “recognition”
 - Highlights the importance of Haas Report (Section 18 election) evidence

Carciere M-Opinion (2014)

- What is the two-part test?
 - (1) In or before 1934, the federal government took an action or series of actions through a course of dealings or other relevant acts reflecting its obligation to, responsibility for, or authority over, an Indian tribe, bringing such tribe under federal jurisdiction; and
 - (2) This jurisdictional status remained intact in 1934

Carciere M-Opinion (2014)

- What are some types of evidence that establish a tribe was “under federal jurisdiction”?
 - Treaty negotiations or relations
 - Federal enforcement of Nonintercourse Acts
 - Trust land acquisitions
 - Federal services provided to tribe or its members
 - Participation in a Section 18 election

Carcieri and FTT Decisions

- All decisions that rely on the IRA's first definition of "Indian" should address *Carcieri*
 - See FTT Handbook at 3.1.1 (Step 10) (revised in 2014) and the SOL FTT Checklist (issued in 2014)
 - Many decisions do not require a lengthy opinion – example: North Fork Rancheria of Mono Indians
 - Section 18 election held in 1935
 - Because tribe voted to reject IRA, decision explained that the Indian Land Consolidation Act amended the IRA to extend Section 5 to all tribes who voted, regardless of *how* they voted

Patchak Patch (2013)

- 25 CFR 151.12 was amended on November 13, 2013 in response to *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S.Ct. 2199 (2012).
- The *Patchak Patch*:
 - Removed requirement that the DOI wait 30 days after FTT decision is final to complete trust transfer;
 - Explicitly requires interested parties to administratively appeal the FTT decision before challenging it in federal court; and
 - Broadens notice of FTT decisions to draw opponents out early in the process

FTT Litigation Update: Federal Court

Recent FTT Acquisitions

- **Cases involving gaming acquisitions**
 - Cowlitz Indian Tribe (Washington) - *Confederated Tribes of the Grand Ronde Community of Oregon, et al., v. Jewell* (D.C. Cir.)
 - Oneida Indian Nation of New York (New York) - Several cases (N.D.N.Y.)
 - North Fork Rancheria of Mono Indians (California) - *Stand Up for California! et al. v. DOI* (D.D.C.)
 - Enterprise Rancheria (California) - *Citizens for a Better Way et al. v. DOI* (E.D. Cal.)
 - Ione Band of Miwok Indians (California) - *Amador County et al. v. DOI* (E.D. Cal.)
- **Cases challenging decades-old acquisitions**
 - Big Lagoon Rancheria (California) - *Big Lagoon Rancheria v. State of California* (9th Cir.)
 - Poarch Band of Creek Indians (Alabama) - Several separate lawsuits including:
 - *State of Ala. v. PCI Gaming* (11th Cir.); and
 - *Muscogee Creek Nation v. Poarch Band of Creek Indians* (M.D. Ala.)
 - *Poarch Band of Creek Indians v. Hildreth* (S.D. Ala.)
 - Jamul Indian Village (California):
 - *Jamul Action Committee et al. v. Chaudhuri* (9th Cir.); and
 - *Rosales et al v. Dutschke at al.* (E.D. Cal.)

FTT Litigation Update: Federal Court

Recent FTT Acquisitions

- Cowlitz Indian Tribe (Washington)
- *Confederated Tribes of the Grand Ronde Community of Oregon , et al., v. Jewell* (D.C. Cir.)
 - Challenged by county/city and citizens' groups
 - Litigating two-part test as part of case
 - Decision issued on December 12, 2014, dismissing the appeal and reaffirming the FTT decision; now on appeal in the D.C. Circuit – briefing starts this summer

FTT Litigation Update: Federal Court

More Recent FTT Acquisitions

- Oneida Indian Nation of New York (New York)
- Several lawsuits simultaneously decided (N.D.N.Y.)
 - Challenged by state/local governments, citizens' groups, and private individuals
 - Plaintiffs argue:
 - Tribe neither recognized nor under federal jurisdiction in 1934;
 - Because tribe voted to reject IRA, they were not under federal jurisdiction
 - Settlement reached with state and counties; decisions on cases with remaining parties issued on March 26, 2015
 - Court affirmed DOI's analysis of 151.10 factors
 - Court also accepted judicial and agency conclusion that OIN was a recognized Indian tribe and under federal jurisdiction in 1934; plaintiffs failed to demonstrate otherwise

FTT Litigation Update: Federal Court

More Recent FTT Acquisitions

- North Fork Rancheria of Mono Indians, Enterprise Rancheria, and Ione Band of Miwok Indians (California)
- Three separate cases in federal courts
 - Challenges brought by citizens' groups and other Indian tribes
 - Citizens' groups argue:
 - North Fork, Enterprise and Ione are not Indian tribes;
 - They were “homeless Indians” that were placed on land for homeless Indians
 - Briefing done and awaiting decisions in all three cases

FTT Litigation Update: Federal Court Cases challenging decades-old acquisitions

- Big Lagoon Rancheria (California)
- *Big Lagoon Rancheria v. State of California* (9th Cir.) -
 - State used *Carcieri* as a defense to lawsuit seeking to enforce the Indian Gaming Regulatory Act's (IGRA) good faith compact negotiations requirement
 - State argued that Tribe was not under federal jurisdiction in 1934, and hence a 1994 land acquisition was invalid and thus Tribe's lands are not "Indian lands" under IGRA
 - On June 4, 2015 the 9th Circuit affirmed the District Court's summary judgment in favor of the tribe. The Court rejected California's argument that the tribe lacked standing to compel it to negotiate in good faith under IGRA. The Court additionally found that California's argument amounted to an improper collateral attack on the BIA's decisions to take the land into trust and to designate the tribe as a federally recognized Indian tribe.

FTT Litigation Update: Federal Court Cases challenging decades-old acquisitions

- Poarch Band of Creek Indians (PBCI) (Alabama)
- Several pending cases in federal and state court seeking to stop PBCI's gaming-related activities
 - In each case, plaintiffs argue that PBCI is not “federally recognized in 1934” and thus land acquisitions in 1980s and 1990s were invalid
 - Waiting on a decision from the 11th Circuit

FTT Litigation Update: Federal Court Cases challenging decades-old acquisitions

- Jamul Indian Village (California)
- Two separate lawsuits filed, both to stop Jamul from developing a casino on an existing reservation, established in the 1980s:
 1. *Jamul Action Committee et al. v. Chaudhuri et al.* (9th Cir.)
 - Plaintiffs argue that Jamul is not a tribe, and that land acquisition in 1980s was invalid
 - District court denied plaintiffs' request for a preliminary injunction to stop casino construction, which was recently appealed to the 9th Circuit
 - Plaintiffs are now seeking an emergency stay from the 9th Circuit and briefing is underway
 2. *Rosales et al. v. Dutschke et al.* (E.D.Cal.)
 - Plaintiffs seek to re-litigate multiple claims already decided against them in other courts, including disputes concerning tribal leadership, the tribe's federally recognized status, and the trust status of the Tribe's reservation

Best Practices

- Prepare thorough and complete applications and decisions
 - Explain why the application satisfies all Part 151 requirements
 - Address *Carcieri* in the decision when relying on the IRA's first definition of "Indian"
 - Address all comments received on the application

Questions?

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