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MEMORANDUM

TO: Tribal Clients

FROM: Alexander, Berkey, Williams & Weathers LLP

DATE: March 20, 2009

RE: **UPDATE: U.S. Supreme Court Case – *Carcieri v. Salazar***

As you may know, the U.S. Supreme Court recently handed down its decision in *Carcieri v. Salazar*, a case concerning the authority of the Secretary of the Interior to make discretionary trust land acquisitions pursuant to 25 U.S.C. § 465. *Carcieri v. Salazar*, 129 S.Ct. 1058, 1062 (2009). The Supreme Court ruled that such trust acquisitions may only be made for Indian tribes that were "under federal jurisdiction" at the time the Indian Reorganization Act (IRA) was enacted on June 18, 1934.

This decision has created confusion and uncertainty in Indian country. It raises several unresolved questions. The meaning of "under federal jurisdiction" is not made clear in the decision, and very little guidance is provided. In this climate of uncertainty, we recommend that tribes review and consider their individual histories with respect to whether they were under federal jurisdiction in 1934. In time, there may develop a range of "indicators" to establish or suggest a tribe being under federal jurisdiction in 1934. Justice Breyer, in a concurring opinion, stated or implied that federal recognition in 1934 is not essential, and that, presumably absent some disqualifying circumstances, tribes under federal jurisdiction in 1934 likely include tribes that had (a) treaties with the United States that were in effect in 1934, (b) a pre-1934 Congressional appropriation, or (c) enrollment as of 1934 with the Indian Office. *Id*. at 1069-70. Justice Souter concluded that it is possible for an unrecognized tribe in 1934 nonetheless to have been under federal jurisdiction at that time. These views of individual justices may provide some guidance for future court decisions, although they are not binding Supreme Court precedent.

Other factors might include negotiation of a treaty with the federal government, a tribe voting on whether or not to organize under the IRA, and tribal involvement in proceedings before the Indian Claims Commission. All of these may be taken as evidence of a tribe being under federal jurisdiction in 1934. The relevance of these factors will be determined first by the Department of the Interior and then the courts. Or, Congress may separately address the problem through legislation.

To make sure your voice is heard on this important issue, you may wish to participate in efforts to urge the DOI to clarify the meaning of "under federal jurisdiction" in a way that extends the benefits of the IRA to the greatest number of tribes. This question may also be taken up by Congress, as national tribal organizations urge a so-called legislative fix to the legal problems created by the *Carcieri* decision. Congressional hearings are presently scheduled before the House Resources Committee on April 1, 2009 and the Senate Committee on Indian Affairs on April 2, 2009.

For those tribes not under federal jurisdiction in 1934, states and counties may attempt to nullify prior discretionary trust acquisitions. Under the current state of the law, we do not believe such attempts will succeed, because the federal Quiet Title Act would bar suits to upset Indian land titles.

The *Carcieri* decision was tied to language in the IRA definition of "Indians" (25 U.S.C. § 479) regarding members of any recognized Indian tribe *now* under federal jurisdiction, with the "now" interpreted to refer to the time of the IRA's enactment in 1934. Another part of the same definition of "Indians" refers to "all other persons of one-half or more Indian blood." This blood-quantum part of the definition may serve as a separate basis for a tribe or for a tribe's members (with sufficient Indian blood quantum) to apply for land to be taken in trust. For some tribes, this may become an important issue to consider and evaluate.

The *Carcieri* decision will prevent Indian tribes that were not under federal jurisdiction in 1934 from having lands taken in trust pursuant to the discretionary trust acquisition procedures pursuant to 25 U.S.C. § 465. Moreover, the Court's decision makes clear that the Indian Land Consolidation Act will not serve as an alternative basis for tribes not under federal jurisdiction in 1934 to have lands taken in trust.

Tribes should consider the *Carcieri* decision in light of their specific histories and circumstances. Tribes, for example, that were terminated after 1934 and then restored may possess good arguments that they were under federal jurisdiction in 1934, as required under *Carcieri*, for fee-to-trust acquisitions pursuant to Section 465. But the effect of these and other historical factors will need to be determined over time as the meaning and application of "under federal jurisdiction" is developed.

The *Carcieri* decision did not involve, and, as a general matter, does not appear to affect mandatory trust acquisitions made pursuant, for example, to certain settlement statutes. That stated, we suggest reviewing the specific language of any applicable statutes for mandatory trust acquisitions in order to assess and confirm.

Please let us know if you want to discuss any of these general matters as they may relate to you, or if we can otherwise be of assistance. At your request, we could provide a more detailed analysis of the *Carcieri* decision, including how it may apply specifically to your tribe.