

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

APRIL 14, 2004

CARCIERI V. NORTON: PROJECT SEEKING TRIBAL SUPPORT ON LAND TO TRUST CHALLENGE

The U.S. Court of Appeals for the First Circuit is considering a case that broadly challenges the authority of the Secretary of Interior to take land into trust for a tribe under Section 5 of the Indian Reorganization Act (IRA). The case is on appeal from a district court decision in favor of the Secretary's acquisition of land in trust for the Narragansett Tribe. *Carcieri v. Norton* 290 F.Supp.2d 167 (D.R.I. 2003).

Highlighting the significance of this case, a group of ten state Attorneys General have submitted an amicus brief making arguments that could affect many tribes. This is clearly part of a coordinated strategy by these states to mount more significant legal challenges to trust land acquisition. The ten states lead with a novel argument that the Indian Reorganization Act does not apply to any tribe not "under federal jurisdiction" in 1934. Secondly, in an effort to stop all land to trust, the states push a very broad argument that Section 5 is an unconstitutional violation of the nondelegation doctrine. Thirdly, their brief argues that taking land into trust violates the Enclave Clause and the 10th Amendment under the U.S. Constitution. The First Circuit's decision will potentially be very significant in that it will address certain issues for the first time.

This is another example of a case where significant tribal interests are at stake, yet no Indian tribe is a party to the litigation – it is solely between the state and the Secretary of Interior. To ensure that the tribal arguments are well-presented, the Tribal Supreme Court Project has coordinated with the Narragansett Tribe and organized the drafting of a tribal amicus brief that focuses on the first two issues – eligibility to participate in the IRA and the nondelegation argument. The Mississippi Band of Choctaw is submitting a separate brief that covers the states' third argument. **We are seeking support from tribes in signing on to the NCAI/tribal brief in order to counter the ten state Attorney Generals opposing land to trust.** (Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota, Utah, Vermont.)

If your Tribe is interested in reviewing the brief and/or signing on, please contact John Dossett at NCAI or Richard Guest at NARF. (E-mail works well - jdossett@ncai.org or richardg@narf.org) This brief is due on April 20, 2004, so time is urgent. We ask that tribes who want to sign on make a contribution to the Tribal Supreme Court Project. We do a lot of work behind the scenes monitoring federal Indian law cases and offering support and advice to tribes at every stage of litigation. We have received terrific pro bono support on this brief led by Ian Gershengorn & Sam Hirsch from Jenner & Block. Please send contributions to NCAI, (attn: Sharon Ivy re: Carcieri), 1301 Connecticut Ave., NW, Suite 200, Washington, DC 20036.

THE SUPREME COURT PROJECT IS A PART OF THE TRIBAL SOVEREIGNTY PROTECTION INITIATIVE AND IS STAFFED BY NARF AND NCAI. PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS OR IF WE CAN BE OF ASSISTANCE. RICHARD GUEST, NARF STAFF ATTORNEY, 202-785-4166 OR JOHN DOSSETT, NCAI GENERAL COUNSEL, 503-248-0783.