



# CERF/CERA REPORT



MEMBER UPDATE

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## Where is the Constitutional Basis For Federal Indian Policy?

By Darrel Smith – SD and Lana Marcussen – AZ

He looked at me for a while, then he put his hand in the air and said, “They have pulled it from the air.”

Constitutional basis they use to justify Federal Indian Policy. What we have been trying to discover, the government has been seriously trying to hide. Several decades ago, I asked the primary Indian affairs lawyer at the South Dakota’s Attorney General Office that question. He looked at me for a while, then he put his hand in the air and said, “They have pulled it from the air.” His answer is primarily correct which explains why the government continues to try to dodge and hide the basis for their authority.

One excuse they have used is the Constitution’s Commerce Clause, which says that Congress has the authority, “To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.” After Roosevelt’s conflict with the Supreme Court in the 1930’s, almost anything that Congress called commerce was allowed by the Supreme Court. This claim that almost anything can be commerce has been countered by more recent Supreme Court decisions. The attorney from Texas arguing the recent Indian Child Welfare Act (ICWA) case of *Brackeen v. Haaland* before the Supreme Court alluded to this commerce authority when he twice claimed that “children are not commerce”. Children certainly are not commerce. Regulating commerce with foreign nations and states doesn’t give Congress plenary power over foreign nations or states. Why would it give them plenary power over tribes? Partly, because of your support for CERA and CERF, I think we can be confident that the federal government will no longer be claiming plenary

With your support, CERA and CERF have for decades been filing Amicus Briefs with the U.S. Supreme Court seeking to find, understand, and challenge the

authority over Federal Indian Policy because of the Commerce Clause. Thank you for that support.

Another claim to federal power is their control over territories. The Constitution says, “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...” Making “all needful rules and regulations respecting the territory” certainly is plenary power. But notice that “Congress shall have power to dispose of “ the territory. How can the federal government maintain permanent territory and its plenary power within states? With your assistance CERA and CERF have been challenging this authority in the Supreme Court for several decades. Now the Supreme Court has clearly said that there isn’t any territory within the United States in the first sentence of *United States v. Vaello Madero*. This claim to plenary power over Federal Indian Policy is over. Your gifts to CERA and CERF have helped us to file a series of Amicus Briefs that have challenged these forms of federal power.

Unfortunately, the territorial power hid another form of federal power that is even more threatening than these to our Constitution, democracy and freedom, and it is a form of power that is necessary for the government to use when the country itself is endangered. War Powers are almost unlimited and have been openly used in the past, for example, primarily starting with the Civil War. Look at the many books about War Powers on your search engine. If the government can use War Powers, without any emergency, then it has almost unlimited power as long as they can keep this source of power hidden from the Supreme Court and our citizens. Claiming a continuing territorial power over “Indian Country;” the federal government hid the use of War Powers from the Court and our citizens. With your assistance, CERA and CERF have been asking the federal government, “Where is the Constitutional Basis for Federal Indian Policy?” We are pushing them closer

and closer to having to admit that there is no constitutional basis for treating Native Americans as less than full citizens. We need your continued support now more than ever.

A fundamental question needs to be asked of our entire country. What has Federal Indian Policy accomplished? Federal Indian Policy has benefited the federal government more than Indian reservations. It took about seventy years for the Soviet Union to realize that Communism was failing their society. Federal Indian Policy has lasted longer than seventy years but the results have been very similar to the failure of Communism in the Soviet Union and yet we continue year after year. We are violating the most fundamental concepts of our country and continuing a system that destroys lives. It is past time to change. Like everyone else in our society, Indians can maintain their social structures, land and society as they choose. It's time for them to choose without the force of the plenary power of the federal government.

**CERA and CERF have been able to file briefs because citizens hav supported these efforts and we need your support now more than ever.**

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## **Nothing is Impossible at DOI/BIA & District Federal Court**

*By Butch Cranford – CA*

In my previous “Carcieri Scam” article I attempted to lay out how the Department of Interior ( DOI) and Bureau of Indian Affairs ( BIA) have ignored the Supreme Court decision in *Carcieri* and instead of administering fee to trust in compliance with the 1934 Indian Reorganization Act (IRA) the Department created an “administrative fix” for *Carcieri*. A “fix” which ignored the Supreme Court and is an absurdity on its face. Absurd or not the Department has been successfully using their “*Carcieri* fix” since 2010 to continue to take land into trust for groups of Indians that were not recognized in 1934 as required by Section 19 of the IRA.

Successful in all but two cases, one in Massachusetts and another in California. The remainder of this article will deal with the California case which has been in federal court since 2012. As noted in the previous article a Citizens Group had filed a comprehensive challenge to a 2012 Record of Decision purporting to acquire land in trust for a group of Indians not recognized in 1934. This challenge was ultimately dismissed at the 9<sup>th</sup> Circuit Court of Appeals for lack of subject matter jurisdiction at the “time of filing”. As part of the unpublished decision the Court ordered the District Court to dismiss the Citizens lawsuit at the time of filing. With this dismissal, all the years of litigation at the District no longer existed legally. As a matter of law, the Citizens had never filed a challenge and could file a new challenge within the six-year statute of limitations accorded to Administrative Procedures Act actions. The six-year limitation to challenge the 2012 ROD would end on May 24, 2018 and the Citizens filed a new challenge to the 2012 ROD on May 22, 2018.

The case was assigned to the same District Court Judge who was reluctant to issue any decisions on any motions and the case sat dormant until a March 10, 2020 hearing on a routine motion to dismiss the Citizens’ 7<sup>th</sup> claim. The plaintiff Citizens had agreed to the dismissal and there was no reason for this hearing and an order dismissing the 7<sup>th</sup> claim could have been issued months earlier. After the hearing, the Judge granted the motion and the case was again just sitting in his Court. However, prior to the hearing and unknown to the Citizens, the

***“Fight for the things that you care about. But do it in a way that will lead others to join you.”***

***Ruth Bader Ginsburg***

**Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is, therefore CERF and CERA’s mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States.**

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Solicitor had withdrawn the “Cowlitz two-part procedure” used to approve the 2012 ROD with M-Opinion, M-37055 on March 9, 2020. The federal attorneys had an ethical obligation to inform the Court at the March 10 hearing of the withdrawal of the “Cowlitz two-part procedure” but did not. The Citizens’ attorney eventually informed the Court of the withdrawal. Without the “Cowlitz two-part procedure” the 2012 ROD is a nullity and void. While that was clearly the case, the Court took no action based on the withdrawal of the “Cowlitz two-part procedure” with M-37055.

For reasons not known the Federal Defendants filed a Motion for judgment on the Pleadings (MJOP) in June 2020 wherein they claimed the decision in the County Case three years earlier decided the Citizens 2018 case. The Citizens Group challenged this decision as it is simply impossible for the County case to have decided an issue that did not exist in 2017. It is impossible for the Federal Defendants to not know it is impossible but they will do anything and take any action to delay any decision based on the Supreme Court’s *Carciari* decision. The Citizen’s first challenge in their 2018 challenge was an improper and illegal Gaming Ordinance approval by the National Indian Gaming Commission Chairman for the group of Indians not recognized in 1934 who had no land eligible for gaming pursuant to the Indian Gaming Regulatory Act.

How the 2017 decision in the County Case could have decided this issue is a legal and judicial canon and possibly known only to the Federal Defendants and to the District Judge in this case. As was typical with this Judge it only took him from June 2020 to May 2022 to issue a decision on the MJOP. He granted the MJOP and the Citizens immediately appealed to the 9<sup>th</sup> Circuit. After several extensions to file their reply the Federal Defendants had a January 23<sup>rd</sup> date for filing their reply to the appeal.

What a panel at the 9<sup>th</sup> Circuit might do is not known but a remand back to the District Court seems to be the most logical. There are other options and possible courses of action available to the 9<sup>th</sup> Circuit so the Citizens will respond to the Federal Defendant’s reply and at some time in 2023 a decision will be issued. The documented evidence in this case shows overwhelmingly that the group for which the 2012 ROD was issued was not recognized in 1934 as required by the 1934 IRA as decided by the Supreme Court in 2009 with its *Carciari* decision and this is

the decision the District and Circuit Court do not want to issue because the 2017 County did not decide this issue as the County did not include the issue in their challenge to the 2012 ROD.

The Citizens group remains hopeful that at some point in time their case will come before a Judge or panel of Judges who will simply look at the documented facts of this case and apply the IRA definition of Indian in Section 19 of the IRA as decided by the Supreme Court to the group of Indians for which the 2012 ROD was issued. Too much to ask after only 9 years?

A decision at the 9<sup>th</sup> Circuit affirming the District Court will prove that nothing is impossible at the DOI/BIA and in District and Circuit Federal Courts evidenced with a decision delivered in 2017 could settle an issue that did not exist until 2018. So the Citizens Group continues to wait for the DOI/BIA to comply with the law and for Federal Courts to decide their cases based on the law and the facts.

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