



# CERF/CERA REPORT

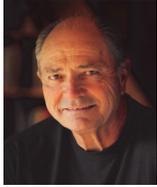


MEMBER UPDATE

OCTOBER 2019

Vol. 15, No. 3

An Educational Publication of Citizens Equal Rights Foundation and Citizens Equal Rights Alliance



## A Message from the Chair of CERA by Butch Cranford, CA

I learned about CERA more than 15 years ago when a “wanne be” BIA created tribe came to my home town of Plymouth California in April 2003 and boldly declared they were going to build a large Las Vegas style casino in Plymouth and there was nothing that could be done to stop them. Groundbreaking in 6 months they declared. I joined with a group of citizens and No Casino In Plymouth (NCIP) was formed to investigate what, if anything, could be done. Elaine Willman, the then CERA Chairperson, contacted NCIP and extended an invitation for NCIP to attend the 2004 CERA Conference in Washington D.C. NCIP was not a large group (8 – 10) and it turned out I was the only one who could attend. So off to Washington D.C. I went to learn if anything could be done to stop the proposed casino. Little did I know that my life was about to change. (for the better).

From the well informed and generous folks at CERA I learned that there was much that could be done and now 16 years later I am happy to report that there has never been any groundbreaking and to date there is no casino in Plymouth. I am convinced that had I not attended that CERA conference in 2004 there would be a casino in Plymouth today. CERA provided our small group with information essential to initiate and sustain a successful legal challenge to an illegal off reservation casino that continues to the present with a challenge in District Federal Court in Sacramento, CA.

None of this would have been possible without the financial support of you; our readers. Your donations allow CERA to host educational conferences for local communities, to monitor cases in the Federal Courts and through our sister organization Citizens Equal Rights Foundation (CERF), to file amicus briefs

(Friends of the Court briefs) in cases at the Supreme Court. Amicus briefs allow CERA to bring original Constitutional meaning, points of law, historical documents, and facts to the attention of the Court that plaintiffs may not have included in their briefing.

CERA/CERF sometimes receives donations from local groups CERA has assisted and who no longer have need of their funds and we recently received a sizable donation from such a group in Wisconsin. On behalf of CERA/CERF I would like to thank the North East Wisconsin Citizens Equal Rights (NEW CER) group and their President John Gerggren for their generous donation.

CERA is the last national citizen-based organization challenging the unconstitutionality of Federal Indian Policy and offering assistance and encouragement to local citizen groups like NCIP. CERA is always appreciative of your financial support and will continue to challenge an unconstitutional Federal Indian Policy in Federal court cases where we believe CERA’s contribution with amicus briefs can make a difference. Please continue to support CERA with your donations – I know from my personal experience that CERA makes a difference.

### 14th Amendment to the U.S. Constitution

Ratified July 9, 1868

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **The Mess of Carpenter v. Murphy**

*by Lana Marcussen, AZ*

*& Darrel Smith, SD*

The most anticipated case before the U.S. Supreme Court in Indian law this last term was abruptly held over to be reargued in the upcoming term, leaving everyone surprised and confused as to why the decision was delayed. The case that has been delayed, *Carpenter v. Murphy*, (soon to be named *Sharp v. Murphy*) concerns a convicted murderer who is claiming that the state courts of Oklahoma had no jurisdiction to try and convict him because he is an Indian and the criminal acts took place in Indian country. Counsel for CERA thinks it has been delayed because no matter how the question of Indian country jurisdiction is answered by the Justices of the Supreme Court the likelihood of the U.S. Department of Justice agreeing that the decision actually decides what the law is as to the federal jurisdiction over Indians or the land status is zero to nil. *Carpenter v. Murphy* is positioned to require the Justices to define a term that has been massively expanded by the Department of Justice as never intended by the statute as happened in *Carcieri v. Salazar* (2009).

Under the Indian country statute, 25 U.S.C. § 1151a, as passed in 1948, the United States maintained jurisdiction to criminally prosecute all offenses committed by an Indian against another Indian within reservation boundaries. The statute was not considered controversial because it was assumed that the jurisdiction being granted to the United States was over the Indian and had nothing to do with the land status. See generally, *United States v. Celestine* (1909). The reservation was defined as being all the land encompassed within the original reservation boundaries to give the broadest criminal jurisdiction to the United States over their Indian wards. Because the statute applied only to criminal jurisdiction over their Indian wards and did not affect the jurisdiction over the land there was very little if any impact on federalism which is the constitutional balance between the national government and the states designed to protect individual rights. In 1948, the debate about the Indians being treated as a race of people being given special federal consideration was becoming controversial. The Truman administration through the Hoover Commission produced four

different civil rights documents discussing the impact of tribal sovereignty and citizenship between 1947-1949.

Just a decade later the civil rights movement was in full swing creating controversy as to whether the Indian tribes could or should still be treated as federal wards and/or partial separate sovereigns. With the rulings in *Brown v. Board of Education*, (1958) the idea of treating any racial group separately became a suspect classification raising major constitutional concerns of equality. With this change the United States had to decide whether to terminate the special treatment of the Indian tribes as a race based policy as discussed in the Hoover Commission reports. In the 1950's this policy of terminating tribal sovereignty was seen as a major possible resolution to integrate the Indians into the main mix of the American people. As the Hoover Commission civil rights reports explained, terminating tribal sovereignty was required to formally include (assimilate) the individual Indian into becoming a full citizen and ending the ward status with the United States as defined in the 1871 statutes. The 1871 Indian Policy statutes placed all Indians into the same status as the freed slaves following the Emancipation Proclamations. This statue of being a "federal instrumentality" allowed President Lincoln to free the slaves but did not and could not grant them citizenship. With the passage of the 13<sup>th</sup> amendment to the Constitution President Lincoln's authority to free the slaves was confirmed. It was the 14<sup>th</sup> Amendment that gave the freed slaves citizenship. Indians not taxed were deliberately not given the same citizenship under the 14<sup>th</sup> Amendment leaving them in the status of "federal instrumentalities." This war power to change the status of a citizen in a time of war into a "federal instrumentality" is the same power used to declare a "draft" of all the able bodied to fight in a war as part of our military.

Terminating the Indian tribes meant the United States would lose the means by which it had preserved the Civil War powers through the Indians against the States and the people. These extra-constitutional powers were deliberately preserved by Secretary of War Edwin Stanton in the federal Indian policy of 1871 that ended treaty making and made the United States the permanent trustee over all Indian interests. AS CERA/CERF have now been arguing for almost 25 years, the main reason the federal Indian law is so erratic and contradictory of general constitutional principles is that the cases are argued and decided to preserve these plenary war powers without consideration to the structural destruction of

the constitutional framework or the effects on the civil liberties of all Americans. The case of *Carpenter v. Murphy* no matter how it is decided, will adversely affect either the principles of federalism by removing a third of the jurisdiction of the State of Oklahoma over its land or will force the Supreme Court to finally admit that the Indian country statute treats all Indians as federal instrumentalities as a race and is therefore unconstitutional.

Before World War II ended, Richard Nixon had a whole team and plan for keeping the war powers activated using Edwin Stanton's 1871 Indian policy and the Department of Justice. Richard Nixon and his cohorts began his new Indian policy before World War II ended by having Abe Fortas as Deputy Secretary of the Interior begin to play with expanding federal jurisdiction over Indian land as set up in 1871. This became a direct and deliberate intrusion against state sovereignty. Huge reserves of coal and other minerals existing within Indian reservations were opened for exploitation at cut rate prices set by the Department of the Interior beginning in 1940. These laws are still in place preventing the Indian tribes from negotiating their own contracts. All mineral pricing is still set by the Department of the Interior's Office of Surface Mining on Indian reservations. These direct war powers became the basis for expanding the definition of Indian country during World War II. Mineral areas being mined or pumped on reservations often went beyond reservation boundaries into adjoining federal public lands. These areas where the minerals crossed into public domain lands were classified as Indian country to avoid state environmental requirements for mining during the war. This became the justification for saying the federal public land laws did not apply to the Indian reservations. This meant that the Secretary of the Interior had the power to say how expansive any Indian reservation boundary was no matter what the old federal land records said had historically happened to "shrink" Indian land holdings.

**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.**

William H. Veeder of the Department of Justice became the main designer of the Nixon Indian policy from 1946 forward. Promoting tribal sovereignty as protecting Indian tribal rights as a new form of creating Indian equality was Veeder's idea to counter the termination discussion. Placing the promotion of tribal sovereignty as the main trust relationship of the United States contradicts each and every part of any individual claiming an independent constitutional right as the highest principle of our constitutional structure. The federal government based on its own plenary war power authority has decided that the promotion of tribal sovereignty is the highest constitutional principle for it to assert. This is how Richard Nixon realized he could overcome the constitutional structure and create unlimited federal power. As stated in *Morton v. Mancari*, (1974) this makes every racial decision of placing Indian tribal sovereignty ahead of any and all individual rights a political decision of our federal government. Promoting tribal sovereignty as a federal Indian equal protection policy turns every legal principle of individual equal protection, as our constitutional framers opined, upside down. It literally justifies that the United States can treat any racial group as federal instrumentalities as a legitimate political decision without the necessity of being in an actual war. This means that domestic law now includes allowing our politicians to regularly use war powers in making our everyday laws. The whole constitutional structure is irrelevant if the war powers can be used when no emergency or war exists. Individual equal protection requires the federal government to consider its primary trust relationship, the protection of each individual's equal opportunity and actual equal rights under the law. It is no accident that the continuation of the Nixon Indian policy is ripping our constitutional structure apart. The brilliance of the Nixon strategy was that "helping and protecting" the Indians became the good and right thing to do and completely justified continuing the 1871 Indian policy indefinitely.

Claiming plenary constitutional authority over the Indians in all matters, the Department of Justice systematically began extending the jurisdictional implications of "Indian country" from just criminal jurisdiction to actual land status in a series of cases after *Brown v. Board of Education*. The United States successfully argued that it could and should reinterpret and assert more expansive legal definitions over what had been the traditional or statutorily set definitions of key words like "Indian," "Indian country" and "reservation boundaries" in conjunction with the Nixon Indian policy of promoting tribal sovereignty.

In *Solem v. Bartlett* (1984) the Department of Justice successfully convinced the Justices of the Supreme Court that the federal public land laws should never have applied to Indian reservations because that is not the way the Indian tribes had understood their rights or trust relationship with the United States. The federal Indian trust relationship was now going to be the measure and justification for reinterpreting any and all land transactions that had occurred whether done by act of Congress or treaty. No matter what the circumstances of how land was opened for settlement it was now going to be subject to reexamination in any federal court threatening state jurisdiction and private property interests. To make matters even worse, the Department of Justice would always be asserting the federal interest as a federal reserved right under the 1871 Indian policy precedents of *U.S. v. Winters*, (1908) and *Winans v. U.S.*, (1905) just as if these interests had been reserved when the Indian reservation was created. Applying the precedent of *Solem v. Bartlett* in *Carpenter v. Murphy* yields the same untenable result of Oklahoma losing a third of its state jurisdiction.

Ironically, the case that allowed the Justices and the rest of the federal government to avoid the race based realities of the Nixon Indian policy does not apply in *Carpenter v. Murphy* because of the way the 1948 statute of Indian country was written. In 1948 a race based classification was acceptable so no mention is made in the statute of promoting any political or tribal interest other than giving the greatest breadth to the United States over its Indian wards. This means the carefully developed legal excuse of *Morton v. Mancari*, (1974) that things done for Indians or Indian tribes were political and not racial decisions does not work as applied in deciding the criminal jurisdiction of the United States in *Carpenter v. Murphy*. There is no political justification for removing one third of the jurisdiction of the State of Oklahoma to give someone that is not even a quarter blood Indian but who is enrollable because of Indian ancestry the special right of not being tried under state law for murder as any other person would be. This was the conclusion of the U.S. Department of Justice in its briefing of *Carpenter* when it decided it did not like the result of applying its main legal precedent of *Solem v. Bartlett*. The Department of Justice created the jurisdictional and federalism mess to promote and expand the extra-constitutional war powers in federal Indian policy from the Indian policy of 1871 into a weapon against

the states and people in the Nixon Indian policy of 1970. Now in briefing *Carpenter* the Department of Justice has decided it does not like the potential result of what it has created. But this does not mean that any federal entity or branch of government has decided that the Nixon Indian policy is wrong or harms the constitutional structure. No group except CERA and CERF are openly asserting that the Nixon Indian policy is just plain wrong because it intentionally thwarts how equal protection under the law was intended to apply.

Given the massive federal power expansion that the Nixon Indian policy has created it is impossible to imagine that the elected branches would be willing to give up the unlimited power over the states and people that this policy has allowed. This is why CERA/CERF made the decision in 1997 to concentrate our very scarce resources on presenting our position to the United States Supreme Court in an attempt to have the Justices see what the Nixon Indian policy is doing to our individual civil liberties, property rights and our state governments. CERA/CERF have continually argued that the constitutional structure must come first to protect all of our rights. If our position is adopted we would make the Indian people equal citizens of the United States just like all other individual citizens. This means adding that the Indian people are protected by the 14<sup>th</sup> Amendment just as all other citizens.

Our arguments are not intended to harm anyone but to require the federal and state governments to apply the equal protection of the law to all persons – Indian and non-Indian equally. The Supreme Court is now openly discussing how the Nixon Indian policy is contradictory to the civil rights movement and constitutional structure. We have successfully established that promoting tribal sovereignty has harmed the constitutional position of the states and has resulted in limiting individual rights. But the Justices of the Supreme Court seem to be incapable of seeing through the Nixon ruse of promoting tribal sovereignty without CERA/CERF providing hard evidence of the intent of the Nixon conspirators to deliberately harm the constitutional structure. CERA/CERF began submitting federal archival documents with our amici briefs in 2003 to prove that the federal reinterpretation of the Indian Reorganization Act of 1934 was actually a massive federal lie that contradicted the intent of the Congress that passed

the Indian Reorganization Act. Since then we have convinced the Supreme Court that they cannot accept any “facts” submitted by the Department of Justice without actual proof. This year we are in a position to submit the actual proof of how William H. Veeder redefined the Indian trust relationship for President Nixon to displace all constitutional structural limitations designed to protect our individual freedom and liberty. The submission of these documents has required the creation of new websites that can post and maintain the extensive research documents CERA/CERF have found and submitted to the Supreme Court.

We need your financial help to finish what we started in 1997 and present our arguments and evidence in *Carpenter v. Murphy* as it is re-briefed and reargued this term. The mess created by the Department of Justice in contradicting its own precedents and realizing that the Nixon Indian policy is destroying the constitutional processes for everyone in the *Carpenter v. Murphy* case is an opportunity to activate the 14<sup>th</sup> Amendment and end this mess once and for all. It is time to defeat the Nixon Indian policy and restore our constitutional freedoms.

## TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

***“All tyranny needs to gain a foothold is for people of good conscience to remain silent.”***

*--Thomas Jefferson*

Visit us at

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## WILL YOU HELP IN A VERY SPECIAL WAY?

For the past 20 years the CERA/CERF board of director’s have traveled to central Wisconsin for their annual meeting. The board is really a brain trust, made up of a group of dedicated individuals who have been negatively impacted by the failure of Federal Indian Policy. They come from New York, Washington, Montana, Minnesota, Wisconsin, Arizona, South Dakota, Tennessee, New Mexico, California, and Massachusetts at considerable expense to themselves. They invest in this weekend retreat not only for the benefit of themselves, but for all who read this Report.

Will you please consider helping the board members with their travel expenses with a special tax-deductible gift to CERF? Indicate FUNDS FOR THE ANNUAL CERF/CERA RETREAT on your check, and send it to CERF, PO Box 0379, Gresham, WI 54128. On average, 14 board members attend that retreat at a combined cost of about \$9,000.

Your contribution will go a long way in thanking this great group of patriots.

CERA/CERF Treasurer, Curt Knoke

## Carcieri 10 Years After

### What Next??

*by Butch Cranford, CA*

It has been more than 10 years since the Supreme Court delivered its landmark fee to trust decision in *Carcieri v. Salazar* – 2009. The court decided that “now” as used in the first definition of Indian in Section 19 of the Indian Reorganization Act (IRA) modified the whole statute and not just the phrase “now under federal jurisdiction” as argued by the federal defendants. The Supreme Court also found that “now” as used in Section 19 meant in 1934 and not at any time in the future after 1934 as argued by the federal defendants. Communities and local governments believed the *Carcieri* decision would require the Bureau of Indian Affairs (BIA) to not approve any fee to trust applications from tribes not recognized in 1934 and not under federal jurisdiction in 1934. Unfortunately, this has not been the case.

Tribes realized the serious impact to fee to trust and immediately began lobbying Congress for a “Carcieri fix.” Meanwhile the BIA’s response to the decision was to quickly schedule conferences with tribal leaders in Sacramento, CA, Minneapolis, MN, and Washington D.C. The overwhelming reaction of the tribes in calling for a “Carcieri fix” by Congress is clear evidence they understood the decision meant tribes not recognized in 1934 and not under federal jurisdiction in 1934 would not be eligible for fee to trust. Since 2009 a number of “Carcieri fix” bills have been introduced in Congress but none have generated enough interest to even receive a vote. During the conferences the BIA held with tribal leaders, BIA bureaucrats assured tribal leaders that if Congress did not “fix” Carcieri the Department would “fix” it administratively. That a Supreme Court decision could be “fixed” administratively by bureaucrats at BIA and the Department of the Interior (DOI) is a bold assertion indeed. That is, however, precisely what has happened.

Since 2009 the Department has ignored the explicit language of the majority decision delivered by Justice Thomas. Instead they have used a concurring minority opinion from Justice Breyer on which to base their misguided and wrong interpretation of the Carcieri decision. After more than 70 years of improperly (illegally) administering fee to trust, the Department developed and now uses a two-pronged post Carcieri test to determine whether a tribe was under federal jurisdiction in 1934 while simply ignoring that tribal recognition in 1934 is required for eligibility for fee to trust. Since 2009 it has been business as usual for fee to trust at the BIA despite the explicit language of the Carcieri decision.

Justice Thomas included the following in Section IV of the majority decision.

“We hold that the term ‘now under Federal jurisdiction’ in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed. Reg. 6177. **Moreover, the petition for writ of certiorari filed in this case specifically represented that ‘[i]n 1934, the Narragansett Indian Tribe ... was neither federally recognized nor under the jurisdiction of the federal**

**government,’ (emphasis added) Pet. For Cert. 6. The respondents’ brief in opposition declined to contest this assertion. (emphasis added) See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court’s Rule 15.2. We therefore reverse the judgment of the Court of Appeals.”**

To understand the importance of this inclusion in the decision a review of the questions presented in the petition as well as a reading of the Court’s Rule 15.2 is helpful.

#### **The questions presented by the plaintiffs were:**

1. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.
2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.
3. Whether providing land “for Indians” in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust.

#### **Supreme Court Rule 15.2**

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, **the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted (emphasis added).** Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court’s attention in the brief in opposition.

As I read Section IV, Justice Thomas has simply stated that the defendant's brief in opposition to the questions presented in the petition for certiorari by the plaintiff and accepted by the Court did not challenge that the tribe in question was not recognized in 1934 or that the tribe in question was not under federal jurisdiction in 1934. In fact, the tribe, the Narragansett, were not federally recognized and not under federal jurisdiction until 1983. The federal defendants failure to convince the Court that "now" did not mean in 1934 meant that the Court could have reversed the judgment of the Court of Appeals on the federal defendant's failure to address the first question by not presenting any evidence that the Narragansett were recognized in 1934 and under federal jurisdiction in 1934.

So why did the Court decide Carcieri in the very narrow manner on only the first question when other questions were presented? A decision on question two would have had far more serious impacts on fee to trust, Indian Country, Federal Indian Policy, and tribes than the narrow, limited decision on the first question. By deciding and reversing the judgment of the Court of Appels on only the first question the Court avoided resolving the conflict included in the Carcieri petition for certiorari among the Circuits on question two. This is noted by Justice Thomas in footnote 7.

"7 Because we conclude that the language of §465 unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case, we do not address petitioners' alternative argument that the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U.S.C. §1701 et seq., precludes the Secretary from exercising his authority under §465."

With the BIA and DOI ignoring and misusing Carcieri and continuing to take land into trust for tribes not recognized in 1934 and not under federal jurisdiction it is just a matter of time before question two or three will come up again and be finally decided by the Court.

The second question raised the issue of whether the extinguishment of aboriginal title precluded the Secretary from creating Indian Country there. The Court avoided deciding this question but it will surely come again to the Court from a State where aboriginal title has been extinguished and where the Secretary attempts to take land into trust.

And the third question asks whether Congress provided a sufficiently intelligible principle on which to delegate the power to take land into trust. This question is, potentially, the most serious of the three because it could reach to the question of where in the U.S. Constitution is Congress authorized to acquire land for Indians, let alone take the land into trust. Justice Thomas has addressed the question of Congress's "plenary" authority in recent concurring minority opinions by stating clearly that he cannot find Congress's alleged power over Indians in his Constitution.

Justice Thomas may be signaling that the Court is ready to rein in a corrupt, out of control, Federal Indian Policy based on Congress's unconstitutional "plenary" power over Indians. CERA has from its founding been committed to and remains committed to bringing these issues to the Supreme Court and ending an archaic, racist, and unconstitutional Federal Indian Policy.

**CERA Membership Dues-\$35**

Send to: CERA

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Gresham, WI 54128

**We need your support!**

*Are you an active member?*

*Are you an active member?  
The kind that would be missed?  
Or are you most contented,  
That your name is on the list?*

*Do you attend the meetings,  
And mingle with the flock?  
Or do you stay at home,  
And criticize and knock?*

*Think it over member,  
You know right from wrong.  
Are you an active member,  
Or do you just belong?  
---Author unknown*

*Federal Indian policy in 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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