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Federal Practice



August 7, 2014

Kevin Bearquiver
Acting Regional Director
Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Dear Mr. Bearquiver:

I. INTRODUCTION:

On November 5, 2013, you sent a letter to Billie Saulque, Chairperson, Benton Paiute Reservation, "requesting the Tribe to submit information and supporting documentation on whether or not the Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation (Tribe) was under Federal jurisdiction in 1934." *See Exhibit ("Ex.") 1 attached hereto.*

The purpose of this letter is to establish a firm factual record, with supporting documentation, that proves the Tribe was unequivocally "under Federal jurisdiction in 1934" and, thus, overcomes any proscription arising from the decision issued on February 24, 2009 in *Carcieri v. Salazar*, 555 U.S. 379.

The Tribe is a member of the "California Fee to Trust Consortium". The Tribe's General Counsel attended the Trust Consortium's Quarter Meeting held at the Smith River Rancheria on July 23 and 24, 2014. Information provided to attendees at the Meeting listed the status of the Tribe's fee to trust application:

- Count 19
- Tribe - Benton
- Project Name - Gas Station and Store
- Acres - 2.50
- On, Off, Contig, Other - off
- App. Receipt Date - 8/13/01
- APN - 24-132-03
- Phase 1 Date - 1/13/05
- NEPA: FONSI or CAT EX - 7/10/06

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”

Re: Benton Station Property Fee to Trust Application

August 7, 2014

- Page 2 -

- GIS Review - 9/06/07
- Notice of App. Date - 7.9/03
- Submit to Solicitor for Prelim Title Opinion & 1934 Juris. - 7/24/07
- Solicitor Opinion Date - 8/02/07
- Notice of Decision - Carcieri
- Final Agency Deter./Public Notice Publication - Carcieri
- Updated Phase 1 W/CIP - Carcieri
- Update Title Commitment - Carcieri
- Accept of Convey - Carcieri
- Submit to Solicitor for Final Title Opinion - Carcieri
- Final Opinion of Title - Carcieri
- Comments - Carcieri Case

See Ex. 2.

II. TRIBAL HISTORY

A. General

The Benton Paiute Reservation, established in 1915 by Executive Order, is the home of the Utu Utu Gwaitu Paiute Tribe which translates into “Hot Water Place People”, a name derived from the “Numic” language, originating from their location next to their ancestral hot springs, a natural flowing spring discharging at 140°F.

The Reservation is located in a remote area of Mono County, near the town of Benton, which is at the intersection of Highway 120 and Highway 6, approximately 10 miles west of the Nevada State border. The prospects for the Tribe to engage in profitable economic enterprises on its original Reservation land are extremely limited. It must be noted that tribal members have undivided interest in numerous individual Indian allotments located in the geographic area that were granted *prior to 1934*.

At this time, Federal trust land held in ownership by the United States government for the benefit of the Tribe consist of 400 acres, the original 160 acres identified in the 1915 Executive Order and 240 acres obtained by Act of Congress in 2006.

The Tribe owns 67 acres of fee land purchased over the years for economic development purposes in Benton, CA. The Tribe has successfully operated the “Benton Station Cafe” for years at the intersection of Highway 120 and Highway 6, a favorite

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”

Re: Benton Station Property Fee to Trust Application

August 7, 2014

- Page 3 -

seasonal stop for travelers visiting Yosemite National Park. The Station is located off the Reservation. The Tribe also contracts with the U.S. Postal service to operate a Post Office on the Benton Station property.

The Tribe’s federally-approved Constitution was established on November 22, 1975 and ratified on January 20, 1976. At this time, tribal enrollment is 138 members with approximately 37 homes on the Reservation. Tribal government consists of five council members, Chairman, Vice-Chairman, Secretary/Treasurer, and two Members-at-Large. The Tribe has also formed the “Benton Paiute Economic Development Corporation” which has been used to promote economic development projects, including the long term management and operation of the Benton Station Cafe.

B. Historic Establishment of Federal Trust Relationship

As early as March 19, 1913, Ross L. Spalsbury, Superintendent, U.S. Indian Service, Bishop, California, was aware that lands “used from time immemorial by the Paiute Indians as a burying grounds” were in danger of encroachment by the construction of a road away over them. *See Ex. 3.* The Superintendent’s letter described the specific land over which a road was going to be constructed as “NE/4, Sec. 11, T. 2, S. R. 51., N.D.N.”¹

The Department of the Interior, U.S. Indians Service, Bishop, California, acting through Superintendent Spaldsbury, recognized the factual existence of Indians at Benton, California in his letter, dated March 19, 1915, to the Commissioner of Indian Affairs: “This is vacant public land, and I recommend that steps be taken to have it set aside as a cemetery for these Indians by Executive Order or otherwise.” *See Ex. 4.*

On April 1, 1913, the U.S. Department of Interior, through the Assistant Commissioner of Indian Affairs was taking steps toward “withdrawing” land “for the homeless Indians living in Inyo and Mono Counties, California. *See Ex. 5.*

Acting on the recommendation of Agency Superintendent Spalsbury, the Second Assistant Commissioner wrote to the Commissioner of the General Land Office on April 3, 1915 asking “whether there are reasons appearing on your records why such land may not be set aside by Executive Order as a withdrawal for the use of Piute

¹ Many of the documents, including maps, supporting whether or not the Tribe was under federal jurisdiction in 1934 were obtained via formal request initiated by the Tribe’s attorney and they are in files held at the Central California Agency.

**Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”
Re: Benton Station Property Fee to Trust Application**

August 7, 2014

- Page 4 -

Indians.” The land described is “NE/4 of Section 11.” *See Ex. 6.*

Assistant Commissioner C.W. Bruce, wrote to the Commissioner of Indian Affairs on May 14, 1915 in specific reference to “NE $\frac{1}{4}$ Sec. 11, T.2 S., R.31 E., M.D.M., California” advising him that he had requested the local officers at Independence, California to report “whether their records show any reasons why the tract should not be reserved for Indian purposes.” *See Ex. 7.*

By letter, dated May 27, 1915, the Second Assistant Commissioner wrote to Superintendent Spalsbury, Bishop School on the “Status of Land” notifying him that his letter of March 19, 1913 had been received. *See Ex. 8.*

The Acting Assistant Commissioner, General Land Office, U.S. Department of the Interior, expressed in a letter, dated June 5, 1915, to Mr. Sells, Commissioner of Indian Affairs that he had received prior correspondence from local officers at Independence, California “that there were no reasons appearing on the record of that office why the above described lands should not be reserved for Indian purposes.” The land was specifically described as “NE $\frac{1}{4}$ Sec. 11, T.2 S., P. 31 E., M.D.M, California”. *See Ex. 9.*

On June 16, 1915, the Second Assistant Commissioner wrote to Superintendent Spalsbury, Bishop School, requesting that he give his Office the exact description of the land acreage which it will be necessary to have reserved in order to adequately protect the interest of these Indians.” *See Ex. 10.* The Second Assistant Commissioner expressed his concern at that time that the 160 acres described as “NE $\frac{1}{4}$ Sec. 11, T.2 S., R.31 E., M.D.M., California” may be too large for “cemetery purposes.”

By letter, dated June 24, 1915, Superintendent Spalsbury, U.S. Indian Service, Bishop, CA, wrote to the Commissioner of Indian Affairs, Washington, D.C. where he made specific reference to the “Benton Band of Paiute Indians” and recommended that the “entire 160 acres be set aside for them.” *See Exhibit 11.* Superintendent Spalsbury noted: “However there are quite a number of Indians in that section and they are without a camping ground; being located on private land at present and the land suggested would not only provide them with their cemetery but also with a camp.”

On July 10, 1915, Assistant Indian Commissioner E.B. Meritt wrote to the Secretary of the Interior:

Letter to Kevin Bearquiver on *Carcieri "Under Federal Jurisdiction in 1934"*
Re: Benton Station Property Fee to Trust Application
August 7, 2014
- Page 5 -

On March 19, 1915 the Superintendent of the Bishop Indian School, California, recommended that steps be taken to have the NE/4 of Sec. 11, T. 2 S., R. 31 E. M.D.M. Mono County California, set aside as a cemetery for the Paiute Indians, who have used the land in this manner for a very long time. The Superintendent's report also showed that there was some undertaking on foot to interfere with the burying ground of these Paiute Indians.

Moreover, he reports that there are quite a number of Indians in that section who are without a camping ground, being located on private land at present, and the 160 acres would not only provide them with a cemetery but also with a place to camp.

This request appears reasonable to the Office, and it is felt the Indians' rights to bury their dead in this spot, as they have been so long accustomed to do, should be unmolested.

See Ex. 12.

From a historical perspective proving the unambiguous existence of the "under federal jurisdiction in 1934" is Exhibit 13, a letter, dated July 20, 1915, from Franklin K. Lane to President Wilson:

I have the honor to transmit herewith the draft of an Executive Order reserving 160 acres of the unappropriated public domain in Mono County, California, as a cemetery and camping ground for a band of Paiute Indians *under the jurisdiction of the Bishop Indian School.* (Emphasis added.)

The Benton Reservation was set aside by President Woodrow Wilson by Executive Order on July 22, 1915 and this undeniably established a "federal government to government relationship" that has remained "unbroken" to this day:

It is hereby ordered that the N.E. ¼ of section 11, township 2 south, range 31 east, M.D.M., containing 160 acres, in Mono County, California, be, and the same is hereby, reserved for the use of a

Letter to Kevin Bearquiver on *Carcieri "Under Federal Jurisdiction in 1934"*

Re: Benton Station Property Fee to Trust Application

August 7, 2014

- Page 6 -

small band of Paiute Indians living near Benton, California, as a cemetery and camping ground: *Provided*, That this order shall not affect any existing valid rights of any person or persons to the land described.

See Ex. 14 and Ex. 15.

A letter, dated July 22, 1915, from the Secretary to the President to the Secretary of Interior, also notes in expressed and unambiguous words noting the "band of Paiute Indians" for whom certain lands in Mono County, California, were reserved were *under the jurisdiction of the Bishop Indian School*. *See Exhibit 16.*

Past Tribal Chairman Joseph C. Saulque wrote a letter to the BIA, Sacramento Area Office, on August 12, 1970:

First, I would like to know if there is a reservation in old Benton, California. If so, what is the location? If not, what happened to it? I'm told by Native Americans around here that there was one.

See Ex. 17.

Weldon A. Rolfe, Acting Area Realty Officer, BIA, Sacramento Area Office, responded on August 19, 1970, to the Mr. Saulque's August 12, 1970 letter:

We are unable to find any record of a reservation around Benton, California. The nearest reservation is at Bishop, approximately 40 miles south.

See Exhibit 18.

Mr. Saulque persisted in his efforts to seek information from the BIA on the existence of the Benton Reservation and the Tribal member wrote another letter on September 21, 1971 to the Sacramento Area Office, Bureau of Indian Affairs:

I wrote a letter to you, dated August 12, 1970, concerning Indian Land in Benton, Mono, California. Your reply dated August 19, 1970, signed by Weldon A. Rolfe, acting area Realty officer, said, "We are unable to find any record of a reservation around Benton,

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”
Re: Benton Station Property Fee to Trust Application
August 7, 2014
- Page 7 -

California. The nearest reservation is at Bishop, Calif, approximately 40 miles south.”

See Ex. 19.

Acting Area Director Wesley L. Barker informed the manager, Riverside District Land Office, on December 28, 1971 that the 1915 Executive Order was “overlooked” by his office and not carried in Area Office records: “however, from now on the reserved land will be known as the *Benton Paiute Indian Reservation*.” (Emphasis added.) *See* Exhibit 20.

Acting Sacramento Area Director, Wesley L. Barker, wrote to the Mr. Saulque, by letter, dated December 30, 1971:

This acknowledges your letter of September 21, received on December 23, regarding the NE1/4 of section 11, T. 2 S., R. 31 E., M.D.M., California 160 acres, which was reserved for the Paiute Indians of Benton, California, by Executive Order of July 22, 1915. The Executive Order has been overlooked by both the Bureau of Land Management and the Bureau of Indian Affairs and we were not aware of it until you brought it to our attention.

The Bureau of Land Management has been carrying the land on their records as vacant public domain; however, we sent their Riverside Office a copy of the Executive Order and informed them that *from now on the reserved land will be known as the Benton Paiute Indian Reservation*.

Sincerely,
/s/Wesley L. Barker

(Emphasis added.) *See* Exhibit 21.

III. STANDARD OF REVIEW UPON DETERMINATION OF “NOW UNDER FEDERAL JURISDICTION”

In February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*. The Court in that decision held that the word “now” in the phrase “now under federal jurisdiction” in the Indian Reorganization Act (“IRA”) refers to the time of the passage of the IRA in 1934.

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”
Re: Benton Station Property Fee to Trust Application
August 7, 2014
- Page 8 -

The Tribe refers to the March 12, 2014 Memorandum (“Memo”) from the Office of the Solicitor to the Secretary of the Interior for the purposes of complying with the November 5, 2013 request of the Acting Regional Director for the Tribe to submit information and supporting documentation on whether or not the Tribe was under Federal jurisdiction in 1934.²

In accordance with the Memo described above, the key and relevant parts comprising “standards of review” are listed:

- Based on this interpretation, when the IRA was enacted in 1934, “jurisdiction” meant the sphere of authority; and “under federal jurisdiction” at Section 19 meant that the recognized Indian tribe was subject to the Indian Affairs’ authority of the United States, either expressly or implicitly. Memo, p. 18.
- Congress’s authority over Indian tribes cannot be divested absent express intent by Congress. Id.
- In showing that a tribe was under federal jurisdiction, the Department will rely on evidence of a particular exercise of plenary authority, even where the United States did not otherwise believe that the tribe was under such jurisdiction. Id.
- A showing must be made that the United States has exercised its jurisdiction at some point prior to 1934 and that this jurisdictional status remained intact in 1934. Memo, p. 19.
- The text of the IRA, its remedial purposes, legislative history, and the Department’s early practices, as well as the Indian canons of construction, the phrase “under federal jurisdiction” entails a two-part inquiry:
 - Whether there is a sufficient showing in the tribe’s history, at or before 1934 that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe’s history

² This entire Memo addressing the subject of the meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act is not included except for those parts relevant to the Tribe analysis.

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”

Re: Benton Station Property Fee to Trust Application

August 7, 2014

- Page 9 -

prior to 1934, taken an action or series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members - that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the Tribe by the Federal Government. *Id.*

- Whether the tribe’s jurisdictional status remained intact in 1934. *Id.*
- For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous, thus obviating the need to examine the Tribe’s history prior to 1934. *Id.*
- For such tribes, there is no need to proceed to the second step of the two-part inquiry. *Id.*; p. 20.
- The Federal Government’s failure to take any actions towards, or on behalf of the tribe during a particular time period does not necessarily reflect a termination or loss of the Tribe’s jurisdictional status. Memo, p. 20.
- Evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action. *Id.*
- There may be periods where federal jurisdiction existed but was dormant. *Id.*
- The absence of any probative evidence that a tribe’s jurisdictional status was terminated or lost prior to 1934 strongly suggest that such status was retained in 1934. *Id.*
- A tribe may have been under federal jurisdiction in 1934 even though the Federal Government did not realize it at the time. Memo, p. 24.
- Whether the tribe’s jurisdictional status remained intact in 1934. *Id.*

Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”
Re: Benton Station Property Fee to Trust Application
August 7, 2014
- Page 10 -

It is within the parameters established by the Solicitor’s Memo that the Exhibits listed and discussed in “II. B. Historic Establishment of Federal Trust Relationship” will be analyzed.

IV. ANALYSIS OF EVIDENCE SUPPORTING TRIBE’S STATUS AS “UNDER FEDERAL JURISDICTION IN 1934”

It is the Tribe’s position that under any applicable administrative standard of evidence, i.e., substantial evidence, preponderance of the evidence or clear and convincing evidence, that it cannot be denied that it was under federal jurisdiction in 1934. In other words, the Tribe has provided more than enough credible evidence in attached to this letter and specifically presented above to make a sufficient and unambiguous showing that the Tribe was recognized in 1915 as a Tribe maintaining a federal trust to trust relationship with the United States of America.

Prior to July 22, 1915, the evidence supports a finding that the United States knew of the existence of a separate and discreet band of Paiute Indians living on or near the land that would become its “reservation.” *See* Ex. 3 to Ex. 13. These Exhibits are proof that the federal government engaged in extensive discussion and review that culminated in the establishment of a discrete place or “camp” for the “Benton Band of Paiute Indians.” *See* Ex. 11.

In terms of “Step 1” of the Solicitor’s Memo the fact that on July 22, 1915, President Woodrow Wilson signed and executed a Presidential Order reserving 160 acres of land for use of a small band of Paiute Indians living near Benton, California, as a cemetery and camping ground should end any further *Carcieri* analysis. The pre-July 22, 1915 communications in the list of Exhibits establishes a series of actions and course of dealings where the Federal Government took responsibility over protecting the land of the Benton Paiute used by them for a cemetery and also providing them sufficient land for camping purposes.

Nothing in the record available to the Tribe shows that the Presidential Executive Order that established the cemetery and camp ground for the Benton Band of Paiute Indians in 1915 has been reversed or eliminated.

Further, the Exhibits contain specific references to the phrase “*under the jurisdiction of the Bishop Indian School.*” *See* Ex. 13 and Ex. 16. The historical record on the use of the term “jurisdiction” unequivocally proves that the Benton Band of

**Letter to Kevin Bearquiver on *Carcieri* “Under Federal Jurisdiction in 1934”
Re: Benton Station Property Fee to Trust Application**

August 7, 2014

- Page 11 -

Paiute Indians was *expressly* subject to the Indian Affairs' authority of the United States at all times prior to the enactment of the IRA by Congress in 1934. There can be no doubt that the Benton Band was within the “sphere of authority” of the Federal Government for *Carcieri* analysis purposes since the Tribe’s jurisdictional status remained intact in 1934.

Probative of the Federal Government’s acknowledgment that the Tribe as an entity under federal jurisdiction in 1934 is found in *Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs*, 17 IBIA 78, 79 (02/22/1989): “The Benton Paiute Reservation was established by Exec. Order No. 2225 of July 22, 1915.” It is conclusive that 20 years before the U.S. Supreme Court’s decision in *Carcieri* that the Federal Government knew the federal trust to trust relationship had been established in 1915.

The Tribe’s federally approved Constitution and its Enrollment Ordinance are documents supporting that the Tribe’s formal existence relates back to 1928 or before 1934. The Tribe’s Constitution, Article III Membership, Sec. 1, defines the eligibility for enrollment as:

- (a) All Paiutes whose names appear on the official roll of California Indians prepared pursuant to the Act of May 18, 1928 (45 Stat. 502), as approved by the Secretary of the Interior on May 16, 1933, and who were then living in the Benton area.

See Ex. 22.³ The Tribe’s approved Enrollment Ordinance has the same eligibility requirement. *See* Exhibit 23. Exhibit 24 is a document titled “Census 1928 draft database Version 2.4.1492, March 19, 2010 that was obtained from the Tribe listing Indians from the Benton area who completed BIA application forms in compliance with the provisions of 45 Stat. 602.

Without a doubt, the fact that the federally approved Constitution (1975) and Enrollment Ordinance (1976) have within them membership requirements that reach back to 1928 is strong probative evidence supporting the *Carcieri* element of “under federal jurisdiction in 1934”.

³ Only those pertinent pages of these referenced documents containing relevant information are included.

Letter to Kevin Bearquiver on *Carcieri "Under Federal Jurisdiction in 1934"*
Re: Benton Station Property Fee to Trust Application
August 7, 2014
- Page 12 -

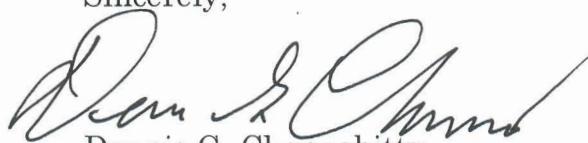
The probative evidence in the record tells a lamentable story that the Tribe was "overlooked" and forgotten by the Federal Government from 1915 to December 1971.⁴ The Federal Government's failure to take any actions towards, or on behalf of the tribe during this 56 year time period does not necessarily reflect a termination or loss of the Tribe's jurisdictional status. After the establishment of the Benton Paiute Reservation in 1915 members of the "Band" received federal services in the form of schooling at Indian Schools located in Bishop and Riverside, California and Stewart Indian School, Carson City, Nevada.⁵

V. CONCLUSION

The Tribe believes that it has made a showing that, at or before 1934, it was under federal jurisdiction in 1934 or at some point in the tribe's history prior to 1934, as proven by a series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members - sufficient to establish, or that specifically reflect federal obligations, duties, responsibility for or authority over the Tribe by the Federal Government. There is no evidence or proof that the Tribe's jurisdictional status was eliminated or severed at anytime between 1915 and 1934.

The Tribe's formal "government to government" relationship with the United States of America government was established by Presidential Executive Order in 1915 and has remained unfettered until today.

Sincerely,



Dennis G. Chappabitty
Attorney for Benton Tribe

cc: Chairman Saulque
Tribal Council

⁴ One can only wonder what the Tribe's Reservation and its People would have accomplished and contributed to Society had the Federal Government not lost its contact with them.

⁵ If necessary, this historical information can be provided after research.