House Subcommittee on Indian, Insular and Alaska Native Affairs
Don Young, Chairman
Hearing Memo

May 12, 2015

To: Natural Resources Committee Members

From: Majority Staff, Subcommittee on Indian, Insular and Alaska Native Affairs

Hearing: Oversight hearing on "*Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934.*"

The Subcommittee will hold an oversight hearing on **Thursday, May 14, 2015 at 2:00 p.m. in room 1334 Longworth** titled: "*Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934.*"

Policy Overview

- The Committee will examine whether the Secretary should have blank check power under a 1934 law to develop all rules and policies for the acquisition of trust land.

- If Congress determines that conditions on the Secretary's power are necessary, the conditions should reflect a balancing of tribes' need and justification for trust lands, and the impact on affected state and local governments, other Indian tribes, and private landowners.

Hearing Summary

Section 5 of the Indian Reorganization Act of 1934[1] (IRA) authorizes the Secretary of the Interior, "in his discretion," to acquire any interest in land or water "for the purpose of providing land for Indians." This authority has not been amended by Congress in the last 81 years. Land so acquired shall be taken by the United States in trust for the individual Indian or Indian tribe for whom the acquisition is made, and be exempt from state and local taxation. In most cases, federal acquisition of land in trust for Indians divests a state and local government of civil and criminal jurisdiction over such land. In addition, a casino operated under the Indian Gaming Regulatory Act of 1988 generally must be located on trust lands. The implementing regulations for the Secretary's acquisition of land in trust for Indians are codified in 25 C.F.R. Part 151.

Today, there are approximately 56 million acres of land held by the United States in trust for Indians (10 million for individual Indians and 46 million for tribes). Many of these lands were placed in trust pursuant to various statutes and treaties; it is unclear how many lands have been acquired under the IRA.

Section 5 of the IRA contains no limits, standards, or even non-binding guidelines on the exercise of the Secretary's power. All rules and policies for taking land in trust for Indians are left to the discretion of an unelected bureaucracy in the Department of the Interior. The only serious limit on the Secretary's power, however, has been defined by the Supreme Court. In *Carcieri v. Salazar*[2], the Court held that the trust land provisions of the IRA may benefit only tribes that were "under federal jurisdiction" on the date of enactment of the Act, or June 18, 1934. These are generally tribes with reservations subjected to 19th century allotment laws.

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[1] Act of June 18, 1934, 48 Stat. 985 (25 U.S.C. 465), amended by P.L. 100-581, 102 Stat. 2941
[2] 555 U.S. 379 (2009)

Because the large number of tribes obtaining formal federal recognition after 1934 may not be able to benefit from the IRA, many tribes seek a legislative reversal of the Supreme Court, while state and county governments support modifications to the Secretary's power to address impacts on creating new trust lands.

In spite of *Carcieri*, since 2009 the Secretary of the Interior has placed more than 280,400 acres of land in trust, and Secretary Jewell wishes to place at least 500,000 acres of land in trust by the end of the Obama Administration.[3] To the Committee's knowledge, Interior has not declined any application to acquire trust land on the grounds that the tribal applicant was not under federal jurisdiction in 1934.

The purpose of this oversight hearing is to examine whether or not there should be any meaningful statutory conditions imposed on the Secretary's power to acquire trust land, and what the policy and constitutional risks may be if Congress fails to enact such conditions.

Invited Witnesses

Mr. Kevin Washburn
Assistant Secretary of Interior - Indian Affairs
U.S. Department of the Interior
Washington, DC

Mr. Randy Noka, Councilman
Narragansett Tribe of Rhode Island
Vice President, United South and Eastern Tribes, Inc.
Charlestown, Rhode Island

Principal Chief George Tiger
Muscogee (Creek) Nation of Oklahoma
Okmulgee, Oklahoma

Ms. Lori Stinson, Tribal Attorney General
Poarch Band of Creek Indians of Alabama
Atmore, Alabama

Mr. David Rabbitt, Supervisor
Sonoma County Board of Supervisors
Santa Rosa, California

Dr. Christian McMillen
Corcoran Department of History
University of Virginia
Charlottesville, Virginia

Background

Overview of the Allotment Era and the Indian Reorganization Act of 1934

The IRA of 1934 was enacted to remedy the loss of Indian lands from then-remaining reservations subjected to the General Allotment Act of 1887 (Dawes Act). Under the Dawes Act, the President was authorized to allot 160-acre or 80-acre parcels of land in Indian reservations to individual Indians located on them, and to open remaining surplus lands to non-Indian settlement. Judged as a failure today, allotment had a humane basis: Congress and activists wanted to

[3] https://www.whitehouse.gov/the-press-office/2014/12/03/fact-sheet-white-house-tribal-nations-conference

convert impoverished Indians living on tribal communal property into property-owning farmers and ranchers, who would presumably assimilate in the wider Western economy.

The Act failed because many Indians did not adjust or were not taught to adjust to the radical shift in their culture, economy, and lifestyle. Upon patenting the lands after a 25-year grace period when the allotments were retained in trust, many Indians sold or mortgaged their lands. Tens of millions of acres left Indian ownership, a result Congress in 1934 wanted to reverse. Today, the combination of individual Indian allotments (many of which have highly fractionated into multiple owners) and non-Indian fee lands have resulted in checker-boarding common on many reservations west of the Mississippi.

Seeking to redress Indians' loss of land, Congress enacted the IRA in 1934. The IRA prohibited further allotment, put remaining allotments still owned by Indians back in federal trust, and authorized the Secretary to acquire lands in trust for individuals and tribes to restore their property. The Act also provided other benefits to encourage tribes to form corporations and western-style tribal governments, and obtain loan guarantees.

Importantly, the text of the IRA contains no limits, conditions, or guidelines on the power delegated to the Secretary to acquire lands and put them in trust for Indians, except one condition in Section 19: an Indian for the purposes of the IRA is a person of Indian descent who is a member of a tribe "recognized and *now* under federal jurisdiction." (Italics added for emphasis).

The Department of the Interior generally ignored the import of the word "now" in the definitions section of IRA until the State of Rhode Island challenged a trust acquisition made by the Secretary for the benefit of the Narragansett Tribe, which obtained formal federal recognition in 1983.

Carcieri v. Salazar

In the 2009 ruling of *Carcieri v. Salazar*, the Supreme Court imposed a limit on the Secretary's trust acquisition power under the IRA. In that case, Governor Donald Carcieri of Rhode Island had sued to block a trust acquisition for the benefit of the Narragansett Tribe on the grounds that the Secretary's authority to hold land in trust under the IRA was limited only to members of recognized tribes "now under Federal jurisdiction," with the word "now" meaning the date of enactment of the IRA, or June 18, 1934. Lower Courts deferred to the Secretary's view that the word "now" means the instant when the Secretary invokes his trust land authority. The Supreme Court reversed. Twenty-one states[4] and several municipal government associations had filed friend-of-the-court briefs on the side of Governor Carcieri.

In its majority opinion, the high court held "that the term 'now under Federal jurisdiction' in [section 19 of the IRA] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."

As a result, the Secretary may no longer use the IRA to acquire trust land for any post-1934 tribe without specific authorization from Congress. Because the Secretary has acquired lands in trust for dozens of tribes recognized *after* 1934, the ruling calls into question the validity of the trust status of such lands and jeopardizes their immunity from State and local taxation and regulatory jurisdiction.

[4] Alabama, Connecticut, Alaska, Arkansas, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and Utah.

The Department of the Interior's End-Around the Supreme Court and Congress

Despite *Carcieri*, the Department of the Interior has continued to acquire land in trust for post-1934 tribes. On March 12, 2014, the Solicitor of Interior issued a Legal Memorandum titled, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." This memo, binding on Interior agencies, effectively defines the term "under federal jurisdiction" in a manner that – unsurprisingly – serves to render the Supreme Court's ruling meaningless and empower the Secretary to take lands in trust for a tribe recognized at any time.

In addition to the Solicitor's Legal Memo, Interior developed a rule to revise procedures relating to when it would transfer land into trust. Under prior rules, Interior gave interested parties 30 days after a trust land application was approved to file a challenge before title would be placed in trust. Under the new rule,[5] title to land is placed in trust when a trust application is approved. Thus, by the time a court decides whether or not Interior's trust acquisition was legal, the land may be fully and irreversibly developed.

These moves by the Department have been done without consulting with the Committee.

Challenges have been and will continue to be mounted by states and private citizens against Interior's acquisition of land in trust for post-1934 tribes. This has created a cloud of uncertainty over Interior's previous – and continuing – trust acquisitions for tribes, which in turn creates uncertainty for tribes and businesses who wish to finance development on the property, whether for housing, businesses, medical clinics, or casinos.

How many tribes and what lands previously acquired in trust are affected by the Supreme Court's holding in *Carcieri*? The Committee has previously sought answers to these questions but the Department has failed to supply the requested information.

Legislation to Address *Carcieri*

Post-1934, tribes have lobbied Congress strongly in support of reversing the Supreme Court and delegating to the Secretary unconditional power to acquire land in trust for Indians. Bills have been introduced in every Congress since 2009 to reverse the Supreme Court ruling but none have been sent to the White House. No legislation has been introduced to modify the Secretary's authority under Section 5 of the IRA.

In the current Congress, H.R. 249 (Cole), H.R. 407 (McCollum), and S. 732 (Tester) would reverse Carcieri and grant the Secretary unconditional power to acquire land in trust for Indians. A copy of the IRA as amended by H.R. 249 is attached at the end of this hearing memo.

While nearly all regional and national tribal associations have adopted resolutions in support of the so-called "clean Carcieri fix" (i.e., legislation to reverse *Carcieri*), a number of tribes have supported legislation to curb "reservation shopping," the informal name for the practice of acquiring lands in trust that are outside an existing Indian reservation – usually in or near an urban area or major highway – for the purpose of operating a casino. Moreover, a number of States and county governments and county government associations have sought reforms in the process the Secretary uses to place land in trust.

Constitutional Questions

There has been one major challenge to the constitutionality of Section 5 of the IRA. In 1995, the U.S. Court of Appeals for the Eighth Circuit, in a lawsuit filed by a state challenging a trust land acquisition by the Secretary, held that

[5] https://turtletalk.files.wordpress.com/2013/11/11-13-13-patchak_final-rule.pdf

"25 U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power . . ."[6]

Quoting principles articulated by the Supreme Court, the Eighth Circuit explained, "There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority-except that the acquisition must be 'for Indians.' It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians."

The Secretary filed a petition for a *writ of certiorari* seeking the Supreme Court's reversal of the Eighth Circuit ruling. In a 1996 decision the Supreme Court simultaneously granted the petition, vacated the judgment, and remanded the matter to Interior for reconsideration of its administrative decision.[7] This was done after Interior, having lost in the U.S. Court of Appeals, quickly created a regulation to self-impose a new limit on the exercise of its trust land acquisition power and effectively asked for a do-over of the lawsuit in the lower courts, where it subsequently got the lawsuit dismissed.

In a sharp dissent, Justice Scalia, joined by Justices O'Connor and Thomas, argued the Court's decision to let Interior "try out a new legal position" in a case it had lost on appeal to be "both unprecedented and inexplicable." Scalia pointed out that the Court created a moving target for the prevailing litigant (the State of South Dakota) and created a perverse incentive for the government to "go for broke" initially, only moderating their policy if they lost.

As a result, the Supreme Court has not squarely ruled on the merits of a challenge regarding the constitutionality of the IRA.

Alaska

On December 18, 2014, the Department finalized an amendment to its trust land acquisition rules (25 C.F.R. Part 151) to make lands in Alaska eligible to be placed in trust for the benefit of Alaska Natives.[8] Prior regulations contained a prohibition on taking land in Alaska in trust. The prohibition had stemmed from a long-held position by the Secretary that enactment of the Alaska Native Claims Settlement Act of 1971 (ANCSA) precluded the acquisition of trust land in Alaska.

Under ANCSA, all claims in Alaska based on aboriginal use and occupancy were extinguished, and 44 million acres of public land were transferred in fee to Alaska Natives. In enacting this law, however, Congress sharply departed from its historic policy of creating reservations for tribes. Rather, Congress conveyed the 44 million acres of settlement lands to for-profit corporations organized by Alaska Natives (the corporations are based in more than 200 Native Villages and in 12 regions of the State). The settlements lands would remain in fee status and subject to state jurisdiction, with a few exceptions. Such lands may be sold, mortgaged, leased, or exchanged on an equal footing with any private property owner. In contrast, if the lands were placed in trust, the Alaska Natives would need the permission of the Secretary of the Interior to lease them, and the lands could not be sold, exchanged, or encumbered.

Under the new rule, the Secretary may now place land in Alaska in trust, but such trust acquisitions are almost certain to be challenged in federal court.

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[6] http://caselaw.findlaw.com/us-8th-circuit/1183341.html

[7] 519 U.S. 919, 117 S.Ct. 286

[8] http://www.bia.gov/WhoWeAre/AS-IA/ORM/LandTrustAlaska/index.htm

25 USCS § 479, as amended by H.R. 249, as introduced, (To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes, and for other purposes.)[9]

25 USCS § 479

§ 479. Definitions

Effective beginning on June 18, 1934, the term "Indian" as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. In said sections, the term `Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 USCS § 465

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $ 2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

[9] (b) Effective Date- The amendments made by this section shall take effect as if included in the Act of June 18, 1934 (commonly known as the `Indian Reorganization Act'; 25 U.S.C. 479), on the date of enactment of that Act.