Subcommittee on Indian, Insular and Alaska Native Affairs
Doug LaMalfa, Chairman
Hearing Memorandum

July 22, 2018

To: All Subcommittee on Indian, Insular and Alaska Native Affairs Members

From: Majority Committee Staff
Subcommittee on Indian, Insular and Alaska Native Affairs (x69725)

Hearing: **Legislative hearing on H.R. 5244 (Rep. William Keating),** To reaffirm the Mashpee Wampanoag Tribe reservation, and for other purposes.
Tuesday, July 24, 2018, at 2:00 p.m. in 1324 Longworth HOB

H.R. 5244, Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Summary of the bill

H.R. 5244 was introduced by Rep. William Keating on March 22, 2018. The bill would "reaffirm" a September 2015 Department of the Interior decision to place land in trust for the Mashpee Wampanoag tribe in the towns of Mashpee and Taunton, Massachusetts, thereby superseding the judgment of a U.S District Court, which in 2016 rejected the Department's legal justification for placing the land in trust.[1]

Cosponsors

Rep. Doug LaMalfa (R-CA), Rep. Don Young (R-AK), Rep. Tom McClintock (R-CA), Rep. Glenn Thompson (R-PA), Rep. Tom Cole (R-OK), Rep. Carlos Curbelo (R-FL), Rep. John Faso (R-NY), Rep. Ruben Gallego (D-AZ), Rep. Raul Grijalva (D-AZ), Rep. Joseph P. Kennedy III (D-MA), Rep. Katherine M. Clark (D-MA), Rep. Michael E. Capuano (D-MA), Rep. Stephen F. Lynch (D-MA), Rep. James P. McGovern (D-MA), Rep. Gregory W. Meeks (D-NY), Rep Seth Moulton (D-MA), Rep. Norma J. Torres (D-CA), and Rep. Niki Tsongas (D-MA)

Invited Witnesses

Mr. Darryl LaCounte
Acting Deputy Bureau Director
Office of Trust Services
Bureau of Indian Affairs
Department of the Interior
Washington, D.C.

[1] *Littlefield v. Department of the Interior, 199 F. Supp. 3d (U.S. Dist. Ct. MA,* 2016).

The Honorable Cedric Cromwell
Chairman
Mashpee Wampanoag Tribe
Mashpee, MA

Background

The Mashpee Wampanoag Tribe, located on Cape Cod in Barnstable County, Massachusetts, is one of two federally-recognized tribes in Massachusetts. The Department of the Interior extended federal recognition to the Tribe in 2007 under its administrative recognition procedures codified in Part 83 of Title 25 of the Code of Federal Regulations.

After gaining federal recognition in 2007, the Mashpee applied to have the Secretary of the Interior, through the Bureau of Indian Affairs (BIA), acquire fee title to certain lands in Massachusetts and to proclaim them the Tribe's "initial reservation." This enables the Tribe to operate a casino on such land under Section 20 of the Indian Gaming Regulatory Act.[2] In 2015 the BIA issued a Record of Decision to acquire 170 acres of land in the Town of Mashpee and 151 acres of land in the City of Taunton, Massachusetts, in trust for the benefit of the Tribe and to proclaim the lands to be the Tribe's initial reservation. The BIA's acquisition of land was made under Section 5 of the Indian Reorganization Act of 1934 (IRA, 25 U.S.C. 465, later transferred to 25 U.S.C. 5108), a statute authorizing the Secretary of the Interior, in his or her discretion, to acquire land in trust for Indians.

The Tribe plans to construct and operate a 400,000-square foot gaming-resort complex in Taunton[3] regulated under a class III gambling compact between the Tribe and Massachusetts. The land-in-trust/casino project has been financed by the Tribe's investment partner, Genting Group, a large Malaysian company with casino facilities in several parts of the world.

In 2016 a group of citizens in East Taunton, Massachusetts, filed a lawsuit challenging the Secretary's acquisition of land in trust for the Mashpee. The plaintiffs' complaint was that Section 5 of the IRA, as interpreted by the U.S. Supreme Court in Carcieri v. Salazar,[4] does not authorize the Secretary to acquire land in trust for the Mashpee. The East Taunton citizens have been opposed to the Tribe's fee-to-trust efforts for at least ten years. Rush Street Gaming, a Chicago-based company, has given financial support to the East Taunton citizens' lawsuit.

On July 28, 2016, the U.S. District Court for the District of Massachusetts ruled in favor of the citizens group, finding that "the Secretary lacked the authority to acquire land in trust for the Mashpees.…"[5] To understand the Court's reasoning, it is necessary to consider how the Department erroneously interpreted the IRA to acquire trust land for the Mashpee.

[2] 25 U.S.C. 2701 et seq.
[3] https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031724.pdf
[4] 555 U.S. 379 (2009).
[5] *Littlefield et al v. Department of the Interior*, U.S. District Court-District of Massachusetts, Civil Action No. 16-10184-WGY, Memorandum and Order, July 28, 2016.

Under Section 5 of the IRA, the Secretary may acquire land in trust for "Indians". Under the IRA, "Indian" is defined as follows:

> The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, 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. (25 U.S.C. 5129). *[emphasis added]*

Until the 2009 *Carcieri* decision, the Secretary held that the word "now" in "now under Federal jurisdiction" meant under federal jurisdiction at the time the Secretary acts to acquire land for Indians. In the Secretary's view, the time at which a tribe is federally recognized or under federal jurisdiction was irrelevant. The Supreme Court wholly rejected this interpretation, holding that "now" as used in the statute unambiguously means June 18, 1934, the date of enactment of the IRA. Thus, under the IRA, the Secretary is not authorized to acquire land for Indians unless they are members of a tribe that was under federal jurisdiction in 1934.

The Obama Administration soon determined that it would consider the term "under federal jurisdiction" to mean something different from "federally recognized." It resumed its acquisition of land for tribes, including tribes recognized long after 1934, by conducting a historical and legal analysis of a tribe's "under federal jurisdiction in 1934" status when a tribe applies for trust land. In support of such analysis, the Solicitor of the Department of the Interior developed a formal legal opinion[6] whose rationale is based largely on a concurring opinion, not joined by the rest of the Court, filed by Justice Breyer in *Carcieri*.

In the Mashpee case, however, the Secretary sidestepped the question of the Tribe's status in 1934. Rather, the Secretary interpreted the phrase "such members" in the IRA definition of "Indian" to mean "all persons of Indian descent who are members of any recognized tribe" rather than "all persons of Indian descent who are members of any recognized tribe now [i.e., in 1934] under Federal jurisdiction" as actually set forth in the statute. In rejecting the Secretary's interpretation, the Court ruled it was "not a close call."[7]

The Court ruled the Secretary lacked authority to acquire the Mashpee land in trust and remanded the case to the Department of the Interior for further consideration of the fee-to-trust application, including a determination of the tribe's jurisdictional status in 1934.

To date, the Department has failed to make any formal determination after notifying the parties a year ago of its intention to conduct a review of whether the Tribe was under federal

[6] https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf
[7] *Littlefield et al v. Department of the Interior*, U.S. District Court-District of Massachusetts, Civil Action No. 16-10184-WGY, Memorandum and Order, July 28, 2016, at 14.

jurisdiction in 1934 and thus eligible to have land taken into trust for it.[8] In the meantime, the Tribe and Genting have not undertaken construction of the casino-resort project.

Land-in-Trust Law and Policy

The Secretary's acquisition of land in trust for Indians effectively removes such land from the jurisdiction of a State and from any applicable local tax rolls. It is also a prerequisite for operating a casino under the Indian Gaming Regulatory Act. A recurring concern from States, local governments, other tribes, private landowners, and other citizens is that the BIA does not adequately consider the impacts of taking land in trust.[9]

The only limits on the Secretary's power to acquire land in trust are those self-imposed by the BIA by regulation codified in Part 151 of Title 25 of the Code of Federal Regulations. While these regulations require the Secretary to solicit views of States and local governments exercising jurisdiction over the lands and to analyze the impacts on local tax rolls and the potential for jurisdictional conflicts, there is no objective standard by which the BIA must accept or reject an application. In other words, land may be taken in trust no matter how consequential it may be on the interests of the State, local jurisdictions, private citizens, and other Indian tribes.

The exceptionally broad power of the Secretary under the IRA led 21 other States to file an *amicus* brief in the Supreme Court in support of the State of Rhode Island in its lawsuit challenging the Secretary's interpretation of the IRA in *Carcieri v. Salazar*. Joining the State of Rhode Island was the Attorney General of Massachusetts.

In addition, on April 24, 2009, the Attorneys General of Alaska, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Utah sent a letter to the Committee on Natural Resources and the Senate Committee on Indian Affairs. In their letter, the State Attorneys General expressed "the larger frustration many states feel with the existing regulatory process for taking land into trust. The current process does not provide for meaningful analysis or weighing of the input of states and local units of government and is void of binding limits on the discretion of the [S]ecretary." The letter further expressed opposition to any "quick fix" (i.e., a reversal) of the *Carcieri* decision and for Congress to allow States "to participate in any discussions regarding legislation affecting the Secretary's authority to take land into trust…"[10]

Obama Administration Revises Fee-to-Trust Rules

In 2013, the BIA revised its rules for taking land in trust under Section 5 of the IRA. One of the major changes made was to provide for the immediate acquisition of title to land in trust upon an approval of a tribe's fee-to-trust application. The previous rule provided a 30-day period

[8] Letter from James E. Cason, Associate Deputy Secretary of the Interior, to plaintiffs' attorneys and Mashpee Tribe, June 30, 2017

[9] See, for example, testimony of the Attorney General of Connecticut, and of a witness for the California State Association of Counties on bills to address *Carcieri v. Salazar*.
https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=151406

[10] Letter to the Chairmen and Ranking Members of the House Committee on Natural Resources and the Senate Committee on Indian Affairs from the Attorneys General of 17 States, April 24, 2009.

before land would transfer into trust, and in conjunction with this rule the Department had a policy to stay the transfer of title into trust if a person filed a lawsuit challenging the action within the 30-day waiting period. Therefore, under the revised rules, if the BIA unlawfully took land in trust, the land would be held in trust and eligible for any development – including a casino – unless a court ordered otherwise.

Analysis of H.R. 5244

The Mashpee bill ratifies and confirms the previous actions of the Secretary to acquire land in trust for the Mashpee tribe. The legislation additionally orders any federal court to dismiss any lawsuit pending on the date of enactment of the legislation relating to the Mashpee lands. Therefore, if H.R. 5244 is enacted into law, the Tribe's land shall remain irrevocably in trust.

Major Provisions of H.R. 5244

Sec. 2. Reaffirmation of Indian Trust Land.

Subsection (a). The actions of taking of land into trust for the Mashpee Tribe, as published in the Federal Register on January 8, 2016, are ratified and confirmed.

Subsection (b). Any federal court action (including one pending on date of enactment) relating to the land described in subsection (a) shall be dismissed.

Subsection (c). All laws of the U.S. applicable to Indians shall be applicable to the Mashpee Tribe and its members. This includes the Secretary having authority to place future lands into trust for the Tribe.

Cost

Unknown.

Administration Position

Unknown.