

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

July 11, 2017

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

From: Majority Committee Staff,
Subcommittee Indian, Insular and Alaska Native Affairs (x6-9725)

Hearing: Oversight hearing on “*Comparing 21st Century Trust Land Acquisition with the intent of the 73rd Congress in Section 5 of the Indian Reorganization Act.*”

On **Thursday, July 13, 2017 at 10:00 am in 1324 Longworth HOB**, the Indian, Insular and Alaska Native Affairs Subcommittee will hold an oversight hearing on “*Comparing 21st Century Trust Land Acquisition with the intent of the 73rd Congress in Section 5 of the Indian Reorganization Act.*” The hearing will focus on the power of the Secretary of the Interior to acquire land in trust, and on whether or not Congress should enact standards to govern the Secretary’s use of such power.

Policy Overview

- Section 5 of the Indian Reorganization Act of 1934 (“IRA”) delegates to the Secretary of the Interior (Secretary) exceptionally broad authority to acquire land in trust for Indians.
- When the Secretary acquires land in trust for Indians, title to the land is legally owned by the federal government, thereby pre-empting state and local jurisdiction and opening the door to off-reservation gaming.
- For decades the Secretary has acquired land in trust regardless of the impact on other tribes, state and local governments, and landowners, and regardless of the capacity of the government to manage the trust lands.
- In 2009, in *Carcieri v. Salazar* the Supreme Court held that the Secretary may not acquire land for Indians pursuant to the IRA unless they are members of a tribe that was “under federal jurisdiction” in 1934.
- The Committee will explore (1) whether the Secretary has implemented the original intent of Congress in its enactment of Section 5 of the IRA and in accordance with *Carcieri v. Salazar*, and (2) whether Congress should require the Secretary to apply any standards or criteria on the acquisition of land in trust, or leave all discretion to the Secretary.

Hearing Summary

Section 5 of the Indian Reorganization Act of 1934¹ (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.” Though enacted to remedy a loss of lands by Indians through the operation of allotment laws including the General Allotment Act², the authority for the Secretary to acquire lands for Indians under Section 5 has not been amended by Congress in the last 83 years.

Land acquired by the Secretary in trust under the IRA is exempt from state and local taxation and civil jurisdiction, and usually from state criminal law depending on the Indian status of criminal offender and victim. 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 or where all such lands are precisely located.

Section 5 of the IRA contains no limits, standards, or even non-binding guidelines on the exercise of the Secretary’s power. Any land acquired by or on behalf of a tribe may be eligible for trust status, regardless of its location or of any connection to the tribe. All rules and policies for taking land in trust for Indians are left to the discretion of the Secretary.

The Supreme Court effectively limited the application of the IRA to tribes that were “under federal jurisdiction” in 1934. The Obama Administration, however, interpreted this phrase in a manner that has appeared to allow the Secretary to resume the acquisition of land in trust for virtually all tribes.³

The purpose of this oversight hearing is to examine whether the Secretary has implemented the IRA in accordance with the intent of Congress and within the limits defined by the Supreme Court, and whether the IRA should be updated to reflect any specific policy standards or criteria that Congress might wish to place on the acquisition of land in trust.

Witnesses (Invited)

Mr. James Cason
Acting Deputy Secretary
U.S. Department of Interior
Washington, D.C.

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

² Act of February 8, 1887, also known as the Dawes Act.

³ To date, the Department of the Interior has not informed the Committee that any application to take land in trust has been denied on the grounds the tribe filing the application was not under federal jurisdiction in 1934.

The Honorable Kirk Francis
President
United South and Eastern Tribes
Washington, D.C.

The Honorable Fred B. Allyn III
Mayor, Town of Ledyard
Ledyard, Connecticut

Mr. Donald Mitchell
Attorney at Law
Anchorage, Alaska

Background

The IRA was enacted to remedy the loss of Indian lands from then-remaining reservations subjected to the General Allotment Act, commonly called the Dawes Act. Under the Dawes Act, Congress sought to end the tribal and reservation system in which Indians had been living by making them individual property owners through allotment in severalty of the reservations in which they were living. Under the 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. Indians receiving allotments were granted U.S. citizenship and made subject to the civil and criminal laws of the state or territory in which they resided.

Many Indians, regardless of whether they wanted it, did not adjust to the shift from a communal land system to one based on individual property ownership. Tens of millions of acres left Indian ownership after allotments were patented to them. 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.⁴

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

⁴ See the Subcommittee oversight hearing of May 23, 2017, for more on Indian land fractionation: <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=401950>

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 Governor Donald Carcieri 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 2009 the Supreme Court resolved Gov. Carcieri’s lawsuit by holding “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 of the decision, the Secretary may no longer use the IRA to acquire trust land for any post-1934 tribe without specific authorization from Congress. Despite Carcieri, the Department of the Interior under the Obama Administration continued to acquire land in trust for tribes recognized after 1934.

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 enables the Secretary, through the Bureau of Indian Affairs (BIA), to acquire land in trust for tribes recognized after 1934.

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.

The Obama Administration and tribes and tribal organizations have generally urged Congress to “fix” *Carcieri v. Salazar* by amending the IRA to eliminate the requirement that a tribe be “under federal jurisdiction” in 1934 in order to benefit from the trust land provisions of Section 5. Congress has not enacted various bills introduced to reverse *Carcieri*.

A more detailed discussion of the background and controversy surrounding *Carcieri* may be found on a hearing memo for a related hearing held in the Subcommittee in the 114th Congress: https://naturalresources.house.gov/uploadedfiles/hearingmemoian5_14.pdf

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