



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: House Committee on Natural Resources Republican Members
From: Indian and Insular Affairs Subcommittee staff, Ken Degenfelder
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Date: Wednesday, June 26, 2024
Subject: Legislative Hearing on two bills: H.R. 1208 and H.R. 6180

The Subcommittee on Indian and Insular Affairs will hold a legislative hearing on two bills: H.R. 1208 (Rep. Cole), 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; and H.R. 6180 (Rep. Carl), “*Poarch Band of Creek Indians Lands Act*” on **Wednesday, June 26, 2024, at 10:15 a.m. in 1324 Longworth House Office Building.**

Member offices are requested to notify Haig Kadian (Haig.Kadian@mail.house.gov) by 4:30 p.m. on Tuesday, June 25, 2024, if their member intends to participate in the hearing.

I. KEY MESSAGES

- Pursuant to the 2009 Supreme Court decision in *Carcieri v. Salazar*, the Secretary of the Interior (Secretary) is only authorized to place land into trust for federally recognized tribes that can demonstrate that they were “under federal jurisdiction” when the Indian Reorganization Act (IRA) became law in 1934.
- H.R. 1208 would amend the IRA to grant the Secretary the ability to place land into trust for the benefit of any federally recognized tribe.
- H.R. 6180 would treat the Poarch Band of Creek Indians as covered by the IRA and reaffirm any lands previously taken into trust for their benefit by the Secretary.
- The Secretary’s ability to take land into trust removes land from local control, placing it under federal and tribal control. Land taken into trust within a community has implications for taxation, zoning, and other local or state laws regarding property.
- Changing the impact of *Carcieri v. Salazar* also has implications for Indian gaming development.

II. WITNESSES

- **Ms. Kathryn Isom-Clause**, Deputy Assistant Secretary for Indian Affairs, U.S. Department of the Interior, Washington, D.C. [H.R. 1208 and H.R. 6180]
- **The Hon. Marshall Pierite**, Chairman, Tunica-Biloxi Tribe of Louisiana, Marksville, LA [H.R. 1208]
- **The Hon. Stephanie Bryan**, Tribal Chair, Poarch Creek Indians, Atmore, AL [H.R. 6180]
- **The Hon. David Rabbitt**, District 2 Supervisor, Sonoma County Board of Supervisors, Sonoma, CA [H.R. 1208 and H.R. 6180]

III. BACKGROUND

[H.R. 1208 \(Rep. Cole\), 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.](#)

H.R. 1208 would amend the IRA¹ and grant the Secretary the ability to place land into trust for the benefit of any federally recognized tribe, not just those considered “under federal jurisdiction” when the IRA became law on June 18, 1934. This would reverse the 2009 Supreme Court decision *Carcieri v. Salazar*.² Similar legislation has been introduced in the past seven Congresses, and the past ten democratic President’s budget requests have included proposed legislative language to accomplish the same goal.³

Land into Trust Authority

Section 5 of the IRA⁴ authorizes the Secretary to take land into trust for the benefit of an Indian tribe “in his discretion.” The IRA was enacted as a remedy to the allotment policies exemplified by the Dawes Act,⁵ which resulted in a reduction of Indian land and continued poverty and poor conditions on reservations, as detailed in the 1928 Meriam Report.⁶ Land held in trust for individual Indians and federally recognized tribes is generally immune from state and local jurisdiction and taxation. Depending on the location of the land and the date it was put in trust, a tribe may be able to operate a casino on land held in trust pursuant to the Indian Gaming Regulatory Act (IGRA).⁷

Currently, there are approximately 56 million surface acres and 59 million acres of subsurface minerals estates held in trust by the United States for American Indians, Alaska Natives and for federally recognized tribes.⁸ Lands can be taken into trust through mandatory or discretionary acquisitions. A mandatory acquisition involves Congress, or a court order, mandating the Secretary take specific land into trust for the benefit of a tribe. Discretionary trust acquisitions

¹ 48 Stat. 984.

² *Carcieri v. Salazar*, 555 U.S. 379 (2009).

³ Included in FY12-FY17 President’s budget request and again in FY22-FY25.

⁴ 48 Stat. 985.

⁵ Act of February 8, 1887, Ch. 119, 24 Stat. 388.

⁶ Meriam Report. 1928. <https://www.uaf.edu/tribal/academics/112/unit-2/indianreorganizationact1934.php>.

⁷ 25 U.S.C. 2701 et seq.

⁸ “About Us” Bureau of Indian Affairs. <https://www.bia.gov/about-us>.

involve the Secretary using the authority granted to them under the IRA to take land into trust on behalf of the tribe.⁹

The Bureau of Indian Affairs (BIA) has issued regulations outlining the Secretary's process to take land into trust for individual Indians or federally recognized tribes.¹⁰ Applications are often seen as procedural because they are generally approved irrespective of whether taking the land into trust would have local, state, or federal tax and governmental impacts.¹¹ There is currently no standard for removing land from trust if a judicial decision deems the application's approval unlawful.¹²

The Carcieri v. Salazar Decision and Effects

The *Carcieri v. Salazar* Supreme Court decision provided a limit on the secretarial power to take land into trust. Resolving a lawsuit filed by the Governor of Rhode Island, a 2009 Supreme Court decision held that the trust land provisions of the IRA may only benefit tribes that were “under federal jurisdiction” on June 18, 1934, the date of the Act's enactment.¹³ These are generally tribes with reservations whose lands were allotted under 19th-century laws. Following allotment, millions of acres of land left Indian ownership. A key goal of Congress in enacting the IRA was to remedy the land loss by Indians in tribes in existence in 1934.¹⁴

The actual impact on all tribes since the decision is unknown for two reasons. First, since 2009, the Department of the Interior (DOI) has not divulged a list of tribes that were or were not under federal jurisdiction in 1934. Tribes applying to have land placed into trust through the BIA's process generally have to prove that they were under federal jurisdiction in 1934, often defending their history, membership, and even the tribe's existence in their land-to-trust applications.

Second, during the Obama Administration, the DOI Solicitor issued an “M-Opinion” interpreting the definition of “under federal jurisdiction” to continue the acquisition of lands for tribes recognized after 1934. This controversial decision by the Obama Administration has allowed the Secretary to continue taking lands into trust for federally recognized tribes but it has also led to ambiguity and lawsuits.¹⁵

For example, one land into trust application from the Mashpee Wampanoag Tribe of Massachusetts for its “initial reservation” caused three lawsuits and three different secretarial decisions across three different presidential administrations, because the tribe was recognized in 2007. Local residents disagreed with the 2015 land into trust decision, as well as plans for a subsequent 400,000-square foot class III gaming-resort complex, and challenged the decision in

⁹ CRS. Tribal Lands: An Overview. October 21, 2021. <https://crsreports.congress.gov/product/pdf/IF/IF11944>.

¹⁰ 25 CFR Part 151. <https://www.ecfr.gov/current/title-25/part-151>.

¹¹ SCIA Hearing. Carcieri: Bringing Certainty to Trust Land Acquisitions. November 2013. See the Late Senator Feinstein's Statement referencing Butte County residents voting against a casino only for DOI to approve the land-into-trust application for a casino. <https://www.govinfo.gov/content/pkg/CHRG-113shrg87133/html/CHRG-113shrg87133.htm>.

¹² 25 CFR 151. <https://www.ecfr.gov/current/title-25/part-151>.

¹³ 555 U.S. 379.

¹⁴ 25 US 5103.

¹⁵ U.S. Department of the Interior. “The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act.” March 2014. <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

federal court.¹⁶ They argued, pursuant to *Carcieri v. Salazar*, that the Secretary did not have authority to take the land into trust since the Mashpee tribe was recognized after the IRA's enactment date.¹⁷ A Massachusetts district court ruled for the residents; then the Secretary issued a new decision in 2018 stating that the Secretary could not take the land into trust. The Mashpee tribe then challenged the 2018 secretarial decision, and a D.C. district court ruled in favor of the tribe, resulting in another 2021 secretarial decision declaring the Mashpee tribe under federal jurisdiction in 1934.¹⁸ The 2021 secretarial decision was challenged in court, with a Massachusetts district court this time rejecting the resident's challenge and siding with the argument based on *Carcieri v. Salazar*, citing evidence of Mashpee children attending the Carlise Indian School under the federal assimilation policy, thus proving the tribe was under federal jurisdiction before 1934.¹⁹ This merry-go-round of litigation took years to complete and ended at the same conclusion as the original 2015 secretarial decision to take the land into trust for the Mashpee.

Local Concerns Regarding Future Land into Trust Decisions and Effect on Indian Gaming

Some local and state governments have concerns with a "fix" to overturn the *Carcieri v. Salazar* decision. The National Association of Counties (NACo) has routinely requested that Congress address the *Carcieri v. Salazar* decision as part of a larger "comprehensive examination" centered on reform to the fee into trust land process.²⁰ Land held in trust does not fall under state or local jurisdiction for law enforcement or taxation. Removing the land from state or local jurisdiction impacts counties, states, and other local stakeholders. Generally, these stakeholders are concerned they do not have enough involvement in the land-into-trust application process, even though it directly impacts their interests, and quick decision timeframes make it challenging to be included in the process.²¹

In December 2023, the BIA promulgated new land into trust acquisition regulations where the agency included a process to determine whether a tribe was "under federal jurisdiction" on June 18, 1934, reflecting the *Carcieri v. Salazar* decision.²² During the rulemaking process, NACo submitted comments requesting the BIA take into consideration the opinions of state and county governments to avoid the "controversy, conflict and costly litigation between tribes and state and county governments."²³ However, the final rule published in December 2023 maintained the 30-day comment period for state and local stakeholders. Changes made in the final rule included:

¹⁶ 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. <https://massgaming.com/wp-content/uploads/Littlefield-et-al-vs-US-Department-of-Interior.pdf>.

¹⁷ *Id.*

¹⁸ DOI fact sheet. Determination that the Secretary has Authority to Take Land in Trust for the Mashpee Wampanoag Tribe. https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/gaming_decisions/508%20Compliant%202021.12.22%20Mashpee%20Decision%20Fact%20Sheet%20and%20QA.pdf.

¹⁹ Department of Justice. Office of Public Affairs. "Justice Department's Successful Defense of Lands in Trust Case Will Preserve Land in Massachusetts for the Mashpee Wampanoag Tribe." April 2024. <https://www.justice.gov/opa/blog/justice-departments-successful-defense-lands-trust-case-will-preserve-land-massachusetts>.

²⁰ NACo. "U.S. Bureau of Indian Affairs Unveils New Final Rule for Tribal Land-in-Trust Process." January 2024. <https://www.naco.org/news/us-bureau-indian-affairs-unveils-new-final-rule-tribal-land-trust-process>.

²¹ NACo. "U.S. Bureau of Indian Affairs Unveils New Final Rule for Tribal Land-in-Trust Process." January 2024. <https://www.naco.org/news/us-bureau-indian-affairs-unveils-new-final-rule-tribal-land-trust-process>.

²² 25 CFR Sec. 151.4. <https://www.ecfr.gov/current/title-25/chapter-I/subchapter-H/part-151>.

²³ NACo. Comments Letter to Assistant Secretary Newland re-Proposed Rule- 25 CFR Part 151 (Land Acquisition); Docket No. BIA-2022-0004. On file with IIA Staff.

acknowledgment that the Secretary’s policy is favorable towards taking land into trust for the benefit of tribes; a requirement that the BIA must issue a decision within 120 days of the application being submitted; and the acknowledgment of how to determine whether a tribe was “under federal jurisdiction” as ruled in *Carciari v. Salazar*.²⁴

Another change involved the acquisition of land into trust outside of a tribe’s land boundaries. Previously, there was a “bungee cord” approach to land as the distance from it to a tribe’s reservation grew—meaning the further from a tribe’s preexisting reservation, the more scrutiny applied to the request. Under the final rule this approach is no longer taken into consideration. The Secretary now presumes that the tribe will benefit from the land being taken into trust.

Any land into trust process changes also have implications for tribal gaming projects as new gaming projects can only be developed on certain lands as laid out by IGRA.²⁵ Under IGRA, tribes can conduct gaming activities on “Indian lands,” which are defined as reservation, trust, or restricted-fee land. While IGRA prohibits gaming-related activities on lands taken into trust after October 17, 1988, various circumstances allow a tribe to circumvent the prohibition.²⁶

Tribal revenues from gaming support the overall well-being of their tribal community, as required by IGRA.²⁷ In 2023, over 200 tribes owned, operated, or licensed more than 500 gaming businesses in 29 states.²⁸ On average, tribal gaming increases employment by 2.4 percent and wages by 5.6 percent on tribal reservations.²⁹ However, this is not the case for every tribe, and successful gaming operations are highly attributed to the overall support seen in the surrounding areas.

H.R. 1208 aims to streamline the process of placing lands into trust for tribes that were federally recognized after 1934. This could impact areas with tribes that have gained federal recognition more recently, including but not limited to the impact of potential expansion of tribal gaming operations.

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²⁴ NACo. “U.S. Bureau of Indian Affairs Unveils New Final Rule for Tribal Land-in-Trust Process.” January 2024. <https://www.naco.org/news/us-bureau-indian-affairs-unveils-new-final-rule-tribal-land-trust-process#:~:text=NACo%20also%20opposes%20administrative%20action,fee%20land%20into%20trust%20process.>

²⁵ IGRA, P.L. 100-497, 25 U.S.C. §§2701–2721.

²⁶ Murray, Mariel. Indian Gaming Regulatory Act: Gaming on Indian Lands. CRS. <https://www.crs.gov/reports/pdf/IF12527/IF12527.pdf>.

²⁷ 25 U.S.C. § 2710.

²⁸ Murray, Mariel. Indian Gaming Regulatory Act: Gaming on Indian Lands. CRS. <https://www.crs.gov/reports/pdf/IF12527/IF12527.pdf>.

²⁹ Wheeler, Laurel. More than Chance: The Local Labor Market Effects of Tribal Gaming. Center for Indian Country Development. Federal Reserve Bank of Minneapolis. 2023. <https://www.minneapolisfed.org/-/media/assets/papers/cicdwp/2023/cicd-wp-2023-02.pdf>.

H.R. 6180 (Rep. Carl), “Poarch Band of Creek Indians Lands Act”

H.R. 6180 would recognize the Poarch Band of Creek Indians as covered by the IRA and reaffirm any lands previously taken into trust for the tribe’s benefit by the Secretary as trust land. Any pending challenges to land taken into trust would be invalid if based upon the argument that the tribe was not under federal jurisdiction in 1934.

The Poarch Band of Creek Indians (Poarch Band) is located approximately 56 miles north of Mobile, Alabama. It is a segment of the original Creek Nation that resided in Alabama and Georgia. Following the War of 1812, the Creeks who supported the United States signed the Treaty of Fort Jackson, ceding their land in Alabama.³⁰ In 1836, the federal government forcibly moved 15,000 Creeks to Oklahoma.³¹ The Creek Indians who remained in the vicinity of Poarch, Alabama, became known as the Poarch Band of Creek Indians, remaining a cohesive tribal group. It was not until August 11, 1984, that the BIA recognized them federally. After recognition, the Poarch Band had their lands in Alabama and Florida administratively placed into trust by the Secretary under Section 5 of the IRA.³²

Litigation regarding Land into Trust in Alabama

As noted above, the *Carcieri v. Salazar* decision left some tribes in limbo regarding whether the Secretary was authorized to take land into trust for them. The Poarch Band is one of those tribes because it was recognized through the BIA’s administrative process in 1984, nearly 50 years after the enactment of the IRA, and the Secretary took land in Alabama and Florida into trust for the tribe prior to 2009.

According to Poarch Band’s testimony at a 2015 hearing, many of its lands were placed in trust prior to 2009 pursuant to the IRA, and these trust lands have been developed with the construction of buildings and businesses, including casinos.³³ If a court were to decide these lands are not lawfully held in trust on the grounds the Poarch Band was recognized after 1934, the lands could lose their trust status, exposing the tribe to state taxation and civil regulation, which in turn could lead to the closure of tribal businesses and the dismantling of facilities. In addition, the tribe’s casinos would become subject to Alabama State law, which could lead to the modification or closure of the gambling facilities that employ large numbers of people and generate revenues for the tribe’s government.³⁴ In 2016, the Poarch Band of Creek Indians prevailed in the U.S. 11th Circuit Court of Appeals, where a unanimous decision concluded that the tribe’s reservation was protected under the IRA and could not be taxed by the state of Alabama.³⁵ However, this decision does not necessarily prevent further litigation on future parcels of land the Secretary could take into trust for the tribe.

³⁰ House Report. Poarch Band of Creek Indians Land Reaffirmation Act. House of Representatives. HR 115-513. 2018. <https://www.congress.gov/congressional-report/115th-congress/house-report/513/1?outputFormat=pdf>.

³¹ History Channel. Trail of Tears. September 26, 2023. <https://www.history.com/topics/native-american-history/trail-of-tears>.

³² House Report. Poarch Band of Creek Indians Land Reaffirmation Act. House of Representatives. HR 115-513. 2018. <https://www.congress.gov/congressional-report/115th-congress/house-report/513/1?outputFormat=pdf>.

³³ Subcommittee on Indian, Insular, and Alaska Native Affairs Subcommittee. Testimony of Attorney General Lori Stinson. May 14, 2015. <https://docs.house.gov/meetings/II/II24/20150514/103445/HHRG-114-II24-Wstate-StinsonL-20150514.pdf>.

³⁴ *Id.*

³⁵ “Poarch Creeks Win Ruling in Dispute Over Taxation of Trust Lands.” July 2016. <https://indianz.com/News/2016/07/12/poarch-creeks-win-ruling-in-dispute-over.asp>.

The Poarch Band currently operates three Class II casinos in Alabama.³⁶ As noted above for H.R. 1208, local and state governments generally have concerns with “fixes” surrounding the *Carciery v. Salazar* decision. However, H.R. 6180 has the support of multiple County Commissioners, Mayors, City Council Members, and state legislators in Alabama.³⁷ Local support highlights the local effect of these decisions and the ability for tribes to gain support for land into trust decisions.

The Muscogee (Creek) Nation of Oklahoma (Muscogee) has previously testified before the House Committee on Natural Resources concerning a parcel of land taken into trust for the Poarch Band and used for a gambling facility. The Muscogee have stated that the area known as “Hickory Ground” is a sacred site for the tribe containing, or previously containing, the remains of Creek ancestors.³⁸ The Muscogee filed a lawsuit in 2012 on this issue, most recently asking a federal appellate court to reinstate the lawsuit after being thrown out in 2021.³⁹

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IV. MAJOR PROVISIONS & SECTION-BY-SECTION

H.R. 1208 (Rep. Cole), 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.

Section 1. Reaffirmation of Authority

Amends the Indian Reorganization Act (25 U.S.C. 5129 et. seq.) to authorize the Secretary to take land into trust for any federally recognized tribe. This removes the need for a tribe to be “under federal jurisdiction” on June 18, 1934. The bill would further ratify any action taken by the Secretary to place land into trust for a federally recognized tribe and ensure that the decision cannot be challenged based on the *Carciery v. Salazar* reasoning. Additionally, a provision is included to limit the impacts of this legislation to this subsection of the IRA only and that any statutory reference to the IRA is to be considered amended by this legislation.

H.R. 6180 (Rep. Carl), “Poarch Band of Creek Indians Lands Act”

Section 2. Applicability of Indian Reorganization Act

Under the Indian Reorganization Act (25 U.S.C. 5129 et. seq.), the Poarch Band of Creek Indians is deemed to be a federally recognized tribe while stating that any lands taken into trust by the Secretary for the tribe are to be ratified and confirmed. The bill has a retroactive effect,

³⁶ The Poarch Band of Creek Indians Tribal Gaming Commission. <https://pci-tgc.org/>.

³⁷ Letter of Support from Alabama Legislators. September 2023. On File with IIA Staff.

³⁸ House Report. Poarch Band of Creek Indians Land Reaffirmation Act. House of Representatives. HR 115-513. 2018. <https://www.congress.gov/congressional-report/115th-congress/house-report/513/1?outputFormat=pdf>.

³⁹ AP.” Muscogee Nation Renews Lawsuit over Alabama Casino They Say Desecrated a Sacred Site.” July 2023. <https://apnews.com/article/muscogee-poarch-creek-lawsuit-graves-sacred-ef741fb801a47678a423379778e6c040>.

stating the effectiveness of the legislation will be as if it was in effect when the IRA was implemented on June 18, 1934.

V. CBO COST ESTIMATE

H.R. 1208 (Rep. Cole), 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.

CBO has not issued an estimate for H.R. 1208. However, CBO issued a cost estimate for a similar bill from the 113th Congress, S. 2188, stating the bill would not have a significant impact on the federal budget.⁴⁰

H.R. 6180 (Rep. Carl), “Poarch Band of Creek Indians Lands Act”

CBO has not issued an estimate for H.R. 6180.

VI. ADMINISTRATION POSITION

H.R. 1208 (Rep. Cole), 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.

Unknown, however, the Biden Administration has supported similar legislative proposals, indicating support for overturning the *Carcieri v. Salazar* decision legislatively. Most recently, President Biden’s FY 2025 Budget for the Department of the Interior included similar language.⁴¹

H.R. 6180 (Rep. Carl), “Poarch Band of Creek Indians Lands Act”

Unknown.

VII. EFFECT ON CURRENT LAW (RAMSEYER)

H.R. 1208 (Rep. Cole), 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.

⁴⁰ CBO. Cost Estimate for S. 2188. September 2014. <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/s21880.pdf>.

⁴¹ Department of the Interior FY 2025 Budget. Appendix. P. 661. https://www.whitehouse.gov/wp-content/uploads/2024/03/int_fy2025.pdf.