

Senate Could Reaffirm Trust Land For Tribes

By Robert J. Ward and Noah N. Gillespie, Schulte Roth & Zabel LLP (June 27, 2019, 2:44 PM EDT)

For the first time since the U.S. Supreme Court's decision in *Carcieri v. Salazar*, one chamber of Congress has passed a measure to restore certainty in Native nations' sovereignty over their own land held in trust by the U.S. government.

Trust Land

The Indian Reorganization Act of 1934 gave the Secretary of the Interior authority to obtain title in the name of the United States to land that the United States would then hold in trust for the benefit of Native nations or their citizens. Putting land into trust is a key agenda item for many Native nations because of how it supports tribal sovereignty over that land.[1]

Trust land is part of Indian Country, a term of art representing the full jurisdiction of all 573 federally recognized tribes. In Indian Country, Native nations have the greatest authority to exercise jurisdiction, including the prosecution of crimes that have otherwise gone unaddressed,[2] while at the same time engaging in development projects of all kinds to generate revenue to care for their people, including residential and business development.[3] The counterparties who work with or finance these projects equally rely on the trust status of this land to achieve their business objectives.

Carcieri v. Salazar

Carcieri created substantial uncertainty over who owned trust land and invited interference in established development proposals.[4] The Supreme Court held that the Secretary of the Interior lacked authority to take land into trust for a particular nation unless that nation had been continuously federally recognized since 1934, the year Congress passed the Indian Reorganization Act. However, Congress removed the federal recognition of many tribes in the "termination era" in the 1950s and 1960s. As a result, *Carcieri* threatened the good title of those Native nations and many others to the land the United States had taken into trust on their behalf.

The Supreme Court further complicated this in *Mash-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, holding that the Administrative Procedures Act and Quiet Title Act authorized private persons to sue the Secretary of the Interior and tribal governments to challenge the use of trust land, and the land's proper status.[5] Together, *Carcieri* and *Patchak* invited disgruntled neighbors to clog the courts and delay development in Indian Country when neighbors simply disagreed with a nearby Nation's intended use of its land.

H.R. 375

In every session of Congress since the Carcieri decision, members of the House of Representatives have introduced bills to reaffirm the status of trust land and tribal sovereignty over that land. On May 15, 2019, the House passed the current bill, H.R. 375, by a vote of 323-96. On the same day, the House also passed a bill to specifically reaffirm the trust status of the Mashpee Wampanoag Nation's land, H.R. 312, by a vote of 275-146, which would finally resolve claims against that nation relating to its land and give federal effect to the compact between the Mashpee Wampanoag Nation and the state of Massachusetts. The Mashpee Wampanoag Nation greeted the Europeans who settled in Plymouth and successfully revitalized their language following a 150-year silence.

Prospects in the Senate

Passing these bills in the House is an important step toward securing trust land for the nations and peoples it belongs to. The bills will now go to the Senate for consideration, and if approved, will be presented to the president to be signed into law. These bills' chances in the Senate are mixed, however, and almost certainly could not overcome a veto.

Most bills affecting Indian Country, especially ones like H.R. 375 that foster economic development, enjoy bipartisan support and are often passed on suspension of the rules, meaning approved without a recorded vote. A similar land preservation bill, H.R. 317 for the Santa Ynez Band of Chumash Indians, passed the House under that simpler procedure just two weeks prior. H.R. 375 and 312 appeared on a similar path until the president wrote a tweet critical of the bills that included a derogatory term and suddenly polarized the debate. Both bills ultimately passed the House with support from both parties, H.R. 375 by a greater margin than H.R. 312. The Senate will better consider the bills on their merits as the spotlight dims.

The Carcieri and Patchak decisions put a cloud over title to the more than 56 million acres of trust land. This chilled investment and development, now for nearly a decade. As the U.S. Chamber of Commerce summarized in its letter to the House committee, "This inconstancy over trust status is hindering business development decisions in financing and planning, preventing the critical flow of investment, and promoting unnecessary, acrimonious, and expensive litigation. These are unsustainable burdens for tribes seeking to improve the standards of living of their members and surrounding communities." [6] Enacting these bills thus not only reaffirms tribal sovereignty, it restores certainty of title and opens the way for development.

Senate leadership is most likely to take up H.R. 375 on its own first. That bill enjoyed much broader support from Republicans in the House and provides a nationwide solution rather than singling out any particular nation. This bill is consistent with Senate leadership's stated policy agenda and thus would be an accomplishment they could claim as their own. Both H.R. 317 and H.R. 375 are now with the Committee for Indian Affairs, which can report them out together or separately. By reporting out H.R. 375 first and moving it to a vote, it could likely pass, and pave the way for the more specific bills to follow.

The president is likely to sign H.R. 375 presented on its own because it is a meaningful change that promotes development and jobs while giving no credit to any particular political rival. In its national reach, H.R. 375 would reaffirm the trust status of the land of both the Mashpee Wampanoag Nation and the Santa Ynez Band of Chumash Indians Nation.

Afterward, senators who support Native nations could continue to advance the bills specific to these nations. While H.R. 317 continues to be uncontroversial, H.R. 312 affecting Sen. Elizabeth Warren's home state of Massachusetts appears at risk. As a result of objections, H.R. 312 never went to committee but directly onto the general orders calendar. There, it can be brought to a vote anytime, and a vote anytime soon likely would not be a favorable one.

Accordingly, an individual approach to these bills is likely to provide the best chance of enacting them into law. If passed, H.R. 375 will protect and reaffirm Native land and allow long-delayed projects that benefit Native nations, their people and the surrounding communities to finally resume, nearly a decade after *Carcieri*.

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[1] Noah N. Gillespie, Administrative Law Essay, Preserving Trust: Overruling *Carcieri* and Patchak While Respecting the Takings Clause, 81 Geo. Wash. L. Rev. 1707, 1708, 1712 (2013).

[2] Violence Against Women Reauthorization Act of 2013 § 902, S. 47, 113th Congress (codified at 25 U.S.C. §1304); see General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153.

[3] Helping Expedite and Advance Responsible Tribal Home Ownership ("HEARTH") Act of 2012, Pub. L. 112-151, 126 Stat. 1150 (amending 25 U.S.C. §415); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2701 et seq.; Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified in scattered sections of 25 C.F.R. Part 162).

[4] 555 U.S. at 384-96 (2009).

[5] 567 U.S. 209 (2014).

[6] Letter from Neil L. Bradley, Apr. 9, 2019.