

Wyoming Senator Barrasso Introduces Carcieri Compromise Bill

Article By:

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More than six years after the U.S. **Supreme Court's** decision in ***Carcieri v. Salazar***, Sen. John Barrasso (R-Wyoming), the chairman of the Senate Committee on ***Indian Affairs***, has introduced the "Interior Improvement Act" to fix the loophole created by the decision that denied some tribes rights under the ***Indian Reorganization Act of 1934 (IRA)***. The bill is not, however, the "clean" *Carcieri* fix that Indian Country had been seeking.

In 2009, the *Carcieri* court ruled that the IRA, which delegated authority to the Secretary of the Interior to place land in trust status for Indian tribes, applied only to tribes "under Federal jurisdiction" on the date of the IRA's enactment. Under the IRA, land is to be placed into trust status only for "the purpose of providing land for Indians." The act defined "Indian" to mean "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The court held that any tribe not "under Federal jurisdiction" as of that date is ineligible to place land in trust.

Carcieri compelled the Secretary to conduct a deep inquiry into whether applicant tribes were "under Federal jurisdiction" in 1934 in anticipation of legal challenges to politically sensitive trust acquisitions, particularly those made for gaming purposes. But proving the requisite relationship between the federal government and the tribes is very difficult, as many tribes lack documentation of that relationship – largely due to the anti-tribal "allotment" policies that preceded the IRA's enactment in 1934 and the termination policies that followed it in the 1950s.

After the *Carcieri* decision, tribes immediately pushed for a "clean" legislative fix from Congress – a bare amendment clarifying Interior's authority to place in trust for all recognized tribes without limitation and retroactively affirming previous trust decisions. Opponents of off-reservation gaming, however, saw an opportunity to increase the input of local governments in trust acquisitions and even to seek a veto over federal trust acquisitions. Opposition from Indian tribes to a local veto has precluded a legislative fix repairing the damage done by the decision.

Barrasso's bill affirms the Department's past and present ability to accept land in trust for *all* federally recognized Indian tribes but, if passed, would not give local governments the veto power they sought. Instead, it would impose a new process on the Secretary in considering trust applications that increases the input sought from, and consideration given to, local governments affected by trust acquisitions.

First, the bill would require the Secretary to notify contiguous jurisdictions within 30 days of receiving an application to place land in trust and to make the tribal application publicly available on the Department of the Interior website. Those jurisdictions would have 30 days to provide comments. The Department's current regulations already require notice and comment from the governments exercising jurisdiction over the trust acquisition, so this is a minor change.

Of much greater impact is the bill's requirement that the Secretary give preferential treatment to those trust applications in which the tribe has entered into a "cooperative agreement" with local governments, defined in the bill as "contiguous jurisdictions." Those applications would be expedited with a 30-day timeline for a decision approving or denying the application, or 60 days after the completion of NEPA review. This would be a drastic improvement over the current wait time, which can extend to months or even years. Relieving the Department of the requirement to conduct a *Carcieri* review would save considerable manpower. Those applications without cooperative agreements would still be eligible for approval but would not be expedited.

Many tribal applicants already enter intergovernmental agreements with local governments to mitigate the impacts of tribal development on trust land and pay for county-provided services that would ordinarily be paid for through property taxes, and it is now common for tribal-state Class III gaming compacts to include a requirement that tribes enter such agreements. Under Barrasso's bill, provisions in cooperative agreements are undefined – the agreements "may include terms relating to mitigation, changes in land use, dispute resolution, fees, and other terms determined by the parties to be appropriate." Some local jurisdictions likely will read those terms in the broadest sense possible and require the payment of "fees" as consideration for execution of a cooperative agreement.

If the tribe determined the demands of local governments to be too onerous, it would be free to submit an application without a cooperative agreement. In such cases, the Secretary, in approving an application, would be required to independently conduct a "determination of mitigation" that would consider anticipated economic impacts on contiguous jurisdictions, mitigation, and whether the local jurisdictions worked in good faith to reach a cooperative agreement.

The proposed legislation expressly provides for judicial review of final trust decisions. That judicial review is a certainty, because, while the bill does not expressly limit the Secretary's discretion to place land in trust, it introduces numerous and ambiguous new factors that the Secretary would be required to consider in processing trust applications. Ambiguity invites litigation, and the bill would likely trade *Carcieri*-based legal challenges to trust acceptances for lawsuits alleging the Secretary's failure to adequately consider these new factors.

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National Law Review, Volume V, Number 321

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