Testimony of Stephanie Bryan, Chairwoman, Poarch Band of Creek Indians
House Natural Resources Committee – Subcommittee on Indian and Insular Affairs
Legislative Oversight Hearing on H.R. 6180, the Poarch Band of Creek Indians Lands Act

June 26, 2024

Good afternoon, Chair Hageman, Ranking Member Leger Fernandez, and Members of the Subcommittee. My name is Stephanie Bryan, and I am honored to serve as the Chair and CEO of the Poarch Band of Creek Indians. Thank you for this opportunity to testify today about H.R. 6180, the Poarch Band of Creek Indians Lands Act. On behalf of the Tribal Council, I extend our great thanks to Rep. Carl for introducing this bill.

History of the Poarch Band of Creek Indians

I want to begin by sharing some history about the Poarch Band of Creek Indians. "The Poarch Band of Creeks of today originated in the aboriginal and historical Creek Nation."[1] At the time of our Nation's founding, the Creek Confederacy governed an expansive territory. Creek lands—guaranteed in the Treaty of New York in 1790—covered most of modern-day Georgia and Alabama, as well as parts of Florida. That territory was reduced twice via treaty over the ensuing two decades, and then again as a result of the War of 1812, when the Creek Confederacy was divided between those who joined with the British and those who remained friendly to the United States. After the war, however, the United States continued to recognize land rights of Creeks who had allied with it. In 1814, the United States granted those Creeks the right to occupy individual reservations in Southern Alabama under the Treaty of Fort Jackson.[2]

Little time passed before the United States' policy toward the Creeks began to change. In 1817, Congress provided that fee simple patents to Creek reservation lands should be issued upon the death of the original reservation grantees. Moreover, in what came to be known as the Trail of Tears, the United States decided to pursue a policy of forced removal of the Creeks and other tribal nations in the South and Eastern United States. Thousands of Native children, women, and men died on these forced marches to the Indian Territory—which is now the state of Oklahoma. Our Tribe avoided this fate. Like other Indian nations located in the South and East today, we were able to do so only by fleeing into remote homelands.

Specifically, our tribe found refuge and settled on the McGhee reserve, located now in the Community of Poarch, Alabama. A Creek leader, Lynn McGhee, had been granted a reserve pursuant to the 1814 Treaty. Under the terms of the Treaty, McGhee and his descendants retained the right to the reserve as long as they occupied it and were to be "protected by and subject to the laws of the United States."[3] This land was "technically individually owned."[4] "[I]n practice," however,"[the McGhee lands] were usable by the entire community" that "settled there" during the removal era.[5]

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[1] Memorandum from Deputy Assistant Secretary – Indian Affairs (Operations), U.S. Dep't of Interior, to Assistant Secretary – Indian Affairs, on Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Poarch Band of Creeks of Alabama pursuant to 25 C.F.R. § 83, at 3 (Dec. 29, 1983).
[2] 7 Stat. 120 (Aug. 9, 1814).
[3] *Id.*
[4] U.S. Dep't of Interior, Office of Federal Acknowledgment, Technical Reports regarding the Poarch Band of Creeks of Atmore, Alabama, at 28-29 (1983).
[5] *Id.*

Unlike other Creek reservations established in the wake of the War of 1812, the McGhee reserve was held in trust and never fee patented. As noted, in 1817 Congress passed a statute that generally removed Creek reservations from trust status. McGhee, however, had been unable to enter his claim for a reservation before the deadline set by the 1814 Treaty of Fort Jackson because of a war injury. For this reason, Congress subsequently acted specifically on behalf of McGhee, granting him the right to select a reservation under the terms of the 1814 Treaty after the deadline. In so doing, Congress opted not to subject the McGhee reserve to the 1817 Act.

In the early 1900s, the Department of Justice confirmed the McGhee reserve's trust status. Specifically, in 1912, the federal government, acting in its role as trustee, sued a timber company for trespass on the McGhee reserve. This action was accompanied by a series of internal memoranda within the Department of Justice, which analyzed whether the land remained in trust and concluded that it did.[6]

Despite this confirmation of trust status, the Government Land Office improperly issued a fee patent to the McGhee heirs in 1924. However, because these fee grants were unlawful, they did not erode the protections owed to our Tribe. Later analysis by the Commissioner of Indian Affairs concluded that the descendants of McGhee "who to this day occupy his reserve continue to be 'protected by and subject to the laws of the United States.'"[7]

In 1984, after years of living in obscurity and abject poverty, the Reagan Administration reaffirmed the status of the Poarch Band of Creek Indians as a federally recognized Tribe. The United States acknowledged that Poarch has been an autonomous, distinct tribal community for centuries, that we have maintained governing authority over our tribal citizens, and that our citizens descend from an historical Indian Tribe. We remain based on the McGhee reserve, which was never disestablished.[8]

Our Tribe is also a successor to the pre-Removal Creek treaties and as such we have at all times since then enjoyed a treaty relationship with the United States. Our ancestors were part of the Creek Nation before the removal era. We were recognized by the United States as autonomous, and our ancestors signed the pre-removal Creek treaties as a subset of the Creek Confederacy.[9] The Department of the Interior has accordingly recognized that we are a "successor of the Creek Nation of Alabama prior to its removal."[10]

Acknowledgement as a federally recognized Indian Tribe was a turning point for our government. In 1984, we began working with the Interior Department to establish a small land base for our community. Using authority provided in the Indian Reorganization Act of 1934, the Tribe worked with Interior to place approximately 389 acres of fee lands into trust from 1985 to 1995. The majority of these trust lands (229.5 acres) were approved by Interior on April 18, 1985.[11]

Over the past four decades, Poarch Creek leaders have balanced the preservation of our Tribe's

[6] Letter from Attorney General McReynolds to Senator Joseph Johnson, at 6-7 (Apr. 23, 1913).
[7] Memorandum from Morris Thompson, Commissioner of Indian Affairs, to Mr. Keep, Associate Solicitor, Indian Affairs on the Eligibility of the Poarch Creek Band Under the Indian Reorganization Act (Mar. 23, 1976).
[8] History, Poarch Band of Creek Indians, https://pci-nsn.gov/our-story/history/ (last visited June 7, 2024).
[9] *Id.*
[10] Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24083, 24083 (June 11, 1984).
[11] See Establishment of Poarch Band of Creek Indians Reservation (50 Fed. Reg. 15502 (April 18, 1985)), and Poarch Band of Creeks-Establishment of Reservation: Correction (50 Fed. Reg. 19813 (May 10, 1985)).

history and culture with the need to rebuild our community. Today, we are blessed to be able to provide our tribal citizens and neighbors with essential services, including functioning infrastructure, police and fire protection, healthcare, and eldercare.

The Tribe has developed positive working relationships with our neighboring counties of Elmore, Escambia, and Montgomery. We have engaged in dozens of MOUs and intergovernmental agreements with these and other local governments that have helped upgrade fire and rescue stations, conduct miles of road repairs and upgrades including lighting installations, provide resources to improve health care and education, and much more. We are also the first responders for 15 miles north and south of the Reservation on Interstate 65. These agreements and services far exceed revenue from any potential tax receipts these neighboring governments would receive if our lands remained in fee. As Alabama Natives and Alabama Neighbors, we are driven to give back to these communities by our belief that working together and giving back makes us all stronger, together. We are proud that our neighboring Counties, mayors, and state representatives have pledged their support for H.R. 6180, the Poarch Band of Creek Indians Parity Act. Attached to my written testimony is a letter of support from our neighboring local governments.

We have been able to improve the economic condition of not only Poarch, Alabama, where we are headquartered, but also in other parts of the State. Our Tribe operates more than 40 companies that do work worldwide and generate 9,000 jobs. I am proud to say that we generate more than 4,000 jobs for families in Alabama. Beyond these enterprises, we also welcome people to visit our lands, especially the Magnolia Branch Wildlife Reserve, which welcomes 30,000 visitors annually. It is one of the prettiest places you can imagine to go fishing, tubing, horseback riding, and camping.

We honor our blessings by giving back to local non-profits and community organizations. We donate nearly $8 million annually to local governments, educational institutions, health care systems, and other philanthropic causes. During the COVID-19 pandemic, we were able to give back to the State of Alabama with a $500,000 donation to the Alabama Department of Health for COVID-19 vaccine storage and administration. In fact, knowing how important protecting rural Alabama is to us, the State asked us to run clinics to vaccinate rural Alabamians.

We have made careful decisions about how to best use our resources and property. However, we have a limited land base, and at this point, we are no longer able to meet the growing housing and many other needs of our nearly 2,900 citizens. For example, when it became clear we needed to expand our Boys and Girls club in 2018, we were forced to fill in the ponds around our community center at a cost of more than $1 million because there was no more buildable trust land.

As our population ages, the Tribal Council has prioritized providing the best healthcare and eldercare available. We have an Assisted Living Facility (ALF) but will soon need a nursing home. We do not have the current land available to provide this service, and the passage of H.R. 6180 will allow us to make this dream of a nursing home a reality. As our community grows, enhancing our governing land base is a not only a need, it is a must.

We are not alone. Tribal governments nationwide have a shortage of usable land, and many – like us – have made land restoration a priority.

The Indian Reorganization Act: Restoration of the Tribal Government Land Base

Congress has repeatedly examined the history of tribal government land tenure, documenting impacts of the federal policies of Removal, Allotment and forced Assimilation, and Termination, all of which displaced many tribal governments, leaving some tribes completely landless. Former

Senate Committee on Indian Affairs Chairman Byron Dorgan acknowledged that "Tribes ceded close to 200 million acres of land during the treaty-making and removal periods prior to 1881. Tribes lost an additional 90 million acres through the Allotment period between 1881 and 1934."[12]

The late Professor William Rice testified that:

> By 1934, Indian land ownership had been reduced … to 48,000,000 acres. But this did not tell the whole story. Even these shocking figures were misleading. Of the 48,000,000 remaining acres, some 20,000,000 acres were in unallotted reservations, another 20,000,000 acres were desert or semi-desert lands, and some 7,000,000 were in fractionated heirship status awaiting sale to non-Indians.[13]

The policy of forced Allotment and Assimilation (1881-1934) sought to destroy tribal governments by mandating the division of communally held tribal government homelands to individual tribal members. After allotments were made, remaining Indian lands were deemed "surplus" and opened to settlement. As noted above, the Allotment policy resulted in the taking of more than 90 million acres of Indian lands, and led to the checkerboard land ownership of many tribal communities and the land fractionation problems that continue to this day. Allotment and Assimilation also devastated tribal government economies, tribal culture, and indigenous social systems.[14]

Since the Supreme Court's 2009 decision in *Carcieri v. Salazar*, this Subcommittee and your Senate counterpart have also frequently examined the history, purposes, and impacts of the Indian Reorganization Act of 1934 ("IRA"). The primary purposes of the IRA were to put a stop to the unilateral allotment of Indian lands and to authorize the Interior Department to rebuild the tribal government land base.[15] Section 5 of the IRA provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.[16]

The IRA also sought to limit the often-unchecked authority of the Interior Department over local tribal government decision-making. To reverse the Allotment policy's efforts to undermine Tribal governments, Section 16 of the IRA sought to empower Tribes to organize their own governing structures by establishing Tribal constitutions and bylaws that fostered the enactment and

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[12] Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes, S. Hrg. 111-136 at 2 (May 21, 2009) (opening statement of Chairman Byron Dorgan) (online at https://www.indian.senate.gov/wp-content/uploads/documents/CHRG-111shrg52879.pdf).

[13] *See* The IRA—75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination, S. Hrg. 112-113 at 14 and fn.12 (June 23, 2011) (statement of Prof. William Rice, citing Indian Affairs Committee hearings on the "Wheeler-Howard Indian Reorganization Act") (online at https://www.govinfo.gov/content/pkg/CHRG-112shrg68389/pdf/CHRG-112shrg68389.pdf).

[14] Allotment and its authorized takings of "surplus" Indian lands stripped tribal governments of untold natural resources. In addition, the policy of Assimilation authorized the government to take Indian children from their homes, forcing them into federal boarding schools where they were forbidden from speaking their language or practicing their religion. We commend the Committee for advancing S. 1723, which would establish a Truth and Healing Commission on Indian Boarding School Policies, and strongly support its final passage.

[15] 25 U.S.C. §§5101 et seq.

[16] 25 U.S.C. § 5108.

enforcement of Tribal laws to govern their lands.[17]

For 75 years, from 1934 to 2009, the Department of the Interior restored approximately 8 million acres of tribal government fee lands into trust status. Interior Departments of presidents of both political parties used the IRA to place land into trust for federally recognized Indian tribes regardless of whether they were formally acknowledged as a tribe before or after 1934. Tribes have used their trust lands to build schools, health centers and housing to serve their communities. These lands are also used for tribal enterprises to promote economic development in mostly rural communities that are all too often underserved and overlooked.[18]

The 2009 *Carcieri v. Salazar* Decision and its Impacts

The Supreme Court, in *Carcieri v. Salazar*, reversed these 75 years of practice and precedent. The Court tied the Interior Secretary's IRA Section 5 authority to place land into trust for Indian tribes to the Act's definition of "Indian", which provides that:

> 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.[19]

The Court held "that the term 'now under Federal jurisdiction' in [the IRA] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." However, Court's decision provided no guidance to determine the meaning of the phrase "under federal jurisdiction", and nothing in the text of the IRA or its legislative history defines that phrase.

In the first *Carcieri*-related hearing before Congress, former Senate Indian Affairs Committee Chairman Dorgan acknowledged— "I just want to say that I am concerned about the court's

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[17] *See* The IRA—75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination, S. Hrg. 112-113 at 15-16 (June 23, 2011) (statement of Prof. William Rice, quoting Indian Affairs Commissioner and architect of the IRA, John Collier, in his testimony before the Senate Committee on Indian Affairs in the run-up to passage of the IRA: "Paralleling this basic purpose [of reversing the allotment system] is another purpose just as basic. The bill stands on two legs. At present the Indian Bureau is a czar. It is an autocrat. It is an autocrat checked here and there by enactments of Congress; but, in the main, Congress has delegated to the Indian Office plenary control over Indian matters. It is a highly centralized autocratic absolutism. Furthermore, it is a bureaucratic absolutism.") (online at https://www.govinfo.gov/content/pkg/CHRG-112shrg68389/pdf/CHRG-112shrg68389.pdf).

[18] There is a common misperception that the Interior Department's fee to trust process serves to expand Indian gaming. The IRA authorizes Interior to place tribal government-owned fee land into trust and nothing more. Nothing in the IRA authorizes or regulates Indian gaming. The question of whether Indian trust lands are eligible to be used for gaming is governed solely by the Indian Gaming Regulatory Act and the National Indian Gaming Commission and Interior Department regulations developed to implement that separate law. Admittedly, some Tribes do submit land into trust applications for gaming purposes. However, those relatively few applications must not only meet the requirements of the IRA's Part 151 regulations to have land placed into trust, but they must also separately meet the requirements of the Interior Department's Part 292 IGRA regulations in order to use the lands for gaming purposes. As former Assistant Secretary Kevin Washburn noted, of the 1,300 trust acquisitions submitted to Interior from 2008-2013, fewer than 15 were for gaming purposes. *See* testimony of Kevin Washburn before the House Resources Committee's Subcommittee on Indian and Alaska Native Affairs, at 2 (Sept. 19, 2013) (online at https://naturalresources.house.gov/uploadedfiles/washburntestimony09-19-13.pdf).

[19] 25 U.S.C. § 5129 (emphasis added).

decision in *Carcieri* and the impact it may have on those tribes that were recognized after 1934. I believe that Congress will likely need to act to clarify this issue for tribes and to ensure that the land in trust process is available to all tribes regardless of when they were recognized."[20] He predicted that the decision could impact hundreds of tribes by: slowing the land-into-trust process; leading to costly litigation over the status of Indian lands; complicating criminal jurisdiction in Indian country; hindering economic development; and creating two classes of Indian tribes.[21] Sadly, each of these predictions have come true.

Costly and Time-Consuming Litigation

We know the effects of the *Carcieri* decision all too well. Our Tribe has been forced to defend the status of our trust lands in several federal court cases. In 2013, the State of Alabama relied on a *Carcieri*-based argument in seeking to enjoin federally approved gaming on Poarch Creek trust lands. The United States, while not named as a defendant in the proceedings, filed *amicus curiae* briefs in support of the Tribe's successful motion to dismiss the case and again when the State unsuccessfully appealed dismissal of its claims to the Eleventh Circuit Court of Appeals.[22] While both the trial and appellate courts rejected the State of Alabama's *Carcieri* challenge, the Tribe was forced to spend hundreds of thousands of dollars and the federal government was forced to devote limited funding an attorney resources to secure that result.

Similarly, the Tribe was forced to file its own federal lawsuit in 2015 in response to the Escambia County, Alabama, tax assessor's attempt to assess state taxes on Poarch Creek trust lands in erroneous reliance on the *Carcieri* decision. The Tribe again prevailed before the federal district court and the Eleventh Circuit Court of Appeals, with the United States filing an appellate *amicus curiae* brief in support of the Tribe's position.[23] And once again, Poarch Creek and the United States were forced to devote limited, valuable time and financial resources to litigating spurious claims that resulted directly from the uncertainty generated by the *Carcieri* decision.

These are but two examples. We have seen specious *Carcieri* arguments raised in numerous other cases filed in state and federal courts, many of which have nothing whatsoever to do with the trust status of Poarch Creek lands, but where the *Carcieri* argument is nonetheless raised either out of lack of understanding or in an attempt to extort an unwarranted settlement from the Tribe.

The impacts of *Carcieri* of course go far beyond our Tribe. Many dozens of cases making *Carcieri*-based arguments have been filed in federal and state courts by state and local governments and individuals throughout the United States. In addition, the Interior Board of Indian Appeals has been bogged down for more than 15 years now with *Carcieri*-related challenges to the BIA's IRA fee to trust decisions.[24] It is difficult to fathom the hours and legal fees related to these cases, not only to the tribal governments forced to defend the attacks on their land, but also to the teams of attorneys at the U.S. Department of the Interior's Solicitor's Office and the U.S. Department of

[20] Examining Executive Branch Authority to Acquire Trust Lands, S. Hrg. 111-136 at 1 (May 21, 2009) (opening statement of Chairman Byron Dorgan) (online at https://www.indian.senate.gov/wp-content/uploads/documents/CHRG-111shrg52879.pdf).
[21] *Id*. at 2-3.
[22] *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015).
[23] *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934 (11th Cir. 2016).
[24] *See e.g.*, Legislative Hearing on H.R. 312, Mashpee Reaffirmation Act; H.R. 375, National *Carcieri* Fix; and Discussion Draft of the RESPECT Act, at 28-29 (April 3, 2019) (Testimony of Professor Colette Routel) (online at https://www.congress.gov/116/chrg/CHRG-116hhrg35971/CHRG-116hhrg35971.pdf).

Justice's Environment and Natural Resources Division.

Thankfully, every court reviewing the issue has upheld the Interior Department's decisions to place our land in trust. However, these lawsuits have taken a toll, and that is why our Tribe is seeking a legislative solution that will provide us with long needed legal certainty.

Two Classes of Tribes

In addition, as Senator Dorgan anticipated, the *Carcieri* decision has created two classes of tribes: those able to prove that they were "under federal jurisdiction" in 1934, and those that cannot. This result directly conflicts with Congress' 1994 amendments to the IRA, which mandated that all federally recognized Indian tribes be treated the same for all purposes under the Act.

The 1994 amendments were passed in direct reaction to efforts at the Bureau of Indian Affairs to use Section 16 of the IRA to classify Indian tribes as being either "created" or "historic". Senator John McCain, then Vice Chairman of the Senate Indian Affairs Committee, offered the amendment, in part, in response to the BIA's treatment of the Pascua Yaqui Tribe of Arizona. In his floor statement that led to passage of the amendment, Senator McCain shared the following:

> According to the Department, created tribes are only authorized to exercise such powers of self-governance as the Secretary may confer on them…. I can find no basis in law or policy for the manner in which section 16 has been interpreted by the Department of the Interior….
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> The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority. All that section 16 was intended to do was to provide a mechanism for the tribes to interact with other governments in our Federal system in a form familiar to those governments through tribal adoption and Secretarial approval of tribal constitutions for those Indian tribes that choose to employ its provisions.
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> Clearly the interpretation of section 16 which has been developed by the Department is inconsistent with the [principal] policies underlying the IRA, which were to stabilize Indian [tribal] governments and to encourage self-government. These policies have taken on additional vitality in the last 20 years as the Congress has repudiated and repealed the policy of termination and enacted the Indian Self-Determination and Education Assistance Act and the Tribal Self-Governance Demonstration Project. The effect of the Department's interpretation of section 16 has been to destabilize Indian tribal governments and to hinder self-governance of the Department's unilateral and often arbitrary decisions about which powers of self-governance a tribal government can exercise.[25]

Senator Inouye, then-Chair of the Committee, who also co-sponsored the amendment, made the following statement to clarify its purpose:

[25] 140 Cong. Rec. 11234 (May 19, 1994).

> [O]ur amendment will correct any instance where any federally recognized Indian tribe has been classified as 'created' and that it will prohibit such classifications from being imposed or used in the future. Our amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government…. Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment to section 16 of the IRA, we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.[26]

The amendment, enacted on May 31, 1994, added subsections (f) and (g) to the Section 16 of the IRA. Subsection (f), titled "Privileges and Immunities of Indian Tribes" prohibited all federal agencies from promulgating regulations or making decisions "that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." Subsection (g) accomplished this same goal, but retroactively, by proclaiming that any regulation or administrative decision that treated tribal governments in a disparate manner "shall have no force or effect."[27]

One of many tragic results of the *Carcieri* decision is that it has breathed life back into this misguided argument that Tribal governments are either "historic" or "created". Former Assistant Secretary for Indian Affairs, Kevin Washburn, testifying in his capacity as a Professor of the University of Iowa College of Law, attempted to refute this line of thinking:

> Since the 1990s, there has been a requirement that each year the Federal Government publish the list of tribes that are recognized. It would have been nice if we had had that in 1934. That would have saved a lot of this work for tribes. But the fact is there is no tribe that exists today that did not exist in 1934. We don't create tribes out of whole cloth in this country. We spend a lot of time working on the reformation of that tribal recognition process, and those tribes have always existed and so they deserve to have land if they have existed. So, I would respectfully urge the Committee to try to move H.R. 375 through the House.[28]

Administrative Attempts to Address the *Carcieri* Decision

In the wake of the Carcieri decision, the Interior Department was forced to make determinations of whether a Tribe that filed an IRA application to place land into trust was under federal jurisdiction on a case-by-case basis. Tribal governments were given little guidance about what factors would be considered in this determination.

To provide Tribes and the public with some guidance, the Interior Department's Office of the Solicitor issued an official M-Opinion on March 12, 2014, that provided a framework of how the

[26] 140 Cong. Rec. 11235 (May 19, 1994).

[27] P.L. 103-263 (May 31, 1994), codified at 25 U.S.C. §5123(f), (g). Given the background of Section 16 of the IRA detailed by Professor Rice, it is beyond comprehension why or how the Interior Department undertook this effort.

[28] Legislative Hearing on H.R. 312, Mashpee Reaffirmation Act; H.R. 375, National *Carcieri* Fix; and Discussion Draft of the RESPECT Act, at 17 (April 3, 2019) (Testimony of Professor Kevin Washburn) (online at https://www.congress.gov/116/chrg/CHRG-116hhrg35971/CHRG-116hhrg35971.pdf).

agency would determine whether an Indian tribe was "under federal jurisdiction" in 1934 for purposes of the administrative fee to trust process. The M-Opinion set forth a two-part test. The first factor requires a sufficient showing that "the United States had, in 1934 or at some point in the tribe's history prior to 1934, an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal government." The second question is to "ascertain whether the tribe's jurisdictional status remained intact in 1934." [29]

While the M-Opinion provided some needed transparency to the land into trust process post-*Carcieri*, it required extensive analysis and work by attorneys and historians from both the applicant Tribe and the Interior Department. Some "under federal jurisdiction" determinations took years to achieve. Often, when a land into trust decision was finalized pursuant to the M-Opinion, the Tribe had to wait additional years for the land to be placed into trust by wading through the federal court process. However, federal courts have generally upheld Interior's determinations pursuant to the 2014 M-Opinion.

On March 9, 2020, then-Solicitor Daniel Jorjani issued a new M-Opinion withdrawing the 2014 M-Opinion, replacing it with two memoranda. The first examines the recognition and jurisdiction elements of the phrase "any recognized tribe now under federal jurisdiction". The second established a four-part test that replaced the test established in the 2014 M-Opinion. Step 1 acknowledged that if Congress enacted a law after 1934 making Section 5 of the IRA applicable to the Tribe, then no "under federal jurisdiction" determination would be necessary.[30] In the absence of post-IRA legislation, Step 2 required a Tribe to show evidence that it was subject to "the federal government's administration of its Indian affairs authority with respect to that particular group of Indians." If there is sufficient evidence "presumptively demonstrat[ing]" federal jurisdiction, the trust acquisition may proceed. Step 3 required a Tribe to show that it was recognized prior to 1934 and remained under federal jurisdiction in 1934. Examples meeting Step 3 include "ratified treaties still in effect in 1934; tribe-specific Executive Orders; tribe-specific legislation, including termination legislation enacted after 1934, which acknowledges the existence of a government-to-government relationship with a tribe at the time it is enacted."[31] If a Tribe did not meet Steps 1-3, Step Four asks whether the "totality of an applicant tribe's non-dispositive evidence ... is sufficient to show that the tribe was 'recognized' in or before 1934 and remained 'under federal jurisdiction' through 1934 [notwithstanding gaps in the historical record]." Step 4 also stated that applicant tribes recognized after 1934 or acknowledged after 1978 under the administrative procedures at Part 83 could also show evidence of "political-legal 'recognition' in or before 1934."[32]

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[29] *The Meaning of Under Federal Jurisdiction for Purposes of the Indian Reorganization Act*, M-37029 at 19 (Mar. 12, 2014).

[30] Memorandum from Interior Solicitor Jorjani to Regional and Field Solicitors, *Procedure for Determining Eligibility for Land-Into-Trust under the First Definition of "Indian" in Section 19 of the IRA*, at 2 and fn. 4-6 (Mar. 10, 2020).

[31] *Id.* at 6-8.

[32] Id. at 8-10.

Regulatory Improvements to the Land into Trust Process

Recognizing the limited shelf life of Interior M-Opinions, in October of 2021, the Interior Department initiated an effort to amend its Part 151 regulations that implement the IRA's Section 5 land into trust provision. On December 12, 2023, the Interior Department published a final rule to amend these regulations governing the discretionary acquisition of tribal fee to trust applications at 25 C.F.R. Part 151.[33]

This is the first substantive update of the administrative Tribal fee into trust process since 1995. The regulatory changes streamline the land into trust process by establishing a 120-day deadline for the Department to make a final determination on trust land applications. Importantly, the new regulation establishes criteria for a Tribal Government's eligibility to use the regulation by clarifying the Department's process to determine whether a Tribe was "under federal jurisdiction" in 1934, as required by the Supreme Court's *Carcieri* decision.[34]

Our Tribe truly appreciates the Interior Department's efforts to improve the administrative land into trust process, and we fully support these changes. While the updated regulations make the process for a Tribe to prove that it was "under federal jurisdiction" much clearer, the updated process still requires teams of attorneys and historians from both the Tribe and the Interior Department to navigate through the regulatory process. If the prior M-Opinions are any indication, even the streamlined process could take years to come to resolution.

In addition, we remain concerned that the regulations will be the subject of future litigation. Just as the Department's recent land into trust decisions made pursuant to the various M-Opinions have been challenged in court, decisions made pursuant to the updated regulations will likewise be challenged. The ensuing legal process will also take many years to achieve a final ruling. The legal challenges will most likely start at the Interior Board of Indian Appeals, which is already backlogged with dozens of tribal trust land acquisition appeals and faces multiple administrative judicial vacancies. Claims will then have to wind their way through the federal district and appellate courts, again consuming countless hours and resources.

As a result, our Tribe is taking what for us is a new approach to addressing our government's need for additional trust lands by working with our congressional delegation and nearby local governments to gain support and passage of the Poarch Band of Creek Indians Lands Act, which would clarify that our Tribe was under federal jurisdiction in 1934 for purposes of the IRA. Our approach is consistent with the Interior Department's updated land to trust regulations and past and recent precedent in Congress.

Section 151.4(b) of Interior's updated regulation clarifies that if Congress enacted legislation after 1934 making the IRA's land into trust provisions applicable to a specific Tribe, no *"under federal jurisdiction"* analysis is needed. Section 151.4(b) of the final rule provides,

> (b) For some Tribes, Congress enacted legislation after 1934 making the IRA applicable to the Tribe. The existence of such legislation making the IRA and its trust acquisition

[33] Land Acquisitions, 88 Fed. Reg. 86,222 (Dec. 12, 2023) (to be codified at 25 C.F.R. pt. 151).

[34] In October 2021, Interior held Tribal Leader consultation sessions that discussed the need to improve the administrative process to restore tribal homelands. On March 28, 2022, the Department released draft revisions to Part 151, and held four Tribal Leader consultations, which led to a proposed rule that was published on December 6, 2022. The Interior Department held several consultations on the proposed rule, and accepted verbal and written comments through March 1, 2023.

provisions applicable to a Tribe eliminates the need to determine whether a Tribe was under Federal jurisdiction in 1934.[35]

While new to our Tribe, this approach simply follows the approach that Congress has taken since the 1970s for Tribes that were restored to federal recognition through an act of Congress.[36]

Legislative Efforts to Address the *Carcieri* Decision

February 24, 2024, marked the 15-year anniversary of the *Carcieri* decision. Congress has considered national *Carcieri* fix bills every year for the past 15 years.[37] With some minor differences, each of these bills sought to amend the IRA to eliminate the phrase "under federal jurisdiction" and clarify that the IRA's land to trust provision applies to all federally recognized Indian tribes. The House of Representatives passed a national *Carcieri* fix in the 116th and 117th Congresses with broad bipartisan support each time under suspension of the rules.[38] However, those bills did not reach final passage.

The Poarch Band of Creek Indians has been one of the leading advocates for a national "*Carcieri* fix." Today, I again offer our full support for Chairman Cole's bipartisan bill, H.R. 1208, which would accomplish this goal.

In the 118th Congress, however, we are taking a parallel track similar to the strategy taken by dozens of Tribes who have worked with their congressional delegation to enact bills to mandate fee-to-trust actions, reaffirm trust lands, or clarify that the IRA applies to their individual tribe.[39]

We are grateful to Rep. Carl for introducing the Poarch Band of Creek Indians Lands Act, H.R. 6180, which would clarify that the IRA's land-into-trust process applies to our Tribe. H.R. 6180 will enable us to work with the Interior Department and local governments restore and protect our lands to meet the acute needs of our growing community. This bill is targeted and tailored, and it has the strong support of the Alabama congressional delegation and the cities and counties surrounding our trust land, including Elmore County, Escambia County, and Montgomery County.

I respectfully ask the full Committee to bring H.R. 6180 to a markup and advance the bill to final passage in the 118th Congress. On behalf of the Poarch Band of Creek Indians, I am honored to speak to you today, and I am happy to answer any questions. Thank you.

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[35] 88 Federal Register 86251 (Dec. 12, 2023).

[36] Legislative Hearing on H.R. 312, Mashpee Reaffirmation Act; H.R. 375, National *Carcieri* Fix; and Discussion Draft of the RESPECT Act, at 32 and fn. 5 (April 3, 2019) (Testimony of Professor Colette Routel) (online at https://www.congress.gov/116/chrg/CHRG-116hhrg35971/CHRG-116hhrg35971.pdf).

[37] 117th Congress – H.R. 4352 (McCollum), S. 1901 (Tester); 116th Congress – H.R. 375 (Cole), S. 2808 (Tester); 115th Congress – H.R. 130 (Cole), H.R. 131 (Cole)(reaffirmation); 114th Congress – H.R. 407 (McCollum), H.R. 249 (Cole), S. 732 (Tester), H.R. 3137 (Cole)(reaffirmation); 113th Congress – H.R. 666 (Markey), H.R. 279 (Cole), S. 2188 (Tester); 112th Congress – H.R. 1234 (Kildee), H.R. 1291 (Cole), S. 767 (Akaka); 111th Congress – H.R. 3742 (Kildee), H.R. 3697 (Cole), S. 1703 (Dorgan).

[38] Roll call vote on H.R. 4352, passed 302-127 (Dec. 1, 2021) (online at https://clerk.house.gov/Votes/2021393); Roll call vote on H.R. 375, passed 323-96 (May 15, 2019) (online at https://clerk.house.gov/Votes/2019208).

[39] *See e.g.*, NDAA for FY'2020, P.L. 116-92 (Dec. 20, 2019) (as enacted included the Santa Ynez Band of Chumash Indians Land Affirmation Act (§ 2868), the Lytton Rancheria Homelands Act (§ 2869), the Little Shell Tribe of Chippewa Indians Restoration Act (§ 2870)); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, P.L. 115-121 (Jan. 29, 2018); Gun Lake Trust Land Reaffirmation Act, P.L. 113-590 (July 30, 2013).