AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

H.R. 312, "MASHPEE WAMPANOAG TRIBE RESERVATION REAFFIRMATION ACT"; H.R. 375, 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 DISCUSSION DRAFT OF H.R. ____, "RESPECT ACT"

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON INDIGENOUS PEOPLES OF THE UNITED STATES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

Wednesday, April 3, 2019

Serial No. 116–11

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.govinfo.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
35–971 PDF WASHINGTON : 2019

COMMITTEE ON NATURAL RESOURCES

RAÚL M. GRIJALVA, AZ, *Chair*
DEBRA A. HAALAND, NM, *Vice Chair*
GREGORIO KILILI CAMACHO SABLAN, CNMI, *Vice Chair, Insular Affairs*
ROB BISHOP, UT, *Ranking Republican Member*

Grace F. Napolitano, CA
Jim Costa, CA
Gregorio Kilili Camacho Sablan, CNMI
Jared Huffman, CA
Alan S. Lowenthal, CA
Ruben Gallego, AZ
TJ Cox, CA
Joe Neguse, CO
Mike Levin, CA
Debra A. Haaland, NM
Jefferson Van Drew, NJ
Joe Cunningham, SC
Nydia M. Velázquez, NY
Diana DeGette, CO
Wm. Lacy Clay, MO
Debbie Dingell, MI
Anthony G. Brown, MD
A. Donald McEachin, VA
Darren Soto, FL
Ed Case, HI
Steven Horsford, NV
Michael F. Q. San Nicolas, GU
Matt Cartwright, PA
Paul Tonko, NY
Vacancy

Don Young, AK
Louie Gohmert, TX
Doug Lamborn, CO
Robert J. Wittman, VA
Tom McClintock, CA
Paul A. Gosar, AZ
Paul Cook, CA
Bruce Westerman, AR
Garret Graves, LA
Jody B. Hice, GA
Aumua Amata Coleman Radewagen, AS
Daniel Webster, FL
Liz Cheney, WY
Mike Johnson, LA
Jenniffer González-Colón, PR
John R. Curtis, UT
Kevin Hern, OK
Russ Fulcher, ID

David Watkins, *Chief of Staff*
Sarah Lim, *Chief Counsel*
Parish Braden, *Republican Staff Director*
http://naturalresources.house.gov

SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

RUBEN GALLEGO, AZ, *Chair*
PAUL COOK, CA, *Ranking Republican Member*

Darren Soto, FL
Michael F. Q. San Nicolas, GU
Debra A. Haaland, NM
Ed Case, HI
Matt Cartwright, PA
Vacancy
Vacancy
Raúl M. Grijalva, AZ, *ex officio*

Don Young, AK
Aumua Amata Coleman Radewagen, AS
John R. Curtis, UT
Kevin Hern, OK
Vacancy
Rob Bishop, UT, *ex officio*

CONTENTS

Page

Hearing held on Wednesday, April 3, 2019 1

Statement of Members:
- Cole, Hon. Tom, a Representative in Congress from the State of Oklahoma 6
- Cook, Hon. Paul, a Representative in Congress from the State of California 5
- Gallego, Hon. Ruben, a Representative in Congress from the State of Arizona 2
  - Prepared statement of 3
- Grijalva, Hon. Raúl M., a Representative in Congress from the State of Arizona 9
  - Prepared statement of 10
- Keating, Hon. William R., a Representative in Congress from the Commonwealth of Massachusetts 7

Statement of Witnesses:
- Baird, Hon. Jessie Little Doe, Vice Chairwoman, Mashpee Wampanoag Tribe, Mashpee, Massachusetts 11
  - Prepared statement of 13
- Fletcher, Matthew, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law, East Lansing, Michigan 56
  - Prepared statement of 58
- Ray-Hodge, Vanessa L., Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, Albuquerque, New Mexico 52
  - Prepared statement of 54
- Richards, Claire, Executive Counsel to the Governor, State of Rhode Island, Providence, Rhode Island 41
  - Prepared statement of 43
- Routel, Colette, Professor of Law, Mitchell Hamline School of Law, St. Paul, Minnesota 24
  - Prepared statement of 25
  - Questions submitted for the record 33
- Washburn, Kevin, Professor of Law, University of Iowa College of Law, Iowa City, Iowa 16
  - Prepared statement of 18
  - Questions submitted for the record 23

Additional Materials Submitted for the Record:
- List of documents submitted for the record retained in the Committee's official files 139
- Cicilline, David and Langevin, James, Representatives from the State of Massachusetts, Testimony for the Record in Opposition 78
- Mashpee Chamber of Commerce, Support Letter 72
- Mashpee Office of Town Manager, Support Letter 73
- Town of Mashpee, Support Letter 74
- City of Taunton, Office of the Mayor, Support Letter 75
- City of Taunton, Mayor Thomas Hoye, Testimony in Support 76
- Taunton Area Chamber of Commerce, Support Letter 77

Submissions for the Record by Rep. Keating
- Akiak Native Community, Support Letter 79
- Apache Alliance, Support Letter 80
- ATNI—Affiliated Tribes of Northwest Indians, Support Letter 81
- Big Valley Band of Pomo Indians, Support Letter 82

Page

Submissions for the Record by Rep. Keating—Continued
Cheyenne River Sioux Tribe, Support Letter 83
Chippewa Cree Tribe of the Rocky Boy's Reservation, Support Letter 84
Ft. Sill—Chiricahua—Warm Springs Apache Tribe, Support Letter 85
Grand Traverse Ottawa and Chippewa Indians, Support Letter 86
Guidiville Indian Rancheria, Support Letter 87
Hualapai Tribe, Support Letter 88
Jena Band of Choctaw Indians, Support Letter 89
Lac Vieux Desert Band of Lake Superior Chippewa, Support Letter ... 90
Lower Brule Sioux Tribe, Support Letter 91
Mashantucket Pequot Tribe, Support Letter 92
Massachusetts Congressional Delegation, Support Letter 93
Massachusetts Senate, Nick Collins, Support Letter 95
Massachusetts Senate, Minority Leader, Bruce Tarr, Support Letter . 96
Massachusetts State Rep. Bradley Jones, Support Letter 97
Massachusetts State Rep. Shaunna O'Connell, Support Letter 98
Massachusetts State Rep. David Vieira, Support Letter 99
Mayflower Descendants, Society of, Support Letter 100
Mechoopda Indian Tribe, Support Letter 101
Midwest Alliance of Sovereign Tribes, Support Letter 102
Mohegan Tribe, Support Letter 103
NAFOA, Support Letter 104
Narragansett Indian Tribe, Support Letter 105
Narragansett Indian Tribe, Chief Stanton, Testimony in Support 106
National Congress of American Indians, Support Letter 111
National Congress of American Indians, Testimony in Support 112
National Indian Gaming Association, Support Resolution 115
Native American Rights Fund, Support Letter 116
New England Residents, Support Petition 117
Nez Perce Tribe, Support Letter 118
Oneida Nation, Support Letter 119
Otoe Missouria Tribe of Indians, Support Letter 120
Pascua Yaqui Tribe, Support Letter 121
Prairie Island Indian Community, Support Letter 122
Pyramid Lake Paiute Tribe, Support Letter 123
Rocky Mountain Tribal Leaders Council, Support Resolution 124
San Carlos Apache Tribe, Support Letter 125
Shinnecock Indian Nation, Support Letter 126
Spirit Lake Tribe, Support Letter 127
St. Croix Chippewa Indians of Wisconsin, Support Letter 128
Stockbridge-Munsee Community, Support Letter 129
Suquamish Tribe, Support Resolution 130
Sycuan Band of Indians, Support Letter 131
Tohono O'odham Nation, Legislative Council, Support Resolution 132
Tonto Apache Tribe, Support Letter 133
USET—United South and Eastern Tribes, Support Letter 134
USET—United South and Eastern Tribes, Testimony in Support 135
Ute Indian Tribe, Support Letter 137
Waccamaw Indian Tribe, Support Letter 138
Yankton Sioux Tribe, Support Letter 139

LEGISLATIVE HEARING ON H.R. 312, TO REAFFIRM THE MASHPEE WAMPANOAG TRIBE RESERVATION, AND FOR OTHER PURPOSES, "MASHPEE WAMPANOAG TRIBE RESERVATION REAFFIRMATION ACT"; H.R. 375, 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 DISCUSSION DRAFT OF H.R. ____, TO PRESCRIBE PROCEDURES FOR EFFECTIVE CONSULTATION AND COORDINATION BY FEDERAL AGENCIES WITH FEDERALLY RECOGNIZED INDIAN TRIBES REGARDING FEDERAL GOVERNMENT ACTIVITIES THAT IMPACT TRIBAL LANDS AND INTERESTS TO ENSURE THAT MEANINGFUL TRIBAL INPUT IS AN INTEGRAL PART OF THE FEDERAL DECISION-MAKING PROCESS, "RESPECT ACT"

Wednesday, April 3, 2019
U.S. House of Representatives
Subcommittee on Indigenous Peoples of the United States
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 2:31 p.m., in room 1324, Longworth House Office Building, Hon. Ruben Gallego [Chairman of the Subcommittee] presiding.

Present: Representatives Gallego, San Nicolas, Haaland, Grijalva; Cook, Young, and Gosar.

Also present: Representatives Cole and Keating.

Mr. GALLEGO. Thank you everybody. The legislative hearing by the Subcommittee for Indigenous Peoples will come to order. The Subcommittee is meeting today to hear testimony on three bills: H.R. 312, H.R. 375, and discussion draft of the RESPECT Act. H.R. 312, sponsored by Representative Bill Keating, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act reaffirms the trust status of the lands of the Mashpee Wampanoag Tribe in Massachusetts.

H.R. 375, sponsored by Representative Tom Cole, would amend the Indian Reorganization Act of 1934 to give the Secretary of the

Interior the power to take land into trust for all tribes regardless of the date of the tribe's recognition. This is known as the Clean *Carcieri* Fix.

The discussion draft of the RESPECT Act, sponsored by Chairman Raúl Grijalva codifies tribal consultation procedures for all Federal agencies to follow. It establishes standards, guarantees that meaningful and effective tribal consultation occurs when Federal agencies are planning activities that impact tribes, and provides judicial recourse for tribes when agencies violate their consultation obligation.

Under Committee Rule 4(f), any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member, therefore I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Subcommittee Clerk by 5 p.m. today, or the close of the hearing, whichever comes first. Hearing no objections, so ordered.

I now ask unanimous consent that Representative Cole, Representative Keating, and Representative Gosar, who is not here but will be joining us, have permission to sit on the dais and participate in the hearing if they wish. So ordered.

HON. RUBEN GALLEGO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GALLEGO. Good morning to you all, and a warm welcome to all of our witnesses here today. Today, we are examining legislation that addresses two issues at the heart of tribal sovereignty and self-governance: tribes' ability to take land into trust and tribal consultation. The acquisition of trust land for the benefit of Indian tribes is essential to tribal self-determination, economic development, and the protection of tribal lands for generations to come. This is why the *Carcieri* Supreme Court decision has been so disturbing to Indian Country.

For over eight decades, the Department of the Interior, under both Republican and Democratic administrations, had consistently construed the Indian Reorganization Act to authorize the placement of land into trust for any tribe, so long as that tribe is federally recognized at the time of the trust application.

However, in 2009, the Supreme Court held in *Carcieri v. Salazar* that only tribes that were under Federal jurisdiction in 1934 were eligible to place land into trust, effectively creating a two-tiered system for trust land acquisition.

The uncertainty caused by this decision continues to threaten tribal sovereignty to this day. A legislative fix is necessary to ensure that we are fulfilling one of our country's most important obligations to Indigenous communities.

H.R. 375 is that fix. I want to thank the sponsor of the legislation, our colleague from Oklahoma, Mr. Cole, for introducing this bill and for testifying here today. Enacting H.R. 375 would restore clarity and stability for all federally recognized tribes, regardless of their date of recognition.

One *Carcieri* consequence that many tribes have faced in the aftermath of the decision is frivolous lawsuits on land that they

have had in trust for years. One such tribe is the Mashpee Wampanoag of Massachusetts.

Like many tribes, for centuries after Europeans came to this continent, the Mashpee were intentionally and systematically rendered landless by state and Federal Governments. They have fought long and hard since that time to re-establish that which was taken from them—a homeland. They did that just in 2015 when the Interior Department approved their application to take 320 acres into trust for the tribe.

In 2016, however, a suit was filed in Federal court that challenged Interior's action based on the *Carcieri* decision. Although the Obama Department of Justice initially sought to defend Mashpee land in an appeal, in May 2017, the Trump DOJ inexplicably withdrew that appeal. Then on September 7, 2018, Interior issued its first *Carcieri* decision, stripping the tribe of its reservation, resulting in the removal of the 2015 trust land from the Mashpee territory.

The legal limbo imposed by this decision has left the Mashpee on the brink of disillusion. The Mashpee's relationship with the Federal Government is one of the oldest in the United States, dating back to when the Pilgrims landed at Plymouth Rock. I think it is a particularly sad statement that 400 years later they still have to defend against the attack on their lands.

H.R. 312 would reaffirm the trust status of the Mashpee lands and ensure that these types of attacks on their homeland do not continue. I want to thank the sponsor of this legislation, the gentleman from Massachusetts, Mr. Keating, for being here to testify.

Finally, we come to the issue of tribal consultation. All of us here understand the importance of ensuring effective, meaningful consultation with tribal governments before the Federal Government takes actions impacting tribal communities. However, time and time again, we have heard from tribes about the problems with the current consultation framework—namely, that there really isn't one.

Consultation processes and procedures differ wildly from agency to agency and sometimes from region to region within the same agency. The result is a myriad of consultation procedures of varying effectiveness, and sometimes no meaningful consultation at all. Consultation requirements should be clear and should have the force of the law.

The RESPECT Act would codify a process for government-to-government tribal consultation and give tribes legal recourse when they are denied access to this process. I want to thank Chairman Grijalva for his tireless work on this issue and I look forward to discussing the proposed legislation with him and our witnesses.

[The prepared statement of Mr. Gallego follows:]

PREPARED STATEMENT OF THE HON. RUBEN GALLEGO, CHAIR, SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

Good morning to you all, and a warm welcome to all our witnesses here today. Today, we are examining legislation that addresses two issues at the heart of tribal sovereignty and self-governance: tribes' ability to take land into trust and tribal consultation. The acquisition of trust land for the benefit of Indian tribes is essential to tribal self-determination, economic development, and the protection of tribal

lands for generations to come. This is why the *Carcieri* Supreme Court decision has been so disturbing to Indian Country.

For over eight decades, the Department of the Interior, under both Republican and Democratic administrations, had consistently construed the Indian Reorganization Act to authorize the placement of land into trust for any tribe, so long as the tribe is federally recognized at the time of the trust application.

However, in 2009, the Supreme Court held in *Carcieri v. Salazar* that only tribes that were "under federal jurisdiction" in 1934 were eligible to place land into trust—effectively creating a two-tiered system for trust land acquisition.

The uncertainty caused by *Carcieri* continues to threaten tribal sovereignty to this day. A legislative fix is necessary to ensure that we are fulfilling one of our country's most important obligations to Indigenous communities.

H.R. 375 is that fix. I want to thank the sponsor of the legislation, our colleague from Oklahoma, Mr. Cole, for introducing this bill and for testifying here today. Enacting H.R. 375 would restore clarity and stability for all federally recognized tribes, regardless of their date of recognition.

One *Carcieri* consequence that many tribes have faced in the aftermath of the decision is frivolous lawsuits on land that they have had in trust for years. One such tribe is the Mashpee Wampanoag of Massachusetts.

Like many tribes, for centuries after Europeans came to this continent, the Mashpee were intentionally and systemically rendered landless by state and Federal Governments. They have fought long and hard since that time to re-establish that which was taken from them: a homeland. They did just that in 2015, when the Interior Department approved their application to take 320 acres into trust for the Tribe.

In 2016, however, a suit was filed in Federal court that challenged Interior's action based on the *Carcieri* decision. Although the Obama Department of Justice initially sought to defend Mashpee's land in an appeal, in May 2017, the Trump DOJ inexplicably withdrew the appeal.

Then, on September 7, 2018, Interior issued its first *Carcieri* decision stripping a tribe of its reservation, resulting in the removal of the 2015 trust land from Mashpee territory.

The legal limbo imposed by this decision has left the Mashpee on the brink of dissolution. The Mashpee's relationship with the Federal Government is one of the oldest in the United States, dating back to when the Pilgrims landed at Plymouth Rock. I think it's a particularly sad statement that 400 years later they still have to defend against attacks on their lands.

H.R. 312 would reaffirm the trust status of Mashpee lands and ensure that these types of attacks on their homeland do not continue. I want to thank the sponsor of the legislation, the gentlemen from Massachusetts, Mr. Keating, for being here today to testify.

Finally, we come to the issue of tribal consultation. All of us here understand the importance of ensuring effective, meaningful consultation with tribal governments before the Federal Government takes actions impacting tribal communities. However, time and time again, we have heard from tribes about the problems with the current consultation framework—namely, that there really isn't one.

Consultation processes and procedures differ widely from agency to agency, and sometimes from region to region within an agency. The result is a myriad of consultation procedures of varying effectiveness—and sometimes no meaningful consultation at all. Consultation requirements should be clear and should have the force of law.

The RESPECT Act would codify a process for government-to-government tribal consultation and give tribes legal recourse when they are denied access to this important process. I want to thank Chairman Grijalva for his tireless work on this issue, and I look forward to discussing the proposed legislation with him and our witnesses.

I would now like to recognize the Ranking Member, Mr. Cook, for his opening statement.

Mr. GALLEGO. I would now like to recognize the Ranking Member, Mr. Cook, for his opening statement.

STATEMENT OF HON. PAUL COOK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COOK. Thank you, Mr. Chairman. I want to apologize for being late. I was on the way over and I got run down in a crosswalk by some guy with Alaskan plates.

[Laughter.]

Mr. COOK. So, I continued my journey, hobbled up here and so once again, I am always certainly cognizant of the time constraints.

As you mentioned, the Subcommittee will receive testimony today on two bills and a draft bill. And from the outset, I want to express my support for H.R. 375 and H.R. 312 because they bring all tribes, including the Mashpee Tribe, onto an even footing with all the other tribes for having land acquired in trust under the Indian Reorganization Act of 1934.

Section 5 of the Indian Reorganization Act—and I have in here the IRA, I am sorry, the Irish in me, I think that is a very dangerous phrase, but I will go with the flow—it authorizes the Secretary of the Interior to acquire any interest in land or water to be held in trust for an Indian tribe now under Federal jurisdiction. In 2009, the Supreme Court resolved the lawsuit, resolved by Rhode Island Governor Carcieri, holding that the tribe now under Federal jurisdiction refers only to those tribes that were under the Federal jurisdiction of the United States when the Indian Reorganization Act was enacted in 1934.

H.R. 375, sponsored by Mr. Cole, would reverse the Supreme Court ruling through an amendment to the Indian Reorganization Act. This bill would provide that any federally recognized Indian tribe, regardless of its status when the IRA was enacted in 1934, may have lands taken in trust under the authority of the subject Act. This bill creates certainty for tribal government that wish to use their lands for economic development and other tribal purposes.

The second bill, H.R. 312, sponsored by our colleague from Massachusetts—and he is still gloating over the two wins that they had in baseball and football, but we won't mention that—Mr. Keating, looks to ratify and confirm previous actions, made by the Secretary of the Interior during the Obama administration, to acquire land in trust for the Mashpee Tribe, just as Mr. Cole's bill aims to do for all tribes.

The Mashpee Tribe, one of the two federally recognized tribes in Massachusetts, was granted Federal recognition by the Department of the Interior in 2007, but its status has since been challenged due to the ruling. These two bills, H.R. 375 and H.R. 312, would put many tribes on the pathway to better health, better education and great self-reliance, a goal shared by tribes, by the Federal Government, and I hope by everyone in this room.

The Federal Government has charged itself with moral obligations of the highest responsibility and trust toward tribes. It has quoted in the *Seminole Nation v. United States 1942*—and Congressman Young, I was not born then, I was born much later and I won't share that information with you—by allowing the impacts of the *Carcieri* decision to stand without remedy. For a decade, Congress has abandoned the trust responsibility for many

tribes by allowing the impacts of that decision to stand without remedy for a decade.

Congress, both Republicans and Democrats, have abandoned that trust responsibility for many tribes. The solution here demands more than grandstanding. It is a complex issue—boy, I could underscore that—that demands our attention and diligence to get it right. Taking land into trust is perhaps the most important tool for tribes to improve the lives of their members, provides to them the modicum of the resources that the United States took from them through the deliberate policies of discrimination, forced relocation and other humiliations during the darkest periods of American history in tribal relations.

The final bill is one that is sponsored by the Chair and this would prescribe procedures between Federal agencies—and I'm being gaveled down I guess—thank you, Mr. Chairman for my abbreviated remarks.

Mr. GALLEGO. I apologize, Ranking Member Cook, that was just in jest.

Mr. COOK. I was just going to praise the Chair.

Mr. GALLEGO. Well, we don't need that. I thank you, Ranking Member Cook.

Now I would like to welcome distinguished Members of Congress who wish to testify on the bills they have sponsored.

First, I welcome our colleague from the great state of Oklahoma, Representative Cole, to speak on his bill, the Clean *Carcieri* Fix, H.R. 375.

Next, we have the honorable gentleman from the Commonwealth of Massachusetts, Representative Keating, to testify on behalf of his legislation, H.R. 312, which would reaffirm to protect the Mashpee Tribal Reservation.

And last, by no means least, the Chairman of the Natural Resources Committee, Representative Grijalva from Arizona, who will speak to his proposed tribal consultation legislation, the RESPECT Act.

Thank you, sirs, for your testimony. Mr. Cole and Mr. Keating, you are welcome to join us on this dais and ask questions of the witnesses, but I know you have a very busy schedule so we understand if you must leave us.

I would now like to recognize Representative Cole for 5 minutes.

STATEMENT OF HON. TOM COLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. COLE. Chairman Gallego, Ranking Member Cook, and members of the Committee, thank you for giving me the opportunity to testify. I appreciate you holding today's hearing on H.R. 375, legislation that would amend the Indian Reorganization Act of 1934, and reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

Between the passage of the Dawes Act in 1887 and the passage of the Indian Reorganization Act in 1934, the Indian land mass in the United States shrank by 86 million acres. Since the enactment of that law, the Department of the Interior has taken back only approximately 9 million acres of land into trust status. Tribes have used their trust lands to build community facilities such as schools,

health centers and housing that served their tribal members. This land is also used for tribal enterprises and promotes economic development in communities that are often underserved and poverty stricken.

In 2009, the Supreme Court of the United States overturned long-existing precedent in its decision on *Carcieri v. Salazar*. The Supreme Court rules specifically that the Secretary's authority to hold land in trust for tribal governments under the Indian Reorganization Act was limited only to recognized tribes "now under Federal jurisdiction" with the word "now" meaning June 18, 1934, the date of the enactment of the Indian Reorganization Act.

Previously, lower courts viewed the word "now" as the instant when the Secretary invoked their trust acquisition authority. However, the Supreme Court reversed lower courts' ruling on how the term "now," "now under Federal jurisdiction," Section 19 of the Indian Reorganization Act, was to be interpreted. It found that the phrase refers only to those tribes that were under the Federal jurisdiction of the United States when the Indian Reorganization Act was enacted in 1934. As a result of the *Carcieri* decision, the Secretary of the Interior may no longer use the Indian Reorganization Act to acquire trust land for any post-1934 tribe without specific authorization from Congress.

Because the Secretaries acquired lands in trust for dozens of tribes recognized after 1934, the *Carcieri* ruling calls into question the validity of the trust status of such lands and jeopardizes their immunity from state and local taxation and regulatory jurisdiction. Many tribes have been forced into court to defend the status of their trust land, costing them millions of dollars and compromising their investments and jurisdiction.

H.R. 375 would amend the Indian Reorganization Act and clarify the language of the Supreme Court ruled upon by striking the term I previously referenced and inserting the words "effective beginning on June 18, 1934." It would also amend the statute language from "any recognized tribe now under Federal jurisdiction" to "any federally recognized Indian tribe." The modest changes clarify that the Secretary does have the authority to take land into trust for any tribe that the Federal Government has recognized.

As a member of the Chickasaw Nation and co-chair of the congressional Native Caucus with my good friend, your fellow Committee Member, Representative Haaland, I commend the Subcommittee for moving forward with this legislation and certainly its willingness to address this important issue.

Thank you very much, Mr. Chairman, and I am prepared to answer any questions at the appropriate time.

Mr. GALLEGO. Thank you, Representative Cole. Now we will have Representative Keating from Massachusetts for 5 minutes.

STATEMENT OF HON. WILLIAM R. KEATING, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. KEATING. Thank you, Mr. Chairman. And in terms of your opening remarks, Ranking Member Cook, don't be sorry for the Irish in you. It is a badge of honor.

Thank you, Chairman Gallego, Ranking Member Cook, the distinguished members of the Committee for inviting me to speak today about H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

As you know, this bipartisan legislation would direct the Department of the Interior to keep 320 acres of Mashpee Wampanoag land in southeastern Massachusetts in trust as federally recognized reservation land. The Mashpee Wampanoag Tribe has called southern New England their home for more than 12,000 years. Many of us know them as the tribe that welcomed the Pilgrims to Plymouth, Massachusetts for the first Thanksgiving. Sadly, like so many Native Americans, the Mashpee Wampanoags have experienced a long, tragic history of injustices, injustices that continue to this day.

After a decade's long legal battle, the Mashpee Wampanoag Tribe finally won Federal recognition from the Department of the Interior in 2007. This distinction granted long overdue access to important Federal resources that are now vital to the tribe's existence. The tribe leverages its Federal support to provide adequate housing, offer employment opportunities and operate numerous essential services including law enforcement, native language learning, pre-K education, health care, counseling and many other things.

In further recognition of their important place in our history, in September 2015, the Department of the Interior supported the Mashpee Wampanoag's Tribe in their plan to acquire land in Taunton, Massachusetts with the goal of placing into a Federal trust. However, as this Committee understands better than most, the Supreme Court's interpretation of the Indian Reorganization Act of 1934 in *Carcieri v. Salazar* resulted in great uncertainty for Native American tribes around the country. Like many others, the Mashpee Wampanoag Tribe's Federal recognition was placed at grave risk.

Additionally, in September 2018, the Department of the Interior decided to reverse course and end its support for the Mashpee Wampanoag Tribe in an ongoing legal challenge to the status of its Taunton Reservation. This reversal has exposed the tribe to the unprecedented fate of having their land taken out of Federal trust. To this day, they remain the only federally recognized tribe in New England for which Congress has not acted to create and protect a reservation.

It is for these reasons that H.R. 312 is so important. This legislation draws on precedents set by this House in both the 113th and 115th Congresses to lift the *Carcieri* cloud over Mashpee Wampanoag's Tribe's existence and direct the Department of the Interior to consider them fully recognized for the purposes of the Indian Reorganization Act. This would ensure the Department can retain the Mashpee land in trust without issue or challenge providing safety and security at a time when the tribe finds itself on the brink of extinction.

Under normal circumstances, legislation like H.R. 312 would pass the House without a hint of opposition. In the 113th Congress, the Gun Lake Trust Land Reaffirmation Act received overwhelming support by both parties. In the 115th Congress, the Thomasina E. Jordan Tribes of Virginia Federal Recognition Act

passed unanimously by voice vote. Both of these Acts became law, each under a different president's administration.

Unfortunately, due to economic factors outside the tribe's control, the Mashpee Wampanoag's status has become needlessly contentious. Put simply, the state of Rhode Island has decided that protection of their casino revenue is more important than the long-term existence of the Mashpee Wampanoag Tribe.

The opposition to H.R. 312 is grounded in the belief that Rhode Island's decision to build near the Massachusetts State line should grant them territorial rights that extend over that border and into the Commonwealth of Massachusetts. Nothing in legislation grants a tribe any special permissions pertaining to the construction of the casino. H.R. 312 would not grant the Mashpee Wampanoag any new or special rights. It merely ensures that the Mashpee Wampanoag Tribe is treated equally alongside other Native American tribes and is no longer vulnerable to having its land taken out of trust.

It is important to note that the Massachusetts State Government has already approved a casino development in the region regardless of whether the tribe operates it or not. Rhode Island knows full well that a private developer has bid for a separate project just up the road from the tribe's reservation. A casino is coming to southeastern Massachusetts no matter what, so why deal a death blow to this tribe?

Mr. Chairman, Mr. Ranking Member, thank you for this timely hearing. As you know, the Mashpee Wampanoag Tribe finds themselves in an extremely dire and uncertain situation as the Federal recognition sits in limbo. Time is of the essence.

Also, I ask for unanimous consent to introduce into the record 54 documents in support of H.R. 312, including a letter from the entire Massachusetts House Delegation urging support for an issue entirely within Massachusetts borders. These materials also include support from individual tribes from around the entire country, tribal coalitions, local government, local business organizations, and members of the Massachusetts State Legislature.

To paraphrase one of the letters in these materials I place before you, our country would not be what it is without the help of the Mashpee Wampanoag Tribe providing the Mayflower passengers help nearly 400 years ago. Today, we must do our part to honor the Mashpee Wampanoag legacy and take one small step toward returning the favor.

I thank the Committee and I yield back.

Mr. GALLEGO. Thank you, Representative Keating. And now we will have Chairman Raúl Grijalva.

STATEMENT OF HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you, Mr. Chairman. The goals of the legislation are simple and straightforward: effective, meaningful tribal consultation as a matter of law. This has been a top priority since I came to Congress.

This bill originally came out of the frustration and obstacles that tribes have faced when it comes to agency actions that affect tribes. It came out of conversations and meetings I had with tribal leaders

over the years, where I heard of the issues that arise between tribes and the Federal Government when tribes are not respected as the sovereign nations that they are.

Congress has never established standards for the Federal Government to follow when it takes actions that affect tribal communities, despite the fact that this is part of our trust responsibility. As the Chairman stated, the current lack of a unified framework has a myriad of consultation procedures, each different from agency to agency, and the process is even more cumbersome when multiple agencies are involved. And much too often, Federal agencies have already decided on a course of action and then consult with tribes by simply notifying them of that agency decision.

Much of the confusion and conflict between the Federal Government and Indian tribes can be traced back to a lack of clear guidelines for meaningful consultation. The legislation sets forth detailed procedures for the timing, format, implementation, and documentation of executive agency consultation with tribes.

It also protects sensitive tribal information, such as the location of sacred sites and other details of cultural and religious practices, and instructs agencies to recognize tribal sovereignty and minimize agency involvement in tribal affairs.

Finally, it provides judicial recourse for tribes when Federal agencies fail to fulfill their consultation obligation. Promoting meaningful government-to-government consultation will create long-lasting efficiencies, reduce project delays, help avoid legal battles, and help fulfill the legal obligations of the Federal Government by ensuring tribal nations have a voice at the table.

There is a reason this is a discussion draft at this time. I want to hear from the experts on the issue and Indian Country on the best way to implement this proposal. As I have said before, the ideas for Indian Country come from Indian Country, and as such, I look forward to a good discussion on the legislation, to hear the thoughts and ideas from our witnesses and others.

I want to thank you, Mr. Chairman, for bringing this item up, and I yield back the remainder of my time.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, CHAIR, COMMITTEE ON NATURAL RESOURCES

Thank you, Mr. Chairman.

The goals of my bill are simple and straightforward—effective, meaningful tribal consultation as a matter of law. This has been one of my top priorities since I came to Congress.

This bill originally came out of the frustration and obstacles that tribes have faced when it comes to agency actions that affect tribes. It came out of the conversations I had with tribal leaders over the years, where I heard of the issues that arise between tribes and the Federal Government when tribes are not respected as the sovereign nations they are.

Congress has never established standards for the Federal Government to follow when it takes actions that affect tribal communities, despite the fact this is part of our trust responsibility.

As the Chairman stated, the current lack of a unified framework has in a myriad of consultation procedures—each different from agency to agency, and the process is even more cumbersome when multiple agencies are involved. And much too often, Federal agencies have already decided on a course of action and then "consult" with tribes by simply notifying them of the agency decision.

Much of the confusion and conflict between the Federal Government and Indian tribes can be traced back to a lack of clear guidelines for meaningful consultation.

The legislation sets forth detailed procedures for the timing, format, implementation, and documentation of executive agency consultation with tribes.

It also protects sensitive tribal information, such as the location of sacred sites and other details of cultural and religious practices, and instructs agencies to recognize tribal sovereignty and minimize agency involvement in tribal affairs.

Finally, it provides judicial recourse for tribes when Federal agencies fail to fulfill their consultation obligation. Promoting meaningful government-to-government consultation will create long-lasting efficiencies, reduce project delays, help avoid legal battles, and help fulfill the legal obligations of the Federal Government by ensuring tribal nations have a voice at the table.

There is a reason this is a discussion draft at this time. I want to hear from experts on the issue and in Indian Country on the best way to implement this proposal. As I have said before—the best ideas for Indian Country come from Indian Country. As such, I look forward to a robust discussion on the bill and to hear the thoughts and ideas from our witnesses.

Thank you, Mr. Chairman, and I yield back.

Mr. GALLEGO. Thank you, Mr. Chairman. Thank you, gentlemen, for your testimony. Mr. Cole, Mr. Keating, you are welcome to join us on the dais and ask questions of the witnesses, but I know you have a busy schedule, so we understand if you must leave us.

Will the next panel please take your seats? Our first witness for this panel is the Honorable Jessie Little Doe Baird, Vice-Chairwoman of the Mashpee Wampanoag Tribe. Next is Mr. Kevin Washburn, Dean and Professor of Law at the University of Iowa and former Assistant Secretary for Indian Affairs at the U.S. Department of the Interior for the Obama administration. Then we have Ms. Colette Routel, Director of the Indian Law Program and Professor of Law at the Mitchell Hamline School of Law. And finally, we have Ms. Claire Richards, Executive Counsel to the Governor of Rhode Island.

Let me remind the witnesses that under our Committee Rules, they must limit their oral statements to 5 minutes, that their entire statement will appear in the hearing record. When you begin, the lights on the witness table will turn green. After 4 minutes, the yellow light will come on. Your time will have expired when the red light comes on, and I will ask you to please complete your statement. I will also allow the entire panel to testify before we start questioning the witnesses.

The Chair now recognizes the Honorable Jessie Little Doe Baird to testify.

STATEMENT OF HON. JESSIE LITTLE DOE BAIRD, VICE CHAIRWOMAN, MASHPEE WAMPANOAG TRIBE, MASHPEE, MASSACHUSETTS

Ms. BAIRD. Good afternoon, Chairman Gallego, Ranking Member Cook, and distinguished members of the Subcommittee. Greetings and thanks also to our great champions, Representatives Bill Keating and Joe Kennedy.

[Speaking native language.] My name is Jessie Little Doe Baird. I am from the Mashpee Wampanoag Nation and I am the Vice Chairwoman for the Mashpee Wampanoag Tribe. I hold a Master of Science in Linguistics from MIT and I am also a 2010 MacArthur Genius Fellow. I come before you today on behalf of the Mashpee Wampanoag Tribe. My tribe is facing the unthinkable: the dis-establishment of our reservation, the collapse of our

government, and the loss of many of our public services. Congress has the power to prevent this with the bipartisan Mashpee Wampanoag Reservation Reaffirmation Act. Thank you so much for holding this hearing today.

Until 2015, we were the only federally acknowledged tribe in New England without Federal trust lands of our own. All others have individual Acts of Congress that provide them with reservation lands. In contrast, Mashpee had to ask the Secretary of the Interior to take land into trust for us under the general authority Congress gave him under the Indian Reorganization Act.

In 2015, with the strong support of the Commonwealth of Massachusetts, the city of Taunton, and the town of Mashpee, the Interior took land in trust for the tribe and proclaimed it as our reservation. However, rather than defending its original decision and litigation challenging it, in September 2018, the Interior, instead, issued a new decision based on a different legal theory that has called into question whether the tribe is eligible for the IRA at all. This creates the very real possibility that our land will be taken out of trust altogether and our reservation dis-established, something that has not happened since the Termination Era.

The threat to our reservation status has had devastating consequences for my people. Without congressional action confirming that the IRA applies to Mashpee, not only will we lose our current reservation, we will never have any reservation. This uncertain status of our reservation has forced us to borrow thousands of dollars every day to keep basic government functions running.

We have been forced to lay off 40 percent of our work force, and tribal unemployment is on the rise. The tribes had to shut down or severely scale back vital government programs. The tribe had to cut its police force by two-thirds and has drastically reduced tribal Court staff. We already have a severe housing shortage, and 43 tribal homes under construction right now have been jeopardized by the uncertain status of our reservation. We have lost our Federal funding for natural resource protection, costing the tribe an estimated $1.2 million already. We have had to shut down our critically needed addiction treatment service programs at a time when Wampanoag people are 400 times more likely to die of an opioid overdose than non-Wampanoag people in our region. Our internationally recognized Wampanoag language immersion school, Mukayuhsak Weekuw, is situated on the reservation. If we lose the reservation status, we lose that school status. Our tribe suffers from having only a 51 percent high school graduation rate. Our language immersion school is vital to increasing our citizens' graduation rate and reducing substance abuse and suicide rates.

We are not asking Congress to do something it has not already done before. In the 113th Congress, Congress passed the Gun Lake Trust Land Reaffirmation Act which reaffirmed a prior trust acquisition for that tribe. Congress also enacted legislation for the Virginia tribes that expressly made the IRA applicable to them, just like the Mashpee Reservation Reaffirmation Act would do for us.

H.R. 312 is supported by the town of Mashpee, the city of Taunton, and our state government. It also has wide support from Indian Country, including the National Congress of American

Indians, and major regional pantribal organizations as well as dozens of individual tribes. It also has widespread support from our local Chambers of Commerce and the Mayflower Society.

We are aware that the state of Rhode Island opposes our legislation. The immediate damage that *Carcieri v. Salazar* did to the great Nation of the Narragansett Tribe, our sisters and neighbors, in the first instance, and the broader damage that case inadvertently has inflicted on the rest of Indian Country in these last 10 years has been terrible. Now the state of Rhode Island seeks to reach across the state line into Massachusetts to crush the hopes and dreams of my nation.

Respectfully, we request that Rhode Island consider the gravity of its behavior and reconsider its position. We are grateful that the Committee is considering H.R. 375, the Clean *Carcieri* Fix bill. We strongly support this legislation and we thank sponsors Representative Cole and Representative Betty McCollum, but with great respect the impact of the *Carcieri* decision on our tribe is now immediate. Finally, since time immemorial, the Mashpee Wampanoag and the land have been inseparable. We have been on the land where Creator placed us, and this is true today as it was 400 years ago.

Mr. GALLEGO. Vice Chairman, please wrap up.

Ms. BAIRD. I'm happy to answer any questions you may have.

[The prepared statement of Ms. Baird follows:]

PREPARED STATEMENT OF THE HON. JESSIE LITTLE DOE BAIRD, VICE CHAIRWOMAN, THE MASHPEE WAMPANOAG TRIBE ON H.R. 312

INTRODUCTION

Good afternoon, Chairman Gallego, Ranking Member Cook, and distinguished members of the Subcommittee. My name is Jessie Little Doe Baird and I am the Vice Chairwoman of the Mashpee Wampanoag Tribe. I also bring greetings from our Chairman, Cedric Cromwell. Our Tribe is suffering from the assault on our reservation and on our very status as Indians. For this reason we urge swift passage of the bipartisan bill H.R. 312, the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act." The damage done to our Tribe during the years in which the status of our reservation has been thrown into doubt is beginning to reach catastrophic levels. Accordingly, we urge Congress to treat Mashpee fairly, and to act with all due haste to protect our reservation from further assault.

Joining us in urging swift passage are the city of Taunton, the Town of Mashpee, Massachusetts State Representative Shauna O'Connell (R-Taunton), Massachusetts State Representative David Vieira (R-Mashpee), Massachusetts State Senator Nick Collins (D-Suffolk), Massachusetts House Republican Leader Brad Jones (Middlesex), and Massachusetts Senate Republican Leader Bruce Tarr (Gloucester), the Mayflower Society, the Mashpee Chamber of Commerce, the Taunton Chamber of Commerce, the Southeastern Massachusetts Building Trades Council, and Dimeo Construction Company.

Also joining us in urging passage of the legislation are the National Congress of American Indians, the National Indian Gaming Association, the United South and Eastern Tribes, the Apache Alliance, Rocky Mountain Tribal Leaders Council, Affiliated Tribes of Northwest Indians, the Midwest Alliance of Sovereign Tribes, the Akiak Native Community, the Tohono O'odham Nation, the Pascua Yaqui Tribe, the San Carlos Apache Tribe, the Tonto Apache Tribe, the Hualapai Tribe, the Mechoopda Indian Tribe, the Big Valley Band of Pomo Indians, the Sycuan Band of the Kumeyaay Nation, the Guidiville Indian Rancheria, the Ione Band of Miwok Indians, the Mashantucket Pequot Tribe, the Mohegan Tribe, the Nez Perce Tribe, the Jena Band of Choctaw Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, Lac Vieux Desert Band of Lake Superior Chippewa, Chippewa Cree Tribe of the Rocky Boy's Reservation, the Shinnecock Indian Nation, the Standing Rock Sioux Tribe, the Ft. Sill Apache Tribe, the Otoe Missouri Tribe of Indians, the Kaw Nation, the Narragansett Indian Tribe, the Yankton Sioux Tribe,

the Cheyenne River Sioux Tribe, the Lower Brule Sioux Tribe, the Ute Indian Tribe, the Suquamish Tribe, the Stockbridge-Munsee Band of Mohican Indians, the Oneida Nation, the St. Croix Tribe of Chippewa Indians, the Native American Rights Fund, the Native American Finance Officers Association.

Since time immemorial, the Mashpee Wampanoag and the land upon which we were placed by Creator have been inseparable. We are one and the same. This fact is no less true today than it was some 400 years ago when the Wampanoag granted Indian land title to the Pilgrims—the land they used to form Plymouth Colony. Yet by the time our Federal recognition was restored to us in 2007, we were a landless tribe with no Federal reservation. This is in part because *we are the only federally recognized tribe in New England for which Congress has not enacted legislation providing for a federally-protected reservation*. For this reason, the Tribe had to rely on the general authority to acquire land in trust and proclaim reservations that Congress gave to the Secretary of the Interior in the Indian Reorganization Act (IRA). Through enactment of H.R. 312 Congress would finally act for Mashpee too, placing us, finally, on an equal footing with other federally recognized tribes.

OVERVIEW OF "THE MASHPEE WAMPANOAG TRIBE RESERVATION REAFFIRMATION ACT" (H.R. 312)

The purpose of the Mashpee Wampanoag Reservation Reaffirmation Act is to reaffirm the status of the Tribe's reservation and ensure that the Tribe will not be treated as some kind of second class tribe that has a lesser status under the IRA than other federally recognized tribes. This is a bipartisan bill with the singular, straightforward purpose of protecting our reservation.

The language of the bill tracks language from two other tribal bills that already have been enacted by Congress, the Gun Lake Restoration Act (S. 1603, passed in the 113th Congress) and the Indian Tribes of Virginia Recognition Act (H.R. 984, passed in the 115th Congress). Subsection (a) tracks language from the Gun Lake statute, and it confirms the status of the Tribe's reservation. Subsection (b) also tracks language from the Gun Lake legislation, and it serves put an end to the costly, painful litigation plaguing the Tribe regarding the status of its reservation. Finally, subsection (c) tracks language from the Virginia Tribes recognition statute, and makes clear that the Tribe will be treated equally with other federally recognized tribes under the IRA.

Just 6 months ago in the 115th Congress, this Subcommittee held a hearing on the predecessor bill (H.R. 5244). There, the bill received positive feedback and bipartisan support. At that hearing, the Department of the Interior raised no objections to the bill in its written testimony, and in fact committed to working with the Subcommittee on moving the bill forward. The only difference between H.R. 5244 and H.R. 312 is that some additional language requested by the Town of Mashpee and agreed to by the Tribe has been added to the bill to acknowledge the existence of a now long-standing intergovernmental agreement between the Town and the Tribe that is also referenced in the Tribe's Record of Decision.

H.R. 312 does not provide any new or special rights to Mashpee. This bill merely asks Congress to exercise its plenary authority over Indian affairs to ensure that the Tribe will be treated the same as other federally recognized tribes by protecting the Tribe's existing reservation. A tribal land base is crucial for the exercise of tribal sovereignty, and for the protection and continuation of tribal culture, and represents the foundation for tribal economic development. Like other federally recognized tribes, we have the right to exercise our tribal sovereignty within our reservation. Preservation of our reservation allows our tribal government provide services and protection to our citizens through tribally operated and funded programs. Having reservation land where we can generate tribal revenue increases our self-sufficiency and decreases our dependence on Federal funding and grants.

THE UNCERTAIN STATUS OF MASHPEE'S RESERVATION IS CAUSING CATASTROPHIC HARM TO THE TRIBE AND INDIVIDUAL CITIZENS

As a result of the legally uncertain status of our reservation, Mashpee has been forced to borrow thousands of dollars every day to keep basic government functions running. The uncertain trust status of Mashpee's reservation is causing our tribal government to move ever closer to shutting down. Mashpee has been forced to lay off 41 percent of its work force, the overwhelming majority comprised of Tribal citizens, and Tribal Council members are performing their governmental duties without pay. Tribal unemployment is on the rise. The Tribe has been forced to shut down or severely scale back many vital government programs.

For example, the Tribe essentially has had to dissolve its police force with the exception of one patrol officer and we have had to reduce tribal court staff. Presently,

we have 43 homes under construction on our reservation lands that will be lost if our reservation goes out trust—this will be devastating given our severe housing shortage. We have also faced the loss of Federal funding that allows us to partner with the Town of Mashpee to our shared water ways and forests. This funding loss has cost the Tribe an estimated $1.2 million to carry out our natural resources development initiatives and programs in conjunction with the Town of Mashpee. Particularly painful, we have had to shut down our critically needed addiction treatment services programs at a time when Wampanoag people are 400 times more likely to die of an opioid overdose than non-Wampanoag people.

Our nationally recognized Wampanoag language immersion school serves preschool and school aged children with a planned expansion to fourth grade. Because this school is situated on reservation lands, the removal of trust status while not only disrupt the curriculum but also the children that have been attending since the age of four. Presently, the Tribe suffers from having only a 51 percent high school graduation rate. Our language immersion school is vital to increasing our citizens' graduation rate and reducing substance abuse and suicide rates. These are only a few examples of the desperately needed tribal government programs that Mashpee has been forced to drastically scale back or completely shut down.

Finally, if the Department acts to take Mashpee's reservation out of the trust, not only will Mashpee lose its jurisdiction over the land and have to further reduce tribal programs, Mashpee will also likely lose the land itself as a result of not being able to pay state taxes on the 321 acres.

ENACTMENT OF H.R. 312 WILL PROVIDE CRITICAL ECONOMIC DEVELOPMENT OPPORTUNITIES TO SOUTHEASTERN MASSACHUSETTS AND RHODE ISLAND

The city of Taunton and Town of Mashpee both strongly support H.R. 312. Both have submitted letters and testimony in support of H.R. 312 and its predecessor bill H.R. 5244. We have entered into intergovernmental agreements with both governments. Our communities and our futures are intertwined. In our intergovernmental agreements we have come together both protect certain areas from development, and to foster mutually beneficial economic growth in other areas. For example, if the status of our reservation is confirmed through enactment of H.R. 312, we will be able to use our reservation to bring over 7,000 jobs to the area (including to the state of Rhode Island). The Tribe has committed to $30 million in upgrades to the Taunton water system and roadways, $10 million per year to local first responders and Taunton city services, and $65 million per year to the state for broader community development initiatives that will benefit the entire state. Once implemented, these commitments will represent the single largest urban renewal effort in Southeastern Massachusetts in a generation. If our reservation is disestablished, we will not be able to honor these commitments.

ARGUMENTS MADE BY THE STATE OF RHODE ISLAND

The state of Rhode Island, in a letter from Governor Gina Raimondo, argues that the Mashpee Reservation Reaffirmation Act "undercuts" the plain language of the Indian Reorganization Act, although the Governor fails to explain how this is true or identify the part of the statute to which she refers. She also insists that the Act "undercuts" the Supreme Court's decision in *Carcieri v. Salazar*. Respectfully, United States Constitution unequivocally endows the U.S. Congress with plenary authority over all matters relating to Indian Affairs. If Congress deems it appropriate to save the Mashpee Indian Tribe's reservation and to stop this senseless, soul-crushing litigation over whether Congress did or did not mean to include Mashpee among the tribes that should benefit from the Indian Reorganization Act of 1934, it acts well within its constitutional authority. The idea that in enacting the IRA Congress relinquished its own authority to acquire land for Indians or to determine which Indian tribes it wishes to make eligible for the IRA is legally incorrect.

Not only is acquiring land in trust for Mashpee not contrary to the plain language of the IRA, but it is entirely consistent with the framers' intention that the IRA would benefit some tribes, like Mashpee, that had been forced into landlessness by centuries of anti-Indian Federal policies which stripped tribes of their lands. *See, e.g.*, S. Rep. No. 1080, 73d Cong., 2d Sess., at 1 (1934) (declaring that one of the "purposes of this bill" was to "provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land"); H.R. Rep. No. 1804, 73d Cong., 2d Sess., at 6 (1934) (noting that the IRA would help to "make many of the now pauperized, landless Indians self supporting").

What the Governor does not say in her letter is that the state of Rhode Island has acknowledged in a market study commissioned by the Rhode Island Department of Revenue that "a substantial portion of Rhode Island gambling revenues are contributed by Massachusetts residents." Christiansen Capital Advisors LLC, *Rhode Island Gaming and State Revenue Forecast*, Oct. 31, 2017, at 19. These commercial casinos pay 60 percent of their revenue to the state and are the third largest source of Rhode Island's revenue. *See* American Gaming Association, *State of States 2018: AGA Survey of the Commercial Casino Industry*, at 103; Katherine Gregg, *Twin River owners, R.I. pols join chorus against Taunton tribal casino bill*, The Providence Journal, Sep. 5, 2018. The state's interest in whether Mashpee's reservation is reaffirmed is not about jurisdiction or checker-boarding—the state's interest is in protecting the revenue stream it is receiving from Massachusetts residents. We value our neighbors in Rhode Island and we would like to have a good working relationship with them, just as we do with our local governments. But we would be remiss in not pointing out the immediate damage that *Carcieri v. Salazar* did to the Narragansett Tribe in the first instance, and the broader damage that case inadvertently has inflicted on the rest of Indian Country in these last 10 years. Now the state of Rhode Island seeks to reach across the state line into Massachusetts to crush the hopes and dreams of *my Tribe*. Respectfully, we request that Rhode Island consider the gravity of its actions and reconsider its position.

CONCLUSION

No other tribe in the United States currently faces the very real threat of having its reservation disestablished over a legal technicality. H.R. 312 is an emergency measure by which Congress can act to resolve this otherwise meaningless legal technicality to provide legal certainty not just to the Tribe, but also to our surrounding communities. We ask Congress to protect our inherent right to govern ourselves as the sovereign that was here long before Europeans arrived; the sovereign that granted lands to the first settlers; the sovereign that is still here taking care of our Mashpee Nation today.

With respect and gratitude, I thank you for your time today. I am happy to answer any questions you may have.

Mr. GALLEGO. Perfect. Thank you, Vice Chairwoman. The Chair now recognizes Mr. Kevin Washburn to testify.

STATEMENT OF KEVIN WASHBURN, PROFESSOR OF LAW, UNIVERSITY OF IOWA COLLEGE OF LAW, IOWA CITY, IOWA

Mr. WASHBURN. Chairman, Ranking Member, Chairman Grijalva, Ms. Haaland, who represents my former home, it is good to see you, and former Chairman Young, I have missed you these past few years.

[Laughter.]

Mr. GALLEGO. OK, with objection, I am ruling that out of order.

[Laughter.]

Mr. WASHBURN. I would like to also thank Tom Cole, my cousin from the Chickasaw Nation, and Betty McCollum. I would first like to talk about H.R. 375, that is bipartisan legislation that both of them have pushed for quite a while and it would be great to get this done. I won't repeat many of the things that Tom Cole has already said, and you have my written testimony, but I just would like to make a couple of points about H.R. 375, the *Carcieri* fix bill, and that is this: No Member of Congress and no Federal policy maker would have designed a system that has two classes of tribes for land into trust. If we started from scratch, that is not what we would do; we would treat tribes the same.

And, indeed, in 1994, Congress passed legislation demanding that tribes be treated the same for all purposes under the IRA, the Indian Reorganization Act. So, no one would have come up with

this system from scratch and we have been living with it because of an erroneous Supreme Court decision that, frankly, was not well thought out.

The question really is, should tribes recognized since 1934 be able to have housing? Should they be able to have police stations and fire stations and lands for agriculture? Should they be able to have economic development and infrastructure? And the answers to all those questions are, of course, they should.

During the Obama administration, the administration, I think, accepted something like more than 2,000 acres, or parcels of land in trust encompassing well over 500,000 acres, and that is because those tribes needed that land and that was really important to the Obama administration to try to make that happen.

Perhaps the best of H.R. 375 is that it would reduce a lot of unnecessary litigation and a lot of bureaucratic resources that are being wasted. I am dean of a law school, I am all for full-employment acts for lawyers, but that is really what H.R. 375 is and, frankly, there is plenty of work for lawyers in Indian Country without having to do so much work to try to meet the requirements of *Carcieri*. I think that we have a lot more better use of work by the hardworking Indian lawyers in Indian Country than to try to keep dealing with this issue, and you guys could correct that real easily by passing this bill.

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.

Let me move briefly to the RESPECT Act, Chairman Grijalva's bill. I strongly believe in the need for consultation as a matter of law, as he described it. We have had at least two decades of careful policy making around tribal consultation. It has become a strong Federal norm that tribes should be consulted on the matters that affect them, and it really has become part of the way we do business in the Federal Government with regard to Indian Country. It is a norm that does not get applied evenly across administrations, however.

I actually in some ways don't like the RESPECT Act because it puts a lot of requirements in place before the Federal Government can act, and I guess I am little libertarian, I don't like putting a whole lot of additional requirements on the Federal Government because it will also keep them from doing good things.

That said, I think what we have seen is that we need something like the RESPECT Act, and I am grateful for Chairman Grijalva for proposing it. There are a lot of good things that it does. One is that it forces consultation. Since it forces consultation, that means that it also wraps in independent Federal agencies, such as the Federal Energy Regulatory Commission and the National Labor Relations Board and those sort of agencies. I think that is

important because those agencies have not always been good about consulting with tribes. And a President's Executive Order can't reach those agencies in the same way.

Why don't I stop there? My time is about up, but I will be happy to answer questions in a little while if need be.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF DEAN KEVIN K. WASHBURN, UNIVERSITY OF IOWA COLLEGE OF LAW[1] ON H.R. 375 AND THE RESPECT ACT

Chairman, Ranking Member, and members of the Committee. Thank you for asking me to appear before you to testify about two bills in the Committee's jurisdiction, H.R. 375, and the RESPECT Act.

Testimony on H.R. 375

I appeared before House or Senate committees in the 112th, 113th and 114th Congresses, on behalf of the Obama administration, to seek a clean *Carcieri*-fix. It is an honor to appear before a Committee of the 116th Congress in an individual capacity but with the same goal.

Background: The Need for a Carcieri *Fix*

One of the greatest long-standing injustices in the history of the United States is the theft of land from Indian tribes during the better part of the first two centuries of this Nation's existence. The loss of native land reflects a wide gulf between our claim to be a just nation and the truth buried in our Nation's history. Since 1787, however, this country has been committed to improving and has sought earnestly, I believe, to become a "more perfect union." It is in that spirit of idealism that I appear before you today.

In the decades prior to the enactment of the Indian Reorganization Act (IRA) during the "Indian New Deal" in 1934, tribes lost more than 90 million acres of land in the continental United States. It was recognition of the scope of this tragic loss that caused Congress to take action. In the IRA, Congress gave the executive branch the authority to take land into trust and thereby restore land to tribes.

The land into trust process unfolded very gradually over the ensuing decades. It is a slow and cumbersome bureaucratic process. In most instances in which land is taken into trust for tribes, the tribe has re-purchased land that previously were taken, often illegally. One might think that requiring tribes to repurchase lands that had once been stolen from them would only compound the injustice, but tribes are grateful to have the land restored as sovereign territory even if they must use their own limited resources to accomplish it.

To supercharge the slow process of finally addressing the long-standing injustice of the theft of Indian lands, President Barack Obama made restoration of tribal land a central priority of his administration. By the time I joined the administration near the end of Obama's first term in 2012, the Obama administration had already taken approximately 180,000 acres of land into trust for tribes.

By the time President Obama left office in 2017, approximately 362,000 acres more had been taken into trust across Indian Country, for a total of 542,000 acres of land acquired during the Obama administration. In addition, more than 2.3 million cumulative acres of trust land have been restored to tribes through the Cobell settlement's fractionated interest buy-back program, an initiative that continues today. These efforts constitute the most successful efforts to reverse tribal land loss in American history.

The Obama administration also took two other key actions related to "land into trust." One was the so-called "*Patchak* Patch," which eliminated a 30-day waiting period for implementation of land into trust decisions. Under the Patchak Patch, once the Department made a decision to take land into trust, usually after months or years of processing an application, the land would go into trust immediately. Though an opponent could still challenge the decision in administrative or judicial litigation, the land would be in trust pending the outcome of the litigation, which often stretches for years. The Patchak Patch thus prevented the strategic and abusive use of litigation to delay the implementation of a land into trust decision that would benefit a tribe. The current administration has indicated that it is interested in revisiting this rule. The other key Obama action in the area of land into trust

[1] For identification purposes only. The testimony presented here is made in an individual capacity and it not made on behalf of the University of Iowa or any other institution.

was the removal of a long-standing Federal regulatory prohibition on taking land into trust for tribes in Alaska. The current administration has indicated that it is also interested in revisiting the Alaska rule.

The aggressive restoration of land to tribes during the Obama administration went a long way toward laying the foundation for a better government-to-government relationship between the United States and tribal nations.

The Supreme Court's 2009 decision in *Carcieri v. Salazar* was an early setback. The *Carcieri* opinion ruled unlawful the Secretary of the Interior's effort to take 31 acres of land into trust for the Narragansett Tribe of Rhode Island for a housing project.

Issued just 1 month after President Obama's inauguration, *Carcieri* was erroneously decided and has had pernicious effects in Indian Country. A significant problem with *Carcieri* is that it misinterpreted the Indian Reorganization Act to make an arbitrary and unwarranted distinction between tribes. As a result of the decision, some tribes are unable to petition the Federal Government to have land restored to them through the land into trust process. The decision was a misinterpretation of law and there is no rational policy basis for treating some tribes differently.

The *Carcieri* decision was troubling in part because it failed to respect congressionally defined norms of Federal Indian policy which had been expressed just a few years earlier. Indeed, in 1994, Congress had expressed a desire that the IRA be applied in the same manner to all tribes. At that time, Congress clarified that no Federal agency should make any determination under the IRA "with respect to a federally recognized Indian tribe 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." P.L. 103–263 (1994). The Secretary's efforts for the Narragansett, however, were entirely consistent with the congressional direction to treat tribes similarly under the IRA. It is for this reason that many believe *Carcieri* was out of step with Federal policy and wrongly decided.

When *Carcieri* was issued, President Obama realized that it had the potential to derail his important policy goal of restoring land to Indian tribes. President Obama personally called on Congress to enact a *Carcieri*-fix in November 2013 and directed his staff before and after that time to seek a *Carcieri*-fix.

Because of the high priority of restoring lands for all tribes, the Obama administration also developed a legal strategy to limit the *Carcieri* decision to its facts and to use other tools in the same statute. This strategy was successful for at least one tribe, but it has failed for at least one other.

A central flaw in *Carcieri*'s reasoning is this: every tribe that is federally recognized today necessarily existed in when the IRA was enacted in 1934. The reason some tribes were not then formally recognized in 1934 is obvious, at least from a historical perspective. The massacres at Wounded Knee (1890) and Sand Creek (1864) were still fresh in oral histories and the deeply scarred memories of native people. Many Indian communities remained in hiding and working hard to avoid attention from the Federal Government.

In the time since 1934, the United States has become somewhat safer for native communities, and tribes eventually started coming out of the shadows. Congress has extended Federal recognition to dozens of tribes since 1934 and the executive branch has recognized a few more. Efforts were made in Congress and the executive branch to treat tribes on an equal basis, except where Congress, treaties or other laws required otherwise.

This is why *Carcieri* was unwelcome to Federal Indian policy makers. It divided tribes into "haves" and "have nots." Because the land into trust process is slow and bureaucratic, the full impact of *Carcieri* has not become known yet. For numerous tribes recognized since 1934, however, *Carcieri* feels like a ticking time bomb. According to the late Professor William Rice, writing shortly after the opinion was issued, *Carcieri* "will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net." Wm. Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous People, and a Proposed Carcieri "Fix,"* 45 Idaho L. Rev. 575, 594 (2009).

In sum, *Carcieri* has the potential to spawn endless litigation about past land acquisitions and block future acquisitions. *Carcieri* remains a serious problem that draws an arbitrary and unwelcome line though Indian Country.

The *Carcieri* decision has been on the books now for 10 years. It is unlikely that it will be corrected by the Supreme Court. I would respectfully urge Congress to explain that it meant what it said in 1994 and amend the IRA to provide absolute clarity that the Secretary of the Interior has authority to restore land for all federally recognized tribal nations in the United States.

Views on H.R. 375

I wish to begin by expressing my appreciation to Representatives Tom Cole and Betty McCollum for continuing to press in a bipartisan way for this important legislation. Representatives Cole and McCollum have worked together—across the aisle—to resolve this important issue for several years. The passage of H.R. 375 has the potential to be a wonderful example of bipartisanship in a divided Congress.

I am also grateful to the Committee leadership for giving this bill a hearing. It is the hope of many people in Indian Country that the recent change in the makeup of the committees and the leadership positions will allow the bill to advance and address this long-standing injustice.

H.R. 375 is an elegant way of addressing *Carcieri v. Salazar*. It is a model of clarity and simplicity and would fully address the problems highlighted above.

H.R. 375 has three important features that are crucial to clarifying the IRA and remediating the harm caused by *Carcieri*. First, it strikes from the IRA the confusing term, "now under federal jurisdiction," making it more obvious that the land into trust provisions have broad application to all federally recognized Indian tribes, no matter when they achieved Federal recognition. Second, it makes the amendment retroactive to the original date of enactment of the IRA in 1934. This insures proper authorization for all actions to take land into trust since that time and prevents unnecessary and fruitless litigation about whether authority existed at the time the land was taken into trust. Finally, H.R. 375 amends the definitions section of the IRA to make it even more clear that the Secretary of the Interior has authority to take lands in trust for tribal nations in Alaska.

Testimony on the RESPECT Act

Tribal consultation has been an important part of Federal Indian policy throughout history and has been revitalized in recent years. I will first provide context for the recent developments in tribal consultation and then discuss the bill in this context.

Background: Executive Order 13175 and Modern Tribal Consultation

Activity that can be described as tribal consultation has existed since the first days of the American republic. Over the course of nearly two centuries, government-to-government relationships that began as arms-length treaty negotiations slowly transformed into a very paternalistic relationship denoted by the concept of a Federal trust responsibility to tribes.

Tribal governments reawakened politically in the 1960s and 1970s and embraced newly revitalized efforts at tribal self-government. A new government-to-government relationship between the Federal Government and tribes began to form. By the 1990s, tribal governments had earned greater political salience, both within their communities and externally. They were becoming stronger partners for the Federal Government.

In a series of orders and memoranda issued throughout his presidency, President Bill Clinton embraced and gradually strengthened the general norm of Federal consultation with tribal governments. Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation*, 46 Univ. of Mich., L.L. Reform 417, 442–43 (2013). This steady development of policy culminated, on November 6, 2000, when Clinton issued Executive Order 13175. The order directed agencies to engage in consultation and coordination with tribes in "the development of Federal policies that have tribal implications." 65 Fed. Reg. 67249 (Nov. 9, 2000). E.O. 13175 was a major step forward in the government-to-government relationship between American Indian nations and the United States. Symbolically, it demonstrated Federal respect for tribes. Practically, it reflected common sense and good government as well as a more effective way of developing and implementing Federal policy. It has never been rescinded and to this day constitutes the governing executive branch statement on tribal consultation.

A notable feature of E.O. 13175 is its breadth. It does not limit the consultation requirement to Federal Indian policies. It applies to any Federal policy with "tribal implications." This presumably includes general Federal policies that affect tribes. As governments and communities in the United States, Indian tribes are, of course, affected by numerous general Federal policies. In other words, E.O. 13175 requires

the Federal Government to consult with tribes about policies even if Indian tribes and people are not the primary target of such policies. While it has not always been implemented as broadly as its terms suggest it should be, E.O. 13175 is an ambitious and positive vision for Federal policy making and the government-to-government relationship.

In 2004, President George W. Bush issued a memorandum in which he noted E.O. 13175 and expressed his administration's commitment to the government-to-government relationship. Memorandum on Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004). The memorandum expressed good intentions, but tribes felt that these intentions were realized only unevenly.

Eight years after President Clinton issued E.O. 13175, President Barack Obama was elected. He embraced Clinton's Executive Order and made a robust effort to implement it by directing each Federal agency to develop its own individualized plan for tribal consultation. Presidential Memorandum on Tribal Consultation, 50 Fed. Reg. 57,881 (Nov. 5, 2009). Prodded by Domestic Policy Council staff at the White House, the vast Federal bureaucracy soon began working to comply, with each Federal agency or office embarking on individual policy-making efforts. The first step was, of course, to consult with tribes. In an effort that was important but must have been amusing to lovers of the Dilbert comic strip, each agency began "tribal consultations on tribal consultation." These efforts bore fruit with each Cabinet-level Department and many sub-departments ultimately issuing their own specific tribal consultation policies, developed organically, but consistent with E.O. 13175. See, for example, the Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 Fed. Reg. 33331 (June 4, 2013).

Though E.O. 13175 specifically disclaimed the creation of rights enforceable against the executive branch in court, it began to change the norms inherent in the Federal government-to-government relationship with tribes. Indeed, a handful of courts have signaled that agency action may be reviewable to insure that the consultation is meaningful. See, e.g., *Cheyenne River Sioux Tribe v. Jewell*, 3:15-CV-03018, 2016 WL 4625672 (D.S.D. Sept. 6, 2016); *Wyoming v. U.S. Dept. of the Interior*, 136 F. Supp. 3d 1317, 1345–46 (D. Wyo. 2015).

During the Obama administration, tribal leaders grew accustomed to annual meetings with the President and members of his cabinet and other agencies. In 2013, President Obama issued Executive Order 13647, ordering an annual White House Tribal Nations Conference. Exec. Order No. 13647, 3 C.F.R. 311 (2014). As a result of the Federal Government's more robust approach to tribal consultation, tribal governments are now more involved in shaping Federal policy affecting them. All of this tribal engagement has made Federal policy more effective.

As tribal governments have engaged in consultation, they have become more competent in evaluating and affecting Federal public policy. They are more politically engaged and offer more astute suggestions. The result is a virtuous cycle: tribal governments engage; Federal policy improves; and tribal governments, in turn, become even more invested in the policy and the engagement. As a result of their invited involvement in the machinery of Federal policy making, tribes have become better Federal partners.

A more substantive impact of this more robust government-to-government relationship has been a further transformation in the content of the Federal trust responsibility itself. Strong tribal input in shaping Federal policy necessarily diminishes the continuing paternalistic tendencies of that policy.

The trust responsibility has quite simply come to embody much greater respect. Statutes continue to reflect Federal Government decision making and oversight of tribes, but the relationship has come to seem more like a collaboration between sovereigns. See Kevin K. Washburn, *What the Future Holds: the Changing Landscape of Federal Indian Policy*, 130 Harv. L. Rev. F. 200, 215–16 (2017).

Moreover, as noted above, because the new norms around the government-to-government relationship explicitly require consultation with tribes on any policy matter that affects them, the norms inherent in the trust responsibility have begun to escape the bounds of Indian policy.

A fair criticism of the executive branch's approach to tribal consultation is that E.O. 13175 has been implemented unevenly. Tribal consultation has been embraced much more enthusiastically in Democrat administrations than in Republican ones, in part because Democrats tend to develop more Federal Indian policy initiatives to serve a core constituency.

The RESPECT Act in Context

The RESPECT Act codifies a much stronger requirement for tribal consultation, but addresses a more narrow range of tribal interests than currently encompassed under E.O. 13175. The RESPECT Act addresses a subset of issues for which tribal

governments are likely to be most concerned, namely Federal activities that affect tribal cultural resources and lands, tribal self-governance, the trust responsibility, and the government-to-government relationship between a tribe and an agency. As to those matters, however, the RESPECT Act mandates robust formal procedural requirements as to how and when such consultation must occur, including providing for planning, notice, meetings, and memoranda of agreement. It also contains provisions requiring development of a record of tribal consultation and requirements for a final decision on the proposed Federal action, with provision for notice and comment.

A significant feature of the RESPECT Act is a provision for confidentiality so that an Indian nation can share information with Federal officials without fear that it will become public. For example, a tribe can disclose the location of a sacred site without fear that it will be disclosed in a Freedom of Information Act response. Aside from that provision, which makes substantive changes to Federal disclosure laws, the RESPECT Act is almost entirely procedural.

The RESPECT Act changes the landscape for tribal consultation as it exists under E.O. 13175 in several significant ways.

First, in contrast to E.O. 13175, the RESPECT Act is judicially enforceable. Due to its terminology, I read the Act to allow a tribe to seek review of an agency determination even before an agency action becomes final, as long as the tribe has exhausted administrative remedies. This would appear to give the Act teeth at any stage of the process. In that respect, the RESPECT Act is much more effective than E.O. 13175 in mandating tribal consultation.

Second, the RESPECT Act creates a uniform process across Federal agencies. Unlike the Obama administration approach to implementation of E.O. 13175, which allowed each agency to develop its own consultation process organically and with tribal input, the RESPECT Act creates uniformity. Such an approach has plusses and minuses.

A plus is that tribes and citizens will know exactly how the uniform process works with each Federal agency, even if they have not worked with that agency previously, and will not have to become familiar with different specialized approaches for different agencies. There is value in uniformity. Consider for example, the National Environmental Policy Act (NEPA). NEPA imposes a regime that works fairly uniformly across the government. Each agency implements it similarly. As a result, expertise is not difficult to find and a lot of people are familiar with it, from citizens to courts.

A minus is that, in light of varying cultures, so-called "one-size-fits-all" approaches don't work well for tribes. Likewise, a "one-size-fits-all" approach to tribal consultation may not capture the needs of different agencies. The Act seems designed primarily with project development activities in mind, but it applies to a wider range of Federal activities, such as rulemaking and policy guidance. This may have unexpected consequences.

Third, it will slow agency decision making and policy development. This also involves plusses and minuses. Tribes will likely be pleased with a slower process if it insures tribal consultation, but tribes too sometimes complain about the greater length of time required to achieve various policy goals, particularly those related to economic development on tribal lands. The RESPECT Act will likely lengthen that time. Consider the Department of the Interior's existing tribal consultation policy; it requires advance notice of at least 30 days for a tribal consultation. That is a modest time period and yet it sometimes prevented agency officials from moving as quickly as they would like, even when developing a policy or making a decision that tribes sought. The time periods in the bill will allow time for robust consultation and plenty of notice but, like NEPA, may force an agency to move more slowly than ideal in some circumstances.

Fourth, the RESPECT Act is in some ways narrower than E.O. 13175. While E.O. 13175 applies to any Federal policy with "tribal implications," which includes some policies that are beyond the traditional scope of Federal Indian policy, the RESPECT Act focuses only on the Federal activities that affect significant tribal interests, such as tribal cultural resources and lands, tribal self-governance, the trust responsibility, and the government-to-government relationship between a tribe and an agency. To the extent that E.O. 13175 is overbroad from the Federal perspective, Federal agencies have tended to take refuge in the fact that it is not judicially enforceable. Agencies have tended to ignore the tribal consultation requirement as to some matters.

Fifth, and on the other hand, the RESPECT Act is broader than E.O. 13175 because it applies to independent Federal regulatory agencies. One of the more frustrating episodes in modern Federal Indian policy for tribes was the National Labor Relations Board's decision to ignore the Federal norms as to tribal consultation and

suddenly reverse long-standing policy toward tribes in a punitive enforcement action. See Wenona Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 693–94 (2004). Because the RESPECT Act applies to "operational activity," it might prevent an independent Federal agency from implementing such a policy change in this manner in the future.

Finally, the RESPECT Act might provide some salutary benefits as it applies to legislative proposals. In the past, bills have been enacted that failed adequately to consider issues involving tribes. For example, in the Adam Walsh Sex Offender Registration and Notification Act, the drafters inadvertently failed to consider the needs of Native American victims and communities. See Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 Ohio St. J. Crim. L. 3 (2008). Because a lot of proposed bills are developed as part of administration packages, the RESPECT Act provides a mechanism for insuring that tribal needs are considered in certain types of proposed legislation.

In a more perfect world, the norm of tribal consultation would be respected evenly through time and across presidential administrations. In such a world, a congressional mandate for more elaborate tribal consultation would not be necessary. In the world in which we live, however, the RESPECT Act is needed to insure best practices in the Federal-tribal government-to-government relationship. Ultimately, the RESPECT Act would have the effect of making tribal consultation less partisan than it is now. Tribes could be assured of the same robust commitment to consultation no matter which party controls the White House.

On balance, the RESPECT Act is a positive contribution and has the ability to advance tribal sovereignty and would improve the relationship between tribes and the Federal Government.

Thank you for inviting my views on this important legislation.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. BISHOP TO KEVIN WASHBURN, UNIVERSITY OF IOWA COLLEGE OF LAW

Question 1. As the Assistant Secretary—Indian Affairs, you signed the September 2015 Record of Decision for the Trust Acquisition and Reservation Proclamation for the Mashpee Tribe ("ROD"). In the ROD, you write "the Tribe qualifies for the IRA's benefits under the second definition of 'Indian.'" (ROD, page 79). To the best of your knowledge, has the Department of the Interior acquired land into trust under the second definition of "Indian" under the IRA for any other tribe besides the Mashpee?

Question 2. To the best of your knowledge, has the Department of the Interior conducted, but not necessarily made final, a Carcieri *analysis under the second definition of "Indian" for any other tribe besides the Mashpee Tribe?*

Question 3. Why didn't the Department of the Interior use the "first definition" of Indian in the IRA in its analysis of the Mashpee Tribe's Carcieri *status?*

Answer. I thank the Committee for its focus on these issues and for these important questions.

It is the responsibility of the Secretary to seek to meet the purposes of the Indian Reorganization Act within the bounds of the law. The Indian Reorganization Act presents more than one pathway for land into trust. During the Obama administration, the goal was to think more holistically about land into trust than the Supreme Court was able to do in *Carcieri*. Because of the nature of its work, the Supreme Court had before it only one of the pathways for land into trust. While *Carcieri* and its necessary implications must be respected as the law of the land, it need not—and should not—be interpreted more broadly than its reasoning requires. That would imbue the Supreme Court with a policy-making function that it does not have and presumably does not wish to have.

I concluded my service at the Department of the Interior effective January 1, 2016, and am sensitive to the fact that I have not been privy to inside discussions and strategy about the land into trust process since I left. Two of these questions essentially ask me for information that implicate the Department's attorney-client, work product and deliberative process privileges with regard to important decisions of the Department. While I understand the public interest in those decisions, it would be arrogant of me to undermine the Department's privileges when another person now holds that office. During my time at the Department of the Interior, the time devoted to land-into-trust applications increased substantially. I do note that the Trump administration has continued taking land into trust, for gaming and other purposes, so presumably it has also had to consider the implications of

Carcieri. However, I am not intimately aware of the decision-making actions of the Department and thus am not competent to answer all of these questions.

I would note also, that, during the Obama administration, the Department resisted providing a list of tribes with "*Carcieri* problems" because producing such a list was not in the interest of any potential tribe that would be included on such a list. Thus, it would not be consistent with the Department's role as trustee for each American Indian nation. Because these questions have similar implications, I believe, respectfully, that it is not in the best interest of any tribe—or for Indian Country generally—for me to answer these questions in the manner that they have been posed. Thank you again for the Committee's attention to these important issues.

Mr. GALLEGO. Thank you, Mr. Washburn. The Chair now recognizes Ms. Colette Routel for her testimony.

STATEMENT OF COLETTE ROUTEL, PROFESSOR OF LAW, MITCHELL HAMLINE SCHOOL OF LAW, ST. PAUL, MINNESOTA

Ms. ROUTEL. Good afternoon. Thank you for allowing me to appear before you today to testify about H.R. 375, a bill to amend the Indian Reorganization Act. As you know, in *Carcieri v. Salazar*, the Supreme Court held that trust lands could only be acquired for tribes that were under Federal jurisdiction when the IRA was adopted in 1934. Because the IRA is the only general statute that authorized the Secretary of the Interior to take land into trust for Indian tribes, tribes that cannot make this showing face the prospect of never regaining a permanent homeland.

Scholars and practitioners alike immediately decried the Court's extraordinarily cramped reading of the statutory text and predicted that the decision would wreak havoc throughout Indian Country by encouraging ways of litigation, stifling economic development, and creating dividing lines between tribes that Congress had sought to abolish.

Sadly, those predictions have come true in the decade that has followed. Frivolous lawsuits have abounded. Local governments and private citizens have challenged the trust acquisitions of dozens of tribes that were obviously under Federal jurisdiction in 1934. Litigants have often used lawsuits to challenge land that has already been taken into trust.

For example, in 2015, a tax assessor in Alabama assessed property taxes on land that was taken into trust 30 years before for the Poarch Band of Creek Indians. The tribe obviously won this case, but not until it had litigated it all the way to the 11th Circuit.

Of course, not all *Carcieri* challenges are frivolous. In 2014, the Department of the Interior issued a formal opinion which provides a two-part framework for determining whether an Indian tribe was under Federal jurisdiction in 1934. The problem is that finding and assembling the information necessary to satisfy this two-part inquiry is daunting. Federal records and correspondence needed to demonstrate these actions are scattered throughout the country in public archives and in private collections. And when tribes gather all of this documentation, they can do so only to have the rules suddenly shift.

The Mashpee Wampanoag Tribe find themselves in just this position. In September 2018, the Department refused to reaffirm the status of the tribe's reservation and it did so even though the

Mashpee submitted documentation, for example, that showed that a significant number of Mashpee children attended the Carlisle Boarding School. Mashpee members were included on Federal census roles and the Federal Government recognized the tribe's hunting, fishing, and gathering rights. This is all evidence that has previously been considered to be sufficient to withstand a *Carcieri* challenge.

The consequences for Mashpee have been extraordinary. The tribe has broken ground on their casino and apparently owes more than $300 million, yet construction is indefinitely stalled and the tribe has no more access to capital. Without trust lands, the tribe does not qualify for even the most basic Federal programs such as food distribution programs, burial assistance, and adult care assistance. All of these programs are administered for Indians that live on or near a reservation, and the Federal Government now tells the Mashpee that they do not.

The Mashpee are just one example of why trust lands are so vital. They are the only lands that are permanently held for the benefit of an Indian tribe. Trust lands can't be taxed; they can't be condemned or otherwise alienated without tribal or congressional authorization. Trust lands are also the only lands on which tribes' sovereignty has never been questioned. Permanency and sovereign authority are necessary components for a true homeland for Indian tribes and this can only be achieved with trust land.

As Dean Washburn already mentioned, there is simply no policy justification for using 1934 as a magical date that limits access to such an important benefit. Moreover, it is not even this date of tribal acknowledgement, but rather the manner in which an Indian tribe became acknowledged that has proved crucial following *Carcieri*. Tribes that were recognized by Congress are almost always insulated from the impacts of *Carcieri* through express provisions in the recognition bills that allow fee-to-trust applications. It is only tribes that went through the office of Federal acknowledgement's grueling recognition process that are now faced with never receiving any land into trust. Many of them waited years and expended millions of dollars to obtain acknowledgement as a federally recognized tribe only to find that the benefits of that decision are elusory.

I urge the members of this Committee to support H.R. 375, which will once again clarify that the benefits of the IRA are available to all federally recognized tribes. Thank you.

[The prepared statement of Ms. Routel follows:]

PREPARED STATEMENT OF COLETTE ROUTEL, PROFESSOR OF LAW & DIRECTOR OF THE INDIAN LAW PROGRAM, MITCHELL HAMLINE SCHOOL OF LAW* ON H.R. 375

Chairman Grijalva, Ranking Member Bishop, and members of the Committee. Thank you for allowing me to appear before you today to testify about H.R. 375, a bill to amend the Indian Reorganization Act.

*The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent Mitchell Hamline School of Law for purposes of this testimony.

Background on the IRA and the Supreme Court's Decision in *Carcieri v. Salazar*

The Indian Reorganization Act ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. §5101 *et seq.*), is one of the most important pieces of legislation directly affecting Indians. When enacted by Congress in June 1934, it signaled a major reversal of governmental policy in Indian affairs. Previously, the United States had aggressively attempted to eradicate tribalism and assimilate individual Indians into white society. The linchpin of this assimilationist policy was the General Allotment Act of 1887 ("GAA"), which broke up tribal reservations into individual 160-acre allotments, while authorizing the remaining "surplus lands" to be sold to non-Indians. As a result of the GAA, Indian lands were diminished from 138 million acres to just 52 million acres in less than 50 years. By the 1930s, the Federal Government realized the devastating impact that this policy was having on Indian communities, and it decided to abruptly reverse course. As the principal component of the Indian New Deal, the IRA was intended to promote tribal self-government and ultimately restore to Indian tribes the management of their own affairs. *See Morton v. Mancari*, 417 U.S. 535, 542 (1974) (noting that the IRA was passed to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically").

Land was recognized as essential to the achievement of these goals. Consequently, the IRA precluded allotment of future reservations. 25 U.S.C. §5101. Unsold "surplus" lands could be returned to the tribe at the discretion of the Secretary of the Interior. 25 U.S.C. §5103. Importantly, the Secretary of the Interior was authorized to acquire new trust land for the benefit of tribes. Section 5 of the IRA reads as follows:

> 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.

IRA, §5, *codified at* 25 U.S.C. § 5108. Section 5 of the IRA remains the only general statute that authorizes the Secretary of the Interior to take land into trust for Indian tribes.

In 2009, the U.S. Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), a decision which disrupted 70 years of agency practice in acquiring trust lands for Indian tribes. The *Carcieri* Court held that Section 5 of the IRA must be read in conjunction with the Act's definition of "Indian," which was limited, in relevant part, to "persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." IRA, §19. According to the Court, the word "now" unambiguously referred to the year that the IRA was enacted (1934), rather than the moment when the Secretary decided to take land into trust for the benefit of a particular tribe. Thus, following *Carcieri*, any tribe seeking the benefits of Section 5 of the IRA was required to establish that it was "under Federal jurisdiction" in 1934.

Scholars and practitioners alike immediately decried the Court's extraordinarily cramped reading of the statutory text and noted that the decision would wreak havoc throughout Indian Country by encouraging waves of litigation, stifling economic development, and creating dividing lines between tribes that Congress had sought to abolish. Sadly, those predictions have all come true in the decade that has followed. H.R. 375 is necessary to right the wrongs that have flowed from the Court's decision in *Carcieri*.

The Original Meaning of "Under Federal Jurisdiction"

The Supreme Court's decision in *Carcieri* provided very little guidance on the meaning of "under Federal jurisdiction," even though Indian tribes would now need to demonstrate that they satisfied this concept as of 1934 in order for the Federal Government to take land into trust on their behalf. Today, "under Federal jurisdiction" may be considered synonymous with Federal recognition, but in 1934, Federal recognition of Indian tribes "was only beginning to take shape," and it "was not universally applied, accepted or frankly, understood." William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 347 (1990). The terms "recognize" and "acknowledge" were more often used simply in the cognitive sense, indicating that a particular tribe was known to the United States, and even then, no comprehensive

list of Indian tribes acknowledged by the United States existed prior to 1934. *Id*. at 339.

The IRA's text and legislative history did not define the phrase "under Federal jurisdiction." This phrase was hastily added to the bill following a confusing colloquy in a hearing before the Senate Committee on Indian Affairs on May 17, 1934. To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., at 237 (May 17, 1934) ("May 17, 1934 Hearing"). It is difficult to interpret the intent of any legislation, and the legislative history of the IRA is particularly challenging because two of the individuals primarily responsible for its passage—Commissioner of Indian Affairs John Collier and Chairman of the Senate Committee on Indian Affairs Burton Wheeler—had divergent views about the ultimate aims of Federal Indian policy. Senator Wheeler still believed that the government should be pursuing a policy of forced assimilation, while Commissioner Collier believed that the Federal Government should encourage the revitalization of traditional religious beliefs, arts and crafts, and governmental institutions. *See generally* Kenneth R. Philip, *John Collier's Crusade for Indian Reform 1920–1954* (1977); Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act 292–93* (2000).

In six different hearings held throughout April and May 1934,[1] Chairman Wheeler expressed his concerns that the term "recognized Indian tribe" was over-inclusive and would require the guardian-ward relationship to be permanently maintained over tribes and tribal members that, in his view, had or would become, fully assimilated into white culture. Specifically, Chairman Wheeler argued that certain Indians in California, Montana and Oklahoma were capable of handling their own affairs, and in the future, they must be given fee title to their property. Near the end of the hearing on May 17, 1934, Wheeler pressed these concerns, noting that there were "several so-called 'tribes'" in northern California that were comprised of "white people essentially," "[a]nd yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment." May 17, 1934 Hearing at 263–66. In response to these concerns, Commissioner Collier stated:

> Commissioner COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. at 266. And the bill was thus amended. This is the only mention of the phrase "now under Federal jurisdiction" in the legislative history. Contrary to the Supreme Court's decision in *Carcieri*, this legislative history appears to support an interpretation of the word "now" that would not freeze in time the status of tribes in 1934, but rather, allow the Federal Government to alter that status in the future. After all, Chairman Wheeler admitted that the persons he was especially concerned about were currently "under the supervision of the Government of the United States," and he wished to change that at a future date.[2]

Not long after this language was added to the bill, Felix Cohen, the Assistant Solicitor, expressed his concerns. Cohen drafted a memorandum attempting to explain the differences between the Senate and House versions of the bill, and he noted that the Senate bill "limits recognized tribal membership to those tribes 'now under Federal jurisdiction,' *whatever that may mean*." National Archives Record Administration, Washington, DC. (NARA-DC), Record Group (RG) 75, Records Concerning the Wheeler-Howard Act, 1933–1937, Box 10, Memorandum of Felix Cohn, Differences Between House Bill and Senate Bill, at 2 (emphasis added). In a later analysis, Cohen explicitly advocated for the removal of the phrase "under Federal jurisdiction," noting that it was likely to "provoke interminable questions of interpretation." NARA-DC, RG 75, Records Concerning the Wheeler-Howard Act, 1933–1937, Box 11, Analysis of Differences Between House Bill and Senate Bill, at

---

[1] The Senate Committee on Indian Affairs held hearings on the draft bill on April 26, 28, 30 and May 3, 4, and 17, 1934.

[2] Justice Thomas' majority opinion in *Carcieri v. Salazar* fails to discuss any of this legislative history. At a minimum, both the language and the legislative history of the statute should have been enough to establish that the word "now" was ambiguous. Then, the Court should have deferred to the agency's long-established practice in interpreting Section 5 of the IRA, which would have also comported with the Indian canons of construction that require ambiguous language in Indian-specific legislation to be read in favor of preserving tribal rights.

14–15. Unfortunately, Cohen's advice was not heeded, and the statute was adopted with the phrase remaining.

The Litigation that Followed

Following the Supreme Court's decision in *Carcieri*, the question became whether "under Federal jurisdiction" referred to tribes that were *subject to* Congress' power,[3] or, more narrowly, only to those tribes that the Federal Government had *exercised* its power over. If the latter were the interpretation adopted by the courts, extensive historical documentation would need to be gathered as part of any fee-to-trust application. Thus, Indian Country braced itself for a series of legal challenges designed to define this phrase. Still, no one could have anticipated the number of frivolous challenges to trust acquisitions that have been lodged over the past decade. States and local governments with strained relationships toward resident Indian tribes have exploited *Carcieri* to delay trust acquisitions or increase the costs of such acquisitions even in circumstances were no reasonable argument could be made that a particular tribe was not under Federal jurisdiction in 1934.

A little bit of additional background is required to explain the absurdity of the challenges that ensued. The IRA sought to encourage tribal self-government, and as a result, the Federal Government sought tribal consent to its provisions through an election that was supposed to be called by the Secretary of the Interior on each reservation. Additionally, the IRA encouraged tribes to adopt written constitutions or corporate charters, which would only become effective when ratified by a majority vote of the adult members of the tribe residing on the reservation. IRA, §§ 16, 17. Theodore Haas, who was Chief Counsel for the Bureau of Indian Affairs in the 1940s, compiled a pamphlet entitled *Ten Years of Tribal Government Under the IRA* (1947). This pamphlet listed the tribes that voted to accept or reject the IRA in the years immediately following its enactment, and it also listed the tribes that had voted on tribal constitutions and corporate charters. The so-called Haas lists certainly do not include all of the Indian tribes who were "under Federal jurisdiction" in 1934. For example, only tribes with existing land bases were permitted to organize as constitutional governments under the IRA; elections were not called for landless tribes. IRA, § 16 (permitting the organization of "[a]ny Indian tribe, or tribes, *residing on the same reservation* . . ."). Nevertheless, the Haas lists should provide irrefutable evidence for those tribes that are mentioned, because they demonstrate that the Federal Government immediately consulted them to determine if, when, and how the IRA would be implemented on their reservations.

Despite this, local governments and private citizens have challenged the trust acquisitions of dozens of tribes including on the Haas lists. The Fond du Lac Band of Ojibwe faced significant delays when it asked that a parcel of land be taken into trust for uses including protection of historical and cultural sites, preservation of sugar bush and riparian lands, and the creation of affordable housing. Saint Louis County objected to the proposed trust acquisition on *Carcieri* grounds. The County did so even though the Minnesota Chippewa Tribe, of which the Fond du Lac Band is a part, (1) voted to accept the IRA on October 27th and November 17, 1934, and (2) adopted an IRA-approved Constitution in 1936. While the County eventually admitted that these votes were conclusive evidence that the Band was "under Federal jurisdiction" in 1934, the Band's trust acquisition was delayed by more than a year due, in part, to this frivolous claim.

The Mille Lacs Band of Ojibwe is also a constituent band of the Minnesota Chippewa Tribe. It is a successor in interest to at least seven treaties with the United States, including an 1837 treaty under which the Band still possesses off-reservation hunting, fishing and gathering rights reaffirmed by the U.S. Supreme Court. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Congress passed numerous statutes for the benefit of the Band prior to the IRA's enactment, and case law expressly recognized the Federal Government's continuing obligations to the Band. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913) (recognizing the Band's continuing interest in reservation lands). Finally, the Band adopted an IRA Constitution in 1936 (as a constituent Band of the Minnesota Chippewa Tribe, specifically referred to in the Constitution as "the non[-]removal Mille Lac Band of Chippewa Indians"), a corporate charter in 1937, and a local governance charter in 1939. Despite all of this, Mille Lacs County challenged the Department's decision to take land into trust for housing purposes, arguing that the Mille Lacs Band was not under Federal jurisdiction in 1934. *Mille Lacs County v. Acting Midwest Regional Director*, 62 IBIA 130 (2016). While the Interior Board of Indian Appeals ("IBIA") ultimately rejected this challenge, it did

[3] Congress may not "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe." *United States v. Sandoval*, 231 U.S. 28 (1913).

not do so until 2½ years following the Acting Midwest Regional Director's decision to take the land into trust.

These are not isolated instances. The Oneida Nation of Wisconsin has twice faced *Carcieri* challenges to its fee-to-trust applications. *Village of Hobart v. Acting Midwest Regional Director*, 57 IBIA 4 (2013) (rejecting Village of Hobart's *Carcieri* challenge and noting that the Nation was party to treaties with the United States, subjected to various congressional acts, voted to accept the IRA in 1934, and adopted an IRA Constitution in 1936); *Dillenburg v. Midwest Regional Director*, 63 IBIA 56 (2016) (rejecting same arguments made by private citizens). Likewise, dozens of other tribes on the Haas lists have faced similar challenges to their fee-to-trust applications, many of which have been appealed (unsuccessfully) to the IBIA and Federal courts. *See, e.g., Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016), aff'd 879 F.3d 1177 (D.C. Cir. 2018) (North Fork Rancheria); *Starkey v. Pacific Regional Director*, 63 IBIA 254 (2016) (La Posta Band of Mission Indians), *New York v. Acting Eastern Regional Director*, 58 IBIA 323 (2014) (Oneida Nation of New York); *Thurston County v. Great Plains Regional Director*, 56 IBIA 296 (2013) (Nebraska Winnebago Tribe); *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62 (2011) (Stockbridge-Munsee Community).

Litigants have not been content, however, to challenge current applications to take land into trust. The Supreme Court amplified the litigation risk posed by *Carcieri* in its decision in *Match-E-Be-Nash-She-Wish Band of Potawatomi v. Patchak*, 567 U.S. 209 (2012). In *Patchak*, the Court interpreted the Quiet Title Act to allow certain retroactive challenges to lands that had already been taken into trust. Prior to *Patchak*, states and local governments seeking to challenge trust land acquisitions were required to file their lawsuits within 30 days. 25 C.F.R. § 151.12(b)(2012).[4] Immediately after *Patchak*, the APA's general 6-year statute of limitations applied to challenges of trust acquisitions.

Emboldened by *Patchak*, litigants sought to remove land that had already been taken into trust for tribes—sometimes decades earlier—by claiming that they were not "under Federal jurisdiction" in 1934. And when these lawsuits failed, new and creative collateral attacks were filed. *See, e.g., Alabama v. PCI Gaming Auth.*, 15 F.Supp.3d 1161 (N.D. Ala. 2014), *aff'd*, 801 F.3d 1278, 1291 (11th Cir. 2015) (noting that the "proper vehicle" for challenging the Secretary's authority to take land into trust for the Poarch Band of Creek Indians was a timely APA challenge, not a collateral challenge to a decision made by the Secretary decades earlier); *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952–53 (9th Cir. 2015) (en banc) (rejecting a *Carcieri* argument raised outside the APA context). For example, in 2015, a tax assessor in Escambia County, Alabama assessed property taxes on land that was taken into trust in 1984 for the Poarch Band of Creek Indians. The assessor apparently claimed that the land was "illegally" taken into trust because the Poarch Band was not "under Federal jurisdiction" in 1934, and therefore, the tax-exempt status of its land should not be recognized. The Tribe sued to stop this assessment and was granted a preliminary injunction by the Federal district court. The Eleventh Circuit upheld that decision, noting that it had previously rejected a collateral attack on the same parcel of land in PCI Gaming. *Poarch Band of Creek Indians v. Hildreth*, 656 Fed. Appx. 934 (11th Cir. 2016).

The Current Meaning of "Under Federal Jurisdiction"?

In 2014, an official M-Opinion was issued by the Department of the Interior, which provides a framework for determining whether an Indian tribe is "under Federal jurisdiction" in 1934. Memorandum from Solicitor Hilary Tompkins to Secretary Sally Jewell, The Meaning of Under Federal Jurisdiction for Purposes of the Indian Reorganization Act, M–37029 (Mar. 12, 2014). In that opinion, the Solicitor required that tribes meet a two-part test. First, there must be evidence prior to 1934 that the United States took "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." *Id.* at 19. Second, tribes must demonstrate that their "jurisdictional status remained intact in 1934." *Id.* To date, courts appear to have adopted this two-part framework. *E.g., Confederated Tribes of the Grand Ronde*

[4] Prior to *Patchak*, if challenges were filed within the 30-day window, as a matter of policy, the Department would not take the land into trust until after the lawsuit had been resolved. If litigants missed this 30-day deadline, however, the land was taken into trust and all challenges to the acquisition were believed to be barred.

Cmty. v. Jewell, 830 F.3d 552 (D.C. Cir. 2016) (adopting two-part test and concluding that the Cowlitz tribe was "under Federal jurisdiction" in 1934).

Finding and assembling the information necessary to satisfy this two-part inquiry, however, is daunting. The M-Opinion provides examples of evidence sufficient to establish Federal obligations, duties, and authority over the tribe, which:

> may include, but is certainly not limited to, the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe.

M–37029, at 19.

Federal records and correspondence needed to demonstrate these actions are scattered throughout the country in public archives and private collections. If, for example, you were looking for information on Minnesota Indian tribes, at a minimum, you would need to search the National Archives in Chicago, Illinois and Washington, DC, as well as local historical societies in the states of Minnesota and Wisconsin. Additionally, the dates and types of documents often sought in response to *Carcieri* challenges are extremely time consuming to gather. From 1887 through 1906, for example, all historical correspondence from Indian agents to the Commissioner of Indian Affairs are filed in chronological order of receipt in the National Archives in Washington, DC. To find relevant documents, the researcher must engage in a multi-step process: (1) identify key words (e.g., names of officials, tribal members, locations, and activities); (2) use those key words to search a microfilmed index that provides only the numbers of letters that were received from Indian agents and private citizens throughout the United States; (3) use a finding aid to determine what box a particular numbered letter is in; and (4) request that box at one of the specific National Archives pull times. Many letters are missing from their assigned boxes, others may be irrelevant, and only 10–15 boxes may be requested for an individual pull. Researching documents in this manner requires a significant expenditure of time, and therefore, money.

The M-Opinion specifically references "the education of Indian children at BIA schools," as a category of documents that can be used to demonstrate that a tribe was "under Federal jurisdiction" prior to 1934. Finding these documents, however, is even more time consuming than the process described above. Records for Indian children are typically organized by the child's last name, not by his or her tribal affiliation. Therefore, genealogies or tribal membership lists are often needed to identify potentially relevant records. And since Indian children were sent to boarding schools throughout the country, a researcher may need to visit document collections in more than three different locations.

Even more distressing, after expending all of these resources, a tribe may gather this documentation only to be told that it is inadequate. The Mashpee Wampanoag Tribe find themselves in just such a position. On March 20, 2013, Solicitor Tompkins wrote Mashpee Wampanoag Tribal Chairman Cedric Cromwell, to inform him about the status of the tribe's pending fee-to-trust application. Tompkins noted that "[t]he majority of *Carcieri* determinations require a comprehensive, fact-intensive analysis that can be time intensive and costly." The Department ultimately decided to forego this determination and take the 321-acre parcel of land into trust for the tribe under a different provision of the IRA, in 2015. But after local residents succeeded in a Federal court lawsuit that required the Department to take another look at its decision, the Mashpee were forced to engage in this "time intensive and costly" process and to collect the kind of information identified in the case law that has developed in case law and in the M-Opinion.

The Mashpee submitted extensive documentation to the Department establishing that the tribe was "under Federal jurisdiction" in 1934. For example, the tribe submitted correspondence, health records, and other school records for a significant number of Mashpee children who attended the Carlisle Indian Industrial School until 1918, when the school closed. Even though the M-Opinion specifically references "the education of Indian students at BIA schools," and even though such evidence has been relied on by several Federal courts in *Carcieri*-related cases, in September 2018, the Department essentially rejected that evidence when it refused to reaffirm the status of the tribe's reservation.

The consequences for the Mashpee Wampanoag Tribe have been extraordinary. They had already broken ground on their tribal casino and apparently owe more than $300 million, yet construction is indefinitely stalled and the tribe has no more access to capital. Without any trust lands, the tribe does not qualify for even the most basic Federal programs. *See, e.g.*, 7 C.F.R. Part 253, 254 (Department of

Agriculture food distribution program only applies to low-income Indians residing on or near a reservation); 25 C.F.R. Part 20 (Federal social service programs including burial assistance, disaster assistance, and adult care assistance) are available only to Indians who reside "on or near reservations"); 25 C.F.R. Part 26 (Indian employment assistance programs are only available to those persons residing on or near Indian reservations). The Tribe has had to layoff employees and its tribal council is working without pay.

What Policy Justifications Support 1934 as the Dividing Line?

As the Mashpee make clear, trust lands are vital. They are the only lands permanently held for the benefit of an Indian tribe. Historically, millions of acres were lost due to the inability of the tribe or tribal members to pay real property taxes or mortgage debts. Charles F. Wilkinson, American Indians, Time and the Law 20 (1987) (noting that prior to the adoption of the IRA, more than 26 million acres of allotted land left Indian hands due to fraud, mortgage foreclosures, and tax sales). While land remains in fee status, state powers of eminent domain could be employed take a right-of-way across that land for pipelines or other projects, potentially destroying cultural and historic resources. Trust land, on the other hand, cannot be taxed, condemned or otherwise alienated without either tribal consent or express congressional authorization. *See e.g.*, 25 C.F.R. § 152.22 (requiring Secretarial approval to convey trust lands); 25 C.F.R. Part 169 (requiring tribal consent and Secretarial approval for rights-of-way across trust lands); *United States v. Rickert*, 188 U.S. 432 (1903) (precluding state taxation of trust property); *The New York Indians*, 72 U.S. 761 (1867) (precluding state taxation and tax forfeiture proceedings against tribal lands); *The Kansas Indians*, 72 U.S. 737 (1867) (same).

Trust lands are also the only lands on which the tribe's sovereign authority is undisputed. Tribes exercise sovereignty over trust lands regardless of whether they are located inside or outside reservation boundaries. *See* 18 U.S.C. § 1151 (defining "Indian country" to include "dependent Indian communities," and allotments still held in trust); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (noting that "dependent Indian communities" includes land that is under Federal superintendence and has been set aside by the Federal Government for the use of a tribe). And while the U.S. Supreme Court has limited tribal sovereignty over non-members on fee land, it has not done so on trust lands. Compare *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (claiming that "[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it," and stating that "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land"), with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribal severance tax on natural resources removed by nonmembers from trust lands), and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that the state could not "restrict an Indian Tribe's regulation of hunting and fishing" on trust lands within its reservation). Permanency and sovereignty authority are, in essence, what makes the land a true homeland for Indian tribes. Trust lands are necessary for both.

The *Carcieri* decision has created two classes of tribes: those that were "under Federal jurisdiction" in 1934, and those that were not. The benefits of the IRA are now unavailable to the latter group. If the latter group did not possess land prior to 2009, when the *Carcieri* decision was handed down, it faces the prospect of never regaining a permanent homeland. Congress never intended this result.

Securing trust lands for Indian tribes was always considered necessary to promote economic security and self-determination, which were the main goals of the IRA. H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). It should not be surprising that the legislative history for the IRA is therefore replete with references to the need to help "landless Indians." *Id*. (stating that the IRA would "make many of the now pauperized, landless Indians self-supporting"); 78 Cong. Rec. 11,370 (1934) (statement of Representative Howard, one of the bill's co-sponsors, stating Section 5 of the IRA would "provide land for Indians who have no land or insufficient land"); 78 Cong. Rec. 11,726 (1934) (noting that the IRA would authorize "the purchase of additional lands for landless Indians"). In fact, there are so many references to "landless Indians" that some have argued—incorrectly—that the IRA's land provisions were only designed to help such tribes and tribal members. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) ("Although the legislative history [of the IRA] frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians"); *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 289–90 (2004) (noting that Indians need not be landless for the Secretary to acquire land for them under

Section 5 of the IRA). Ironically, the IRA is now being read to *preclude* most landless tribes from acquiring any trust lands.

Subsequent Congresses did not intend this result either. In nearly every individual tribal recognition statute passed since the 1970s, Congress provided that the newly recognized or re-recognized tribe was permitted to utilize all of the rights and benefits provided by the IRA, including the right to have the Secretary acquire lands in trust for the tribe.[5] Additionally, in 1994, Congress enacted amendments to the IRA that explicitly prohibited any Federal agency from promulgating a regulation or making a decision "that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes." 25 U.S.C. §476(f) & (g). These amendments were passed in direct reaction to informal policies of the Bureau of Indian Affairs, which had begun classifying tribes into "created" and "historic" tribes, limiting the benefits available to former. Senator Inouye, who co-sponsored the legislation, told Congress that:

> The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes. . . . [I]t 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 . . ., we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.

140 Cong. Rec. S6147, 1994 WL 196882 (May 19, 1994).

The language and intent of the 1994 List Act is contrary to the Court's decision in *Carcieri*, which now requires the Department to distinguish between tribes that were "under Federal jurisdiction" in 1934, and those that were not. The practical distinction, however, ends up being different. It is not the date of tribal acknowledgment, but rather, the manner in which an Indian tribe became acknowledged that is crucial. As noted above, tribes that were recognized by Congress are generally insulated from the impacts of *Carcieri* through express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Indeed, many tribal acknowledgment bills passed by Congress include more favorable fee-to-trust provisions, which eliminate the Secretary's discretion and instead mandate that certain lands (either determined by quantity, location, or both) be taken into trust for the tribe. This demonstrates that Congress has always understood the vital importance of trust lands to tribal sovereignty.

The only tribes faced with the inability of the Federal Government to take any land into trust for their benefit are a subset of those tribes recognized through the Office of Federal Acknowledgment ("OFA"). Drawing a distinction between congressionally recognized and OFA-recognized tribes to the detriment of the latter group,

---

[5] *See, e.g.*, Tonto Apache Tribe of Arizona, P.L. 92–470 (Oct. 6, 1972) ("The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934 . . . and shall be subject to all of the provisions thereof"); Pasqua Yaqui of Arizona, P.L. 95–375 (Sept. 18,1978) ("The provisions of the Act of June 18, 1934 . . . are extended to such members described in subsection (a) of this section"); Cedar City Band of Paiutes in Utah, P.L. 96–227 (Apr. 3, 1980) ("The provisions of the Act of June 18, 1934 . . . except as inconsistent with the specific provisions of this Act, are made applicable to the tribe and the members of the tribe."); Ysleta Del Sur Pueblo of Texas, P.L. 100–89 (Aug. 18, 1987) ("The Act of June 18, 1934 (28 Stat. 984) as amended . . . shall apply to members of the tribe, the tribe, and the reservation"); Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100–420 (Sept. 8, 1988) ("The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, Indian tribes, or Indian reservations which are not inconsistent with this Act shall apply to the members of the Band, and the reservation"); Yurok Tribe of California, P.L. 100–580 (Oct. 31, 1988) ("The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe"); Pokagon Band of Potawatomi Indians of Michigan, P.L. 103–323 (Sept. 21, 1994) ("Except as otherwise provided in this Act, all Federal laws of general application to Indians and Indian tribes, including the Act of June 18, 1934 . . . shall apply with respect to the Band and its members"); Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians, P.L. 103–324 (Sept. 21, 1994) ("All laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians, including the Act of June 18, 1934 . . . which are not inconsistent with any specific provision of this Act shall be applicable to the Bands and their members").

simply makes no sense. These are tribes that have already proven their continuous existence from 1900 to the present through expert reports and primary source documents. Many of them have waited years and expended millions of dollars to obtain acknowledgment as a federally recognized tribe only to find the benefits of that decision illusory.

I urge the members of this Committee to support H.R. 375, which will once again clarify that the benefits of the IRA are available to all federally recognized tribes. Each time the Federal Government takes land into trust, it helps a tribe use the land to build housing, to protect cultural resources, or to pursue economic development necessary to fund tribal governmental operations and services. The Federal Government has an obligation to reverse the impacts of misguided Federal policies that deprived tribes of their lands and resources and sought to stamp out their unique identity. Adopting a clean *Carcieri*-fix would be one step in that direction.

Thank you.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. BISHOP TO COLETTE ROUTEL, PROFESSOR OF LAW, MITCHELL HAMLINE SCHOOL OF LAW

Question 1. In your written statement, you explain that the Solicitor of the Interior in 2013 decided to forgo the usual Carcieri *determination for the Mashpee. Land was later taken in trust for the Mashpee "under a different provision of the IRA . . ." [Written Statement, page 7]. To clarify, is this "different provision of the IRA" the so-called "second definition" of "Indian" in section 19 of that Act? If so, then to the best of your knowledge, has the Department ever acquired land in trust under the IRA for any other tribe under the second definition of "Indian"?*

Answer. *The IRA's second definition of "Indian."*:

In my written testimony previously provided to the Subcommittee, I noted that the Department of the Interior ("Department") initially decided to forego making a *Carcieri* determination for the Mashpee Wampanoag, and instead took land into trust for the tribe "under a different provision of the IRA" in 2015. Ranking Member Bishop asked whether this "different provision" was the second definition of "Indian" in Section 19 of the Indian Reorganization Act ("IRA"), and if so, whether I knew of any instances of the Department previously invoking this definition. The answer to these questions is "yes."

Section 19 of the IRA defines the term "Indian" as follows:

> 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 of more Indian blood . . . .

The italicized portion of this Section is the so-called "second definition," which was used by the Department in its initial decision to take land into trust for the Mashpee. To date, I have not specifically set out to research the historical implementation of this provision. I do, however, know of at least two instances where this provision was used to ensure that tribes had access to the benefits of the IRA: the Saginaw Chippewa Indian Community and the Bay Mills Indian Community.

In 1855, the "Ottawa and Chippewa Indians" and the "Saginaw, Swan Creek and Black River Indians" signed two treaties with the United States that created several reservations for their benefit in the state of Michigan. *See* 1855 Treaty of Detroit, 10 Stat. 591 ("1855 Ottawa and Chippewa Treaty"); Treaty with the Chippewa, 11 Stat. 633 (1855) ("1855 Saginaw Treaty"). Article V of the 1855 Ottawa and Chippewa Treaty provided that "[t]he tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved." Article VI of the 1855 Saginaw Treaty contained nearly identical language. These provisions were included in the treaties at the request of the tribes. Tribal leaders had expressed frustration that the government was negotiating with the Ottawa and Chippewa together, even though they were separate communities. For example, during negotiations for the 1855 Ottawa and Chippewa Treaty, Waw-be-geeg, a Chippewa chief from the Upper Peninsula, indicated his concern several times, noting that "I told you when I first came that I wanted to be separated from the Ottawas and you have not answered me. We have sat here and heard you talk to the Ottawas while you paid no attention to us." George Manypenny, the Commissioner of Indian Affairs,

responded to Waw-be-geeg by stating that the fictious grouping of the Ottawa and Chippewa bands together as one tribe would be dissolved in the treaty: "[t]he very case you suggested is met in the treaty you are separated as you desire. This treaty you and the Ottawas must sign together is because the old treaty of 36 was made in that way, but here we have followed your suggestion and provide . . . that no general council shall be called" in the future. *United States v. Michigan*, 471 F.Supp. 192, 247–48 (W.D. Mich. 1979) (recounting the history of Article V of the 1855 Treaty, including excerpts from the original treaty journal, and concluding that Article V was not meant to terminate the government-to-government relationship with the Michigan Ottawa and Chippewa bands).

Years after the 1855 Treaties were ratified, Federal officials who had not been present for the negotiations misread Articles V & VI, and incorrectly concluded that they had ended the Federal-tribal relationship with the Ottawa and Chippewa bands in Michigan. As a result, by the end of the 19th century, the Federal Government had abdicated its responsibilities to the bands and repeatedly stated that they were no longer wards of the government subject to Federal jurisdiction. *E.g., Grand Traverse Band v. Office of U.S. Att'y*, 369 F.3d 960, 961–62 n.2 (6th Cir. 2004) (describing the Federal Government's misinterpretation of Article V of the 1855 Ottawa and Chippewa Treaty, and its decision to cease recognizing the signatory tribes).

When the IRA was enacted in 1934, the Department had to determine whether it would enable these Michigan Indian tribes to access its benefits. In 1934, the Department still clung to the position that these tribes had been "dissolved" and were no longer "under Federal jurisdiction." The Department originally expressed interest in purchasing land and taking that land into trust for half-bloods (i.e., the third definition of Indian in the IRA). Ultimately, however, the Department never followed through on this approach even while it did so for tribes in neighboring states, such as the St. Croix Band of Chippewa Indians. 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, 724–25 (decision recognizing St. Croix as half-blood community). Instead, the Department encouraged the Saginaw Chippewa Indian Community and Bay Mills Indian Community to organize under the IRA's second definition of "Indian." The Department acknowledged that both Saginaw and Bay Mills maintained reservations pursuant to the 1855 Treaty, and therefore, the descendants of persons who were members of those two bands prior to their dissolution could organize under the IRA if they were residing on those reservations. Once the bands were organized, they could adopt constitutional membership criteria that included persons who lived off-reservation.

By way of example, I am attaching one of the letters articulating this process for the Saginaw Chippewa Indian Community. In July 1936, Assistant Commissioner of Indian Affairs, William Zimmerman, wrote to the Saginaw Chippewa and indicated that "[a]lthough historically your group composed the Saginaw, Swan Creek, and Black River Bands, Article 6 of the treaty of August 2, 1855, 11 Stat. 633, made with those bands, dissolved their tribal organization." Because (according to the Federal Government's misreading of the treaty) the tribe no longer existed, Zimmerman noted that they should organize under the second definition of "Indian" in the IRA: "[y]our group also comes within the term "Indian" as defined in section 19 of the Reorganization Act in view of the fact that your group is composed of descendants of members of a recognized tribe, residing on June 1, 1934, within the boundaries of an Indian reservation." Zimmerman to Chairman, July 31, 1936, CCF 9060-A-1936, Tomah 068. Zimmerman did not believe that the Saginaw Chippewa needed to establish that they were "under Federal jurisdiction" as of June 1934; indeed, under his misinterpretation of the 1855 Treaty, he was saying that the tribe was not under Federal jurisdiction as of that date.

The Department made a similar determination for the Bay Mills Indian Community. *See, e.g.*, Amicus Brief of Historians, *Carcieri v. Salazar*, at 17–18 (noting that in 1934, Federal officials believed "that the Bay Mills Indians were no longer 'wards of the government'" and that "Commissioner Collier suggested, and the Bay Mills community agreed, that they should organize as 'Indians residing on one reservation'"); Charles E. Cleland, *The Place of the Pike (Gnoozhekaaning): A History of the Bay Mills Indian Community* 67–73 (2001) (recounting Commissioner Collier's decision, in May 1936, to allow Bay Mills to organize under the IRA's second definition of "Indian"). The Federal Government then purchased approximately 1,000 acres of land within or adjacent to Bay Mills' existing reservation and took that land into trust for the benefit of the tribe. Cleland, *supra*, at 70–71.

Unfortunately, the Department did not permit many other Michigan Ottawa and Chippewa bands to organize, and those tribes had to wait many years for Congress or the Office of Federal Acknowledgment ("OFA") to reaffirm their existence. The Grand River Band of Ottawa and Chippewa Indians was the first tribe

acknowledged by OFA. Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indian Tribe, 45 Fed. Reg. 19,321 (1980).[1] The Little Traverse Bay Bands of Odawa Indians and the Little River Band were recognized through congressional legislation. Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians, P.L. 103–324, 108 Stat. 2156 (Sept. 21, 1994). And the Grand River Band is still seeking Federal acknowledgment; the OFA has promised to issue its decision with respect to the Band by April 23, 2019. *See* Letter from Director, OFA to Chairman, Grand River Band (Mar. 21, 2019), available at https://www.bia.gov/sites/bia.gov/files/assets/asia/ofa/petition/146_grrvbd_MI/146_pf_ext_2019_04.pdf.

There are undoubtedly more examples of tribes that organized or otherwise received certain benefits of the IRA under the second definition of "Indian." These two decisions, however, demonstrate that the Department's decision to take land into trust for the Mashpee in 2015 under the IRA's second definition of "Indian" was consistent with its prior rulings. Like the Grand Traverse Band and other Michigan Indian tribes, in 1934, the Department could have extended the benefits of the IRA to the Mashpee using *any* of the IRA definitions of "Indian,"[2] and it was only Federal mistake and/or neglect that prevented the Mashpee from accessing these benefits. That mistake should not continue to have the force of law.

Question 2. Your written testimony goes into some detail regarding the intent of the 73rd Congress (particularly the intent of Senator Burton Wheeler, Chairman of the Senate Indian Affairs Committee) in its enactment the IRA. According to your testimony, Senator Wheeler was an assimilationist. Did the other members of the House and Senate Indian Affairs Committees share or oppose Senator Burton's policy views in this respect? Are the views of these other Members important in an analysis of the intent of the 73rd Congress in its enactment of the IRA?

Answer. *Views of Congress in enacting the IRA*:

My prior testimony highlighted Senator Wheeler's views because the statutory language interpreted in *Carcieri* was added in direct response to the concerns he expressed in a series of committee hearings. Additionally, it seemed important that even Senator Wheeler, who held pro-assimilationist views that "were extreme even for [his] time," would not have supported the constrained interpretation of Section 19 of the IRA that the Court reached in *Carcieri*.[3] Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act 241* (2000).

In adopting its interpretation of the IRA, the *Carcieri* Court claimed that the word "now" meant "at the time of enactment." But the word "now" could just have easily referred to "at the time the statute is applied," as it does in numerous other

---

[1] Justice Breyer noted in his concurring opinion in *Carcieri* that tribes such as the Grand Traverse Band were likely "under Federal jurisdiction" in 1934, even though the Federal Government mistakenly believed they were not. *Carcieri v. Salazar*, 555 U.S. 379, 397–99 (2009) (Breyer J., concurring). More recently, the Interior Board of Indian Appeals affirmed the ability of the Department to take land into trust for the Grand Traverse Band, concluding that the Band did satisfy the first definition of "Indian" in Section 19 of the IRA. *Grand Traverse County Bd. of Comm'rs v. Acting Midwest Reg'l Dir.*, 61 IBIA 273 (2015).

[2] The Mashpee had several members in 1934 that were of one-half or more Indian blood, and therefore, the Department could have also invoked the third definition of Indian to enable the tribe to organize under the IRA, as it did for the St. Croix Band.

[3] Senator Wheeler was, in fact, a strong supporter of the IRA as adopted. When he presented the bill for a vote before the entire Senate, he stated: "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians. I, myself, thinking that this bill, as now presented, is the greatest step forward the Department has ever taken with reference to Indians." 73 Cong. Rec. 11,123 (1934). Senator Wheeler specifically noted that the acquisition of lands was one of the main purposes of the IRA, and that the Department had the authority to acquire new trust lands for both Indian tribes and for individual Indians. *Id.* at 11,123, 11,126 (noting that "[t]he second purpose is to provide for the acquisition, through purchase, of land for Indians now landless who are anxious and fitted to make a living on such land," and, in response to questions from a fellow Senator, stating that Section 5 applied "not [just] for Indian tribes, but for both tribes and individual Indians").

Scholars have noted that Senator Wheeler's original resistance to the IRA was due to many non-substantive factors in addition to his pro-assimilationist views. The first bill was drafted without congressional input, and it was lengthy (in excess of 50 pages) and poorly written. Senator Wheeler did not get along with Commissioner Collier. And finally, Senator Wheeler was initially not convinced that President Roosevelt supported the bill. When the bill was shortened and revised, with Senator Wheeler's input, and when President Roosevelt expressed his strong support for the bill, Wheeler became a strong advocate for its passage. Rusco, *supra* at 232–26, 240–41.

statutes. *See, e.g.*, Comment to Uniform Child Custody Jurisdiction Act, § 14(a)(1) (explaining that the word "now" in the phrase "does not now have jurisdiction," means "at the time of the petition," and not when the statute was enacted). If Congress wanted to limit the phrase "now under Federal jurisdiction" to the date of enactment of the IRA, it could have done so easily by referencing a particular date. After all, the second definition of Indian in Section 19 refers to "descendants of such members who were, *on June 1, 1934*, residing within the present boundaries of any reservation."

Typically, when there is ambiguity in a statute, courts defer to the reasonable interpretation of the executive branch agency charged with implementing that statute, particularly if that interpretation is memorialized in regulations promulgated through notice-and-comment rulemaking. *See, e.g., Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Yet in *Carcieri*, the Court ignored the Department's land-into-trust regulations, which had been in place for more than 25 years and extended the benefits of the IRA to all federally recognized tribes. 25 C.F.R. §§ 151.2(b), (c)(1) (2009). The Court also ignored the Indian canons of construction, which state that "statutes are to be construed liberally in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

Nothing in the legislative history of the IRA clarifies this ambiguity in a way that would support the Court's decision in *Carcieri*. In terms of legislative history, the most probative evidence of congressional intent can be found in the official House and Senate Reports. *See*, S. Rep. No. 73–1080 (1934) ("Senate Report"); H.R. Rep. No. 73–1804 (1934) ("House Report"); H.R. Rep. No. 73–2049 (1934) ("Conf. Rep."). These reports indicate that Section 5, which authorizes the Department to take land into trust for Indian tribes, was supposed to be construed broadly. The Senate Report, for example, notes that the bill was designed "to conserve and develop Indian lands and resources," because "the land holdings of the Indians have steadily dwindled and a considerable number of Indians have become entirely landless." Senate Report at 1. Section 5 was intended "[t]o meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support." *Id*. at 2. Section 7 of the bill also authorized the Secretary of the Interior "to proclaim new Indian reservations on the lands acquired, pursuant to section 5 of the bill." *Id*. There is no discussion in the Senate Report of the meaning of Section 19, which defines the terms "Indian" and "tribe." *See id.* at 3.

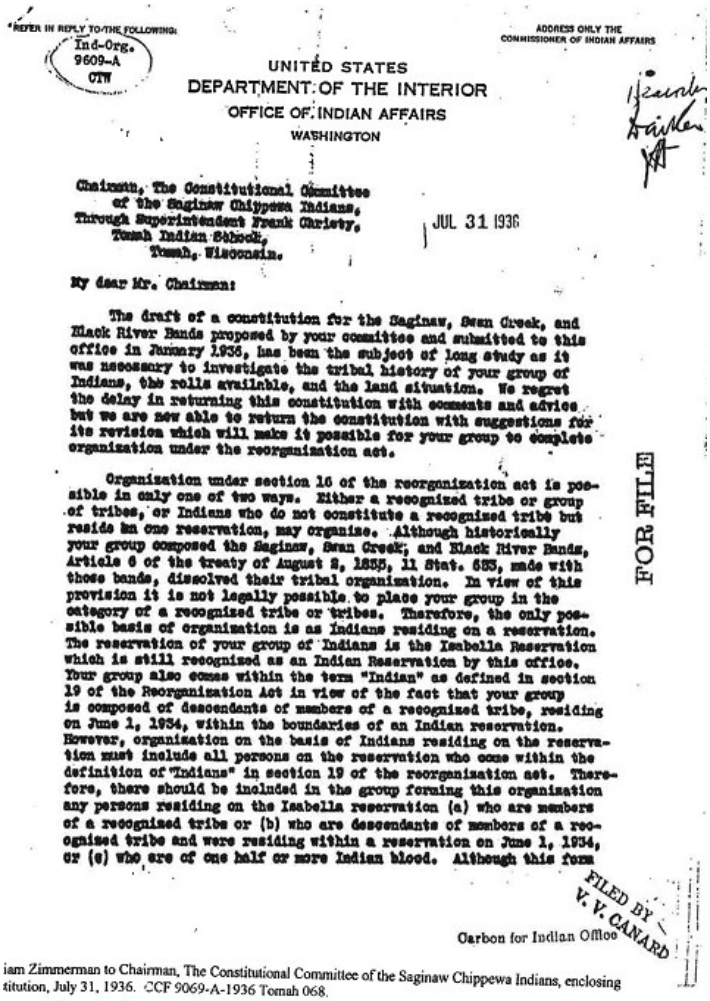
The House report contains similar language. It states the purpose of the IRA: "broadly, the measure proposes to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." House Report at 6. The Act should "make many of the now pauperized, landless Indians self-supporting, [because] it authorizes a long-term program of purchasing land for them." *Id*. Nothing in the House Report explains the definitions of "Indian" or "tribe," and nothing indicates Congress' intention to limit the provision of the Act to those who were "under Federal jurisdiction" in 1934. *See id.* at 7.

The IRA received strong support in Congress. In the Senate, it passed by a voice vote. In the House, it passed by a vote of 258 to 88. Some votes in favor of the Act came from individuals who maintained a pro-assimilationist philosophy and there is no indication that they intended to limit to the benefits of the IRA to only those tribes that Federal officials arbitrarily determined were "under Federal jurisdiction" in 1934. Even if such a sentiment could be found, the Supreme Court has previously insisted that courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan*, 426 U.S. at 388 n.14.

The Supreme Court unfairly limited the application of this historic statute in *Carcieri v. Salazar*. This decision was wrong. Creating a dividing line based on whether a tribe was or was not "under Federal jurisdiction" in 1934, is not supported by any modem policy justifications. I hope that Congress will rectify this injustice, both for Mashpee and for other Indian tribes.

*****

ATTACHMENT



REFER IN REPLY TO THE FOLLOWING:
Ind-Org.
9609-A
CTW

ADDRESS ONLY THE COMMISSIONER OF INDIAN AFFAIRS

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Chairman, The Constitutional Committee
of the Saginaw Chippewa Indians,
Through Superintendent Frank Christy,
Tomah Indian School,
Tomah, Wisconsin.

JUL 31 1936

My dear Mr. Chairman:

The draft of a constitution for the Saginaw, Swan Creek, and Black River Bands proposed by your committee and submitted to this office in January 1936, has been the subject of long study as it was necessary to investigate the tribal history of your group of Indians, the rolls available, and the land situation. We regret the delay in returning this constitution with comments and advice but we are now able to return the constitution with suggestions for its revision which will make it possible for your group to complete organization under the reorganization act.

Organization under section 16 of the reorganization act is possible in only one of two ways. Either a recognized tribe or group of tribes, or Indians who do not constitute a recognized tribe but reside on one reservation, may organize. Although historically your group composed the Saginaw, Swan Creek, and Black River Bands, Article 6 of the treaty of August 2, 1855, 11 Stat. 633, made with those bands, dissolved their tribal organization. In view of this provision it is not legally possible to place your group in the category of a recognized tribe or tribes. Therefore, the only possible basis of organization is as Indians residing on a reservation. The reservation of your group of Indians is the Isabella Reservation which is still recognized as an Indian Reservation by this office. Your group also comes within the term "Indian" as defined in section 19 of the Reorganization Act in view of the fact that your group is composed of descendants of members of a recognized tribe, residing on June 1, 1934, within the boundaries of an Indian reservation. However, organization on the basis of Indians residing on the reservation must include all persons on the reservation who come within the definition of "Indians" in section 19 of the reorganization act. Therefore, there should be included in the group forming this organization any persons residing on the Isabella reservation (a) who are members of a recognized tribe or (b) who are descendants of members of a recognized tribe and were residing within a reservation on June 1, 1934, or (c) who are of one half or more Indian blood. Although this form

FOR FILE

FILED BY
V. V. CANARD

Carbon for Indian Office

iam Zimmerman to Chairman, The Constitutional Committee of the Saginaw Chippewa Indians, enclosing
titution, July 31, 1936. CCF 9069-A-1936 Tomah 068.

of organization would not initially include descendants of members of the Saginaw, Swan Creek and Black River Bands outside the reservation, after the organization is formed the organized group can adopt the Indians in the various districts outside the reservation which your group now wishes to include in the organization. In view of the foregoing legal requirements the provisions of the constitution should be revised along the lines described below.

1. In the preamble it is suggested the words "We, the members of the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians of the State of Michigan" be rephrased to read "We, the Indians residing on the Isabella Reservation in the State of Michigan." This change would make it clear that the persons organizing under this constitution are all the Indians residing on the Isabella Reservation. The various persons who can be considered "Indians" for the purpose of this organization can then be set forth in the second sentence of Article I as follows: "Said organization is to be composed of the descendants of members of the Saginaw, Swan Creek and Black River Bands of Chippewa Indians residing on the Isabella Reservation on June 1, 1934, and at the time of the adoption of this constitution, and all other persons recognized as Indians under section 19 of the Act of June 18, 1934 (48 Stat. 984), who are residing on Isabella Reservation at the time of the adoption of this constitution."

2. In Article I it is provided that the name of the organization shall be "The Saginaw Chippewa Indians of Michigan." It is suggested that in the name there be included some such word as "tribe" or "organization" in order to provide a general term which can be used to refer to the organized group throughout the constitution. A group of Indians organized under the reorganization act can call themselves a tribe even though they were not previously a recognized tribe.

3. The Isabella Reservation was established by the treaty of October 18, 1864, 14 Stat. 657. Therefore, the reference to the Executive order of 1855 and the treaty of August 2, 1855, should be omitted in Article II. The reference to the restricted lands in the Bay City, Caro, and Oscoda Districts should be eliminated from the definition of the Territory. It will not be legally possible for this organization to extend its jurisdiction to lands outside the reservation even though they should be restricted lands belonging to members of the organization unless such lands should be transferred to the tribe.

4. In Article III on membership there is a reference to a pay roll of 1867 as the basis of membership in the organization. However, this pay roll is not now available in the Indian Office and, in any event, later rolls have been found which can be used if necessary to assist in determining the Indians entitled to reside on the Isabella Reservation. These are the rolls approved November 10, 1885, November 13, 1885, and November 7, 1891, giving the names of Indians who received land allotments within the Isabella Reservation. There are no up-to-date census rolls of your group.

It is suggested that the above allotment rolls be used as the basis of membership. If this is satisfactory, section 1(a) of Article III should read as follows: "All persons whose names appear on any or all of the allotment rolls of November 10, 1883, November 13, 1885, and November 10, 1891, their descendants and all other persons entitled to reside on the Isabella Reservation, provided that no person may be a member of the tribe unless he is a resident of the reservation at the time of the adoption of this Constitution and By-laws." The revised roll prepared by the Tribal Council under Section 2 of Article XII should be made subject to the approval of the Secretary of the Interior.

Section 1(b) of Article III limits the membership of children born in the future to children of one-quarter degree of blood born within the territory of the organization. It is not necessary that the child be actually born upon the reservation if one of his parents is a resident of the reservation at the time of his birth. Furthermore, if the parents of the child are such residents at the time of his birth, the Department does not insist upon a requirement of one-quarter degree of Indian blood, though this requirement may be included if the committee desires. It is suggested that the wording be revised to read "All future-born children of at least one-quarter degree Indian blood born to any member who is a resident of the reservation at the time of the birth of said children."

5. In Section 2 of Article III the Tribal Council is given power to promulgate ordinances subject to review covering the adoption of new members. Under this provision the Tribal Council may make ordinances dealing with the adoption of the descendants of the members of the Saginaw, Swan Creek, and Black River Bands who are now residing in the Bay City, Saro, and Oscoda Districts in Michigan. However, if your committee prefers, a provision may be drafted to be placed in the constitution to provide for a method of adopting those Indians.

6. In view of the fact that the Indians outside the reservation will not be members of the organization at the time it is formed, it is suggested that section 2 of Article IV, dealing with the election of representatives from the various districts, be revised. It might be provided that the entire council shall be elected from within the reservation until such time as a certain number outside the reservation have become members of the organization and then each designated number of members such as 50 or 100 would be entitled to elect one head man as a representative upon the council. It should also be determined and stated in the constitution whether the reservation itself is to be districted, and whether all the members of the organization vote for each member of the council or whether only those in definite districts vote for a definite number of head men from their district.

7. Since the work of the Tribal Council may greatly increase, it is suggested that in section 8 of Article IV it be provided that regular meetings may be held at such other periods as the Tribal Council may determine.

Carbon for Indian Office

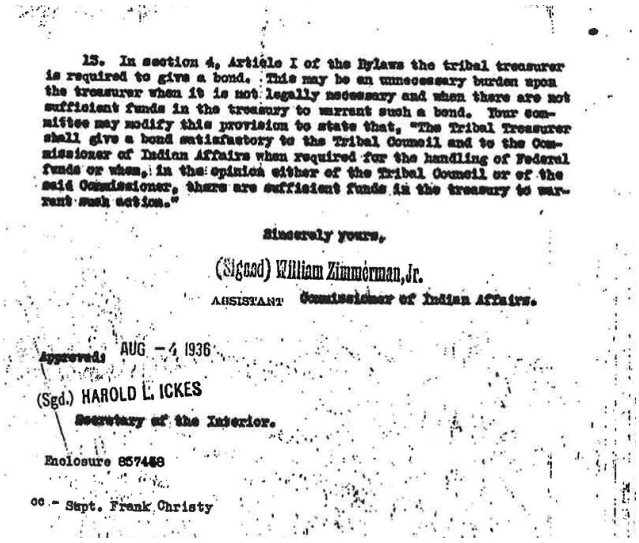
8. In section 10 of Article IV and in various other places throughout the constitution, reference is made to the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians where the meaning is not the old bands but the new organization. It is suggested that these references be changed to refer to the Saginaw Chippewa Indian Tribe.

9. It is stated in the letter of Superintendent Christy, dated January 16, 1936, that no provision has been made in the constitution for law and order because of the scattered location of the Indians. This is a proper omission in view of the circumstances, but, attention is called to the fact that in Article VI, section 1(f) there is a provision giving the Tribal Council power to promulgate and enforce ordinances, subject to review by the Secretary of the Interior, governing conduct of members of the organization. This power is in effect a power over law and order and, if this was not intended, the purpose of the provision should be made more definite.

10. In section 1(g) of Article VI the Tribal Council is given power to levy taxes on its members. This power is one which belongs to an historical tribe which has retained its tribal character and therefore its sovereignty over its own members. There is no authority in the Indian Reorganization Act to confer the power to levy taxes upon an organization of a group of Indians residing on a reservation. However, the Tribal Council can be given power to levy taxes or assessments for the use of property and facilities which belong to the organization.

11. In section 3 of Article VI of the constitution and in Article III of the Bylaws the reference to the group organizing under this constitution should be changed to accord with the change suggested in the preamble.

12. Section 5 of Article VI provides for the filling of vacancies in the Tribal Council in the case of removal from office. However, no provision is made in the constitution for the removal from office of a tribal council member. It should be possible under the constitution to remove a tribal councilman when he has been guilty of some misconduct or when the people as a whole are not satisfied with his work. Accordingly, your committee can provide for two types of removal. One is removal from office by the Tribal Council of an officer charged with improper conduct or gross neglect of duty after notice to the accused officer and opportunity for him to answer the charges. The committee may also provide that upon the petition of a certain number of members in the organization the Tribal Council shall call an election at which it shall be determined whether the designated officer shall be recalled from office.



13. In section 4, Article I of the Bylaws the tribal treasurer is required to give a bond. This may be an unnecessary burden upon the treasurer when it is not legally necessary and when there are not sufficient funds in the treasury to warrant such a bond. Your committee may modify this provision to state that, "The Tribal Treasurer shall give a bond satisfactory to the Tribal Council and to the Commissioner of Indian Affairs when required for the handling of Federal funds or when, in the opinion either of the Tribal Council or of the said Commissioner, there are sufficient funds in the treasury to warrant such action."

Sincerely yours,

(Signed) William Zimmerman, Jr.

ASSISTANT Commissioner of Indian Affairs.

Approved: AUG – 4 1936

(Sgd.) HAROLD L. ICKES

Secretary of the Interior.

Enclosure 857488

cc - Supt. Frank Christy

Mr. GALLEGO. Thank you, Ms. Routel. The Chairman now recognizes Ms. Richards to testify.

STATEMENT OF CLAIRE RICHARDS, EXECUTIVE COUNSEL TO THE GOVERNOR, STATE OF RHODE ISLAND, PROVIDENCE, RHODE ISLAND

Ms. RICHARDS. Good afternoon, Chairman Gallego, Ranking Member Cook, and distinguished members of the Subcommittee. Thank you for giving me the opportunity to speak in opposition to H.R. 312, the Mashpee Wampanoag Reservation Reaffirmation Act, and to talk a little bit about the Act's potential effect on Rhode Island. My name is Claire Richards. I'm Executive Counsel to Governor Gina Raimondo, the governor of Rhode Island. I have served as legal counsel for four governors; two were Republicans, one was an Independent, and Governor Raimondo is a Democrat. My 22-year tenure has included 10 years of litigation involving the Indian Reorganization Act resulting in the Supreme Court's decision in *Carcieri v. Salazar*. In my capacity as Governor's Counsel, I regularly deal with complex legal questions surrounding the allocation of sovereignty between the state, the United States, and Indian tribes.

Congress enacted the IRA to authorize the Secretary of the Interior to take land in trust for Indians. By its express terms, however, the IRA authorizes such fee-to-trust conversion only for those Indian tribes under Federal jurisdiction as of 1934.

In 2015, the Secretary took land into trust for the Mashpee to operate a resort casino in Taunton, Massachusetts, even though the Mashpee were not under Federal jurisdiction as of 1934. The Secretary's decision violated the IRA and was an effort to sidestep *Carcieri*. It was quickly struck down by a Massachusetts Federal court in a case called *Littlefield v. the Department of the Interior.*

Littlefield held that the Secretary's decision to take the Taunton land in trust was wrong based on the plain language of the IRA. Responding to the Secretary's argument that certain provisions of the IRA were ambiguous and therefore permitted her to convert the Taunton land to trust, the Court replied "with respect, this is not a close call: to find ambiguity here would be to find it everywhere."

The Mashpee Act resurrects and summarily affirms this erroneous interpretation of the IRA. In so doing, it undermines the established statutory scheme for acquiring trust lands for Indians, as well as the Supreme Court's decision in *Carcieri*. It nullifies *Littlefield* and upends the current view of the Department of the Interior itself. All conclude that the Secretary is not authorized to take land into trust for the Mashpee or any other tribe that was not under Federal jurisdiction in 1934.

The Act, and the faulty rationale upon which it premised, will open the door to other fee-to-trust conversions in states like Rhode Island whose tribes are also excluded from the trust provisions of the IRA. Federally recognized tribes in these states will argue that they stand in no different position from the Mashpee and that the Secretary's discredited rationale should apply to them as well.

Federal trust acquisitions can have serious consequences for states. They strip states of their jurisdiction over land, they encourage tax free and tax advantage sales on trust property, and they give rise to complex jurisdictional checkerboarding issues. And the acquisition of land in trust is often a necessary precondition to the establishment of a Federal Indian casino.

Rhode Island would be particularly hard hit by such acquisitions, whether within the state or, as here, less than 15 miles from its border. As one example, Rhode Island's Constitution gives the state exclusive authority to operate casinos within its borders. Rhode Island operates two casinos and uses its over $300 million a year in annual gaming revenues to fund education, infrastructure, and social programs for its citizens. An Indian casino in Rhode Island's gaming catchment area poses a serious threat to those revenues. Rhode Island has experienced similar threats to revenue from the sale of tax-free tobacco products on Indian trust lands.

Because of their effect on surrounding jurisdictions, trust acquisitions should strictly conform to the plain language of, and the limitations set forth in, the IRA. They should follow an orderly and established vetting process which includes consideration of the impact on neighboring jurisdictions. They should not be based on a firmly discredited legal rationale to which even the current Secretary of the Interior does not adhere.

Thank you for allowing me this opportunity to raise the Governor's concerns on this important issue and to urge the Subcommittee not to pass H.R. 312. I would be happy to answer any questions.

[The prepared statement of Ms. Richards follows:]

PREPARED STATEMENT OF CLAIRE RICHARDS, EXECUTIVE COUNSEL TO GINA M. RAIMONDO, GOVERNOR OF RHODE ISLAND ON H.R. 312

Good afternoon Chairman Gallego and members of the Subcommittee. Thank you for giving me the opportunity to speak in opposition to H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (the Act) and to talk about the Act's potential effect on Rhode Island.

I am Claire Richards, Executive Counsel to Gina Raimondo, Governor of Rhode Island. I have served as legal counsel to four Rhode Island governors; two were Republicans, one was an Independent, and Governor Raimondo is a Democrat. My 22-year tenure has included 10 years of litigation involving the Indian Reorganization Act of 1934 (the IRA) resulting in the Supreme Court's decision in *Carcieri v. Salazar*. In my capacity as Governor's Counsel, I regularly deal with complex legal questions surrounding the allocation of sovereignty between the state, the United States and Indian tribes.

Congress enacted the IRA to authorize the Secretary of the Interior to take land in trust for Indians. 25 U.S.C. § 5108. By its express terms, however, the IRA authorizes such fee-to-trust acquisitions only for those Indian tribes under Federal jurisdiction as of 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

In 2015, the Secretary took land into trust for the Mashpee to operate a resort casino in Taunton, Massachusetts, even though the Mashpee were not under Federal jurisdiction as of 1934. The Secretary's decision violated the IRA and was an effort to sidestep *Carcieri*; it was quickly struck down by a Massachusetts Federal court in *Littlefield v. U.S. Dep't of the Interior*, 199 F.Supp. 3d 391 (D. Mass. 2016), *appeal pending*, No. 16–2481 (1st Cir. 2016). *Littlefield* held that the Secretary's decision to take the Taunton land in trust was wrong based on the plain language of the IRA. Responding to the Secretary's argument that certain provisions of the IRA were ambiguous and therefore permitted her to convert the Taunton land to trust, the Court replied: "[w]ith respect, this is not a close call: to find ambiguity here would be to find it everywhere." *Id*. at 396.

The Act resurrects and summarily affirms this erroneous interpretation of the IRA. In so doing, it undermines the established statutory scheme for acquiring trust lands for Indians, as well as the Supreme Court's decision in *Carcieri*. It nullifies *Littlefield* and upends the current view of the Department of the Interior itself.[1] All conclude that the Secretary is not authorized to take land into trust for the Mashpee or any other tribe that was not under Federal jurisdiction as of 1934.

The Act—and the faulty rationale upon which it is premised—will open the door to other fee-to-trust conversions in states, like Rhode Island, whose tribes are also excluded from the trust provisions of the IRA. Federally recognized tribes in these states will argue that they stand in no different position from the Mashpee and that the Secretary's discredited rationale should apply to them as well.

Federal trust acquisitions can have serious consequences for states. They strip states of their jurisdiction over land, they encourage tax free and tax-advantaged sales on trust property and they give rise to complex jurisdictional "checkerboarding" problems. And, the acquisition of land in trust is often a necessary precondition to the establishment of a Federal Indian casino.

Rhode Island would be particularly hard hit by such acquisitions, whether within the state or, as here, less than 15 miles from its border. As one example, Rhode Island's Constitution gives the state exclusive authority to operate casinos within its borders. Rhode Island operates two casinos and uses its over $300 million in annual gaming revenues to fund education, infrastructure and social programs for its citizens. An Indian casino in Rhode Island's gaming catchment area poses a serious threat to the state's gaming revenue. Rhode Island has experienced similar threats to revenue from the sale of tax free tobacco products on Indian trust lands.

Because of their effect on surrounding jurisdictions, trust acquisitions should strictly conform to the plain language of, and limitations set forth in, the IRA. They should follow an orderly and established vetting process which includes consideration of the impact on neighboring states. They should not be based on a firmly discredited legal rationale to which even the current Secretary of the Interior does not adhere.

Thank you again for allowing me this opportunity to raise the Governor's concerns on this important issue and to urge the Subcommittee not to pass the H.R. 312. I would be happy to answer any questions.

---

[1] In June 2017, the Department shared a draft revised decision with the Mashpee and the citizens who brought the *Littlefield* action denying the Tribe's land-in-trust request.

Mr. GALLEGO. I thank the expert witnesses for their powerful testimony, reminding the Members that Committee Rule 3(d) puts a 5-minute limit on questions. The Chairman will now recognize Members for any questions they wish to ask the witnesses. I will start by recognizing myself for 5 minutes.

This question is for the Honorable Jessie Little Doe Baird. From your testimony, you seem to have a lot of local support for your tribe and your economic development initiative. What local support do you have and why is there opposition from the state of Rhode Island, although I think I just plainly heard the answer, and does your tribe's bill affect the jurisdiction of Rhode Island in any way?

Ms. BAIRD. Thank you. I think the reason that we have opposition from the state of Rhode Island we have just heard, fully a third of their state revenue is generated from their casinos, the state casinos, and our legislation has absolutely no impact on the state of Rhode Island in terms of jurisdiction taxes or anything else. We do have full support from our local legislature, the city of Taunton, the town of Mashpee, Chambers of Commerce, and I think it is pretty clear that the reason the state of Rhode Island opposes our bill is because it wants to protect its current monopoly on the gaming industry in southern New England. It has been successful in using the courts to crush the Narragansett Tribe and it now is attempting to use Congress to do the same to Mashpee.

Mr. GALLEGO. Thank you. Mr. Washburn, in your testimony, you mentioned the Patchak Patch, an administrative policy that eliminated the 30-day waiting period for implementation of land-into-trust decisions. Although trust decisions can be challenged through administrative or judicial litigation, this policy allowed the land to stay in trust pending the outcome.

What are the legal ramifications of not having this policy in place during the land-into-trust process? And do you know if the Trump administration has been receptive to implementing a similar policy?

Mr. WASHBURN. Thank you, Mr. Chairman. We instituted the Patchak Patch, so called, during the Obama administration basically so that land would go into trust immediately rather than waiting for 30 days. The reason the Federal Government originally waited for 30 days was to give people time to challenge that and bring litigation if they wanted to do so. What we learned was that it was really a delay tactic. People would challenge it and litigation would go on for years and years and that was just for purposes of delay. Ultimately, the United States would win that litigation, but meanwhile the land would not have been in trust for as many years as litigation went on. So, the Patchak Patch was a way to say, we are going to take the land into trust immediately and if there is any litigation, it can happen while the land is already in trust.

My sense is that the Trump administration is revisiting the approach that the Obama administration used, and they have been trying to do consultations and have discussions around changing the land-into-trust rules to make them less favorable for tribes. Thank you.

Mr. GALLEGO. Thank you, Mr. Washburn. Ms. Routel, other than the Mashpee, how many times have you witnessed a tribe face challenges to their fee-to-trust applications due to *Carcieri*?

Ms. ROUTEL. It is really hard to put a number on it because there are countless challenges that come at the application stage that never make their way into the courts. When we look at challenges that have been brought in the Federal courts and in front of the Interior Board of Indian Appeals, we are talking about some 50 reported decisions at this point. So, there has been a large amount of litigation, and a lot of it has been litigation that, as Dean Washburn mentioned, we would consider to have been brought just to delay tribes that there is no doubt that they were under Federal jurisdiction in 1934 because they appear on some of the very first lists that were created of tribes that allowed them to vote on application of the IRA and confirm that they either voted on and adopted, or disapproved IRA constitutions.

Mr. GALLEGO. Ms. Richards, how many other casino or gaming enterprises has the state of Rhode Island opposed, either through litigation or through legislative manner outside of the state of Rhode Island?

Ms. RICHARDS. To my knowledge, this is the only one, Mr. Chairman.

Mr. GALLEGO. So, this is the only gaming operation, or potential gaming operation, that the state of Rhode Island has actively involved, even though we know there are other operations that are either coming on-line or have come on-line? And is it because this is the only opportunity to have a legal recourse using the *Carcieri* problem and that's why you are not using it for other tribes? Or are other gaming institutions better funded to be more difficult for the Government of Rhode Island to fight them?

Ms. RICHARDS. No, the Mashpee Reaffirmation Act is an act that has a direct economic impact on us, and that is why we are here today.

Mr. GALLEGO. Right, but there are other gaming institutions that also will have a direct economic impact on the state of Rhode Island. Has your representation of those institutions—has the state of Rhode Island ever opposed, legally, in any matter any of those other gaming institutions?

Ms. RICHARDS. You mean private casinos?

Mr. GALLEGO. Yes.

Ms. RICHARDS. We have not opposed any private casinos to my knowledge, and the reason for that is that private casinos operate on a more equal footing to Rhode Island's casinos. It is much more difficult for Rhode Island's casinos to compete against a Federal Indian casino because of the effective tax rate.

Mr. GALLEGO. I find that a very dubious claim. Thank you. And now I would like to recognize our Ranking Member, Representative Cook.

Mr. COOK. Thank you very much. I appreciate the witnesses, and just to carry on, Ms. Richards, on the competition from other casinos, if you will, and that is kind of the argument here. You do have two in Connecticut that are very close to the Rhode Island border, right? And I notice they weren't mentioned in the threat to

the commercial interests of Rhode Island. Obviously it is just the Mashpee, is that correct?

Ms. RICHARDS. The two Connecticut casinos, which are the Foxwoods and the Mohegan, they are not far from the Rhode Island border. On the other hand, they certainly predate my time in office. They predate *Carcieri*. And they may even predate some of our own gaming operations.

Mr. COOK. I have to be honest with you, I am very sympathetic to the tribe in Massachusetts, and I could get myself into serious trouble because I usually drive from Connecticut to Cape Code in the summer. I am sure I am going to have a number of speeding tickets going through Rhode Island if I don't handle this correctly. And second, my daughter and son-in-law are both graduates of the University of Rhode Island, so Thanksgiving is going to be a very interesting time this year.

But in the testimony that was given, I understand commercial interests and everything else, but as somebody who taught American History, I am very, very sympathetic to tribes and their own identity, and far too often I think so many tribes have been on the verge of extinction because of some of the things that have happened in the past. I'm from California, I know the wars between casinos and gaming and everything else, but I still have a tendency to side with the history, the heritage, and everything else. Gaming may be a transcendent thing, so right now I am very, very sympathetic to the testimony that has been given by the Mashpee Indians. I yield back.

Mr. GALLEGO. Thank you, Ranking Member Cook. I now recognize Chairman Grijalva for questions.

Mr. GRIJALVA. Thank you very much, Mr. Chairman.

In response to the Chairman's question you answered the direction in which I wanted to ask you as well.

Ms. Richards, let me just follow up on some questions. After the *Carcieri* decision in 2009 that involved a tribe in Rhode Island, ultimately this decision led to the Supreme Court ruling that land cannot be taken into trust for tribes recognized after the Indian Reorganization Act of 1934, which brings us to today, and brings us to Mr. Cole's legislation.

Why do you believe that land is only afforded to tribes recognized before 1934?

Ms. RICHARDS. To be perfectly honest, Mr. Chairman, I don't think there's a great reason why there should be two classes of tribes, those under jurisdiction prior to 1934 and those under jurisdiction after 1934. For that reason, I have not testified against Representative Cole's bill, which is H.R. 375. That would extend the IRA to all tribes regardless of when they were under jurisdiction.

I think the state of Rhode Island, if that bill were to pass, would really urge a total revamp of the IRA, and the revamp would include setting standards for the acquisition of tribal trust property, for taking into account the impact of trust property on local jurisdictions, for making a system that is transparent which has clear and objective standards, gives local jurisdictions significant role in the process, a substantial role in the process, gives timely notifications to jurisdictions——

Mr. GRIJALVA. Essentially providing to, in this instance, a state degree of veto power over land being taken into trust, correct?

Ms. RICHARDS. Some degree of consultation, just as you, Mr. Chairman, seek full consultation between tribes and the Federal Government, the state and local jurisdictions would also seek to be heavily involved. I think one of the things that——

Mr. GRIJALVA. So, you don't see Mr. Keating's legislation as complementary to the position that you just said, you don't think there should be two standards of tribes.

Ms. RICHARDS. I do not see it as complementary, no.

Mr. GRIJALVA. And correcting what is essentially a precedent that does establish two different standards for tribes, particularly the issue we are dealing with of land being taken into trust?

Ms. RICHARDS. I think Mr. Cole's bill, H.R. 375, would address the parity issue between the pre-1934 Act tribes and the post-1934 Act tribes, but I do think a total revamp of the IRA to be more responsive to states' interests would be called for.

Mr. GRIJALVA. I think that that would be significant and I think an undercutting of sovereignty trust responsibility if we were to establish a precedent that essentially, whether you want to call it consultation, but would provide a state or another local entity, a municipality, a county, essentially veto power over a process that is devoid of those other interests.

Ms. RICHARDS. I don't see it as veto power, but I think it is very important to keep in mind the host jurisdiction's impacts that arise as a result of a fee-to-trust acquisition.

Mr. GRIJALVA. Tomato-tomatoe, but I think it is veto power. Let me yield back, Mr. Chairman, and I appreciate the time.

Mr. GALLEGO. Thank you Mr. Chairman. And we now recognize Representative Keating.

Mr. KEATING. Thank you Mr. Chairman. Attorney Richards, you broadened your arguments in your remark to say, basically, that all states should be concerned about this. And I just want to ask you, we tailored this bill directly from the legislation in Gun Lake and the Virginia tribal legislation. So, if this is such a concern to all states, did you take any formal opposition as a state to those two pieces of legislation?

Ms. RICHARDS. We did not. I am not familiar with those pieces of legislation, unfortunately.

Mr. KEATING. Well, I will tell you that they are almost identical to this legislation. And do you happen to know how the Rhode Island congressional delegation voted on one of those bills?

Ms. RICHARDS. I don't know.

Mr. KEATING. I will inform you. They were in support of those bills, so the congressional delegation from Rhode Island supported the very same legislation as this.

Just another question. Your background in law is one of jurisdictions, and you mentioned state jurisdiction and U.S. jurisdiction. You can clearly, I think, can't you, know the boundaries and jurisdictions of a particular state?

Ms. RICHARDS. I do know the geographic boundaries of the state.

Mr. KEATING. Of a state.

Ms. RICHARDS. I certainly am aware of those.

Mr. KEATING. Could you say you could define the boundaries of America? Of the United States?

Ms. RICHARDS. I don't really think I understand your question.

Mr. KEATING. Do you believe that America, the United States, has a boundary around it?

Ms. RICHARDS. Yes.

Mr. KEATING. Thank you. So, I have a question for you. Can you define what you included in your testimony; can you define this entity? You said you defined an entity as the "Rhode Island's gaming catchment area."

Ms. RICHARDS. Yes.

Mr. KEATING. What is that jurisdiction? What does that mean?

Ms. RICHARDS. Normally when people discuss gaming or any kind of casino, they draw a circle around the casino——

Mr. KEATING. What's the circle?

Ms. RICHARDS. It is a certain geographic circle.

Mr. KEATING. What is it though? You are here.

Ms. RICHARDS. I think it is about a hundred miles.

Mr. KEATING. So, that is an official boundary? The question then—are you aware that Massachusetts already has approved a casino in that southeastern Massachusetts area, regardless of this?

Ms. RICHARDS. I am.

Mr. KEATING. So, what you are saying is you don't want this particular piece of legislation that will keep a tribe in existence versus another one that is already approved by Massachusetts that you can't do much about, it is going to have the same effect, if not more, on your gaming. So, how could you do this to the tribe?

Ms. RICHARDS. Because as I explained earlier to the Committee, Indian gaming operations do not operate on an equal footing from private casinos.

Mr. KEATING. You are missing my point here. There is still going to be a casino there.

Ms. RICHARDS. That is right.

Mr. KEATING. And you are saying the biggest reason you are here is Rhode Island is going to lose money with those Massachusetts plates that come over the border.

Ms. RICHARDS. What I am saying is that there are impacts on Rhode Island from having fee-to-trust conversions. They are not limited to casinos. They also include the tax free and tax advantage sales of any product. Those tax free and tax advantage sales from trust properties affect Rhode Island very clearly even though they may not be located within its borders.

Mr. KEATING. So, you are in favor of a casino from Massachusetts on the other side of the border then?

Ms. RICHARDS. Pardon me?

Mr. KEATING. You are in favor, if that is your point, then you are in favor of a casino on the other side of the border, just not this one. So, Rhode Island's position, the Governor's position is that you favor a casino in southeastern Massachusetts next to your border.

Ms. RICHARDS. We are neutral on opposing casinos that operate under the same competitive footing as Rhode Island's.

Mr. KEATING. So, just for the record, it is good that the Rhode Island people know that you are not opposing a casino on the other

side of your border and the revenues that might be lost according to your arguments. I yield back.

Mr. GALLEGO. Thank you Representative Keating. Further questions for Ms. Richards.

Has there been an economic impact study, not on the gaming side, but on what you claim is going to be the impact of sales of tobacco and other non-taxable goods on the state of Rhode Island?

Ms. RICHARDS. I am not aware of a study that we have because we haven't confronted this. In 2002, the Narragansett Indian Tribe started the tax advantage sales of tobacco products from trust lands within Rhode Island and the state took immediate action, but we did not have an impact analysis done.

Mr. GALLEGO. You do understand why just 1 second ago you said, the other reason why we are against this is because of non-taxable goods such as tobacco sales. And then when I asked you have you done a study what the impact is, you said you don't know what the impact would be. So, it makes it very difficult for me to understand your position. If you don't understand what the impact is, how can you say it is actually going to affect Rhode Island? You are just guessing.

Ms. RICHARDS. Well, the differential between taxed tobacco products and untaxed tobacco products is enormous, and I think most people——

Mr. GALLEGO. Enormous in what sense? Are we talking a couple hundred thousand? Million? Two million? Ten million? You don't know, but yet you are coming here and testifying and somehow making a decision—not you, but obviously at the behest of your Government—that that is a reason why to stop the Mashpee from actually having recognition. What I am saying is if you are going to come here and say that, at least have a claim and some money and a study attached it.

Ms. RICHARDS. We have experienced from our own jurisdiction—we haven't done a study because we don't have tax free or tax advantage sales going on right now, but we did in 2003 have them, and we determined for ourselves that it would be a serious impact on our tobacco revenues. I cannot, at this moment, give you the exact amount of the impact.

Mr. GALLEGO. But you can feel comfortable enough to use it as an argument to stop this tribe from being federally recognized?

Ms. RICHARDS. Yes, I can.

Mr. GALLEGO. Representative Gosar.

Dr. GOSAR. Thank you Mr. Chairman and Republican Leader Cook for allowing me to participate in this important hearing today. I am especially grateful to Mr. Cook for his leadership on the Subcommittee and on these issues.

The so-called RESPECT Act is an extremely radical proposal that would shut down important operations within the Federal Government until the lengthy and unrealistic consultation and coordination requirements prescribed by the bill are met. It is so broad and far-reaching that even the Obama administration opposed a nearly identical version of this bill. This bill would cause catastrophic harm to local communities and increase things like permitting times, negatively impacting grazing, responsible energy production,

forest thinning and important infrastructure projects in that process.

We all want tribes in local communities to have a way in which activities that impact their daily lives, but this bill isn't the way to go about that. A better model is the provision in the La Paz County Land Conveyance Act that I worked on with the Colorado River Indian Tribe to include.

H.R. 375, the so-called Clean *Carcieri* Fix, is another bill I opposed in its current form. H.R. 375 contradicts a Supreme Court ruling and the Indian Reorganization Act of 1934. We have seen previous Departments of the Interior take off reservation land into trust against the will of states, compacts and local communities for the sole purpose of building new casinos.

This was certainly the case in my state with the Tohono O'odham Nation, who covertly acted against its fellow tribes, the state of Arizona, and the general public to open an off-reservation casino in Glendale. Litigation discovery and audio recordings affirmed this shameful conspiracy implemented by the Tohono O'odham. I am concerned that H.R. 375, as written, will encourage the same future abuse in that regard.

Finally, H.R. 312 is contrary to current view of the Department of the Interior, contradicts a Supreme Court decision and aims to reverse Federal court decisions on this matter in order to build a massive 400,000 square-foot off-reservation gaming complex for the benefit of a Malaysian gaming company.

Besides benefiting this Malaysian company, H.R. 312 has close ties and origins associated with corrupt DC lobbyist Jack Abramoff and Senator Elizabeth Warren. The Mashpee Tribe paid tens of thousands of dollars to Abramoff, and the chairman of the tribe at that time was sentenced to 41 months in prison for crimes he committed in conjunction with efforts to secure Federal recognition. The Mashpee Tribe was not a federally recognized tribe until it received an administrative recognition in 2007.

If H.R. 312 is passed, Congress will declare years of fighting and victories by local stakeholders as if they never happened. Congress will also take the view that current Federal law shouldn't apply to the Mashpee Tribe.

Ms. Richards, you testified that if this massive 400,000 square-foot off-reservation gaming complex is allowed to be built in Massachusetts, the state of Rhode Island will suffer significant harm with regards to revenue for education, infrastructure, and social programs. Can you elaborate a little more on this harm, and reiterate why the Governor and people of Rhode Island oppose this bill?

Ms. RICHARDS. Mr. Gosar, we have conducted an impact analysis which I can provide to you. I am not familiar enough with the contours of that to talk about it at the moment.

Dr. GOSAR. We would appreciate that. Vice Chairman Baird, how will the tribe ever make money from this casino project in light of the $450 million debt that the tribe owes in Genting which would operate the casino? Is this bill actually a financial bail-out for Genting?

Ms. BAIRD. It is Vice Chairwoman, Representative.

Dr. GOSAR. I am sorry.

Ms. BAIRD. And I would first like to state that for me, as a Mashpee Wampanoag woman, mother, grandmother and a leader of my community, and as a woman whose blood and bones have been in my territory for 12,000 years, I am sitting here today with one purpose in mind: to keep the land under my people's feet.

I also want to state that because the Federal Government has forced this tribe and other tribes into two processes that are very lengthy and very expensive: (1) the Federal acknowledgement process; and (2) the land in trust process for which the Federal Government provides no funding to assist those tribes, we are forced to enter into agreements and find funding to help us get through these processes, and they are very expensive. The Federal acknowledgement process alone took 30 years and cost us millions of dollars, as did the land in trust process.

Dr. GOSAR. I find that, Mr. Chairman, a little obvious that that service being over $350 million that you will never get out from underneath that debt. I yield back.

Mr. GALLEGO. Thank you Representative Gosar. Now I would like to recognize Chairman Grijalva.

Mr. GRIJALVA. Thank you very much.

Dean Washburn, if Congress does not act on righting this wrong *Carcieri* decision, what do you foresee in the next 10 years of having this type of decision on the books for Indian Country?

Mr. WASHBURN. Chairman, it is just going to keep causing problems, it is going to keep causing litigation. As my colleague Professor Routel testified, it gets brought up in a lot of these cases and has to be litigated and you need expert witnesses to go out, historians, to go out and gather up a bunch of documents and kind of like Vice Chairwoman Baird was just talking about, these experts are very expensive and they end up causing tremendous delay. And it means that some tribes may never get land in trust, and that is really the problem, and every tribe deserves to have a homeland.

Mr. GRIJALVA. Professor, the same question from your perspective, if we don't do this Clean Fix that is before us.

Ms. ROUTEL. Well, the starkest example is really the tribes that were recognized through the OFA process that spent 20, 30 years to gain that recognition, that expended enormous resources, and in all those cases, they had to prove, sometimes from historic times all the way to the present that they continued to exist. They had to prove that they continued to exist socially and politically, that outsiders recognized them, and they had to amass an enormous quantity of documents. Yet, after standing in line and going through that whole process, they are now faced with never having any land into trust. Meanwhile, other tribes that were in a similar position were recognized by Congress and they all received language in their recognition bills that specifically allow them to receive the benefits of the IRA, and some of them mandatory trust acquisitions.

What Ms. Richards was saying about tribes, like the Mashpee being tax free is a myth in Indian Country. Native people pay taxes and tribes do. The Federal Government taxes Indian gaming operations. And there are taxes that flow, it's just they won't flow to Rhode Island because of those borders.

But the Mashpee will create 7,000 new jobs; they will give $50 million in revenue to the state of Massachusetts. In addition to that, there is $100 million in revenues that is projected to go to the city that the casino is sited in.

And this notion of tobacco taxes, the Supreme Court has repeatedly held that tribes, when they sell tobacco to non-Natives, they actually have to collect a state tax. So, again, there will be a tax on those sales, it's just the tax will be turned over to the state of Massachusetts.

The tribes are not at a competitive advantage here. Mashpee just wants what every single other tribe in the country has, which is a permanent homeland.

Mr. GRIJALVA. And the compact with Arizona, all the 22 tribes and those that do have gaming as part of their enterprises, paid to the state. That revenue goes into, unfortunately to a what I think is a black hole, but that is another story.

Mr. Chairman, with all due respect, I have to leave for amendments on the Floor. The next panel was to discuss the RESPECT Act. I apologize for not being here for those questions. I will be submitting those in writing to you to forward. And to the other panelists that are going to speak to that issue, my apologizes. I need to be there. I thought that this would go faster than it did. I yield back, and thank you very much.

Mr. GALLEGO. Thank you Mr. Chairman. If there are no further questions, we are going to move on to the second panel. All right, excellent.

Let me again remind the witnesses that under our Committee Rules, they must limit their oral statements to 5 minutes, but it does not have to be 5 minutes, but the entire statement will appear in the hearing record. When you begin, the lights on the witness table will turn green. After 4 minutes, the yellow light will come on. Your time will have expired when the red light comes on and I will ask you to please complete your statement. I will also allow the entire panel to testify, minus Mr. Washburn who already gave his testimony, before questioning of the witnesses.

Our first witness is going to be Ms. Vanessa Ray-Hodge, Partner at—I apologize if I say this incorrectly—Sonosky, LLC, and former Senior Counselor to the Solicitor at the Department of the Interior; and finally Mr. Matthew Fletcher, Professor of Law and Director of Indigenous Law and Policy Center at Michigan State University College of Law; as well as again Mr. Kevin Washburn.

The Chair now recognizes Vanessa Ray-Hodge to testify.

STATEMENT OF VANESSA L. RAY-HODGE, PARTNER, SONOSKY, CHAMBERS, SACHSE, MIELKE & BROWNELL, LLP, ALBUQUERQUE, NEW MEXICO

Ms. RAY-HODGE. Good afternoon, Chairman Gallego and members of the Subcommittee. My name is Vanessa Ray-Hodge and I am an enrolled member of the Pueblo of Acoma and a partner in the law firm of Sonosky, Chambers. I regularly represent Indian tribes throughout various tribal consultation processes. I previously served as the Senior Counselor to the Solicitor at the Interior, and actively participated in numerous Federal-Tribal consultations and in the development of the Interior's Tribal

Consultation Policy. And I have to say from my experience at the Interior, tribal consultation doesn't necessarily slow down the Federal process if it is done right.

I support and applaud Congressman Grijalva's bill, which would codify the principles of Executive Order 13175 into law and establish a legally enforceable consultation obligation for all Federal agencies. The United States has a long history of enacting policies or authorizing infrastructure development projects over the objections of tribes, which has often resulted in the destruction of tribal communities and culture. Tribal consultation is implemented differently by each Executive Department, and the sad reality, especially now, is that tribal consultation is often treated as just a box to check, or completely ignored.

But Executive Order 13175 was intended to treat tribes as sovereign nations and recognize that the United States had policies in the past that placed tribes on reservations, oftentimes removing them from their aboriginal homelands where many tribes continue to have treaty rights and cultural and sacred sites. The ad hoc manner in which consultation is implemented by Federal agencies has resulted in frustration by Indian tribes and widespread discounting of tribal governments and their concerns. This has created an adversarial process rather than a cooperative one in which tribes are seen as valued partners that can improve the decision-making process in a manner that respects tribal rights.

The RESPECT Act takes a major first step toward changing the tribal consultation process in a good way. The Act outlines a structured process that aims to ensure that tribes can participate fully in consultation, and consultation must occur early and often. In my experience, I have often found that there is a lack of Federal decision makers who are directly involved in consultation. Instead, agency staff often attend and they are not authorized or able to answer questions or provide meaningful feedback to Indian tribes. Tribes are left having a one-sided dialogue and are usually only informed about how their concerns were addressed after a final decision is rendered. The RESPECT Act would bring a much-needed change in this process by requiring a two-way dialogue between Federal agencies and tribes.

An important component that would also help improve the consultation process is to require training for Federal employees who participate in consultation and to agency decision makers. A core objective of tribes during consultation is to provide Federal decision makers with context and information needed to support informed decisions that protect tribal interests. Tribal concerns are often misunderstood or overlooked by those without any background in the unique history and relationship that the United States has with Indian tribes.

With the right tools, consultation can provide a solid foundation for Federal decisions, but Federal agencies must recognize and apply these principles. Where Federal actions relate to applicants seeking Federal approval for a project, the consultation process should also require that applicants meet with, consider, and address tribal concerns. There should not be an expectation that applicants can ignore tribes and just work with Federal agencies. And Federal agencies shouldn't be able to hide behind applicants.

When all parties come together, I have seen positive working relationships result, even when it requires modifications of a project. And while there might not always be agreement, Federal agencies have a trust responsibility to take a hard look and deal with tribal concerns. In this regard, the Act should specifically recognize Federal agencies affirmative obligations to protect tribal treaty resources, sacred sites, and trust lands.

Indeed, in 2006, nine Federal agencies signed an MOU recognizing this obligation must be considered when making Federal decisions impacting tribal interests. The goal of making tribal consultation judicially reviewable is also a critical component for accountability. In sum, the draft RESPECT Act is a welcome piece of legislation that is long overdue.

I appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

[The prepared statement of Ms. Ray-Hodge follows:]

PREPARED STATEMENT OF VANESSA L. RAY-HODGE, SONOSKY, CHAMBERS, SACHSE, MIELKE & BROWNELL, LLP ON THE DRAFT OF THE RESPECT ACT

By Invitation of the Subcommittee, Not on Behalf of Any Client

Good Afternoon Chairman Gallego and members of the Subcommittee, thank you for the opportunity to provide feedback on the draft RESPECT Act. I am Vanessa L. Ray-Hodge, an enrolled member of the Pueblo of Acoma and a partner in the law firm of Sonosky, Chambers, Sachse, Mielke & Brownell (500 Marquette Ave., N.W., Suite 600, Albuquerque, NM 87111. Telephone: 505-247-0147). I regularly represent Indian tribes on a variety of matters, including working with Indian tribes and Federal agencies throughout the tribal consultation process for projects that occur on and off Reservation or trust lands. I previously worked as the Senior Counselor to the Solicitor at the Department of the Interior and actively participated in numerous Federal-Tribal consultations on behalf of the Department.

I support and applaud Congressman Grijalva's bill, which would codify the principles of Executive Order 13175 into law and establish a legally enforceable consultation obligation for all Federal agencies.

The United States has a long history of authorizing infrastructure development projects over the objections of Indian tribes. This abdication of Federal trust and treaty obligations has had devastating effects on tribal communities and cultures. Indeed, the most recent protest (NODAPL) against the Dakota Access Pipeline near the Standing Rock Sioux Reservation brought to light many of the shortfalls of the Federal Government's current consultation policy. After the NODAPL movement, I worked with the National Congress of American Indians on drafting comprehensive Tribal comments relating to the shortfalls of the current consultation process and attach those comments here for your reference.

Under the current Tribal consultation framework, Federal permitting agencies tend to treat Indian tribes as members of the public, entitled to only limited information and the ability to submit comments, rather than incorporating tribes into decision-making processes as is done for non-Federal governmental entities. But Indian tribes are not members of the public. Tribes are sovereign governments that retain their inherent rights to govern their own peoples, lands and natural resources. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (Indian tribes' inherent sovereignty empowers them to govern their own citizens and territories); Cohen's Handbook of Federal Indian Law § 4.01[1] (Nell Jessup Newton ed., 2012) (discussing the independent origin of Indian tribes' sovereignty). At a minimum, tribes should be respected as governments and their unique relationship with the United States acknowledged and appropriately incorporated into Federal decision making.

The draft RESPECT Act takes a major first step toward changing the Tribal consultation process in a good way. Currently there are no uniform standards or processes for Federal agencies to use when initiating Tribal consultation. As a result, agencies do not always implement consultation early in the Federal decision-making process or ensure that Indian tribes are consulted in a meaningful way. For example, what often happens is Federal agencies will engage with applicants and make major planning decisions on a project long before tribes are consulted. These

decisions invariably result in routes or project alternatives that will have the greatest impact on Tribal lands, treaty rights, and cultural and sacred sites. At that point it is almost impossible for tribes to have any meaningful impact throughout the consultation process to protect their rights or interests. Many of these problems could be resolved if tribes were consulted early and applicants were required to listen to Tribal concerns before any major decisions on the direction of a project are finalized with Federal agencies. The draft RESPECT Act helps address these inadequacies for the better.

Oftentimes, there is a complete lack of Federal decision makers who are directly involved in consultation and there is nothing to ensure that the full range of Tribal rights and interests are comprehensively presented to and considered by decision makers. In many instances, agency staff without any decision-making authority are sent to Tribal consultations. Staff is usually not able to answer any questions or provide meaningful responses to Tribal concerns—rendering Tribal consultation just another box to check in the Federal review process. Nor is there any mechanism to hold applicants accountable for demonstrating why Tribal concerns cannot be resolved.

The goal of Tribal consultation is not merely to give Indian tribes a seat at the table and a chance to be heard. Rather, the core objective is to provide Federal decision makers with context, information, and perspectives needed to support informed decisions that actually protect Tribal interests. Tribal Treaty rights, the Federal trust responsibility to tribes, and the environmental justice doctrine all must be given meaning and respected in actual Federal decisions that impact tribes. Consultation can provide the solid foundation for Federal decisions, but the Federal agencies must be willing to recognize and apply these principles in their decision making.

In other words, there are at least two components to ensure that Tribal interests are meaningfully considered in Federal decision making. First, there must be a comprehensive and properly structured process that enables tribes to participate fully. Second, there must be a heightened awareness and recognition among Federal decision makers about the sources, scope, and significance of Tribal rights, and the need to incorporate and protect those rights in Federal decisions. The objective is to seek the free, prior and informed Tribal consent where fundamental Tribal interests are at stake. Federal decision makers must come to understand that it is in the national interest to uphold the promises that the United States made in treaties, and to exercise discretion consistent with the duties of a trustee to tribes. And this understanding must guide every decision that impacts Tribal interests.

The draft RESPECT Act does a good job at starting to outline a uniform process for engaging in Tribal consultation across all Federal agencies. However, the Act should specifically mention Federal agencies' obligation to protect Tribal treaty resources, sacred sites and trust lands. The Act should make clear that Tribal consultation triggered by a Federal undertaking that implicates Tribal lands and interests is different than Tribal consultation required under Section 106 of the National Historic Preservation Act. In addition, if a Federal undertaking requires the development of an Environmental Assessment or Environmental Impact Statement in accordance with the National Environmental Policy Act ("NEPA"), the Act should expressly provide that Indian tribes whose lands or interests will be impacted must be consulted during the environmental review process. Federal agencies must also ensure that even where an applicant is performing the environmental review under NEPA, affected Indian tribes should be joined as cooperating agencies or given an opportunity to meaningfully consult with the applicable Federal agencies prior to any finalization or approval of the environmental review documents. Tribal concerns and objections must be included in any final NEPA document, and Federal agencies must be required to explain whether or not Tribal concerns or objections were resolved.

In addition, the Act should provide that all Federal personnel whose work involves participating in Tribal consultation are required to participate in comprehensive training regarding Treaty rights, the trust responsibility, the United States' historical treatment of Indian tribes, and the vast differences among Tribal cultures. This kind of training already takes place in some situations within the Interior Department. The Bureau of Reclamation, for example, has developed a training program for its regional offices to learn about the trust responsibility and Indian tribes in the context of Indian water settlements. The Reclamation training has been successful in large part because it is provided by a well-respected Indian law professor and Tribal leaders who can speak about the significance of a water settlement from the Tribal perspective. This kind of approach needs to be implemented more broadly across all agencies that make decisions impacting Tribal rights and interests.

Training must be required for all agency personnel who are involved in projects requiring Federal approval where Indian tribes may be affected. Trainings, at a minimum, must include:

- Overview of the trust responsibility and unique relationship between the United States and Indian tribes.
- Overview of the United States' historical policies impacting Indian tribes, including how those policies resulted in Indian tribes having significant rights and interests in off-reservation areas.
- Tribal perspectives on the importance of the trust responsibility.

These are just a few comments on the draft RESPECT Act, which is a welcome piece of legislation that is long overdue. At bottom, Indian tribes must be afforded a real opportunity to meaningfully consult with Federal agencies—and Federal agencies must be held accountable during the consultation process. Even if there is not ultimate agreement, Federal agencies have a trust responsibility to consider Tribal concerns and explain why any concerns were not addressed.

I appreciate the opportunity to provide these comments and I look forward to working with the Subcommittee and the Committee on finalizing the draft. This Act will ensure that the United States fulfills its trust responsibility to consult with Indian tribes when Federal actions impact Tribal lands or interests. I would be happy to answer any questions the Committee may have.

Mr. GALLEGO. Thank you Ms. Ray-Hodge. The Chair now recognizes Mr. Matthew Fletcher for his testimony.

STATEMENT OF MATTHEW FLETCHER, PROFESSOR OF LAW AND DIRECTOR OF THE INDIGENOUS LAW & POLICY CENTER, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, EAST LANSING, MICHIGAN

Mr. FLETCHER. Thank you very much, Mr. Chairman, and Minority Leader. My name is Matthew Fletcher. I am a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, which is located in Michigan, and I am disappointed to see that Mr. Grijalva had to step out. I was about to engage in a little bit of hero worship.

My very first trip to Washington, DC, as a lawyer was in the late 1990s, right around 20 years ago, and we were here to engage in an act of tribal consultation, so to speak. Back in those days, the Department of Labor's Wage and Hour Division had refused to treat my client, an Indian tribe in Arizona, as a state for purposes of minimum wage law. Our fire department and our police department, our fire department in particular, would be on-call for 48 hours at a time and then they would get 2 days off, and then they would get another day on. So, the Wage and Hour Division was telling us that we owed them 25 hours of overtime every week, even though most of the firefighters, although they were looking for the windmill, I had to admit most of the time they spend in the fire station was lifting weights.

I got a chance to meet Mr. Grijalva that day, or that year, and talk about this project. That was a bad experience in terms of tribal consultation, but I have had some good experiences as well as a lawyer and as an advocate.

Under the Obama administration, in particular, we were pleased to see, especially when Mr. Washburn was Assistant Secretary, the government worked hard with Indian tribes, and they sort of were forced to by the Administrative Procedures Act and engaging in

some regulation and guidance releases in relation to the Indian Tribal Welfare Act, which is a statute near and dear to my heart.

And to be frank, while there is a little bit of litigation going on in that case, the regulations that came out and the accompanying guidances, probably the best work that has come out of Indian Country in relationship with the Federal Government that I have seen in the last 20 years. Outstanding work. And I think that is because the tribes were on board, they participated, and the Federal Government took what they said seriously.

But when it comes to bigger projects where there are other issues, other interests that are arrayed against tribes, or in opposition to tribes, I think what you see is the perception without a statute like the RESPECT Act, with the perception from Indian County is always going to be that the Federal Government's practice is to consult when they want Indian tribes to help back them up with a project they are already going to go forward with, and then the tribe's perspective is that the Federal Government will not consult, or will do a poor job of consulting, when the Federal Government expects opposition from the tribes.

And I just want to harken back to the history of my own tribe, which is the Grand Traverse Band, and some of the tribes in Michigan. Way back in the day, in the 1830s, we came to Washington, DC to negotiate the Treaty of Washington, and our tribal leader back in those days was a guy named Aishquagonabe, and he negotiated along with the other Michigan Odawa and Ojibwe Tribes, a treaty that would guarantee us a homeland, that would guarantee us places to go on and off the reservation for purposes of hunting, gathering, fishing—obviously fishing—and Article XIII of that treaty says that we were allowed to enter off-reservation lands until those lands were required for settlement.

And, unfortunately, the first thing that the United States did with those ceded territories—they were never really settled—was to turn most of those to lease those lands over to timber interests. And most of the Lower Peninsula and all of the Upper Peninsula of the state of Michigan over the next several decades were de-forested. Possibly the greatest source of virgin pine in the Great Lakes is all gone. Some of that is still at the bottom of Lake Michigan because of timber that ships that have sunk in Lake Michigan.

But when we talk about catastrophic impacts as a result of actions taken by the Federal Government, I begin with my own tribe's history and this de-forestation. That was our livelihood, those forests, and our access to those livelihoods until the land was required for settlement were destroyed. We were not able to really live in a homeland without access to those trees.

And you can see that throughout Indian Country where there has been a history of a lack of consultation. You see the flooding of reservations at Three Affiliated, Fort Berthold, Seneca Nation and other flooding of reservations. You see dams and culverts that have destroyed salmon habitat in the Pacific Northwest.

And I guess I want to conclude with, just to harken back, to paraphrase to a Supreme Court case that just came out, and Justice Gorsuch's dicta mentioning that Indian tribes, when they negotiated treaties, did not just negotiate for the right to continue to

live, but to continue to live in their way. Miigwetch. Thank you very much.

[The prepared statement Mr. Fletcher follows:]

PREPARED STATEMENT OF MATTHEW L.M. FLETCHER, PROFESSOR OF LAW AND DIRECTOR OF THE INDIGENOUS LAW AND POLICY CENTER AT MICHIGAN STATE UNIVERSITY COLLEGE OF LAW ON THE RESPECT ACT

SUMMARY

Chairman Gallego and members of the Committee, it is a pleasure to testify today on the RESPECT Act, a bill to ensure effective consultation between the United States and Indian tribes in regards to Federal activities that affect tribal lands and interests.

Today, I hope to provide an overview of the legal, political, and moral obligations of the United States to ensure meaningful consultation between the Federal Government and Indian tribes to ensure effective consultation between the United States and Indian tribes in regards to Federal activities that affect tribal lands and interests. I believe the RESPECT Act is a powerful step toward fulfilling that obligation. Federal-tribal relations work better as a partnership of sovereigns instead of an adversarial relationship where outcomes are governed by which sovereign has the superior bargaining position. The RESPECT Act is a step on that road to partnership, cooperation, and respect between sovereigns.

In the current of Federal Indian law and policy, known as the self-determination era, Congress and the executive branch largely have embraced the trust relationship. In every significant Indian affairs statute of the last several decades, Congress has acknowledged the trust relationship. Unsurprisingly, many Indian tribes thrive under the self-determination policy, growing by leaps and bounds in their ability to govern. The old era of guardianship where the Federal Government made most major decisions for Indian tribes and Indian people is a relic of the past. Still, Federal agencies too frequently move forward with controversial projects—notably the Line 5 and Back 40 Mine projects in the western Great Lakes—without bothering to engage in tribal consultation at all.

Overall, the draft bill is an excellent achievement. The present system is dominated by indeterminacy—no one knows exactly what constitutes consultation; no one knows definitely when to initiate consultation; no one knows exactly what the outcome of consultation is supposed to be; and no one knows how to enforce the consultation mandate, or whether it is enforceable at all. The indeterminacy contributes to the quick breakdown of communication, and a switch from cooperation to adversity.

The discussion draft's specific requirements obligating Federal agencies to helpfully document tribal consultation activities will be extremely useful. The breadth of the scope of the consultation requirement in the discussion draft will also be useful. As Congress is aware, many Federal projects are delayed by litigation after the breakdown of Federal consultation efforts. A clear process will contribute greatly to increased efficiency.

In conclusion, the RESPECT Act is a major step forward in Federal-tribal relations. The Indian nations that entered into treaties with the United States—and that petitioned for and received Federal acknowledgment by statute or administrative act—always understood the duty of protection to be a partnership. Consultation is merely an acknowledgment of the respect due to both sovereigns, Federal and tribal. Every step the United States takes toward treating Indian tribes as partners is a positive step.

Miigwetch.

STATEMENT

Chairman Gallego and members of the Committee, it is a pleasure to testify today on the RESPECT Act, a bill to ensure effective consultation between the United States and Indian tribes in regards to Federal activities that affect tribal lands and interests.

I am Professor of Law and Director of the Indigenous Law and Policy Center at Michigan State University College of Law, and visiting professor at Michigan and Stanford Law Schools later on in 2019. I am a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, located in the heart of Anishinaabeki, Peshawbestown, Leelanau County, Michigan. Although I do not speak in my official capacity, I should note that I am an appellate judge for nine Indian tribes—the Grand Traverse Band, the Mashpee Wampanoag Tribe, the Match-E-Be-Nash-She-

Wish Band of Pottawatomi Indians, the Pokagon Band of Potawatomi Indians, the Hoopa Valley Tribe, the Nottawaseppi Huron Band of Potawatomi Indians, the Santee Sioux Tribe of Nebraska, and the Tulalip Tribes.

My hornbook, Federal Indian Law (West Academic Publishing), was published in 2016 and my concise hornbook, Principles of Federal Indian Law (West Academic Publishing), in 2017. I co-authored the sixth and seventh editions of Cases and Materials on Federal Indian Law (West Publishing 2011 and 2017), with David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., and Kristen A. Carpenter. I also authored American Indian Tribal Law (Aspen 2011), the first casebook for law students on tribal law; The Return of the Eagle: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians (Michigan State University Press 2012); and American Indian Education: Counternarratives in Racism, Struggle, and the Law (Routledge 2008). I co-edited The Indian Civil Rights Act at Forty with Kristen A. Carpenter and Angela R. Riley (UCLA American Indian Studies Press 2012), and Facing the Future: The Indian Child Welfare Act at 30 with Wenona T. Singel and Kathryn E. Fort (Michigan State University Press 2009). My latest book, On Indian-Hating, will be published by Fulcrum Publishing. My most recent law review articles are forthcoming in the *California Law Review* and the *Michigan Law Review*. I am the primary editor and author of the leading law blog on American Indian law and policy, Turtle Talk, http://turtletalk.wordpress.com/. I graduated from the University of Michigan Law School in 1997 and the University of Michigan in 1994.

Today, I hope to provide an overview of the legal, political, and moral obligations of the United States to ensure meaningful consultation between the Federal Government and Indian tribes to ensure effective consultation between the United States and Indian tribes in regards to Federal activities that affect tribal lands and interests. I believe the RESPECT Act is a powerful step toward fulfilling that obligation. I also hope to provide a snapshot of the universe of cases in which tribes bring claims against the Federal Government alleging failure to meet consultation obligations.

I. The Understanding of the Anishinaabeg Treaty Negotiators

In 1836, the collected Michigan Odawa nations met in Washington DC to negotiate a treaty with Lewis Cass and Henry Schoolcraft.[1] The Odawa ogemaag selected Aishquagonabe to speak for the Odawak treaty delegation that includes the federally recognized Indian tribes, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, and Little River Band of Ottawa Indians, plus the Grand River and Burt Lake Odawa bands still seeking Federal acknowledgment. [The Ojibwe nations of the eastern Upper Peninsula of what is now the state of Michigan selected their own speaker.]

The Odawa nations that negotiated and executed the 1836 Treaty of Washington ceded approximately one-third of the land base of the Lower Peninsula of what is now the state of Michigan, represented in the land cession map drawn by Michigan State University professor Dylan Miner and attached to this document as Appendix 1. The Odawa tribes negotiated for permanent reservations, a promise the United States failed to implement, and for usufructary rights to hunt, fish, and gather on the ceded lands until those lands "were required for settlement."[2] As was established in the first decade of this century during the inland hunting, fishing, and gathering phase of *United States v. Michigan*,[3] much of the ceded territory was never required for settlement. Much of the ceded territory is north of the effective growing season and was therefore not valuable for agricultural land. Instead, the Federal Government sold or leased almost all the land at pennies on the dollar of the effective market rate to private non-Indian timber interests. Private interests completely eradicated the virgin timber of the entire Upper and Lower Peninsula area.[4] The economic value of that timber is incalculable. Importantly, the deforestation of the ceded territory dramatically undercut the ability of Michigan Anishinaabe to live their lives in accordance with Mino-Bimaadiziwin.[5] The forests housed the wildlife the Anishinaabe depended upon for food. The forests provided the materials for the summer and winter shelter Anishinaabe people required. The forests provided the medicines Anishinaabe people required. In short, the forests were uniquely critical to the livelihoods of the Anishinaabek. The Michigan virgin

[1] See generally Matthew L.M. Fletcher, The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians 2–33 (2011).

[2] Treaty of Washington, Article XIII, 7 Stat. 491 (1836).

[3] Fletcher, The Eagle Returns, supra, at 146–47.

[4] Robert H. Keller, An Economic History of the Indian Treaties in the Great Lakes Region, 4:2 Am. Indian J. 2, 10 (Feb. 1978).

[5] See generally Edward Benton-Benai, The Mishomis Book: The Voice of the Ojibwe (1979).

forests are gone and will not return in our lifetimes, in our children's lifetimes, in our grandchildren's lifetimes.

Imagine a world where the United States consulted with the Michigan Odawa nations before giving away the vast Michigan forests to private interests. Indian nations could have advised Federal officials what those forests meant to the Anishinaabek. Imagine how Indian nations could have advised Federal officials how to make the forests economically productive while still maintaining a sustainable forestry. But no. The forests are gone and they are not coming back. Most of the value of that timber left the state. All of the citizens of Michigan lost.

Aishquagonabe and the rest of the Odawa ogemaag negotiated for permanent reservations and for the right to continue to use and maintain the forests. Ultimately, the United States did not fulfill the promise to guarantee permanent reservations, leaving the off-reservation rights as the only remaining valuable consideration for the Michigan Odawaak. Like other treaty negotiations, the American treaty negotiators received massively valuable consideration from the Michigan Odawa nations.[6] In exchange for the cession of their aboriginal title, the Odawa nations received deforestation and the eradication of their lifeways.

The takeaway from this history is that Federal-tribal relations work better as a partnership of sovereigns instead of an adversarial relationship where outcomes are governed by which sovereign has the superior bargaining position. The RESPECT Act is a step on that road to partnership, cooperation, and respect between sovereigns.

II. The Duty to Consult

Indian tribes and the Federal Government's relationship began as a sovereign-to-sovereign relationship grounded in treaty relations.[7] There are hundreds of treaties between the United States and various Indian tribes. The creation of the treaty relationship between the United States and a given Indian tribe is a form of recognition of that tribe as a sovereign entity, sometimes referred to as a domestic sovereign.[8] The United States, after all, does not enter into treaties with state governments, corporations, or churches, only foreign nations and Indian tribes. Indian tribes that do not have a formal treaty relationship with the United States, primarily those tribes located in California and Alaska, are acknowledged to enjoy the same relationship with the Federal Government so long as they are federally acknowledged as a tribal sovereign, either through an Act of Congress or through the Federal acknowledgment process.[9]

The treaty relationship imposed a "duty of protection" on the United States for the benefit of recognized Indian tribes.[10] Colloquially, the duty of protection means that the United States as a "superior" sovereign agrees to protect domestic sovereigns, i.e., Indian tribes. The Supreme Court recognized the duty of protection in the Marshall Trilogy of cases.[11] Unfortunately for Indian tribes, the Court analogized the duty of protection to a guardianship.[12] One positive side-effect of that era was the Supreme Court's recognition of the duty of protection as an independent source of congressional authority to legislate in Indian affairs.[13] In the modern era, the duty of protection is more accurately described as the trust relationship.[14]

In the current of Federal Indian law and policy, known as the self-determination era, Congress and the executive branch largely have embraced the trust relationship. In every significant Indian affairs statute of the last several decades, Congress has acknowledged the trust relationship.[15] Unsurprisingly, many Indian tribes thrive under the self-determination policy, growing by leaps and bounds in their ability to govern. The old era of guardianship where the Federal Government made most major decisions for Indian tribes and Indian people is a relic of the past.

Or it should be.

As this body well knows, the United States often must decide between many competing interests. Tribal interests in governance, lands, sacred sites, historical sites,

---

[6] *Cf. Washington State Dept. of Licensing v. Cougar Den, Inc.*, 2019 WL 1245535, at *11 (S.Ct., Mar. 19, 2019) (Gorsuch, J., concurring in judgment) ("[T]he millions of acres the Tribe ceded were a prize the United States desperately wanted.").

[7] Matthew L.M. Fletcher, Federal Indian Law § 5.3, at 212 (2016).

[8] Fletcher, Federal Indian Law, supra, § 5.3, at 212–15.

[9] Fletcher, Federal Indian Law, supra, § 5.1, at 170–75.

[10] Fletcher, Federal Indian Law, supra, § 5.2, at 175.

[11] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

[12] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J., lead opinion).

[13] *United States v. Kagama*, 118 U.S. 375, 384 (1886).

[14] Fletcher, Federal Indian Law, supra, § 5.2, at 181–94.

[15] For a survey of statutes, see Fletcher, Federal Indian Law, § 5.2 at 188–94.

economic markets, and jurisdiction often conflict with private, non-tribal interests, state interests, Federal interests, and even the interests of other tribes. When the United States must may difficult choices between these completing interests, it is all too easy for government officials to invoke the old guardian-ward model of Federal decision making involving tribal interests. To be fair to Federal officials, the Supreme Court has effectively given free reign to Federal agencies to ignore tribal interests and sweep away the trust relationship.[16]

In my own experience as in-house counsel for Indian tribes from 1998 to 2004, I saw both sides of meaningful tribal consultation. On one hand, I attempted to negotiate with the Department of Labor on the question of whether the Fair Labor Standards Act's minimum wage requirements would apply to tribally run public safety departments, such as police and fire. At that time (the late 1990s), the Department's view was that tribal governments were not governments entitled to an exemption under the law, an agency interpretation made without contacting affected tribes at all that could have cost individual tribes hundreds of thousands or even millions a year. Conversely, I worked with the Environmental Protection Agency on behalf of two other tribal clients (in the early 2000s) on the implementation of the Clean Water and Clean Air Act's authorizations to treat Indian tribes as states for purposes of enforcement. The former situation cost my tribal client thousands of dollars in attorney fees before the government agreed to change its policy decision.

Great Lakes tribes now are aligning to protect treaty rights in the western Great Lakes that are threatened with activities, namely, Enbridge Line 5 and the Back 40 Mine. Bryan Newland, the Chairman of the Bay Mills Indian Community, described how the EPA gave tribes 10 days to comment to changes on a settlement agreement favoring the Line 5 owners, but were not given a copy of the proposed changes at all. Bryan Newland, Will the EPA allow the Line 5 Pipeline to remain in the Straits of Mackinac? Turtle Talk blog, May 31, 2018, https://turtletalk.blog/2018/05/31/will-the-epa-allow-the-line-5-pipeline-to-remain-in-the-straits-of-mackinac/.

In the context of the Back 40 Mine, a Federal judge relieved the EPA of its duty to consult under the National Historic Preservation Act because the state of Michigan assumed jurisdiction over the mine activities.[17] In both instances, Federal consultation with Indian tribes was either nonexistent or minimal. In both the Line 5 and Back 40 situations, public opinion strongly opposes the projects. The RESPECT Act is needed to change the government's understanding of the partnership between Indian tribes and the United States when treaty rights are at stake.

The Federal Government's duty to consult is a critical element to the United States' ongoing duty of protection, the basis for the general trust relationship.[18] The duty of consultation is also a key element to the duty of free, prior, and informed consent codified in the United Nations Declaration on the Rights of Indigenous Peoples.[19]

III. Comments on the RESPECT Act Discussion Draft

Overall, the draft bill is an excellent achievement. The present system is dominated by indeterminacy—no one knows exactly what constitutes consultation; no one knows definitely when to initiate consultation; no one knows exactly what the outcome of consultation is supposed to be; and no one knows how to enforce the consultation mandate, or whether it is enforceable at all. The indeterminacy contributes to the quick breakdown of communication, and a switch from cooperation to adversity.

The discussion draft's specific requirements obligating Federal agencies to helpfully document tribal consultation activities will be extremely useful. The breadth of the scope of the consultation requirement in the discussion draft will also be useful. As Congress is aware, many Federal projects are delayed by litigation after the breakdown of Federal consultation efforts. A clear process will contribute greatly to increased efficiency.[20]

---

[16] Fletcher, Federal Indian Law, § 5.2, at 209–12.

[17] *Menominee Indian Tribe of Wisconsin v. EPA*, 2018 WL 6681397 (E.D. Wis., Dec. 19, 2018).

[18] Colette Routel & Jeffrey Holth, Toward Genuine Consultation in the 21st Century, 46 U. Mich. J. L. Reform 417, 420–35 (2013).

[19] See generally Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach, A/HRC/39/62, at 5–8 (Aug. 10, 2018); S. James Anaya & Sergio Puig, Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples, 67 U. Toronto L.J. 435 (2017).

[20] Dean B. Suagee, Consulting with Tribes for Off-Reservation Projects, 25:1 Nat. Resources & Env't, 54, 55 (Summer 2010).

Treaty Rights

The discussion draft appears to leave out reference to treaty rights. I recommend included explicit reference to treaty rights to ensure that treaty rights affected by Federal activities are included. Section 4(1) defines "activities" broadly, and properly so. Section 4(A) in particular is broad enough to include most, if not all, tribal interests arising from treaty rights. However, recent treaty rights litigation such as the culverts case in the Pacific Northwest, the pipeline cases in the northern Great Plains and in the Great Lakes area, and other treaty rights matters involve the critical treaty right to a homeland, originally recognized in the Supreme Court decision *United States v. Winans*.[21] Federal approvals of projects far from reservation lands that have the potential to destroy off-reservation resources protected by treaty rights such as clean water and fish habitat should require tribal consultation. Explicit reference to treaty rights would be helpful to avoid conflict over the scope of the duty of consultation.

State Government Activities

Many tribes are frustrated with state governments that are implementing Federal programs affecting tribal interests. In some instances, the United States has delegated Federal powers to state government to effectuate a particular purpose, such as implementing the Clean Water Act. Absent the delegation to the state, the United States would remain obligated to engage in tribal consultation. The discussion draft could be clarified to ensure that states implementing or administering Federal programs respect the duty of tribal consultation.

Section 105(b)—Payment for Tribal Documentation Work

This section alone would constitute a great advance in Federal-tribal relations. Few tribes would choose to divert scarce tribal resources to a project in response to the requests of the Federal Government to explain the tribe's interest and how that interest might be affected by a proposed Federal project. As the cases listed in Appendix II indicate, all too often Federal consultation efforts devolve into an adversarial situation. Federal money available to handle those requests for information is more likely to make a tribe respond to consultation inquiries.

I might suggest expanding this section to include more activities. Quick research into tribal laws available at the National Indian Law Library's website showed that there are relatively few tribal consultation statutes or formal offices for responding to consultation requests.[22] It would be very helpful if there were funding available for tribes to develop their own tribal consultation laws and consultation offices. As the record shows, many tribes cannot efficiently respond to Federal consultation requests, and sometimes Federal inquiries go nowhere because there is no formalized tribal process. Federal self-determination appropriations could be increased to meet that need.

Section 401—Judicial Review

Tribal consultation only works if the government notifies and begins consulting with affected Indian tribes prior to the earliest stages of a project, a notion that undergirds Section 101 of the discussion draft. The survey of cases contained in Appendix II includes a few cases where an agency waited until a project was well underway, or where an agency went ahead with a project before receiving a response from a tribe, or where the agency made no effort whatsoever to engage in consultation. There are also cases where a tribe sued an agency successfully under another statute, such as the National Environmental Policy Act or the National Historic Preservation Act, while the tribe's claims under the tribal consultation policy failed. In a situation where the agency, for whatever reason, does not consult with an Indian tribe but moves forward with a project anyway, judicial review is a critical tool for tribes. Section 401 is a great first step.

Survey of Federal Court Litigation over Tribal Consultation

The table that appears as Appendix II is a non-comprehensive list of Federal court cases brought by Indian tribes against Federal agencies or Federal officials alleging that the United States failed to adequately consult with those tribes. A significant number of these cases concluded with injunctions against Federal projects going forward, either because of the failure to adequately consult with tribes or for some other violation of Federal law raised by the tribal plaintiffs, such as the failure

---

[21] 198 U.S. 371, 385 (1905).

[22] The Rincon Band of Luiseño Mission Indians' tribal consultation ordinance (Rincon Tribal Code § 2.800 et seq.) appears to be a very good model, and is available here: https://narf.org/nill/codes/rincon_luiseno/index.html.

to comply with NEPA. It is possible, perhaps even likely, that tribal consultation could have addressed the issues raised by the tribes.

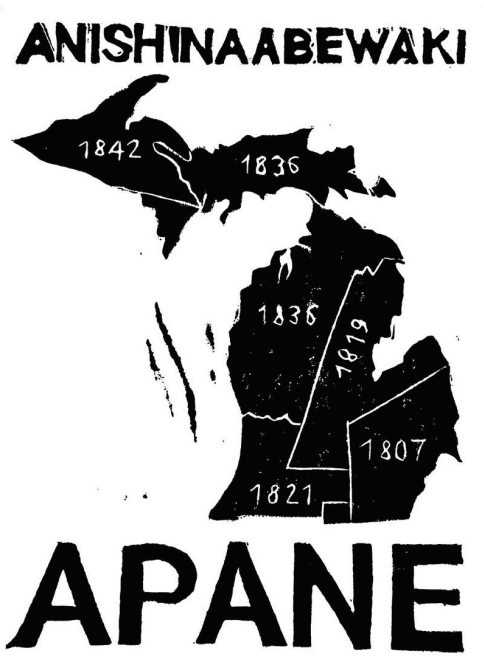
In conclusion, the RESPECT Act is a major step forward in Federal-tribal relations. The Indian nations that entered into treaties with the United States—and that petitioned for and received Federal acknowledgment by statute or administrative act—always understood the duty of protection to be a partnership. Consultation is merely an acknowledgment of the respect due to both sovereigns, Federal and tribal. Every step the United States takes toward treating Indian tribes as partners is a positive step.

Miigwetch.

*****

ATTACHMENTS

Appendix I



DYLAN MINER, *ANISHINAABEWAKI APANE – ALWAYS (AND CONTINUOUSLY) INDIGENOUS LANDS* (2017)

Appendix II

Case	Tribal Interest	Form of Consultation; Outcome	Likely Compliance with Proposed RESPECT Act?	Federal Court Outcome
Coyote Valley Band of Pomo Indians v. DOT, 2018 WL 1569714 (N.D. Cal. 2018)	Sacred sites [Coyote Valley + Round Valley tribes]	Notice + Comment; Approval of project over tribal objections	No	Agency allowed to proceed
Havasupai v. Provencio, 906 F.3d 1155 (9th Cir. 2018)	Sacred sites + Environmental	None	No	Agency allowed to proceed [cert petition filed March 2019]
Cachil Dehe Band v. Zinke, 889 F.3d 584 (9th Cir. 2018)	Economic [gaming]	Notice [tribe did not respond]	Possibly	Agency allowed to proceed
Hopi v. EPA, 851 F.3d 957 (9th Cir. 2017)	Economic interest	Notice + Comment (excluded in late stages); Approval of project over tribal objections	No	Agency allowed to proceed
Standing Rock Sioux v. US Army Corps, 205 F.Supp.3d 4 (D.S.D. 2016) + related proceedings (ongoing)	Sacred sites + Environmental interests	(Late) Notice + Comment; Approval of project over tribal objections	Likely no	Agency allowed to proceed
Cheyenne River Sioux v. Jewell, 205 F.Supp.3d	Bureau of Indian Education	Notice + Comment (certain info excluded from gov't	No	[Tribe stated claim of inadequate

1052 (D.S.D. 2016)	restructuring	materials); Proposal sent to Congress without tribal consent		consultation]
Colorado River Indian Tribes v. DOI, 2015 WL 12661945 (C.D. Cal. 2015)	Sacred sites	Notice + Comment + [partial] Remediation; Approval of project over tribal objections	Likely not	Agency allowed to proceed
Yakama v. USFS, 2015 WL 1276811 (E.D. Wash, 2015)	Sacred site (Yakama and Umatilla tribes)	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of NHPA)
Quechan v. DOI, 927 F.Supp.2d 921 (S.D. Cal. 2013), aff'd, 673 Fed.Appx. 709 (9th Cir. 2016)	Historic sites	Notice [tribe did not respond for 4 years]	Possibly	Agency allowed to proceed
Summit Lake Paiute v. BLM, 496 Fed.Appx. 712 (9th. Cir 2012)	Sacred sites	Notice + Comment + Site Visits; Approval of project over tribal objection	No	Agency allowed to proceed
Quechuan v. DOI, 755 F.Supp.2d 1104 (S.D. Cal. 2010)	Sacred site	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of NHPA)
Crow Creek Sioux v. Donovan, 2010 WL 1005170 (D.S.D. 2010)	Suspension by HUD of Contractors	None	Not clear	Agency allowed to proceed
Te-Moak Shoshone v. DOI, 608 F.3d 592 (9th Cir. 2009)	Sacred site	Notice (1 year late)	No	Agency enjoined [NEPA violation]

South Fork Shoshone v. DOI, 588 F.3d 718 (9th Cir. (2009)	Sacred site	Notice + Comment + Study + Cooperation; Approval of project over tribal objections	Possibly	Agency enjoined [NEPA violation]
Yankton Sioux v. HHS, 533 F.3d 634 (8th Cir. 2008)	Closing of Indian Health Service ER	Report issued to Congress including presentation of "tribe's views"	No	Agency allowed to proceed
Pit River Tribe v. USFS, 469 F.3d 768 (9th Cir. 2006)	Sacred sites	None	No	Agency enjoined
Fallon Shoshone Paiute v. BLM, 455 F.Supp.2d 1207 (D. Nev. 2006)	Sacred sites + Indian ancestral remains	Notice + Comment [terminated after tribe retained experts]; Approval of project over tribal objection	No	Agency enjoined (violation of NAGPRA)
Yankton v. Kempthorne, 442 F.Supp.2d 774 (D.S.D. 2006)	Indian education restructuring	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of BIA consultation policy)
Cheyenne Arapaho v. US, 2006 WL 8436383 (W.D. Okla. 2006)	Economic interest (gaming)	None	No	[federal gov't motion to dismiss denied]
Eight Northern Indian Pueblos v. Kempthorne, 2006 WL 8443876 (D.N.M. 2006)	Bureau of Indian Education restructuring	Notice [inadequate as to consequences of project]	No	Agency enjoined
Yankton Sioux v. US Army Corps, 194 F.Supp.2d	Indian ancestral remains	Notice + Cooperation [partial, until gov't	No	[tribe's motion for injunction denied as

977 (D.S.D. 2002)		terminated]		unripe]
Winnebago v. Babbitt, 915 F.Supp. 157 (D.S.D. 1996)	BIA agency hiring freeze + Reduction in Force	None	No	Mandamus issued against agency
Lower Brule Sioux v. Deer, 911 F.Supp. 395 (D.S.D. 1995)	BIA Reduction in Force	None	No	Mandamus issued against agency
Oglala Sioux v. Andrus, 603 F.2d 707 (8th Cir. 1979)	BIA superintendent reassignment	None	No	Agency enjoined (violation of general trust duty)

Mr. GALLEGO. I want to thank the expert witnesses for their testimony. We will now move on to questions. I will start by recognizing myself for 5 minutes.

Ms. Vanessa Ray-Hodge, can you elaborate on how the RESPECT Act should be adjusted to protect all tribal treaty resources, sacred sites and trust lands? And why is this clarification important?

Ms. RAY-HODGE. I think it is important to have express mention in the Act because often agencies don't give serious consideration to their dual legal obligations, those obligations under their Federal statutes, but also to Indian tribes under treaties and Federal case law. So, I think oftentimes what happens is because it is not in the top of the minds of Federal agencies when they are resolving issues, tribal rights are often subjugated, or left out, of the balancing of what is the right decision to make, or if modifications need to be made in a Federal policy or a project to protect those rights. Because at the end of the day, it is only Congress that has the authority to diminish tribal treaty rights or rights that have been legally recognized by the Federal courts for tribes, and so agencies have to take that consideration into play, or else they could start trying to diminish rights that would be unlawful.

Mr. GALLEGO. Thank you very much, Ms. Ray-Hodge. Mr. Washburn, this version of the RESPECT Act was expanded so it applies to independent Federal regulatory agencies. This was due to conversations with tribes that independent agencies were ignoring their duty to consult. What is your experience and your past dealings with some of these independent agencies when it comes to these matters? And should they be included in the RESPECT Act?

Mr. WASHBURN. Thank you, Chairman. I would say absolutely, and that is something that only Congress can do, because President Clinton did an Executive Order on tribal consultation and Obama did a Presidential Memorandum to further that. But the executive branch can't reach independent Federal regulatory agencies like you all, so we need Congress to act in the RESPECT Act for that purpose. And those independent agencies have a very checkered history of working with tribes. Some of them do OK sometimes, but

they don't have that norm firmly established, and if you passed a law, they would have to follow that law. I think we would get better results. Indian tribes work a lot better when the Federal agencies communicate with them well, and Indian tribes and the Federal Government can work well together. We have seen that. But it takes careful consultation and good communication, and that is what the RESPECT Act does. Thank you.

Mr. GALLEGO. Thank you, Mr. Washburn. Mr. Fletcher, thank you for your in-depth written testimony, especially your analysis of how drastically different things might be today for Indian Country and America had tribal consultation been applied from the beginning. Where do you feel the duty for tribal consultation stems from?

Mr. FLETCHER. Well, I think it is actually a constitutional duty, and it is certainly rooted in the treaties. You may recall that there are as many as 400 treaties between Indian tribes and the United States, and those treaties really are the creation of a relationship between governments that is a partnership.

As Rob Williams wrote in his book *Linking Arms Together* on the history of the Haudenosaunee Treaties, some of the tribes treated those as familial relationships. And we know the Supreme Court in the Marshall Trilogy, which is the first series of important cases on Indian law from the 1820s and 1830s referred to this relationship where the United States had undertaken a duty of protection to Indian tribes. Most of those treaties reference Indian tribes coming under the protection of the United States. To this day, that duty of protection really is usually described as the general trust relationship. And if we treat these management of resources, management of government and jurisdictions as a partnership, then every single time the United States does take an action or propose an action that affects tribes, there should be some consultation with that tribal partner.

Mr. GALLEGO. Mr. Fletcher, to follow up, the Constitution is inherently a government-to-government function, but there are times when the Federal Government delegates their powers to a state government for a particular purpose, such as implementing a Clean Water Act, then the obligation to consult gets murky. What should the requirement to consult be in these cases?

Mr. FLETCHER. Well, I think if nothing else, Congress could certainly require the states when they do agree to implement Federal programs through a delegation from Congress, that states need to be reminded that they are stepping in the shoes of the Federal Government and they have entered into obligations under this trust responsibility.

I look at some of the programs or some of the activities undergoing in the Great Lakes right now, like the Back 40 Mine, which is depending on Michigan approvals. We have also had the Line 5 in the Straits of Mackinac, which is a huge pipeline. That literally could be an existential threat to the Great Lakes. And much of that is dependent on state action.

Mr. GALLEGO. Thank you, Mr. Fletcher. I now recognize the Ranking Member, Representative Cook.

Mr. COOK. Thank you, Mr. Chairman. Listening to the testimony and everything else, I am optimistic about this, but maybe it is my

cynicism because of my old age and insults from Don Young—no. This is something that is very, very difficult. I worked for the Federal Government and the Marine Corps 26 years and it seemed as though every year there was a new program that we were going to change the Marine Corps, this and that. And one of the hardest things is to get it right in any of these programs. And it is going to be tough because I think we have to change the behavior of the Federal Government, and particularly their attitude with Native Americans, Indigenous People, because—I am not a member of a tribe, but I would have a chip on my shoulder.

I mean, if you look at all the history over the years, I would be very, very careful of anybody from Washington. Don't trust them. But if you can have a level playing field, and I think you have to establish if this isn't enacted, then I think we have to go even further, so that you have the ground rules, what you want to accomplish, so it is not a Washington tells the tribes what is going on, or I think there is going to be resentment of failure.

And I wanted to get Professor Washburn's, as a member of the previous administration, am I being too cynical? Because I think it is a great idea, good intentions, everything like that, but when you put it in action, it is going to be very, very difficult. Do you have any words of wisdom on where we can go a little further on this?

Mr. WASHBURN. I think tribes and the Federal Government work better, they have improved over time and they can work well together now, so I think maybe you are a little cynical. I think that we can be optimistic. Tribes have become so much more sophisticated and so much more capable of self-government and exercising sovereignty so much better and so much better resourced, and they have become almost equal partners to the Federal Government. There are still some paternalistic aspects to it, but tribes do a great job and I think that largely the improvement is due to tribes, not due to the Federal Government.

Mr. COOK. Oh, I agree with you 100 percent. Maybe you trust the Federal Government more than I do, but I guess I shouldn't say that. I know we are, but I don't trust myself and I think when—wait a minute, I got two—thanks, Don.

All I am saying is—and I taught American History, a professor and all that, maybe that is the problem, I taught too much American History and a lot of it was terrible, and I am not going to go through everything that has happened to so many tribes, so all I am doing is, I will have an open mind on this and I appreciate what the Chairman is doing, and just starting off with the name of the Act, the RESPECT Act, and this is something that doesn't happen for years because if there was that respect then I think we could expect better conditions and everything else.

I am not going to go on and on, and I think we can do a lot with this, but the one thing I want is not driven so much by us, but you have that input from the tribes, a lot of different areas and this and that, and that is going to be tough to find a common denominator. But let's do it. I yield back.

Mr. GALLEGO. Thank you, Ranking Member Cook. I now recognize Delegate San Nicolas for questions.

Mr. SAN NICOLAS. Thank you, Mr. Chair. I appreciate everybody being here today to discuss this legislation. I am the Delegate from

Guam, so I am the Representative of a U.S. Territory and my heritage is Chamorro, Indigenous People of Guam. We have a lot of close ties to our land as well, and a lot of the same challenges that our Indigenous brothers and sisters have in the tribes.

One of our most unique experiences so far has been dealing with a military realignment into Guam from Okinawa, moving thousands of Marines into the island. And one of the biggest challenges has been trying to walk that middle ground with the Federal Government in terms of the environmental impact on the territory. One of the real advantages that we have had as a result of the process, the way the military needs to go about doing their process, is they were required to complete an environmental impact study before they can even move forward.

One of the things that I appreciate about this legislation is it creates a mandate for agencies to consult with the tribes, but I think that we need to maybe look further into creating a basis for consultation. For example, I think the tribes should probably be able to request, in advance, prior to even beginning consultation, that an environmental impact study be done with respect to whatever activity the Federal Government is looking to undertake.

And one of the reasons why I would probably recommend that is because if you require an environmental impact study upfront before the consultations, then you will have a basis for being able to go in and actually consult. Otherwise you might be sitting down at a table and you are only discussing what they share with you, you might not have all the facts in front of you. And if there is no EIS, no environmental impact study, then you might not know necessarily what to consult about.

And one of the most powerful things about the EIS that has been effective so far, is whenever there were any violations of it, we could take the military to court and get the project stopped or get injunctions on whatever activities are taking, because their EIS, which was mandated to be presented before they were able to move forward, their EIS did not include a certain component.

So, this might actually put more empowerment into the tribes if before there is even consultation, an official Federal environmental impact study needs to be presented with respect to whatever activity, if the tribe so requests one to be provided in advance of consultation. Because I think a lot of the concerns at the tribal level will be similar to the concerns of the Chamorro people with respect to environment, with respect to how you are impacting our way of life or how you are impacting our quality of life. And all of that had to be put into the environmental impact study that the military had to put together before they began moving forward with the military realignment.

How does the panel feel about perhaps including some kind of component like that so that when you walk into these consultations that the mandate does require you actually know what you are going to be consulting rather than sitting there and wondering if they are sharing all of the information or not or if you are walking away from the table being fully informed and also having fully participated based on all the facts? If I could get feedback from the panel, please.

Mr. WASHBURN. Delegate, there is a lot of sense in what you say because tribes do need to have a lot of information to be able to consult effectively. I would probably stop short of requiring an environmental analysis or EIS before consultation can even start. I would come at it a little differently just to say the Federal Government should consult early and often and they should continue the consultation as more information becomes available, because I wouldn't want to put up an artificial barrier to keep the Federal Government from consulting with a tribe about something that it is going to be doing.

I used to joke that tribes would get mad at me when I was in the government if I came up with an idea in the shower and I didn't consult before I toweled off. The tribes want to be engaged that much, so if the proposal that you suggest, the only worry I have about it is that it would keep the Federal Government from going ahead and consulting while they are waiting for the EIS to be completed. Thank you.

Ms. RAY-HODGE. Thank you, Congressman. I actually sort of agree with Mr. Washburn because I do think that tribes want to be consulted as early as possible when they know something is happening. I do think if it is something like an agency policy, you wouldn't necessarily do an EIS, but there are lots of projects that happen on Federal lands where an EIS is required, and what tribes are asking for in the Lower 48 and in Alaska is to be cooperating agencies from the start of that EIS document being started to the end of it so that they have the opportunity for true consultation to get their concerns in.

Mr. GALLEGO. Thank you, Delegate San Nicolas. Are there any further questions from the panel? Great.

I thank the witnesses for their valuable testimony, and the Members for their questions and time. Members of the Subcommittee may have some additional questions for the witnesses and we will ask you to respond to those in writing. The hearing record will be held open for 10 days for these responses.

If there is no further business before the Subcommittee, the Chairman again thanks the members of the Subcommittee and our witnesses. The Subcommittee stands adjourned.

[Whereupon, at 4:17 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

LETTERS OF SUPPORT FOR THE RECORD

MASHPEE CHAMBER OF COMMERCE

March 25, 2019

Hon. RAUL GRIJALVA,
Hon. ROB BISHOP,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: The Mashpee Chamber of Commerce Continues support of the passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Grijalva, Ranking Member Bishop, Chairman Hoeven, and Vice Chairman Udall:

We at the Mashpee Chamber of Commerce have read recent news reports concerning the movement of H.R. 312 and the effort to fast track this bill through the House. We applaud Congress for taking such affirmative steps to pass the Mashpee Wampanoag Reservation Reaffirmation Act and protect the Tribe's reservation lands. Enclosed please find the support letter we submitted to Congress last year in connection with H.R. 5244 (now, H.R. 312), that voices our strong support for this effort.

We urge you to continue to move this bill and vote in favor of H.R. 312.

Sincerely,

PATRICE PIMENTAL,
President, Board of Directors.

OFFICE OF THE TOWN OF MASHPEE
MASHPEE, MASSACHUSETTS

April 11, 2019

Hon. RUBEN GALLEGO, *Chairman*,
Hon. PAUL COOK, *Ranking Member*,
House Committee on Natural Resources,
Subcommittee on Indigenous Peoples of the United States,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: Subcommittee Hearing on H.R. 312, the Mashpee Wampanoag Reservation Reaffirmation Act, held on April 3, 2019

Dear Chairman Gallego, Ranking Member Cook, and Members of the Subcommittee:

On behalf of the Town of Mashpee, Massachusetts, I write to thank you for holding the hearing last week on H.R. 312, the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act," and respectfully submit these comments in support of this vitally important bill. The Town has been advocating for Congress to enact this measure since the predecessor version of the bill was first introduced in the 115th Congress as H.R. 5244, and we fully intend to continue doing so this Congress as well.

The Town of Mashpee and the Mashpee Wampanoag Tribe are old neighbors that have enjoyed an ongoing, positive, and productive working relationship over the course of many years—a relationship that both the Tribe and the Town value very much. The success of our longstanding relationship is evidenced in part by the 2008 Intergovernmental Agreement between the Tribe and the Town, which is referenced in the text of H.R. 312. The important jurisdictional and other balances that the Tribe and the town negotiated in 2008 are expressly recognized and preserved by the bill.

Aside from the Intergovernmental Agreement, as we stated in our comments to the Subcommittee on Indian, Insular, and Alaska Native Affairs last Congress, we also wish to emphasize that this legislation will help ensure that the Tribe's economic development plans for the part of its reservation that lies within the nearby community of Taunton will be preserved and serve to stimulate job creation in an area that is best suited for it. For this reason as well, the Town strongly supports this legislation.

Above all, the Town of Mashpee believes enactment of H.R. 312 is simply the right thing to do. This Act ensures that the Tribe has a federally-protected homeland in its historic territory and that it enjoys the same rights under Federal Indian law as other federally-recognized Indian tribes.

The Town appreciates the Committee's consideration of our views and again urge you to vote in favor of the bill as soon as possible.

Sincerely,

RODNEY C. COLLINS,
Town Manager.

TOWN OF MASHPEE,
OFFICE OF SELECTMEN,
MASHPEE, MASSACHUSETTS

May 22, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: The Town of Mashpee Urges Passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (S. 2628 and H.R. 5244)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Town of Mashpee, Massachusetts, I write to express our Town's unequivocal support for swift passage of the Mashpee Wampanoag Reservation Reaffirmation Act, and toward that end we ask that you schedule hearings in your respective Committees of jurisdiction as quickly as possible. The establishment of the Mashpee Wampanoag reservation in 2015 was *very long overdue*, and we feel strongly that this legislation is needed to protect that reservation.

The Town and the Tribe are old neighbors and have long had a positive working relationship with one another, and that relationship has in some ways been memorialized in various agreements and memoranda of understanding over the years.

One of the reasons the Town supports the Mashpee Reservation Reaffirmation Act is that we believe it will also help to protect our relationship. Indeed, the Town and the Tribe have worked cooperatively together to craft a minor proposed amendment to the legislation which would further strengthen our agreement with each other, and a copy of that proposed amendment is attached. We join with the Tribe in asking that the Committees adopt this amendment during the legislative process.

The Town of Mashpee thanks you for the good work you do, and for your interest in helping both the Mashpee Wampanoag Tribe and the Town of Mashpee move productively into the future. If you have any questions, please do not hesitate to contact me directly, or have your staff contact the Town's attorney, Patrick Costello, at telephone number (XXX) XXX–XXXX with any questions.

Sincerely,

CAROL A. SHERMAN,
Chairman.

*****

ATTACHMENT

(S. 2628; H.R. 5244) Mashpee Wampanoag Tribe Reservation Reaffirmation Act, as amended

To reaffirm the Mashpee Wampanoag Tribe reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act."

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) In General.—The taking of land into trust by the United States for the benefit of the Mashpee Wampanoag Tribe of Massachusetts as described in the final Notice of Reservation Proclamation published at 81 Federal Register 948 (January 8, 2016) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) Application.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) Applicability of Laws.—All laws (including regulations) of the United States of general applicability to Indians or nations, Indian tribes, or bands of Indians (including the Act of June 18, 1934 (25 U.S.C. 5101 et seq.)), shall be applicable to the Mashpee Wampanoag Tribe of Massachusetts and tribal members, provided, however, that to the extent such laws and regulations are inconsistent with the terms of the Intergovernmental Agreement, dated April 22, 2008, by and between the Mashpee Wampanoag Tribe and the Town of Mashpee, Massachusetts, the terms of said Intergovernmental Agreement shall control.

CITY OF TAUNTON,
OFFICE OF THE MAYOR,
TAUNTON, MA

June 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. DOUG LAMALFA,
Hon. RUBEN GALLEGO,
House Subcommittee on Indian and Alaska Native Affairs,
Washington, DC 20515.

Re: The City of Taunton Urges Passage of H.R. 5244, The Mashpee Wampanoag Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman LaMalfa, and Ranking Member Gallego:

In my capacity as Mayor of the City of Taunton, I write to urge Congress to act quickly to protect the Mashpee Wampanoag Tribe's reservation lands.

This Tribe—the one that welcomed the Pilgrims in 1620—deserves to have its trust lands, located within its aboriginal territory, secured through this legislation. The City of Taunton sees it as a moral imperative to ensure that the Tribe is not forced back into landless.

But it is also a moral and economic imperative for the City of Taunton. The City of Taunton has already overwhelmingly approved through a city-wide local referendum the Tribe's planned economic development. Our partnership with the Tribe will create thousands of good-paying jobs—jobs our community desperately needs. And we are confident that the economic multiplier effect will lead to the further growth of more businesses and ventures, and more revenue to the City.

We are grateful for the strong bipartisan support the Mashpee Reservation Reaffirmation Act has received. We know that your leadership is key to ensuring passage of this important legislation.

I respectfully urge you to support this legislation and move the legislation out of your Committee as quickly as possible.

Sincerely,

THOMAS C. HOYE JR.,
Mayor.

TESTIMONY OF THE HON. THOMAS C. HOYE, JR., MAYOR, CITY OF TAUNTON, MASSACHUSETTS

URGING PASSAGE OF THE MASHPEE RESERVATION REAFFIRMATION ACT (S. 5244)

HEARING BEFORE THE INDIAN, INSULAR & ALASKA NATIVE AFFAIRS SUBCOMMITTEE, HOUSE NATURAL RESOURCES COMMITTEE

JULY 24, 2018

My name is Thomas C. Hoye, Jr. I am mayor of the City of Taunton, Massachusetts. On behalf of our City, I respectfully request that this written testimony be included in the record. The health and well-being of the City of Taunton and the Mashpee Wampanoag Indian Tribe are closely intertwined, and for this reason the City urges the Committee to vote favorably on the legislation as soon as possible and to do everything within its power to ensure it becomes law in this Congress.

Background

The City of Taunton has a population of nearly 57,000 people and is located in southeastern Massachusetts. Founded in 1637 by members of the Plymouth Colony, the City is located squarely within Wampanoag traditional historical territory.

Our City has a long history of successful economic development. The Taunton Ironworks was established in 1656 and operated for more than two hundred years. In the 19th century, we also became home to famous silversmithing companies, include some still known today, like Reed & Barton. Other famous manufacturers operating in Taunton beginning in the 19th century included the Weir Stove Company, the Field Tack Company, Mason Machine Works, Taunton Locomotive Works, and Whittenton Mills. Our location on the Taunton River made our City a major shipping point before the railroads were built, and afterwards Taunton became an important railroad hub for the transportation of agricultural goods and industrial products.

Unfortunately, in more recent years, our manufacturing industries have suffered and diminished, and our City and our region has not been able to benefit from the same economic improvement as we see in other parts of the Commonwealth of Massachusetts and other parts of the United States. The impact on our City and its infrastructure is palpable.

Close Working Relationship With the Mashpee Wampanoag Tribe

The City and the Tribe have a close working relationship. The City and the Tribe have entered into an agreement under which, among other things, the Tribe will pay the City a share of net revenues generated from slot machines, the Tribe will make PILOT payments to the City, and the Tribe will pay for all up-front infrastructure costs. The agreement contemplates over fifteen million dollars in one-time mitigation improvements and over four million dollars in annual recurring mitigation payments to the City, as well as a minimum of eight million dollars per year of slot machine revenue. (Please See Exhibit A: Intergovernmental Agreement By and Between the Mashpee Wampanoag Tribe and the City of Taunton, dated May 17, 2012, and, Amendment to Intergovernmental Agreement, dated March 13, 2013)

Economic Importance to the Entire Southeastern Massachusetts Region

The litigation that has raised technical legal objections to the creation of the Tribe's reservation threatens thousands of much needed jobs, jeopardizes critical traffic infrastructure that would benefit the entire region, and prevents the Commonwealth from collecting hundreds of millions of dollars in revenue that could be going to education and economic development that would benefit all of us. This project will stimulate strong economic growth for the City of Taunton and the region and provide many needed jobs at a time when projects of this magnitude are few and far between. The Casino will supplement Taunton's budget with an anticipated over $13 million dollars a year that would enable us to hire badly needed police officers, firefighters, teachers, and, to fund well overdue public infrastructure projects.

We Urge Congress to Enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

The Tribe's economic development plan has the overwhelming support of the City of Taunton, as demonstrated by the public referendum vote with 63 percent of those casting ballots voting in favor of the proposed Casino. (Please see Exhibit B: City

of Taunton 6/9/2012 Special Election Official Results) The City's residents know that a tribal gaming facility located on the portion of the Tribe's reservation that abuts our City will create thousands of good paying jobs, upwards of $75 million in local and state tax revenue, and another $15 million in desperately needed infrastructure improvements. And the economic multiplier effects for area businesses would be tremendous.

Our schools, police and fire departments also need a boost in revenue. Cities across the state will benefit from the development that the Tribe has sought to do. We need Congress' help to protect the Tribe, protect the people of Taunton, and to protect southeastern Massachusetts from the negative consequences of seemingly endless litigation about otherwise meaningless technical legal issues.

In sum, not only is passing the Reservation Reaffirmation Act the right thing to do for the City economically, it is also the right thing to do considering the Tribe's long-standing ties to Taunton and the surrounding area going back thousands of years, and the fact that it was the Wampanoag people that made the settlement of our state possible because of their hospitality.

For these reasons, we urge Congress to enact this legislation as quickly as possible.

TAUNTON AREA CHAMBER OF COMMERCE,
TAUNTON, MASSACHUSETTS

Hon. RUBEN GALLEGO, CHAIRMAN,
Hon. PAUL COOK, RANKING MEMBER,
House Subcommittee on Indigenous Peoples of the United States,
Washington, DC 20515.

Re: The Taunton Area Chamber of Commerce Urges Swift Passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Gallego and Ranking Member Cook:

On behalf of the Taunton Area Chamber of Commerce, I am writing to respectfully urge the House Natural Resources Committee and its Subcommittee on Indian, Insular and Alaska Native Affairs, to work to enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). We commend the Committee for scheduling a hearing to hear testimony on this important legislation and we respectfully request to submit testimony for the hearing record.

As we expressed in our June 7, 2018 letter to this Committee, the establishment of the Mashpee Wampanoag Tribe's reservation has brought the promise of significant economic development that will not only benefit the Mashpee Wampanoag Tribe but the entire Taunton Community. H.R. 5244 will ensure that the Tribe's reservation is protected and secure economic growth in the southeast region for years to come.

The construction and operation of the Tribe's planned casino and resort will create nearly 7,000 jobs. Additionally, the operation of the casino and resort will revitalize existing businesses in the surrounding areas and incentivize the creation of new ventures that will provide even more jobs for residents. The operation of the casino and resort will also bring more than just jobs to our community. The Tribe has committed to $30 million in upgrades to the Taunton water system and roadways and $10 million per year to local first responders and Taunton city services.

Passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act is critically important to the economic future of Taunton, and we urge this Committee to act swiftly to support the enactment of this legislation.

Sincerely,

KERRIE BABIN

TESTIMONY IN OPPOSITION FOR THE RECORD

TESTIMONY OF THE HON. DAVID N. CICILLINE AND THE HON. JAMES R. LANGEVIN REPRESENTATIVES IN CONGRESS FROM THE STATE OF RHODE ISLAND

Good afternoon Chairman Gallego, Ranking Member Cook, and members of the House Committee on Natural Resources' Indigenous Peoples Subcommittee. Thank you for allowing us to submit our testimony today to express our strong opposition to H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. H.R. 312 would allow the Mashpee Wampanoag Tribe to open a casino in Taunton, Massachusetts. The bill would not only overturn a 2018 decision by the U.S. Department of Interior and reverse a 2016 ruling by the U.S. District Court in Massachusetts, but it would also deliver a devastating blow to Rhode Island's economy.

The Mashpee Wampanoag Tribe was federally recognized in 2007 after the Tribe hired former lobbyist and convicted felon Jack Abramoff. Prior to that time, the Tribe's application for Federal recognition had not been acted upon since it was originally filed in the 1970s. In 2009, the U.S. Supreme Court ruled in *Carcieri v. Salazar* that the Federal Government could only take land into trust for tribes that were recognized when the Indian Reorganization Act passed in 1934. In 2015, the U.S. Department of Interior defied the 2009 Supreme Court ruling and unjustly took land into trust for the Mashpee Tribe using a novel and flawed methodology. A year later, residents of Taunton, Massachusetts sued in U.S. District Court and won to stop the U.S. Department of the Interior from taking land into trust for the Tribe. In 2018, the U.S. Department of the Interior reviewed the Mashpee application pursuant to the correct legal methodology and summarily rejected the Tribe's application in a thorough and well-reasoned decision. The Mashpee Tribe, backed by a Malaysian Gaming Company, is now looking to Congress to reverse major Federal court decisions and the recent ruling by the U.S. Department of the Interior.

If H.R. 312 were to become law, it would have a devastating impact on Rhode Island's economy. The Twin River and Tiverton casinos generate over $300 million in revenue, representing the third largest source of revenue for Rhode Island. The revenue from the casino industry in Rhode Island helps fund education and infrastructure programs. Our state would suffer tremendously if Congress passed H.R. 312 by allowing the Mashpee Wampanoag Tribe to build a casino on our border.

While we are primarily concerned about the impact this bill will have on our state, we are also concerned about the precedent it will set. If Congress grants the Mashpee Tribe this exception, it would encourage other tribes to seek individual relief from Congress. Instead of Congress picking winners and losers, we believe that Congress should look at updating the Indian Reorganization Act of 1934 to make the land to trust process more transparent and fair.

Last, we are concerned by the haste in which this bill was nearly brought to the Floor last week under suspension without a hearing or a markup. We thank Chairman Gallego and Ranking Member Cook for taking the time to have a hearing on this controversial bill today. A bill that overturns decisions by the U.S. Department of the Interior, U.S. Supreme Court, and U.S. District Court should go through the entire Committee process before being brought to the House Floor for vote under regular order.

Thank you again for the opportunity to express our opposition to H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Submissions for the Record by Rep. Keating

LETTERS OF SUPPORT

AKIAK NATIVE COMMUNITY,
AKIAK, ALASKA

June 5, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Please Support the H.R. 5244/S. 2628, Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, the Akiak Native Community, I write today to ask that you support H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act, which are now pending in the House Natural Resources Committee—Subcommittee on Indian, Insular, and Alaska Native Affairs, and in the Senate Indian Affairs Committee. This bipartisan bill is broadly supported in Indian country and is urgently needed in order to ensure that the Mashpee Reservation, located within the Mashpee Tribe's traditional homelands, is not disestablished due to a technicality.

The Mashpee Reservation was established in accordance with the Indian Reorganization Act and with the strong support of the local community. However, this reservation is now being threatened by litigation that could soon return the Tribe to landlessness—something that the IRA was enacted to prevent. As you know, tribal land allows tribes to protect their cultures, provide public services to their members, and engage in economic development. By reaffirming the status of the Mashpee Reservation, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act will ensure that these essential components of self-determination are preserved.

We respectfully request that Congress fulfill its trust responsibility to the Mashpee Tribe by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. Thank you for considering this request and for the work you do for Indian country.

Respectfully submitted,

Ivan M. Ivan, Chief

Michael Williams, Sr., Tribal Council

Moses Owen, Tribal Council

Sam Jackson II, Tribal Council

APACHE ALLIANCE,
SCOTTSDALE, AZ

May 16, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf the member tribes of the Apache Alliance, we are writing to express our support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). As a federally recognized Indian Tribe, the Mashpee Wampanoag Tribe should be entitled to the same benefits under the Indian Reorganization Act as are other federally recognized tribes. Yet because of a legal technicality, the Mashpee Wampanoag Tribe's federal reservation is under attack in the federal courts *and could be disestablished by later this year*—something the federal government has not allowed to happen since the Termination Era.

Congress's plenary authority over Indian issues is the only thing standing between the Mashpee Tribe's reservation and the Tribe's return to landlessness. We urge the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to hold hearings on these bills and vote them out of Committee as quickly as possible. You have the power to prevent this Tribe from suffering yet another historical wrong.

Sincerely,

JEFF HAOZOUS,
President.

AFFILIATED TRIBES OF NORTHWEST INDIANS,
PORTLAND, OR

June 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of our organization, the Affiliated Tribes of Northwest Indians (ATNI) representing over fifty tribes in the northwest, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Respectfully,

LEONARD FORSMAN,
President.

BIG VALLEY BAND OF POMO INDIANS,
LAKEPORT, CA

May 10, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

ANTHONY JACK,
Tribal Chairman.

CHEYENNE RIVER SIOUX TRIBE,
EAGLE BUTTE, SOUTH DAKOTA

June 4, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would be the first time in modern history that a reservation is disestablished, and would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected. The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Thank you and if you have any questions please feel free to contact me at: XXXXXXXXXXXXXXX.

Sincerely,

HAROLD C. FRAZIER,
Chairman.

THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION,
BOX ELDER, MONTANA

October 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Please Support the H.R. 5244/S. 2628, Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, the Chippewa Cree Tribe, I write today to ask that you support H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act, which are now pending in the House Natural Resources Committee—Subcommittee on Indian, Insular, and Alaska Native Affairs, and in the Senate Indian Affairs Committee. This bipartisan bill is broadly supported in Indian country and is urgently needed in order to ensure that the Mashpee Reservation, located within the Mashpee Tribe's traditional homelands, is not disestablished due to a technicality.

The Mashpee Reservation was established in accordance with the Indian Reorganization Act and with the strong support of the local community. However, this reservation is now being threatened by litigation that could soon return the Tribe to landlessness—something that the IRA was enacted to prevent. As you know, tribal land allows tribes to protect their cultures, provide public services to their members, and engage in economic development. By reaffirming the status of the Mashpee Reservation, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act will ensure that these essential components of self-determination are preserved.

We respectfully request that Congress fulfill its trust responsibility to the Mashpee Tribe by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. Thank you for considering this request and for the work you do for Indian country.

Sincerely,

HARLAN BAKER,
Chairman of the Chippewa Cree Tribe.

FORT SILL—CHIRICAHUA—WARM SPRINGS—APACHE TRIBE,
APACHE, OKLAHOMA

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

JEFF HAOZOUS,
Tribal Chairman.

THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
PESHAWBESTOWN, MI

September 26, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for H.R. 5244, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

In 1980, the Grand Traverse band of Ottawa and Chippewa Indians (GTB) became the first federally recognized tribe under the CFR Part 83 process. These administratively promulgated federal rules to recognize an Indian tribe have their origins in the Congressional Indian Policy Review Commission findings in the 1970s that the federal government had purposely or negligently neglected its trust obligation to primarily historic Midwest and Eastern Tribes. GTB, like many Indian tribes, had been administratively terminated by federal policy and, as a result, the federal trust relation between GTB and the United States was diminished, but never terminated. As part of the findings in the historic Indian Policy Review Commission, the Secretary of the Interior was congressionally directed to promulgate federal rules to recognize Indian tribes that had been neglected by variable and inconsistent administration of federal Indian policy over time.

The Mashpee Wampanoag Tribe is substantially similar to the Grand Traverse Band of Ottawa and Chippewa Indians in its history of neglect by the federal government. That history of neglect by the United States should not now be used to categorically determine an arbitrary date under federal law tied to the Indian Reorganization Act (IRA). Without a question, the Mashpee Wampanoag Tribe is an Indian tribe. The circumstances of Mashpee's relation to federal Indian law is largely a result of federal Indian policy, which is not controlled by the Mashpee tribe, indeed, the federal government by its neglect controlled the federal Indian law relationship between Mashpee and the federal government. GTB suffered a similar fate of neglect.

GTB urges Congress to recognize the inequities of an arbitrary date created by the IRA and to therefore extend the benefits of federal Indian law to the Mashpee Wampanoag by the enactment of H.R. 5244, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. The enactment of H.R. 5244 would be a measure of historical justice to the Mashpee based upon its previous historical neglect by the federal government.

Sincerely,

THURLOW "SAM" MCCLELLAN,
Tribal Chairman.

GUIDIVILLE INDIAN RANCHERIA,
TALMAGE, CA

June 7, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of our Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. We are acutely and painfully aware of the importance of this, having had our reservation lands illegally terminated by the federal government over 60 years ago. Despite our best efforts, we have yet to recover a usable trust land base. The process to acquire new lands in trust is long, difficult, expensive and wrought with anti-Indian organizations obstructionist tactics and litigation. The result of no land base on all aspects of the Tribe is absolutely devastating, and we can testify to this fact first hand.

We understand the Mashpee Tribe's reservation, which was established with the strong support of surrounding local governments, but is now threatened by litigation brought by a NIMBY group based on technical legal issues. Addressing this situation is the perfect opportunity for the United States to demonstrate and perform its trust responsibility to the Tribe by using its lawmaking authority to protect the Tribe from such unethical attacks. We strongly urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

MERLENE SANCHEZ,
Tribal Chairperson.

HUALAPAI TRIBE,
OFFICE OF THE CHAIRPERSON,
PEACH SPRINGS, ARIZONA

October 17, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Hualapai Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

DAMON R. CLARKE, CHAIRMAN
Hualapai Tribal Council

JENA BAND OF CHOCTAW INDIANS,
JENA, LOUISIANA

May 9, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Jena Band of Choctaw Indians, a federally recognized Tribe in Louisiana and long time member of the United South and Eastern Tribes, we respectfully urge that the Senate Indian Affairs Committee and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs work diligently and do everything legally possible to ensure the swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

We believe every federally recognized tribe in the United States is entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation, which was established with the strong support of surrounding local governments and which I have visited, is threatened by litigation brought by a NIMBY group based on, as I understand it, technical legal issues. We urge Congress to use its plenary authority and enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act to ensure that the Mashpee Tribe is not forever rendered perpetually landless.

Sincerely,

B. CHERYL SMITH,
Tribal Chief.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA
TRIBAL GOVERNMENT,
WATERSMEET, MICHIGAN

June 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for H.R. 5244/S. 2628, Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear esteemed members of Congress:

I am writing on behalf of Lac Vieux Desert Band of Lake Superior Chippewa Indians to advocate for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). We strongly urge the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to utilize their plenary power and ensure the reaffirmation of the Mashpee Tribe's Reservation.

The Mashpee Wampanoag Tribe is a federally recognized tribe with a reservation located within its historical homeland in Massachusetts. This reservation was established in accordance with the Indian Reorganization Act and with strong local government support. The Mashpee Tribe has been successful in rebuilding and providing for its members, as well as establishing great relationships with surrounding local governments. The Mashpee Tribe's reservation is threatened by litigation that could disestablish the reservation, which has not happened since the Termination era.

The Mashpee Tribe is not asking for new or special rights, only the reaffirmation of its reservation. If Congress does not exercise its plenary authority, the Mashpee Tribe's reservation and means of self-sufficiency will be lost. This is consistent with the federal government's trust obligations to federally recognized tribes. Please enact this important legislation.

Sincerely,

JAMES WILLIAMS, JR.,
Tribal Chairman.

LOWER BRULE SIOUX TRIBE,
TRIBAL ADMINISTRATION,
LOWER BRULE, SD

June 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for H.R. 5244/S. 2628, Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear esteemed members of Congress:

I am writing on behalf of the Lower Brule Sioux Tribe to advocate for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). We strongly urge the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to utilize their plenary power and ensure the reaffirmation of the Mashpee Tribe's Reservation.

The Mashpee Wampanoag Tribe is a federally recognized tribe with a reservation located within its historical homeland in Massachusetts. This reservation was established in accordance with the Indian Reorganization Act and with strong local government support. The Mashpee Tribe has been successful in rebuilding and providing for its members, as well as establishing great relationships with surrounding local governments. The Mashpee Tribe's reservation is threatened by litigation that could disestablish the reservation, which has not happened since the Termination Era.

The Mashpee Tribe is not asking for new or special rights, only the reaffirmation of its reservation. If Congress does not exercise its plenary authority, the Mashpee Tribe's reservation and means of self-sufficiency will be lost. This is consistent with the federal governments trust obligations to federally recognized tribes. Please enact this important legislation.

Sincerely,

BOYD I. GOURNEAU,
Chairman.

MASHANTUCKET PEQUOT TRIBE,
LEDYARD, CONNECTICUT

June 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to support the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). I understand that this is an urgent matter for the Mashpee Tribe and that they have strong local government support for the creation of its reservation.

I further understand that the threat to the Mashpee Tribe's federally protected lands is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation. Congress should exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land are protected. The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

RODNEY BUTLER,
Chairman.

CONGRESS OF THE UNITED STATES

STAND WITH THE TRIBE WHO WELCOMED THE PILGRIMS:
SUPPORT H.R. 312, THE MASHPEE WAMPANOAG TRIBE
RESERVATION REAFFIRMATION ACT

Dear Colleague,

We write to ask for your support for H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. This bipartisan legislation would require the Department of the Interior (DOI) to keep the Mashpee Wampanoag land, approximately 320 acres in Massachusetts, in trust as federally recognized reservation land. The Mashpee Wampanoags have called southeastern New England home for more than 12,000 years. In fact, they were the tribe who welcomed the Pilgrims and helped to ensure their survival during their first winter in Plymouth, Massachusetts.

Our country has a long, tragic history of disadvantaging Native American tribes. It took a nearly 40-year legal battle for the Mashpee Wampanoag Tribe to become federally recognized in 2007, which finally granted the Tribe access to important federal resources to help protect centuries of culture, provide adequate employment and housing, and ensure access to essential services like law enforcement, native language programs, pre-K education, and more.

However, the Supreme Court's decision in *Carcieri v. Salazar* just two years later called the status of the Mashpee Wampanoag Tribe—and the status of tribes around the country—into question. Additionally, the Mashpee Wampanoag Tribe has been uniquely affected. A 2018 decision by the DOI to reverse its support for the Tribe has left them vulnerable to the unprecedented fate of having their land taken out of trust and losing access to these critical resources. Without the straightforward fix in H.R. 312, the Tribe could cease to exist.

All other federally recognized tribes in New England have congressionally ratified land claim settlements in which reservations were set aside for those tribes. Their reservations, therefore, are protected and not at any risk. The Mashpee Wampanoag Tribe is the only federally recognized New England tribe for which Congress has not taken action to create and protect a reservation.

By passing H.R. 312, Congress will not only be protecting the Tribe whose ancestors helped ensure the survival of the Pilgrim settlement, it will protect all Native American tribes by sending a strong message that Congress does not approve of any efforts to undermine the statutory federal recognition of tribes throughout the country.

Although there has been some negative representation of what H.R. 312 seeks to accomplish, the legislation does not provide the Mashpee Wampanoag Tribe with any new or special rights. Rather, it simply ensures the Mashpee Wampanoag Tribe is no longer vulnerable to having its land taken out of trust, and the Tribe is treated equally alongside other Native American tribes so it can care for its members and protect its legacy. This action is not without precedent, as Congress has previously acted in similar situations to protect tribal lands. H.R. 312 mirrors language recently enacted as parts of the Gun Lake Trust Land Reaffirmation Act (P.L. 113–179) and the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 (P.L. 115–121).

H.R. 312 has received widespread support from Native American communities across the country, including:

- Pantribal Organizations including the National Congress of American Indians, the United South and Eastern Tribes, the Apache Alliance, the Rocky Mountain Tribal Leaders Council, the Affiliated Tribes of Northwest Indians, the Midwest Alliance of Sovereign Tribes, the Native American Rights Fund, the National Indian Gaming Association, and the Native American Finance Officers Association
- Individual Tribes including the Akiak Native Community (Alaska), the Tohono O'odham Nation (Arizona), the Pascua Yaqui Tribe (Arizona), the San Carlos Apache Tribe (Arizona), the Tonto Apache Tribe (Arizona), the Hualapai Tribe (Arizona), the Mechoopda Indian Tribe (California), the Big Valley Band of Pomo Indians (California), the Sycuan Band of the Kumeyaay Nation (California), the Guidiville Indian Rancheria (California), the Mashantucket Pequot Tribe (Connecticut), the Mohegan Tribe (Connecticut), the Nez Perce Tribe (Idaho), the Jena Band of Choctaw Indians (Louisiana), the Grand Traverse Band of Ottawa and Chippewa Indians (Michigan), the Lac Vieux Desert Band of Lake Superior Chippewa (Michigan), the Chippewa

Cree Tribe of the Rocky Boy's Reservation (Montana), the Shinnecock Indian Nation (New York), the Spirit Lake Tribe (North Dakota), the Ft. Sill Apache Tribe (Oklahoma), the Otoe Missouri Tribe of Indians (Oklahoma), the Narragansett Indian Tribe (Rhode Island), the Yankton Sioux Tribe (South Dakota), the Cheyenne River Sioux Tribe (South Dakota), the Lower Brule Sioux Tribe (South Dakota), the Ute Indian Tribe (Utah), the Suquamish Tribe (Washington), the Stockbridge-Munsee Band of Mohican Indians (Wisconsin), the Oneida Nation (Wisconsin), and the St. Croix Tribe of Chippewa Indians (Wisconsin)

Thank you for your attention to this bipartisan legislation as we work to support the existence of the Mashpee Wampanoag Tribe. If you have any questions or concerns about this legislation, please contact Michael Wertheimer with Rep. Keating at (XXX) XXX–XXXX. Should the opportunity arise, we respectfully urge you to vote Yes on passage of this legislation.

Sincerely,

William R. Keating
Member of Congress

Joseph P. Kennedy, III
Member of Congress

Richard E. Neal
Member of Congress

James P. McGovern
Member of Congress

Stephen F. Lynch
Member of Congress

Katherine M. Clark
Member of Congress

Seth Moulton
Member of Congress

Ayanna Pressley
Member of Congress

Lori Trahan
Member of Congress

THE COMMONWEALTH OF MASSACHUSETTS,
MASSACHUSETTS SENATE,
BOSTON, MA

August 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. DOUG LAMALFA,
Hon. RUBEN GALLEGO,
House Subcommittee on Indian and Alaska Native Affairs,
Washington, DC 20515.

Re: The Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman LaMalfa, and Ranking Member Gallego:

I write to you today in support H.R. 5244 as an economic stimulus to our state and region. The construction and operation of the First Light Resort and Casino by the Mashpee Wampanoag Tribe will bring a significant economic impact to the Southeastern Massachusetts economy, providing stable and good paying jobs for years to come. Through partnerships with local businesses, the Tribe has showed an exceptional commitment to revitalizing the entirety of the local and regional economy, and the immediate creation of nearly 7,000 rests on their success in this endeavor.

I would like to thank the Committee for holding a hearing on this matter, and respectfully request that this legislation be passed.

Sincerely,

NICK COLLINS,
State Senator,
First Suffolk District.

THE COMMONWEALTH OF MASSACHUSETTS,
MASSACHUSETTS SENATE,
OFFICE OF THE MINORITY LEADER,
BOSTON, MA

August 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. DOUG LAMALFA,
Hon. RUBEN GALLEGO,
House Subcommittee on Indian and Alaska Native Affairs,
Washington, DC 20515.

Re: The Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman LaMalfa, and Ranking Member Gallego:

Job creation and sustainable economic development are crucial to the continued growth of the Southeastern Massachusetts region. The construction and operation of the First Light & Casino by the Mashpee Wampanoag Tribe will bring a much needed boost to struggling Southeastern Massachusetts economy. The bipartisan Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) will ensure that the Tribe's reservation is protected, and will secure economic growth in Southeastern Massachusetts for years to come. I applaud the Committee for scheduling a hearing on this important legislation and I respectfully request that this letter be submitted for the hearing record.

The Tribe has worked to build partnerships with many local businesses to facilitate the construction of the First Light Resort & Casino. These partnerships will help to revitalize and strengthen the Southeastern Massachusetts community. All of this vital economic development for Southeastern Massachusetts is now at risk due to bureaucratic red tape and technical legal issues that are blocking the Tribe from moving ahead with the casino and resort.

If H.R. 5244 passes, construction of the casino and resort could resume immediately, instantly creating jobs for residents of Southeastern Massachusetts. The construction and operation of the casino and resort will create nearly 7,000 jobs. Additionally, the operation of the casino and resort will revitalize existing business in Southeastern Massachusetts and incentivize businesses to come to the community. I urge this Committee to support economic development in Southeastern Massachusetts by working to secure passage of H.R. 5244.

Sincerely,

BRUCE E. TARR,
State Senator,
Minority Leader.

THE COMMONWEALTH OF MASSACHUSETTS,
HOUSE OF REPRESENTATIVES,
STATE HOUSE, BOSTON, MA

July 25, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. DOUG LAMALFA,
Hon. RUBEN GALLEGO,
House Subcommittee on Indian and Alaska Native Affairs,
Washington, DC 20515.

Re: The Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman LaMalfa, and Ranking Member Gallego:

Job creation and sustainable economic development are crucial to the continued growth of the Southeastern Massachusetts region. The construction and operation of the First Light Resort & Casino by the Mashpee Wampanoag Tribe will bring a much needed boost to the struggling Southeastern Massachusetts economy. The bipartisan Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) will ensure that the Tribe's reservation is protected and secure economic growth in the Southeastern Massachusetts region for years to come. I applaud the Committee for scheduling a hearing on this important legislation and I respectfully request that this letter be submitted for the hearing record.

The Tribe has worked to build partnerships with many local businesses to facilitate the construction of the First Light Resort & Casino. These partnerships will help to revitalize and strengthen the Southeastern Massachusetts community. All of this vital economic development for Southeastern Massachusetts is now at risk due to bureaucratic red tape and technical legal issues that are blocking the Tribe from moving ahead with the casino and resort.

If H.R. 5244 passes, construction of the casino and resort could resume immediately, instantly creating jobs for residents of Southeastern Massachusetts. The construction and operation of the casino and resort will create nearly 7,000 jobs. Additionally, the operation of the casino and resort will revitalize existing business in Southeastern Massachusetts and incentivize businesses to come to the community. I urge this Committee to support economic development in Southeastern Massachusetts by working to secure passage of H.R. 5244.

Sincerely,

BRADLEY H. JONES JR.,
Minority Leader.

THE COMMONWEALTH OF MASSACHUSETTS,
HOUSE OF REPRESENTATIVES,
STATE HOUSE, BOSTON, MA

March 27, 2019

Hon. RUBEN GALLEGO, CHAIRMAN,
Hon. PAUL COOK, RANKING MEMBER,
House Subcommittee on Indigenous Peoples of the United States,
Washington, DC 20515.

Re: Mashpee Wampanoag Tribe Reservation Reaffirmation Act, H.R. 312

Dear Chairman Gallego and Ranking Member Cook:

I am writing to urge the House Natural Resources Committee and its Subcommittee on Indigenous Peoples of the United States to support the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

The establishment of the Mashpee Wampanoag Tribe's reservation has brought the promise of significant economic development that will not only benefit the Mashpee Wampanoag Tribe but the entire southeastern Massachusetts region. It will ensure that the Tribe's reservation is protected and secure long-term economic growth in the entire region for years to come.

The construction and operation of the Tribe's planned casino and resort will create nearly 7,000 jobs. Additionally, the operation of the casino and resort will revitalize existing businesses in the surrounding areas and incentivize the creation of new ventures that will provide even more jobs for residents. The operation of the casino and resort will also bring more than just jobs to our community. The Tribe has committed to $30 million in upgrades to infrastructure in the region and $10 million per year to local first responders and municipal services.

Passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act is critically important to the economic future of southeastern Massachusetts and we urge you and this Committee to act swiftly to support the enactment of this legislation.

Sincerely,

SHAUNNA O'CONNELL,
State Representative.

THE COMMONWEALTH OF MASSACHUSETTS,
HOUSE OF REPRESENTATIVES,
STATE HOUSE, BOSTON, MA

March 27, 2019

Hon. RAUL GRIJALVA, CHAIRMAN,
Hon. ROB BISHOP, RANKING MEMBER,
House Committee on Natural Resources,
Washington, DC 20515.

Dear Chairman Grijalva and Ranking Member Bishop:

Wuneekeesuq. I am the State Representative for the Third Barnstable District in Massachusetts, that includes the town of Mashpee. I am writing to urge the House Natural Resources Committee to move H.R. 312—The Mashpee Wampanoag Tribe Reservation Reaffirmation Act to the floor of the House as soon as possible. H.R. 312 will confirm the status of the tribe's reservation.

The Mashpee Wampanoag Tribe has longstanding positive relationships with local communities surrounding its reservation. The Mashpee Wampanoag Tribe's ancestors taught the Pilgrims how to survive and farm the land. Leaders of the tribe formed an alliance with the Pilgrims, and the very first Thanksgiving was a Wampanoag feast joined by the Pilgrims to celebrate a successful fall harvest. That feast provided an enduring lesson of what can come from people of different backgrounds sitting down together and authentically listening to each other.

Over the centuries, the tribe has endured challenges brought about as a result of settlement and development. These challenges have been overcome with a sense of purpose and identity, and the tribe was officially recognized by the federal government in 2007. The town of Mashpee and the Mashpee Wampanoag Tribe have worked together to build a relationship of mutual respect and recognition as is evidenced by the town's support for H.R. 312.

Much of the dialogue around tribal recognition and land in trust has surrounded the development of a resort casino and the economic benefits to the Wampanoag and Southeastern Massachusetts. While this is definitely an important factor, it should not be the sole reason for reaffirming the reservation status. The lands currently in trust are a small representation of the aboriginal homeland of the Wampanoag people. The People of the First Light have sustainably lived on this land for over 12,000 years. Reaffirmation of land in trust by the U.S. Congress would be a clear message that also reaffirms the dignity and identity of a culture that predates the American experiment.

As for the economic benefits of H.R. 312, the construction and operation of the tribe's planned casino and resort will create nearly 7,000 jobs that will benefit residents of Southeastern Massachusetts. Furthermore, the operation of the casino and resort will rejuvenate existing businesses in the surrounding areas and help to bring further development to our communities.

The Mashpee Wampanoag Tribe is an important partner to local governments with the shared goal of creating a prosperous Southeastern Massachusetts community. Passage of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act will not only serve to benefit Southeastern Massachusetts, it will reaffirm the culture and identity of a people who helped settle the Commonwealth of Massachusetts. As my Wampanoag friends would say, that in and of itself is Wuneeshkeety (Good Medicine). I urge the Committee to favorably release this legislation and work toward its enactment.

Kutaputunumuw,

DAVID T. VIEIRA,
State Representative.

GENERAL SOCIETY OF MAYFLOWER DESCENDANTS,
THE MAYFLOWER SOCIETY,
PLYMOUTH, MA

March 26, 2019

Hon. NANCY PELOSI,
Speaker of the House
12th District, California

Dear Speaker Pelosi:

The General Society of Mayflower Descendants requests your support for H.R. 312, a bill designed to provide federal protection for Mashpee Wampanoag reservation lands that were designated for the Tribe by action of the US Department of the Interior in 2015. This legislation enjoys bipartisan support, including key members of the House Natural Resources Committee.

The decision by the Department of the Interior to hold the Tribe's land in trust was based on a lengthy and arduous process which demonstrated, among other things, that these 321 acres in Massachusetts were just a tiny part of the homeland originally held by the ancestors of the Mashpee Wampanoags. We find it to be unconscionable that on September 7, 2018, the Interior Department reversed that decision, based on their interpretation that the Tribe was not "under federal jurisdiction" in 1934.

You may know that in March 1621 our ancestors and the ancestors of the Mashpee Wampanoags formulated an agreement of mutual support. That peaceful agreement lasted for over fifty years, outliving all of those who signed it or who witnessed its creation, and allowing Plymouth Colony to survive. Among the signers was Governor John Carver for the Pilgrims and Massasoit, Osamequin, the Great Sachem of the Wampanoags. Terms of that agreement spelled out that King James would esteem Massasoit as his friend and ally. The agreement is a worthy precedent to be followed today by all who honor the Pilgrims and the Native Americans who created this critical part of American society.

The General Society of Mayflower Descendants is composed of 30,000 members, each of whom has proven lineage from the Mayflower Pilgrims. We have members in all fifty states, Canada, and around the world. It is no stretch to state that none of us would be here today without the historically documented help that the people of the Wampanoag Tribe gave to our ancestors. Part of our organization's purpose is to perpetuate the memory of the Pilgrims' accomplishments. Upholding the spirit of their agreement with their neighbors honors that purpose.

On behalf of our members I urge you to support H.R. 312 to guarantee the Mashpee Wampanoag Tribe the protection of their lands, which is an important element of their self-determination as a Tribe. Thank you for your consideration of this request.

Sincerely,

GEORGE P. GARMANY, JR. MD,
Governor General.

MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA,
CHICO, CA

April 30, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

DENNIS E. RAMIREZ,
Chairman.

MIDWEST ALLIANCE OF SOVEREIGN TRIBES,
GRESHAM, WI

June 13, 2018

Hon. JOHN HOEVEN,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Hoeven:

The MAST office understands and respects these key issues that you are working on day to day for Indian Country!

We respectfully, ask that the Senate Indian Affairs Committee, the House Natural Resources Committee and it's Subcommittee on Indian and Alaska Native Affairs take all action to ensure enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act—H.R. 5244 and S. 2628.

All Federally recognized tribes in the United States should be holding federally protected lands labeled Reservations where all Nations recognize and respect each other's Sovereignty!

We ask Congress to use its plenary authority to ensure that the Mashpee Wampanoag Nation is not forever rendered perpetually landless by enacting H.R. 5244 and S. 2628.

Respectfully,

SCOTT R. VELE,
Executive Director.

THE MOHEGAN TRIBE,
UNCASVILLE, CT

June 6, 2016

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: The Mohegan Tribe Supports the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Mohegan Tribe of Indians of Connecticut, I respectfully request that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

The Mashpee Tribe is the only federally recognized tribe in the Northeast that does not have a land claim settlement. As a result, unlike other tribes with such settlements, Mashpee had no alternative but to rely on the general land acquisition authority provided in the Indian Reorganization Act (IRA) to establish a reservation. The Mashpee Tribe's reservation is located within Mashpee's traditional homelands, and was established in accordance with the IRA and with the strong support of surrounding local governments. Unfortunately, the existence of this reservation is now threatened by litigation based on technical legal issues. These technical legal issues could lead to the disestablishment of Mashpee's reservation—the first time an Indian reservation would be disestablished since the Termination Era.

A land base is a foundational component of tribal sovereignty and provides the space for tribes to maintain our cultural identities and build our economies. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act reaffirms that status of the Tribe's reservation so that the Tribe can continue to provide vital services to its members, protect its culture, and expand its economy to provide for future generations.

We urge Congress to employ its plenary authority to enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act to ensure that the Mashpee Tribe is not forever rendered continually landless.

Sincerely,

KEVIN P. BROWN, 'RED EAGLE",
Chairman.

NAFOA,
WASHINGTON, DC

July 20, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

NAFOA is a national organization representing tribal governments with the mission of building and sustaining economic and community development. In furtherance of that mission, we are writing to express our support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) and respectfully urge its swift enactment.

Lands are integral to tribal sovereignty, cultural identity, and for building institutions and economies that foster the well-being of tribal citizens. The U.S. Department of the Interior (DOI) has exercised its authority under the Indian Reorganization Act (IRA)[1] to restore tribal homelands following devastating Federal actions including removal, allotment, and relocation policies. Over the last several decades, restoration of homelands has enabled tribes to provide essential government services to tribal members and develop their communities. Any uncertainty regarding the status of tribal lands will harm tribal governments' ability to make independent self-determined decisions and provide for the well-being of its citizens—two fundamental rights of any sovereign.

The Department of Interior issued a decision on September 18, 2015 to take approximately 321 acres of land into trust on behalf of the Mashpee Wampanoag Tribe of Massachusetts. A subsequent legal challenge to the decision threatens tribal sovereignty and the Mashpee Wampanoag Tribe's ability to make important decisions affecting its members. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act will provide much-needed certainty regarding the status of the tribe's newly restored lands and allow the tribe to go forward in providing necessary services to tribal members.

We urge Congress to use its authority to restore Mashpee Wampanoag Tribe's lands through the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. Please feel free to contact me if you have questions or need further information.

Sincerely,

DANTE DESIDERIO,
Executive Director.

[1] Indian Reorganization Act of 1934, 25 U.S.C. ch. 14, subch. V § 461 et seq.

NARRAGANSETT INDIAN TRIBE,
CHARLESTOWN, RHODE ISLAND

March 26, 2019

Hon. DAVID CICILLINE,
Hon. JIM LANGEVIN,
U.S. House of Representatives,
Washington, DC 20515.

Re: Mashpee Wampanoag Reservation Reaffirmation Act

Dear Congressmen:

The Narragansett Indian Tribe wrote to Congress last year, and would like to take this opportunity to reiterate our strong support for the Mashpee Wampanoag Reservation Reaffirmation Act (currently H.R. 312, formerly H.R. 5244).

This emergency legislation was crafted in an effort to prevent the Mashpee Wampanoag Tribe from the threat of losing their reservation lands. It also addresses the significant damage that has plagued the Mashpee Wampanoag Tribe by commercial casino companies that have chosen to challenge the status of the Wampanoag Tribe's reservation for no other apparent reason than their own financial gain. The Wampanoag Tribe has been forced to lay off workers and cut programs; with the unfortunate truth being that more layoffs and program cuts are on the horizon if their reservation cannot be protected. This has inevitably become a moral issue for the United States; the entirety of Indian Country is watching and collectively poses the question—Will the United States of America honor its word to the Wampanoag Tribe and Protect their reservation?

It should be noted that both the Wampanoag Tribe and this respective Bill are strongly supported by the state government's with closest proximity to the Tribe's Reservation; the Town of Mashpee and the City of Taunton.

We urge you to vote in favor of H.R. 312.

I thank you for your time with this matter.

Respectfully,

ANTHONY DEAN STANTON,
Chief Sachem.

TESTIMONY OF CHIEF SACHEM ANTHONY DEAN STANTON NARRAGANSETT INDIAN TRIBE

"INDIGENOUS PEOPLES LEGISLATIVE HEARING" ON H.R. 312, H.R. 375 AND RESPECT ACT

APRIL 3, 2019

On behalf of the more than 2,700 members of the Narragansett Indian Tribe, I write to express our Tribe's support for two measures introduced in the 116th Congress: H.R. 312, the "Mashpee Wampanoag Tribe Reservation Reaffirmation Act," and H.R. 375, a measure to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes under the Indian Reorganization Act. The Narragansett Indian Tribe also endorses Natural Resources Committee Chairman Raul Grijalva's discussion draft measure, the "Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes" or the "RESPECT Act," a measure to prescribe procedures for effective consultation and coordination by Federal agencies with federally recognized Indian Tribes concerning actions of the Federal Government that impact Tribal lands and interests to ensure that meaningful tribal input is an integral part of the Federal decision-making process.

This Subcommittee, and the 116th Congress, must decide whether the economic interests of the State of Rhode Island should dictate Federal Indian policy for the Nation and the millions of American Indians and Alaska Natives, most of whom live at or below the poverty level. In the 17th Century, the ancestors of the Mashpee Wampanoag Tribe and the Narragansett Indian Tribe extended friendship and protection to the European immigrants who struggled to survive on our lands. The roles of their respective descendants are now reversed. We ask whether the United States, in the 21st Century, will return the favor and protect the descendants of the Mashpee Wampanoag and us, the Narragansett. We are confident in the ultimate outcome. Dr. Martin Luther King once said that the moral arc of the universe is long, but it bends toward justice. The question is how many years will we and other Tribes have to wait.

The history of the Narragansett Indian Tribe in what today is Rhode Island is well established. Although we have existed in Rhode Island for millennia, we regained Federal acknowledgement only in 1983, after a century of effort, through the cumbersome Federal Acknowledgement Process (FAP). It was the Narragansett that granted Roger Williams asylum and safe haven as he fled from Plymouth and the Massachusetts Bay colonies. With the assistance and protection of our Tribal ancestors, Canonicus and Miantonomi, Williams was able to establish Providence Plantations in 1636 as a haven for religious tolerance and peaceful coexistence with our ancestors. Roger Williams, a minister and theologian, advocated honorable dealings with our Tribe.

What would Roger Williams make of the current leaders of the State of Rhode Island, their representatives in Congress, and the testimony presented to the Subcommittee today on behalf of its Governor—opposing the right of the Mashpee Wampanoag Tribe to retain in Federal trust a 321-acre Tribal homeland for their members in Taunton, Massachusetts, and provide essential governmental services—for the stated reason that Rhode Island claims a 100-mile economic zone of interest around its two *de facto* State casinos in Lincoln and Newport, Rhode Island.

Those who lack empathy for the plight of others do not govern well. They use tactics of divide and conquer and are forever pitting "us" against "them." By ignoring the universal and unalienable right of all people to "life, liberty, and the pursuit of happiness," they stand astride history and the unrelenting progress of a Nation and its people to better themselves. It was true of the Civil Rights movement and it is true of the latest "Indian Wars" over *Carcieri*, gaming and other land-into trust issues.

It will take the leadership of the House Natural Resources Committee, its Chairman, Ranking Member, and members, and the entire Congress, to push aside those who would stifle and suppress the aspirations of Native Americans to improve their condition. State officials will bitterly fight, as they have done for decades, to keep the economic competitive advantage they have gained at the expense of Native Americans. The Mashpee Wampanoag Tribe are their latest victim. There are 535 State representatives serving in Congress. All of them are also Federal trustees who must honor the Nation's treaties and Federal laws enacted for the benefit of Indian tribes. With unity and courage, the Nation can do better for Indian tribes.

If Rhode Island prevails in defeating passage of H.R. 312, the State, with just over one million people, will set back by a generation the aspirations of millions of the American Indians and Alaska Natives who seek community stability and economic development opportunities that can only occur if Congress reaffirms, once and for all, that Tribal trust lands are in fact trust lands and a Tribe's homeland that the United States will defend and safeguard for generations. Tribal trust lands allow federally recognized Indian Tribes to provide essential government services to underserved and poverty-stricken Tribal communities with Federal funds—services which often depend on the trust status of the land.

Mashpee Wampanoag Vice Chairwoman Jessie Little Doe Baird eloquently described the dire consequences her members face if the trust status of their reservation is lost as a result of litigation brought for the sole purpose of undermining the Tribe's sovereign status and leaving Mashpee the only New England Indian Tribe without a reservation.

Why is self-determination and self-governance so important to Native people? As noted above, most Indian tribes struggle to provide core governmental services to their members. We American Indians, by any measure, fall well below our non-Indian fellow Americans in health status and life expectancy, economic status, and living conditions (housing, schools, drinking water and wastewater systems, broadband and other utilities, law enforcement and public safety, hospitals and clinics, and other essential services). Tribal lands, held in trust by the United States, empowers tribes and afford us the opportunity to establish infrastructure, a key requirement for promoting community stability—which every people seek.

In other words, Tribal lands are an essential ingredient that allows us to maintain and perpetuate cultural, social and religious practices that help define us and give us our Tribal identity as a separate and distinct people who wish to exercise self-determination. It is the aspiration of all people to be free and independent.

This Committee need only look back to the 105th Congress in 1998 when it considered important amendments to the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93–638, to understand the importance of Tribal self-governance. The ISDEAA, first enacted in 1975, was landmark legislation that ushered in the modern era of Federal Indian law and the empowerment of Tribal nations by allowing Tribes to step into the shoes of the Secretary of the Interior and the Secretary of the Department of Health and Human Services to plan, design and carry out Federal programs for Indians with funds provided by the Federal Government. When doing so, the United States fulfills its part of the contract between Tribes and the Federal Government, in return for the transfer of millions of acres of our aboriginal lands in return for the protection of the United States and for services to our members who gave up a way of life.

With regard to the principles of Self-Governance, former Natural Resources Committee Chairman George Miller stated:

> The nature of Self-Governance is rooted in the inherent sovereignty of American Indian and Alaska Native tribes. From the founding of this Nation, Indian tribes and Alaska Native villages have been recognized as 'distinct, independent, political communities' exercising powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by virtue of their own innate sovereignty. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). The tribes' sovereignty predates the founding of the United States and its Constitution and forms the backdrop against which the United States has continually entered into relations with Indian tribes and Native villages.
>
> The present model of tribal Self-Governance arose out of the federal policy of Indian Self-Determination. The modern Self-Determination era began as Congress and contemporary Administrations ended the dubious experiment of Termination which was intended to end the federal trust responsibility to Native Americans.
>
> ***
>
> As a policy, Termination was a disaster. Recognizing this, President Kennedy campaigned in 1960 promising the Indian tribes that:
>
> > There would be no change in treaty or contractual relationships without the consent of the tribes concerned. There would be protection of the Indian land base, credit assistance, and encouragement of tribal planning for economic development.

***

President Richard Nixon's 1970 'Special Message on Indian Affairs' also called for increased tribal self-determination:

> This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cutoff from Federal concern and Federal support.

House Rep. No. 105–765, 105th Cong., 2d Sess., Committee on Natural Resources, to accompany H.R. 1833, Tribal Self-Governance Amendments of 1998, Additional Views of Ranking Member George Miller, pp. 54–55 (1998).

In concluding his support for the legislation that would become Pub. L. 106–260, Act of Aug. 18, 2000, adding title V to the ISDEAA, Congressman Miller noted:

> Sometimes we need to look to the past in order to understand our proper relationship with Indian tribes. More than two centuries ago, Congress set forth what should be our guiding principles. In 1789, Congress passed the Northwest Ordinance, a set of seven articles intended to govern the addition of new states to the Union. These articles served as a compact between the people and the States . . . Article Three set for the Nation's policy toward Indian tribes:
>
> *The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken away from them without their consent * * * but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them * * *.*

Id. p. 60. Emphasis supplied.

H.R. 312 is such a law—*founded in justice and humanity*—to prevent further wrongs being done to the Mashpee Wampanoag Tribe. The bipartisan measure, introduced by Congressman Keating of Massachusetts, and supported by the Town of Mashpee, the City of Taunton, Massachusetts, State legislators and the Massachusetts Congressional delegation, would reaffirm, ratify and confirm the 2016 decision of the Secretary of the Interior to take land into trust for the benefit of the Mashpee Wampanoag Tribe. It would further protect the act of Congress from legal challenge and, importantly, with limited exception, extend all laws of general applicability to Indians and Indian nations applicable to the Mashpee Wampanoag Tribe and their members.

As noted by Vice Chairwoman Jessie Little Doe Baird, H.R. 312 is quite similar to Federal laws passed by Congress in recent years that reaffirmed a Tribe's trust land holdings: S. 1603, the Gun Lake Restoration Act, and H.R. 984, the Indian Tribes of Virginia Recognition Act.

Just as the Northwest Ordinance permitted new states to enter the Union on an "*equal footing*" with existing states, Congress extended the same principle to tribes. In 1994, well before the ill-conceived and wrongly decided 2009 U.S. Supreme Court *Carcieri* decision, Congress amended the Indian Reorganization Act by enacting Pub. L. 103–263 to prohibit the federal government and executive agencies from taking any action 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." 25 U.S.C. § 5123(f). With the history of the Northwest Ordinance, it was logical for the Federal Government to reaffirm the same principle as to the Nation's 573 federally recognized Tribes.

The equal footing amendment to the IRA, sponsored by Senator John McCain, a two-time chairman of the Senate Indian Affairs Committee, "put an end to the discriminatory practices that had been developing" within the Department of the Interior to classify tribes as either "*historic*" and "entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action" or "*created*" and "therefore possessing limited sovereign powers." Sen. Rep. No. 112–166, 112th Cong., 2d Sess., May 17, 2012, Committee on Indian Affairs, to accompany S. 676, amending the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes, p.12 ("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." 140 Cong. Rec. S6147 (daily ed. May

19, 1994) (statement of Sen. Daniel K. Inouye)." (emphasis in original)). Id. at 12, fn. 71.

As noted by Dean Washburn, the "central flaw in *Carcieri's* reasoning is this: every tribe that is federally recognized today *necessarily existed when the IRA was enacted in 1934*." The 1994 equal footing amendment to the IRA reaffirmed its applicability to all federally recognized tribes, not just those under Federal superintendence as of 1934. Any tension between the IRA and the 1994 equal footing amendment to it, should have been resolved by the courts to harmonize the legislation consistent with the expressed sentiment of Congress that all tribes should be treated equal, and not divided into "haves" and "have nots" as is now the case.

For the above noted reason, we strongly urge this Subcommittee and the Congress to also pass H.R. 375, Congressman Tom Cole's bipartisan measure to reaffirm the authority of the Secretary of the Interior to take land into trust for *all* Indian tribes for the simple reason that "*it is and has always been*" Federal law and policy to treat Tribes equally.

As noted by Dean Washburn, Congressman Cole's measure would amend the Indian Reorganization Act (IRA) in three important ways. First, it strikes the phrase "now under federal jurisdiction" from the Act, making it clear that the IRA applies to all federally recognized tribes. Second, it makes the amendment retroactive to 1934, the original date of the IRA, and ensures the proper authorization for all Secretarial actions taken since and removes the threat of litigation. Third, the bill amends the definitions in the IRA to make it clear that the Interior Secretary has authority to take lands into trust for Alaska Native villages, putting every Tribal Nation on an equal footing as Congress has always intended.

H.R. 375 is especially important for us, the Narragansett. The *Carcieri* decision was about us and our rights and privileges as a federally recognized Tribe. We sought to place a 31-acre parcel in trust for housing development under a jurisdictional framework separate and distinct from that of our 1,800-acre trust settlement lands. Rhode Island challenged our right to create a Tribal community under our jurisdiction. Rhode Island fought to have our settlement act interpreted as it wanted, in an unnatural manner that strained credulity, rather than as prior Federal court decisions held which granted us a degree of independence from State interference.

The State of Rhode Island now opposes Congressman Cole's measure and argues that it "undermines" the *Carcieri* decision. We recall that the State of Rhode Island reversed a Federal court decision in our favor in 1996. The difference is that the late Senator John Chafee did it through stealth and without the transparency of today's hearing. He added a non-germane rider to the FY 1996 appropriations act, a must-pass piece of legislation, days before the Senate vote that unilaterally amended our 1978 settlement legislation, and reversed a 1994 decision of the United States Court of Appeals for the First Circuit in *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1994). That decision held that we, like other federally recognized Tribes, had the right to pursue economic development under the Indian Gaming Regulatory Act (IGRA). There was no consultation between Rhode Island and the Tribe before Senator Chafee acted. We had won an important court victory against Rhode Island and the State was not going to let it stand.

Here, Congressman Cole introduced legislation in the House, Congressional hearings are being held, and there is ample public debate by all concerned.

This is not the first Congress to introduce a "clean fix" to reverse the *Carcieri* decision. Rhode Island has opposed any measure that would include the Narragansett Indian Tribe. They would have the Nation believe that we are somehow different than other Indian tribes in the continental United States. We are not. Our history is the history of the United States' treatment of its indigenous people. From the King Phillip's War of 1675, and the Great Swamp Massacre of our ancestors by colonial militia a century before the Declaration of Independence, our aboriginal lands were stolen and diminished in size. Rhode Island colonists, and then as State citizens, purchased our lands at cheap prices. By the 19th Century, we had little more than a few hundred acres in Washington County, Rhode Island. In the latter part of the 19th Century, agents of the State began a lengthy and unrelenting campaign to unilaterally and unlawfully de-tribalize the Narragansett Tribe. The State passed legislation in violation of the Federal Nonintercourse Act, a combination of acts passed by Congress in the 1790s to protect the inalienability of aboriginal title to Tribal lands without the consent of Congress. In debt, our remaining Tribal lands, with the exception of three acres of Indian church lands were sold. We have fought ever since to regain recognition and the return of our aboriginal lands.

But we never stopped being Narragansett. In 1900, the Tribe incorporated itself, and in 1934, a long house was built to hold Tribal meetings.

In 1975, the same year as the ISDEAA was enacted, we brought suit against the State of Rhode Island and private landowner, reasserting our aboriginal title claim to our ancestral lands. Despite the State's strong opposition, we prevailed and the State entered into settlement negotiations. We were ignored by Rhode Island until we asserted our rights. In 1983, we regained Federal recognition that we were and have always been a separate and distinct Indian tribe. The State of Rhode Island has fought us ever since. The State has opposed nearly all our efforts to pursue economic development. Now the State opposes the Mashpee Wampanoag Tribe because the Tribe, and its economic development interests, pose a risk to the State's two casinos and the many Massachusetts residents who travel to Rhode Island to gamble.

Rhode Island State officials have misrepresented the truth on several occasions, including today's hearing. The Governor's representative, in her written remarks, asserts that if H.R. 312 were to become law, the federally recognized Tribes (*plural*) in Rhode Island would argue for similar treatment. Rhode Island's two senators are also on record making similar statements to their Senate colleagues. There is only *one* federally recognized Indian Tribe in the State of Rhode Island, the Narragansett.

In the 1994 First Circuit decision decided in our favor, the Court found that: "based on our understanding of the statutory interface, we hold that the provisions of the Indian Gaming Regulatory Act apply with full force to the lands in Rhode Island now held in Trust by the United States for the Narragansett Indian Tribe." Based on that decision, the then-Governor of Rhode Island negotiated the Tribe-State compact that would permit us to construct and operate a Class III facility on Tribal lands under IGRA. He required, however, that we submit to a State referendum. Non-Indians wishing to open casinos in Rhode Island flooded the ballot initiative.

With the prospect of multiple casinos, Rhode Islanders rejected them all. We then opted to build and open a bingo hall (class II gaming under IGRA) on our trust lands and were completing an environmental assessment, as required by law. Senator Chafee had had enough. He inserted a one-sentence amendment to our settlement legislation, the Rhode Island Indian Claims Settlement Act, that stripped us of the rights we had fought so hard to secure. Senator Chafee's amendment read: "For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian Lands." Senator McCain objected to this unilateral action by Senator Chafee. On the Senate floor, Senator McCain rose and remarked:

> Mr. President, I want to express my concern regarding an opposition to Section 330 of the general provisions of the Interior and related agencies portions of this Omnibus Appropriations Bill because Section 330 would, in a discriminatory fashion, dismantle the rights of one Indian tribe to conduct gaming activities on its lands like all other Indian tribes. Section 330 is specific to Rhode Island. It would expressly deny the only federally recognized Indian tribe in Rhode Island, the Narragansett Indian Tribe, the rights other Indian Tribes have under the Indian Gaming Regulatory Act. . . . I must say that Section 330 of this appropriations bill is an . . . unfair end run around the ongoing work of the authorizing committee [Senate Indian Affairs Committee]. Section 330 would substantially amend the authorizing legislation on an appropriation measure without the benefit of any legislative hearing, without any contribution by the authorizing committee of jurisdiction and without any public debate by those most affected—the Narragansett Indian Tribe of Rhode Island.

That was 23 years ago. We know all too well what happens when State and Federal officials exercise power against Indian Tribes without consultation or any public debate and with indifference to the aspirations of Native people to provide for their communities.

John Adams famously remarked:

> "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."

The weight of public opinion is clear. The *Carcieri* decision was wrongly decided in 2009 and upended 70 years of Federal Indian policy that sought to reverse the destructive effects of the Indian Allotment Act that caused the loss of more than

90 million acres of Indian lands lead to great poverty and suffering for the Nation's first Americans—suffering which continues mostly unabated to this day. We Narragansett were among the Indian Tribes that lost our aboriginal lands. We are no different than other federally recognized Tribes who fight a never-ending battle to hold our Tribal communities together and maintain our cultural identity. It is long past time that the *Carcieri* decision be consigned to the dust bin of history where it belongs.

In conclusion, we enthusiastically endorse and support H.R. 312, H.R. 375 and the proposed RESPECT Act that would codify as Federal law the principles of good governance; that the United States and the Indian nations should engage in meaningful government-to-government consultation concerning matters that can have profound impacts on Tribal communities.

Thank you for the opportunity to present testimony to the Subcommittee.

NATIONAL CONGRESS OF AMERICAN INDIANS,
WASHINGTON, DC

May 7, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the National Congress of American Indians, the oldest and largest national organization representing the collective interests of American Indian and Alaska Natives tribes and their citizens, we respectfully request that you take all actions necessary to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. The Mashpee Tribe, like all other federally recognized tribes, is entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination.

Further, on June 6, 2018, NCAI passed a motion by the full body of its 2018 Midyear Conference, stating its complete support for the Mashpee Tribe and calling upon Congress to pass the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. The failure of Congress to act in this instance could result in the Mashpee Tribe's reservation being disestablished. This would be the first time in modern history that a reservation is disestablished, and would leave the Tribe perpetually landless. For this reason, it is imperative that Congress exercise its authority to provide the Tribe a land base and an opportunity to effectively self-govern and prosper.

In closing, thank you for your consideration of this important issue. If you have any further questions or comments, please feel free to reach out to Derrick Beetso, NCAI Senior Counsel, at XXXXXXXXXX. Thanks again.

Sincerely,

JACQUELINE PATA,
NCAI Executive Director.

TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

HEARING ON H.R. 375

APRIL 18, 2019

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization made up of American Indian and Alaska Native tribal governments and their citizens, I write to submit testimony on H.R. 375—*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. 375 is legislation that would protect existing Indian trust lands and restore certainty and fairness to the tribal land into trust process which has been impaired by the Supreme Court's decision *Carcieri v. Salazar*, 555 U.S. 379 (2009). As demonstrated below, *Carcieri* has effectively created two classes of tribal nations, and has overburdened tribal, federal, and state resources by generating unnecessary conflict over the restoration and retention of tribal homelands and consequently impeded economic development. Accordingly, NCAI strongly urges Congress to end this turmoil by enacting a congressional fix to the Indian Reorganization Act (IRA) which reaffirms the Secretary of the Interior's (Secretary) authority to restore tribal homelands for all federally recognized tribal nations.

I. Overview on Congress' Intent in Passing the IRA & the Carcieri Problem

Tribal nations are the sovereign beneficiaries of a unique fiduciary relationship with the Federal Government, and Congress has plenary and exclusive authority to legislate over Indian affairs.

In exercise of this plenary authority, in 1934 Congress repudiated its policy of forced assimilation of tribal people and allotment of their lands under the General Allotment Act of 1887 by enacting the IRA. By that time, federal allotment policies had resulted in the taking and loss of 86 million acres of tribal homelands. In doing so, such policies severely fractionated treaty-bargained for Indian Reservations, resulting in the mismanagement of tribal interests, the "checker-boarding" of Indian lands, and the jurisdictional patchwork surrounding many residents of Indian country today.

The IRA ended this destructive policy by setting forth a process to restore and protect tribal homelands in order to provide tribal nations with the tools to succeed as self-governing bodies. To accomplish this purpose, 25 U.S.C. § 5108 authorized the Secretary to acquire lands "within or without existing reservations" for the "purpose of providing land for Indians." For over 75 years, the United States Department of the Interior (Interior) consistently interpreted the IRA as authorizing the Secretary to acquire land in trust status for any tribal nation—so long as that nation was federally recognized at the time of the trust application.

In *Carcieri* the Supreme Court departed from this long-standing precedent and determined that the IRA land into trust process requires tribal nations to demonstrate that they were "under federal jurisdiction" in 1934. However, the *Carcieri* decision did not explain how "under federal jurisdiction" should be defined. To that end, in 2014, the implementing agency, Interior, provided interpretive guidance in the form of a Solicitor's Opinion M–37029.

M–37029 introduced the following two-part agency analysis to address the "under federal jurisdiction" question presented by the *Carcieri* decision: (1) whether there is a sufficient showing in a tribal nation's history that during or prior to 1934, the tribal nation was under federal jurisdiction; and (2) whether the tribal nation's jurisdictional status remained intact in 1934.

While M–37029 provides some guidance for Interior's evaluation of land-into-trust applications, it does not address the resulting disparate treatment of tribal nations, and did not stem the tide of post-*Carcieri* litigation.

II. The Carcieri Decision Has Effectively Created Two Classes of Tribal Nations

Effectively, the *Carcieri* decision has resulted in two classes of tribal nations in violation of P.L. 103–263.[1] Those determined to have been under federal jurisdiction in 1934 and those determined not to have been under federal jurisdiction in 1934. Simply put, Congress' intent—to provide the necessary tools for tribes to effectively self-govern—is not wholly realized by all tribal nations. Until Congress acts, there

[1] *See* P.L. 103–263, 108 Stat 707 (1994 providing that "[d]epartments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe 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.").

are some tribes that Interior is simply unable to acquire land for. These tribes' lands, while owned in fee simple by a tribal nation, are unable to realize their full potential as economic drivers and residential homelands for tribal citizens. This is contrary to Congress' intent and results in certain tribes having less opportunities with respect to developing a sufficient tax base, providing critical tribal services for their citizens, or protecting and preserving critical lands and natural resources.

III. The Carcieri Decision Has Overburdened Governmental Resources

The uptick in litigation elicited by the *Carcieri* decision has caused irrevocable damage to affected communities. Within three years of the decision in 2013, then Assistant Secretary of Indian Affairs, Kevin Washburn testified that the federal government was "up to [its] eyeballs in litigation on these matters."[2] During that same hearing, entitled *Carcieri: Bringing Certainty to Trust Land Acquisitions*, Washburn also testified that:

> [Interior] is . . . forced to expend resources both before and during litigation to defend against such spurious claims—resources that are needed for social services, protection of natural resources and implementation of treaty rights. A straightforward *Carcieri* fix would be a tremendous economic boost to Indian country, at no cost to the Federal government.[3]

To Washburn's point, presently tribal nations are forced to spend scarce resources through the following process to acquire homelands: (1) purchase or otherwise acquire land in fee; (2) commence the labor intensive and lengthy fee-into-trust administrative application process; (3) subsequently defend against *Carcieri* attacks in the district and appellate courts; and (4) occasionally—in the worst scenarios—tribal nations are forced to seek specific land acquisition legislation through Congress.

Each of these steps comes with an enormous monetary and political cost to tribal nations. In addition to these costs, tribal communities bear the lost opportunity costs of foregoing expenses, both internally and at the federal level as noted in Washburn's testimony above, on critical service needs such as education, public safety, housing, and other needs, in order to support the expense of a fee to trust application.

At taxpayer's expense, the federal government also pays the price at the executive, judicial, and congressional branches. At the executive level, Interior expended many workhours in developing and implementing M–37029's two-step analysis, which now requires Interior to engage in a time-intensive analysis, sometimes taking years to complete, on whether a tribal nation was under federal jurisdiction in 1934. Assuming a favorable decision is reached on behalf of the tribe, it often then gets challenged through litigation where Interior and the Department of Justice, in coordination with the affected tribal nation, then expend years defending the trust acquisition in fulfillment of the federal trust responsibility. Further, burdening Interior resources has created ancillary harm for tribal nations that were under federal jurisdiction in 1934 as it has slowed the land into-trust-process.

Federal judicial resources are concurrently stretched as *Carcieri* cases crowd their dockets for years and mandate painstaking reviews of lengthy administrative records involving history and genealogy. This drain on the federal judiciary has led a D.C. Circuit judge to exclaim "[e]nough is enough!" in a case involving a 16-year-old land into trust acquisition that was aggravated by post-*Carcieri* litigation.[4]

Likewise, Congress's resources have been expended both in the consideration of 15 *Carcieri* fixes for over a decade and through tribe-specific bills which are the final resort for acquisition and re-affirmation of tribal homelands.

Lastly, states and local governments have also exhausted tax-payer resources on unsuccessful *Carcieri* litigation. For example, in a 15-year long case that was exacerbated by post-*Carcieri* litigation, a rural California county with a 20% poverty rate expended $850,000[5] to oppose a Interior tribal trust acquisition.

---

[2] "Carcieri: Bringing Certainty to Trust Land Acquisitions" testimony by former Assistant Secretary of Indian Affairs, Kevin Washburn, November 20, 2013. https://www.govinfo.gov/content/pkg/CHRG-113shrg87133/html/CHRG-113shrg87133.htm.

[3] Id.

[4] To re-affirm an existing trust acquisition for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, in 2014 Congress enacted the "Gun Lake Trust Land Reaffirmation Act," Pub. L. 113–179, 128 Stat. 1913.

[5] "Year in Review," Chico News and Review, December 18, 2018, https://issuu.com/news_review/docs/c-2018-12-27.

IV. Tribal Homelands are Critical to the Health, Safety, and Welfare of Tribal Communities

The IRA has enabled tribal nations to restore their homelands through the land into trust process and has been vital to tribal self-governance, including greater economic self-sufficiency. Through the IRA process, tribal nations are better able to deliver essential government services through the construction of schools, health facilities, Head Start centers, elder and veteran centers, housing, and justice facilities. Restoration of homelands has also enabled tribal nations to protect their cultures and traditions and aligns with Congress and the Administration's goal of supporting tribal self-determination and self-sufficiency.

Tribal trust acquisitions further aid tribal economic development by generating public and private partnerships that lead to increased jobs and services for tribal and non-tribal communities. As a result, in rural counties tribal nations are often the largest employers and health service providers for the entire community.[6]

V. Conclusion

For a decade, NCAI has requested that Congress address the *Carcieri* problem by (1) restoring the Secretary's authority under the IRA to take land into trust for all federally recognized tribal nations; and (2) reaffirming existing Indian trust lands. This common sense approach is wholly consistent with the IRA's intent to rebuild tribal homelands, governments and economies and has the demonstrated potential to benefit all tribal nations and their surrounding communities. Equally, a clean fix would end the confusion and intergovernmental disputes that resulted from the Supreme Court's ill-advised decision a decade ago in *Carcieri*. We thank you in advance for consideration of this testimony, and look forward to engaging on solutions to this critical issue in the 116th Congress.

[6] *See, e.g.*, Oregon Secretary of State, Oregon Blue Book, https://sos.oregon.gov/blue-book/Pages/national-tribes-intro.aspx (acknowledging that tribal governments are some of the "largest employers in their counties—generating employment for tax-paying employees, benefiting local communities and the entire state."); Northwest Portland Indian Health Board (Coeur D'Alene profile showcases a tribal ambulatory health care facility, on trust land, that "employs 170 staff and serves 6,000 native and non-native patients.") http://www.npaihb.org/member-tribes/coeur-dalene-tribe/.

NATIONAL INDIAN GAMING ASSOCIATION

RESOLUTION 05–LAS–BOD–4–20–18

TITLE: To Support H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

WHEREAS, the National Indian Gaming Association (NIGA) is an intertribal association of 184 federally recognized Indian Tribes established to support Indian gaming and defend Indian sovereignty; and

WHEREAS, Indian Tribes are sovereigns that pre-date the United States, with prior and treaty protected rights to self-government and to our Indian lands, and

WHEREAS, the Constitution of the United States, through the Treaty, Commerce, and Apportionment Clauses and the 14th Amendment, recognizes the sovereign status of Indian Tribes as Native nations established prior to the United States; and

WHEREAS, before the United States, Indian nations were independent sovereigns with complete authority over our lands and our citizens; and

WHEREAS, on September 18, 2015 the Department of the Interior issued a decision to accept approximately 321 acres of land into trust for the Mashpee Wampanoag Tribe of Massachusetts as the Tribe's initial reservation, and within the Tribe's historical territory; and

WHEREAS, the Department's decision has since been subject to challenge, thereby threatening the Tribe's newly established trust lands, its ability to acquire lost homelands, and more broadly, its people and its sovereignty; and

WHEREAS, bipartisan legislation, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) has been introduced in Congress, which reaffirms the Department's trust acquisition for the Mashpee Tribe.

NOW THEREFORE BE IT RESOLVED, NIGA hereby calls on Congress to enact H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act; and

BE IT FURTHER RESOLVED that this resolution shall be the policy of NIGA until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the Board of Directors at a meeting of the National Indian Gaming Association, held at the Westgate Las Vegas Resort & Casino, 3000 Paradise Rd, on April 20, 2018, Las Vegas, NV, with a quorum present.

Ernest L. Stevens, Jr., Chairman Paulette Jordan, Secretary

NATIVE AMERICAN RIGHTS FUND,
BOULDER, COLORADO

May 11, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

The Native American Rights Fund respectfully urges the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues.

We urge Congress to use its authority to deal with Indian Tribes to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

JOHN E. ECHOHAWK,
Executive Director.

July 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244/S. 2628)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

We, the undersigned, request your support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) and ask that you act swiftly to move this bill through the legislative process in your respective committees in order to ensure its passage in the House and Senate.

The Mashpee Indian Tribe, a federally recognized tribe with a history, culture and government that pre-dates the founding of the United States—the Tribe that helped the Pilgrims—eventually lost all of its historical lands because of the federal government's failure to protect those lands from encroachment. In 2015, with overwhelming local support, the Department of the Interior finally rectified this historical injustice and established Mashpee's first reservation. The status of Mashpee's reservation is now threatened by technical legal issues. This could result in the disestablishment of Mashpee's reservation and could return the Tribe to landlessness.

The Mashpee Wampanoag Tribe Reservation Reaffirmation Act reaffirms the status of the Mashpee Reservation and will allow the Tribe to continue to provide the cultural, economic, and public services to its members that are the essential ingredients of its self-determination as a Tribe. Passage of the legislation also will bring thousands of jobs and millions of dollars of related infrastructure and community development to Taunton and surrounding communities, as part of the Tribe's economic development efforts.

We respectfully request that Congress enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act to ensure that the Mashpee Reservation is protected and that the Tribe is not made landless. Thank you for your consideration of this request.

Sincerely,

Signed by 185 Residents of the New England Area.

NEZ PERCE TRIBAL EXECUTIVE COMMITTEE,
LAPWAI, IDAHO

November 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244/S. 2628)

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

The Nez Perce Tribe requests your support of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) and asks that you act swiftly to move this bill through the legislative process in your respective committees in order to ensure its passage in the House and Senate.

In 2015, pursuant to the Indian Reorganization Act and with strong support from local governments and the state of Massachusetts, the Department of the Interior (Department) took into trust lands located within the Mashpee Wampanoag Tribe's (Mashpee's) traditional homeland and proclaimed those lands as the Mashpee Reservation. Unfortunately, despite strong support of the surrounding community, the existence of the Reservation is threatened by litigation based on technical legal issues initiated by a small group of local residents. In May 2017, the Department withdrew from the litigation and is no longer defending the status of the Mashpee Reservation.

On September 7, 2018, the Department issued a decision refusing to reaffirm its own authority to confirm the status of the Mashpee Reservation opening the door for the Reservation to be taken out of trust and disestablished.

As you know, land is fundamental to tribal self-determination—it provides the means for tribes to protect their cultures and to engage in desperately needed economic development. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act confirms the Mashpee Reservation's status and allows the Tribe to continue providing cultural, economic, and public services to its members that are the essential ingredients of its self-determination as a Tribe.

The Nez Perce Tribe respectfully requests that Congress enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act to ensure that the Mashpee Reservation is protected and that the Tribe is not made landless. Thank you for your consideration of this request.

Sincerely,

SHANNON F. WHEELER,
Chairman.

ONEIDA NATION,
ONEIDA BUSINESS COMMITTEE,
ONEIDA, WI

June 8, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected. The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

TEHASSI HILL,
Chairman.

OTOE MISSOURIA TRIBE OF INDIANS,
RED ROCK, OK

June 5, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would be the first time in modern history that a reservation is disestablished, and would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected. The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

JOHN SHOTTON,
Tribal Chairman.

PASCUA YAQUI TRIBE,
OFFICE OF THE CHAIRMAN,
TUCSON, ARIZONA

May 1, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Pascua Yaqui Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe is threatened by litigation challenging the status of its reservation based on technical legal issues.

Pascua Yaqui was restored to federal recognition in 1978.[1] In 1991, we faced a crisis similar to the one Mashpee faces now. In the process of reviewing amendments to our constitution, the Department of the Interior purported to determine that Pascua Yaqui was a "created" tribe rather than an "historic" tribe for the purposes of the Indian Reorganization Act of 1934 (IRA), and as a result Interior asserted that we did not have the inherent authority to regulate law and order on our reservation. Congress did the right thing to ensure that Pascua Yaqui would be treated fairly when in 1994 Congress passed an amendment to the IRA that clarified that all federally recognized tribes must be treated equally under the IRA,[2] thereby putting an end to the Department's practice of creating different classifications of federally recognized tribes. As a federally recognized tribe, Mashpee must also be treated equally under the IRA with all other federally recognized tribes.

We urge Congress to enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act will ensure that the Mashpee Tribe receives equal treatment under the IRA and by so doing, will protect the Tribe from being rendered perpetually landless. Enactment of the legislation is consistent with the federal government's trust responsibility toward Mashpee, and we urge you to do whatever you can to ensure that the proposed legislation becomes law.

Sincerely,

ROBERT VALENCIA,
Chairman.

[1] Public Law No. 95–375, 97 Stat. 712 (1978).
[2] Public Law No. 103–263, 108 Stat. 707 (1994).

PRAIRIE ISLAND INDIAN COMMUNITY,
WELCH, MN

April 16, 2019

Hon. RAUL GRIJALVA,
Hon. ROB BISHOP,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. RUBEN GALLEGO,
Hon. PAUL COOK,
House Subcommittee on Indigenous Peoples of the United States,
Washington, DC 20515.

Re: The Prairie Island Indian Community Urges Passage of H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Grijalva, Ranking Member Bishop, Chairman Gallego, and Ranking Member Cook:

On behalf of the Prairie Island Indian Community, a federally recognized Tribe located on the banks of the Mississippi River in Welch, Minnesota, I write to express our concerns and to request your unequivocal support for swift passage of the Mashpee Wampanoag Reservation Reaffirmation Act. We believe that the establishment of the Mashpee Wampanoag Reservation was very long overdue and that this legislation is needed to protect their Reservation as well as the Tribal Sovereignty of the Tribal Nations in the United States of America. This bipartisan bill is broadly supported in Indian Country and is urgently needed in order to ensure that the Mashpee Reservation, located within the Mashpee Tribe's traditional homelands, is not disestablished due to a technicality.

The Mashpee Reservation was established in accordance with the Indian Reorganization Act and with the strong support of the State and the local community. However, this Reservation is now being threatened by litigation that could result in the Tribe's land being taken out of trust—something that the federal government has not allowed to happen since the Termination Era in the 1950's.

Like the Mashapee Wampanoag, the overall goal of the Prairie Island Indian Community is to protect its members and to support the long-term health and self-sufficiency of the Tribe in the face of overwhelming odds. In 1938, Lock and Dam No. 3 was placed in operation by the Army Corps of Engineers on the Upper Mississippi River, less than three miles downstream from the Prairie Island Reservation. It resulted in a permanent and unauthorized taking of our Reservation land. Lock and Dam No. 3 also regularly overflows and as a result severe flooding of the Reservation takes place seasonally.

In 1973, without consultation, the Prairie Island Nuclear Generating Plant (PINGP) was then placed a mere 600 yards from our land. Currently, forty-four dry casks of spent nuclear fuel are also stored in close proximity to Tribal homes, our church, our learning center, the Tribe's community center and Tribal businesses. No other human beings in this country live closer to nuclear power plant and spent-fuel storage. The Nuclear Regulatory Commission (NRC) has licensed the storage of an additional fifty-four dry casks of spent nuclear fuel at the plant by 2034. Our community is located within the Plume Exposure Pathway Emergency Planning Zone for the nuclear plant, an area with a higher risk of exposure or evacuation in the event of an accident.

Finally to further complicate the situation, there is only one reliable road leading on and off of our Reservation, and this road is often blocked by railroad traffic carrying a variety of freight, including highly volatile Bakken crude oil.

Because of the circumstances we face, we must look elsewhere for safe land. The Mashpee Wampanoag decision causes great concern to our community as it conveys this administration's view on fee-to-trust transfers for Native American Tribes that desperately need it are not a priority.

We believe that the decision made by the Department of Interior severely affects the Mashpee Wampanoag's Tribal Sovereignty and restricts their ability for proper self-governance. Their ability for further economic development, which the Tribe relies on to fund many functions of their government, will without a doubt be affected and therefore the many social service programs the Tribe provides to its citizens will suffer. As was clear from the Mashpee Tribe's testimony before the

House Natural Resources Committee on April 3rd, 2019, the quality of life for the Tribe and its citizens has been significantly affected. The uncertain status of the Reservation has caused great harm to programs such as, elder services and addiction treatment services, and has been forced to lay off much of its Tribal government work force. For this reason we join so many other voices from Indian Country and around the United States to respectfully urge that Congress fulfill its trust responsibility to the Mashpee Tribe by enacting the Mashpee Wampanoag Reservation Reaffirmation Act as soon as possible.

The Prairie Island Indian Community would like to thank you for the excellent work that you do, and are pleased with your interest in helping, not only the Mashpee Wampanoag Tribe, but Tribal Nations across the country. If you have any questions, please do not hesitate to contact me directly, or have your staff contact our Government Relations Specialist, Cody Whitebear, at telephone number XXX–XXX–XXXX.

Sincerely,

SHELLEY BUCK,
President.

PYRAMID LAKE PAIUTE TRIBE,
NIXON, NEVADA

June 5, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the Pyramid Lake Paiute Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

VINTON HAWLEY,
National Indian Health Board, Chairman
HHS, Secretary's Tribal Advisory Committee, Member

ROCKY MOUNTAIN TRIBAL LEADERS COUNCIL

RESOLUTION #20-June-2018-2

A RESOLUTION TO SUPPORT H.R. 5244 AND S. 2628, THE MASHPEE WAMPANOAG TRIBE RESERVATION REAFFIRMATION ACT

WHEREAS, the Rocky Mountain Tribal Leaders Council (TLC) has been created for the express purpose of providing its member Tribes with a unified voice and a collective organization to address issues of concern to the Tribes and Indian people; and

WHEREAS, the Board of Directors of the Tribal Leaders Council consists of duly elected Tribal Chairs, Presidents and Council Members who are fully authorized to represent their respective Tribes; and

WHEREAS, as a manifestation of their solemn duty, the Tribal governments actively engage in policy formation on any matters that affect the Tribes and reservations; and

WHEREAS, the governments of the various Native American nations have exercised full sovereign authority since time immemorial, including over their separate territories, lands, sacred grounds, and natural resources, including clean and fresh water; and

WHEREAS, Indian Tribes are sovereigns that pre-date the United States, with prior and treaty protected rights to self-government and to our Indian lands; and

WHEREAS, the Constitution of the United States, through the Treaty, Commerce, and Apportionment Clauses and the 14th Amendment, recognizes the sovereign status of Indian Tribes as Native nations established prior to the United States; and

WHEREAS, before the United States, Native nations were independent sovereigns with complete authority over our lands and our citizens; and

WHEREAS, on September 18, 2015 the Department of the Interior issued a decision to accept approximately 321 acres of land into trust for the Mashpee Wampanoag Tribe of Massachusetts as the Tribe's initial reservation, and within the Tribe's historical territory; and

WHEREAS, the Department's decision has since been subject to challenge, thereby threatening the Tribe's only trust land and more broadly, its people and its sovereignty; and

WHEREAS, bipartisan legislation, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628), has been introduced in Congress to reaffirm the Department's trust acquisition for the Mashpee Tribe and to prevent the Tribe from once again being made landless.

NOW THEREFORE BE IT RESOLVED, that the Rocky Mountain Tribal Leadership Council hereby calls on Congress to enact H.R. 5244 and S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

CERTIFICATION

We, the undersigned, as the Chair and the Secretary of the Tribal Leaders Council, do hereby certify that the foregoing Resolution was duly presented and approved unanimously at an official Board Meeting of the Rocky Mountain Tribal Leaders Council, which was held on the 7th day of June in Billings, Montana with 9 member Tribes present to constitute a Quorum.

Alvin Not Afraid Jr.,
Chairman—Tribal Leaders Council

Gerald Gray,
Secretary—Tribal Leaders Council

SAN CARLOS APACHE TRIBE,
SAN CARLOS, ARIZONA

May 9, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the 16,500 members of the San Carlos Apache Tribe (the "Tribe"), I respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Wampanoag Reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a group of individual citizens opposed to tribal sovereignty proclaims that the Mashpee Wampanoag reservation should not be in their back yard based on technical legal issues.

Reservations form a core component of tribal sovereignty, cultural identity and the foundation of a tribe's economy. All tribes have an interest in protecting our reservations. All tribes have an interest in reacquiring our aboriginal territories, our ancestral homelands. A threat to one reservation is a threat to all reservations. Any threat to the restoration of a tribe's land base, is a threat to all tribes.

As our partner in the preservation of tribal reservations and aboriginal territories, the federal government has a solemn duty borne out of its trust responsibility to all tribes to prioritize the restoration of our tribal land bases. However, this NIMBY action threatens the ability of the Mashpee Wampanoag Tribe to rebuild its economy and provide essential government services to its members—the fundamental goal of the land-into-trust process. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act simply provides legal certainty to the status of the Tribe's trust lands, allowing their efforts to move forward.

We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

As we say in our Apache language, Ahi'yi'é, thank you for your support in this critically important matter.

Sincerely,

TERRY RAMBLER,
Chairman.

SHINNECOCK INDIAN NATION,
SHINNECOCK INDIAN TERRITORY,
SOUTHAMPTON, NEW YORK

July 13, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my tribe, the Shinnecock Indian Nation, to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would be the first time in modern history that a reservation is disestablished, and would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected.

As another Indian Nation from the Northeast, we stand united with the Mashpee Wampanoag in the fight to protect their historic lands. As you are aware, tribes in the Northeast endured the first contact with settlers and have the longest recorded history of all Indian Nations. As such, we personally recognize the immense tribulations the Mashpee Wampanoag have faced and the importance for its reservation lands to remain protected.

The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self- determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Respectfully,

Charles K. Smith II,
Chairman, Council of Trustees

Donald Williams Jr.,
Sachem, Council of Trustees

SPIRIT LAKE TRIBE,
FORT TOTTEN, ND

June 7, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would be the first time in modern history that a reservation is disestablished, and would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected.

The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

DOUGLAS YANKTON,
Vice-Chairman.

ST. CROIX CHIPPEWA INDIANS OF WISCONSIN,
WEBSTER, WI

June 11, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: The St. Croix Tribe Supports the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of the St. Croix Tribe of Chippewa Indians of Wisconsin, I respectfully request that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

The Mashpee Tribe is the only federally recognized tribe in the Northeast that does not have a land claim settlement. As a result, unlike other tribes with such settlements, Mashpee had no alternative but to rely on the general land acquisition authority provided in the Indian Reorganization Act (IRA) to establish a reservation. The Mashpee Tribe's reservation is located within Mashpee's traditional homelands, and was established in accordance with the IRA and with the strong support of surrounding local governments. Unfortunately, the existence of this reservation is now threatened by litigation based on technical legal issues. These technical legal issues could lead to the disestablishment of Mashpee's reservation—the first time an Indian reservation would be disestablished since the Termination Era.

A land base is a foundational component of tribal sovereignty and provides the space for tribes to maintain our cultural identities and build our economies. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act reaffirms that status of the Tribe's reservation so that the Tribe can continue to provide vital services to its members, protect its culture, and expand its economy to provide for future generations.

We urge Congress to employ its plenary authority to enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act to ensure that the Mashpee Tribe is not forever rendered continually landless.

Sincerely,

LEWIS TAYLOR,
Chairman, Tribal Council.

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,
BOWLER, WI

June 5, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

I am writing on behalf of my Tribe to respectfully request that you take all necessary action to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) is enacted as soon as possible. This is an urgent matter, as the Mashpee Tribe's reservation is in danger of being taken out of trust, despite strong local government support for its creation.

This threat to the Mashpee Tribe's federally protected lands, established under the authority of the Indian Reorganization Act, is the result of litigation brought by a small group of individuals, challenging the Tribe's reservation on technical legal grounds. This would be the first time in modern history that a reservation is disestablished and would result in the Mashpee Tribe becoming perpetually landless. Congress must exercise its plenary authority to ensure that the Mashpee Tribe and its reservation land is protected.

The Mashpee Tribe, like all other federally recognized tribes, should be entitled to a federally protected reservation where it can exercise its sovereignty, protect its culture, and engage in self-determination. Please enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

SHANNON HOLSEY,
President.

THE SUQUAMISH TRIBE
PORT MADISON INDIAN RESERVATION

RESOLUTION 2018–107

WHEREAS, the Suquamish Tribal Council is the duly constituted governing body of the Port Madison Indian Reservation by authority of the Constitution and Bylaws for the Suquamish Tribe of the Port Madison Indian Reservation, Washington, as approved on July 2, 1965, by the Under-Secretary of the United States Department of the Interior;

WHEREAS, under Article III of the Constitution and Bylaws of the Suquamish Tribe, the Suquamish Tribal Council is charged with the general governance of the Port Madison Indian Reservation and to this end, has the power, right, and authority to take all actions necessary to carry such duties into effect, including protecting the health, security, and general welfare of the Tribe;

WHEREAS, the Mashpee Indian Tribe, a federally recognized Tribe with a history, culture, and government that predates the founding of the United States—the Tribe that helped the Pilgrims—eventually lost all of its historical lands because of the federal government's failure to protect those lands from encroachment;

WHEREAS, in 2015, the Department of the Interior ("Interior") finally rectified this historical injustice when it took into trust certain land within the Tribe's historical territory in Massachusetts and made it the Tribe's reservation, with overwhelming local support, pursuant to the Indian Reorganization Act ("IRA");

WHEREAS, a suit was filed in federal court to challenge Interior's action, and the court rejected Interior's original legal theory, which was based on the second definition of "Indian" in the IRA, calling into question the legal status of the Tribe's reservation; however, the court further allowed the Tribe to petition Interior under a different legal theory, based on the first definition of "Indian" in the IRA;

WHEREAS, Interior originally sought to defend its decision and the Tribe's reservation when it filed an appeal in December 2016, but in May 2017 the Department of Justice withdrew from the litigation and is no longer defending the status of the Tribe's reservation;

WHEREAS, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628) will reaffirm the status of the Tribe's reservation and make clear that the Tribe is entitled to be treated the same way under the IRA as other federally recognized Tribes; and

WHEREAS, the Mashpee Wampanoag Tribe is not asking for new or special rights, but rather is asking Congress, through this Act, to exercise its plenary authority to ensure that the Tribe will be treated equally with other federally recognized Tribes under the IRA, thereby protecting the Tribe's existing reservation so that it can continue to provide services to its members, protect its culture, and provide employment and housing for its members;

NOW THEREFORE BE IT RESOLVED, that the Suquamish Tribal Council hereby declares its support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act, joining with the Mashpee Wampanoag Tribe in urging Congress to pass the Act.

CERTIFICATION

The foregoing resolution was duly adopted on June 25, 2018 at a regular meeting of the Suquamish Tribal Council at which a quorum was present, by a vote of 6 for and 0 against, with 0 abstention(s), in accordance and pursuant to the authority vested in it by the Constitution and Bylaws of the Suquamish Tribe.

By:	Attested to by:
Leonard Forsman, Chairman	Nigel Lawrence, Secretary

SYCUAN TRIBE,
EL CAJON, CA

June 6, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

CODY J. MARTINEZ,
Chairman.

RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL
(Supporting Mashpee Wampanoag Tribe Reservation Reaffirmation Act)
RESOLUTION NO. 18–145

WHEREAS, the Constitution of the Tohono O'odham Nation vests the Legislative Council with the authority to "consult, negotiate and conclude agreements and contracts on behalf of the Tohono O'odham Nation with Federal, State and local governments or other Indian tribes or their departments, agencies, or political subdivisions . . ." (Constitution, Article VI, Section 1(f); and

WHEREAS, as a direct result of federal policies designed to break up tribal governments and Indian land bases and relocate tribes to economically unproductive reservation lands, Indian land holdings in the United States fell from 138 million acres in 1887 to 48 million acres in 1934, a loss that crippled tribes' ability to provide employment and economic opportunities; and

WHEREAS, these nineteenth century policies were repudiated and replaced by the land-into-trust acquisition provisions of the Indian Reorganization Act of 1934 (25 U.S.C. §465) and other land acquisition authorities which authorize the Secretary of the Interior to acquire lands in trust for the benefit of Indian tribes, thereby providing for the acquisition of land bases that are essential to meet the needs of tribal governments, including economic development; and

WHEREAS, despite the Department of the Interior's ongoing trust obligation, after acquiring land in trust for the Mashpee Wampanoag Tribe in 2015, the United States has withdrawn from a suit defending its trust acquisition and, as a direct result, the Tribe is now facing the loss of its reservation lands; and

WHEREAS, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act, introduced as H.R. 5244 and companion bill S. 2628, will protect the trust status of Mashpee Wampanoag Tribe's reservation; and

WHEREAS, "[tlhe Nation's written comments to federal, state, and local governments on laws and rules proposed by those entities must be approved by the Tohono O'odham Legislative Council." (1 Tohono O'odham Code Chapter 3, Section 3102); and

WHEREAS, the Tohono O'odham Nation strongly supports the protection of all tribal trust lands, and the Agricultural and Natural Resources Committee recommends that the Legislative Council support the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

NOW THEREFORE BE IT RESOLVED that the Tohono O'odham Legislative Council calls upon the United States Congress to enact the Mashpee Wampanoag Tribe Reservation Reaffirmation Act and any subsequent federal legislation protecting the trust status of Mashpee Wampanoag Tribe's reservation.

BE IT FINALLY RESOLVED that the Tohono O'odham Legislative Council authorizes and directs the Chairman of the Nation and appropriate Legislative Council delegations to advocate for the enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

The foregoing Resolution was passed by the Tohono O'odham Legislative Council on the 3rd day of May, 2018 at a meeting at which a quorum was present with a vote of 2,875.6 FOR; -0- AGAINST; -0- NOT VOTING; and 209.0[06] ABSENT, pursuant to the powers vested in the Council by Article VI, Section 1(f); and Article VII, Section 2(c) and 2(d) of the Constitution of the Tohono O'odham Nation, adopted by the Tohono O'odham Nation on January 18, l986; and approved by the Acting Deputy Assistant Secretary—Indian Affairs (Operations) on March 6, 1986, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

ATTEST:	TOHONO O'ODHAM LEG. COUNCIL
Evonne Wilson, Leg. Secretary 3rd day of May, 2018	Timothy Joaquin, Leg. Chairman 3rd day of May, 2018

Said Resolution was submitted for approval to the office of the Chairman of the Tohono O'odham Nation on the 3rd day of May, 2018 at 1:48 o'clock, p.m., pursuant to the provisions of Section 5 of Article VII of the Constitution and will become effective upon his approval or upon his failure to either approve or disapprove it within 48 hours of submittal.

[X] APPROVED on the 4th day of May, 2018 at 1:30 o'clock, p.m.

TOHONO O'ODHAM NATION
Edward D. Manuel, Chairman

TONTO APACHE TRIBE,
TONTO APACHE RESERVATION #30,
PAYSON, ARIZONA

June 4, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

VICE CHAIRMAN,
Tonto Apache Tribe.

USET—UNITED SOUTH AND EASTERN TRIBES, INC.,
WASHINGTON, DC

April 27, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to respectfully urge the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas.[1] USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

The Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. USET SPF Tribal Nations, including the Mashpee Wampanoag Tribe, continue to work to reacquire our homelands, which are a fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases.

However, the Mashpee Wampanoag Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a group of individual citizens opposed to Tribal sovereignty. This jeopardizes the ability of the Mashpee Wampanoag Tribe to rebuild its economy and provide essential government services to its citizens, which are the fundamental goals of the land-into-trust process. The Mashpee Wampanoag Tribe Reservation Reaffirmation Act simply provides legal certainty to the status of the Tribe's trust land, allowing these efforts to proceed forward.

As a federally recognized Tribal Nation, it is critical for the Mashpee Wampanoag Tribe to restore its homelands. We urge Congress to use its authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (XXX) X–XXXX.

Sincerely,

Kirk Francis,
President

Kitcki A. Carroll,
Executive Director

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

TESTIMONY OF THE UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND

FOR THE RECORD OF THE HOUSE NATURAL RESOURCES SUBCOMMITTEE ON INDIGENOUS PEOPLES OF THE UNITED STATES LEGISLATIVE HEARING ON, "H.R. 375, H.R. 312, AND THE RESPECT ACT"

APRIL 17, 2019

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the House Natural Resources Subcommittee on Indigenous Peoples of the United States with the following testimony for the record of its legislative hearing on, "H.R. 375, H.R. 312, and the Requirements, Expectations, and Standard Procedures 3 for Executive Consultation with Tribes (RESPECT) Act." USET SPF appreciates the Subcommittee's willingness to begin its work in the 116th Congress with two issues of great import to USET SPF and across Indian Country: the restoration of Tribal homelands and the strengthening of Tribal consultation requirements.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine.[1] USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes advocating for the full exercise of inherent Tribal sovereignty.

Restoration of Tribal Homelands

The Tribal Nations located in the eastern part of what is now the United States have a lengthier history when it comes to the systematic dispossession of our lands as a result of hundreds of years of federal (and before that, colonial) policies. In the wake of these policies, a majority of USET SPF Tribal Nations hold only a fraction of their homelands and some remain landless.

In response to federal policies that stripped us of our land base, the Department of the Interior (DOI) has, for nearly 85 years, restored Tribal lands through trust acquisitions to enable Tribal Nations to build schools, health clinics, hospitals, housing, and provide other essential services to Tribal citizens. Over this period, DOI has approved trust acquisitions for approximately 5 million acres of former Tribal homelands, which represents only a small fraction of the more than 100 million acres lost through Federal policies of removal, allotment, and assimilation.

USET SPF Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. The federal government's objective in the trust responsibility and obligations to our Nations must be to support healthy and sustainable self-determining Tribal governments, which fundamentally includes the restoration of lands to all federally recognized Tribal Nations, as well as the legal defense of these land acquisitions.

No Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base—a homeland—to support robust Tribal self-government, cultural preservation and economic development. The federal government should ensure every Tribal Nation has the opportunity to restore its homelands, regardless of the concerns of other units of government, private citizens, or other interests. This is a necessary function of the U.S. government in delivering upon the trust responsibility and obligations to Tribal Nations. Regaining a land base is essential to the exercise of Tribal self-

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

government. When the federal government holds land in trust for a Tribal Nation, the Tribal Nation is able to exercise jurisdiction over the land, including over individuals' actions and over taxation. This jurisdiction allows the Tribal Nation to protect its people and to generate economic growth, which in turn encourages the flourishing of the Tribal Nation's cultural practices. Jurisdiction over territory is a bedrock principle of sovereignty, and Tribal Nations must exercise such jurisdiction in order to fully implement the inherent sovereignty they possess. Just as states exercise jurisdiction over their land, Tribal Nations must also exercise jurisdiction, thereby promoting government fairness and parity between state governments and Tribal Nation governments.

While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. We further recognize that the federal government has a trust responsibility and obligation to Tribal Nations in the restoration and management of trust lands. With this in mind, it is vital that the land-into-trust process be available to and applied equally to all federally recognized Tribal Nations. This parity is central to the federal government's legal and moral obligations to all of Indian Country.

The fundamentally incorrect 2009 decision in *Carcieri v. Salazar* has created a deeply inequitable 2-class system, in which some Tribal Nations have the ability to restore the homelands stolen from them and others do not. This 2-class system serves to deny these Tribal Nations a critical component of the trust relationship, vital aspects of the exercise of inherent sovereignty, and the opportunity to qualify for several government programs. To add insult to injury, in the years following the decision, the rhetoric surrounding the need to correct this grave injustice has been perverted by those who seek to undermine the acquisition of trust lands for Tribal Nations. This has led to widespread misunderstanding about the purpose and effects of a fix.

As Congress (and other branches of the federal government) approaches the restoration of Tribal homelands, USET SPF continues to repeat that this basic correction is simply that. It returns us to the status quo prior to 2009—a rigorous process for the acquisition of trust land for **ALL** federally recognized Tribal Nations. This long overdue fix does not confer any additional benefits or supersede any existing law, nor is it about anything other than the rightful restoration of Tribal homelands.

USET SPF continues to call for the immediate passage of a fix that contains the two features necessary to restore parity to the land-into-trust process: (1) a reaffirmation of the status of current trust lands; and (2) confirmation that the Secretary has authority to take land into trust for all federally recognized Tribal Nations. USET SPF extends its gratitude to Rep. Tom Cole for his continued introduction of bi-partisan legislation that would right this wrong.

RESPECT Act

Another essential aspect of the federal trust responsibility and obligations to Tribal Nations is the duty to consult on the development of federal policies and actions that have Tribal implications. This requirement is borne out of the sacred relationship between the federal government and Tribal Nations, as well as numerous treaties, court cases, laws, and executive actions. It is a recognition of our inherent sovereignty and self-determination.

However, the duty to consult, despite existing policies and agreements, including Executive Order (E.O.) 13175, is not consistently undertaken or applied, nor is it codified in law. As a result, Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making, and in the context of high-stakes infrastructure projects, Tribal consent is required to fulfill the federal treaty and trust responsibilities. The determination of what level of consultation is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent.

Indeed, the relationship between the United States and Tribal Nations began as one of mutual consent to treaty terms and other agreements, even if the Tribal Nations were under duress. That mutual consent principle should continue, though of course applied this time in an honorable fashion. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a

strengthened model achieved via statute. In the long term, we must return to the achievement of Tribal Nation consent for federal action in recognition of sovereign equality.

It is time that the U.S. work to reform the Tribal consultation process, as conducted by agencies across the federal government. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments. This is consistent with our efforts to modernize the federal trust relationship, including ensuring that Tribal Nations are full and equal participants in the shaping of federal Indian policy.

With this in mind, USET SPF supports the spirit and intent of the discussion draft of the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes (RESPECT) Act. We commend Chairman Grijalva for beginning an important dialogue on how to strengthen consultation requirements. USET SPF is especially pleased to see that the RESPECT Act would apply to all federal agencies and departments, including independent agencies, as each of these entities shares equally in the federal trust responsibility and obligations.

We are also pleased that the Chairman has released the RESPECT Act as a discussion draft. We believe there are opportunities to further refine and strengthen this draft legislation, including addressing issues related to the achievement of Tribal Nation consent, as well as supporting inter-agency coordination and training, and the creation of an Indian desk at the Office of Management and Budget. In addition, we share some concern about the unintentionally narrow scope of the Act. We look forward to the opportunity to work with Chairman to sharpen the legislative language and ensure the RESPECT Act is appropriately comprehensive.

UTE INDIAN TRIBE,
UTE TRIBAL BUSINESS COMMITTEE,
FORT DUCHESNE, UTAH

June 12, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear Chairman Bishop, Ranking Member Grijalva, Chairman Hoeven, and Vice Chairman Udall:

On behalf of my Tribe, we respectfully urge that the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, do everything possible to ensure swift enactment of the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628).

Every federally recognized tribe in the United States should be entitled to a federally-protected reservation where it can exercise its sovereignty, protect its culture, and benefit from the federal laws and programs that are tied to having reservation land. The Mashpee Tribe's reservation—which was established with the strong support of surrounding local governments—is threatened by litigation brought by a NIMBY group based on technical legal issues. We urge Congress to use its plenary authority to ensure that the Mashpee Tribe is not forever rendered perpetually landless by enacting the Mashpee Wampanoag Tribe Reservation Reaffirmation Act.

Sincerely,

LUKE DUNCAN,
Chairman.

THE WACCAMAW INDIAN PEOPLE,
CONWAY, SC

September 30, 2018

Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Dear Congressman:

I am writing in support of H.R. 5244. I know that you are the ranking member of the House Natural Recourses Committee and it is your participation with that committee that I believe is very key at this moment in time. I fear that your committee, surrendering the authority to reaffirm the Mashpee Wampanoag's Tribal Reservation, will harm real people and a real culture, in the near future. Mashpee should not be forced to jump through hopes that no one else does. Indians already have to meet arbitrary standards that never apply to non-Indians.

I realize that your job is a difficult one and that no matter which step you take, one side is happy, the other side disappointed. This issue needs to be raised above the "feels good today" status, to a level that will support this country and Native Culture, into the future generations.

The Mashpee Wampanoag are real. They are real fathers, mothers, sons, daughters and friends. We are real people who have made a strong contribution to this country. Our (Indian) people, serve more per capita in the United States Armed Forces than any other ethnic group. 49 of our people are awarded the congressional Medal of Honor and countless of our people have died to protect your position as a United States Congressman and all freedoms enjoyed by every citizen of this country, except the Indian people.

The history and culture of this country is predated by that of the Indian communities by centuries. As an American, we cannot afford to lose it, least our history be a mere 249 years old. As an Indian, our people deserve to feel secure in what we have earned over the years. We should not be subjected to the "to and fro" threats, to our people and society.

Congressman, please support H.R. 5244 and give us back some security! Thank you for your time today and for what you do for this country.

I remain sincerely,

HAROLD (BUSTER) HATCHER,
Chief of the Waccamaw.

YANKTON SIOUX TRIBE,
WAGNER, SD

June 1, 2018

Hon. ROB BISHOP,
Hon. RAUL GRIJALVA,
House Committee on Natural Resources,
Washington, DC 20515.

Hon. JOHN HOEVEN,
Hon. TOM UDALL,
Senate Committee on Indian Affairs,
Washington, DC 20510.

Re: Support for H.R. 5244/S. 2628, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act

Dear esteemed Members of Congress:

I am writing on behalf of the Yankton Sioux Tribe to advocate for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (H.R. 5244 and S. 2628). We strongly urge the Senate Indian Affairs Committee, and the House Natural Resources Committee and its Subcommittee on Indian and Alaska Native Affairs, to ensure the reaffirmation of the Mashpee Tribe's Reservation.

The Mashpee Wampanoag Tribe is a federally recognized tribe with a reservation located within its historical homeland in Massachusetts. This reservation was established in accordance with the Indian Reorganization Act and with strong local government support. The Mashpee Tribe has been successful in rebuilding and providing for its members, as well as establishing great relationships with surrounding local governments. The Mashpee Tribe's reservation is threatened by litigation that could disestablish the reservation, which has not happened since the Termination era.

The Mashpee Tribe is not asking for new or special rights, only the reaffirmation of its reservation. If Congress does not exercise its plenary authority, the Mashpee Tribe's reservation and means of self- sufficiency will be lost. This is consistent with the federal government's trust obligations to federally recognized tribes. Please enact this important legislation.

Sincerely,

ROBERT FLYING HAWK,
Chairman, Business and Claims Committee.

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

Submission for the Record by Vanessa L. Ray-Hodge

—NCAI Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making, November 30, 2016

○