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IS THERE A NEW WAR ON INDIAN COUNTRY?

by Dennis J. Whittlesey

Over the past week, two proposals have surfaced that could have profound impacts on Indian Country, and they likely would not be for the better.

The first proposal surfaced on October 20 when a Utah congressman introduced legislation to terminate all Interior Department jurisdiction over federal recognition of Indian tribes. The second came a day later when a major candidate for President announced that he wants to relocate the Department of the Interior out of Washington, insuring isolation from both other government agencies and Congress.

Either of these proposals alone should be cause for concern for anyone involved in Indian affairs. Taken together, there should be cause for alarm.

The first event was the introduction of legislation known as the "Tribal Recognition Act," introduced by Rep. Rob Bishop (R-Utah), who just happens to be Chairman of the House Natural Resources Committee, which has jurisdiction over Indian affairs. The essential element of H.R. 3764 is that Congress would strip the Department of the Interior and the Bureau of Indian Affairs of the ability to recognize Indian tribes. Instead, the only entity that would be able to confer recognition status would be Congress itself.

At this time, Congress already has the power to recognize tribes by virtue of its plenary power over Indian affairs found in the so-called "Indian Commerce Clause" of the United States Constitution. But the Interior Secretary also has tribal recognition authority pursuant to the Indian Reorganization Act of 1934, and in some cases the federal courts can do the same.

The Secretary's recognition power is exercised through an administrative process within the Interior Department's Office of Federal Acknowledgement. While the process has been criticized as being unduly cumbersome and time-consuming, the fact remains that a number of tribes have won administrative recognition after demonstrating that they satisfy a multitude of requirements, including continuous tribal existence over an identified period of time. The process is far from perfect and may not always seem fair, but it is designed to assist the Secretary in reaching a reasoned decision as to the applicant tribe's qualification to be federally recognized.

The legislation ostensibly preserves that administrative process as a vehicle for the Secretary to reach a recommendation for legislative recognition, but Congress would be free to ignore it. Indeed, the

actual decisions would made by Congress without regard to merit. And Congress, lest we forget, is a political body.

The second proposal was made by former Florida Governor Jeb Bush as part of his "Western Land and Resource Management Plan." His stated rationale was to address the concerns of residents of the Western United States, who "feel the impact of federal decision-making more acutely than those in the rest of the nation." He added, "Of the 635 million acres owned and managed by the federal government, 582 million acres – 90 percent – are in the West, including Alaska."

As for the potential location for the Department, the statement highlighted Denver, Salt Lake City, and Reno.

Bush's official statement did not mention the fact that the overwhelming majority of Bureau of Indian Affairs and Office of Special Trustee employees already are in the West and located in or near Indian Country. And it made no attempt to explain how or why Indian Country would be better served by moving the entire Department of the Interior out of Washington, D.C., or how it would improve the effectiveness of the Department's senior officials.

At this time, there is little prospect that either of these proposals will become reality, since there is no sign of support from within the current administration. However, the fact that they have even been discussed at such a significant level should be of concern throughout Indian Country.

SEN. BARRASSO INTRODUCES *CARCIERI* COMPROMISE BILL

by Patrick Sullivan

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

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

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

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

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

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

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

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

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

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