

MASHPEE WAMPANOAG TRIBE RESERVATION
REAFFIRMATION ACT

MAY 10, 2019.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. GRIJALVA, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 312]

The Committee on Natural Resources, to whom was referred the bill (H.R. 312) to reaffirm the Mashpee Wampanoag Tribe reservation, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

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 (81 Fed. Reg. 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 Tribe and Tribal members, except 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 that Intergovernmental Agreement shall control.

PURPOSE OF THE BILL

The purpose of H.R. 312 is to reaffirm the trust status of certain lands of the Mashpee Wampanoag Tribe and other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Prior to 2009, the Department of the Interior had long construed the Indian Reorganization Act (IRA) to authorize the Secretary of Interior to place 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 U.S. Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the Secretary's authority to place land into trust for tribes under the IRA had to be informed by whether the tribe meets one of the IRA's three definitions of "Indian," and it then considered whether the Narragansett Tribe met the first definition which applies only to tribes "now under federal jurisdiction." Reversing 75 years of agency practice and federal court case law, the Court determined that "now" meant in 1934 rather than at the time the Secretary exercises the authority. Subsequent related events have resulted in a very real danger the Mashpee Wampanoag Tribe will be the first tribe this century to be stripped of its sovereign rights to land.

The Mashpee Wampanoag Tribe is one of two federally recognized tribes of Wampanoag people in Massachusetts. Their people have inhabited present-day Massachusetts and eastern Rhode Island for more than 12,000 years. The Tribe has existed as a distinct community since at least the 1620s. As such, the Mashpee's relationship with the federal government is one of the oldest in the United States. Their history includes contact with the Pilgrims and, according to their tradition, participation in the first Thanksgiving in 1621.

Like many tribes, the federal government failed to protect Mashpee's historical lands such that eventually all of their lands were taken from them over time. In 1977, the Mashpee took legal action by filing suit in federal court claiming that their land had been taken from them illegally. However, the judge declared that the Mashpee were not federally recognized and so did not meet the legal definition of a tribe. On that basis, the court dismissed the case—not on the merits, but on procedural standing grounds. The Tribe subsequently petitioned the federal government for recognition in 1978, and in 2007 the Bush Administration extended formal recognition to the Tribe.¹ However, they remained landless.

In 2012, the Tribe filed a land-into-trust application with the Bureau of Indian Affairs (BIA) for approximately 170 acres in the Town of Mashpee, MA, and an additional approximately 150 acres in the City of Taunton, MA, both within the Tribe's historical homelands. The Tribe's applications were bolstered by the full support of both local jurisdictions and by the Commonwealth of Massachusetts. In 2015, the application was approved, and the land was taken into trust; the two parcels together were proclaimed the

¹ U.S. Dep't of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment, Petitioner #015: Mashpee Wampanoag, MA, <https://www.bia.gov/as-ia/ofa/015-mashpe-ma>.

Tribe's reservation land by the Department of the Interior in 2016. The Department relied on the second definition of Indian in the IRA to take these actions. The Tribe constructed a government center on the land, which includes its school, courtrooms and multi-purpose rooms, and a medical-clinic facility. The Tribe even broke ground to construct and operate a 400,000-square foot casino and resort in Taunton under a Class III gaming compact between the Tribe and the State of Massachusetts that had been reviewed and approved by the Department of the Interior. Any resulting gaming would be the product of the robust and longstanding consideration process established in the widely applicable Indian Gaming Regulatory Act.

In 2016, a group of Taunton residents, backed by an out-of-state commercial gaming company, filed a *Carciere* suit in federal court to challenge Interior's action.

Initially, the Executive Branch defended its decision to create the Mashpee reservation. In March 2014, the Office of the Solicitor at the Department of the Interior issued a legal memorandum interpreting *Carciere* as well as the intent of the IRA. It concluded that, even with the *Carciere* ruling, "[t]he Department will continue to take land into trust on behalf of tribes under the test set forth herein to advance Congress' stated goals of the IRA to provid[e] land for Indians."² On July 28, 2016, the U.S. District Court for the District of Massachusetts ruled that the Secretary of Interior lacked authority to acquire the Mashpee land in trust based on the second definition of "Indian." In particular, the court found that the second definition is dependent on the first definition, and that the Department's decision had not considered whether the Tribe met the first definition. The Tribe and the Department of Justice appealed the court's construction to the First Circuit, but the case was remanded to the Department of the Interior to consider whether the Tribe meets the first definition.³

However, in May 2017, the Department of Justice under the Trump Administration inexplicably withdrew from the litigation and is no longer defending the status of the Tribe's land. Then, on September 7, 2018, the Department of the Interior issued its first *Carciere* decision in which it refused to reaffirm its own authority to confirm the status of the Tribe's lands in trust. The agency decision would mark the first time since the Termination era that the United States acts to disestablish an Indian reservation and render a tribe landless.

These attacks on the reservation and on the Tribe's very status have wreaked havoc and imposed extreme hardship on the Tribe. The legal uncertainty that has been imposed by these events is forcing the Tribe to borrow thousands of dollars every day just to keep its government running and has resulted in devastating cuts to essential services and massive layoffs. Since a significant number of tribal members rely on the Tribe for employment, the tribal unemployment rate has skyrocketed. The Tribe has had to essentially dissolve their police force and lay off all tribal court staff. The Mashpee are also in the process of shutting down their elder serv-

² U.S. Dep't of Interior, Solicitor's Opinion M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (Mar. 12, 2014), <https://www.doi.gov/solicitor/opinions>.

³ *Littlefield et al. v. Department of the Interior*, D. Mass., No. 16-10184-WGY.

ices and addiction treatment programs, they and are on the brink of having to shut down their Wampanoag language immersion school serving preschool and school-aged children.

H.R. 312 would reaffirm the status of the Mashpee Wampanoag reservation and make clear that the Tribe is entitled to be treated the same way as other federally recognized tribes. This legislation is urgently needed to protect the Tribe's reservation lands and to ensure the Tribe has the resources to continue functioning as a sovereign government. Congress has enacted similar "land reaffirmation" laws before.⁴ This bill in no way exempts the Tribe from the Indian Gaming Regulatory Act.

H.R. 312 is widely supported in Indian Country, with the Committee having received letters of support from over fifty individual tribes and pan-tribal organizations. Additionally, the bill has strong local support, including from the Town of Mashpee and the City of Taunton; their respective chambers of commerce; the Commonwealth of Massachusetts; numerous members of both the Massachusetts House and Senate; the Mayflower Society; and many local businesses and business leaders.

COMMITTEE ACTION

H.R. 312 was introduced on January 8, 2019, by Representative William R. Keating (D-MA). The bill was referred solely to the Committee on Natural Resources, and within the Committee to the Subcommittee for Indigenous Peoples of the United States. The Subcommittee held a hearing on the bill on April 3, 2019. On May 1, 2019, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Chair Grijalva (D-AZ) offered an amendment in the nature of a substitute, consisting of the text of H.R. 312, as introduced. Representative Paul Gosar (R-AZ) offered an amendment designated Gosar #1 to the amendment in the nature of a substitute. The Gosar amendment was not agreed to by a roll call vote of 10 yeas and 26 nays, as follows:

⁴See Pub. L. No. 113-179, *Gun Lake Trust Land Reaffirmation Act*; Pub. L. No. 115-121, *Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act*.

Date: May 1, 2019

COMMITTEE ON NATURAL RESOURCES
116th Congress - Roll Call

Bill / Motion: H.R. 312**Roll Call #:****Amendment:** Mr. Gosar #1 amendment to the Grijalva amendment in the nature of a substitute**Disposition:** Not agreed to by a roll call vote of 10 yeas and 26 nays.

| MEMBERS (44) | | YEAS | NAYS | PRESENT |
|-------------------------------------|----|-------------|-------------|----------------|
| Mr. Grijalva, AZ (Chair) | 1 | | X | |
| Mr. Bishop, UT (Ranking) | 2 | X | | |
| Mrs. Napolitano, CA | 3 | | X | |
| Mr. Young, AK | 4 | | X | |
| Mr. Costa, CA | 5 | | X | |
| Mr. Gohmert, TX | 6 | | | |
| Mr. Sablan, CNMI | 7 | | X | |
| Mr. Lamborn, CO | 8 | X | | |
| Mr. Huffman, CA | 9 | | X | |
| Mr. Wittman, VA | 10 | | | |
| Mr. Lowenthal, CA | 11 | | X | |
| Mr. McClintock, CA | 12 | | X | |
| Mr. Gallego, AZ | 13 | | X | |
| Mr. Gosar, AZ | 14 | X | | |
| Mr. Cox, CA | 15 | | X | |
| Mr. Cook, CA | 16 | | X | |
| Mr. Neguse, CO | 17 | | X | |
| Mr. Westerman, AR | 18 | X | | |
| Mr. Levin, CA | 19 | | X | |
| Mr. Graves, LA | 20 | X | | |
| Ms. Haaland, NM | 21 | | X | |
| Mr. Hice, GA | 22 | | | |
| Mr. Van Drew, NJ | 23 | | X | |
| Mrs. Radewagen, AS | 24 | | | |
| Mr. Cunningham, SC | 25 | | X | |
| Mr. Webster, FL | 26 | X | | |
| Ms. Velázquez, NY | 27 | | | |
| Ms. Cheney, WY | 28 | X | | |
| Ms. DeGette, CO | 29 | | X | |
| Mr. Johnson, LA | 30 | | | |
| Mr. Clay, MS | 31 | | X | |
| Ms. González-Colón, PR | 32 | X | | |
| Mrs. Dingell, MI | 33 | | X | |
| Mr. Curtis, UT | 34 | | | |
| Mr. Brown, MD | 35 | | X | |
| Mr. Herr, OK | 36 | X | | |
| Mr. McEachin, VA | 37 | | | |
| Mr. Fulcher, ID | 38 | X | | |
| Mr. Soto, FL | 39 | | X | |
| Mr. Case, HI | 40 | | X | |
| Mr. Horsford, NV | 41 | | X | |
| Mr. San Nicolas, GU | 42 | | X | |
| Mr. Cartwright, PA | 43 | | X | |
| Mr. Tonko, NY | 44 | | X | |
| TOTALS | | 10 | 26 | |
| Total: 44 / Quorum: 15 / Report: 23 | | YEAS | NAYS | PRESENT |

The amendment in the nature of a substitute offered by Chair Grijalva was adopted by voice vote. The bill, as amended, was ordered favorably reported to the House of Representatives by a roll call vote of 26 yeas and 10 nays, as follows:

HEARINGS

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing was used to develop or consider H.R. 312: Subcommittee for Indigenous Peoples of the United States legislative hearing held on April 3, 2019, at 2:00 p.m.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office.

The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

RULEMAKINGS AND EXISTING PROGRAMS

Directed Rule Making. This bill does not contain any directed rule makings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program

PREEMPTION

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes to existing law.

DISSENTING VIEWS

H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act, is a \$500+ million bailout for a foreign corporation. The bill contradicts a Supreme Court decision and aims to reverse federal court decisions on this matter to build a massive 400,000 square foot off-reservation gaming complex for the benefit of Genting, a foreign Malaysian gaming company.

More specifically, H.R. 312 ratifies a discretionary action taken by the Obama Administration Bureau of Indian Affairs (BIA) to hold land in trust for the Mashpee Tribe under a certain law even though a federal court has determined that such law does not authorize the Secretary to hold land in trust for such tribe. The bill also orders courts to dismiss any pending lawsuit concerning the lawfulness of the BIA action.

The bill creates two reservations for the Mashpee Tribe of Massachusetts. One reservation will be in the Town of Mashpee, the tribe's historic reservation lands. No casino will be allowed "within the geographical boundaries of the Town of Mashpee." The other reservation will be 50 miles away from Mashpee in the City of Taunton. This site is not part of the tribe's historic reservation and was selected by the tribe and Genting for a billion-dollar casino project because of its proximity to the Providence, Rhode Island casino market (20 miles distant).

In 1988, Congress enacted the Indian Gaming Regulatory Act with the intent to restrict casinos to tribes' original reservations. By placing land in trust for gaming in Taunton, H.R. 312 creates an off-reservation casino, which is inconsistent with Congressional intent. This is often called "reservation shopping" and it is an abuse of the Indian Gaming Regulatory Act. The tribe's lawyers knew that reservation shopping was a political headache, so they went to the previous administration to obtain the two reservations through administrative action. A federal judge, however, ruled what the previous Administration did was unlawful, so now they need legislation to authorize the off-reservation casino.

The bill is opposed by the State of Rhode Island, and it's opposed by local citizen groups in Taunton—the ones who successfully won the lawsuit that H.R. 312 would nullify. At the Committee hearing on the bill, the State of Rhode Island testified that H.R. 312 will cause the State significant harm with regard to revenues for education, infrastructure and social programs.

The Wampanoag Tribe of Gay Head (Aquinnah) is also "strenuously opposed" to the passage of H.R. 312 and expressed "serious concerns about the legislation" in a May 17, 2019, letter to Natural Resources Committee Chairman Raúl Grijalva.

H.R. 312 is a financial bailout for Genting. The tribe is swamped with a \$500+ million debt to Genting, and there's no way the tribe can ever pay this back and still make enough money to sustain

itself. Genting, therefore, will be the real owner of the project, not the tribe. This kind of arrangement, where the creditor practically controls the financial future of a debtor-tribe, is contrary to the Indian Gaming Regulatory Act, which requires every tribal casino to be 100% tribally-owned.

Moreover, the American Principles Project also reported on the ties between convicted lobbyist Jack Abramoff and the Mashpee Wampanoag Tribe stating, “The expansive Abramoff investigation uncovered major corruption within the Mashpee Wampanoag tribe. Its chief, Glenn Marshall, pled guilty in 2009 to multiple federal charges, including embezzling tribal funds and campaign finance violations committed while working with Abramoff to secure federal recognition of the tribe [in 2007].”

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

The bill was opposed by 10 of the 13 voting Republicans during the Natural Resources Committee markup of this bill, including Ranking Republican Rob Bishop. These Members are joined by Americans for Limited Government, American Principles Project, Coalition for American Values, Eagle Forum, the Governor of Rhode Island, the Wampanoag Tribe of Gray Head (Aquinnah), Congressman David N. Cicilline (D-RI), Congressman James R. Langevin (D-RI) and President Donald Trump.

This opposition was enough to have the bill pulled from consideration by the House of Representatives under the suspension of the rules procedures one week after it was considered in Committee with no bill report or score from the Congressional Budget Office. Now, the Democrat Leadership plans to use a closed rule to get this controversial bill out of the House of Representatives. Given that H.R. 312 authorizes an off-reservation casino, bails out a foreign corporation from major financial problems of its own making and reverses the judgment of a federal court, it is no wonder that the Majority had to resort to these drastic measures.

PAUL A. GOSAR, D.D.S.,
Member of Congress.

