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WRITTEN STATEMENT FOR THE RECORD

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BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
HOUSE NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

ON BEHALF OF THE
NATIONAL ASSOCIATION OF COUNTIES
AND THE
CALIFORNIA STATE ASSOCIATION OF COUNTIES

IN THE MATTER OF H.R. 1291 (COLE), 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 H.R. 1234 (KILDEE), 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.

JULY 12, 2011

Thank you Chairman Young, Ranking Member Boren and Members of the Subcommittee for the opportunity to testify today on HR 1291 and HR 1234. I also want to take this opportunity to thank Chairman Hastings and his staff for their continued accessibility and efforts to include county governments in the ongoing discussions involving the far-reaching implications of the Supreme Court's *Carcieri v. Salazar* decision.

My name is Susan Adams and I am a County Supervisor in Marin County, California and currently sit on the Board of Directors for the California State Association of Counties (CSAC). This testimony is submitted on behalf of the National Association of Counties (NACo) and CSAC, both of which have been actively involved in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

Established in 1935, NACo is the only national organization representing county governments in Washington, DC. Over 2,000 of the 3,068 counties in the United States are members of NACo, representing over 80 percent of the nation's population. NACo provides an extensive line of services including legislative, research, technical and public affairs assistance, as well as enterprise services to its members.

CSAC, which was founded in 1895, is the unified voice on behalf of all 58 of California's counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services.

For perspective on NACo's and CSAC's activities and approach to Indian Affairs matters, attached to this testimony is the pertinent NACo policy on the *Carcieri v. Salazar* decision and CSAC's Congressional Position Paper on Indian Affairs.

The intent of this testimony is to provide a perspective from counties regarding the significance of the Supreme Court's decision in *Carcieri* and to recommend measures for the Subcommittee to consider as it seeks to address the implications of this decision in legislation. We believe that the experience of county governments is similar throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decision-making system for trust lands. The views presented herein also reflect policy positions of many State Attorneys General who are committed to the creation of a fee to trust process where legitimate tribal interests can be met, and legitimate state and local interests properly considered (see attached policies).

It is from this local government experience and concern about the fee to trust process that we address the implications of the *Carcieri* decision. On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar*. The Court held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the federal government upon enactment of the Indian Reorganization Act (IRA) in 1934.

In the wake of this significant court decision, varied proposals for reversing the *Carcieri* decision have been generated, some proposing administrative action and others favoring a congressional approach. Today's hearing is recognition of the significance of the *Carcieri* decision and the need to consider legislative action. We are in full agreement that administrative or regulatory action to avoid the decision in *Carcieri* is not appropriate, but we urge the Subcommittee that addressing the Supreme Court decision in isolation of the larger problems of the fee to trust system misses an historic opportunity.

A legislative resolution that hastily returns the trust land system to its status before *Carcieri* will be regarded as unsatisfactory to counties, local governments, and the people we serve. Rather than a "fix," such a result would only perpetuate a broken system, where the non-tribal entities most affected by the fee to trust process are without a meaningful role. Ultimately, this would undermine the respectful government-to-government relationship that is necessary for both tribes and neighboring governments to fully develop, thrive, and serve the people dependent upon them for their well being.

Recommendation

Our primary recommendation to this Subcommittee and to Congress is this: Do not advance a congressional response to *Carcieri* that allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with input from tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under the Indian Gaming Regulatory Act (IGRA). A framework for such reforms is outlined below. Concurrently, NACo and CSAC join in the request of Members of Congress that the Secretary of the Interior determine the impacts of *Carcieri*, as to the specific tribes affected and nature and urgency of their need, so that a more focused and effective legislative remedy can be undertaken.

What the *Carcieri* decision presents, more than anything else, is an opportunity for Congress to carefully exercise its constitutional authority for trust land acquisitions, to define the respective roles of Congress and the executive branch in trust land decisions, and to establish clear and specific congressional standards and processes to guide trust land decisions in the future. A clear definition of roles is acutely needed regardless of whether trust and recognition decisions are ultimately made by Congress, as provided in the Constitution, or the executive branch under a congressional grant of authority. It should be noted that Congress has power ***not*** to provide new standardless authority to the executive branch for trust land decisions and instead retain its own authority to make these decisions on a case-by-case basis as it has done in the past, although decreasingly in recent years. Whether or not Congress chooses to retain its authority or to delegate it in some way, it owes it to tribes and to states, counties, local governments and communities, to provide clear direction to the Secretary of the Interior to make trust land decisions according to specific congressional standards and to eliminate much of the conflict inherent in such decisions under present practice. The reforms suggested by NACo and CSAC are an important step in that direction.

We respectfully urge Members of this Subcommittee to consider both sides of the problem in any legislation seeking to address the trust land process post-*Carcieri,* namely: 1) the absence of authority to acquire trust lands, which affects post-1934 tribes, and 2) the lack of meaningful

standards and a fair and open process, which affects states, local governments, businesses and non-tribal communities. As Congress considers the trust land issue, it should undertake reform that is in the interests of all affected parties. The remainder of our testimony addresses the trust land process, the need for its reform, and the principal reforms to be considered.

Legislative Background

In 1934, Congress passed the Indian Reorganization Act (IRA) to address the needs of impoverished and largely landless Indians. The poverty of Indians was well-documented in 1934 and attributed in substantial part to the loss of Indian landholdings through the General Allotment Act of 1887 and federal allotment policy. Congress sought to reverse the effects of allotment by enacting the IRA, which authorizes the Secretary of the Interior to acquire land in trust for tribes through section 5. Acquiring land in trust removes land from state and local jurisdiction and exempts such land from state and local taxation.

As envisioned by its authors, the land acquisition authority in the IRA allowed the Secretary to fill in checker-boarded reservations that had been opened to settlement through allotment, and create small farming communities outside existing reservations, to allow impoverished and landless Indians to be self-supporting by using the land for agriculture, grazing, and forestry. Western interests in Congress resisted even that modest land acquisition policy, because they did not want new reservations and did not want existing reservations, where non-Indians already owned much of the allotted land, to be filled in and closed. As a result, the IRA bill was substantially rewritten and stripped of any stated land acquisition policy, leaving the Secretary's authority to take land into trust unsupported by any statutory context. In fact, Western interests took the further step, after enactment, of restricting funding for the land acquisitions called for by the IRA. Even with full funding, the annual appropriations called for under the IRA would have allowed the Secretary to purchase only 200 160-acre farms per year. Funding for land acquisitions was eliminated during World War II. Following World War II, federal Indian policy moved back toward assimilation and away from creating separate Indian communities. These developments caused land acquisitions under the IRA to be infrequent and small in scope, producing relatively small impacts on state and local governments and rarely generating significant opposition.

In recent years, the acquisition of land in trust on behalf of tribes, however, has substantially expanded and become increasingly controversial. The passage of the Indian Gaming Regulatory Act (IGRA) in 1988, in particular, substantially increased both tribal and non-tribal investor interest in having lands acquired in trust so that economic development projects otherwise prohibited under state law could be built. The opportunities under IGRA were also a factor in causing many tribal groups which were not recognized as tribes in 1934 to seek federal recognition and trust land in the past 20 years. Further, tribes have more aggressively sought lands that are of substantially greater value to state and local governments, even when distant from the tribe's existing reservation, because such locations are far more marketable for various economic purposes. The result has been increasing conflict between, on the one hand, the federal government and Indian tribes represented by the government in trust acquisition proceedings, and on the other hand, state and local governments.

Congressional Action Must Address the Broken System

A central concern with the current trust acquisition process is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: 1) potential jurisdictional conflicts; and 2) loss of tax revenues. The notice local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land, or identifying a non-intensive, mundane use for the land, only to change the use to heavy economic development, such as gaming or energy projects soon after the land is acquired in trust. As a result, state and local governments have become increasingly vocal about the inadequacy of the role provided to them in the trust process and the problems with the trust process.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. A legislative response is now not only appropriate and timely but critical to meeting the fundamental interests of both tribes and local governments.

The following legislative proposal addresses many of the concerns of state and local government over the trust process and is designed to establish objective standards, increase transparency and more fairly balance the interests of state and local government in the trust acquisition process. It is offered with the understanding that a so-called *Carcieri* "fix" which leaves the fee to trust system broken is ultimately counterproductive to the interests of tribes as well as local and state governments.

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set standards under which any delegated trust land authority would be applied by the Bureau of Indian Affairs (BIA). Section 5 of the IRA, which was the subject of the *Carcieri* decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations … for the purpose of providing land to Indians." 25 U.S.C. §465. This general and undefined Congressional guidance, as implemented by the executive branch, and specifically the Secretary of Interior, has resulted in a trust land process that fails to meaningfully include legitimate interests, to provide adequate transparency to the public, or to demonstrate fundamental balance in trust land decisions. The unsatisfactory process, the lack of transparency and the lack of balance in trust land decision-making have all combined to create significant controversy, serious conflicts between tribes and states, counties and local governments, including litigation costly to all parties, and broad distrust of the fairness of the system.

All of these effects can and should be avoided. Because the *Carcieri* decision has definitively confirmed the Secretary's lack of authority to take lands into trusts for post-1934 tribes, Congress now has the opportunity not just to address the issue of the Secretary's authority under the current failed system, but to reassert its primary authority for these decisions by setting specific standards for taking land into trust that address the main shortcomings of the current trust land process. Some of the more important new standards are described below.

LEGISLATIVE REFORM FRAMEWORK

Notice and Transparency

1) ***Require Full Disclosure From The Tribes On Trust Land Applications and Other Indian Land Decisions, and Fair Notice and Transparency From The BIA***. The Part 151 regulations, which implement the trust land acquisition authority given to the Secretary of Interior by the IRA, are not specific and do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the affected public) to determine the nature of the tribal proposal, evaluate the impacts and provide meaningful comments. BIA should be directed to require tribes to provide reasonably detailed information to state and affected local governments, as well as the public, about the proposed uses of the land early on, not unlike the public information required for planning, zoning and permitting on the local level. This assumes even greater importance since local planning, zoning and permitting are being preempted by the trust land decision, and therefore information about intended uses is reasonable and fair to require.

   Legislative and regulatory changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications and petitions for Indian Land Determinations in their jurisdiction and have adequate time to provide meaningful input.

   For example, Indian lands determinations, a critical step for a tribe to take land into trust for gaming purposes, is conducted in secret without notice to affected counties or any real opportunity for input. Incredibly, counties are often forced to file a Freedom of Information Act (FOIA) request to even determine if an application was filed and the basis for the petition.

   New paradigm required for collaboration between BIA, Tribes and local government. Notice for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and opportunity to comment is minimal; this must change. A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land-related determinations. For too long counties have been excluded from providing input in critical Department of Interior decisions and policy formation that directly affects their communities. This remains true today as evidenced by new policies being announced by the Administration without input from local government organizations.

   The corollary is that consultation with counties and local governments must be real, with all affected communities and public comment. Under Part 151, BIA does not invite comment

by third parties even though they may experience major negative impacts, although it will accept and review such comments. BIA accepts comments only from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss and zoning conflicts. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision. Broad notice of trust applications should be required with at least 90 days to respond.

2) ***The BIA Should Define "Tribal Need" and Require Specific Information about Need from the Tribes***. The BIA regulations provide inadequate guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. These standards can be met by virtually any trust land request, regardless of how successful the tribe is or how much land it already owns. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.

"Need" is not without limits. Congress should consider explicit limits on tribal need for more trust land so that the trust land acquisition process does not continue to be a "blank check" for removing land from state and local jurisdiction. Our associations do not oppose a lower "need" threshold for governmental and housing projects rather than large commercial developments and further support the use by a tribe of non-tribal land for development provided the tribe fully complies with state and local government laws and regulations applicable to other development.

3) Applications should Require Specific Representations of Intended Uses. Changes in use should not be permitted without further reviews, including environmental impacts, and application of relevant procedures and limitations. Such further review should have the same notice, comment, and consultation as the initial application. The law also should be changed to specifically allow restrictions and conditions to be placed on land going into trust that further the interests of both affected tribes and other affected governments.

There needs to be opportunity for redress when the system has not worked. BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions where tribes have changed, or proposed to change the use of trust property from what was submitted in the original request. These types of actions, which can serve to circumvent laws, such as IGRA, and the standard fee to trust review processes, should be subject to challenge by affected third parties.

4) Tribes that Reach Local Intergovernmental Agreements to Address Jurisdiction and Environmental Impacts should have Streamlined Processes. The legal framework should encourage tribes to reach intergovernmental agreements to address off-reservation project

impacts by reducing the threshold for demonstrating need when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion contained in the current process, due to the lack of clear standards, almost inevitably creates conflict and burdens the system. A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

5) Establish Clear Objective Standards for Agency Exercise of Discretion in making Fee to Trust Decisions. The lack of meaningful standards or *any* objective criteria in fee to trust decisions made by the BIA have been long criticized by the U.S. Government Accountability Office and local governments. The executive branch should be given clear direction from Congress regarding considerations of need and mitigation of impacts to approve a fee to trust decision. BIA requests only minimal information about the impacts of such acquisitions on local communities and BIA trust land decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. As a result, there are well-known and significant impacts of trust land decisions on communities and states, with consequent controversy and delay and distrust of the process. It should be noted that the BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes. However the delegation of authority is resolved, Congress must specifically direct clear and balanced standards that ensure that trust land requests cannot be approved where the negative impacts to other parties outweigh the benefit to the tribe.

Intergovernmental Agreements and Tribal-County Partnerships

NACo and CSAC believe that Intergovernmental Agreements should be encouraged between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. Such an approach is required and working well, for example, under recent California State gaming compacts. As stated above, if any legislative modifications are made, we strongly support amendments to IGRA that facilitate a tribe, as a potential component of trust application approval, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services. Such an approach can help to streamline the application process while also helping to insure the success of the tribal project within the local community.

California's Situation and the Need for a Suspension of Fee-To-Trust Application Processing

California's unique cultural history and geography, and the fact that there are over 100 federally-recognized tribes in the state, contributes to the fact that no two of these applications are alike. The diversity of applications and circumstances in California reinforce the need for both clear objective standards in the fee to trust process and the importance of local intergovernmental agreements to address particular concerns.

The Supreme Court's decision in *Carcieri* further complicates this picture. As previously discussed, the Court held that the authority of the Secretary of the Interior to take land into

trust for tribes extends only to those tribes under federal jurisdiction in 1934. However, the phrase "under federal jurisdiction" is not defined.

Notably, many California tribes are located on "Rancherias," which were originally federal property on which homeless Indians were placed. No "recognition" was extended to most of these tribes at that time. If legislation to change the result in *Carcieri* is considered, it is essential that changes be made to the fee-to-trust processes to ensure improved notice to counties and to better define standards to remove property from local jurisdiction. Requirements must be established to ensure that the significant off-reservation impacts of tribal projects are fully mitigated. In particular, any new legislation should address the significant issues raised in states like California, which did not generally have a "reservation" system, and that are now faced with small Bands of tribal people who are recognized by the federal government as tribes and who are anxious to establish large commercial casinos.

In the meantime, NACo and CSAC strongly urge the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri's* implications are better understood and legislation is passed to better define when and which tribes may acquire land, particularly for gaming purposes.

Pending Legislation

As stated above, while our associations support legislation, it must address the critical repairs needed in the fee to trust process. Unfortunately, the legislation pending in the House (HR 1291, Rep. Tom Cole and HR 1234, Rep. Dale Kildee) fails to set clear standards for taking land into trust, to properly balance the roles and interests of tribes, state, local and federal governments in these decisions, and to clearly address the apparent usurpation of authority by the Executive Branch over Congress' constitutional authority over tribal recognition. HR 1291, in particular, serves to expand the undelegated power of the Department of the Interior by expanding the definition of an Indian tribe under the IRA to any community the Secretary "acknowledges to exist as an Indian Tribe." In doing so, the effect of the bill is to facilitate off-reservation activities by tribes and perpetuate the inconsistent standards that have been used to create tribal entities. Such a "solution" causes controversy and conflict rather than an open process which, particularly in states such as California, is needed to address the varied circumstances of local governments and tribes.

Conclusion

We ask Members of the Subcommittee to incorporate the aforementioned requests into any Congressional actions that may emerge regarding the *Carcieri* decision. Congress must take the lead in any legal repair for inequities caused by the Supreme Court's action, but absolutely should not do so without addressing these reforms. NACo's and CSAC's proposals are common-sense reforms, based upon a broad national base of experience on these issues that, if enacted, will eliminate some of the most controversial and problematic elements of the current trust land acquisition process. The result would help states, local governments and non-tribal stakeholders. It also would assist trust land applicants by guiding their requests towards a collaborative process and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge Members to reject any "one size fits all" solution to these issues. In our view, IGRA itself has often represented such an approach, and as a result has caused many problems throughout the nation where the sheer number of tribal entities and the great disparity among them requires a thoughtful case-by-case analysis of each tribal land acquisition decision.

Thank you for considering these views. Should you have questions regarding our testimony or if NACo or CSAC can be of further assistance, please contact Mike Belarmino, NACo Associate Legislative Director, at (202) 942-4254, mbelarmino@naco.org or DeAnn Baker, CSAC Senior Legislative Representative, at (916) 327-7500 ext. 509, dbaker@counties.org.