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Statement of the
California State Association of Counties
for the record of the
U. S. Senate Committee on Indian Affairs
for its May 21, 2009 hearing to examine
Executive Branch authority to acquire trust lands for Indian Tribes

Submitted June 4, 2009

Chairman Dorgan and Members of the Committee:

This testimony is submitted on behalf of the California State Association of Counties (CSAC), which is the unified voice on behalf of all 58 California counties. For perspective on CSAC's activities and approach to Indian Affairs matters, we are attaching the CSAC Congressional Position Paper on Indian Affairs issued in March, 2009. Our intent in this testimony to provide a perspective from California's counties regarding the significance of the Supreme Court's recent decision in *Carcieri v. Salazar*, and to recommend measures for the Committee to consider as it seeks to address the implications of this decision in legislation. CSAC believes that the experience of our county government members in the State of California is similar to that of county and local governments throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decision system for trust lands.

It is against this backdrop 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*. This decision 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 or reinstating authority for trust land acquisitions are being generated, some proposing administrative action and others favoring a Congressional approach. Because of the early scheduling of hearings in both houses of the Congress, our assumption is that there is recognition of the implications of the *Carcieri* decision and appreciation of the need to consider a legislative resolution. We are in full agreement that a Congressional resolution is required, rather than an administrative one, but we urge that the full implications of the decision and all potential resolutions should be identified for consideration before legislative action is taken. We do not believe that a legislative resolution that hastily restores the trust land system to its status before *Carcieri* will be regarded as satisfactory to counties and local governments.

Recommendation

Our primary recommendation to this committee, to our delegation and to the Congress, is this: Do not advance an immediate Congressional response to *Carcieri*, with comprehensive coverage of tribes, but rather set in motion a process that asks the Secretary of the Interior to produce the actual facts with respect to any tribe that may be affected by the decision and the nature and urgency of their need. Based on the facts that are produced by the Secretary, the tribes and state and local governments, more focused and effective action can be taken. During the period in which the needed information is gathered for the Committee, a detailed examination, with oversight and other hearings, should consider what reforms of the trust land process, as well as the definition of Indian lands under IGRA, must be undertaken at the time that legislation to "fix" *Carcieri* can proceed.

What the *Carcieri* decision presents, more than anything else, is an opportunity for Congress to fully reconsider 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, whether 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 it in its power **not** to provide new 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 the recent past. 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 authority to the Secretary of 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.

CSAC will respectfully ask that our state delegation assume a leadership role to address both sides of the problem in any legislation seeking to re-establish the trust land process post-*Carcieri*: 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. If Congress is to open up the trust land issue to fix *Carcieri*, 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.

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set such standards under which any delegated trust land authority would be applied by 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 the 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, 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 authority issue by restoring the current failed system, but to reassert its primary authority for these decisions by setting specific trust land standards that address the main shortcomings of the current trust land process. Some of the more important new standards are as follows.

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 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, the Secretary should be required to seek out and carefully consider comments of local affected governments on Indian gaming proposals subject to the two-part test determination that gaming would be in the best interest of the tribe and not detrimental to the surrounding community (25 U.S.C. 2719 (b)(1)(A)). This change would recognize the reality of the impacts tribal

development projects have on local government services and that the success of these projects are maximized by engagement with the affected jurisdictions. Indeed, in most cases CSAC believes that the two-part process as provided in Section 20 of IGRA should be the process used for land applications for gaming purposes.

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.

2) The BIA should define “tribal need” and require specific information in trust land applications 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.

Our suggestion is that “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. CSAC does not oppose 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 all other development, including full compliance with environmental laws, health and safety laws, and mitigation of all impacts of that development on the affected county.

3) Applications should require specific representations of intended uses. Changes in use should not be permitted without further reviews, including environmental impacts, and approval or denial as the review indicates. Such further review should have the same notice and comment and consultation as the initial application.

The Decision Process and Standards

1) A new paradigm for working with counties and local governments. The notices for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and comment is minimal, and 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 meaningful participation in critical Department of the Interior (DOI) decisions and policy formation which directly affects their communities.

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, although will accept review and comment by third parties, even though they may experience major negative impacts. BIA only accepts comments 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.

To begin to address these issues, CSAC recommends that within the BIA an office be created to act as liaison for tribes and local and state government. This office would be a point of contact to work with non-tribal governments to insure they have the information necessary regarding DOI programs and initiatives to help foster cooperative government-to-government relations with

tribes. As part of this paradigm shift, local governments would be consulted, in a manner similar to that as tribes, on proposed rule changes and initiatives that may impact counties.

2) Establish standards that require that tribal and non-tribal interests be balanced in considering the impacts of trust land decisions. 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.

For this reason, any delegation of authority to the Secretary by Congress should consider placing decision-making responsibility for trust lands in some agency or entity without the mission conflicts of the BIA. 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, considering the negative impacts to other parties, the benefit to the tribe cannot be justified.

3) Limit the use of trust land to the tribe's declared purpose. One of the most problematic aspects of tribal trust acquisition is that once the land is acquired, BIA takes the position that the property can be used for any purpose regardless of what the initial proposal called for. For example, land acquired for tribal residential purposes can be changed to commercial use without any further review or comment by affected parties, regardless of the impacts. By allowing for un-reviewed changes in use, BIA has created an opportunity for the trust land acquisition process to be abused by tribes that seek to hide the true intent of their requests or that simply find it convenient to develop a different use after acquisition. In recent years the hidden purpose has often been the intent to develop a casino but avoid a real analysis of its impacts. The trust acquisition process should be reconstructed under Congressional direction to prohibit changes in the type of use unless a supplemental public review and decision-making process takes place.

4) For calculating tax losses for local governments, the valuation should be based on the proposed use of the land. BIA maintains that the evaluation of the tax loss impacts of taking land into trust should be based solely on the current use of the land, not what it will be developed for after acquisition. Often the current use is "undeveloped", with minimal tax value, whereas the proposed use is high-value commercial or gaming. We strongly suggest that when a tribe proposes a specific after-trust acquisition use of the land that is new or different from current use before the acquisition, BIA should be required to value the revenue loss to local governments on the proposed or intended basis.

Federal Sovereign Immunity

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, which often are very controversial and used to promote reservation shopping that will enrich investors at the expense of local governments. Third parties should have the right to challenge harmful trust land decisions, and BIA should not be allowed to shield its actions behind the federal government's sovereign immunity.

Intergovernmental Agreements and Tribal-County Partnerships

CSAC has consistently advocated that Intergovernmental Agreements be required 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. As stated above, if any legislative modifications are made, CSAC strongly supports amendments to IGRA that require a tribe, as a condition to approval of a trust application, 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.

Under the new model advocated by CSAC, the BIA would be charged to assist tribes and counties to promote common interests through taking advantage of appropriate federal programs. For example, the BIA could play a productive role in helping interested governments take advantage of such programs as the Energy Policy Act of 2005 (to develop sustainable energy sources); the Indian Reservation Roads Program (IRR) (to clarify jurisdictional issues and access transportation funds to improve tribal and county roads serving tribal government); and Indian Justice System funding (to build collaboration between county and tribal public safety officials to address issues of common concern).

California's situation and the need for a suspension of fee-to-trust application processing

At present, there are over 70 applications from California tribes to take land into trust for purposes representing almost 7,000 acres of land (at least 10 of these applications seek to declare the properties "Indian lands" and therefore eligible for gaming activities under IGRA). 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. Some tribes are seeking to have lands located far from their aboriginal location deemed "restored land" under IGRA, so that it is eligible for gaming even without the support of the Governor or local communities, as would be otherwise required.

The U.S. Supreme Court's recent decision in *Carcieri* further complicates this picture. 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, when the Indian Reorganization Act (IRA) was passed. However the phrase "under federal jurisdiction" is not defined. CSAC's interpretation of the decision is that land should not be placed into trust under the IRA unless a tribe was federally recognized in 1934. This type of bright line rule provides clarity and avoids endless litigation.

However, 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 a legislative "fix" is considered to the decision, it is essential that changes are made to the fee-to-trust processes to ensure improved notice to counties and in order to better define standards to remove the 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, CSAC strongly urges the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri's* implications are better understood and new regulations promulgated (or legislation passed) to better define when and which tribes may acquire land, particularly for gaming purposes.

Conclusion

We ask that you incorporate these 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 *Carcieri* decision but absolutely should not do so without addressing these reforms. These are common-sense reforms 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 to fair and equitable results and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge the committee to reject any "one size fits all" solution to these issues. In CSAC's view, IGRA itself has often represented such an approach, and as a result has caused many problems in a State like California, 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 CSAC can be of further assistance please contact DeAnn Baker, CSAC Senior Legislative Representative, at (916) 327-7500 ext. 509 or at dbaker@counties.org.

Sincerely,

A handwritten signature in black ink that reads "Mike McGowan". The signature is written in a cursive style with a small dot above the 'i' in "Mike".

Mike McGowan
Supervisor, Yolo County, California
Chair, CSAC Housing, Land Use, and Transportation Committee & Indian Gaming Working Group