Committee on Resources

Witness Testimony

TESTIMONY OF STEPHEN V. QUESENBERRY

CALIFORNIA INDIAN LEGAL SERVICES

ON H.R. 2742

Before the United States House of Representatives

Committee on Resources

(March 17, 1998)

I. Introductory Comments

Good morning, Mr. Chairman. My name is Stephen Quesenberry. I am the Director of Litigation for California Indian Legal Services and am appearing today on behalf of eight of the 10 federally recognized California Tribes listed in H.R. 2742, the California Indian Land Transfer Act. I am also appearing on behalf of the Advisory Council on California Indian Policy, a statewide Indian council created by Congress pursuant to the Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416 (October 14, 1992), as amended by Pub. L. No. 104-109 (February 12, 1996). My testimony today is based on my work with California Tribes on land and economic development-related matters, and, more specifically, on my direct involvement in the process which led to the development and initial introduction of the California Indian Land Transfer Act (CILTA). My testimony includes a brief overview of the history and tribal interests behind the development of the CILTA and specific comments on the problems in H.R. 2742 that should be corrected through mark-up.

Mr. Chairman, the California Tribes and the Advisory Council thank you for taking the initiative to introduce H.R. 2742 at the end of the last Congressional session. However, they were extremely disappointed that H.R. 2742 substantially modified the original version of the CILTA transmitted to Congress by the Administration on May 28, 1997. Although the Tribes had urged introduction of the bill, they fully expected it would be the version which had emerged from their collaborative efforts with the Department of the Interior, in consultation with the State and local county governments. Over the past few weeks, the Tribes and the Department have had discussions with your staff in which they expressed their respective concerns about certain provisions of H.R. 2742, and the Department has proposed substitute language that would address these concerns. The Tribes have reviewed this substitute language and are in full accord with the Department's recommendations, which essentially mirror the language of the bill (H.R. 3642) approved by this Committee and passed by the House in 1996. This Committee's approval of the proposed substitute language will correct the flaws in H.R. 2742, as discussed below, and bring full circle the unprecedented spirit of inter-governmental collaboration that has characterized the development of this legislation from the outset.

II. Background of the California Indian Land Transfer Act

The CILTA had its genesis in the simple fact that the vast majority of California tribes lack a land base adequate to achieve any significant measure of community and economic development. Such a lack of land and resources directly and negatively impacts a principal goal of Federal Indian policy: to promote tribal economic development, tribal self-determination, and strong tribal self-government. Moreover, we must remember that in California the lack of an adequate tribal land base is not an accident of history. California Indians were deliberately deprived of the benefit of 18 treaties negotiated by their chiefs and headmen in 1851-52 when the United States Senate refused to ratify the treaties and took the extraordinary step of placing them under seal for 50 years. These treaties would have reserved approximately 8.5 million acres of land for the California tribes and placed them in a very different position than they are in today. Today, the Indian land base in California consists of approximately 463,000 acres, including both tribal and individual Indian trust lands, distributed among California's 104 federally recognized tribes. Many of these lands consist of small, widely dispersed parcels, without significant timber, mineral, or water resources. Most California tribes today remain among the poorest in the country.

Land has been the primary factor in the survival and development of Indian peoples and culture. Without the nexus of land, as the history of California so clearly demonstrates, most of the California Indians were denied a refuge from white hostilities and left bereft of their traditional means of physical and cultural survival. In the decades immediately following California statehood in 1850, the major threat to Indian people was physical extermination at the hands of the non-Indian population. In those difficult times, when powerful state interests trumped a weak and ineffective Federal Indian policy in California, the limited amount of land set aside for Indian purposes at least provided a means of survival and limited subsistence for some California tribes. The current threats to Indian survival are of a more subtle socio-economic nature: grinding poverty, discrimination, and a nascent non-Indian backlash against assertions of tribal sovereignty and economic power. And in an era where tribal self-determination is the cornerstone of Federal Indian policy, the tribal land base takes on greater significance because it provides the potential for real Indian economic development and advancement as the Tribes move into the twenty-first century. The twin objectives of tribal self-determination and economic self-sufficiency, enshrined in existing Federal Indian policy, go hand in hand and cannot be achieved without an adequate tribal land base.

For many years, the California tribes have sought ways to increase their limited land bases for housing and community facilities construction, economic development, and cultural and natural resources protection. These efforts achieved only modest success because of the generally high cost of acquiring private lands in California and the fact that few of California's small tribes have the capital necessary to implement a viable land acquisition program. Moreover, in many cases the lands which offer the most immediate benefit to the tribes are federal lands that lie adjacent to, within, or in near proximity to existing Indian reservations and aboriginal areas, such as the Bureau of Land Management (BLM) lands included in this bill. However, the process of administratively transferring federal lands from one federal agency to another presents unique problems, especially where the lands transferred would be added to an existing Indian reservation with the resulting need to modify the reservation boundaries, something only Congress is authorized to do. In the mid-1980s, the California Tribes and the BLM commenced a dialogue to find ways to expedite this process within the constraints of the BLM's land management and planning processes. This initial dialogue was expanded and eventually culminated in the transfer of approximately 5,000 acres of BLM land to the BIA in trust for 10 Southern California Tribes. See Southern California Indian Land Transfer Act of 1988 (SCILTA), Pub. L. 100-581. Passage of SCILTA would not have been possible without the close collaborative efforts of the Tribes, the BLM and the BIA, in consultation with the local county governments of San Diego, Riverside, and San Bernardino. Thereafter, in response to needs expressed by the California Tribes at the California Indian Listening Conference held in Palm Springs on December 8, 1994, Secretary

of Interior Babbitt made a formal commitment to work with the California Tribes on further initiatives to address their land needs. This was the initial impetus for the Administration's support of the CILTA.

A draft of the CILTA was originally submitted to Congress by the Administration on April 5, 1996. This was the bill that the California Tribes had worked closely with the Department, in consultation with the State and county governments, to develop. That bill was introduced on June 13, 1996, by Congressman Elton Gallegly, Chair of the former House Subcommitte on Native American and Insular Affairs, as H.R. 3642. It was reported out of the Resources Committee without amendment, passed the House on September 10, 1996 and was placed on the Senate consent calendar, but died despite widespread support when the Senate abruptly adjourned on October 3, 1996, without bringing it to a vote. On May 28, 1997, during the 1st Session of the 105th Congress, the Administration submitted essentially the same draft version of the CILTA to Congress, amended to include transfers to three additional California tribes and some additional language regarding the intended uses of the lands. Unfortunately, the Administration's version of the CILTA was not introduced. H.R. 2742, introduced on October 24, 1997, substantially modified the Administration's version and failed to reflect the essential collaborative aspect of the draft bill.

The following comments address the major problems with H.R. 2742 and are consistent with the substitute language provided to the Committee by the Department.

III. Specific Comments on H.R. 2742

A. The Gaming Prohibition Should Be Removed.

The bill as proposed by the Administration and the Tribes was never a gaming bill or designed to further tribal gaming efforts, yet H.R. 2742 contains an express prohibition, Section 3(a), on Class II and Class III gaming. This provision is unnecessary and should be removed.

Congress provided for the comprehensive regulation of Indian gaming in the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701 et seq. Moreover, some of the Tribes already have gaming operations on their reservations and the remainder could engage in gaming on their existing lands, if they so choose, as long as they comply with the IGRA. Moreover, each of the Tribes included in the bill has specifically determined, through its own internal planning process, the intended use of the lands to be transferred. See attached Exhibit A. All of these uses are non-gaming in nature. Even if, in the future, one of the Tribes should decide to engage in Class II or Class III gaming on the transferred lands, this would trigger application of specific provisions of the IGRA. More importantly, Congress has struck a delicate balance between tribal sovereignty and state and federal interests in the IGRA, and this land transfer bill should not serve as a vehicle to disturb or disrupt that balance by unilaterally imposing prohibitions on tribal land use and management decisions.

B. A Provision Providing for the Cancellation of Grazing Privileges Should Be Included in the Bill.

H.R. 2742 sets up a conflict between the Tribes and any current permitted grazing activities on these lands by omitting a provision that would have terminated such grazing privileges two years after the date of enactment. The omission of this provision creates a potential conflict between the bill and other federal land management laws and policies, and invites additional problems when the current permit terms expire. The original version of the CILTA recommended by the Department allows for a two-year transition period in which the Tribes and those currently exercising grazing privileges could prepare for tribal takeover of the permitted lands, or re-negotiate the existing permit in accordance with applicable BIA leasing regulations.

This provision is fair to both the current users of the BLM lands and the Tribes. And, it encourages an orderly transition by placing the Tribes in essentially the same position that the BLM now occupies, i.e. with a choice of either renewing the permit through re-negotiation under the BIA leasing regulations, or terminating it and putting the lands to other use. On the other hand, the substitute language proposed by the Department would preserve all valid existing rights in effect on the day before enactment of the CILTA. The distinction between grazing privileges and valid existing rights, such as rights of way granted for roads and utilities, is essential in order to reconcile H.R. 2742 with existing federal law.

The Department's proposed substitute language addresses these issues by including separate provisions on the cancellation of grazing privileges and the preservation of valid existing rights.

C. The Provision Exempting the Transferred Lands from Public Law 280, Absent Tribal Consent, Should Be Removed.

The Tribes and the Advisory Council strongly recommend that Section 3(c)(2) be removed. This section precludes the State from exercising both civil and criminal jurisdiction on the transferred lands without the consent of the tribes. With regard to civil jurisdiction, the United States Supreme Court's decisions interpreting Pub. L. 280 have confirmed broad tribal civil regulatory and taxing jurisdiction within Indian country. On the criminal side, however, Pub. L. 280 vests in the State similarly expansive criminal jurisdiction over Indian lands in California. Section 3(c)(2) would upset this jurisdictional scheme, thereby introducing confusion in the application of the State's criminal laws, by creating small areas of Indian land on which the State's criminal laws would have no effect. Such a result would place an undue burden on the Tribes and the Federal government to immediately develop procedures for effective criminal law enforcement within these areas.

Although the Advisory Council on California Indian Policy has recommended that Congress authorize retrocession of Pub. L. 280 criminal jurisdiction in California on a tribe-by-tribe basis, accompanied by the necessary federal planning and support for tribal law enforcement and judicial systems, the piecemeal "checkerboard" approach of Section 3(c)(2) of H.R. 2742 benefits neither the Tribes nor the State. Therefore, the Committee should remove this provision from the bill.

IV. Conclusion

Mr. Chairman, the Tribes and the Advisory Council appreciate the Committee's willingness to listen to their concerns regarding H.R. 2742. We hope that the Committee will promptly schedule H.R. 2742 for mark-up in consideration of the comments submitted today. In closing, I want to emphasize that the Tribes have made extraordinary efforts to ensure that the local county governments were offered a full opportunity to review the CILTA and register any concerns they might have. None of the counties oppose these land transfers and a number of them have gone on record by passing resolutions in support. Indeed, the CILTA could serve as a possible model for future Federal land acquisitions by needy tribes. The Tribes have done their part. The Committee should honor the extraordinary inter-governmental collaboration involved in the development of this bill by adopting the substitute language proposed by the Department and passing the bill out of committee at the earliest possible date.

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