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Statement of the
California State Association of Counties
for the record of the
U. S. House of Representatives Committee on Natural Resources
for its November 4, 2009 Legislative Hearing on
H.R. 3742 (Kildee) and H.R. 3697 (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

Submitted November 4, 2009

Chairman Rahall and Honorable 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 of California's 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 is 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 "fix" or 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-making system for trust lands. The views presented by CSAC also reflect policy positions of many State Attorneys General and the National Association of Counties (NACo) all of whom are committed to the creation of a fee to trust process where 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*. 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. Today's hearing 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 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 restores 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 solution will only perpetuate the current problem. A situation where the non-tribal entities most effected by the fee to trust process are without a meaningful role, thereby ultimately undermining the respectful government to government relationships 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 committee, to our delegation, and to the Congress, is this: Do not advance an immediate Congressional response to *Carcieri*, which allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with oversight and other hearings which include participation by tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under IGRA. Concurrently, request 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, 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 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 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. As Congress considers 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 described below.

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 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, health and safety laws.

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 law 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 governments.

<u>The Decision Process and Standards</u>

1) A new paradigm for working with counties and local governments. 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 meaningful participation in critical Department of the Interior (DOI) decisions and policy formation which directly affects their communities. This remains true today as evidenced by new fee to trust policies now being announced by the Administration without any 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, 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 and the people they serve.

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 tribal application proposed. 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 or to otherwise allow restrictions and conditions to be placed on the land when it goes into trust status.

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 to help support the county and other local government services that often will be provided to the new development.

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 enrich non-tribal 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. Such an approach is required and working well under recent California State gaming compacts. 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 land 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 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, 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.

The Bills

As stated above, while CSAC supports a "*Carcieri* fix" it most be one which addresses the critical repairs needed in the fee to trust process. Both HR 3697 and HR 3762, while redefining the word "now" to resolve the question at issue in the *Carcieri* case, fail to set clear standards for taking land into trust, to properly balance the roles 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 3742, 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 of the Interior "acknowledges to exist as an Indian Tribe." In doing so, particularly in California, the effect of the bill is to facilitate off reservation gaming 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 California, is needed to address the varied circumstances of local governments and tribes.

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,

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CSAC Congressional Position Paper on Indian Affairs
March 2009

The California State Association of Counties (CSAC) is the single, unified voice speaking on behalf of all 58 California counties. Due to the impacts related to large scale tribal gaming in California, Indian issues have emerged as one of CSAC's top priorities. To address these issues CSAC adopted specific policy guidelines concerning land use, mitigation of tribal development environmental impacts, and jurisdictional questions arising from tribal commercial ventures (attached). There are at least two key reasons for this keen interest. First, counties are legally responsible to provide a broad scope of vital services for all members of their communities. Second, tribal gaming and other economic development projects have rapidly expanded, creating a myriad of economic, social, environmental, health, and safety impacts. The facts clearly show that the mitigation and costs of such impacts increasingly fall upon county government.

In recognition of these interrelationships, CSAC strongly urges a new model of government-to-government relations between tribal and county governments. Such a model envisions partnerships which seek both to take advantage of mutually beneficial opportunities and insure that significant off-reservation impacts of intensive tribal economic development are fully mitigated. Towards this end, counties urge policy and legislative modifications which require consultation and adequate notice to counties regarding proposed rule changes, significant policy modifications, and various Indian lands determinations. As part of this effort CSAC favors creation of a Bureau of Indian Affairs (BIA) local government liaison to facilitate county tribal partnerships.

Introduction

At the outset, CSAC reaffirms its absolute respect for the authority granted to federally recognized tribes and its support for Indian tribal self-governance and economic self-reliance. The experience of California counties, however, is that existing laws fail to address the unique relationships between tribes and counties.

Every Californian, including all tribal members, depends upon county government for a broad range of critical services, from public safety and human services, to waste management and disaster relief. In all, California counties are responsible for nearly 700 programs, including sheriff, public health, child and adult protective services, jails and roads and bridges.

Most of these services are provided to residents both outside and inside city limits. It is no exaggeration to say that county government is essential to the quality of life for over 35 million Californians. No other form of local government so directly impacts the daily lives of all citizens. In addition, because county government has very little authority to independently raise taxes and increase revenues, the ability to be consulted about and adequately mitigate reservation commercial endeavors is critical.

The failure to include counties as a central stakeholder in federal government decisions affecting county jurisdictional areas has caused unnecessary conflict with Indian tribes. To address these issues CSAC has regularly testified and commented on congressional proposals and administrative rulemaking in this important area. Currently, three overall issues facing the new Administration and Congress are of preeminent importance.

Consultation and Notice

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. 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.

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.

In addition, legislative and regulatory changes need to be made to insure 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.

Fee-to-Trust Acquisitions

Suspension of Fee-to-Trust Applications

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, contribute 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 v. Salazar* (2009; No. 07-526) further complicates this picture. The Court held that the authority of the Secretary of 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 address the decision, it is essential that changes be made to the fee-to-trust process that insure improved notice to counties, better defined standards to remove the property from local jurisdiction, and requirements that the significant off-reservation impacts of tribal projects are fully mitigated.

In the meantime, CSAC strongly urges the Department of 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.

Mitigation Agreements

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.

Tribal County Partnerships

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.

CSAC is committed to collaboratively addressing these important issues which so significantly affect our communities.

For further information please contact DeAnn Baker, CSAC Legislative Representative at (916) 327-7500 ext. 509 or at dbaker@counties.org or Kiana Buss, CSAC Legislative Analyst at (916) 327-7500 ext. 566 or kbuss@counties.org.

State Attorneys General

A Communication From the Chief Legal Officers
of the Following States and Territories:

Alaska * Colorado * Connecticut * Florida
Hawaii * Iowa * Kansas * Massachusetts * Michigan
Mississippi * Ohio * Rhode Island * South Carolina
South Dakota * Tennessee * Texas * Utah

FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Doc Hastings
COMPANY: Ranking Member House Committee on Natural Resources
FAX NUMBER:
PHONE NUMBER: 202-225-5929
RE: Carcieri v. Salazar

FROM: 17 State Attorneys General
DATE: 4/24/2009
TOTAL NO. OF PAGES, INCLUDING COVER: 4
SENDER'S REFERENCE NUMBER:
YOUR REFERENCE NUMBER:
202-331-1427

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NOTES/COMMENTS:

State Attorneys General

A Communication From the Chief Legal Officers
of the Following States and Territories:

Alaska * Colorado * Connecticut * Florida
Hawaii * Iowa * Kansas * Massachusetts * Michigan
Mississippi * Ohio * Rhode Island * South Carolina
South Dakota * Tennessee * Texas * Utah

April 24, 2009

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate

The Honorable John Barrasso,
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
United States House of Representatives

The Honorable Doc Hastings
Ranking Member
Committee on Natural Resources
United States House of Representatives

Via Facsimile

RE: Congressional Committee Hearings re: *Carcieri v. Salazar*, 555 U.S. _____ (2009)

Dear Senators Dorgan and Barrasso and Representatives Rahall and Hastings:

The undersigned Attorneys General understand that the Senate Committee on Indian Affairs and the House Natural Resources Committee have conducted a hearing on the potential impacts of the recent United States Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. ____ (2009). The *Carcieri* decision recognized Congress' original intent to limit the authority of the Secretary of Interior to take lands into trust for only those tribes that were recognized at the time the Indian Reorganization Act was enacted in 1934.

A March 13, 2009, story in "Indian Country Today" stated that Indian country officials are calling for a quick legislative fix so that state and local interests will not have time to make arguments that Congress should let the *Carcieri* decision stand. The undersigned believe it would not be in the best interests of all stakeholders, both Indian and non-Indian, to rush a legislative fix and to ignore legitimate state and local interests. The goal of any legislation should be to craft a workable process that allows all interested parties an opportunity to be heard.

Each exercise of the Secretary's authority to take land into trust has substantial impact on state and local communities. Taking land into trust deprives the local units of government and the state of the ability to tax the land and calls into question the power of state and local government to enforce civil and criminal laws on the land.

The *Carcieri* decision is only one highly visible example of the larger frustration many states feel with the existing regulatory process for taking land into trust. The current process does not provide for meaningful

analysis or weighing of the input of states and local units of government and is void of binding limits on the discretion of the secretary. Moreover, the Department of Interior has promised to review and rewrite the current regulations. That promise was made nearly a decade ago, but the regulatory process remains stalled.

The undersigned Attorneys General request that they be allowed to participate in any discussions regarding legislation affecting the Secretary's authority to take land into trust because of the significant impacts such legislation has on the states. The process used to draft any legislation must include all of the stakeholders in order to reduce the potential for disputes and further litigation. The states recognize that, in some instances, taking land into trust for Tribes can be beneficial to all concerned, but it can be detrimental if the trust determinations that are ultimately made unjustifiably undermine the ability of state and local governments to carry on their core functions.

We have been advised that the Committee has committed to move carefully and deliberately in crafting any response to *Carcieri*. We applaud such an approach and respectfully request that we be included in the process so that we can articulate our concerns on behalf of our citizens.

Sincerely,

Patrick C. Lynch
Rhode Island Attorney General

Wayne Anthony Ross
Alaska Attorney General

Richard Blumenthal
Connecticut Attorney General

Mark J. Bennett
Hawaii Attorney General

Steve Six
Kansas Attorney General

Larry Long
South Dakota Attorney General

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Bill McCollum
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Ohio Attorney General

Robert E. Cooper, Jr.
Tennessee Attorney General

Mark L. Shurtleff
Utah Attorney General

Jim Hood
Mississippi Attorney General

Henry McMaster
South Carolina Attorney General

Greg Abbott
Texas Attorney General


NACo
National Association of Counties
The Voice of America's Counties

1. INTERGOVERNMENTAL TAX POLICY

1.6 [text of 1.1-1.6.1 not reproduced]

1.6.2. **Reimbursement**. Legislation must be enacted by the federal government or the states to reimburse counties for any loss in property tax revenues caused by legislation or by administrative action which reduces or exempts property from taxation, such as the holding of lands in trust for the benefit of Native Americans.

Comment: Derived from Finance & Intergovernmental Affairs Legislative Conference, Interim Policy Resolution adopted March 2009 and entitled "Create a New Program to Pay Counties in Lieu of Lost Property Tax Revenue from Tribally Owned Lands and Property Held in Trust by the Federal Government".

Deletions: ~~crossed out~~ *Additions:* underlined

PROPOSED RESOLUTION TO CREATE A NEW PROGRAM TO PAY COUNTIES IN LIEU OF LOST PROPERTY TAX REVENUE FROM TRIBALLY OWNED LANDS AND PROPERTY HELD IN TRUST BY THE FEDERAL GOVERNMENT

Issue: Counties are unable to collect property taxes on Indian properties held in trust by the Federal Government.

Proposed policy: NACo supports the creation of a new Federal program that would reimburse county and local government for lost property taxes incurred due to Indian properties held in trust by the federal government. Funding allocations shall not negatively impact the payment in Lieu of Taxes program (31 U.S.C. Chapter 69).

Background: The federal government declares to have a trust responsibility for Indians. This trust relationship includes holding title to properties in their names for their benefit. These properties are exempt from state and local taxation. The Indian Reorganization Act of 1934 allows certain Indian tribes and individuals that are Native American, to convert privately owned lands in fee status to trust status. Fee lands are under the jurisdiction of the State, county, and local governments, and as such are taxable by county and local governments.

Trust properties have title held by the federal government, are under federal oversight, and are not taxable by county and local governments. County and local governments provide essential services to all citizens, including citizens that are tribal members, whether the land on which they reside is taxable or not. Those services include, but are not limited to; road construction and maintenance, law enforcement, State and county welfare services, emergency services, and services provided by all county offices. Taxes collected by the county also maintain the properties of the county for all citizens to enjoy, and pay the wages of elected county officials, many of whom are Native American. Indian tribes and Indian individuals throughout the country own trust lands and properties with title held by the federal government and are continuing to apply to the U.S. Department of the Interior to get additional fee lands placed into trust with the federal government.

Property improvements, such as businesses and homes located on trust land are not taxable by counties and local governments. This creates financial hardship on counties and local governments, as they must continue to provide quality services with less revenue. This also creates an unfair tax burden on citizens that are not Indian and cannot qualify per lack of tribal membership to remove their land from county and local taxation. Due to the loss in tax revenue created by federal law, county governments are forced to set levies higher. Some counties with large amounts of trust properties are already at the maximum levy allowed by state law.

Existing law fails to address the financial burden to county governments when land is removed from county and local taxation. Although the tax impact is among the criteria for the U.S. Department of the Interior to consider before taking land into trust, it rarely is the cause for denying trust applications.

Fiscal/Urban/Rural Impacts: Adoption of such a program would lead to potential increases in county general fund levels that would allow for greater availability of county services to the community.

4. INTERGOVERNMENTAL ISSUES

4.9 Tribal/County Government Relations [text of 4.9.1-4.9.4 not reproduced]

4.9.5 NACo supports the improvement of the process by which lands are considered to be taken into trust, including revision of the Indian Reorganization Act of 1934 to require (i) adequate advance notice of applications, (ii) actual meaningful consultation (including providing counties 120 days to respond to applications and requiring the Department of the Interior/Bureau of Indian Affairs to respond within 90 days, in writing, to such comments explaining the rationale for acceptance or rejection of those comments), and (iii) to the extent constitutionally permissible, the consent of the affected counties.

Comment: Derived from two Finance & Intergovernmental Affairs Policy Resolutions adopted July 15, 2009 and entitled "Resolution on Improving the Process by which Lands are Taken into Trust for Native American Purposes" and "Resolution on Lands Taken Into Trust".

Additions: underlined

PROPOSED RESOLUTION ON IMPROVING THE PROCESS BY WHICH LANDS ARE TAKEN INTO TRUST FOR NATIVE AMERICAN PURPOSES

Issue: Improving Bureau of Indian Affairs processes for taking lands into trust.

Proposed policy: NACo supports revisions to the Indian Reorganization Act of 1934 which would require preliminary notification, which would not commence the formal comment period, to counties of applications for lands into trust in those counties by the Bureau of Indian Affairs, and extend the official comment period for affected local governments from 30 to 120 days, and require the Bureau of Indian Affairs (BIA) to respond, within 90 days in writing, to such comments explaining the rationale for the acceptance or rejection of those comments. The Secretary of the Interior shall fully consider the public comments and the response before making a determination that the lands should be taken into trust for Native American purposes.

Background: The Indian Reorganization Act was intended to restore some of the traditional lands to Native Americans to provide primarily for economic development for the benefit of tribal members.

When lands are taken into trust for Native purposes, local governments are affected because, since such lands are not subject to local taxation, revenues are lost that otherwise would provide county services to all the residents of the county. Local land use decisions are not applicable to Indian Country lands, and local environmental and consumer protections are also not applicable.

Currently, the Bureau of Indian Affairs notifies the affected governments and allows under regulation 30 days for the government to comment. This is hardly sufficient for the local government to solicit impacts of taking lands into trust, hold appropriate public hearings, analyze the implications of the possible action, write comments and submit them to BIA. BIA has not traditionally shown any serious interest in accepting and/or acting on comments provided by local governments before submitting recommendations to the Secretary on taking lands into trust for Indian Country.

NACo believes more serious consideration should be given to local government concerns before the Secretary makes a determination. By extending the comment and review deadlines, county governments will be able to provide better information to the BIA and the Secretary before a determination is made.

Fiscal/Urban/Rural Impact: When lands are taken into trust, regardless of whether they are urban or rural, tax revenues are lost based on the acreage taken off the property tax rolls and sales tax revenues lost to Native businesses.

PROPOSED RESOLUTION ON LANDS TAKEN INTO TRUST

Issue: Acquisition of trust lands by the U.S. Department of Interior.

Proposed policy: NACo supports policies which would require that lands are not to be placed into trust and removed from the land use jurisdiction of local governments without adequate notice, actual meaningful consultation and, to the extent constitutionally permissible, the consent of the affected counties. To facilitate such consultation, the Department of the Interior shall contact the affected county to determine the net effect of taking particular lands into trust. This should include off-reservation impacts. The Secretary should place greater weight on the revenue implications for county government when considering such lands, and deny applications to take land into trust when it determines that the loss of property tax revenue would have negative financial impact on affected counties.

Background: The Indian Reorganization Act of 1934 authorizes the Secretary of the United States Department of the Interior to acquire land to be held in trust for the use of American Indian tribes. In California a significant number of ratified tribal gaming compacts do not restrict gaming facilities to areas within a tribe's current trust land or legally recognized aboriginal territory. Such compacts are negotiated with the state's governor.

In addition, issues are beginning to emerge with non-gaming tribal development projects. In some California counties, land developers are seeking partnerships with tribes in order to avoid local land use controls and to build projects, which would not otherwise be allowed under the local land use regulations. Some tribes are seeking to acquire land outside their current trust land or their legally recognized aboriginal territory and to have that land placed into federal trust and beyond the reach of a county's land use jurisdiction. These acquisitions are not automatically taken into trust; the Secretary of the Interior must review and ratify any trust land recommendation.

Existing law fails to address the off-reservation impacts of tribal land development, particularly in those instances when local land use and health and safety regulations are not being fully observed by tribes in their commercial endeavors.

Further, although tax impact is among the criteria for taking land into trust, many county officials do not believe that they are meaningfully involved in the process or that their concerns are given sufficient weight. The federal government does not make any payment in lieu of taxes to affected local governments or require the tribe or any other party to do so.

Fiscal/Urban/Rural Impact: Land that is taken into trust is exempt from county land use and state and local taxing authority.

4. INTERGOVERNMENTAL ISSUES

4.9 Tribal/County Government Relations [text of 4.9.1-4.9.5 not reproduced]

4.9.6 NACo supports the revision of the Indian Gaming Regulatory Act (IGRA) to require consultation with, and mitigation of identified impacts on, affected local governments and the implementation of accountability procedures.

Comment: Derived from the Finance & Intergovernmental Affairs Policy Resolution adopted July 15, 2009 and entitled "Resolution Seeking Mitigation for the Impact of Indian Gaming". Additions: underlined

PROPOSED RESOLUTION SEEKING MITIGATION FOR THE IMPACT OF INDIAN GAMING

Issue: Consideration and mitigation of the impact on counties of Indian gaming.

Proposed policy: The National Association of Counties seeks an amendment to the Indian Gaming Regulatory Act (IGRA) to require consultation with, and mitigation of identified impacts on, affected local governments and accountability procedures to be implemented.

Background: The Indian Gaming Regulatory Act (IGRA) of 1988 provides a framework for state regulation of Indian gaming. 'Class III' or casino-style gaming is restricted to states where the particular form of gaming is permitted for other purposes within the state and where the tribe has negotiated a compact with the state that has been approved by the Secretary of the Interior. However, the Interior Department has the authority and is moving forward to overrule states and authorize Class III gaming where the tribe and state have not successfully negotiated a compact. This has served in some instances as a disincentive for meaningful negotiation.

The Interior Department is responsible for discharging the federal government's trust obligation to Indian tribes and has no commensurate responsibility for protecting the interests of the surrounding community. There is no statutory guidance for the Interior Department with regard to mitigation nor any obligation on the part of the state to provide for local mitigation as a part of its compact.

IGRA also created the National Indian Gaming Regulatory Commission, which has authority to regulate 'Class II', which includes bingo and certain card games. However, federal courts have ruled that the National Indian Gaming Regulatory Commission does not have authority to regulate Class III gaming, which was intended under IGRA to be regulated according to terms of the state compact. As a result there has been strong interest in strengthening IGRA to explicitly provide regulatory authority over Class III gaming to the National Indian Gaming Regulatory Commission, particularly in instances – such as in Wyoming – where Secretarial procedures are being used by the Interior Department to authorize gaming in the absence of a state compact.

Fiscal/Urban/Rural Impact: Counties can incur significant costs from tribal gaming for which the county has no authority to recoup costs. The proposed amendment would require the Department of the Interior to consider and provide for mitigation of costs incurred by counties.