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WRITTEN STATEMENT FOR THE RECORD

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**BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

**HEARING: *“EXAMINING IMPACTS OF FEDERAL NATURAL
RESOURCES LAWS GONE ASTRAY”***

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Thank you Chairman Raúl Labrador, Ranking Member A. Donald McEachin, and Members of the Subcommittee for the opportunity to testify today on this important issue. My name is Diane Dillon, and I serve on the Napa County Board of Supervisors. The Board of Supervisors is both the legislative and the executive authority in Napa County. In its Executive role, the Board of Supervisors sets priorities for the County. We approve budgets; supervise the official conduct of County officers and employees; control all County property; and appropriate and spend money on public safety, human service, health, and other programs that meet the needs of County residents. In its legislative role, our Board's most important function is to make determinations consistent with our County's comprehensive land use plan.

The subject of this hearing is an extremely important one, not just to Napa County, but to counties across the State of California. In my role as County Supervisor, I have worked extensively with the California State Association of Counties (CSAC), which represents county governments before the California Legislature, administrative agencies, and the federal government. I am serving in my second year as Chair of the County and Tribal Government Relations Subcommittee of the National Association of Counties (NACO).

While I am here on behalf of Napa County only, my views regarding the problems the current fee-to-trust process creates and how that process should be implemented have been informed by Napa County's experiences and those of other counties in California and across the United States. By working with CSAC to develop legislation and policies intended to reduce the controversy and intergovernmental conflict the federal fee-to-trust process has caused, I have heard from counties across the nation about when the fee-to-trust process has worked and when it has not. What we all believe is that what is desperately needed is a fair federal process with clear standards that will enable tribes and counties to work together as partners—and not as adversaries, which has unfortunately been increasingly the case.

Today's hearing, entitled "Examining Impacts of Federal Natural Resources Laws Gone Astray," is a sound way of considering the fee-to-trust process set forth in Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 5108. Congress enacted the IRA over *83 years ago* to address a different problem than we have today. The Department of the Interior ("Department") has used Section 5 for purposes other than those Congress was addressing in 1934, and despite the vastly different legal, social, political, and economic conditions we have today. The crux of the problem fundamentally is that Section 5 is outdated. The Subcommittee should consider: (1) how the Department's use of Section 5 has expanded since 1934 and whether that use is consistent with Congress's primary purposes in enacting the IRA in 1934; and (2) whether Section 5, in its current form, can be reconciled with state and local legal frameworks governing land use development and the modern economy. I would like to address both of those issues and propose some changes for consideration.

A. The Department's gradual expansion of its fee-to-trust authority has undermined intergovernmental relationships

There can be little doubt that the Department has gradually expanded its trust authority beyond what Congress envisioned in 1934. The most obvious evidence of that gradual expansion is the

Supreme Court’s 2009 decision in *Carciere v. Salazar*.¹ That case involved a challenge by the State of Rhode Island to the Department’s authority to acquire land in trust pursuant to Section 5 of the IRA for the Narragansett Indian Tribe, an eastern Tribe that had been placed under formal guardianship by the Colony of Rhode Island and eventually the State. Under Section 5, the Department may acquire trust lands “for the purpose of providing land for Indians.” Congress defined “Indian” in Section 19 as:

(1) all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction;

(2) all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation; and

(3) all other persons of one-half or more Indian blood.

The Department argued that the word “now” in the first definition meant at the time the Department acquired land in trust. The State argued that “now” meant 1934, the year Congress enacted the IRA. The Court agreed with the latter and held that the authority of the Secretary of the Interior (“Secretary”) to acquire land in trust is unambiguously limited “to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”

It does not appear, however, that the Department has accorded the temporal restrictions the Court addressed in *Carciere* with much weight. Tribes, states, and local governments, for their part, sought legislation to address the decision. Many tribes, for example, urged Congress to pass narrowly tailored legislation to reverse the Court’s decision, with no other limitations. Napa County, along with CSAC and counties from other states, supported broader changes to the IRA to help address myriad conflicts the fee-to-trust process was generating.

But rather than meaningfully engage in that process, the Department instead worked for over a year on a new legal interpretation of the decades-old statute, with input from tribes seeking trust lands. Claiming that Section 19 is ambiguous, the Department announced its new theory in a 2010 decision to acquire land in trust for the Cowlitz Tribe—a Tribe that was not acknowledged until 2002, nor under federal jurisdiction in 1934 in any meaningful sense. In fact, the 2000 acknowledgment decision for the Cowlitz Tribe explicitly states the Tribe was not a “reservation tribe under Federal jurisdiction or under direct Federal supervision.” The limitations in Section 19 of the IRA must be meaningless if, relying on “ambiguity,” the Department can conclude in 2000 that the Tribe was not a “reservation tribe under Federal jurisdiction or under direct Federal supervision,” but reach the opposite conclusion in 2010.

In another case, the Department acquired land for the Mashpee Tribe, which has a history virtually identical to the Narragansett Tribe in *Carciere*. The Mashpee Tribe, like the Narragansett Tribe, was a tribe that was first under the guardianship and supervision of the colony of Massachusetts and later under the jurisdiction of the Commonwealth. The Department never acknowledged any responsibility for the Mashpee Tribe, at least prior to acknowledging it in 2007. Rather than rely on the first part of the definition of “Indian” used in the Narragansett

¹ 555 U.S. 379 (2009).

and Cowlitz cases, the Department used the second part of the definition in Section 19 to contrive a way to take land into trust. A federal district court has since rejected the Department's decision, but the land remains in trust and the Department is now evaluating whether the Tribe can qualify for trust land under the first part of the definition, despite the Supreme Court's straightforward conclusion in *Carciere*.² There have been a number of other challenges based on the *Carciere* decision in California and other states.

Coming on the heels of the *Carciere* decision, the Department's response in the Cowlitz situation was deeply troubling. The Supreme Court held in *Carciere* that there are temporal limits on the Department's trust authority, and the Department responded by developing an interpretation of Section 19 that reads those limits out of existence.

Members of the *Carciere* Court also expressed concerns regarding the trust power itself, and the Department responded by establishing a goal for itself of acquiring as much land in trust as possible.³ In fact, between 2010 and 2016, the Department acquired almost 500,000 acres of land in trust.⁴

When there is such doubt and confusion regarding the scope of the Department's power, it is appropriate to take a step back to consider the history of the statute, whether the purposes for which the statute is being used today are consistent with Congressional intent, and whether the manner in which such decisions are being made is appropriate, given changed conditions since 1934. Yet the Department took the opposite approach, with the result of further alienating communities that believe it is not merely indifferent to, but actually dismissive of, their concerns about the impacts of trust acquisition.

B. The trust authority in Section 5 was not designed for use in the modern economy

The problems to which Congress was responding in 1934 are not the same problems that tribes and communities face today. When Congress enacted the IRA, its primary purposes were to (1) stop the allotment of tribal land (the government program of individualizing and privatizing Indian lands) and (2) promote principles of tribal self-determination and self-governance by giving tribes greater authority to manage their lands and resources.⁵ The goal of protecting tribal land is obvious from many of the provisions of the Act, which prohibit further allotment of tribal land, extend periods of restricted fee, restore surplus reservation lands to tribes, provide for the consolidation of lands within reservations, and authorize the acquisition of land in trust.

The fact that Congress wanted to protect tribal land, however, does not mean that Congress intended for the trust authority to be used as indiscriminately and extensively as it has been used. It is not even reasonable to assume that Congress was anticipating that the Department would

² See *Littlefield v. United States Department of Interior*, 199 F.Supp.3d 391, 2016 WL 4098749 (D. Mass. July 28, 2016).

³ The decision to acquire land in trust, however, is—as Chief Justice Roberts has noted—an “extraordinary assertion of power” where the Secretary “gets to take land and give it a whole different jurisdictional status apart from state law.” Chief Justice Roberts asked, “Wouldn't you normally regard these types of definitions in a restrictive way to limit that power?”

⁴ <https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands>.

⁵ See *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

extensively use the fee-to-trust power to acquire trust lands purchased by tribes on the open market. When Congress passed the IRA in 1934, it was in the midst of the Great Depression. The impetus behind the IRA was the Meriam Report, which detailed the extreme poverty, health, and living conditions of most Indians and included statistics showing that seventy one percent of Indians reported a total income of less than \$200 per year.⁶ The IRA was only part of the effort to address the conditions on reservation; special programs under the Civilian Conservation Corps and the Works Progress Administration were also implemented.⁷

Congress protected tribal lands through a variety of mechanisms, but in authorizing the acquisition of additional lands, it appropriated funds for that purpose. It did so almost certainly because, absent federal funds, there was no way for impoverished Indians to acquire lands. Thus, Section 5 generally authorizes the Secretary, “in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands,” but it also limits the moneys available for that purpose. Section 5 states, “For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year.” The Department’s ability to acquire land in trust was understood to be inherently limited.

Circumstances—tribal and otherwise—have obviously changed since the Great Depression. Over the past 83 years, many tribes have developed robust economies from natural resource development and other economic projects. Tribal gaming, in particular, has changed the economic fortunes for many tribes, and created an opportunity to acquire more trust land in economically attractive locations, resulting in conflict and litigation. When Congress enacted Section 5, it did not envision the economic power of many tribes today and it did not do so against the backdrop of tribal gaming. This is no longer a system limited to a \$2,000,000 annual appropriation; it is a system where investors will pay tens to hundreds of millions of dollars to help a tribal group get acknowledged and/or obtain trust land, if in the “right” location.⁸ And yet we still have impoverished tribes; the implementation of a 1934 solution has created two financial classes of tribes.

Not only have economic circumstances changed since 1934, the regulatory framework in which states and local governments operate has changed. Most cities in the United States lacked zoning laws at the turn of the century. In 1916, New York City was the first city in the nation to adopt a comprehensive zoning ordinance. By the 1920s, hundreds of local governments adopted local zoning. Most Indian reservations, however, were located significant distances from urban areas.

Between the 1920s and 1960s, California cities controlled land use primarily through zoning regulation. In 1972, however, the State of California mandated comprehensive long-term planning and required local controls to be consistent with the plan. Cities were required to

⁶ <https://www.indian.senate.gov/sites/default/files/upload/files/Frederick-Hoxie-testimony.pdf> (discussing history of IRA).

⁷ *Id.* at 8.

⁸ In 2016, for example, it was reported that Genting Malaysia Bhd had already invested about \$250 million in promissory notes issued by the Mashpee Wampanoag Tribal Gaming Authority for gaming development and the fee-to-trust process. <https://news.worldcasinodirectory.com/genting-announces-first-investment-management-deal-with-mashpee-first-light-casino-in-massachusetts-25108>.

develop a general plan that addressed land use, traffic, housing, open space, and public facilities. In addition, California passed the California Environmental Quality Act in 1970, which requires local agencies to follow certain procedures in developing general plans, as well as when considering specific projects. People buy homes, businesses make investments, and counties develop infrastructure based in reliance on those comprehensive land use plans. And to the extent that those plans change, the affected community can play a role in those decisions through democratic and legal avenues.

In 1968, Napa County established the nation's first agricultural preserve. The legislation, which originally protected 26,000 acres of valley floor, controls minimum parcel sizes (currently 40 acres) and allows agriculture and homes as primary uses. "The crafters of the legislation had the foresight to recognize that we needed not to prevent development but monitor it to make sure we were protecting the natural landscape and utilizing the environment in a way that was beneficial to residents, farmers, and developers alike."⁹ In 1990, as further protection against urban growth in a world-renowned agricultural area, Napa County residents by initiative voted to mandate voters' approval for certain land use decisions within agricultural areas of the County.¹⁰ There was simply nothing comparable to these sorts of efforts in 1934 and no sense that Section 5 would or could be used to upend democratically enacted protections, such as Napa's agricultural preserve.

It is the ability (and willingness) of the United States to override these local land use processes by exercising the fee-to-trust authority that generates more conflict and litigation than any other issue. Congress did not address local land use when it enacted Section 5 because local zoning was rudimentary in 1934; Congress could not have been envisioning a day when tribes could purchase lands in urban areas or agricultural preserves such as Napa's. Nor did it consider the possibility that the Department would use Section 5 to completely strip state and local governments of their authority over local land use, with little to no regard for state and local concerns.

Although the Department has implemented regulations requiring it to consider the views of affected states and local governments, trust applications are virtually never denied on the basis that states and local governments oppose them. While the amount of litigation related to trust decisions demonstrates that the Department has not implemented Section 5 with any serious regard for local impacts, there are also studies to confirm this view. In 2013, Kelsey J. Waples reviewed all 111 fee-to-trust decisions by the Pacific Region BIA Office between 2001 and 2011.¹¹ He found that BIA granted 100 percent of the proposed acquisition requests and in no case did any of the factors BIA is required to consider under its regulations weigh against approval of an application.

The litigation and conflict these decisions have generated have not led the Department to reconsider how it implements its fee-to-trust authority and whether changes are in order to prevent such conflicts from occurring. To the contrary, the Department has revised its

⁹ <http://wordpress.napahistory.org/wordpress/napa-valley-agricultural-preserve-2/>.

¹⁰ The California Supreme Court upheld the ability of a voter initiative to override the local legislative land use process in *Devita vs. County of Napa* (1995) 9 Cal.4th 763.

¹¹ Kelsey J. Waples, *Extreme Rubber Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 *Pepperdine Law Review* 250 (2013).

regulations to make it harder for affected parties to challenge a decision or to have any remedy available if they succeed. The Department has also eliminated its policy of staying the transfer of title into trust upon a final decision, effectively stacking the deck against the affected community that might challenge a federal decision. These are not changes that reflect a federal agency concerned about objective decision-making or minimizing conflicts. These are policies that appear to reflect an agency with contempt for communities adversely affected by its decisions. And it is time for change.

C. Congress should develop a new process for acquiring lands in trust

The process for acquiring land in trust has created significant controversy, serious conflicts between tribes and states, counties and local governments—including decades of litigation—and broad distrust of the fairness of the system. Congress should consider whether the Department should have a role in acquiring land in trust at all or whether trust decisions should be handled through legislation. It should also consider the purposes for which lands will be used, the impacts of the proposed uses (and any subsequent change of use) to surrounding communities, and different standards that might be applied to such decisions. These broader questions are important and ought to be fully considered before moving forward.

If Congress determines that the Department should continue to play a role in the trust acquisition process, it should impose a number of requirements. Those include:

1. Notice and Transparency

The Department should be required to publish notice of an application for land in trust on its website, as well as a copy of all application materials, maps, legal descriptions, and related documents. Under the current regulations, it is very difficult for affected parties (local and state governments, and the public) to determine the nature of the tribal proposal, evaluate the impacts, and provide meaningful comments.

Notice should be provided to and comment sought from not just the jurisdictional governments, but those governments from the communities that are likely to be impacted by the proposed activities. The impacts of trust decisions, particularly for gaming purposes, do not end at city or county borders. They can be felt across entire regions. The public services provided by neighboring states, counties, and cities may be impacted and those impacts must be considered. Neighboring tribes, including those with ancestral ties to the region, can be affected; 25 miles is usually an inadequate measure for outreach.

The Department must do better and more to ascertain the impacts of its decision-making.

2. Consistency with the General Plan, Local Land Use, and other Applicable Laws

The Department should not be permitted to acquire land in trust for a tribe if the proposed use is inconsistent with local land use. If local government is supportive of an inconsistent project, amendments to the local land use law should be required to ensure that the state and local processes enacted to give citizens a voice in the process are not silenced. Tribes are able to seek land on the open market, which includes the ability to purchase lands in areas where a proposed use will be compatible with existing law. They are also able to seek amendments that will enable

a project to be consistent with local land use law. The federal law should be structured in a manner that minimizes community conflict, and the Department should not be permitted to upend state and local long-term planning through the trust process.

This change alone will go far in reducing the community conflict we see across the nation.

3. Streamlined Process

The Department should make intergovernmental agreements a priority. One way to do that is to develop an expedited fee-to-trust process for projects where the applicant tribe has negotiated an agreement with the jurisdictional governments addressing a variety of issues, including environmental, socio-economic, and other impacts. Again, the goal is to encourage tribes to partner with the affected community, to avoid an adversarial situation.

A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

4. Meaningful Consultation

Under the current regulations, the Department limits the parties from which it seeks information and does not conduct meaningful outreach. The Department should be statutorily required to consult with states, counties, and local governments and to consider comments provided by private parties. Under the current regulations, the Department does not invite comment by third parties even though they may experience major negative impacts, although it will accept and review such comments. Although the Department accepts comments from any party, it does not necessarily give those comments any weight; the law instead should mandate meaningful opportunity for consultation with local governments to address the impacts of the project.

5. Limits on Acquisition

Congress should carefully consider whether there should be limits on the amount of land that can be acquired in trust for a particular tribe by defining “need” for land. The current approach does not provide guidance as to what constitutes legitimate tribal need for a trust land acquisition. To the contrary, the Department generally considers “need” for land to be satisfied by the fact that a tribe has purchased it. There are no standards other than the stipulation that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. There are numerous examples of the Department taking land into trust for economically and governmentally self-sufficient tribes with large land bases.

It is incongruous, at best, for the Department to use a Great Depression statute intended to help alleviate the conditions of Indians living under federal jurisdiction to benefit wealthy, economically sophisticated tribes. The Shakopee Mdewakanton Tribe is reported to pay its members over \$1 million per year in gaming per capita payments, yet the Department still acquires land in trust on their behalf.¹² The Seminole Tribe is reported to worth billions.¹³ Other

¹² <https://www.casino.org/news/lavish-living-for-the-richest-tribe-owning-indian-casinos-in-america>.

¹³ <http://www.publicgaming.com/index.php/racinocasino-/21380-how-the-seminole-tribe-of-florida-went-from-being-a-band-of-outcasts-living-in-the-everglades-to-the-multibillionaire-owners-of-an-iconic-global-brand>.

cases seem to defy common sense. In 2002, the St. Augustine Tribe opened a casino in Coachella, California, despite the Tribe consisting of only one adult member.¹⁴ The last member of the Tribe died in 1986, but that member's granddaughter, who was raised by another grandmother, moved back to the reservation with her three children after learning of her heritage.

Congress should also consider whether to apply different standards for "need" depending on whether an application is for off-reservation land. Under the Department's current interpretation of its authority, every time the Department acquires land in trust, state and local laws are generally eliminated and tribal law applies. As the amount of trust land increases, the jurisdictional and legal complexity becomes untenable. In particular, people may not be aware of which laws apply where; tribes are not required to publish their laws or judicial decisions. This problem is exacerbated when non-contiguous lands are acquired in trust.

6. Changes in Use of Land

Congress should consider how and when tribes may change the purposes for which trust lands will be used. There have been a number of cases where tribes have changed the proposed use for trust land after the land was taken into trust. As an example, a California tribe sought and obtained approval for a medical facility on newly acquired trust land near two elementary schools, a church, residences, and a major state highway. The tribe later built the medical facility on another parcel of trust land that had been placed in trust years before. The tribe then decided to build a 29-lane outdoor commercial gun range on the land taken into trust by the Department for the medical facility.¹⁵ The public outcry was dramatic. Although the tribe ultimately reduced the scope of its project, it can increase it at any time.

Indeed, in 1934, Congress did not understand tribal sovereign immunity in the manner it is understood today. The notion that tribes enjoyed sovereign immunity was inchoate in 1934. Since then, however, the Supreme Court has held that tribes enjoyed sovereign immunity for off-reservation commercial conduct until 1998.¹⁶

Given these problems, it is important that Congress address this issue in legislation.

Approved applications should require specific representations of intended uses, and changes to those uses 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 explicitly authorize restrictions and conditions to be placed on land going into trust that furthers the interests of both affected tribes and other affected governments.

7. Enforceable Mitigation

In many environmental impact statements and records of decision, the Department has concluded that a trust application will not adversely impact the community because the impacts can be

¹⁴ <https://indiancountrymedianetwork.com/news/eight-member-augustine-tribe-opens-casino/>.

¹⁵ See <http://www.gunrangeinfo.com/archived-site/>; <http://www.startribune.com/prior-lake-city-council-opposes-shakopee-tribe-s-land-plans/363092071/>.

¹⁶ See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

mitigated. It does not, however, require there to actually be enforceable mitigation. Other agencies condition permits on compliance with mitigation requirements. The Department does not.

To the extent that a decision relies on a finding that impacts can be mitigated, the Department should be required to identify an enforceable intergovernmental agreement that provides the mitigation cited or require, as a condition of acquisition, that the applicant waive its immunity to allow the affected community to enforce the mitigation.

8. Appeals of Land Acquisition Decisions

In November 2013, the Department finalized a rule eliminating the Department's own "self-stay" policy, which had required the Secretary to publish notice of a final trust decision 30 days before actually transferring title.¹⁷ The waiting period was intended to ensure that interested parties had the opportunity to seek judicial review before the Secretary acquired title to the land. The new policy now directs the Secretary or other BIA official to "immediately acquire the land in trust" after a decision becomes final. The Department justified the new rule by stating that the Department could remove land from trust, if a decision was deemed arbitrary and capricious.

The rule, however, has been abused. The Department has cut off state rights by transferring land into trust and has refused reasonable requests that it either stay the effect of a final decision or provide even a day of notice to allow a potentially affected party to seek an emergency injunction. The Department has transferred title to lands before decisions were final, ignoring requests that the illegal transfer be undone, and it has resisted removing land from trust after a federal court has held a trust decision to be arbitrary and capricious. The Department has not lived up to its commitment to remove land from trust when it has violated the law and it should not be permitted to take title prior to judicial review.

The Department has also encouraged tribes to begin development immediately upon acceptance of land into trust. If the beneficiary of the trust decision does not intervene in a judicial proceeding, the aggrieved party cannot seek emergency relief because of tribal sovereign immunity. Thus, development can be completed before the aggrieved party has been able to have their claims heard.

CONCLUSION

I appreciate the opportunity to testify on the Department's fee-to-trust authority. The legal, political, and economic landscape bears little resemblance to what existed in 1934, and it is inappropriate, at least, for the Department to implement Section 5 as if nothing has changed over the last 83 years. It is long past time for Congress to tackle this controversial issue.

¹⁷ 25 CFR Part 151, BIA-2013-0005, RIN 1076-AF15.