

FINAL DRAFT

WRITTEN STATEMENT FOR THE RECORD

**THE HONORABLE DIANE DILLON
SUPERVISOR, NAPA COUNTY, CALIFORNIA**

**BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**ON BEHALF OF THE
CALIFORNIA STATE ASSOCIATION OF COUNTIES**

**IN THE MATTER OF “*CARCIERI: BRINGING CERTAINTY TO TRUST LAND
ACQUISITIONS*”**

NOVEMBER 20, 2013

Thank you Chairwoman Cantwell, Ranking Member Barrasso, and Members of the Committee for the opportunity to testify today. My name is Diane Dillon and I am a County Supervisor in Napa County, California and am actively involved in the California State Association of Counties (CSAC). This testimony is submitted on behalf of CSAC, which has been actively engaged in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

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

The intent of this testimony is to provide a perspective from counties regarding the significance of the Supreme Court's decision in *Carcieri v. Salazar* and to recommend measures for the Committee to consider as it seeks to address the implications of the decision. The views presented herein also reflect policy positions of many State Attorneys General who are committed to the creation of a fee-to-trust process in which tribal interests can be met and legitimate state and local interests are properly considered.

In our view, the recent *Carcieri* decision provides Congress with a rare opportunity to address long-standing defects in the land-into-trust system. The current process - as authorized under the *Indian Reorganization Act of 1934* (IRA) and governed by the Department of the Interior's Part 151 regulations - lacks adequate standards and has led to significant, and in many cases, unnecessary conflict and distrust of the federal decision-making system for trust lands. It is from this local government experience regarding the fee-to-trust process that we address the implications of the *Carcieri* decision.

The Deficiencies of the Current Trust-Land Process

The fundamental problem with the trust acquisition process is that Congress has not set standards under which any delegated trust land authority would be applied by the Bureau of Indian Affairs (BIA). The relevant section of federal law, Section 5 of the IRA, 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.

The aforementioned general and undefined congressional guidance has resulted in a trust land process that fails to meaningfully include legitimate interests, provide adequate transparency to the public, or demonstrate fundamental balance in trust land decisions. The unsatisfactory process has created significant controversy, serious conflicts between tribes and states, counties and local governments - including litigation costly to all parties - and broad distrust of the fairness of the system.

It should be noted that the deficiencies in the trust land process were reaffirmed recently in a quantitative analysis of all 111 fee-to-trust decisions by the Pacific Region BIA Office between 2001 and 2011.¹ The analysis found that BIA granted 100 percent of the proposed acquisition requests and in no case did any Section 151 factor weigh against approval of an application.² The analysis further found that because of the lack of clear guidance and objective criteria, Pacific Region BIA decisions avoid substantive analysis in favor of filler considerations and boilerplate language.³ The result is a broken process in which community concerns are ignored or downplayed, applications are rubber-stamped at a 100 percent acceptance rate, and tribes and local governments are forced into unnecessary and unproductive conflict.⁴ The problem appears likely to worsen in the future, given recent statements by the Department trumpeting its desire to “keep that freight train moving” and “keep restoring lands for tribes.”⁵

While there are a number of major flaws in BIA's fee-to-trust process, one of CSAC's central concerns is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet, state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: 1) potential jurisdictional conflicts; and, 2) loss of tax revenues.

Moreover, the notice that local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land; in other cases, tribes have identified a non-intensive, mundane use, only to change the use to heavy economic development, such as gaming or energy projects, soon after the land is acquired in trust.

Local governments also are often forced to resort to Freedom of Information Act (FOIA) requests to ascertain if a petition for an Indian lands determination - a key step in the process for a parcel of land to qualify for gaming - has been filed in their jurisdiction. Because many tribal land acquisitions ultimately will be used for economic development purposes - including gaming activities - there are often significant unmitigated impacts to the surrounding community, including environmental and economic impacts. Unfortunately, current law does not provide any incentive for tribes and affected local governments to enter into agreements for the mitigation of off-reservation impacts.

¹ (Kelsey J. Waples, *Extreme Rubber Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 *Pepperdine Law Review* 250 (2013).

² *Id.*, pp. 278.

³ *Id.*, pp. 286, 293, 302.

⁴ *Id.*, pp. 292, 295, 297.

⁵ See “Washburn Announces Plan of Attack for Patchak Plan,” <http://indiancountrytodaymedianetwork.com/2013/05/24/washburn-announces-plan-attack-patchak-patch-149514>.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. Indeed, the current notification process embodied in the Part 151 regulations is, in practice, insufficient and falls far short of providing local governments with the level of detail needed to adequately respond to proposed trust land acquisitions. Accordingly, a legislative effort is needed to meet the fundamental interests of both tribes and local governments.

Carcieri v. Salazar - An Historic Opportunity

On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar*. The Court held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the federal government upon enactment of the IRA in 1934.

Because the *Carcieri* decision has definitively confirmed the Secretary's lack of authority to take land into trust for post-1934 tribes, Congress has the opportunity not just to address the issue of the Secretary's authority under the current failed fee-to-trust system, but to reassert its primary authority for these decisions by setting specific standards for taking land into trust that address the main shortcomings of the trust land process.

In the wake of this significant court decision, varied proposals for reversing the *Carcieri* decision have been generated, some proposing administrative action and others favoring a congressional approach. Today's hearing, like several hearings before it, is a recognition of the significance of the *Carcieri* decision and the need to consider legislative action.

We believe that the responsibility to address the implications of *Carcieri* clearly rests with Congress and that a decision to do so in isolation of the larger problems of the fee-to-trust system would represent an historic missed opportunity. Indeed, a legislative resolution that hastily returns the trust land system to its status before *Carcieri* will be regarded as unsatisfactory to counties, local governments, and the people we serve. Rather than a "fix," such a result would only perpetuate a broken system, where the non-tribal entities most affected by the trust acquisition process are without a meaningful role. Ultimately, this would undermine the respectful government-to-government relationship that is necessary for both tribes and neighboring governments to fully develop, thrive, and serve the people dependent upon them for their well being.

Our primary recommendation to the Committee and to Congress is this: Do not advance a congressional response to *Carcieri* that allows the Secretary of the Interior to return to the flawed fee-to-trust process. Rather, Congress should make meaningful, comprehensive reforms to the trust land system. Legislation should include provisions that ensure local governments and impacted parties are able to file a challenge to a trust acquisition decision *before* title to

the land is transferred. Such a change is necessary in light of the Department of the Interior's recent decision - discussed in further detail below - to eliminate the waiting period in which the Secretary was required to publish a notice of a trust decision 30 days before actually acquiring title to the land.

CSAC believes that the *Carciari* decision presents Congress with an opportunity to carefully exercise its constitutional authority for fee-to-trust acquisitions and to define the respective roles of Congress and the Executive Branch in trust land decisions. Additionally, it affords Congress with the opportunity to establish clear and specific congressional standards and processes to guide trust land decisions in the future. A clear definition of roles is acutely needed regardless of whether trust and recognition decisions are ultimately made by Congress, as provided in the Constitution, or the Executive Branch under a congressional grant of authority.

It should be noted that Congress has the power to *not* provide new standard-less authority to the Executive Branch for trust land decisions and instead retain its own authority to make these decisions on a case-by-case basis as it has done in the past, although decreasingly in recent years. Whether or not Congress chooses to retain its authority or to delegate it in some way, it owes it to tribes and to states, counties, local governments and communities, to provide clear direction to the Secretary of the Interior to make trust land decisions according to specific congressional standards and to eliminate much of the conflict inherent in such decisions under present practice.

Looking ahead, we respectfully urge Members of this Committee to consider a comprehensive approach the problem in any legislation seeking to address the trust land process post-*Carciari*, namely: 1) the absence of authority to acquire trust lands, which affects post-1934 tribes, and 2) the lack of meaningful standards and a fair and open process, which affects states, local governments, businesses and non-tribal communities. As Congress considers the trust land issue, it should undertake reform that is in the interests of all affected parties.

Some of the more important new standards should be as follows:

Notice and Transparency

1) Require Full Disclosure from the Tribes on Trust Land Applications and Other Indian Land Decisions, and Fair Notice and Transparency from the BIA. The Part 151 regulations are not specific and do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the 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; accordingly, 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. 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. As previously indicated, counties are often forced to file a FOIA request to even determine if an application was filed and the basis for the petition.

Notice for trust and other land actions for tribes that go to counties and other governments is not only very limited in coverage, the opportunity to comment is minimal; this must change. A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land-related determinations. For too long, counties have been excluded from providing input in critical Department of Interior decisions and policy formation that directly affects their communities. This remains true today as evidenced by new policies being announced by the Administration without input from or consultation with local government organizations.

The corollary is that consultation with counties and local governments must be substantive, include all affected communities, and provide an opportunity for public comment. Under Part 151, BIA does not invite comment by third parties even though they may experience major negative impacts, although it will accept and review such comments. BIA accepts comments only from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss, government services currently provided to the subject parcels, and zoning conflicts. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision. Broad notice of trust applications should be required with at least 90 days to respond.

Define Tribal Need

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 a trust land acquisition. There are no standards other than the stipulation 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.

Congress should consider developing standards requiring justification of the need and purpose for acquisition of additional trust lands so that the acquisition process does not continue to be a

“blank check” for removing land from state and local jurisdiction. Notably, CSAC supports a lower threshold for acquisition of trust land that will be used only for non-gaming or non-intensive economic purposes, including governmental uses and housing projects.

Changes in Use of Land

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

Intergovernmental Agreements

4) Tribes that Reach Local Intergovernmental Agreements to Address Jurisdiction and Environmental Impacts Should Have a Streamlined Process. The legal framework should encourage tribes to reach intergovernmental agreements to address off-reservation project impacts by reducing the threshold for demonstrating need when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion contained in the current process, due to the lack of clear standards, almost inevitably creates conflict and burdens the system. A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

It should be noted that an approach that encourages intergovernmental agreements between a tribe and local government affected by fee-to-trust applications is required and working well under recent California State gaming compacts. Not only does such an approach offer the opportunity to streamline the application process, it can also help to ensure the success of the tribal project within the local community. The establishment of a trust land system that incentivizes intergovernmental agreements between tribes and local governments is at the heart of CSAC's fee-to-trust reform recommendations and should be a top priority for Congress.

Clear and Objective Standards

5) Establish Clear and Objective Standards for Agency Exercise of Discretion in Making Fee-to-Trust Decisions. The lack of meaningful standards or any objective criteria in fee-to-trust decisions made by the BIA have been long criticized by the U.S. Government Accountability Office and local governments. For example, BIA requests only minimal information about the impacts of such acquisitions on local communities and 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.

Furthermore, the BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes. In order to reasonably balance the interests of tribes and local governments, the Executive Branch should be given clear direction from Congress

regarding considerations of need and mitigation of impacts to approve a trust land acquisition. However any delegation of authority is resolved, Congress must specifically direct clear and balanced standards that ensure that trust land requests cannot be approved where the negative impacts to other parties outweigh the benefit to the tribe.

The attached fee-to-trust legislative reform proposal developed by CSAC seeks to address the inequities and flaws in the current trust land system. The centerpiece of the reform package is a proposal that would provide an incentive for tribes and local governments to enter into judicially enforceable mitigation agreements. Additionally, the proposal would remedy the serious defects in the fee-to-trust process related to inadequate notification and consultation requirements, including those outlined in the aforementioned *Pepperdine Law Review* analysis of fee-to-trust decisions, as well as address other significant shortcomings in the trust land system.

Appeals of Land Acquisition Decisions

On November 13th of this year, the Department of the Interior finalized a new rule governing decisions by the Secretary to approve or deny applications to acquire land in trust. CSAC believes that the final rule, which amends the Department's 151 regulations, will expedite trust approvals to the detriment of all interested parties, and to the administrative process itself.

The rule (found at *25 CFR Part 151, BIA-2013-0005, RIN 1076-AF15*) effectively repeals the Department's "self-stay" policy, which required the Secretary to publish a notice of a trust decision 30 days before actually transferring title. The now-eliminated waiting period was intended to ensure that interested parties had the opportunity to seek judicial review under the Administrative Procedure Act (APA) before the Secretary acquired title to land in trust. In virtually all past cases, if a challenger filed suit within the 30-day window, the Secretary agreed to "self-stay" the trust transfer during court proceedings, thus allowing for the orderly resolution of the challenge.

It should be noted that the Department's new rule incorrectly asserts that because of the Supreme Court's 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, eliminating the current 30-day wait period will not effect a change in the law or affect any parties' rights under current law. In *Patchak*, the Court determined that the Quiet Title Act did not bar APA challenges to trust decisions after title transfer to the United States. However, as described below, the final rule puts local governments in a far worse position by dramatically altering the balance of equities and eliminating their ability to obtain emergency relief after a decision to accept the land in trust, but before the land achieves trust status.

The rule fails to recognize that the facts on the ground and balance of equities changes when land achieves trust status and development commences. The rule directs the Secretary or other BIA official to "immediately acquire the land in trust" after a decision becomes final, and the BIA is encouraging tribes to begin development immediately upon acceptance of land into trust. Both of these steps appear intended to foreclose concerned parties from obtaining

emergency relief, even with regard to trust decisions that are clearly inappropriate and arbitrary. Courts are less likely to order emergency relief if a tribe and its development partners have invested resources and substantially implemented a gaming or other development project. Indeed, courts may be unable to grant relief at all if tribes decline to participate in the action and claim sovereign immunity.

The rule also contravenes protections in the APA for parties seeking emergency relief from administrative decisions. In particular, Section 705 of the APA authorizes federal courts to postpone the effective date of an agency action and to preserve status or rights pending conclusion of the review proceedings. The rule circumvents Section 705 by pushing land transfers before an affected party can seek judicial review and allow the courts to exercise their authority to review trust transfers. Communities and local governments will be harmed because, even if successful in the litigation, their success likely will not bring back the tax revenue and other fees lost when the land went into trust, nor remove the incompatible developments that are not permitted under comprehensive local land use plans, now possible without the rule.

The Department's push for immediate project implementation also appears intended to impede a court's ability to award complete relief. Litigation can take years to reach a final decision, which raises strong concerns regarding the Department's practical ability to unwind a trust decision and remove land from trust. The rule ignores these concerns, and includes no procedure for undoing a trust decision in a transparent and orderly manner.

The Department is amiss in asserting that these harms are balanced by the rule's requirements regarding the notification of decisions and administrative appeal rights. These changes are equally flawed, as the rule requires communities and local governments to make themselves known to BIA officials at every decision-making level to receive written notice of a trust land acquisition. It will be extremely difficult for anyone to sort through local and national BIA organizational charts to try to determine how, when, and by whom a particular application will be processed. BIA decision-making is far from transparent today, and the rule will make the process even more opaque and participation more difficult in the future.

In light of the Department's new rule, we believe that Congress should seek legislative changes that would entitle a party, upon timely request, to an automatic 30 day stay of a decision approving a trust application. A stay of decision should hold true whether a party has appealed a trust decision to the Interior Board of Indian Appeals, or has appeared before the Assistant Secretary - Indian Affairs. This would enable the party to preserve its rights by seeking a judicial order staying the effectiveness of any Departmental approval pending the court's review of the validity of that decision.

Additional provisions requiring BIA to publish trust applications on its website, provide regular updates as to the status of its review, identify the decision-makers responsible for an application, and provide contact information to allow parties to identify themselves as

interested parties also should be required. Parties should be exempt from exhaustion requirements in the absence of substantial compliance with these provisions.

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

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

The Supreme Court's decision in *Carciere* further complicates this picture. As previously discussed, the Court held that the authority of the Secretary of the Interior to take land into trust for tribes extends only to those tribes under federal jurisdiction in 1934. However, the phrase "under federal jurisdiction" is not defined.

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

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

Pending Legislation

As stated above, congressional action must address the critical repairs needed in the fee-to-trust process. Unfortunately, legislation currently pending in the House (HR 279 and HR 666) fails to set clear standards for taking land into trust, to properly balance the roles and interests of tribes, state, local and federal governments in these decisions, and to clearly address the apparent usurpation of authority by the Executive Branch over Congress' constitutional authority over tribal recognition.

HR 279, in particular, serves to expand the undelegated power of the Department of the Interior by expanding the definition of an Indian tribe under the IRA to any community the Secretary "*acknowledges* to exist as an Indian Tribe [emphasis added]." In doing so, the effect

of the bill is to facilitate off-reservation activities by tribes and perpetuate the inconsistent standards that have been used to create tribal entities. Such a “solution” causes controversy and conflict rather than an open process which, particularly in states such as California, is needed to address the varied circumstances of local governments and tribes.

Conclusion

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

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

Thank you for considering these views. Should you have questions regarding our testimony or if CSAC can be of further assistance, please contact Kiana Buss, CSAC Legislative Representative, at (916) 327-7500 ext. 566, kbuss@counties.org.