WRITTEN STATEMENT FOR THE RECORD

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BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
HOUSE NATURAL RESOURCES SUBCOMMITTEE ON INDIAN AN INSULAR AFFAIRS

ON BEHALF OF THE
NATIONAL ASSOCIATION OF COUNTIES

IN THE MATTER OF: H.R. 1208, 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, AND FOR OTHER PURPOSES (REP. COLE); AND H.R. 6180, *"POARCH BAND OF CREEK INDIANS LANDS ACT* (REP. CARTER)

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Thank you, Chair Westerman, Chair Hageman, Ranking Member Leger Fernandez, and Members of the Subcommittee, for the opportunity to testify today. My name is David Rabbitt, and I am a County Supervisor in Sonoma County, California and am actively involved in and formerly served as a member of the Board of Directors of the National Association of Counties (NACo). This testimony is submitted on behalf of NACo, which has been a leader in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

Established in 1935, NACo is the only national organization representing county governments in Washington, DC. Over 2,600 of the 3,069 counties in the United States are members of NACo, representing over 80 percent of the nation's population. NACo provides an extensive line of services including legislative, research, technical and public affairs assistance, as well as enterprise services to its members.

I am also an active member of the California State Association of Counties (CSAC), which was founded in 1895, and 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. Along with NACo, CSAC has been a leader in actively pursuing federal policies aimed at fostering productive tribal-county relationships.

Counties play a critical role in the everyday lives of our nation's residents. Many county responsibilities are mandated by both the state and the federal government. While county responsibilities differ widely, most states grant their counties significant authority to fulfill public services. These authorities include construction and maintenance of roads, bridges and critical infrastructure, assessment of property taxes, record keeping, administering elections, and overseeing jails, court systems and public hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment and workforce training, emergency management, land use planning and zoning. As strong intergovernmental partners, counties support government-to-government relations that recognize the unique role and interests of tribes, state, counties and other local governments to protect all members of our communities and provide governmental services and infrastructure beneficial to all.

At the outset, I'd like to take this opportunity to reaffirm NACo's absolute respect for the authority of federally recognized Indian tribes. We reaffirm our support for the right of tribes to self-governance and recognize the need for tribes to preserve their heritage and to pursue economic self-reliance. Furthermore, NACo recognizes the disparity and inequity caused by the Court's 2009 decision in *Carcieri v. Salazar* and believes that it continues to be the responsibility of Congress to pass legislation that would put all federally recognized tribes on equal footing relative to the opportunity to have land taken into trust.

At the same time, it is absolutely essential that Congress fix the longstanding, systemic defects in the Department of the Interior's broken fee-to-trust process. To be crystal clear, we believe that **any** *Carcieri* fix – that is, any legislation that would restore the Interior Secretary's authority to

take land into trust for tribes – must be coupled with much-needed, long overdue reforms in the Federal Government's deeply flawed trust land decision-making process. Unfortunately, a so-called "clean *Carcieri* fix," such as the one embodied in H.R. 1208, would do nothing to repair the underlying problems in the trust-land system and would only serve to perpetuate the inherent conflict of the current process – a process, incidentally, that is broken for all parties, tribes and local governments.

Notably, recent action taken by the U.S. Department of the Interior – namely a series of updates to the Bureau of Indian Affairs' (BIA) fee-to-trust regulations found at *25 CFR Part 151* – did nothing to repair the underlying flaws in the trust acquisition system. Rather, the Department's new regulation, which went into effect in January 2024, further undercuts counties' already limited ability to participate in the fee-to-trust process. Of paramount concern to counties, the rule does not adequately account for – or include any sort of mechanism to address – the significant impacts to local governments and communities that often occur as a result of major tribal development projects, including casinos.

The Deficiencies of the Current Trust-Land Process

The fundamental problem with the trust acquisition process is that Congress has not established objective standards under which any delegated trust-land authority is to be applied by the BIA. The relevant section of federal law, Section 5 of the *Indian Reorganization Act of 1934* (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.

This general and undefined congressional guidance, which was codified 90 years ago, 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, which is governed by the BIA's Part 151 regulations, 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. Tribes deserve an efficient and predictable trust acquisition process that is not continually bogged down by controversy and legal action. Likewise, states and counties also deserve a process that considers their legitimate governmental interests.

With 574 federally recognized tribes across the United States, no two fee-to-trust applications are alike. In California, we see this diversity firsthand with over 100 federally recognized tribes, all of which have unique cultural history and geography. The diversity of applications and circumstances across the country reinforces the need for both clear, objective standards in the fee-to-trust process and the importance of local intergovernmental agreements to address specific concerns.

Notably, many California tribes are located on "Rancherias," which were originally federal property on which landless Indians were placed. No "recognition" was extended to most of these

tribes at that time. Therefore any *Carcieri*-related legislation must address the significant issues raised in states like California and many others across the country 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 may seek to establish large commercial casinos. In particular, legislation must ensure improved notice to counties and define the standards by which property can be removed from local jurisdiction. Moreover, requirements must be established to ensure that the significant off-reservation impacts of tribal projects are fully mitigated.

It should be noted that many of the deficiencies in the trust-land process were reaffirmed 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]

These same conclusions were reached in a 2006 Government Accounting Office Report to Congress on the fee-to-trust process, which determined that the regulations do not provide a clear, uniform or objective approach. The Report found:

> [T]he regulations provide wide discretion to the decision maker because the criteria are not specific, and BIA has not provided clear guidelines for applying them. Given the wide discretion that exists and the increased scrutiny that the land in trust process has come under with the growth of Indian gaming, it is important that the process be as open and transparent as possible.[4]

Unfortunately, the fee-to-trust process remains broken as 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.[5] Moreover, the deficiencies in the process could soon be amplified by the recent revisions to BIA's Part 151 regulations, which further streamline the fee-to-trust process by eliminating certain criteria and establishing several new presumptions of approval. Additionally, the new regulations establish a 120-day time frame for a Tribe to receive a final fee-to-trust decision. Currently, this process takes 958 days, on average, and while counties agree this is simply too long for Tribes to wait for a decision, 120 days is not a sufficient amount of time for BIA to comprehensively review and evaluate the impacts of an application.

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[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] *Indian Issues: BIA's Efforts to impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*," United States Government Accounting Office, at pp. 36-38 (July 2006).

[5] Id., pp. 292, 295, 297.

While there are a number of major flaws in BIA's fee-to-trust process, one of NACo'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, in practice, state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the Part 151 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 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.

One measure of the severe dysfunction is that local governments are often forced to resort to Freedom of Information Act (FOIA) requests to ascertain if a trust application or 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 with the BIA. Again, despite the significant impact on counties, and the relevant information they hold, local governments do not receive notice of the filing of either a trust application or Indian Lands determination. Although trust applications are often deemed incomplete by the BIA, it is during this time that counties and tribes are best positioned to collaboratively address any concerns before receiving formal notice of a complete application and be given 30 days to decide whether to support or oppose the project. The lack of consultation is even worse with Indian lands determinations, as counties are not notified of the requests and are not allowed to comment or otherwise invited to participate in the process. These processes must include local participation in order to ensure that there is a complete factual basis upon which objective decisions can be made.

While the Department of the Interior has acknowledged the increased impacts and conflicts inherent in recent trust-land decisions, its new regulations do not strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. Indeed, the notification process embodied in the new Part 151 regulations is insufficient and falls far short of providing local governments with the level of detail needed to adequately respond to proposed trust-land acquisitions. This point was included as a "Recommendation for Executive Action" in the GAO Report, as the Interior Secretary was recommended to direct BIA to revise trust regulations and "guidelines for providing state and local governments more information on the applications and a longer period to provide meaningful comments on the applications[.]"[6] Regrettably, the 2024 regulations do not embody this important recommendation and state and local governments continue to have only 30 days to provide comments on a pending fee-to-trust application.

[6] GAO Report, *supra*. at p. 37.

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 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 15 years since 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 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 to *Carcieri* that keeps the current trust-land system in place 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 provide critical services to the people dependent upon them for their well being.

Accordingly, our primary recommendation to the Subcommittee and Congress is this: Do not advance a congressional response to *Carcieri* that allows the Department of the Interior to continue the flawed fee-to-trust process. Rather, Congress should make meaningful, comprehensive reforms to the trust-land system that reflect the right to self-governance of our Tribal neighbors and which address the legitimate concerns of counties and other key stakeholders.

NACo believes that the *Carcieri* 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.

As we have urged for years, we respectfully ask Members of this Subcommittee to employ a comprehensive approach to addressing the implications of the *Carcieri* decision and the deficiencies in the trust land process, *,* 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 the Subcommittee considers potential *Carcieri* legislation, it should undertake reform that is in the interests of all affected parties – both Tribes and non-Tribal governments alike.

Legislative Recommendations

1. Require Full Disclosure and Fair Notice and Transparency from the BIA on Trust Land Applications and Other Indian Land Decisions. The Part 151 regulations are not specific and do not require sufficient information to be furnished to affected parties regarding tribal plans to use the land proposed for trust status. As a result, it is very difficult for those parties (local and state governments, and the public) to determine the nature of the tribal proposal, evaluate the impacts, and provide meaningful comments.

Federal law should require BIA to ensure that tribes provide reasonably detailed information about the intended uses of proposed trust land, 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 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. NACo believes counties should be provided 120 days to respond to land in trust applications and request that BIA provide a response explaining the rationale for acceptance or rejection within 90 days[7].

[7] National Association of Counties (NACo). 2024. *American County Platform.* *https://www.naco.org/resources/2023%E2%80%932024-american-county-platform-and-resolutions*

2. 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 has been long criticized by the U.S. Government Accountability Office and local governments. As previously indicated, 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 broad authority and discretion to make acquisition decisions in favor of tribes, an authority that was affirmed and further broadened through BIA's recent Part 151 revisions. To reasonably balance the interests of tribes and local governments, Congress should provide the Executive Branch with clear statutory standards that take into account the legitimate interests of both parties. However any delegation of authority is ultimately resolved, Congress must specifically direct balanced standards that ensure that trust land requests cannot be approved where the negative impacts to other parties outweigh the benefit to the tribe.

3. 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 providing a streamlined fee-to-trust process when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion delegated to the BIA by virtue of the Part 151 regulations, along with 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. Furthermore, counties oppose any federal actions that limit our ability to reach mutually acceptable and enforceable agreements and/or provide critical services to our communities.

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 has worked well in recent California 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 NACo's fee-to-trust reform recommendations and should be a top priority for Congress.

4. Secretarial Determination Regarding Off-reservation Impacts – While there are many examples of successful collaboration between tribes and counties, neighboring governments will not always see eye-to-eye on major development projects. Therefore, in cases in which tribes and counties are unable to reach enforceable mitigation agreements with respect to potential trust acquisitions, legislation should require the Secretary of the Interior to undertake a comprehensive analysis of all anticipated off-reservation impacts in direct consultation with the state and affected local government(s). In turn, and as a condition of approving a trust

acquisition, the Secretary should be required to certify that the applicant has taken steps to ensure that **all significant jurisdictional conflicts and impacts – including increased costs of local services, lost revenues, and environmental impacts – have been mitigated to the maximum extent practicable**. Counties believes that this type of Secretarial determination **must** be part of any *Carcieri*/fee-to-trust reform package.

Conclusion

Congressional action must address the critical repairs needed in the fee-to-trust process. Unfortunately, legislation currently pending in the U.S. House (H.R. 1208) 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.

We ask Members of the Subcommittee to incorporate the aforementioned reforms into any legislation that addresses the *Carcieri* decision. Counties' 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.

Thank you for considering these views. Should you have questions regarding our testimony or if NACo can be of further assistance, please contact Paige Mellerio at pmellerio@naco.org or (202) 942-4272.