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The Honorable Senator John Barrasso
United State Senate Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, DC 20510-6450

Re: Opposition to S.1879

Dear Chairman Barrasso:

We appreciate the introduction of S. 1879, the Interior Improvement Act, to address existing problems with the current fee-to-trust process under section 5 of the Indian Reorganization Act. We agree that the process is broken and appreciate your attempt to address its deficiencies. However, the bill as introduced does not sufficiently address these deficiencies, and we oppose it as introduced. The bill assumes that acquisition of lands by the federal government automatically removes the land from the state's territorial jurisdiction, and that has never been the law. But even accepting that assumption, the bill fails to address the deficiencies in the current process that affect the general public. We address the second point first, below.

I. THE BILL FAILS TO CURE PROBLEMS PLAGUING THE FEE TO TRUST PROCESS

Assuming that the federal government has the power to strip states of territorial jurisdiction by taking land into trust for an Indian tribe, an assumption we strongly contest below, S.1879 fails to cure many of the current problems plaguing the fee into trust process. These are both substantive problems and procedural problems.

Our general concern is as follows: Assuming jurisdiction to land changes when the land is taken into trust for an Indian tribe, then taking land into trust carves out an area that is no longer subject to state land use and zoning laws and no longer subject to state laws regulating business operations. Instead of having all land in an area subject to one law, taking land into trust creates little islands of land that are subject to a different law or no law. This has resulted in the relatively

recent phenomena of reservation shopping where Indian tribes seek to put newly purchased lands in trust in order to circumvent state laws that serve to protect the general public. Tribes seek to develop the land contrary to local law and to engage in businesses that would not be allowed under those state laws. This is a gross abuse of the current law and should not be countenanced.

This results in significant conflict between the new Indian owners and pre-existing owners of other lands in the area. When the Indian Reorganization Act was passed, Indian sovereignty was a pale shadow of what it has become. Congress contemplated that Indian tribes would operate more akin to a municipal sovereignty than a sovereign state. See Deloria & Lytle, *The Nations Within, The Past and Future of American Indian Sovereignty* (1984). Further, Congress did not contemplate that lands taken into trust would be close to existing cities and settlements inhabited by the general public or that activities on such lands would have such significant impacts on the general public. In addition, since 1934, land use planning has increased in importance all around the country. The advent of Indian gaming, partnership of Indians with investors and the purchase by Indians of lands in urban areas, has brought these groups into conflict, and no mechanism has been provided to govern these conflicts. One is desperately needed.

We suggest that an application to take land into trust should go through a two-part process. The first step would be for the secretary to determine if there is a prima facie showing of tribal need for the land. If so, the second step would entail evaluation of impacts on the general public and on state and local governments. Comments should be solicited to facilitate the evaluation of such impacts. The Secretary would then balance the needs of the tribe with the impacts on the general public.

We list some of our specific suggestions below:

<u>The First Step Should Be a Threshold Showing of Need</u>. Before third parties should be asked to provide comment, the tribe should be required to make a prima facie showing of need. Need may be for residential use or for economic activity. Need for residential use should involve disclosure of identities of tribal members and some verification of qualification for membership. Transparency is needed. Lands should not be taken out of state territorial jurisdiction without such verification. Economic needs should involve disclosure and evaluation of the tribe's financial condition. Need should also be limited to the size of lands lost by the tribe and should consider prior lands restored. So if a tribe had 100 acres before

allotment began, lost it, and since passage of the IRA has had 40 acres restored, the tribe would be limited to having 60 more acres taken into trust.

If a Tribe Establishes a Prima Facie Showing of Need for Land, Then the Department Should Evaluate Third Party Impacts. Often, an Indian development will have severe impacts on a local area, on local residents, businesses, property owners, on the general public, and on local and state government. Therefore, once a tribe establishes a prima facie case of need to have a certain parcel of land taken into trust, the Department should evaluate the impacts to third parties of taking the land into trust.

In measuring impacts, the Department needs to look at the types of impacts, the severity of impacts, and any mitigating factors.

Impacts of all types should be considered. Broad types include environmental, financial, and socio-economic impacts. Environmental impacts include changes in zoned land use, increases or other affects on traffic, and aesthetics. If the planned use is not consistent will local land use limits, the inconsistencies and the impacts of such inconsistencies need to be studied and considered. Financial impacts includes impacts on local governments, as well as on the economy. Socio-economic impacts includes affects on jobs, on crime and the general socio-economic condition in the area. When casinos open close to neighborhoods, illegal drug dealing and prostitution naturally follows.

The severity of impacts is dependent on a number of factors, such as the size of the Indian development, the proximity of the Indian development to impacted third parties, and the number of third parties affected.

Mitigating factors might include whether the Indian tribe has nearby lands, and whether impacts are just incrementally increased or more greatly increased , whether there has been a continual sovereign tribal presence in the area.

The Public Should be Included in the process. The impacts discussed above affect individuals, businesses and state and local government. Yet S.1879 limits participation in the process to state and local government.

The bill needs to be amended to include the broad public in the process. As discussed, taking land into trust can affect local residents, businesses, property

owners and the general public. The public has a right to have its interests considered.

When local government considers specific development projects, local law always requires the proponent to serve notice on neighbors. There are constitutional due process issues at stake. If the federal government is going to involve itself in the land use process by taking land into trust for Indian tribes, it too needs to provide sufficient notice to local homeowners. At the very least, such notice should comply with constitutional due process requirements imposed on local planning agencies.

S.1879 would require that written notice be given to each "contiguous jurisdiction," defined obliquely as "the largest territorial division for local government within a State with authority to enter into cooperative agreements with Indian tribes." Apparently, this does not include even city government. The bill needs to include not only city government in the process, but also those members of the general public in the general area. Many of them will suffer impacts much more direct and greater than those suffered by the county. These third parties can include city governments in the area, local governments that are not contiguous, and residents, businesses, property owners and members of the general public. The failure to require notice on property owners of a government decision that would result in the replacement of state jurisdiction over the land with federal and tribal jurisdiction is a severe deficiency and raises constitutional concerns.

The extent of notice should depend on the nature of the activity. However, at the very least, it should include all residents, businesses, property owners within a distance equal to ten times the largest diameter of the subject land. Often notice is served to persons affected within an area 10 times the greatest width or length of the project, and we suggest that formula be adopted here.

Failure to Allow Adequate Comment Period. S. 1879, as proposed, would allow for comments for only 30 days. As should be clear, the interests at stake are many, varied and important. Gathering information on a proposal, evaluating the impacts from the proposal, and articulating those impacts takes time. Thirty days is not sufficient time to complete this task, especially for the general public which does not have office staff or financial resources to do this on a professional level. The general public should be given more than 30 days to provide comments. Sixty days is more appropriate.

Failure to Balance Interests of General Public and Tribe. The land into trust process cries out for a balancing of interests, namely the interests of the general public and the interests of the tribe. Currently, the statute gives the Secretary complete discretion to take any land into trust and does not require that the Secretary balance interests of Indian tribes and the general public. The result has been near complete neglect of the interests of state and local government, of local residents, businesses, and property owners, and of the general public. The only interests that are considered are those of the Indians. The result, as has been confirmed by a law review article, has been a 100% acceptance rate "for IRA fee-to-trust acquisitions in California from 2001 through 2011." Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee to Trust Process of the Indian Reorganization Act of 1934*, Pepperdine L.Rev., 40 Pepp. L. Rev. 1 (2013).

If the Secretary is to perform this role, he or needs to discard his favoritism of the Indian nations endemic to the Bureau of Indian Affairs, and provide a balanced consideration of tribal interests with interests of the general public. The less the historical connection of the tribe to the land or the less the need of the tribe, the less weight the request would have. The greater the impact on the general public, the more weight their opposition would have.

The General Public Should be Allowed to Challenge Decisions in Court. Members of the general public should be allowed to challenge the Secretary's decision and pursue their interests in court. However, under S. 1879, only contiguous jurisdictions would have that right (subs. (f)).

Timely Court Challenges Should be Resolved Before Transfer is Made. Persons who believe that approval of an application to take land into trust should be able to challenge the decision before title is actually transferred. Challengers should be given at least 30-days to challenge the decision in court, and once the decision is challenged, the transfer should be put on hold. That allows orderly review and ensures that the law is followed. Otherwise, if title were taken, and it turned out later that the decision to take title was overturned in the courts, it would be difficult to undo the transfer. It would be especially difficult if the tribe began a business or began construction on the site. In such situations, states always provide a short time period for challengers to seek court review. The same is needed here.

That used to be the case in federal regulation, but in the wake of the *Carcieri* decision, the BIA repealed such provisions, reasoning that challenges could always

be brought. The problem with that reasoning is that it ignores the difficulty in undoing a faulty decision.

S.1879 fails to allow for challenges before transfer of title.

Once Land is Taken into Trust, the Federal Government Should Oversee Changes in Use. A number of times a tribe has applied to take land into trust, and asserted a certain planned use, but after the land has been taken into trust, the tribe develops the lands for a different use. At that point, the County no longer has jurisdiction to govern such change, and there is no process which would involve consideration of impacts on neighbors. The Federal government needs to oversee changes in planned use. If Indians tribes are going to continue to be allowed to buy up new parcels of land and remove them from state and local jurisdiction for private business development, prior occupants in the area need to have rights.

Promotion of Cooperative Agreements Fails to Protect the Public

S.1879 encourages cooperative agreements between "the applicant and a contiguous jurisdiction," and in fact, cooperative agreements become a focus of S.1879. Promotion of cooperative agreements between tribes and counties sounds like a good idea, but further analysis reveals deep flaws in that process.

County governments in California have shown a proclivity to seek mitigation of impacts from tribal developments not in the sense of reducing the size of the project or magnitude of the activity, but rather to seek payments of money in "mitigation" of the effects. And the bigger the project, the more payments they want. These payments often benefit county supervisors in that they constitute a pool of unrestricted money, not dedicated as to any particular use, which can be allocated by the Supervisors at their discretion (and thus for the Supervisors' political gain). This becomes a type of slush account. Thus, tribal projects are a boon to county elected officials, and the officials become more a partner of the tribe, sharing in the profits, than a regulator. Payments are loosely tied to "environmental and financial impacts" on the county. Rather than seeking to lessen impacts on residents and businesses, elected officials have a personal interest in allowing all the impacts to stand and taking "mitigation" payments from the tribe. The interests of elected officials conflict with the interests of the general populace.

Sonoma County in California, in particular, has shown a desire not to fight Indian development, but to use it to generate revenue. This was the County's attitude when negotiating a deal with the Graton Indians for a casino and was the County's attitude in negotiating with the Lytton Indians over land for a residential development and for a winery and resort in Windsor. Regarding the latter project, the Lytton are a very wealthy tribe of just 270 members, buying $47 million of prime wine country land, and paying over market price. The County has agreed to forego $450,000 per year for 22 years and $640,000 per year after that for payment of $6 million up front. This will lead to a net loss of $3.8 million for the County after 22 years and a net loss of $26 million after 50 years. This makes no economic sense and means that County residents will essentially be subsidizing the tribe's operation. But the $6 million comes in as unrestricted funds, not property taxes, and so becomes a slush fund. The County supervisors would rather have that slush fund and make the county residents and businesses subsidize the Indian tribe. This is the type of Cooperative Agreement that has been praised in Committee hearings, but we condemn it as corrupt political dealings.

Cooperative agreements become a tool of counties to obtain these payments. They do not protect the public, but create a divide between the interests of the public and the interests of elected officials. Congress should neither encourage nor even facilitate this type of corrupt behavior.

II. The Bill Ignores State Rights to Territorial Jurisdiction

S.1879 assumes that once the Federal government accepts title to land in trust for an Indian tribe, the federal government displaces the state's sovereignty with the tribe's sovereignty. That has never been the law.

There is a distinction in law between acquiring *title* to land and acquiring *jurisdiction* over that land, but this distinction is lost in the bill. Just as title can be acquired only from the current title holder, so jurisdiction must be acquired from the current sovereign.

There are only three ways by which the Federal government can obtain jurisdiction over a site within a state's borders. The first is to reserve jurisdiction when the federal government creates the state and admits it into the Union. (For example, in 1889, Wyoming adopted a Constitution confirming that existing Indian lands "shall remain under the absolute jurisdiction and control of" Congress (Art.

21, Sec. 26) and the Federal government admitted Wyoming to the Union on the basis of that reservation. (26 Stat. 222.)) Second, if the federal government subsequently acquires lands in the state, the federal government can obtain state consent to its exercise of exclusive jurisdiction over those lands at the time it purchases them (as provided in the Enclave Clause). Third, anytime after the federal government's acquisition of land, the federal government can secure formal cession of jurisdiction from the state. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525. *Williams v. Arlington Hotel Co.*, 22 F.2d 669 (8th Cir. 1927); *Wagner v. State*, 270 Mont. 26 (1995) [State had never ceded territorial jurisdiction over national forest and could prosecute individual for possession of drugs]; *see Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (1957). All three methods require state consent. *Fort Leavenworth* expressly negates the claim that the federal government can strip states of jurisdiction, calling such an act of "disseisin." Id. at 538.

The limits on transfer of territorial jurisdiction apply to Indian lands the same as to non-Indian lands. *Silas Mason v. Tax Comm'n of Washington*, 302 U.S. 186 (1937). Compare *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) [Alaska could enforce anti-fish-trap law on Indian reservation over which federal government did not reserve jurisdiction on state's admission] and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) [Alaska lacked jurisdiction to enforce anti-fish-trap laws on Indian reservation over which the federal government did reserve jurisdiction at time of state's admission.] As in *Metlakatla Indian Community*, most Indian reservations were established before admission of the state in which they sit, and thus fit the first exception as lands over which the federal government reserved jurisdiction upon admission of the state into the Union. But when that is not the case, the state still has jurisdiction over the lands.

Congress has the power to authorize the Secretary to accept lands into trust for tribes. However, that action does not divest the state of its existing jurisdiction over the lands. Congress does not have the power to strip a state of jurisdiction over the trust lands and to vest jurisdiction in the Indian tribe. That cannot be done without state consent. *Fort Leavenworth*. If state laws applied to the site before the change in title, they continue to apply to the site after the change in title and apply to everyone, including Indian tribes.

When an Indian tribe applies to have land taken into trust, a process is needed to determine whether the subject lands are under state or Indian jurisdiction. This is especially true where lands were reservation lands. These

changes are necessary to protect state rights and to protect interests of the general public.

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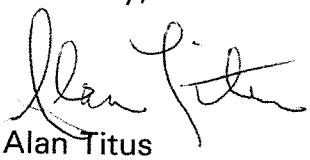
We appreciate your introduction of a bill to modify the fee-to-trust process, and we appreciate your consideration of these comments. We encourage development of legislation that will constitute substantial reform of the land into trust process and that will recognize the rights of all citizens.

Sincerely,



Alan Titus