Stand Up For California!
"Citizens making a difference"

www.standupca.org

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August 31, 2015

The Honorable John Barrasso
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Jon Tester
Vice Chairman
Senate Committee on Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510

RE: Senate Bill S. 1879 – The Interior Improvement Act
Support IF Significantly AMENDED

Dear Senators Barrasso and Tester,

Stand Up for California! ("Stand Up")[1] sincerely appreciates the effort to develop a programmatic policy to reform of the fee-to-trust process. The Carcieri decision has provided the catalyst, the only leverage affected parties and other entities have had in years to try to improve the fee-to-trust process. S-1879 provides language to encourage local agreements and notification to affected Counties. While Stand Up is supportive of these concepts there are many aspects of S-1879 that must be considered and debated to arrive at meaningful reform. The opportunity the Carcieri fix provides must not be squandered.

Stand Up firmly believes that a legislative solution is necessary to provide guidance to the Department of the Interior which has created and sustained the current trust land system. The development of the current trust land system has been on a case-by-case basis, establishing weak procedure and ill-defined substantive standards. Moreover, the current trust land system

[1] *Stand Up For California!* is a not for profit public corporation that acts as a resource of information to community groups, local and state officials. Stand Up advocates reform of state and federal policies that brings about fairness, objectivity and transparency in regards to the industry of gaming.

has been affected and decisions influenced by the passage of the Indian Gaming Regulatory Act in 1988. Since the Department of the Interior has a special responsibility to Indians and tribes, and no particular obligation to states, local governments and communities of citizens is why clearly defined objective standards are necessary.

Communities of citizens and other vested interests have objected for years that the current process lacks objective standards, does not adequately account for adverse impacts, is not fairly or objectively administered and does not address the issues that arise upon change in use-of-land taken into trust. Stand Up seeks to work constructively with this committee to address these legitimate issues. Our letter makes some recommendations for improvement to S-1879. Stand Up asks that you give these legitimate issues your serious consideration. Please include Stand Up's letter as part of the legislative record.

DISCUSSION

S-1879 unnecessarily limits judicial review to County governments or County equivalents. California needs a programmatic policy that to the greatest extent possible provides for all affected parties to participate in an open, fair and objective process. S-1879 needlessly disenfranchises the civil and property rights of affected parties, which include private property owners, communities of citizens, environmental groups, civic organizations, business groups, state government and state agencies, utility and water districts.

S-1879 is silent on public participation in the fee to trust process. There is no requirement that the Secretary of the Interior must notify affected parties or receive their letters of comment, read their letters of comment, consider their letters of comment or even act upon their letters of comment. The public is not even certain if their letters of comment become part of the federal record of a fee-to-trust transaction. S-1879 states several times that information is to be made available *"to the public"*. This phrase seems to be window dressing to give the illusion of public participation and consideration.

> ***Stand Up recommends that the process be open to all affected parties. All parties that request participation should receive notification; have the opportunity to comment and the right to appeal.***

S-1879 focuses on off-reservation fee-to-trust transactions. An unintended consequence will be a national expansion of gaming. Congress must face-the-fact that it has essentially legalized gaming in the United States and dictated it from the federal level to states and municipalities. S-1879 if passed in its present form will expand gaming nationally. Congress must deal wholly and fully with the impacts caused in states and local areas populated with communities of non-Indian citizens who will directly and financially suffer the impacts of federally protected lands specifically for a casino/hotel development.

Here is a short list of the many impacts documented in letters of comment since 2000 in the fee-to-trust process by private citizens, community and civic groups, utility and water districts,

environmental groups and the State of California[2] seemingly ignored or discounted as speculation by decision-makers at the Bureau of Indian Affairs.

- Domestic and agricultural water outages that also exacerbate fire protection needs
- Overdraft of ground water creating interference with wells
- Denial of access to private property of non-tribal citizens
- Proposed garbage dumps in sensitive environmental locations
- Noise nuisance from the development of a new raceway within 100 yards of an established neighborhood
- Change of land-use; land for a medical clinic is now proposed for a gun range within 1000 feet of schools, churches and homes, a soccer field becomes a casino parking lot etc. http://www.gunrangeinfo.com/
- Numerous collisions on narrow unlit rural roads
- Increased drunk driving in rural residential areas
- Massive developments in agriculturally zoned areas
- Developments in ecologically sensitive areas that disrupt wildlife migration, movement and connectivity
- A disruption of law enforcement services due to a mix of jurisdictions between tribes and the state
- Unfair competition for established local businesses resulting in reduced revenues to the local, regional and state coffers affected by after-acquired lands for gaming

The location of a casino is an issue of import that affects a state's police powers. Tribal casinos have an impact on traffic, local businesses, taxation, housing, police and fire service, social services, shared natural resources such as water, air quality, night sky, increased crime and community development. These impacts are significant to both the local and regional areas affected by a proposed casino on after-acquired lands.

S-1879 does not establish objective standards on how impacts are to be considered. Nor does S-1879 ensure the process will be objectively administered. Rather, S-1879 gives unbridled discretion to the Secretary of the Interior to take off-reservation land into trust *"on a discretionary basis"*. This action will preclude judicial review of the Secretary's substantive decision under the *"committed to agency discretion by law"* exception in the Administrative Procedure Act.

> ***Stand Up strongly recommends removal of the "on a discretionary basis" language from the bill. This is a license for the Secretary of the Interior to stamp approved on each and every fee-to-trust transaction.***

[2] Stand Up has previously sent your office a number of comment letters submitted by the Governor of California on fee-to-trust impacts. The letters also identify the Bureau of Indian Affairs ignoring their own rules and regulations in the administration of the process. The concerns of the State or its citizens should not be discounted.

Clear, objective criteria are needed in order to define the following:

"Purpose": The purpose for the acquisition must be clearly stated. It cannot simply be a concept of acquiring land in trust for non-specific or generic uses that are impossible to assess and evaluate. A clear purpose cannot be banking land for a future use such as "tribally governed commercial enterprises". This practice creates significant fiscal and environmental issues as well as significant impacts on community and local government general plans. Any change in a stated purpose in future years must be revisited to ensure that the change does not result in significant negative unaddressed impacts to the shared resources of the regional areas affected by the change. The inclusion of open-ended, vague and generalized "pursuits" as the purpose of the trust transaction is beyond the intent of the Indian Reorganization Act. Land banking defeats the spirit and purpose of the law requiring the Secretary's considered valuation of the purposes for which the land will be used.

"Need": A clear distinction between *need and want* must be defined. The land is needed for development of a specific plan. The need is essential to the tribal government's *"immediate"* situation.

"Contiguous Lands": The current Bureau of Indian Affairs policy on contiguous lands is contradictory. Current regulations state that the "land is contiguous if the parcels touch at a point". This part of the definition is good. However, the Bureau of Indian Affairs expands the definition to include parcels of land having a common boundary is vague and allows the Bureau of Indian Affairs to interpret that numerous parcels joined together share a common boundary with the one parcel that actually touches at a point. Public roads are often deeded to local government or the State creating a separation between parcels. Right-of-ways/easements recorded and sometimes adjudicated must be given serious consideration. Ignoring the right-of-way of a private property owner, utility or water district represents a "takings" on the part of the United States.[3]

"Business Plan": There must be a detailed business plan for the immediate development proposed in the fee-to-trust transaction, for example; many of the out-of-state gaming profiteers for off-reservation gaming proposals purchase large swaths of land, 300 or more acres. The casino/hotel proposals usually develop 50 to 60 acres. The Environmental Impact Statements and fee-to-trust applications produced fail to state what is going to be developed on the remaining acreage. The business plan must detail the entire acreage and its immediate use.

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[3] IBIA ruling August 21, 2015, Crest-Dehesa-Grantie Hills-Harbison Canyon Sub-regional Planning Groups; Dehesa Valley Community Council, Inc.; Waldon G. Riggs and Carolynn P. Riggs; David O'Connor and Delia O'Connor; Geraldeane Fox; and Irene M. Harper v. Acting Pacific Regional Director, Bureau of Indian Affairs. "In their notices of appeal, opening brief, and the declaration accompanying their reply brief, **Appellant Individuals contend that they own easements which, by the terms of the Decision, would be taken in trust by the United States, and that they own property that would be rendered unmarketable if those easements are held by the United States in Trust for the Tribe.** In our view, Appellants have made a sufficient showing of particularized injury to a legally protected interest and the Regional Directors motion does not seriously contest setting aside the Decision would redress the alleged injury that the trust acquisition will cloud Appellant Individuals' title to their property or associated easements. Thus we deny the Regional Director's motion to dismiss." IBIA vacates the trust decision.

"Jurisdictional Conflicts": Currently the trust regulation limits this to taxation and the administration of justice. This may have been an appropriate range of jurisdictional issues in 1934 but in 2015 this is not sufficient. Properties are complicated by public-right-of-ways; utility easements and senior water rights which affect civil regulatory relationships not considered when Congress first enacted the Indian Reorganization Act. Because of the nature of tribal sovereignty non-tribal citizens have no recourse to resolve these types of disputes.

> ***Stand Up recommends development of objective criteria so that clear definitions can be established. The fee to trust process was developed as a land-use process and requires stringent criteria in order to provide an open, fair and objective process.***

S-1879 affects any controversial Indian lands determination that has been made. Many Bureau of Indian Affairs fee-to-trust decisions that are currently being challenged in court are controversial gaming decisions. Moreover, these decisions do not detail, the purpose, need or provide a business plan for the entire acreage. These are decisions that in some instances the federal government has admitted failure to complying with the Clean Air Act. In one instance, the Bureau of Indian Affairs identifies Indians living on a specific Rancheria as "squatters" and instructed them to leave. Somehow, years latter the Bureau of Indian Affairs identifies the group as a Tribe eligible for gaming. In California, most of the decisions that are being challenged have been made by Assistant Secretary Washburn.

S-1879 provides *retroactive protection* language that would have the effect of terminating in its entirety any legal action that raises a Carcieri challenge. For citizens and local governments involved in this type of litigation it is the first time they are in a fair forum, the first time that the concerns raised in their letters of comment are being taken seriously.

> ***The retroactive protection language must be removed. In many instances citizens have had to wait for judicial review as it is the only fair forum in which their concerns are being heard. The retroactive language is unfair. Congress has long stayed away from interfering in issues that are being adjudicated and should continue to do so in this instance.***

CONCLUSION

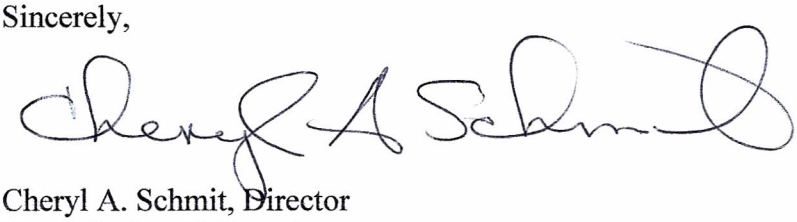
California with 110 Tribes and 81 Indian groups petitioning for federal recognition will be significantly and negatively affected by S-1879 as it is currently drafted. The Bureau of Indian Affairs Quarterly Report[4] lists 102 fee-to-trust transactions encompassing 12,000 ac.'s of land in California. Applications are still being submitted. Stand Up does not seek to impede the economic progress and advancement of our nation's native peoples; rather we seek regulatory reforms that are in the best interests of all our nation's inhabitants. We believe that it is possible to promote responsible growth of tribal homelands and economies and at the same time address the legitimate concerns of communities, local governments, states and state agencies. The possibility of success to accomplish this depends upon all sides recognizing the duties and

[4] Quarterly Report for Fee-to-Trust applications cited in the Indian Affairs Directives Transmittal Sheet#52 of the Indian Affairs Manual – FOIA request Feb. 2015, Report as of Nov. 2011.

responsibilities that we all have to each other. We can find a way forward that is fair and objective and provides meaningful reform.

Stand Up requests that you give these legitimate concerns your serious consideration.

Sincerely,



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