TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
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I appreciate the opportunity to comment on the issue of Native American trust lands after the United States Supreme Court decision in *Carcieri v. Salazar*. I urge the committee to take no further action regarding the decision -- while reforming the process for taking land into trust for pre-1934 tribes and requiring congressional approval for post-1934 tribes.

Even as it leaves *Carcieri v. Salazar* in place, Congress should reform and clarify existing laws and procedures for taking land into trust. I recommend Congress: (1) validate the trust land transactions approved prior to the *Carcieri* decision by the Secretary of the Interior for post-1934 tribes; and (2) repeal or reform the Interior Department approval process for trust land applications to ensure states, towns and individuals have a meaningful voice.

Lawmakers should determine whether the current system -- authorizing the Secretary of the Interior to determine when and whether to take lands into trust on behalf of a Native American tribe recognized prior to 1934 -- is still necessary to achieve the original goals of the Indian Reorganization Act (IRA). Congress should either reform the administrative process in order to achieve fair and equitable decisions regarding trust lands for these tribes or repeal the Act, thereby establishing for pre-1934 tribes the same Congressional trust approval as post-1934 tribes.

I. Congress should have sole Authority to approve post-1934 Tribal trust land requests

The United States Supreme Court's decision in *Carcieri v. Salazar* recognized Congress' "plain and unambiguous" intent that the Indian Reorganization Act ("the IRA") permit the Secretary of the Interior to take land into trust only on behalf of Indian tribes federally recognized at the time of the IRA's 1934 enactment.

The Court's decision was not only consistent with the IRA's plain language, but also with the Act's broader purpose, namely, to help remediate the negative impact of pre-1934 federal policies and bureaucratic failings on tribes under federal jurisdiction at the time.

In 1887, Congress passed the misguided and deeply flawed General Allotment Act, which transferred ownership of Indian lands from federally recognized tribes to individual tribal

members. The results were disastrous. In the ensuing years, more than two-thirds of Indian land was acquired by non-Indians, contributing to poverty and social dislocation among Native Americans.

The record clearly shows that Congress passed the IRA in 1934 to address the damage done by the General Allotment Act of 1887. Congress' clear intention was to provide a legal means for tribes to regain land unfairly lost because of flawed federal policy. Indeed, the IRA sought to remediate the consequences of "deficiencies in the Interior Department's performance of its responsibilities" to protect the assets of recognized tribes under federal jurisdiction prior to 1934. *United States v. Mitchell*, 463 U.S. 206, 220 (1983).

As Connecticut and other states said in our U.S. Supreme Court brief:

> "Reading the IRA to apply only to tribes recognized and under federal jurisdiction in 1934 is not only consistent with the legislative history directly related to the 'now' limitation, it is also entirely consistent with the Act's broader purposes and history. The IRA was intended to help remediate the impact on then-recognized tribes of pre-1934 federal policies and bureaucratic failings. Specifically, this Court has recognized that '[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) and citing S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934)).
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> "One of the primary aspects of that past oppression and paternalism was the federal government's policy of allotment, which began with the passage of the General Allotment Act of 1887 and lasted until 1934, when the IRA was enacted. During the allotment period, two-thirds of former Indian lands were acquired by non-Indians. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA brought 'an abrupt end' to that allotment policy and reflected a 'broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies.' *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008) (per curiam) (emphasis added) (quoting County of Yakima, 402 U.S. at 255)."

Tribes recognized after 1934 are unaffected by the failed federal policies the IRA was intended to correct. No post 1934 tribes lost land because of the General Allotment Act of 1887.

Instead of righting injustices visited upon federally recognized tribes before 1934 -- as Congress rightly intended -- extending this law to tribes recognized after that date threatens to create new injustices against local communities and states. Allowing post 1934 tribes to use IRA to take land into trust twists congressional intent, giving tribes never wronged by the previous federal policy a super-weapon that unfairly denies their non-Indian neighbors the ability to effectively contest such decisions.

Taking land into trust on behalf of an Indian tribe has significant ramifications for states and local communities.

- Trust land is outside state and local taxation and thus is removed from town tax rolls, often resulting in a significant loss of tax revenue for local governments. 25 U.S.C. § 465.

- Trust lands are outside land use regulation potentially burdening the State and surrounding communities with increased traffic, noise, and pollution.

- Issues may arise as to criminal and civil jurisdiction, including key public health and safety laws.

These are not abstract concerns for Connecticut residents. In the early 1990s, one tribe, then the richest in the nation, threw three neighboring Connecticut towns into an uproar when it produced a map showing all the property it wished to take into trust. Significant portions of all three towns would have been absorbed into the reservation, permanently removing them from the tax rolls and local land use and environmental restrictions. Because of the vast powers vested in the Bureau of Indian Affairs ("BIA") by IRA, the towns and their residents appeared to have little chance of even being heard, let alone challenging the tribe's land trust requests. Only after years of bitter, costly litigation did my office and the towns succeed in forestalling the tribe's trust land application.

Critical decisions should remain with Congress -- as representatives of the people -- rather than an appointed individual, ensuring that state and local communities have a voice and real input in the process. Congress is uniquely able to balance the interests of the state and local governments against those of the tribes, in a process that is transparent, accountable, ensures input from all affected parties and reflects a consensus among tribes, states and local communities.

Congressional action has been an effective route for tribal recognition and for settlement of land claims. Connecticut's two federally-recognized tribes -- the Mashantucket Pequot and the Mohegan -- were either recognized or obtained significant land holdings through Settlement Acts. *See* 25 U.S.C. § 1751 *et. seq*. (The Mashantucket Pequot Indian Land Claims Settlement Act); 25 U.S.C. § 1775 *et. seq.* (The Mohegan Nation Land Claims Settlement Act). Several other states have similarly reached agreements with tribes and their Congressional delegation to federally recognize the tribes and establish reservation land for such tribes. See, *Rhode Island Land Claims Settlement Act*, 25 U.S.C. §1701 et seq.; *Maine Indian Claims Settlement Act*, 25 U.S.C. § 1721 et seq.

Although any such settlement necessarily entails compromises for the impacted state and local communities, as well as the tribe, the involvement of Congress ensures that all interests are heard and considered, and lends the result a legitimacy that the administrative process cannot and does not.

Additional legislation with regard to post-1934 tribes is unnecessary. Congress is the appropriate body to make trust decisions concerning tribes that were not impacted by defective federal policies and bureaucratic deficiencies that the IRA was intended to remediate.

II. If a Department of Interior process is maintained, Congress should make the process more equitable and fair.

The current trust lands acquisition process is deeply flawed, providing virtually limitless discretion to the Secretary of the Interior, leading to arbitrary decisions that undermine public confidence in the fairness of the process and have significant impact on communities and states.

Congressional reform of the administrative trust lands process must include:

- **Standards:** Administrative approval or rejection of trust lands applications should balance the Tribal need to achieve a critical economic or community interest with the impact of trust status on non-Indian residents;

- **Fair process:** Community leaders, state officials, Tribal leaders and individuals directly affected by a Trust lands application should be notified of the application and have an opportunity to be heard;

II.A. Standards for Administrative Trust Land Decisions

The federal Indian Recognition Act (IRA) places effectively no limitation on the Secretary's exercise of the trust power, requiring only that he take the land "for the purpose of providing land to Indians." Indeed, the Interior Department's criteria for trust land decisions actually impose only an illusory limit on the Secretary's trust power because the Secretary has retained the ability to "waive or make exceptions" to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian." 25 C.F.R. § 1.2. The paucity of congressional guidance has led several federal judges to question the IRA's constitutionality. *See, e.g.*, *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33-40 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009) (Brown, J., dissenting); *South Dakota v. DOI*, 69 F.3d 878, 882 (8th Cir. 1995), *cert. granted and decision vacated*, at 519 U.S. 919 (1996).[1] Indeed, a panel of the United States Court of Appeals for the Eighth Circuit noted that the IRA, by its terms, "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *South Dakota*, 69 F.3d at 882.

[1] Although the Supreme Court vacated the Eighth Circuit's decision, it did not address the nondelegation question.

While the lack of adequate standards raises constitutional concerns, fairness and equity require Congress establish meaningful criteria, balancing the proposed trust acquisition's benefit to the tribe against the negative consequences to the State and local communities. The criteria should: (1) require that the decision maker consider the cumulative impact of tax losses and other consequences resulting from multiple parcels being taken into trust over time; (2) mandate consideration of the degree to which the acquisition is truly necessary for the economic subsistence of the tribe; (3) include a presumption against acquisitions on behalf of economically sound tribes that already have an adequate land base and wealth and (4) place the burden on the tribal applicant to demonstrate that the benefits significantly outweigh the negative impacts.

Connecticut's experience provides a useful example of why standards are necessary.

In 1994, the Mashantucket Pequot Tribe -- which obtained a 2,200-acre federal reservation pursuant to a congressionally approved Settlement Act and was already the wealthiest tribe in the country -- applied to have approximately 100 acres outside its reservation taken into trust for economic and gaming expansion purposes. The State and local communities protested, but the Secretary ultimately sided with the Tribe despite the lack of evidence that taking the land into trust was necessary to achieve its economic expansion. In fact, although the Tribe ultimately withdrew its trust application, it has since continued to expand and has made billions of dollars in profits -- demonstrating serious flaws in the Secretary's initial approval of the trust application.

Further demonstrating the need for standards: When the State and local communities appealed the Secretary's grant of the Mashantucket Pequot Tribe's trust application, the Secretary of the Interior told the district court that he had unfettered and unbridled authority to take land into trust for the Tribe. He told the court that only at some point "'prior to the acquisition of all of southeastern Connecticut,'" would it "'be unreasonable for the Secretary to find that he had rationally considered' the regulatory criteria" requiring the Secretary to consider the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls. *State of Conn. v. Babbitt*, 26 F. Supp. 2d 397, 406 n.19 (D. Conn. 1998), *rev'd*, 228 F.3d 82 (2d Cir. 2000); *see also* 25 C.F.R. §§ 151.10 & 151.11 (setting forth criteria for on and off reservation trust acquisitions).

Such a standard is grossly unfair to non-Indian residents affected by tribal trust land applications. Congress has a duty to the States, the local communities, and their citizens to ensure that the IRA includes meaningful, binding and judicially enforceable standards to protect their substantial interests when tribes seek to take land into trust.

II.B. Fair Process

Connecticut's experience with the Interior Department's process for deciding trust land applications revealed substantial and significant flaws and inequities, undermining the public's confidence in any trust land decision.

- *States and local communities are provided insufficient time to respond to an application for trust acquisition.* Under existing regulations, States and local communities have only 30 days to comment on a trust application. That often is not enough time to formulate a meaningful response. A Government Accountability Office (GAO) report raises similar concerns adding that the Bureau of Indian Affairs (BIA) does not consistently allow for extensions of time where it is necessary to formulate a proper response. GAO, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* 32 (July 2006).

- *States and local communities are not given critical information necessary to adequately respond in a timely manner*. The notice of a trust application contains neither the tribe's application nor its supporting materials. States and local governments are forced to independently obtain that information, whether through a Freedom of Information Act request or other means. Time needed to obtain that information further reduces the time those entities have to formulate and present their objections. Notices should therefore include all information the tribe submits in support of its application.

- *Some states and local communities are not even notified of the trust application.* The regulations only require the Secretary to "notify the state and local governments having regulatory jurisdiction over the land to be acquired." 25 C.F.R. § 151.10(e) & 151.11. That notice requirement is too narrow, and could leave governments and individuals with significant interests unaware of the acquisition request until it is too late. Congress should require that the Secretary provide notice to all State and local governments with an interest, regardless of whether they have regulatory jurisdiction.

- *States and local communities are provided no opportunity to comment on any material change in the use of the trust land*. All tribal trust applications should fully disclose the intended use of the property and require a tribe seeking to change that use to undergo a new decision and comment process with the ability for affected parties to obtain judicial review. The concerns of State and local governments may depend greatly on the proposed land use. A Tribe should not be able to obtain trust land for one purpose and then use it for another without providing the impacted communities an opportunity to challenge the change. The clearest example of such a situation would be a tribe taking land into trust for a non-gaming purpose, and then seeking to use that land for gaming activity.

- *States and local communities are not afforded meaningful judicial review of trust land decisions.* Until 1996, the Department of the Interior took the position that its decisions were not subject to judicial review. *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting). Then, following the Eighth Circuit's decision holding that Section 5 was an unconstitutional delegation, the Department "did an about-face with regard to the availability of judicial review under the APA," *id*., and gave aggrieved parties 30 days to seek judicial review. 25 C.F.R. § 151.12(b). Congress must ensure that States and local communities are able to

obtain judicial review of initial trust acquisitions and proposed use changes. Further, the Department has continued to take the position that "action will continue to be barred by the [Quiet Title Act, 28 U.S.C. § 2409a] after the United States formally acquires title." *Dep't of the Interior*, 519 U.S. at 920. To ensure that States and local communities -- and other parties aggrieved by a trust acquisition or a change in the use of trust land -- have the ability to obtain judicial review, Congress should waive the sovereign immunity of the United States as to claims arising out of trust acquisitions or decisions to permit a tribe to materially change the use of existing trust land.

Procedural fairness and adequate opportunity to comment are essential to the public's confidence in these critical, often far-reaching decisions.

I appreciate the committee's continued concern regarding trust land procedures and look forward to working with it on this issue of critical importance to Tribes, communities and governments.