RCRC
RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

August 27, 2015

The Honorable John Barrasso, Chair
Select Committee on Indian Affairs
United States Senate
838 Hart Building
Washington, DC 20510

The Honorable Jon Tester, Ranking Member
Select Committee on Indian Affairs
United States Senate
838 Hart Building
Washington, DC 20510

RE: S.1879 - SUPPORT IF AMENDED

Dear Chairman Barrasso and Ranking Member Tester:

The Rural County Representatives of California (RCRC) appreciates the introduction of S. 1879, the Interior Improvement Act, to address longstanding problems with the existing fee-to-trust land acquisition process at the U.S. Department of the Interior and the possible ways of addressing the U.S. Supreme Court's *Carcieri v. Salazar* decision. While we welcome the concept of some of the revisions proposed in this legislation, we feel the bill does not go far enough, and have a Support if Amended position, and encourage additional modifications to improve the fee-to-trust process for all interested parties.

RCRC is an association of thirty-four rural California counties. Our counties include over half the land mass of the state. We represent the interests of rural California on issues as diverse as land use, environment, natural resources, wildfire response, housing, transportation, public safety, public health, and human services, among others.

RCRC counties are home to many of the more than 100 recognized Indian Tribes in California. We fully support the preservation of Indian heritage and the development of economic opportunity for Tribes in our counties. Because we are responsible for the economic and social well-being of all county residents and the environment in which they live, we are committed to economic development and responsible land use improvement for all our residents, tribal and non-tribal. However, the effect of trust acquisitions in rural counties can be particularly acute when much of the county land is already owned by the federal government.

In some of our member counties, private lands account for single digit percentages of the total land mass of the county and in many of our counties private lands account for

less than half of the county's jurisdiction. Trust acquisitions ensure the loss of local revenue as more land is taken off tax rolls and subsequent development is exempt from taxation. Improving the fee-to-trust process is critical to improving the economic well-being of all our counties, and should include the well-being of all who reside within them, not solely the tribal residents.

The existing fee-to-trust process is opaque, cumbersome, lengthy, and uncertain for all parties involved. More than one-quarter of the Tribes in California have applied for fee-to-trust lands within the past four years. These applications comprise 10,314 acres of land, approximately equal to the number of acres taken into trust in California in the previous ten years. During that period, 100 percent of the fee-to-trust applications were approved by the Bureau of Indian Affairs (BIA). While the BIA must follow regulations, the Government Accountability Office has concluded that "most of the criteria in the regulations are not specific and thus do not offer clear guidance for how the BIA should apply them…As a result the BIA decision-maker has wide discretion."

We recognize that the Interior Improvement Act would be a significant step forward in correcting deficiencies in the existing process. We strongly support the legislation's required notification of affected county governments and the allowance for comment on ***all*** public concerns, not just those affecting disputes in jurisdiction and revenue loss. Moreover, we welcome the encouragement provided in the legislation for the development of cooperative agreements between tribes and contiguous jurisdictions. However, we would like to see all elements of the bill be stronger. While S. 1879 would provide marked improvement, Congress must take full advantage of this occasion to ensure a better process for Tribes and affected local governments. The *Carcieri* decision has afforded all entities involved in the fee-to-trust process including tribes, local governments, the federal government, and our communities the unique chance to remake the fee-to-trust process. All should seize this opportunity to create a system that is fair and transparent and leaves all our communities both tribal and non-tribal alike as healthy as possible. In that spirit we urge the Committee to consider the following further improvements to the legislation:

Comment periods should be extended or eliminated: Contiguous jurisdictions would have a mere 30 days to provide comment on filed applications and only an additional 30 days once the application is complete. These comment periods are simply inadequate, particularly for rural counties that have limited staffing capabilities and where elected officials often meet in formal session less frequently to consider legally required actions. Rural areas are the most likely to be affected by fee-to-trust applications since those are the areas where traditional tribal lands are most typically located in California. These are the jurisdictions least well-equipped with expertise, staff, and readily-available third-party resources often necessary to adequately respond to a filed application. In order to prepare comments that properly show sufficiently researched potential outcomes for certain types of trust land activities, smaller jurisdictions will need additional time to gather resources not available in-house. The timeframes currently provided by the bill

are not adequate to these needs. We recommend at least 90 days for comments, but strongly recommend that timeframes be eliminated altogether as they limit opportunities for affected parties to participate in the judicial process and are especially exclusionary and discriminatory against the participation of small and rural local governments.

"Contiguous jurisdiction" language should be revised or eliminated to ensure engagement of affected counties and to limit confusion and conflict: The current language in the bill which uses a definition of "contiguous jurisdiction" could inadvertently exclude a county if it does not have "authority and control over the land contiguous to the land under consideration in the application." An applicant parcel could be located within the boundaries of an incorporated city, leaving the county without a contiguous border to the parcel. The term "contiguous jurisdictions" is unnecessarily difficult to define, is legally ambiguous, and, as explained above, could potentially eliminate the ability of affected governments to participate in rightful judicial review or obtain needed mitigation. Moreover, it could lead to conflicts between adjacent jurisdictions, the state, and neighboring tribes. We strongly recommend either elimination of the term or that the definition be revised to ensure that the county is considered a contiguous jurisdiction when any parcel within the county is an applicant. Notification of trust applications, the right to comment, and the standing to participate in judicial action and appeals should be extended to all affected jurisdictions, not just those arbitrarily defined as "contiguous".

Any affected party should be allowed to seek judicial review: A somewhat surprising regression from current law is that the current form of the legislation would limit standing for judicial review to only an applicant or the legally ambiguous, "contiguous jurisdiction". All affected parties try to avoid litigation, but they should have access to an administrative process and the courts to address a grievance. The impacts of trust acquisition can be broad and significant, and *all* those affected by the process should be able to seek administrative and judicial review.

Narrowing the pool of individuals who are eligible to seek standing will certainly silence viewpoints that should be heard when attempting to determine whether or not there are additional needs or harms to be mitigated when taking lands into trust. A local government is not the only entity to be impacted—schools, local business-owners, hospitals, public safety, and utilities entities (which may or may not be affiliated with the local government) are all likely to have impacts from a trust action and should be entitled to seek judicial review to seek mitigation for their grievance in a trust action.

The current version of the measure also seeks to allow for trust lands to be designated that are under active lawsuit, which is clearly inappropriate and would cause undue confusion and hardship for local land use planning.

"Mitigation" should be defined: We appreciate the consideration of mitigation in the legislation and want to ensure that all aspects of mitigating impacts of trust acquisitions

are addressed and not reduced to merely a paper exercise. Under the legislation, mitigation is an important component of cooperative agreements and part of the determination that the Secretary must make if an application is not accompanied by a cooperative agreement. While "economic impact" defined in the bill might capture some aspects of impacts to be mitigated, it is not comprehensive and does not provide enough direction for parties seeking cooperative agreements nor the Secretary, who must make a determination of mitigation.

We recommend that mitigation be defined to include economic impacts, environmental impacts, as well as impacts to the overall chosen land use plan of the county. For example, if a county has a land use plan that commits to keeping parts of its county primarily in working landscapes, such as agriculture or timberlands, the impacts of any trust plan in that jurisdiction would have to consider the county's land use plan and determine whether the trust plan was a harmonious use. It would be difficult to "mitigate" a major hotel and casino operation in the middle of an agrarian setting. A simple exchange of funds from the tribe to the local government would not account for the damage to the land use. Moreover, standards of need for the tribe should be balanced against the potential damage the trust lands could be doing to the community. Should it be determined that mitigation to repair harm caused is not feasible, determining the level of harm caused to the tribe by ***not*** having that particular land taken into trust should also be considered. Stronger language in the bill to build a framework of criteria for the mitigation components of this Act would build confidence between tribes and jurisdictions, and not put the Secretary so squarely in the middle. RCRC stands ready to assist in creating such a framework.

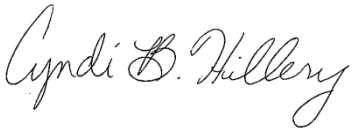
Change in use should be subject to review by the public and contiguous jurisdictions, as well as possible additional federal approvals: A change in use of trust lands is a common occurrence and concern for county governments. S. 1879 addresses this concern but only as a possible component of a cooperative agreement. The use of the land is as significant for determining impacts and mitigation as the land acquisition itself. Often trust lands are shifted to more intense types of use with little warning to house activities that pose a threat to neighboring properties, such as a case in one of our member counties where a 29-lane live gun range is proposed on trust land adjacent to a school; this land was originally taken into trust for the purpose of housing a medical clinic.

We recommend that land use be a required element of an application and that relevant mitigation be legally enforceable. Any change in land use, particularly in cases where there is no cooperative agreement, must be subject to review by the public and contiguous jurisdictions, and the mitigation for the new use must be legally enforceable—otherwise, there is no accountability in the process at all. A tribe could include one use in the application and immediately change to another with no ramifications whatsoever, and no further mitigation provided, regardless of need. Additionally, the bill does nothing to restrict changes in use from those included in an

application that has already been evaluated under NEPA. The language, at a minimum, should include a restriction on changes in use that would trigger NEPA review in non-tribal lands and require new NEPA review and subsequent federal approval for any change in use.

Again we thank you for introducing this important legislation. We encourage the Committee to hold a hearing on the proposal and would appreciate the opportunity to work with you in modifying the bill. We look forward to working with the Committee to establish the framework for a new fee-to-trust process that protects the interests of all parties and believe that this is an excellent first step. Please feel free to contact RCRC Legislative Advocate Cyndi Hillery at chillery@rcrcnet.org or (916) 447-4806 or our federal representative Thane Young at (202) 638-1950 to begin work on further strengthening this measure or with questions on our position.

Sincerely,



CYNDI B. HILLERY
Legislative Advocate