OFFICE OF THE COUNTY ADMINISTRATOR
CONTRA COSTA COUNTY

TO: Legislation Committee
Supervisor Susan A. Bonilla, Chair
Supervisor Gayle B. Uilkema, Vice Chair

FROM: Lara DeLaney, Legislative Coordinator

DATE: January 25, 2010

SUBJECT: **Agenda Item #6: Request from CSAC to Send Congressional Delegation a Letter re: S. 1703: Quick Carcieri Fix**

RECOMMENDATION

CONSIDER the request from CSAC to send our congressional delegation a letter regarding S. 1703: Quick Carcieri Fix, in support of comprehensive reform to the fee-land into trust process for tribes. Such a letter would be consistent with the Board's adopted 2010 Federal Platform.

BACKGROUND

On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar* (2009; No. 07-526). The Court held that the authority of the Secretary of Interior to take land into trust for tribes extends only to those tribes under federal jurisdiction in 1934, when the Indian Reorganization Act (IRA) was passed. **However the phrase "under federal jurisdiction" is not defined and therefore has thrown into question the status of many tribal trust land acquisitions.**

Many tribal governments are calling for a quick "fix" to Carcieri which would simply provide a definition of "under federal jurisdiction" that would include all tribes the Secretary has acted on behalf of with respect to land trust applications.

Within the last several months, there has been movement on a number of items related to the *Carcieri* decision and the fee-land into trust process. While most of the update below is informational in nature, **CSAC is requesting that every Board take action on the *Carcieri* issue by sending a letter to our congressional delegation in opposition to a "quick fix" and in support of comprehensive reform to the fee-land into trust process.** CSAC recommends using the attached CSAC letter to Senator Feinstein as a template for contacting our representatives. Also attached is a copy of a letter that Supervisor Diane Jacob, San Diego County, sent to Senator Feinstein.

While CSAC has made some progress on the issue, this issue is considered to be an uphill battle, and individual county action is needed alongside CSAC action to be effective.

Update:

1. CSAC's Washington D.C. advocate Joe Krahn reports that Senate Indian Affairs (IA) Committee Chairman Dorgan's *Carcieri* "fix" bill (S. 1703) was approved by the IA Committee on December 17, 2009. During the committee's markup of the legislation, the panel approved an amendment offered by Senator Tom Coburn (R-OK) that would require the Department of Interior to publish a list of tribes affected by the *Carcieri* decision. Under the amendment, the Interior Department would need to produce the list within one calendar year.

   According to IA Committee staff, they are working on writing the Committee's Report on the legislation, which should be ready sometime in February 2010. Once the report is finalized, the bill would then be discharged from the committee and the chairman would try to "hotline" the bill (move the bill to the Senate floor under Unanimous Consent).

   Senator Feinstein's staff has indicated to CSAC that they have conveyed to Dorgan's staff that Senator Feinstein will be seeking modifications to the bill. These changes are consistent with the trust land reforms sought by CSAC and as provided for in the association's testimony to the IA Committee.

2. On the House side, staff has indicated that the *Carcieri* bill(s) are not on the Natural Resources Committee's calendar at this point in time (other issues will be before the committee in the near term). CSAC continues to keep in contact with our House Members on this issue.

3. CSAC has also retained additional counsel in Washington DC regarding efforts in Congress to "fix" the *Carcieri* decision with a contract with Guy Martin of Perkins Coie LLP.

<u>Carcieri Specifics</u>

- The *Carcieri* decision has provided a rare window of opportunity for Congress to address concerns related to the fee-land into trust process.

- California's counties urge that the full implications of the decision and all potential resolutions should be identified for consideration before legislative action is taken.

- Further, we urge our congressional representatives to advance not just a simple fix of the *Carcieri* holding, but a broader solution that fairly balances the roles of local and tribal governments.

- Such a solution should establish clear and specific congressional standards and processes to guide future trust land decisions, and should define the respective roles of Congress and the executive branch in the fee-land into trust process.

- Ultimately our goal is to improve the fee-land into trust process to be more transparent and one that provides due consideration to both tribes and non-tribal interests such as local governments and the citizens and communities we represent.

- Counties share the following concerns related to the fee-land into trust process :

    - The current fee-land into trust process has a number of systemic flaws, including a lack of clearly defined standards for trust land acquisitions.

    - There is inadequate notification requirements, meaning local governments are often forced to resort to Freedom of Information Act requests to determine if petitions for Indian land determinations have been filed in their jurisdictions.

    - CSAC also believes that intergovernmental agreements should be required between tribes and local governments to require mitigation for adverse impacts of gaming, related businesses and other commercial activities, including environmental and economic impacts from the transfer of the fee-land into trust.

- Ultimately our goal is to improve the fee-land into trust process to be more transparent and one that provides due consideration to both tribes and non-tribal interests such as local governments and the citizens and communities we represent.

Specifically, this includes:

<u>Notice and Transparency</u>

1. Require full disclosure from the tribes on trust land applications and other Indian land decisions, and fair notice and transparency from the Bureau of Indian Affairs (BIA).
2. The BIA should define “tribal need” and require specific information in trust land applications about need from the tribes.
3. Applications should require specific representations of intended uses.

<u>The Decision Process and Standards</u>

1. A new paradigm for working with counties and local governments is needed where counties are considered meaningful and constructive stakeholders in Indian land related determinations.
2. Establish standards that require that tribal and non-tribal interests be balanced in considering the impacts of trust land decisions.
3. Limit the use of trust land to the tribe’s declared purpose.

4. For calculating tax losses for local governments, the valuation should be based on the proposed use of the land.

Federal Sovereign Immunity

1. BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions, which often are very controversial and used to promote reservation shopping that will enrich investors at the expense of local governments. Third parties should have the right to challenge harmful trust land decisions, and BIA should not be allowed to shield its actions behind the federal government's sovereign immunity.

Intergovernmental Agreements and Tribal-County Partnerships

1. CSAC has consistently advocated that Intergovernmental Agreements be required between a tribe and local government affected by fee-land into trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. As stated above, if any legislative modifications are made, CSAC strongly supports amendments to IGRA that require a tribe, as a condition to approval of a trust application, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming, related businesses and other commercial activities on local infrastructure and services.

Attachment A: CSAC letter to Senator Feinstein

Attachment B: Letter from Supervisor Jacob to Senator Feinstein