CONFEDERATED TRIBES OF
WARM SPRINGS
1855

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COMMENTS OF THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION REGARDING PROPOSED REVISIONS TO 25 CFR PART 151 "FEE TO TRUST" REGULATIONS

February 28, 2018

This document represents the official comments of the Confederated Tribes of the Warm Springs Reservation of Oregon ("Warm Springs Tribe") on the proposed "fee-to-trust" regulations (25 CFR Part 151) provided to us in "Dear Tribal Leader" letters dated October 4, 2017, and December 6, 2017.

GENERAL COMMENT

Since the 1970's, the Warm Springs Tribe has actively pursued opportunities provided under Section 5 of the 1934 Indian Reorganization Act ("IRA") to take land into trust outside the Warm Springs Reservation at locations where the Tribe has Treaty-reserved fishing, hunting, food-gathering rights, or cultural and historical ties. The purpose of acquiring these lands and putting them into trust is to preserve the special character of the properties and to protect, in perpetuity under tribal management and federal protection, the natural and cultural resources associated with the properties. In recent years, the Tribe has utilized a Bonneville Power Administration program to purchase thousands of acres in a half dozen locations to enhance fish and wildlife habitat. Our goal is to eventually have these lands, which are currently in fee status, taken into trust. Having these lands in trust will help ensure that the off-reservation fishing, hunting, and food gathering rights, secured by our 1855 Treaty with the United States, can be utilized by future generations of Warm Springs tribal members.

SPECIFIC COMMENTS

1. **The Distance Requirement Is Improper and Ignores Historic, Legal and Aboriginal Ties to Off-Reservation Locations**. The proposed regulations evaluation of applications based on the distance in miles from the reservation and/or trust land is arbitrary and should be eliminated. Any historical, legal, or aboriginal ties between the applicant tribe and the proposed acquisition makes much more sense as an evaluation criteria. In the case of Warm Springs Tribe, our 1855 Treaty ceded area encompasses ten million acres of north central Oregon. Much of our Treaty ceded area, and other locations beyond the ceded area, where our tribal members historically or currently exercise Treaty reserved hunting, fishing, and food gathering rights, is located between 100 and 200 miles from our reservation. In fact, as stated in our general comment above, the Warm Springs Tribe's strong interest in protecting and preserving the natural habitat and resources upon which the exercise of our 1855 Treaty off-reservation rights depend is our primary reason for taking land into trust. If the land is taken into trust and under

our control, it cannot be managed or developed by others in a manner that would be detrimental to the natural resources on which our Treaty rights depend.

2. **Gaming Provisions Should Be Eliminated**. Adding requirements for Part 151 fee-to-trust applications involving gaming projects is objectionable for several reasons. First, newly acquired trust lands are not eligible for gaming unless they meet the requirements of Section 20 of the 1988 Indian Gaming Regulatory Act ("IGRA"). The statutory requirements of Section 20 are implemented by the regulations set out at 25 CFR Part 292. Typically, discretionary Part 151 fee-to-trust applications involving gaming are coupled with an application under IGRA Section 20 for a gaming eligible determination pursuant to the "Secretarial [two part] determination and Governor's concurrence" regulations set out in Subpart C of Part 292. These regulations require that applications provide all the information, and more, that would be required by the new gaming provisions of the proposed Part 151 regulations. In other words, the proposed Part 151 regulations simply duplicate the requirements of the existing Part 292 regulations and thereby double the regulatory burden on tribes seeking trust land for gaming purposes. Second, adding IGRA-type gaming requirements to Part 151 fee-to-trust regulations may well violate IGRA (25 USC Section 2791(c)), which prohibits IGRA from "diminish[ing] the authority and responsibility of the Secretary to take land into trust". Third, if tribes pursuing gaming projects are not able meet the Part 292 requirements, they may wish, nonetheless, to have the land taken into trust under Part 151 for non-gaming purposes. However, the proposed changes to the Part 151 regulations would appear to prohibit approval for non-gaming purposes of Part 151 applications submitted in connection with gaming projects. Instead, a tribe who failed to get a governor's concurrence or a positive two part determination under the Part 292 regulations, would have to start the Part 151 application process all over again to have the land taken into trust for non-gaming purposes. This added administrative burden on tribes cannot be justified.

3. **Local Government MOU's**. Requiring applications to include completed MOU's with local governments in order to obtain approval puts the "cart before the horse". Tribes would be at a huge disadvantage in negotiating MOU's with local governments when, as set out in the proposed regulations, the local governments know tribes **must** have the MOU's in place in order to begin the Part 151 application process. This requirement simply encourages local governments to make unreasonable demands of tribes

4. **Federal Land Use Authority**. The proposed regulations grant the federal government, in effect, land use approval authority over tribal development projects on newly acquired trust lands. It should not be up to the federal government to determine whether a manufacturing plant, a residential housing development, or a commercial retail project is an appropriate land use for newly acquired trust land. Section 5 of the 1934 IRA is the source of the fee-to-trust process and the statute does not, in any way, limit tribal land uses for newly acquired trust lands. Accordingly, restricting land uses on newly acquired trust lands is unlawful under the IRA.

5. **What Is Wrong With The Existing Part 151 Regulations?** The Secretary has provided no information at all to justify the sweeping changes in the current fee-to-trust process set out in the proposed regulations. There must be a compelling rationale for changing the current regulations, but none has been provided.

6. **Requiring Central Office Approval For Non-Gaming Applications Is Unnecessary.** The proposed regulations improperly centralize the fee-to-trust decision-making process in the BIA central office in Washington, D.C. Unless there is a massive expansion of Central Office staff to process these applications, which is highly unlikely, the result will be to slow to a crawl the processing of applications with the result that most applications will never be acted upon. The BIA regional offices should be allowed to exercise delegated authority to approve fee-to-trust applications, the great majority of which are non-controversial. Only applications involving gaming projects should be sent to the Central Office for review and approval, as they are now under the current regulations.

7. **Do Not Reinstate The 30-Day Waiting Period**. Reinstatement of the 30 day waiting period before accepting land into trust after a final decision is unnecessary. It only invites litigation. The existing regulations have proven to provide an adequate opportunity, consistent with due process, to legally challenge Part 151 application approvals.

8. **Two-Phase Application Process.** The proposed "two phase" application process may be unlawful in practice and only complicates the application process. NEPA compliance is required for all federal actions, 40 CFR Section 1501.2, but may include categorical exclusions. Any application denial at the first phase that does not comply with NEPA, or provide a categorical exclusion, is subject to challenge as an arbitrary and capricious decision. NEPA cannot lawfully be avoided at the "phase one" application evaluation stage.

9. **Any Revised Regulations Should Only Apply to New Applications Submitted After the Regulations Effective Date**. If this proposal should eventually result in any new or revised Part 151 regulations, we strongly believe that such new regulations should only apply to new applications submitted after the regulations effective date. To apply the new regulations to pending applications would be fundamentally unfair and cause the applicant tribes great hardship, expense and significant delay in the processing of their applications.

Thank you for considering the Comments of the Warm Springs Tribe on this important matter.