



Spokane Tribe of Indians

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July 2, 2018

Tara Mac Lean Sweeny, Assistant Secretary – Indian Affairs
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
Attn. Fee-to-Trust Consultation
1849 C Street NW, Mail Stop 4660-MIB
Washington, D.C. 20240

SUBMITTED VIA EMAIL (consultation@bia.gov)

RE: The Spokane Tribe of Indians' Comments on the Proposed Revisions to 25 C.F.R. § 151, Fee-to-Trust Regulations

Dear Mr. Tashuda:

The [Tribe] (“[STOI” or “Tribe”) submits these comments on the Department of the Interior’s (“DOI”) proposed revisions to the Fee-to-Trust (“FTT”) Regulations of 25 CFR Part 151, specifically changes to 25 CFR § 151.11 and § 151.12. The Tribe appreciates the opportunity to provide these comments, in addition to the oral comments previously provided at the January 25, 2018 Consultation Session in Portland, Oregon.

The Tribe supports the inclusion of an “aboriginal tie,” to the land in question as a factor for consideration in the FTT process, insofar as lands should not be placed into trust over the objections of a resident tribe. However, the Tribe recommends that this factor only be considered if an objecting tribe provides evidence that the land in question lies within its exclusive aboriginal territory.

However, the other proposed changes to FTT regulations are deeply troubling. The changes will negatively impact every Indian tribe, especially those tribes without an existing land base. Among other things, the proposed amendments would require tribes, including STOI, to expend additional resources to address new and unnecessary criteria. The amendments also make the FTT process more difficult and time consuming. Further, under current FTT regulations, states, counties, cities, and other local units of government already have significant opportunity to make their concerns known. The DOI’s proposed changes lack valid justification and would increase these entities’ ability to impede vital FTT land acquisitions.

For the reasons discussed below, the Tribe urges the DOI to adopt and expand only those provisions which grant resident tribes greater authority over FTT applications for land located within the resident tribe's aboriginal territory.

I. INTRODUCTION

A. A Brief History of the Tribe.

The Tribe's aboriginal territory is situated in the upper Columbia Plateau, within the low-elevation Columbia River basin. The Columbia Plateau is bounded on the west by the Cascade Mountains, on the east by the Rocky Mountains to the north by the Fraser River, and to the south by the Blue Mountains. The most unique natural features of the Plateau are the numerous flood-scoured scabland channels characterized by basalt cliffs, step toes, buttes, and thousands of small basins containing ponds, lakes, and extensive wetlands.

Ethno historians divide the Plateau into two cultural regions – the Northern Plateau and the Southern Plateau – presently delineated by the American and Canadian political boundary. The Northern Plateau peoples were more dependent upon fishing and hunting, whereas those of the Southern Plateau peoples were principally reliant on plants, supplemented by hunting, and, in the case of the Spokane, by fishing.

The major shared cultural features of the Plateau were a relatively simple political structure, with leadership by chiefs through inheritance, group consultation and consensus. The need to maintain mutual cross utilization of subsistence resources during a well-defined annual subsistence round was well established. Despite degrees of linguistic differences and cultural adaptation, groups within the Plateau cultures area shared certain distinctive cultural features.

The Spokane have been variously described as comprising three principal bands described according to their principal village sites located along the Spokane River: the Upper Spokane, from the state line to Spokane Falls and the mouth of Latah/Hangman Creek; the Middle Spokane, from Latah to the mouth of the Little Spokane and to Tum Tum; and the Lower Spokane, from Tum Tum to the confluence of the Spokane and Columbia Rivers. The Spokane maintained major fishing stations during the fall and spring salmon runs along the Spokane River from its mouth at the Columbia River southeasterly to Spokane Falls (which served as a major fish blockage).

Even before the horse, the Spokane carried on brisk trade with neighboring tribes, particularly the Coeur d'Alene, who sought salmon from the Spokane - as the salmon runs did not extend eastward into their territory. Exh. 13, (Ross 2011: 32). The Spokane Tribe was strategically located in the trade between coastal tribes, the southern plateau tribes and the plains tribes to the east of the Rocky Mountains. Additionally, Spokane territory fell between a relatively brisk north-south trade route along the Columbia River system. The introduction of the horse only increased trade between the regional tribes.

Though the expedition passed well to the south of the Tribe's territory, the first historical report of the Spokane Tribe comes from the 1805-1806 expedition of Lewis and Clark. William Clark

prepared a map of Spokane Territory based on his discussion with Nez Perce traders.¹ In 1806, the first white man entered Spokane territory, David Thompson, the chief surveyor for the Northwest Company of Canada. Soon after the arrival of Thompson, traders, particularly those seeking the furs of the region, came in to Spokane territory.

In 1810, at the confluence of the Little Spokane River with the Spokane River, the Northwest Company established Spokane House, which became the hub for fur trading with the Indians in the Columbia Plateau. The first structures were completed at Spokane House in 1812. These early years of the fur trade were marked by relative peace, primarily due to the Spokane desire for European trade goods.

By 1825, Spokane House operations ceased and were replaced by Fort Colville, constructed in 1826 near Kettle Falls, WA. Thereafter, the Spokane joined other tribes in the trek to Fort Colville to exchange their ever-decreasing supply of pelts. By the 1830's, the zenith of the fur trade had long passed.

In 1836 the first missionary, Samuel Parker, arrived in Spokane territory to survey potential sites for Protestant missions. In 1838, Cushing Eells and Elkanah Walker located the first permanent Christian mission along Tshimakin creek (the eastern boundary of the 1881 Executive Order establishing the Tribe's Reservation). The Tshimakin site was selected because it was located on the main north/south trail the Spokane and other tribes had used for centuries and it was a natural site with water, meadow, and trees. By 1838, Eells and Walker had completed their winter quarters and reported they had a congregation of two hundred Spokane.² The two missionaries studied the Spokane language and succeeded well enough to compose a primer in Spokane to teach the Indians how to read and write their own language. The primer, consisting of sixteen pages, was printed on Henry Harmon Spaulding's Lapwai press in 1842. Titled Etshiit Thlu Sitski Thlu Sitskaisitlinish, it was the third book published in the western United States.

In 1842, Father Peter DeSmet, the first of many Catholic missionaries, took his first trip into Spokane country. Father Nicholas Point, later noted for his early paintings of Indians, established a mission among the Coeur d' Alene in 1842. From there, Father Point often visited the Spokane in their territory and created the first known illustrations of Spokane tribal members. Another Jesuit who visited the Spokane from the Coeur d' Alene mission was Father Joseph Joset, who played an important role in the War of 1858.

¹*Spokane Tribe of Indians v. United States*, ICC Docket No. 331, Plaintiff's Exhibit 26 (Map prepared by William Clark). In Spokane's case before the Indian Claims Commission, Dr. Vernon Ray testified that the Clark Map was probably based on information that Lewis and Clark had obtained from Columbia River Sahaptin Indians, probably the Nez Perce Tribe, "which reflects very accurately the territory and locations of villages of the Spokane Indians further to the north." The Spokane Tribe is identified on the Map as Hi-High-e-nim-o (a principal village site at the confluence of the Spokane and the Little Spokane) and L-a-r-t-e-e-l-o (the principal village located at Spokane Falls, present day Downtown Spokane. Exh. 15, (Ray Testimony: 18-19 (Ray Testimony). Ray stated: "I think I ought to go further and say that the names are, of course, not names obtained from the Spokane Indians proper and it would be natural that the Indians with whom he talked would give him their names for the Spokane Indians, not the Spokane Indians' name for themselves."

² The Walkers were not able to sustain their apparent early "successes" in converting the Spokane. Mrs. Eells's diary entry for March 1847 lamented "We have been here for almost nine years, and have not yet been permitted to hear the cry of one penitent, or the songs of one redeemed soul." See, Exh. 13, (Ross 2011:63 quoting Snowden 1909: 130).

Through the Donation Acts of September 27, 1850, February 14, 1853 and July 17, 1854, Congress enabled settlers in Oregon and Washington to claim lands by fulfilling certain residence and cultivation requirements.³ Isaac Stevens was appointed as the first territorial governor and in 1853 he was designated a Treaty Commissioner (as well as the Superintendent of Indian Affairs) and was authorized to enter into treaties with tribes within the Territory. Faced with the fact that Indian title in the area had not been extinguished, Governor Stevens addressed a letter to the Commissioner of Indian Affairs advocating that prompt action be taken to arrange for the purchase of lands between the Cascades and the Rocky Mountains from the tribes. Thereafter, Governor Stevens proceeded to treat with many of the tribes in the Washington Territory.

On his return west from meeting with the Blackfeet Tribe east of the Rocky Mountains in 1854, Governor Stevens met with the Spokane at Spokane Falls. Stevens indicated that he would be back to see them in the spring of 1856 for the purpose of making a treaty between the Tribe and the United States. The Spokane Tribe is referenced in the Nez Perce Treaty of 1855, which is further evidence of the Tribe's deep connection to the region. However, due to growing Indian unrest, Stevens' was precluded from returning to Spokane territory to create a treaty with the Tribe.

On May 6, 1858, Colonel E.J. Steptoe and 160 members of the 9th Infantry rode from Fort Walla Walla, heading north toward Spokane territory. Upon reaching the present town of Rosalia Washington, Steptoe encountered between 800-1000 warriors. The warriors had detected Steptoe and his soldiers, armed with cannons, and took arms as a precaution before sending headmen to approach Steptoe for a parley. When asked to explain his intentions, Steptoe gave the implausible answer that he was on a peaceful mission to Colville country. Both Steptoe and the Indians knew that their parlay was well east of the usual path to Colville, and Steptoe's weak reason added to the Indian's apprehension that their families could be targeted for an Army attack. After the parley, Steptoe continued his march toward the southern portion of Spokane territory. Steptoe later wrote that the warriors of allied Spokane, Coeur d'Alene and Palouse spent the day harassing his column "by yells, taunts, and menaces."

The next day the warriors attacked Steptoe's troops, and a daylong battle ensued. Steptoe retreated to high ground for the night, surrounded by warriors. The soldiers were able to sneak through the Indian lines during the night, leaving pack horses, mules, and supplies behind. On May 22, Steptoe's men made it back to Fort Walla Walla, having suffered seven fatalities.

Meanwhile, General Clark, the Commander of the Department of the Pacific, left on a steamer to Fort Vancouver, where he could more closely supervise what had become a beleaguered army campaign against the Spokane and other allied tribes. Arriving in Fort Vancouver on June 23, 1858, General Clark called for a meeting with Colonels Steptoe and Wright. The meeting was probably uncomfortable for the two colonels: Wright being embarrassed by the Yakama tribe two years prior at Naches and Steptoe limping back to Fort Vancouver just days before.

³ As discussed *infra* the result of these donation acts was the taking - piece by piece - of Spokane territory, even though the Spokane did not cede their aboriginal lands until 1892, when the 1887 Spokane Falls Agreement was ratified by Congress.

On July 4, 1858 he issued orders to Colonel Wright to gather his expedition at the Dalles, march into Fort Walla Walla and then north into Palouse, Spokane and Coeur d'Alene country. Wright was to "meet with the Indians who agreed to submit to Clark's conditions for peace; and to make war upon any Indians who refused." By August 26, 1858, Colonel George Wright and his force of 600 men had crossed the Snake River, continuing north toward Spokane territory.

On September 1, 1858, Wright's army engaged the Spokane and allied Coeur d'Alene and Palouse at Four Lakes, near the present site of Fairchild Air Force Base. In addition to artillery, including a Howitzer, Wright's men were armed with newly-issued Springfield long-range rifles that fired newly developed mini balls. The Spokane and allied tribes were armed with only muskets and traditional weaponry. While the army leveled artillery fired and advanced upon the Indians at the base of the hill, two squadrons commenced to "charge the Indians on the plain, overwhelm them entirely, kill many, defeat and disperse them all, and in five minutes not a hostile Indian was to be seen on the plain." By 2 p.m., Wright sounded recall and declared victory. No casualties or wounded were reported "attributable, doubt not, in great measure, to the fact that our long range rifles can reach the enemy, where he cannot reach us. The enemy lost some eighteen or twenty men killed, and many wounded." After the battle, Wright and his troops camped at Four Lakes for five nights.

In an attempt to neutralize the Army's artillery and the long-range rifles, the Spokane and allied tribes set fire to the grasses of what is now known as the West Plains. For the next seven hours, a running gun battle raged across the West Plains just to the north of Highway 2 between Fairchild Air Force Base and Geiger Field.

After the Battle of the West Plains, Wright and his troops ventured to their main campsite "1 1/2 miles below the falls," where they camped through September 6. After securing 800 horses, Wright made camp along the Spokane River just on the Washington side of the state line and ordered the slaughter of all but a few of the 800 captured horses (it took two days to complete the task).

Wright and his men then continued into Coeur d'Alene Territory and obtained a treaty of surrender from the Coeur d'Alene on September 17. Wright then marched south and west into Palouse Territory, burning villages and foodstuffs along the way, eventually making his way back to Spokane territory.

The combination of a decisive military loss, the slaughter of their horses and destruction of their winter foodstuffs on the cusp of fall were crippling blows for the Spokane and allied tribes.

On September 24, 1858 Wright entered into a treaty with the Spokane, signed by 36 Tribal leaders, providing for the cessation of all hostilities and granting whites passage through Spokane country. Among other demands, the treaty required the Spokane to deliver to Wright the warriors who had attacked Steptoe; to deliver one chief and four men with families to be held as hostages for one year to guarantee future good conduct of the tribe; and to promise the safe passage of whites through Spokane country.⁴ Importantly, however, the Treaty did not contain any cession of the Tribe's lands.

⁴ These same treaty terms were imposed upon the Coeur d'Alene and the Palouse.

Wright's campaign marked the end of armed conflict between the Spokane and the United States. Not only were the Spokane militarily defeated: the loss of so many horses, and Wright's burning of the Tribe's villages and winter food supplies took a devastating toll. Over the next fifteen years, non-Indian encroachment upon the Spokane Tribe's lands steadily continued. During this period, Chief Spokane Garry ascended as a principal spokesperson for the Tribe. Garry was instructed by his Tribe to see what could be done to obtain a formal treaty. Chief Garry was chosen mainly because he spoke English fluently as a result of his earlier schooling at the Episcopalian mission at Red River, Canada.

Meanwhile, missionaries increased their presence among the Tribe. The St. Michaels Mission was constructed within Spokane territory in 1866 at the request of Chief Baptiste of the Upper Spokane, who had asked that a Catholic missionary be sent to his band. By February 1867, Father Cataldo, a Jesuit priest and founder of Gonzaga University,⁵ had baptized one hundred Spokane Indians as Catholics. As a mark of his popularity within the Tribe, Father Cataldo - who was fluent in Spokane - was called "S'-Chuisse," which meant "Dried Salmon," because of his lean and dried appearance.

On April 9, 1872, by Executive Order, a reservation was created for the "Methow, Okanagon, San Poel, Lake, Colville, Calispel, Spokane, Coeur d'Alene and other scattering bands of Indians in Washington." This reservation extended from the Spokane and Little Spokane rivers north to the 49th parallel, and from the Columbia River eastward to the Pend d'Oreille River and the 117th Meridian. The Order was revoked July 2, 1872, and instead a reservation was created encompassing the land between the Columbia and Okanogan Rivers south of the 49th parallel. However, the Spokane refused to remove from their Territory to the newly created reservation, which eventually became the Colville Indian Reservation.

In 1874, General Davis met with Spokane leaders at Spokane Falls to discuss a reservation for the Spokane. Reverend H.T. Cowley accompanied Chief Garry to the meeting and reported that the General treated Garry in a very cool manner and stated to that he had no interest in creating a reservation for the Spokane.

On March 3, 1875, Congress enacted 18 Stat. 402, 420, "which provided that Individual Indians who renounced their tribal relations and become citizens could acquire patents to tracts of land occupied by them." The Spokane Indians refused to sever their tribal relations, or to leave their own lands to reside upon the Colville Indian Reservation. They continued to express a desire to remain in their own country and to retain possession of their fisheries along the Spokane River."

On August 18, 1877, Indian Inspector E.C. Watkins, General Frank Wheaton and Captain M.C. Wilkinson met with the Spokane and offered a document to the Spokane leaders. The leaders would agree to remove by November 1, 1877 to a tract of land north of Spokane River, south of a

⁵ While working with regional tribes, Father Cataldo recognized that if the Jesuits were to continue their Indian mission work, they would have to build a catholic school and college. He wrote to leadership in Rome, pleading that if the Church didn't start a school, then forty years of missionary work would be wasted. The idea of a Jesuit school and college took root - only not for Indian children. Gonzaga opened its doors - to white male children only - on September 17, 1887. See www.gonzaga.edu/Academics/Libraries/Foley-Library/Departments/Special-Collections/exhibitions/GonzagaHistory1887.asp.

line extending from the mouth of Numchin Creek of the Columbia River east to the source of the Chamokane Creek. The document was then executed by six Indians who are each identified as chiefs or headmen of the Lower Spokane Band. By Field Order No. 3 on September 3, 1880, the Army directed that the tract identified in the August 18, 1877 Agreement should be protected from white settlement in anticipation of an Indian Reservation being established in that area. On January 18, 1881, President R.B. Hayes issued an Executive Order establishing the 154,602.57-acre Spokane Indian Reservation.

The 1881 Executive Order Reservation included many principal permanent village sites of the Lower Spokane. Many of the Lower Spokanes therefore did not have to “move” to the Reservation. However, even the Lower Spokane residing on the Reservation continued their subsistence activities by participating in their traditional seasonal rounds throughout their aboriginal territory until the early 1890’s. Meanwhile, most of the middle and upper Spokane refused to relocate to the Reservation, instead remaining within their traditional environs, even amidst ever-increasing non-Indian settlement.

By July 25, 1881, with the arrival of the first rail line in the city, the Northern Pacific, the City of Spokane (then called Spokane Falls) had become the region’s trade hub. With the discovery of gold in the Coeur d’ Alene mountains of northern Idaho in 1883, the population of the City of Spokane grew to 1,000. By early 1887 the city’s population swelled to over 15,000. Piece by piece, non-Indian encroachment was enveloping the land base and fishing sites necessary for the Spokane to maintain their traditional seasonal rounds. As the non-Indian population increased, the Spokane residing off the reservation became increasingly marginalized and the need for reaching an agreement with the Tribe became ever pressing.

On May 15, 1886, Congress established the Northwest Indian Commission, in part to address the ever-deteriorating condition of the off-Reservation Spokane. On March 18, 1887, the Northwest Commission met with Spokane leaders, which resulted in an agreement under which the Spokane ceded all rights, title and claims to any and all lands lying outside the Reservation and agreement by the off-Reservation Spokane to move to the Spokane Reservation, or nearby reservations. In exchange, the Tribe received \$127,000.00, to be used for erection of houses, and purchase of cattle, seeds, and farm implements. Congress ratified the agreement on July 13, 1892. Garry, Lot, Louis, and Enoch were among the Spokane signatories to the Agreement.

Even after the execution of the 1887 Agreement, many Middle and Upper Spokane refused to relocate to nearby reservations, including Louis and Enoch, who did not give up their aboriginal residences until 1895, and even then many of their people stayed in locations around the City of Spokane and along the Spokane River, in places where they had not yet been pushed out by the whites.

The construction of several dams along the Spokane River between 1890 and 1911 hastened the relocation of the off-Reservation Spokane. During this period, seven dams were constructed along the Spokane River, from Post Falls Dam at the headwaters to Little Falls Dam at river mile 29, which resulted in the destruction of the Tribe’s salmon fishery along that entire stretch of river. Salmon continued to spawn downriver from Little Falls Dam (located within the Reservation) into the late 1930’s when Grand Coulee Dam, under construction since 1933, blocked all salmon and

steelhead from the upper Columbia River Basin. Upon the completion of Grand Coulee Dam in 1942, Lake Roosevelt was created, which raised the water levels of the Columbia and Spokane Rivers some 70 feet, wiping out the Spokane Tribe's remaining salmon fishery and inundating Reservations lands, sacred sites and burial sites along both rivers.⁶

In 1932, the Spokane employed legal counsel to present a land claim to Congress. Although Congress passed legislation approving the claim, President Herbert Hoover vetoed the bill. The Indian Claims Commission ("ICC") was created on August 13, 1946 to adjudicate claims filed by Indian tribes against the United States. On August 10, 1951, the Tribe filed a claim before the Indian Claims Commission, alleging that the amount of money paid for the cession of land under the Agreement of 1887 was unreasonably low.

B. A Brief History of the Fee-to-Trust Process.

In 1887, the United States Congress passed the General Allotment Act which, after the 25-year grace period passed, led to tens of millions of acres passing out of Indian control.⁷ Later, in 1934, Congress passed the Indian Reorganization Act ("IRA"). Though the IRA is generally seen as a corrective response to the General Allotment Act⁸⁹ to restore Indians lands to the tribes, its broad grant of authority to the Secretary of the Interior ("Secretary") is not limited to only those impacts from the General Allotment Act. Under the IRA, "[t]he Secretary... is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."¹⁰ Thus, the IRA contemplated a mechanism by which a tribe could recover and restore its traditional and aboriginal land base. The text of the IRA contains no specific limitations or criteria for the FTT process.

The Bureau of Indian Affairs ("BIA") first published and standardized regulations to guide the FTT process in 1980.¹¹ These original FTT regulations contain fewer criteria for FTT land acquisitions, but still include a number of familiar requirements, such as impacts "on the State and its political subdivisions resulting from the removal of the land from tax rolls."¹² From the very beginning, state and local governments have had ample opportunity to voice their concerns regarding FTT applications, and their voice only increased when the BIA amended the FTT regulations in 1995.¹³ Among other changes, the 1995 amendments, which remain in effect today, expanded Secretary consideration of impacts on non-Indian communities, expressly allow state

⁶ To this day, the Spokane Tribe continues to seek compensation for these devastating losses.

⁷ House Subcommittee Memo, May 12, 2015 (available at https://naturalresources.house.gov/uploadedfiles/hearingmemoian5_14.pdf).

⁸ *Id.*

⁹ House Subcommittee Memo, July 11, 2017 (available at https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_ov_hrg_07.13.17.pdf).

¹⁰ 25 U.S.C. § 5108; formerly cited as 25 U.S.C. § 465.

¹¹ BIA Press Release, *Regulations Governing Indian Land Acquisitions Published* (Sept. 18, 1980) (available at https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/Press_Release_Regulations_Governing_Indian_Land_Acquisitions_Published_09-18-80.pdf).

¹² 45 FR 62034 (Sept. 18, 1980).

¹³ 60 FR 32874 (June 23, 1995).

and local governments to express their opposition, and created previously non-existent categories, on-reservation acquisitions and off-reservation acquisition, each with different criteria not contained in or required by the IRA.

II. THE TRIBE SUPPORTS AN “ABORIGINAL TIE” REQUIREMENT FOR FEE-TO-TRUST APPLICATIONS, HOWEVER THE BURDEN SHOULD BE SHIFTED.

The proposed amendments are filled with a number of unnecessary changes, additional criteria, and potential pitfalls. However, the Tribe generally supports a requirement to consider a resident tribe’s objections. Proposed 25 C.F.R. § 151.11(a)(1)(i) and (a)(2)(A) would require tribal applicants to include, as part of their FTT application, the applicant tribe’s historical or modern connection, if any, to the desired land. In other words, applicant tribes must have aboriginal or modern ties to the land they seek to place in trust status. The language should be amended to shift the initial burden away from an applicant tribe to another tribe that claims an “aboriginal tie” to the land in question. If an objecting tribe demonstrates the parcel falls within its exclusive aboriginal territory, then the parcel should not be placed into trust.

We support this requirement for a number of reasons:

First, such an amendment is in line with the purpose and policy of the IRA. These criteria, and the specific language of proposed 25 CFR § 151.11(a)(1)(i) and (a)(2)(A), contemplates a genuine historical connection to the desired land. The purpose of the IRA was to help restore Indian lands previously lost due to the General Allotment Act. The Tribe does not see how the Secretary or DOI can “restore” land to a tribe that never held, or lived on or around the land. As such, it is entirely proper to consider the objections of a resident tribe.

The Tribe is concerned about the proposed “modern” connection. A demonstration a parcel falls within an objecting tribe’s exclusive aboriginal territory should outweigh less established modern connections.

Second, history matters in Indian Country. Where you come from matters. Where your people come from matters. The connection between indigenous people and their homelands cannot be overstated: it is what makes us indigenous. We believe it is very important for the DOI to respect this principle when reviewing FTT applications. We understand that in certain parts of the United States, the geographic boundaries of a tribe’s exclusive aboriginal territory may not be clear. But that is not always the case and resident tribes should have a say about what happens in their aboriginal territory.

When foreign tribes come onto the undisputed, exclusive aboriginal territory of the STOI to petition the Secretary to take STOI aboriginal land into trust for the benefit of a *foreign* tribe, then we, as the resident tribe, should have a seat at the table. The resident tribe should have the ability, clearly expressed in the CFRs, to directly voice its concerns to the BIA, DOI, and the Secretary. In these situations, where a foreign tribe seeks to go into another tribe’s territory, reap economic benefits, and exercise governmental jurisdiction over our territory, the resident tribe must have an avenue to be heard. We recommend amending the proposed regulations to grant resident tribes the

express and clear ability to comment on FTT applications the same as other governments, both state and local.

Finally, not only should the resident tribe's concerns be expressly and clearly allowed under the regulations, foreign tribes should not be able to place land into trust over the objection of the resident tribe. For example, should the Kalispel Tribe of Indians ("KTI") purchase or obtain land in the heart of STOI's exclusive aboriginal territory and seek to place it into trust status, STOI (as the resident tribe) should be allowed to object to the FTT application.

In fact, the Tribe has categorically objected¹⁴, and continues to object, to the KTI's efforts to claim Spokane ancestral land as their own through the FTT process. The KTI aboriginal homelands are "far removed" from the Spokane area.¹⁵ Rather than being thankful for the opportunity to engage in economic development activities (including gaming) in our homelands, KTI has spent millions of dollars on lawyers, lobbyists, PR firms and other fast friends to oppose our efforts to provide for our people and meet our vast unmet needs. This well documented, decade long pattern, demonstrates that any further KTI trust acquisitions in our homelands will clearly be to our detriment and will not serve the purposes of the IRA. Enough is enough. This should not be allowed to continue. Unfortunately, we know, for a fact, that STOI is not the only tribe to suffer from marauding, foreign tribes in this manner. If resident tribe objects, the BIA and DOI should honor that objection and deny the foreign tribe's FTT application.

It may be argued in comments that nothing in the Indian Reorganization Act ("IRA") requires consideration of another tribe's comments and objections based upon its own claims of "aboriginal tie." However, nothing in the IRA requires that concerns of state, counties, or other local government be considered. "Generally speaking, the Secretary has broad discretion under the Indian Reorganization Act of 1934 (IRA) ... 25 U.S.C. § 465, to decide whether to acquire land in trust on behalf of Indian tribes." *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001)

As with states, counties, and others, we support the DOI's efforts here, as amended, and request that the DOI give resident tribe's a seat at the table, an opportunity to provide written comments just as other local governments, and meaningfully object to the FTT applications of foreign tribes. This is in line with the purpose and policy of the IRA, which is to restore tribal homelands, not to allow marauding tribes to use the federal government as a surrogate to exercise governmental authority over an objecting tribe's homelands.

III. THE TRIBE OPPOSES ALL OTHER PROPOSED AMENDMENTS TO THE FEE-TO-TRUST PROCESS AND ITS REQUIREMENTS.

¹⁴ Spokane Tribal Resolution 2015-402, wherein the Tribe formally and categorically objected to the DOI placing any more land located within the STOI's exclusive Aboriginal Territory into trust for KTI and requested notice and meaningful opportunity to comment on any request by KTI for the DOI to place any further lands located with STOI exclusive Aboriginal Territory into trust.

¹⁵ U.S. Dep't of the Interior, Assistant Secretary-Indian Affairs, Secretarial Determination for The Spokane Tribe of Indians, at 30, n.160 (2015).

As discussed previously, the IRA authorizes the Secretary to place land into trust for the benefit of tribes. This authorization does not include any limitations, restrictions, or other burdensome criteria, and was intended to allow tribes to restore their homelands. Since then, the IRA FTT process have become more and more costly and more difficult to successfully navigate.

These latest amendments, but for the one hidden gem discussed previously in these comments, are more of the same. They create additional categories of land, require even more unnecessary criteria, increase the cost and delays of the FTT process, impose a 30-day waiting period which allows for increased litigation, and allow local governments ever greater power and opportunity to object to or obstruct FTT applications.

A. New and Separate Categories for Gaming and Non-Gaming FTT Applications are Not Required by the IRA, and are Not Needed.

The clear and unambiguous language of the IRA authorizes the Secretary to acquire lands for the purpose of “providing lands for Indians” and then place said land into trust status. The IRA does not differentiate between on or off-reservation lands, nor does the IRA require the Secretary to treat certain lands differently. Neither did the original 1980 FTT regulations nor the 1995 amendments.

It has been nearly 40 years since the original FTT regulations were established and the Tribe finds it odd that the DOI and BIA would only now seek to divide FTT applications into new categories, gaming and non-gaming. There is no legal authority, basis, or need to divide applications into this manner. The IRA provided the Secretary with authority to take lands into trust. Period. There is no limitation on what types of land he accepts, or the use of that land

Gaming activities on trust lands are already highly regulated and subject to multiple laws and regulations. The Indian Gaming Regulatory Act (“IGRA”) governs gaming on trust lands, both on and off a reservation.¹⁶ Under IGRA, tribes are generally prohibited from conducting gaming operations on trust land acquired after October 17, 1988.¹⁷ The exceptions to this general ban against gaming are detailed and rigorous, which the STOI knows all too well having successfully navigated through the § 2719 two-part determination process fairly recently.¹⁸ 25 C.F.R. Part 292 provides additional guidance regarding on trust land acquired after October 17, 1988.¹⁹ Any additional regulations under 25 C.F.R. Part 151 to govern gaming on trust lands are redundant and are not needed.

B. The Additional Criteria Required for FTT Applications are Burdensome and are Not Necessary.

The proposed amendments create additional requirements for all off-reservation FTT applications. The Tribe supports only one of these new requirements, the historical and modern connection, as discussed in these comments previously. The other two new considerations are: 1) whether the

¹⁶ 25 U.S.C. § 2701, *et seq.*

¹⁷ 25 U.S.C. § 2719(a).

¹⁸ 25 U.S.C. § 2719(b)(1)(A) and (B), and § 2719(b)(2)(A) and (B).

¹⁹ 25 C.F.R. Part 292.

FTT acquisition “will facilitate the consolidation of the Tribe’s land holdings and reduce checkerboard patterns of jurisdiction”, and 2) “whether the Tribal government can effectively exercise its governmental and regulatory powers at the proposed site.

Tribes familiar with the regulations for off-reservation gaming on recently acquired land may recognize some of this language. After all, these types of requirements were previously found only in off-reservation gaming applications, which are few and far between. We know, first hand, just how rare, difficult, and time consuming off-reservation applications can be. Unfortunately, the new amendments are not limited to gaming acquisitions alone. Instead, these new criteria apply to *all* off-reservation FTT applications, both gaming and non-gaming alike. This creates new and unnecessary burdens on tribes seeking FTT acquisitions for purposes other than gaming operations. [For example, a tribe may want to acquire lands not for any financial or industry-based reason, which would clearly require exercise of tribal governmental and regulatory powers. Rather, the tribe may simply recognize the land as archaeologically or culturally significant and seek to preserve it for the future by simply leaving the land in its current state. Requiring the tribe to show it can flex its regulatory muscle is be unduly burdensome on the tribe and does not seem to accomplish very much.

These new regulations will certainly impact the already scarce resources of many tribes across the United States. Even just a small understanding of the problems facing Indian Country, and the BIA has more than only a small understanding, there are better uses for tribal resources, both in terms of manpower and in money. Tribes in every corner of the country struggle to address the many unmet needs of their members. Additional requirements and criteria, may divert already insufficient resources away from critical programs. Tribes are in need of FTT acquisitions, in part, to restore their homelands and provide for their people. These acquisitions are intended to be part of the solution to the problem of unmet needs. Instead, the DOI and BIA expect the Tribe to deplete its resources in pursuit of land, land to be used to obtain more resources for the Tribe. This does not make sense.

C. The Amendments Enable Opponents to More Easily Block FTT Acquisitions.

The proposed amendments also grant states, local governments, and other FTT opponents greater ability and opportunity to obstruct FTT applications.

Tax rolls and jurisdictional impacts have long been common criticisms against FTT acquisitions. While such considerations were not included in the 1980 regulations, they were added in the 1995 amendments which remain in effect today. Current 25 CFR § 151.11 already allows state and local governments to “provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.”²⁰ Under the existing regulations state and local governments already have significant opportunity to comment on FTT applications.

Under the proposed amendments, local governments and other opponents would also be able to complain of “potential conflicts of land use”. This will allow opponents of a FTT application to slow or prevent the transfer, which flies in the face of the IRA’s intent to restore tribal homelands.

²⁰ 25 C.F.R. § 151.10(d).

D. The Proposed Two-Step Review Process is Flawed.

DOI's proposed amendments create a "two-step" review process for all FTT acquisitions. Under proposed § 151.11(c)(1), the Secretary completes an "initial review" going through more in-depth review. If a tribe's FTT application fails to "adequately" address the new and burdensome criteria, the Secretary may deny the application early in the process. This model is ill-advised and problematic.

First, imposing a two-step review will create additional delays to an already too-long application process. Delays are more than simply inconvenient; they can force vital projects to a standstill and leave tribes in limbo, sometimes for years. Even if a FTT application successfully completes the initial review, overcoming the new and unnecessary criteria, it must still address the second part of the process where it is reviewed for compliance with the National Environmental Policy Act ("NEPA"), *Carcieri v. Salazar*, 555 U.S. 379 (2009)²¹, and 25 C.F.R. Part 292 compliance, where applicable. If a tribe prefers to submit all the materials at once, taking a gamble that the FTT acquisition will be approved, such an action should be allowed. DOI should focus on streamlining the FTT process rather than reducing it to a crawl.

Second, § 151.11(c)(1)(iii) states "If the initial review reveals that the application fails to address, or does not *adequately* address, the information required in paragraph (a), the Secretary will deny the application...." (emphasis added). Using "adequately" as the standard of proof for the initial review is insufficient. "Adequately" is a subjective standard which may increase the risk of bias in the review process and arbitrary and capricious determinations. This leaves both the DOI and the tribe vulnerable to lawsuits.

Third, the amendments will increase the cost of the FTT process. The addition of new criteria will require tribes to spend more time and resources to prepare compliant applications. It also requires the DOI to use more time and resources to perform the two-part review process. This is not in the best interest of the tribes or DOI. Reinstating the 30-day waiting period before land is placed into trust slows down the FTT process and grants opponents an automatic 30-day window to fabricate and file frivolous lawsuits. This all but guarantees increased litigation as it and increases the cost of FTT acquisitions, for both the tribe and DOI. However, it does *not* create new avenues of judicial review for opponents; they are already able to file suit and, potentially, overturn any FTT determination.²² Based on this history, it is unclear who benefits from this rule change.

Finally, the proposed amendments lack flexibility. The existing regulations allow tribes to work with the BIA to correct FTT application deficiencies, which is helpful to avoid potential administrative appeals, litigation, and the costs thereof. The proposed amendments will cut off this avenue of cooperation.

²¹ In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court interpreted the IRA's "now under Federal jurisdiction" as a limitation which allowed the Secretary to take land into trust only when the tribe was federally recognized in 1934.

²² In *Patchak v. Zinke*, 138 S. Ct. 897 (2018), the *Supreme* Court ruled that DOI was not immune from lawsuits filed after land was actually placed into trust.

IV. CONCLUSION

The Tribe fully supports amendments which would require the BIA to consider a resident tribe's objections to a foreign tribe's FTT application. Such an amendment in line with the IRA's purpose of restoring tribal lands, as it would protect resident tribes from losing their homelands to foreign tribes lacking any real connection to the area or property. Resident tribes should have the ability and opportunity to comment on FTT applications on par with state and local governments.

However, STOI's support begins and ends with these aboriginal tie requirements. The remaining FTT amendments make things even more difficult for tribes to put land into trust status. These amendments are burdensome, costly, cause lengthy delay, and are unnecessary. Further, such revisions do not help tribes nor are they in line with the purpose or spirit of the IRA. The Tribe urges the DOI and BIA to reconsider these amendments to 25 C.F.R. § 151.11 and § 151.12.