



**CONFEDERATED TRIBES OF
COOS, LOWER UMPQUA AND SIUSLAW INDIANS
TRIBAL GOVERNMENT**

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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 Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians’
Comments on the Proposed Revisions to 25 C.F.R. § 151, Fee-to-Trust
Regulations**

Dear Mr. Tashuda:

The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (“CTCLUSI” 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.

The other proposed changes to the 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 CTCLUSI, 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.

All said, our ancestral homeland encompasses approximately 1.6 million acres of resource-rich lands lying along a 75-mile long (as the Raven flies) section of the Oregon coast, and extending inland across the Coast Range to Oregon's interior valleys. Our ancestors were the stewards and caretakers of all these lands since time immemorial. CTCLUSI has significant aboriginal ties to these lands, ties which have been thoroughly documented for more than two-hundred years and are supported by an even longer archaeological record.

We will never know the true scale of mortality or crime committed against our ancestors, but it is clear that our Tribe was physically and spiritually exhausted by the late summer of 1855. That is when our people were rounded up, imprisoned, and removed from our lands under force of arms under color of a dishonored and unratified treaty – a treaty of peace and land cession that our ancestors signed in good faith which the Senate failed to ratify and the United States Government refused to honor.

In 1984, after more than 125 years of struggle, Congress extended federal recognition to the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians. Since restoration, our people have worked tirelessly to rebuild our relationship with our lands, resources, and distinct Tribal cultures. We have resumed our roles of stewards and caretakers of the lands and resources that were once managed by our ancestors. This includes the nearly 15,000 acres of current Bureau of Land Management (“BLM”) land which, under H.R. 1306, requires the Secretary of the Interior (“Secretary”) to place into trust for the benefit of CTCLUSI. Prior to this legislation, the Tribe was nearly landless, holding only small pockets of trust and fee property throughout our aboriginal territory. However, CTCLUSI still faces many challenges on this front. The BLM lands are mostly forest areas and the Tribe is in need of lands for tribal offices, homes, youth summer camps, and more. CTCLUSI also seeks to consolidate its land base and place additional land into trust to guard and care for it as our ancestors did generations ago, even against claims from fellow tribes.

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.¹ Later, in 1934, Congress passed the Indian Reorganization Act (“IRA”). Though the IRA is generally seen as a corrective response to the General Allotment Act²³ 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.”⁴ 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.

¹ House Subcommittee Memo, May 12, 2015 (available at https://naturalresources.house.gov/uploadedfiles/hearingmemoiiian5_14.pdf).

² *Id.*

³ House Subcommittee Memo, July 11, 2017 (available at https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_ov_hrg_07.13.17.pdf).

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

The Bureau of Indian Affairs (“BIA”) first published and standardized regulations to guide the FTT process in 1980.⁵ 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.”⁶ 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 1995.⁷ Among other changes, the 1995 amendments, which remain in effect today, expanded Secretary consideration of impacts on non-Indian communities, expressly allow state 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 that the 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.

⁵ 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).

⁶ 45 FR 62034 (Sept. 18, 1980).

⁷ 60 FR 32874 (June 23, 1995).

When foreign tribes come onto the undisputed, exclusive aboriginal territory of the CTCLUSI to petition the Secretary to take CTCLUSI 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 another Indian tribe purchase or obtain land in the heart of CTCLUSI's exclusive aboriginal territory and seek to place it into trust status, CTCLUSI (as the resident tribe) should be allowed to object to the FTT application.

It may be argued in comments that nothing in the 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 ... 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.

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.⁸ Under IGRA, tribes are generally prohibited from conducting gaming operations on trust land acquired after October 17, 1988.⁹ The exceptions to this general ban against gaming are detailed and rigorous.¹⁰ 25 C.F.R. Part 292 provides additional guidance regarding on trust land acquired after October 17, 1988.¹¹ 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 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. 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, CTCLUSI has submitted a FTT application concerning property we refer to as “Fossil Point” which we generally intend to hold and preserve in its current, archaeological and culturally significant state. CTCLUSI, a mandatory PL-280 tribe, does not anticipate building any facilities on the property, or doing much more than protecting the property. As such, how can CTCLUSI possibly show whether we can effectively exercise our governmental and regulatory powers? Even if we could show this, to what end? Other tribes almost certainly face similar concerns.

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.

⁸ 25 U.S.C. § 2701, *et seq.*

⁹ 25 U.S.C. § 2719(a).

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

¹¹ 25 C.F.R. Part 292.

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.”¹² 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.

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)¹³, 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

¹² 25 C.F.R. § 151.10(d).

¹³ 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.

review for opponents; they are already able to file suit and, potentially, overturn any FTT determination.¹⁴ 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.

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, CTCLUSI's support begins and ends with these aboriginal tie requirements. The remaining proposed FTT amendments make it 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.

¹⁴ 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.