



The Confederated Tribes of the Colville Reservation

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RE: Comments on Proposed Changes to Fee-to-Trust Regulations

On behalf of the Confederated Tribes of the Colville Reservation (“CCT” or the “Colville Tribes”), please consider these comments on the Department of the Interior’s (“Department”) possible reopening of the fee-to-trust regulations (“FTT”) at 25 CFR Part 151. As I stated at the January 25, 2018, consultation in Portland, Oregon, the CCT opposes more regulations to the fee-to-trust process or otherwise reopening the regulations. With the current Administration’s efforts to streamline regulatory processes throughout the federal government, we find it curious that the Department is considering additional regulatory requirements to the FTT process in the first instance.

Additional regulatory burdens on the FTT process, as I stated at the Portland consultation, will cause additional delay for tribal economic development which, in turn, will affect tribal governmental revenues. Every regulatory delay imposed on a project adds to poverty, unemployment, and to tribes’ ability to become self-sufficient.

As discussed in our responses to the Department’s consultation questions, below, while the CCT rejects reopening the Part 151 regulations, it does support the Department issuing guidance or directive that expedites certain FTT applications.

1. What should the objective of the land-into-trust program be? What should the Department be working to accomplish?

The objective should be to encourage tribal economic development, consolidation of tribal land bases, elimination of jurisdictional conflicts with states, and preservation of trust resources. The ability to place land into trust is a critical mechanism for tribes to protect and restore their land bases.

During the 1880s, the Colville Tribes came under increasing pressure to cede the North Half of the Colville Indian Reservation (“North Half”), in large part because it was rich in

minerals. A federal delegation was dispatched to the Colville Indian Reservation to seek a cession of the Tribes' lands. In 1891, many of the various aboriginal Indian tribes and bands of the Colville Indian Reservation approved the Agreement of May 9, 1891, under which the Colville Tribes ceded the North Half, which consists of roughly 1.5 million acres. However, the 1891 Agreement also reserved to the Colville Tribes and its citizens several important rights to the ceded land. On July 1, 1892, Congress approved an Act, which "vacated and restored to the public domain" the North Half. The ceded North Half is bounded on the north by the U.S.-Canadian border, on the east by the Columbia River, on the west by the Okanogan River, and on the south, is separated from the south half of the Colville Indian Reservation by a line running parallel to the U.S.-Canadian border located approximately 35 miles south thereof.

The North Half has been, and remains, an integral part of the Colville Tribes and its membership. In 2016, the Department had reaffirmed that through 638 contracts, federal statutes, and court decisions that the CCT possesses jurisdiction over the more than 160 trust allotments in the North Half. The CCT actively continues to acquire land in the North Half in an effort to restore its reservation land base and to complement the CCT's efforts to expand not only its homeland, but also its forest management and economic development capabilities.

To add any additional hurdles to the FFT process would impair the CCT's efforts to restore its North Half land base, which the Department has long supported and provided the CCT assistance.

2. How effectively does the Department address on-reservation land-into-trust applications?

Although on-reservation applications can be approved by BIA agency offices, these should be considered mandatory trust acquisitions. The present day Colville Indian Reservation covers 1.4 million acres or 2,200 square miles. The Colville Tribes owns more than 90,000 acres of fee land *within* the reservation boundaries, most of which is uninhabited forest or rangeland that is contiguous to other trust land. In Washington State, nearly all of these lands are excluded from the state and county tax rolls by operation of a state law that excludes tribally owned fee lands that are used for governmental purposes. The Department should consider guidance that expedites these types of non-controversial on-reservation lands being placed into trust status. The Department should also consider removing requirements for cadastral surveys and Phase I Environmental Site Assessments when tract history and adjacent land ownership provides this information.

3. Under what circumstances should the Department approve or disapprove an off-reservation trust acquisition?

The Department should approve off-reservation trust applications where there are no environmental concerns, no encumbrances to title, and the application is consistent with the current 151 regulations. As with the CCT's lands in the North Half, the Department should not

assume that an application is controversial merely because a parcel is outside the boundaries of an existing reservation. The vast majority of FTT applications, whether on- or off-reservation, are not controversial. In some cases, federal entities actually provide tribes the funds to acquire land and proceed through the FTT process. For example, the Bonneville Power Administration (“BPA”) provides funds to the CCT to acquire and place into trust lands for habitat mitigation purposes. The BPA does this to comply with a requirement of the Northwest Power Act, which requires it to mitigate for fish and wildlife habitat in its hydropower operations.

The Department should not allow a handful of applications that may be considered controversial to guide policy making and create new burdens for everyone else.

4. What criteria should the Department consider when approving or disapproving an off-reservation trust application?

The Secretary of the Interior (“Secretary”) should continue to use the current considerations at 25 CFR §151.11, but we recommend developing categorical exclusions for FTT applications to help facilitate the NEPA process. The Department has previously issued categorical exclusions for fractionated interests, so precedent exists for additional exclusions.

The current regulations strike an effective balance between the Secretary’s fiduciary duty to Indian tribes and the need to take into consideration comments from state and local governments. However, the Department has a trust responsibility to Indian tribes and not to state and local governments. This trust responsibility is delegated from Congress, through the Indian Commerce Clause, which established the federal-tribal relationship, leaving no room for state regulatory authority in Indian affairs absent affirmative acts of Congress.

5. Should different criteria and/or procedures be used in processing off-reservation applications based on:

a. Whether the application is for economic development as distinguished from non-economic development purposes (for example, Tribal government buildings, or Tribal health care, or Tribal housing)?

This is largely a NEPA question. NEPA provides the analysis to determine whether there are any significant effects to the human environment that would affect the Department’s decision to acquire the land in trust status. As a policy matter, tribal economic development is an essential component of tribal self-sufficiency and there should be no distinction for the purposes of trust land acquisition whether the acquisition is for economic development or other purposes.

b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?

As noted in paragraph (a), above, this is currently handled through the NEPA process. For example, a small gaming facility would be much less intrusive than an open pit mine. To the extent the Department intends to propose changes to the regulations that further distinguish treatment of gaming-related applications from other economic development-related applications, the CCT believes the Department's off-reservation gaming regulations at 25 CFR Part 292 provide sufficient guidance.

c. Whether the application involves no change in use?

Any application that involves no change in use (i.e., does not trigger NEPA) should receive expedited consideration, such as the CCT's efforts to acquire its on-reservation forest and range parcels into trust. The Department should issue informal guidance to expedite these applications.

6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?

Advantages to operating on trust lands include preemption of state and local taxes and regulations on the land and improvements, enhanced tribal jurisdiction, and the ability to exclude third parties. Disadvantages of trust land are that most uses of the land require BIA approval, which can be time consuming. The only advantage of operating on fee land is that no BIA approval is required.

7. Should pending applications be subject to new revisions if/when they are finalized?

No. This question is concerning because it insinuates that pending applications are currently in a holding pattern until the Department decides how to process them. The Department has consistently stated that its goal is to reduce barriers and improve efficiency. If true, current pending applications should be processed under the current regulations. If any changes are proposed, only applications submitted after the date those regulatory changes are final and in effect should be processed under such new regulations.

8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?

There should be a presumption in favor of the tribal interests when state and local jurisdictions assert generalized concerns about loss of tax revenue, jurisdiction, etc. The Interior Board of Indian Appeals has consistently noted that these types of generalized concerns do not factor into its decisions or analysis when reviewing administrative appeals of FTT applications.

9. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?

MOUs and similar agreements generally assist in relationships between tribes and state/local governments, particularly with respect to law enforcement and other emergency services. However, the Department absolutely should not include MOUs within the FTT as a requirement or a consideration. This is critical because even the mention of MOUs in this context would severely undercut tribal interests during negotiations of such agreements.

If the Department were to revise its regulations or issue a directive that mentions MOUs as a consideration or requirement for FTT acquisitions, state and local governments will be able to withhold their acquiescence to such agreements until the tribal applicant has met all of their concerns. Under the current framework, state and local governments have more of a motivation to work with tribes and enter into agreements on a government-to-government basis. This should not be changed.

10. What recommendations would you make to streamline/improve the land-into-trust program?

If the Department is to consider any changes to the FTT process, it should (1) expand the use of categorical exclusions in the FTT process; (2) issue a directive or other guidance that treats on-reservation FTT applications as mandatory acquisitions or, at a minimum, expedites non-controversial on-reservation applications; (3) extend the current six month timeframe for Phase I environmental site assessments to one year, which will ensure that tribes do not need to pay to have these surveys updated should an application encounter a delay in the FTT process; and (4) re-delegate decision making on non-gaming off-reservation FTT applications to BIA Regional Directors.

Sincerely,



Dr. Michael Marchand