

CONFEDERATED TRIBES OF THE UMATILLA INDIAN
RESERVATION

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DEPARTMENT OF NATURAL RESOURCES

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TO: Healthy Forest Reserve Program	FROM: Audie Huber
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NOTES/COMMENTS:

Please find attached the comments of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) provides the following comments regarding the draft regulations for the Healthy Reserve Program (HFRP) for the Natural Resources Conservation Service (NRCS) published in the Federal Register. 74 Fed. Reg. 1954 (January 14, 2009).

C O N F I D E N T I A L N O T I C E

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DEPARTMENT OF NATURAL RESOURCES

Rec'd
3/25/09



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March 20, 2009

Easements Programs Division
Natural Resources Conservation Service,
Healthy Forest Reserve Program Comments
P.O. 2890, Room 5234-S,
Washington, DC 20013.

Re: Healthy Forests Reserve Program Regulations

Submitted Electronically to www.Regulations.gov

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) provides the following comments regarding the draft regulations for the Healthy Reserve Program (HFRP) for the Natural Resources Conservation Service (NRCS) published in the Federal Register. 74 Fed. Reg. 1954 (January 14, 2009). Unfortunately, the CTUIR DNR was not aware that these regulations were available for comment until we received an e-mail from the local NRCS representative 14 days prior to the expiration of the 60 day comment period. Due to this short timeframe, we were not able to give the draft regulations the full and careful review that would otherwise have occurred. However, we do have the following comments on the proposed regulations.

The CTUIR DNR has adopted the following "First Foods" mission:

"To protect, restore, and enhance the first foods - water, salmon, deer, cous, and huckleberry - for the perpetual cultural, economic, and sovereign benefit of the CTUIR. We will accomplish this utilizing traditional ecological and cultural knowledge and science to inform: 1) population and habitat management goals and actions; and 2) natural resource policies and regulatory mechanisms."

This mission emphasizes the indivisible nature of natural resources and tribal culture. It also provides a framework to identify management goals and leverage practical areas of overlap with co-managers such as the NRCS. It is our intent to fulfill this mission for both the benefit of the CTUIR, and agencies with Trust responsibility and who need to be responsive to Tribal values, rights, and goals.

TREATY, JUNE 9, 1855 ♦ CAYUSE, UMATILLA AND WALLA WALLA TRIBES

Of particular note, the HFRP regulations rely on section 8205 of the 2008 Farm Bill to reject application of funds on Indian Lands which are held in trust. To justify this assertion the regulations rely on the conference report to the 2008 Farm Bill. This interpretation is arbitrary, capricious and otherwise not in conformance with the law. Section 8205 states in relevant part:

(3) **ACREAGE OWNED BY INDIAN TRIBES.**—In the case of acreage owned by an Indian tribe, the Secretary may enroll acreage into the healthy forests reserve program through the use of—

- (A) a 30-year contract (the value of which shall be equivalent to the value of a 30-year easement);
- (B) a 10-year cost-share agreement; or
- (C) any combination of

There is no ambiguity in this provision. If land is owned by a tribe, that land may be enrolled in the healthy forest reserve program. The vast majority of lands owned by tribes are held in trust by the United States. NRCS seems to be concluding that because the US holds title, the lands are not owned by the tribe. This is illogical and counter intuitive. Agencies are only allowed to look to legislative history in the event that there is ambiguity in the legislative language. Here there is none. The tribes are beneficial owners of vast tracts of lands on reservation where the title is held by the U.S. To exclude those lands is to thwart the express language of the statute. Further, this is the only instance in the proposed regulations where NRCS relies upon the conference report. Facially, it appears to be an attempt to selectively read the legislation in order to exclude trust lands on reservation in reliance upon a report that was not debated nor was it voted upon by congress and has no force and effect of law. This conference report is legislative history, but legislative history is a last resort when attempting to discern legislative intent. The legislation itself is always the starting point and the regulations as drafted ignore the plain meaning of the legislation. In the variety of other regulations NRCS is adopting, tribal trust lands are suitable for the projects, but not for the HFRP. There is no logical distinction to allow some programs on trust lands with identical legislative authorization while excluding them from HFRP. The regulations must be amended to remove the restriction that HFRP can only be on tribal fee lands. This includes the definition of "Acreage Owned by Indian Tribes" in § 625.2 and any other references to this interpretation. The NRCS can not rewrite laws based on a selective reading of legislative history.

Further, the regulations characterize the removal of trust lands from other provisions of the existing regulations and characterize the change as a "minor change." 74 Fed. Reg. 1961. This is hardly a minor change. Taking an entire classification of Indian lands out of consideration for the HFRP due to a reference in a conference report is an extremely significant change that should have been subject to consultation under Executive Order 13175. In the preamble to the regulations, it notes that "this proposed rule will not have substantial direct effect on one or more Indian tribes." 74 Fed. Reg. 1956. The CTUIR DNR disagrees. This change will have direct, significant effects on tribes operating these programs.

Congress knows how to exclude trust lands from legislation. For instance, in the very same bill, the 2008 Farm Bill, in Section 5501 it states "(2) EXCLUSION.—Section 4 shall not apply to trust land, restricted tribal land, or tribal corporation land that is mortgaged in accordance with paragraph (1)." Further, Section 8003 of the same bill states "(6) EFFECT ON TRUST LAND.— (A) INELIGIBILITY.—The Secretary shall not provide a grant under the Program for any project on land held in trust by the United States including Indian reservations and allotment land)." From this language it is unmistakably clear congress knows how to exempt application of a law to tribal trust lands. Congress did not do so in this case. Indeed, with this legislative backdrop, it is difficult to understand how NRCS could read "acreage owned by Indian Tribes" to exclude lands beneficially owned by a tribe and held in trust by the US without some express, unequivocal, affirmative language to do so. The CTUIR DNR would appreciate a written justification that tribal trust lands are excluded under the above referenced language can exclude tribal trust lands.

On the issue of tribal consultation, it is not clear that the regulations require consultation with tribes when actions NRCS funds off reservation directly impact a treaty reserved resource of the tribes. The regulations overall are silent on this issue. Tribal consultation is the cornerstone of the trust responsibility owed the tribes by federal agencies. Failing to mandate tribal consultation for projects which may impact treaty reserved resources is a significant oversight. This is not to presuppose that NRCS projects may damage treaty rights or resources, only that there may be impacts, good or bad. The CTUIR DNR suggests that the regulations require consultation with tribes to discuss impacts and evaluate the effectiveness of the program over time so that the NRCS can meet its trust responsibility to the tribes.

The CTUIR expects the NRCS to comply with Section 106 of the National Historic Preservation Act, 16 USC § 470 and 36 CFR § 800, for all it's undertakings including Environmental Quality Incentives Program, Farm and Ranch Lands Protection Program, Grassland Reserve Program, Healthy Forest Reserve Program, Technical Service Provider Assistance program, Wetlands Reserve Program, Wildlife Habitat Incentives Program or any other project of NRCS. In order to assess whether sites listed in or eligible for inclusion in the National Register are within the Area of Potential Effect (APE), a cultural resource investigation must be conducted. The SHPO/THPO and affected Tribes need to be consulted with throughout the process. This includes reviewing cultural resource reports in order to assess the effects the undertaking may have on cultural resources and make any needed recommendations. The agency evaluates the historic significance of the resources in consultation with the SHPO and affected tribes.

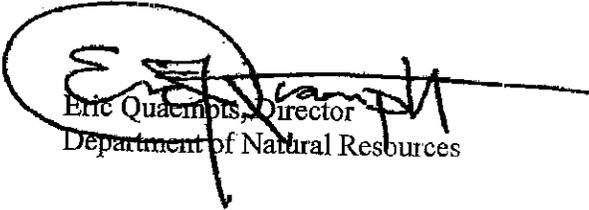
Currently for off-reservation projects, the NRCS provides the CTUIR with a spreadsheet that includes location only to section and the type of activity that is to occur. There is no description as to the extent of the activity, just "stream rechannel" or "prescribed burn". The CTUIR does not receive the results of the cultural resource investigations and therefore has no idea what resources were identified and therefore potentially affected by the proposed undertaking. The CTUIR believes that consultation is critical throughout the process. As 36 CFR 800.1(a) says, "The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of

project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties." The CTUIR feels that it is vital to be consulted with on the determination of the APE of the proposed undertaking and the results of the investigation to determine whether or not historic properties will be effected. Without this information, the CTUIR finds it difficult to assess whether historic properties of religious and cultural significance will be impacted.

Further, another issue has created some conflict with Washington State NRCS staff who believe that funds identified in legislation for a specific purpose and specific recipient do not require compliance with Section 106 of the NHPA because the funds are "pass-through funds." The Advisory Council on Historic Preservation, the federal agency responsible for monitoring the implementation of the NHPA, has taken the position that unless the legislation expressly exempts the funding from environmental laws in general or the NHPA specifically, the federal agency must comply with Section 106. Please clarify this directive to your state staff.

Again, due to the short time frame, we were not able to provide detailed review of the regulatory proposal. In the future, I would appreciate notices such as these be mailed to myself as the Director of DNR and Gordy Schumacher, program manager of the Forest, Agriculture, and Range Programs. The CTUIR DNR expects a written response to the questions posed in this letter. If you have any questions, please contact Mr. Schumacher at 541-278-3792.

Sincerely,


Eric Quacimpts, Director
Department of Natural Resources