

Committee on Natural Resources  
Rob Bishop, Chairman  
Markup Memorandum

December 11, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff, Subcommittee on Indian, Insular and Alaska Native Affairs, (x-6-9725)

Hearing: **S. 1285 (Sen. Jeff Merkley)**, A bill to allow the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes of Siletz Indians of Oregon, the Confederated Tribes of Warm Springs, the Cow Creek Band of Umpqua Tribe of Indians, the Klamath Tribes, and the Burns Paiute Tribes to lease or transfer certain lands.  
**December 12-13, 2017, 1324 Longworth HOB**

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**S. 1285 (Sen. Jeff Merkley), “Oregon Tribal Economic Development Act”**

**Summary**

S. 1285 was introduced by Sen. Jeff Merkley (D-OR) on May 25, 2017, and passed the Senate on November 30, 2017. The bill would clarify that seven federally recognized tribes in Oregon<sup>1</sup> can buy, sell, lease, or otherwise convey their non-trust (fee simple) owned land without approval from the federal government. According to the tribes, without clarification, an overly broad interpretation of the Indian Non-Intercourse Act<sup>2</sup> could potentially hamper economic development on existing tribal lands, even if they are not held in trust.

**Cosponsors**

Sen. Ron Wyden (D-OR)

**Background**

***Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians***

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (Tribes) are the aboriginal inhabitants of the central and south-central coast of Oregon. After initial contact with fur traders in the early 1800’s, these tribes along the Oregon coast negotiated a treaty with the United States in 1855; however, the treaty was never ratified nor the terms fully realized.

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<sup>1</sup> Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, the Confederated Tribes of the Grand Ronde Community, the Confederated Tribes of Siletz Indians, the Confederated Tribes of Warm Springs, the Cow Creek Band of Umpqua Tribe of Indians, the Klamath Tribes, and the Burns Paiute Tribes

<sup>2</sup> 25 U.S.C. §177.

In 1940, six acres were bestowed to the tribes by a non-Indian; later these lands were placed into trust by the Department of the Interior. These six acres, which constituted the Tribes' reservation, are located approximately 100 miles southwest of Eugene, Oregon.

In 1954 the Tribes, along with several other tribes in Oregon, were terminated pursuant to the Western Oregon Termination Act,<sup>3</sup> effective August 1956. However, the Tribes federal recognition was restored in October 1984.<sup>4</sup> Under that Act, approximately 1.02 acres in Coos County, Oregon, and several other counties, were placed into trust for the establishment as a reservation for the Tribes. In 1998, Congress placed an additional tract of land into trust for the Tribes.<sup>5</sup>

Today, the Tribes have 153 acres held in trust by the United States. Over the years the Tribes have acquired land through donations and purchases, including 98 acres of restored land along Highway 126 in Florence, Oregon, where the Three Rivers casino is located.

### **The Indian Trade and Intercourse Act**

The Indian Trade and Intercourse Act of 1790,<sup>6</sup> reserves to the United States the exclusive right to acquire Indian lands. The Act was intended to protect Indian tribes by preventing the loss of their lands, except by treaty. It does so by preventing the transfer, sale, lease, or other conveyance of land owned by an Indian tribe to third parties without federal approval. This prohibition applies to both trust and fee lands, regardless of the source of money used to obtain the lands. Over the centuries, a number of acts of Congress providing for the acquisition, conveyance, and leasing of land in trust for Indians have had the effect of superseding the Trade and Intercourse Act even though this Act has never been repealed.

In recent years, the Act has generally not interfered with the ability of a tribe to buy, sell, or lease land that it owns in fee simple. However, there is precedent for tribes to seek legislation in Congress to waive it, as S. 1285 does, for transactions of non-trust land over an abundance of caution by both the tribal and non-tribal parties. In the 113th and 114th Congresses, similar bills were enacted into law, allowing the Miami Tribe of Oklahoma and the Fond du Lac Band of Lake Superior Chippewa to lease or transfer fee land the tribe owned.<sup>7</sup> In the 106th Congress, a bill was enacted into law, with a similar purpose, for the Lower Sioux Indian Community in Minnesota.<sup>8</sup> Congress has also enacted several other pieces of legislation authorizing several tribes to sell or mortgage specific lands.<sup>9</sup>

S. 1285 would expressly authorize seven tribes in Oregon to have more control over land that the tribe owns in fee without further federal approval. The bill simply ensures that the Trade and Intercourse Act does not interfere with the ability of the seven tribes to convey fee land. The

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<sup>3</sup> Chapter 733, 68 Stat. 724.

<sup>4</sup> See P.L. 98-481.

<sup>5</sup> See P.L. 105-256.

<sup>6</sup> 25 U.S.C. § 177.

<sup>7</sup> See P.L. 114-127 and P.L. 113-88.

<sup>8</sup> See P.L. 106-217.

<sup>9</sup> See P.L. 102-497, 106 Stat. 3255; P.L. 107-331, 116 Stat. 2834; P.L. 103-435, 108 Stat. 4566; P.L. 105-256, 112 Stat. 1896, P.L. 110-76.

tribes have stated that without S. 1285, these tribes would have difficulty demonstrating clear title to land necessary for securing financing vital to executing real estate transactions.

### **Need for Legislation**

As noted previously, while the Trade and Intercourse Act has not generally interfered with a tribe's fee land dealings, the Act has generated a great deal of litigation throughout history which has resulted in several court decisions on the issue. Although the purpose of the Act is viewed by some as outdated, the U.S. Supreme Court in 2005 said it "remain[s] substantially in force today... [and] bars sales of tribal land without the acquiescence of the Federal Government."

S. 1285 would allow each of the aforementioned tribes<sup>10</sup> in Oregon to lease, sell, convey, warrant, or transfer all or any portion of interest in any real property not held in trust for the Tribes. The bill also states that the legislation does not authorize the Tribes to lease, sell, convey, warrant, or otherwise transfer all or any portion of any interest in any real property held in trust for their benefit.

### **Administration Position**

On July 12, 2017, the Senate Committee on Indian Affairs held a legislative hearing on S. 1285. During the hearing, the Administration testified in support of S. 1285.<sup>11</sup> At the September 13, 2017 mark-up of S. 1285, two additional Oregon tribes were added to the bill (Klamath and Burns Paiute tribes).

On November 15, 2017, at a hearing on a substantially similar bill, H.R. 3225, the Administration testified in support.<sup>12</sup>

### **Cost**

The CBO estimated that S. 1285 would have no effect on the federal budget.<sup>13</sup>

### **Anticipated Amendments**

None.

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<sup>10</sup> Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, the Confederated Tribes of the Grand Ronde Community, the Confederated Tribes of Siletz Indians, the Confederated Tribes of Warm Springs, the Cow Creek Band of Umpqua Tribe of Indians, the Klamath Tribes, and the Burns Paiute Tribes.

<sup>11</sup> Legislative Hrg S. 1285. Senate Committee on Indian Affairs. July 12, 2017. 115<sup>th</sup> Congress.

<sup>12</sup> Legislative Hrg. H.R. 3225. SCmte. Indian, Insular and Alaska Native Affairs. November 15, 2017. 115<sup>th</sup> Congress.

<sup>13</sup> <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/s1285.pdf>.