**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLARK COUNTY, WASHINGTON;
CITY OF VANCOUVER, WASHINGTON;
CITIZENS AGAINST RESERVATION SHOPPING (CARS); AL ALEXANDERSON; GREG AND SUSAN GILBERT; DRAGONSLAYER INC.; and MICHELS DEVELOPMENT LLP,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN L. SALAZAR, in his official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; DONALD LAVERDURE, in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs; NATIONAL INDIAN GAMING COMMISSION; and TRACIE STEVENS, in her official capacity as Chairwoman of the National Indian Gaming Commission,

Defendants,

and

COWLITZ INDIAN TRIBE,

Intervenor-Defendant.

Case No. 1:11-cv-00278-RWR
Judge Richard W. Roberts

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56 and LCvR 7(h), Clark County and Vancouver, Washington, Citizens Against Reservation Shopping (CARS), Al Alexanderson, Greg and Susan Gilbert, Dragonslayer Inc., and Michel's Development LLP (Card Rooms) (collectively, Plaintiffs) respectfully move for summary judgment. Plaintiffs' motion should be granted for the reasons that follow.[1]

INTRODUCTION

This case is not about restoring an Indian homeland. It is about reaping a windfall from gambling. For more than a decade, the Cowlitz Tribe's (the Cowlitz or the Tribe) has worked to have approximately 152 acres of land located near La Center, Washington (Casino Site) acquired in trust for a casino. The Tribe's desire to develop a casino near La Center, which is less than a half-hour drive from Portland, is understandable. The closer the casino is to a population center, the more money the Tribe can expect to make. But federal law does not permit the Bureau of Indian Affairs (BIA) to divest local governments permanently of their jurisdiction, disregard the concerns of local citizens, and undermine local businesses that have long supported the surrounding community, so that a tribe can make more money. The Secretary's decision to acquire land in trust for a casino must comply with laws that require a tribe to have been recognized and under federal jurisdiction in 1934 and to have a significant historical connection to the land. The Cowlitz Tribe and the Casino Site do not meet these requirements.

BIA and the National Indian Gaming Commission (NIGC) ignored the statutory, regulatory and judicial limitations on the exercise of their authority in approving the Tribe's trust request and ancillary gaming ordinance. BIA's attempt to circumvent the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), is only one example of the agencies' efforts

[1] This is an administrative record review case; therefore, Plaintiffs are proceeding pursuant to LCvR7(h)(2), which does not require that a separate statement of material facts not in genuine dispute be filed. Citations will refer to either the NIGC record (NIGC ARXXXX), or to the collective OS/AS-IA/SOL/BIA record (ARXXXX).

to avoid the statutory limitations placed on their authority. In 2009, the U.S. Supreme Court ruled that, under the Indian Reorganization Act (IRA), the Secretary can acquire land in trust only for recognized tribes under federal jurisdiction in 1934. Two years later, the BIA's Record of Decision (ROD) approving the Cowlitz Tribe's trust acquisition sidestepped the Court's holding by relying on selective language from minority opinions in the case. BIA concluded that the Cowlitz Tribe was a federally recognized tribe "under Federal jurisdiction" in 1934, notwithstanding the facts that (1) BIA did not recognize the Tribe until 2002; (2) NIGC found that the Tribe was not recognized during the entire twentieth century in 2005; and (3) John Collier, the Commissioner of Indian Affairs and the architect of the IRA, declared *in 1933* that the Cowlitz Tribe was "no longer in existence as a communal entity …, and [had] no reservation under Governmental control."

Like BIA, NIGC also assumed authority that it did not have. NIGC's approvals of a tribal gaming ordinance and an amendment to that gaming ordinance violated the Indian Gaming Regulatory Act (IGRA). NIGC not only took action it had no power to take, it also issued a determination that deviated from precedent and ignored conflicts with its regulations and policies when it approved the Tribe's amendment to its gaming ordinance. Moreover, NIGC failed to address key questions regarding its authority and responsibilities and the scope and impact of its decisions, questions that are critical to the Tribe's effort to bolster its failing application and BIA's environmental review under the National Environmental Policy Act (NEPA).

BIA reliance on NIGC's unlawful decisions to avoid preparing a supplemental environmental impact statement, support its decision to acquire land in trust, and determine that the proposed site could be used for gaming has undermined the decisions BIA sought to strengthen. The Acting General Counsel of NIGC testified to Congress in 2006 that "[t]he

Cowlitz ordinance decision is really an anomaly" that NIGC was "not exactly thrilled with" making because "it is generally much better to let the processes go through." It is "generally much better to let the processes go through" because that is what the law requires.

Like Humpty Dumpty in Lewis Carroll's *Through the Looking Glass*, these federal agencies seem to think that "[w]hen [they] use a word, it means just what [they] choose it to mean—neither more nor less." But words have meaning – BIA cannot make "now" in the IRA mean "whenever" and "significant" in IGRA regulations mean "casual" just because it suits BIA's purposes. BIA and NIGC are bound by the language of the IRA, IGRA, the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and their respective regulations. BIA and NIGC violated those laws in this case; their decisions should be vacated.

STATEMENT OF FACTS

I. Statutory Framework

A. The Indian Reorganization Act of 1934

Congress passed the IRA in June 1934 to repudiate the policies that had been in place since the enactment of the Indian General Allotment Act (Dawes Act), 24 Stat. 388, as amended, 25 U.S.C. §§ 331 et seq.[2] *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 436 (1989). To arrest the loss of Indian land and help rebuild the land base of tribes harmed by allotment policies, Congress authorized the Secretary through Section 5 of the IRA to acquire land and hold it in trust "for the purpose of providing land *for Indians*." Ch. 576, § 5, 48 Stat. 985 (codified at 25 U.S.C. § 465) (emphasis added).[3]

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[2] Established by the Dawes Act in 1887, the allotment program required tribal members to surrender their interest in tribally owned common land – usually a reservation established by treaty, Congress or Executive Order – for a personally assigned undivided interest in parcels of land, allotted to them individually. Cohen's Handbook of Federal Indian Law § 1.4, at 77 (2009).

[3] The trust acquisition process is administered by the Secretary through the Assistant Secretary – Indian Affairs under 25 C.F.R. part 151. This brief refers to decisions made by the Assistant Secretary – Indian Affairs as decisions made by BIA or the Secretary.

Section 19 of the IRA defines the term "Indian" as:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479. The Secretary relied on the first of the three definitions of "Indian" for the Cowlitz trust request. That definition was also the subject of the decision in *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), in which the Court held that "the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 396. The Court held that the Secretary's authority to acquire land in trust pertained only to those tribes that were *recognized* and *under the jurisdiction* of the federal government in 1934. *Id.*

The trust acquisition process requires BIA to consider, among other things, a tribe's purpose for the land, the tribe's need to have the land held in trust, the impacts of the acquisition and the jurisdictional consequences for state and local governments. 25 C.F.R. §§ 151.10, .11. When the Secretary acquires land in trust for a tribe, he divests state and local governments of all regulatory control, including taxation.

B. Indian Gaming Regulatory Act

Congress passed IGRA in 1988 to govern gaming on Indian lands. Pub. L. 100-497 § 5, 102 Stat. 2469 (codified at 25 U.S.C. §§ 2701 et seq.). Congress created the NIGC, a semi-independent commission within DOI, to implement IGRA. 25 U.S.C. § 2704.

Section 20 of IGRA prohibits gaming on land acquired in trust after October 17, 1988, *id.*. § 2719(a)(1), subject to three exceptions, two of which are relevant in this case. Land acquired in trust as "the restoration of lands for an Indian tribe that is restored to Federal recognition" can be used for gaming. *Id.* § 2719(b)(1)(B)(iii). Land acquired as "the initial reservation of an Indian tribe" can also be used. *Id.* § 2719(b)(1)(B)(ii). If the land meets the

requirements of Section 20, a tribe may conduct gaming only if NIGC has approved a tribal ordinance or resolution that authorizes such gaming. *Id.* § 2710(b)(2), (d)(1)(A).[4]

NIGC's regulation of gaming on Indian lands under IGRA is separate from the trust acquisition process, which is overseen by the Secretary under the IRA. The trust process overlaps with IGRA only when the Secretary must determine, as part of a gaming-related trust request, whether the land that a tribe seeks to have taken into trust will be eligible for gaming under Section 20, if acquired in trust. *Id.* § 2719; 25 C.F.R. part 292; *see also* 25 C.F.R. § 151.10(c) (requiring tribes to identify the purpose of a proposed trust acquisition).

C. National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321 et seq., requires federal agencies to take a "hard look" at the environmental consequences of their proposed actions. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). When contemplating any "major Federal action[] significantly affecting the environment," such as a trust acquisition, agencies must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4. The EIS must specify the underlying purpose of a project and the need to which the agency is responding, 40 C.F.R. § 1502.13, and explore and objectively evaluate all "reasonable" alternatives to a proposed action, *id.* § 1502.14. The agency must also "provide [a] full and fair discussion" of the "significant impacts" of a proposed action on the environment, including a discussion of the probable beneficial and adverse social, economic, and environmental effects of each alternative. *Id.* §§ 1502.1, 1508.8, 1508.14. The public must be provided with an opportunity to participate in the NEPA review. *Id.* §§ 1500.1(b), 1500.2(d), 1503.1, 1503.4, 1506.6.

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[4] The Chair of the NIGC is responsible for approving gaming ordinances under 25 U.S.C. § 2710. To avoid creating confusion, however, the brief will refer to the Chair's approvals of the Tribe Gaming Ordinance and Gaming Ordinance Amendment as made by NIGC.

II. The Cowlitz Casino Dispute

The history of NIGC's and BIA's review of the Cowlitz casino trust proposal is labyrinthine. Unlike every other trust land request, before or since, NIGC and BIA married two unrelated processes – the Secretary's trust acquisition process under 25 C.F.R. part 151 and NIGC's gaming ordinance review process (normally a pro forma review) under 25 C.F.R. part 522. These two review processes ordinarily have nothing to do with each other. The Tribe, however, took creative (and questionable) liberties with the NIGC review process to buoy BIA's trust review, the NEPA process and the initial reservation determination – and NIGC and BIA allowed it to do so.

A. Federal Acknowledgment and the Casino Site

Prior to 2002, the United States did not have a government-to-government relationship with the Cowlitz. The Tribe had no treaty with the United States; the United States had never established a reservation for the Tribe; and Congress had never passed legislation on behalf of the Tribe. AR064739 [ROD 79]. To attain tribal status under federal law, the Tribe filed a petition for federal acknowledgment (also known as "recognition") pursuant to 25 C.F.R. part 83 in 1975.[5] NIGC AR006760; *see also* AR006441. BIA recognized the Cowlitz as a tribe under federal law on January 4, 2002. *See Reconsidered Final Determination*, 67 Fed. Reg. 607 (Jan. 4, 2002).

According to the Indian Claims Commission (ICC), established in 1946 to hear claims for damages for lost land by tribes against the United States, the Tribe historically "exclusively used and occupied" an area "generally described as the entire drainage of the Cowlitz River and extending to the south to include the Toutle River drainage." *Simon Plamondon, on the Relation*

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[5] Plaintiffs challenge the actions of two separate agencies – NIGC and BIA. As a consequence, there are two separate administrative records. NIGC and BIA each numbered their records sequentially. As a consequence, the numbering overlaps. For that reason, Plaintiffs identify NIGC's record by noting NIGC before AR. Those cites beginning with AR refer to BIA's record.

of the Cowlitz Tribe of Indians v. United States, 21 Ind.. Similarly, the BIA found in its acknowledgment decision that the Cowlitz had neither an historical nor a significant modern presence in the area encompassed by Clark County. NIGC AR003834-835. Thus, the 152-acre site where the Tribe hopes to develop its casino is not within the lands defined by the ICC or BIA. Even today, the Tribe's tribal housing, the Cowlitz Elders Program, and its Senior Nutrition Center are all located on the Tribe's historic lands near Toledo, Washington, approximately 50 miles north of the Casino Site. NIGC AR01706-1708. The Tribe's headquarters is located in Longview, Washington, 25 miles north of the Casino Site. *Id.* Forty-five miles north of the Casino Site in Vader, the Tribe owns approximately 55 acres of land. NIGC AR01709.

The Casino Site is conveniently located approximately 16 miles from Vancouver and 25 miles from Portland at the La Center Interchange on I-5.

B. The Tribe's Initial Trust Land Requests

The Tribe planned to develop a casino for at least four years before its federal acknowledgment was final. [6] NIGC AR005963; s*ee also* AR124032-033. By November 3, 2001, the Tribe was "ready to go," planning to submit a trust request the day it received its final determination of federal acknowledgment. NIGC AR005964. On January 4, 2002, the Tribe filed its first trust request with BIA. AR123996. Although the trust regulations require tribes to identify the purpose for the trust land, the Tribe's application did not acknowledge gaming as the purpose. The Tribe stated that there would be no change in the current agricultural use of the land. AR131365; AR131388-390. Because there was to be no change in use, the BIA Regional Office processed the application using a categorical exclusion (CE), to NEPA, AR131388, which

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[6] Tribal Meeting Minutes dated June 6, 1998 identify "Indian Gaming" as a proposed committee tasked with the following responsibility: "Identify potential sites for gaming operations and related enterprises." NIGC AR005963.

permits an agency to act without an EIS or EA.[7] The Regional Office recommended accepting the land in trust, relying on the CE, but the BIA Central Office determined that the regulations require the Tribe to state whether the land would be used for gaming. AR131378; *see also* AR131365. The Tribe withdrew its request during the summer of 2003 and returned to the drawing board. AR103476.

C. Federal Review of the Trust Application and Ordinance Approval Requests

In 2003, the Tribe proposed an agreement to Clark County to mitigate the impacts of the Tribe's development for an "as yet undetermined economic purpose, which could include a casino." AR107190 [DEIS App. A]. In exchange for certain commitments, including some remuneration, Clark County agreed to provide services to the Casino Site. AR107192-202 [DEIS App. C]; NIGC AR000787. The Tribe and Clark County executed a Memorandum of Understanding (MOU) on March 2, 2004. *Id.* On May 3, 2004, several Plaintiffs in this case challenged the MOU under state law before an administrative Board. AR100033-054; AR007895.

Immediately after Clark County executed the 2004 MOU (and while the MOU challenge was pending), the Tribe filed a revised trust application for the Casino Site on March 2, 2004, again requesting that the BIA take the Casino Site into trust. This time, the Tribe identified gaming as a "possible" use of the land in its trust request. AR124121-122; AR129741; AR16005. The Tribe also requested that the Secretary designate the Casino Site as its "initial reservation," which would qualify the casino for an exemption from Section 20 of IGRA. [8]

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[7] When it is not clear whether a federal action will require an EIS, an agency must first prepare an environmental assessment (EA) to determine whether an EIS is necessary. 40 C.F.R. § 1501.4. An EA is a concise document that briefly describes the anticipated impacts of a proposed federal action. *Id.* § 1508.9. A CE applies to "a category of actions which do not individually or cumulatively have a significant effect on the human environment *Id.* § 1508.4.

[8] Clark County entered into the MOU without the Tribe having provided all of the facts surrounding its application. In comments to BIA, Clark County clarified the circumstances of the MOU negotiations:

> [W]e developed the [MOU] in an atmosphere of significant uncertainty amid no small

AR128840. In March 2004, BIA released an EA for the trust request, evaluating the impacts of a "possible" 41,800 square-foot casino. AR129710.

After significant public criticism of the EA for not revealing the true scope of the casino development, the Cowlitz announced on July 28, 2004, that instead of the 41,800 square-foot casino in the EA, AR129741, it was actually proposing a much larger casino. AR004282. On November 12, 2004, BIA issued a notice of intent to prepare a draft EIS (DEIS) for the new proposal, which described a casino with 520,000 square-feet of gaming floor, restaurant and retail facilities and convention and entertainment facilities, a 250-room hotel, and tribal offices and other buildings. AR015935. The casino BIA ultimately analyzed in the DEIS involved 1,183,635 square-feet, with up to 3,000 slot machines, 135 gaming tables, restaurant and retail facilities, a convention center, a 250-room hotel, and parking for 7,250 vehicles. AR106590; AR106642; AR106648-649 [DEIS ii, 2-3, 2-9 to 2-10].

On March 15, 2005, while BIA was preparing the draft EIS, the Tribe submitted a request to NIGC seeking approval for a Class II gaming ordinance, which specifically identified the Casino Site (2005 Ordinance). NIGC AR5408-38 at 5410; *see also* AR064224-273 at 238.[9] On November 23, 2005, NIGC approved the site-specific class II gaming ordinance based on its November 22, 2005 determination that the Casino Site would qualify as restored lands under Section 20. AR118239. After receiving multiple objections to the NIGC's decision, BIA announced that it would conduct an independent review of the decision. AR006438-457; AR001342; AR013036-051. It never did so.

> measure of frustration. . . . The initial application was for the land to be taken into trust, not to establish a reservation that would be exempt from the Governor's review [under the two-part determination] in the event that a proposal for a casino should materialize . . . It was not until March 12, 2004 that we received notice that the new application was requesting "initial reservation" status.

NIGC AR000720-721.

[9] Class II gaming does not include slot machines and house-banked card games. *See* 25 C.F.R. §§ 502.3, .4. Although the Tribe was proposing to conduct those activities, IGRA requires a tribe to include its Compact with the State before NIGC can approve a Class III gaming ordinance. *Id.* § 522.6. To this day, the Tribe does not have a Compact.

In April 14, 2006, BIA released the DEIS for public comment. AR106587. The local governments, Plaintiffs and Grand Ronde uniformly objected because BIA failed to consider alternatives within the Tribe's historic land base, incorrectly evaluated the impacts, and relied on the MOU as a source of mitigation. AR101853-887. On June 6, 2006, during the DEIS comment period, the Tribe submitted another revised trust application. AR106485-503. This application included the legal and factual arguments that the Tribe had presented to NIGC to obtain its restored lands determination in 2005, as well as a copy of that NIGC decision. *Id*. The revised application also relied on the 2004 MOU with Clark County to demonstrate the mitigation of local impacts. AR106493. The application still did not include the Economic Development Plan required by 25 C.F.R. § 151.11(c).

On October 17, 2006, the Washington Court of Appeals reversed a lower court's dismissal of the MOU challenge and remanded the matter to the Western Washington Growth Management Appeals Board. AR063381. Because the DEIS and the Tribe's trust request had relied heavily on the challenged MOU, the Tribe submitted to NIGC a proposed amendment to its previously approved 2005 Ordinance (2008 Amendment) as an alternative. NIGC AR00770-772. The Tribe's 2008 Amendment incorporated by reference an allegedly "irrevocable" and "enforceable" Environmental, Public Health, and Safety Ordinance (EPHS Ordinance), in order to provide mitigation for impacts. *Id*. On June 15, 2007, the Western Washington Growth Management Appeals Board invalidated the MOU and the courts affirmed that decision. *Clark Cnty. v. WWGMHB*, No. 07-2-01398-6 (Dec. 14, 2007). On January 8, 2008, NIGC approved the Tribe's 2008 Amendment. AR007498.[10]

In early March 2007, several months after the close of the comment period on the DEIS, the Tribe submitted an Economic Development Plan, which incorporated an "Unmet Needs

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[10] On March 28, 2008, the City of Vancouver, Washington challenged the NIGC's 2005 and 2008 approvals. That challenge was dismissed based on the Ninth Circuit's finding that the City lacked standing to challenge NIGC's approval of the amendment before BIA acted on the Tribe's trust application. *City of Vancouver v. Skibine*, No. 08-35954 (9th Cir. Aug. 31, 2010).

Report." AR090557-599 [FEIS App. E]. The Tribe claimed that it required $114 million per year to meet the needs of its 3,544 members (a per capita amount *twice* the combined federal/state/local government annual expenditure for Washington State residents). AR090577, AR090599. Using this estimate, the Tribe argued that only the Casino Site could provide sufficient revenue. BIA used the Unmet Needs Report to support excluding northern alternatives from detailed review and relied on the Report for its final trust decision. AR064691 [ROD 31].

D. The *Carcieri* Decision

BIA completed the Final EIS (FEIS) evaluating the Tribe's trust application by May 2008,[11] AR075768, but the trust application remained pending. Before the Secretary acted on the trust request, the Supreme Court issued the *Carcieri* decision in which the Court interpreted the IRA as limiting the Secretary's authority to take land into trust to only those recognized tribes that were "under Federal jurisdiction" upon enactment of the IRA in June 1934.

On December 17, 2010, the Secretary issued an ROD, accepting the Casino Site in trust and designating it the Tribe's initial reservation. DOI published a Notice of Final Agency Determination in the Federal Register on January 4, 2011. 76 Fed. Reg. 377 (Jan. 4, 2011). Plaintiffs filed this case on January 31, 2011. (Dkt. No. 1).[12]

STANDARD OF REVIEW

In an APA case, the Court must ''hold unlawful and set aside agency action, findings, and conclusions'' that are ''arbitrary, capricious, an abuse of discretion, or otherwise not in

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[11] Two weeks before the release of the FEIS, the Western Washington Growth Board confirmed that the Casino Site would remain in agricultural status when it invalidated part of the revised Clark County Comprehensive Land Use Plan that would have changed the designation to an urban services light industrial zone. The Washington courts upheld this decision. *See Clark Cnty. v. W. Wash. Hearings Review Bd.*, 259 P.3d 1108 (Wash. 2011); *Clark Cnty. v. W. Wash. Hearings Review Bd.*, 254 P.3d 862 (Wash. Ct. App. 2011). The FEIS, however, incorrectly treated the Casino Site as having been taken out of the protective agricultural and rural use category.

[12] On February 1, 2011, plaintiffs in the related case *Confederated Tribes of Grand Ronde Community of Oregon v. U.S. Department of Interior*, Case No. 11-cv-00284-RWR (D.D.C. Feb.1, 2011), also filed a Complaint for Declaratory and Injunctive Relief challenging the ROD under the APA.

accordance with law.'' 5 U.S.C. § 706(2)(A). This standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.''' *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The agency 'must cogently explain why it has exercised its discretion in a given manner,' and that explanation must be sufficient to enable the Court 'to conclude that the agency's action was the product of reasoned decisionmaking.''' *Id*. at 48, 52.

ARGUMENT

I. The Secretary Lacks the Authority to Acquire Land in Trust on Behalf of the Cowlitz Tribe

The IRA empowers the Secretary to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. To approve the Cowlitz trust application, the Secretary had to find that the Tribe meets the IRA definition of "Indian." The Secretary found that the Cowlitz qualify under the first definition of "Indian" set forth in Section 19 of the IRA – i.e., "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id*. § 479. *See also* AR064743 [ROD 83]. It is undisputed that, to come within this definition, a tribe must meet both the "recognition" and "jurisdiction" prongs of the definition. 25 U.S.C. § 479.

At issue here is the Secretary's interpretation and application of the terms "recognized Indian tribe" and "under Federal jurisdiction" in Section 19. By concluding that the Cowlitz Tribe satisfies both terms, the Secretary expanded his authority to take land into trust far beyond the express limits set forth in the IRA in a fashion to qualify a great many Indian groups for trust acquisition. In fact, the Secretary interprets and applies these terms so broadly that any newly recognized tribe whose members had any contact with federal authorities prior to June 1934 would fall within the definition. This interpretation is contrary to the text of the IRA, its

legislative history, contemporaneous interpretations by administrative officials, and relevant case law.

Furthermore, the facts do not support the conclusion that the Cowlitz were "under Federal jurisdiction" even under the Secretary's own interpretation of this phrase. The Secretary announced a "two-part inquiry" to determine whether the IRA's jurisdictional requirement has been met, but failed to identify evidence sufficient to satisfy it. In fact, the historical evidence in the administrative record demonstrates that the Cowlitz were *not* under federal jurisdiction in 1934.

A. The Secretary's Interpretation of the IRA's "Recognition" Requirement Is Contrary to the Plain Language of the Act, Legislative History, and the Factual Support on Which the Secretary Relies

When Congress enacted the IRA in June 1934, the Cowlitz had no reservation and were not recognized by treaty or statute. AR064739 [ROD 79]. The ROD does not claim that the Cowlitz were formally recognized in 1934. The plain terms of the IRA, however, require that a tribe must be both "recognized" and "under Federal jurisdiction" as of June 1934 or the Secretary cannot acquire land in trust for that tribe. *See* 25 U.S.C. § 479. The Cowlitz do not meet this test, as they were neither recognized nor under federal jurisdiction in 1934.

The Secretary attempts to avoid this inevitable result by concluding that "the date of federal recognition does not affect" his authority to take land into trust under the IRA. AR064749 [ROD 89]. The Secretary's position is that it makes no difference whether a tribe was recognized when the IRA was enacted in 1934, or, as is the case with the Cowlitz, recognized almost 70 years later. *Id.* Instead, the Secretary concludes that "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." *Id.* This is the same line of argument that the Supreme Court rejected in *Carcieri*. Perhaps recognizing that the argument is likely to fail again, the Secretary proffers an alternative reading, asserting that the Cowlitz satisfy the IRA's definition even if it requires "recognition" in 1934. Under this alternative interpretation, the Secretary asserts that "formal or 'jurisdictional'" recognition is a

"modern notion," and that the IRA's definition is satisfied because the Cowlitz were recognized in 1934 in a "'cognitive' or quasi-anthropological sense." AR064747 [ROD 87]. *See also* AR064764 [ROD 104]. Neither of the Secretary's interpretations of the IRA's recognition requirement may be sustained.

1. The IRA requires tribal "recognition" as of 1934

The primary question at issue in *Carcieri* was the meaning of the phrase "now under Federal jurisdiction" in Section 19 of the IRA. 555 U.S. at 382. The Secretary argued in *Carcieri* "that the word 'now' is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are 'under Federal jurisdiction' at the time that the land is accepted into trust." *Id*. at 382. The Court rejected the Secretary's argument and held that "the phrase 'now under Federal jurisdiction'" unambiguously "refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." *Id*. at 382-83.

Rather than accept the limitations that *Carceri* places on his authority, the Secretary invokes Justice Breyer's concurring opinion to support his present position that "the word 'now' modifies only the phrase 'under federal jurisdiction'; it does not modify the phrase 'recognized Indian tribe.'" AR064749 [ROD 89] (citing *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring)). This position is contrary to both the plain statutory text and the *majority's* opinion in *Carcieri*. By holding that "the phrase 'now under Federal jurisdiction' refers to a *tribe* that was under federal jurisdiction at the time of the statute's enactment," *id*. (emphasis added), the Court recognized that "now under Federal jurisdiction" is a prepositional phrase that modifies the immediately preceding "any recognized Indian *tribe*." *See id*. ("As a result, § 479 limits the Secretary's authority to tak[e] land into trust for the purpose of providing land to members of a *tribe* that was under federal jurisdiction when the IRA was enacted in June 1934.") (emphasis

added)).[13] Although the Secretary concedes that "now under Federal jurisdiction" was meant to modify "recognized Indian tribe," *see* AR064748 [ROD 88], his conclusion that the definition is satisfied by "recognition" that occurs at any time – even decades after the Act's enactment – illogically severs "now" from that phrase.[14]

Because the relevant language in the IRA is unambiguous, the Secretary's interpretation is not entitled to deference from this Court; the statute is to be applied strictly by its terms and without regard to legislative history. *Carcieri*, 555 U.S. at 387. *See also id*. at 397 (Breyer, J., concurring) (noting that the proper scope of the word "now" is a matter on which Congress clearly "did not intend to delegate interpretive authority to the Department"). The Secretary relies on legislative history, however, to assert that the phrase "under federal jurisdiction" was adopted "in order to clarify and narrow" the term "recognized Indian tribe." AR064748 [ROD 88]. But the ROD misapplies this reasoning. If the universe of recognized tribes can be forever

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[13] In an earlier decision, the Supreme Court suggested that the temporal limitation on the IRA's recognition requirement was self-evident. *See United States v. John*, 437 U.S. 634, 650 (1978) (noting that the IRA "defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation") (inserted date in original). Other courts have reached similar conclusions. *See United States v. State Tax Comm'n of Miss.*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction,' and the additional language to like effect."); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (summarizing authority supporting position that the IRA's recognition requirement requires federal recognition as of 1934).

[14] That Section 19 requires recognition as of 1934 is further supported by the second alternative definition of "Indian" set forth therein, which provides:

> The term 'Indian' as used in this act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, *and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation* . . . .

25 U.S.C. § 479 (emphasis added). Although not at issue in this litigation, this second definition is informative, because imposing the Secretary's reading on the first would render the second definition nonsensical. As a matter of grammar, "such members" must refer to the antecedent in the first clause, "members of any recognized Indian tribe." But to hold that "members of any recognized Indian tribe" could come into being at any time – even decades after the passage of the IRA – would render the "such members" clause wholly perplexing. Why speak of "descendents" of members captured by the first part of the definition living on a reservation as of June 1, 1934, if the first part of the definition can be triggered at any time?

expanded through the acknowledgment process, the phrase "now under Federal jurisdiction" would not limit the Indians eligible under Section 19. By reasoning that "now" does not modify "any recognized tribe," the Secretary acts contrary to the result that the Secretary concluded Congress intended to achieve – that is, a narrowing of the category of eligible tribes. The Secretary's expansive interpretation is both grammatically implausible and inconsistent with the very intent the Secretary ascribes to Congress. This Court should reject his interpretation.

2. The IRA's recognition requirement is not satisfied by informal or "cognitive" recognition

It is undisputed that the Cowlitz were not federally recognized in 1934. AR064764 [ROD 104]. As a result, the Secretary resorts to arguing that, if the IRA requires that a tribe be "recognized" in 1934, it is sufficient that the Cowlitz were recognized in a "'cognitive' or quasi-anthropological sense.'" AR064747-748 [ROD 87-88] (internal citations omitted). The Secretary describes "cognitive" or "quasi-anthropological" recognition as requiring only that "federal officials simply 'knew' or 'realized' that an Indian tribe existed." AR064748 [ROD 88].

The Secretary's conclusion that Congress used the term "recognition" in a "cognitive" sense is not supportable. "Cognitive" recognition suggests identification as a racial class. But the Supreme Court has construed the term "federally recognized" tribe in the IRA as designating a political rather than a racial status. *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974). Even the primary authority upon which the Secretary relies does not support his interpretation of what recognized meant in 1934. *See* AR064747 [ROD 87] (citing William Quinn Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 333 (1990)) (hereinafter, "Quinn"). Quinn concludes that the "cognitive" sense of recognition was only used "in the early documentary record" long before the enactment of the IRA. Quinn, *supra*, at 333. He explains that, by 1934, the term "recognition" had been used in the jurisdictional sense for over fifty years:

> [B]eginning around the 1870's, and in some earlier decisions, 'recognize' and 'recognition' were used in a formal *jurisdictional* sense, i.e., that the federal government formally acknowledges a tribe's existence as a 'domestic dependent

> nation' with tribal sovereignty and deals with it in a special relationship on a government-to-government basis. . . . One cannot ascribe to any exact moment when the jurisdictional sense superseded the cognitive sense in the minds of government officials, but at least since the [IRA] of 1934 . . . the term "recognized" has been used almost exclusively in the jurisdictional sense by all branches of the government.

Id. at 333-34.[15] *See also id*. at 355 (concluding that, by end of the period leading up to the enactment of the IRA, "[o]ne can at least say that no longer does the record show that the terms ['recognize' and 'recognition'] were ever used in simply a cognitive sense" and "[w]ith the advent of the [IRA], the concept is firmly established, and the term is consistently used to signify the [jurisdictional] concept").

The Secretary's conclusion that the term "recognition" meant cognitive or informal recognition in 1934 is also contrary to the case law at that time, which consistently held that only Congress had the power to determine "'to what extent, and for what time [Indian tribes] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States.'" *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting *United States v. Sandoval*, 231 U.S. 28, 45 (1913)). Congress exercised the power to recognize tribes, not through the ministerial acts of agency employees dispersing periodic benefits to individuals that identified with one tribe or another, but through treaties and express legislative action. It was plainly understood that Congress acted expressly and specifically to recognize tribes. *See*, *e.g., id*. at 361-62 (noting that when, "[i]n 1904, the territorial court, *finding no congressional enactment expressly declaring* [the Pueblo Indians] in a state of tutelage or assuming direct control of their property, held their lands taxable like the lands of others" Congress quickly enacted a series of statutes asserting federal jurisdiction over the Pueblo and recognizing them as

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[15] Moreover, Quinn's discussion of the era of "cognitive" recognition (termed the "First American Phase" from 1783-1871) is at odds with the ROD's application of the concept. In particular, the ROD cites as evidence of the Cowlitz being cognitively recognized the fact that the Tribe engaged in failed treaty negotiations in 1855. But Quinn explains that the *successful* act of *ratified* treaty-making was the primary means for *recognizing* Indian tribes during this era. *See id*. at 339.

an Indian tribe); *Wilber v. United States ex rel. Kadrie*, 281 U.S. 206, 221 & n.10 (1930) (finding that Congress had "in many . . . acts . . . recognized the continued existence of the [Chippewa] tribe" and citing in a footnote several of these legislative acts). *See also Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) ("The federal government has historically recognized tribes through treaties, statutes, and executive orders . . . .").[16]

Even if one were to adopt the Secretary's adoption of a cognitive test, the Cowlitz fail it. In 1933, Commission Collier (the IRA's author) wrote a letter stating that the Cowlitz were "without any tribal organization, and [were] generally self-supporting, and [had] been absorbed into the body politic." As a consequence, Collier found that an individual Cowlitz Indian was not entitled to requested benefits. *See* AR064761 [ROD 101]. Collier's letter provides clear evidence that Collier neither formally nor cognitively recognized the Cowlitz.[17] There is no

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[16] *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[5], at 143 (2009) ("Until the twentieth century, the existence of treaty relations or other formal political acts recognizing tribal status of particular groups such as statutes and ratified agreements obviated the need for any more refined considerations, definitions, or criteria for tribal status."); *id*. § 3.02[5] n.55 ("While Congress ended treaty-making in 1871, the federal government continued to conduct relations with Indian tribes through statutes, agreements, and executive orders.").

[17] The ROD treats statements by Collier inconsistently and draws illogical and unreasonable conclusions from this evidence. On the one hand, the ROD conveniently rejects Collier's plain statement that the Cowlitz were not recognized in 1933 as inconsistent with the Department's decision recognizing the Tribe *seventy years later*. AR064761 [ROD 101 n.128]. Yet the ROD fails to explain why Collier's statement is not relevant to the understanding of the term "recognition" *as of 1934*. On the other hand, the ROD relies on other statements by Collier that the Secretary apparently believes supports his ultimate conclusion. In particular, the ROD relies on a different letter by Collier, written in 1934, in which Collier instructed the local Superintendent that, if allotments were made to non-Quinault Indians who lived on the Quinault Reservation, such Indians should not be included on the Quinault roll for the Reservation, but instead "should be enrolled, *if under your jurisdiction*, as Chinook, Chehalis, and Cowlitz Indians." AR064761 [ROD 101]. The ROD argues that this is evidence that the Cowlitz Tribe was under Federal jurisdiction at this time, and that this letter "differs greatly" from Collier's conclusion in his letter the year before, that the Cowlitz were not recognized as a tribe at that time. AR064761 [ROD 101 n.129. In fact, the two statements are clearly consistent. Collier's instructions regarding the treatment of individual Cowlitz Indians receiving allotments on the Quinault Reservation expresses no opinion regarding the existence of the Cowlitz as a *tribe*; indeed, the fact that individual Cowlitz Indians were receiving services through an entirely different tribe supports Collier's conclusion that the Cowlitz were no longer functioning as a tribal entity. Moreover, the use of the word "jurisdiction" in the letter appears to refer to geographic scope or the administrative purview of the superintendent since it is unlikely Commissioner Collier would leave it to the discretion of the local superintendent to determine the "jurisdictional" status of a tribe.

authority for the Secretary's conclusion that the term "recognized" was understood in 1934 to mean merely cognitive awareness or general perception of government officials that a tribe existed, but even if it were, the Cowlitz fail even that test.

B. The Secretary's Interpretation of the IRA's "Jurisdiction" Requirement Is Also Unlawful Because It Is Contrary to the Act's Plain Language and Legislative History

The Secretary's interpretation of the "under federal jurisdiction" requirement of Section 19 suffers from the same flaw as his interpretation of "recognition"; both are overly expansive. The Secretary acknowledges that *Carcieri* held that in order to come under the IRA, a tribe must have been "under Federal jurisdiction" in 1934. AR064742 [ROD 82]. He also recognizes that Congress added "under Federal jurisdiction" to narrow the universe of tribes qualifying for trust land. AR064748 [ROD 88]. But his construction of that term, however, embraces virtually any tribe and therefore is contrary to the plain language of the IRA and its congressional intent.

The Secretary construes the term "under Federal jurisdiction" as requiring a "two-part inquiry." The first part of the inquiry has four very general requirements. A tribe must show that (1) an agent of "the United States, in 1934 *or at some point in the tribe's history prior to 1934*," (2) "[took] an action or series of actions," (3) "for or on behalf of the tribe *or . . . tribal members*"; (4) "sufficient to establish, or that generally reflects federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." AR064754 [ROD 94] (emphases added). The second part of the inquiry merely requires that there be no "probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934." AR064755 [ROD 95].

The Secretary's position fails for two reasons. First, the Court held in *Carcieri* that "now under Federal jurisdiction," means in June 1934. 555 U.S. at 382. The Secretary's claim that "now" is satisfied by events occurring "at some point in the tribe's history prior to 1934" is inconsistent with the plain text of the IRA and the Supreme Court's express holding. Second, the Secretary's assertion that "under Federal jurisdiction" is satisfied by actions taken for "tribal

members" is contrary to the statutory text, which requires that a "recognized tribe" – not individual members – be under federal jurisdiction at the time of the IRA's passage in 1934. 25 U.S.C. § 479 (defining "Indian" as "all persons of Indian descent who are members of any recognized Indian *tribe* now under Federal jurisdiction . . .") (emphasis added).[18]

The Secretary's overly broad interpretation of the phrase "under Federal jurisdiction" is also contrary to the ROD's recital of the legislative intent. The ROD states that Congress adopted the phrase "under Federal jurisdiction" "in order to clarify and narrow" the term "recognized Indian tribe." AR064748 [ROD 88]. The Secretary's exceedingly broad interpretation of "under Federal jurisdiction" does not narrow the universe of recognized Indian tribes. The standard endorsed by the ROD is so easily met that any tribe with individual members that had any interaction with federal government agents would qualify the entire tribe as under federal jurisdiction.

Because the ROD rejects the possibility that "recognition" or "jurisdiction" as used in Section 19 requires formal or jurisdictional recognition, it is unclear why these casual relationships would ever be subject to official, affirmative acts to "terminate" recognition or jurisdiction, as the second part of the Secretary's definition demands.[19] AR064754-755 [ROD 94-95]. The second part of the inquiry imposes no meaningful limitation on the first – the second prong of the test will never be met if the first prong of the test is so casually satisfied. Any tribe presumably meets the Secretary's two-part inquiry, a result contrary to the plain text of

[18] Moreover, the Secretary's conclusion that sporadic interactions between individual Indians and federal government agents could serve to bring under federal jurisdiction a tribe that actively attempted to avoid ceding to United States' jurisdiction, as the Cowlitz did, is patently unreasonable. The fact that an agent may – for an unspecified reason – have thought that he had some responsibility to or power over an Indian of Cowlitz descent says nothing as to whether the United States was exercising jurisdiction over the Cowlitz *Tribe*.

[19] It must be noted that NIGC Opinion marshaled facts to show that the Casino Site qualifies for the restored lands exception to the bar on gaming for newly acquired land. AR118239-63. NIGC found that these facts demonstrated that the Cowlitz were terminated as a recognized tribe during most of the twentieth century. AR118239. In fact, the Cowlitz Tribe itself went to great lengths to show that it had been terminated. NIGC AR005408-445.

the statute and its legislative intent as recited by the ROD. Because the Secretary based his determination on a misconception of the law, the Secretary's decision "may not stand." *Chenery Corp.*, 318 U.S. 80, 94 (1943).

In an effort to escape *Carcieri*'s "in 1934" restriction in the phrase "now under Federal jurisdiction," the ROD embraces a 1980 memorandum from the Associate Solicitor, Indian Affairs involving the Stillaguamish Tribe. AR 064750 [ROD 90]. The ROD quotes the memorandum as saying "'recognized tribe now under [f]ederal jurisdiction' … includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not the obligation was acknowledged at that time." *Id.* One assumes that even the Secretary agrees that the United States cannot plausibly have an unknown continuous course of dealings with a tribe. It may be possible that the United States had a legal obligation in 1934 that it overlooked, or of which, through error, the United States was not aware. But a legal obligation to a tribe as a group of Indians must necessarily arise from an event or formal action that creates in the United States a legal promise or obligation and in the tribe a legal right or benefit--an action such as a treaty, a statute or an executive order. Nowhere in the ROD or elsewhere in the administrative record is such an event or action identified with regard to the Cowlitz. Accordingly, even accepting the carefully selected definitions in the ROD, there is no reasonable claim that the Cowlitz were under federal jurisdiction in 1934.

C. There Is Insufficient Evidence to Support the Secretary's Determination that the Cowlitz Were "Under Federal Jurisdiction" in 1934

Even if his interpretation were permissible, the Secretary's approval of the Cowlitz's trust request must be vacated because the evidence upon which it relies fails to satisfy the ROD's definition of "under federal jurisdiction." The evidence the Secretary relies on falls into one of two categories: (1) evidence that individual Indians, identified as Cowlitz Indians, received

services from representatives of the local agency[20]; or (2) evidence that the Cowlitz, as a tribe, refused to cede its lands, enter into a treaty, and accept services from Government officials.[21] Evidence falling into the first category cannot demonstrate jurisdiction because it is contrary to the text of the IRA, which requires that the *tribe*, not individual Indians associated with the tribe, be under federal jurisdiction in 1934. Evidence falling into the second category cannot support the Secretary's conclusion that the Cowlitz were "under Federal jurisdiction" in 1934, because such evidence establishes that the Tribe *refused* to be under federal jurisdiction, not that the government exercised its jurisdiction over the tribe. The evidence the Secretary relies on fails to meet an essential part of the ROD's announced two-part inquiry, which requires that the

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[20] Evidence cited by the ROD that falls into this first category includes the fact that, in and around the late 1880's, a total of twenty to thirty land allotments were made to Cowlitz Indians pursuant to (1) the Indian Homestead Act, under which the Government gave allotments of private land to individual Native Americans who agreed to anglicize their names and who, upon which taking ownership of the land, became entitled to full U.S. Citizenship; and (2) the General Allotment Act, which similarly provided for the allotment of land to individual Native Americans, AR064761 [ROD 101]. In addition, beginning in 1894 and into the twentieth century, the federal government provided certain services (including school and authorization of expenditure for health services) for some individuals who defined themselves as Cowlitz Indians, *see* AR064758-759 [ROD 98-99]; and in or around the early 1900s, some individual Cowlitz Indians received allotments of land on the Quinault Reservation, AR064762 [ROD 102].

[21] Evidence cited by the ROD that falls into this second category includes the assertion that, in 1855, the Cowlitz were among several tribes that engaged in failed treaty negotiations with Washington State's first territorial Governor Isaac Stevens, AR064757 [ROD 97]; through "the rest of the 1850's and into the 1860's, officials of the Department continued to recommend that the United States enter into a treaty with . . . the Cowlitz, *because they recognized that Indian title to the land had never been properly ceded*," AR064758 [ROD 98] (emphasis added); "during the 1860's, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation," however, these efforts were unsuccessful, AR064758 [ROD 98]; in June 1868, "the local Superintendent attempted to distribute goods and provisions" at a meeting with the Cowlitz (and presumably the Chehalis) Tribe on the Chehalis Reservation, but the Cowlitz "*refused* to accept either goods or provisions, believing, as they declared, that the acceptance of presents would be construed into a surrender of their title" to the lands where they lived, AR064758 [ROD 98](emphasis added); and in 1904, the Cowlitz "began a prolonged [but ultimately unsuccessful] effort to obtain legislation to bring a claim against the United States for the taking of their land," in support of which the local Superintendent wrote, "[t]hese Indians . . . *have never had any recognition at the hands of the Government* . . . I estimate that there are about 100 members of this tribe [and this Tribe is one of only two] in Southwestern Washington who have preserved their tribal identity and who have not had any recognition from the government," AR064760 [ROD 100] (emphasis added).

government action was "sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." AR064754 [ROD 94]. A failed treaty negotiation is a legal nullity. U.S. Const., art. II, cl. 2 (requiring ratification before a treaty has any legal effect. *See also S.E.C. v. International Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990). A failed treaty could never serve to bring a tribe under federal jurisdiction, because such failed negotiations create no "obligations, duties, responsibility for or authority over the tribe" by the United States. AR064754 [ROD 94].

By relying on the Tribe's failed treaty negotiations as "evidence" that the Cowlitz were under federal jurisdiction, the ROD necessarily – and without reasoned explanation – equates an enacted treaty with an unratified treaty and a failed effort to negotiate a treaty, despite the obvious and critical differences between each. In doing so, the ROD undermines its endorsed definition of the term "under Federal jurisdiction." The Court need not even find the ROD's definition of "under Federal jurisdiction" unreasonable to vacate its approval of the Cowlitz application; it need only find that the Secretary, having announced a rule requiring a tribe to identify government action "sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe," flatly contradicted it, reaching a conclusion that is not supported by the factual record on which the Secretary purports to rely. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007) (holding that where an agency's decision is internally contradictory or legally inconsistent, the proper course is to remand to the agency). *Cf. Kansas City, Mo. v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard."). On these grounds, this Court should invalidate the trust acquisition as inconsistent with the Secretary's own standard.

D. The Historical Facts in the Administrative Record Do Not Support the Secretary's Decision

Agencies may not reach conclusions that are irrational given the relevant evidence in the record before them. *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 n.56 (D.C. Cir. 1983). The Secretary's conclusion that the Cowlitz were under federal jurisdiction in 1934 is contrary to historical facts expressly cited in the ROD. It is also contrary to historical facts found by NIGC in determining that the Casino Site qualified for gaming under the restored lands decision exception to Section 20 (NIGC Opinion), and upon which the Secretary expressly relies elsewhere in the ROD. *See* AR064702-03 [ROD 42-43]. Indeed, the evidence that the Cowlitz were *not* under federal jurisdiction in 1934 is so substantial, that NIGC had no trouble supporting its conclusion that "the historical evidence establishes that the United States did not recognize the Cowlitz as a governmental entity from at least the 1900s until 2002." AR118245 [NIGC Op. 5]. The Secretary dismisses this contradiction as "not fatal" to his ultimate conclusion, because of his belief that Section 19's recognition requirement does not require "formal recognition" and that the "under Federal jurisdiction" requirement entails a different inquiry. AR064754 [ROD 104]. But the Secretary's new two-part inquiry for determining whether a tribe was "under Federal jurisdiction" requires that the government take actions "sufficient to establish, or that generally reflect *federal obligations, duties, responsibility for or authority over the tribe* by the Federal Government." AR064744 [ROD 94] (emphasis added). The Secretary's conclusion that the federal government had any federal obligations, duties, or responsibility for or authority over the tribe in 1934 cannot be sustained on the historical record.

For example, in the early 1900s, DOI "opposed a series of bills introduced in Congress that would have given the U.S. Court of Claims jurisdiction to hear the Tribe's [land] claims, based in part on the Department's position that it no longer had a government-to-government relationship with the Tribe." AR118246 [NIGC Op. 6]. In 1924, the then-Secretary wrote a letter to the Senate Committee on Indian Affairs stating that the Cowlitz "are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic."

AR118246 [NIGC Op. 6] (quoting Letter from Secretary Hubert Work, Dept. of the Interior, to the Honorable J.W. Harreld, Chairman (Mar. 28, 1924)). The Tribe's effort to have legislation enacted is referenced in the ROD, but the DOI's opposition is noted only in passing. The ROD dismisses Secretary Work's opinion as "inconsistent" with other federal acts, all of which are unspecified except to reference the 2002 federal acknowledgment process. AR064759 [ROD 99 n.15]. Nowhere does the ROD attempt to explain why the Secretary disregards Secretary Work's letter after the NIGC Opinion directly credits it.

Similarly, the NIGC Opinion relies on Commissioner Collier's 1933 letter, which rejected an application from a Cowlitz Indian for enrollment on the basis that the tribe did not exist as an entity under governmental control. AR118246 [NIGC Op. 6] (quoting Letter from John Collier, Comm., Bureau of Indian Affairs, to Lewis Layton (Oct. 25, 1933)). The Secretary dismisses this letter as "inconsistent" with a letter written by Collier the following year,[22] but makes no effort to explain why he rejects out-of-hand historical evidence that forms a substantial part of the basis for the NIGC Opinion upon which the Secretary relies elsewhere in the ROD.[23]

The Secretary also unreasonably rejects other evidence credited and relied upon in the NIGC Opinion as irrelevant to his determination of whether the Cowlitz were under federal jurisdiction in 1934. For example, the NIGC Opinion relies in part on a 1975 letter from the Commissioner to the Senate Subcommittee on Indian Affairs, in which DOI advised that the Cowlitz Tribe "is not a Federally-recognized tribe . . . there is presently no successor to the aboriginal entity aggrieved in 1863." AR118247 [NIGC Op. 7] (quoting Letter from Morris Thompson, Comm. of Indian Affairs, to the Chair of the Senate Subcommittee on Indian Affairs (Sept. 24, 1975)). In a follow-up letter, the Department explained why the Tribe was not

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[22] *See* supra note 18 for discussion of why the Secretary's conclusion that the two Collier letters are inconsistent is unreasonable.

[23] The ROD fails to address another piece of evidence about the Cowlitz's status prior to the 2002 decision recognizing the Tribe, credited by and relied upon in the NIGC Opinion. *See* NIGC Op. 7 (1968 BIA letter stating "the Cowlitz . . . are not presently recognized as an organized tribe of the United States").

recognized:

> Throughout the 1850's and 60's the United States made a concerted effort to conclude a treaty with the Cowlitz Indians. Despite these efforts, no treaty was ever executed between the United States government and the Cowlitz Indians. *From that time to the present, there has been no continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians*.

AR118247 [NIGC Op. 7] (quoting Letter from Thompson to the Honorable James Abourezk, United States Senate (Oct. 29, 1975)) (emphasis added). The Secretary dismisses these letters as irrelevant, claiming that arguments based on them confuse the concepts of recognition and "under Federal jurisdiction." AR064765 [ROD 105]. He does not explain how it is plausible that a tribe could be "under federal jurisdiction," but have "no continuous official contact with the Federal government."

The Secretary's conclusory dismissal of this evidence as irrelevant is also contrary to his reasoning elsewhere in the ROD. The DOI follow-up letter quoted above clearly evidences that, following the failed treaty negotiations of the mid-1800s, the United States did not have, as required by the Secretary's two-part inquiry for "under federal jurisdiction," any federal obligations, duties or responsibility for or authority over the Tribe. In addition, prior conclusions by federal government officials about the Tribe's recognition status reflect facts that are directly relevant to the question whether the historical evidence demonstrates that the Cowlitz are among the subset of federally recognized tribes that were under federal jurisdiction as of 1934. These prior determinations cannot simply be cast aside by the Secretary.

The Secretary's attempt to avoid the clear meaning of the Supreme Court's interpretation of section 19 set forth in *Carcieri* fails because it conflicts 1) with the plain meaning of section 19; 2) with congressional intent of the IRA as found by the Secretary; 3) with the NIGC's conclusion; 4) with numerous historical statements by federal officials; and 5) with the overwhelming weight of factual evidence. Any of these grounds is sufficient to vacate the Secretary's determination that he had authority to acquire the Casino Site in trust for the Cowlitz

Tribe.

II. NIGC's Approvals of the 2005 Gaming Ordinance and the 2008 Amendment Incorporating the EPHS Ordinance Are Unlawful

NIGC's approvals of the Tribe's 2005 Gaming Ordinance and the 2008 Amendment incorporating the EPHS Ordinance, which underpin BIA's NEPA review, trust decision and initial reservation determination, are unlawful. First, NIGC lacked the authority to approve the Tribe's site-specific 2005 Gaming Ordinance before the Casino Site was acquired in trust. Second, because NIGC could not approve the 2005 Gaming Ordinance, it could not approve the 2008 Amendment to the 2005 Gaming Ordinance. Third, NIGC impermissibly ignored important aspects of the problems the 2005 Ordinance and 2008 Amendment presented. Because NIGC's actions were ultra vires and otherwise unlawful, its approvals should be vacated.

A. Background on NIGC's Approval of the 2005 Gaming Ordinance and 2008 Amendment

The NIGC is responsible for approving gaming ordinances, which govern casino operations. 25 U.S.C. § 2710. Gaming ordinances generally focus on issues such as the use of gaming revenues, supply contracts, background investigations, etc., as set forth in 25 C.F.R. part 522. NIGC's review of a proposed gaming ordinance is generally pro forma; NIGC simply reviews an ordinance to determine whether the tribe included all of the necessary elements. 25 C.F.R. §§ 522.4, 522.6.

Tribes usually do not identify a particular parcel of land in a gaming ordinance. Ordinances generically reference "Indian lands," which IGRA regulations define as reservation land, trust land, or restricted lands over which an Indian tribe exercises governmental power. 25 C.F.R. § 502.12. Generic gaming ordinances do not require the NIGC to determine whether a particular site is eligible for gaming.[24] When a tribe does identify a particular parcel in its

[24] Tribes occasionally identify the particular land upon which they intend to conduct gaming in a proposed gaming ordinance *when they already have land in trust*

gaming ordinance – which occasionally happens – NIGC must make two determinations. First, NIGC must determine whether the identified parcel is eligible for gaming under Section 20, which requires among other things for the land to be *in trust*. 25 U.S.C. § 2719. If the land qualifies for gaming, NIGC then determines whether the ordinance meets the requirements set forth in 25 C.F.R. part 522.

In every other case before and since the 2005 Gaming Ordinance, NIGC has required a tribe to have land in trust *before* it would approve a site-specific gaming ordinance.[25] In fact, DOI promulgated regulations in 2008 implementing Section 20, which require a tribe to submit a request for a gaming eligibility determination *to the Office of Indian Gaming* (OIG) within BIA, not the NIGC, "[i]f the tribe seeks to game on newly acquired lands that require a land-into-trust application." 25 C.F.R. § 292.3(b). Only when the "newly acquired lands" are *already* in trust, can a tribe submit a request for a gaming eligibility determination to either NIGC or OIG/BIA. *Id.* § 292.3(a). *See* 73 Fed. Reg. 29354 (May 20, 2008).

In 2005, however, NIGC made an exception for the Cowlitz. Nearly six years before the Secretary would act on the trust request, the Tribe submitted a gaming ordinance to NIGC for approval. NIGC AR005608-012. The 2005 Gaming Ordinance specifically identified a (non-existent) reservation and the proposed Casino Site as the location where the Tribe intended to conduct gaming.[26] Because the Cowlitz's application took this unprecedented approach, the

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[25] Before the Cowlitz application, the NIGC had never approved a site-specific gaming ordinance prior to the Secretary acquiring land in trust. Nor has it done so since. In fact, then-Acting General Counsel for NIGC Penny Coleman testified before Congress:

> The Cowlitz ordinance decision is really an anomaly. It's the only time that we've been in this situation where it was a trust acquisition that hadn't happened and we had a site-specific ordinance…. [W]hen the tribe came to us and told us they were going to do it, we were not exactly thrilled with it because we knew that this was a very unusual situation and it is generally much better to let the processes go through.

AR133403.

[26] The gaming ordinance that the Cowlitz submitted to the NIGC defined the "Tribe's Indian Lands" to mean:

(1) All lands within the limits of the Cowlitz Indian reservation; or

Tribe requested that the NIGC make a determination as to whether the Casino Site, if acquired in trust, would be eligible for gaming as the restoration of lands for a restored tribe under Section 20 of IGRA. 25 U.S.C. § 2719(b)(1)(B)(iii). *See* NIGC AR005658-659. The Tribe also submitted a voluminous "Request for a Restored Lands Determination," that purported to demonstrate why the Tribe believed it qualified under the restored lands exception in Section 20. NIGC AR005408. In November 2005, NIGC approved the Tribe's 2005 Gaming Ordinance, relying on an NIGC opinion that concluded that the Casino Site would – if acquired in trust by the Secretary – qualify for gaming under the restored lands exception. NIGC AR118239.[27]

In October 2007, the Tribe returned to NIGC requesting that NIGC approve an amendment to the 2005 Gaming Ordinance, which incorporated by reference the EPHS Ordinance. *See e.g*., NIGC AR000745, NIGC AR000770. The Tribe passed the EPHS Ordinance to provide an alternative vehicle for "guaranteeing" mitigation for the proposed casino following the invalidation of the Clark County MOU. NIGC AR005712-726. The Tribe claimed that the EPHS Ordinance replaced the invalid MOU in substance and legal effect. NIGC approved the 2008 Amendment on January 8, 2008 (2008 Amendment). AR007498.

B. NIGC Lacked Authority to Approve the 2005 Gaming Ordinance and the 2008 Amendment Because the Casino Site Was Not in Trust

NIGC's approvals of the 2005 Gaming Ordinance and the 2008 Amendment were ultra vires as well as arbitrary and capricious. IGRA does not authorize NIGC to approve a gaming

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> (2) Any lands title to which is either held in trust by the United States for the benefit of the Tribe … including but not limited to, certain land for which the Tribe has submitted an [application and which the Tribe intends to use for the development of a gaming facility as allowable under [section 20], provided that this certain land will not be deemed the 'Tribes Indian Lands' until such time as the United States has acquired trust title to it and the Tribe exercises governmental power over it.

AR005533.

[27] Plaintiffs Card Rooms and Al Alexanderson and the Grand Ronde Tribe submitted extensive evidence that the Casino Site did not qualify as restored lands. NIGC did nothing more than acknowledge that this information had been filed. AR13862; AR13893; NIGC AR000969-973; NICG AR000383.

ordinance under 25 C.F.R. part 522 or to make a determination that specific land is eligible for gaming under Section 20 *before the Secretary has acquired the land in trust*. NIGC approved the 2005 Gaming Ordinance years before the Secretary approved the Tribe's trust application. Because NIGC's initial approval of the 2005 Gaming Ordinance was done without statutory authority, NIGC also lacked the authority to approve the Tribe's 2008 Amendment to the 2005 Ordinance.

By its terms, IGRA imposes clear requirements for NIGC action on a gaming ordinance. IGRA authorizes NIGC to "approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming *on the Indian lands within the tribe's jurisdiction* if such ordinance or resolution" meets certain enumerated requirements. 25 U.S.C. § 2710(b)(2) (emphasis added).[28] Similarly, "Indian lands" are "any lands title to which *is either held* in trust by the United States for the benefit of any Indian tribe or individual or *held* by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe *exercises* governmental power." *Id*. § 2703(4) (emphases added). The Casino Site was neither in 2005 or 2008.

Congress likewise limited NIGC's authority to regulate gaming only to lands already acquired in trust by providing in Section 20 that "gaming regulated by [IGRA] shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after [October 17, 1988] unless . . . lands *are taken into trust* as" a settlement of a land claim, restored lands or initial reservation. 25 U.S.C. § 2719(a), (b)(1)(B) (emphasis added).

NIGC does not quarrel with this interpretation or the fact that it cannot approve site-specific gaming ordinances prior to the Secretary acquiring land in trust. In fact, NIGC expressly adopted this very interpretation of the limitation on its authority in a decision issued in

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[28] Congress included the same temporal requirement for approvals of class III gaming ordinances as it did for class II. For site-specific class III gaming ordinances, the ordinance must be approved by a tribe (1) "*having jurisdiction*," *id*. § 2710(d)(2)(A)(i) (emphasis added), over reservation, trust or restricted lands over which the tribe (2) "*exercises* governmental power," *id*. § 2703(4) (emphasis added).

2011. *See Tohono O'Odham Nation Class III site-specific, conditional gaming ordinance amendment* at 11 (NIGC, Aug. 24, 2011) ("Tohono Op."). Ex. 1. Like the Cowlitz, the Tohono O'Odham Nation requested NIGC's approval of a gaming ordinance that identified lands that were subject to a trust request pending before the Secretary. NIGC concluded that, "it is unreasonable for the NIGC to make speculative gaming eligibility determinations for parcels that may or may not be taken in trust at some point in the future." *Id*. NIGC used a straightforward interpretation of IGRA to reach this conclusion. Chairwoman Stevens stated: "I interpret the words *acquired* and *taken* as used in § 2719(a) and (b)(1)(B) to mean that the land must be in trust before it may qualify for [a] § 2719 exception to the general prohibition for gaming on after-acquired trust land." Tohono Op. at 9 (emphasis added). This interpretation "is consistent with dictionary definitions" and the "ordinary meaning" of the words "acquired " and "taken," as well as with congressional intent. *Id.* at 10. Because the Tohono O'Odham's proposed trust land could not "*qualify for an exception to the after-acquired trust land prohibition against gaming at this time*, and the site-specific ordinance amendment does not comport with the requirements of IGRA," NIGC refused to approve the gaming ordinance. *Id.* at 11 (emphasis added). This same reasoning applies to the Cowlitz ordinance, and NIGC was statutorily bound to decline to take action on the Cowlitz's 2005 Gaming Ordinance.[29]

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[29] Attorney General McKenna of Washington questioned the Chairman's authority on this same basis in November 21, 2005 letter:

> [N]one of the three exceptions [to section 20] can currently apply. . . . [I]t is not at all clear whether the issuance of such an advisory opinion is within either the authority or the mission of the NIGC. The issuance of a "restored lands" determination by NIGC at this juncture would be, at best, wasteful of the NIGC's limited resources and, at worst, prejudicial and disruptive of the Secretary's pending trust land determination.

NIGC AR001682. NIGC's staff obviously was concerned about this issue, as well. For example, in an email from Sandra Ashton of NIGC to Ed Fleischer, a lobbyist from the Tribe's financial backers, Ms. Ashton states "You know that the lands section is a problem, particularly in light of Interior's recent policy shift re not approving compacts unless off-reservation land is already in trust." NIGC AR005517. Fleischer responded: "I need to review the policy shift on compacts you mentioned, but I think that Warm Springs is a different situation." NIGC AR005516. Yet, the record does not demonstrate how the NIGC resolved this concern for the Cowlitz application, and the decision itself provides no explanation.

NIGC cannot defend its approval of the 2005 Gaming Ordinance on the basis of deference to its expertise. Deference is only appropriate if a statute is ambiguous, and as NIGC recently concluded, IGRA is not on this point. NIGC's after-the-fact defense of its approval of the 2005 Gaming Ordinance in the Tohono O'Odham decision claiming that it "took the reasonable approach of allowing land not yet taken into trust to qualify for an exception to the general prohibition against gaming …," *id.* at 8, is unpersuasive. NIGC's statutory interpretation in the Tohono O'Odham decision belies any claim of ambiguity:

> The language of the statute simply says "acquired." It does not say "as may be acquired," or "acquired in the future." As a consequence, a reasonable interpretation of the statute indicates that the land must be in trust for the exceptions to the general prohibition on after-acquired trust land to apply to the land.

Id. at 9. In addition, NIGC now concludes that its "construction of IGRA, § 2719(a) and (b)(1)(B), requiring that land actually be acquired in trust before an exception allowing gaming can apply, *is consistent with Congress's intent*." *Id.* at 10 (emphasis added). When Congress has spoken directly to the precise question at issue, and "'[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Mingo Logan Coal Co. v. U.S. EPA*, 2012 WL 975880, at *5 (D.D.C. Mar. 23, 2012) (citing *Chevron, USA, Inc. v. Natural Res. Def. Council*, *Inc*., 467 U.S. 837, 842-43 (1984)); *see also Carcieri*, 555 U.S. at 387 (citations omitted).

Finally, NIGC's 2005 interpretation is not entitled to deference for another reason: NIGC did not offer a reasoned explanation or interpretation.[30] The only explanation NIGC provided

[30] Even if the Court were to find that IGRA is ambiguous, Chairman Hogen's conclusion is not entitled to deference. "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Here, Hogen exercised no care in reaching his conclusion and failed entirely to explain NIGC's position. Moreover, an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is "'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

fails to address whether it can make a gaming eligibility determination prior to trust acquisition. NIGC merely assumed in 2005 that it had the authority to approve the 2005 Gaming Ordinance and make a Section 20 determination, but it did not explain its basis for doing so:

> The ordinance's definition of "Tribe's Indian Lands" contains a site-specific legal land description of a nearly 152-acre site in Clark County, Washington, made expressly contingent on the United States first accepting title to the site and the Tribe first exercising governmental power over the site. *This proposed definition required the NIGC to conduct a legal analysis of the applicability of IGRA's restored lands for a restored tribe provision*, 25 U.S.C. § 2719(b)(1)(B)(iii)…

AR118239 (emphasis added). NIGC's "explanation" is no explanation at all; NIGC merely concluded that NIGC was "required" to act. The "we had to do it" justification falls far short of the reasoned explanation the APA demands. *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (citing *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). Because there is no statutory construction provided by NIGC in 2005, there is nothing to defer to. NIGC had no authority to act on the 2005 Gaming Ordinance, or to issue the associated gaming eligibility determination. Both actions were ultra vires and should be vacated.

C. NIGC's Approval of the 2008 Amendment Was Unlawful

Because NIGC lacked the authority to approve the Tribe's site-specific 2005 Gaming Ordinance, it similarly lacked authority to approve the Tribe's 2008 Amendment to the 2005 Gaming Ordinance. For that reason alone, this Court should vacate NIGC's approval of the 2008 Amendment, which incorporates by reference the EPHS Ordinance.

But NIGC's approval of the 2008 Amendment is also arbitrary and capricious for another reason: NIGC failed to address "important aspect[s] of the problem" in reaching its decision. *State Farm*, 463 U.S. at 43. The Tribe's submission of the 2008 Amendment raised two new questions for NIGC's consideration: 1) is the EPHS Ordinance that the 2008 Amendment purports to incorporate by reference *enforceable* by NIGC; and 2) is the Tribe's waiver of sovereign immunity found in the EPHS Ordinance truly irrevocable. NIGC failed to address either question when it approved the 2008 Amendment.

The questions of enforceability and revocability are critical in this case. If the EPHS Ordinance is not “guaranteed” – that is, irrevocable and enforceable – the Tribe’s substitution for the MOU and the commitments for mitigation on which BIA based the ROD are illusory and subject to relinquishment by the Tribe at will. The Tribe incorrectly asserted that its unilateral EPHS Ordinance is the legal equivalent of a contract – like the MOU with Clark County – and is just as binding. The Tribe submitted the 2008 Amendment to NIGC to create a substitute for the MOU:

> In this case . . . the Tribe has volunteered to amend its tribal gaming ordinance so that the [NIGC] will have authority to enforce all of the mitigation measures articulated in the MOU and Final EIS. We think it is important to note that there is no real practical or legal difference between having the enforcement mechanism provided by a federal cooperation agency (through NIGC and the tribal gaming ordinance) versus a local cooperating agency (through the County and the MOU).

NIGC AR001615–621, at 20. [31] The Tribe further claimed that the wavier of sovereign immunity in the EPHS Ordinance was “irrevocable” and that “there is no real practical or legal difference between having the enforcement mechanism provided by a federal cooperating agency (through NIGC and the tribal gaming ordinance) versus a local cooperating agency (through the County and the MOU).” *Id.*

Plaintiffs objected to the Tribe’s proposed 2008 Amendment on the grounds that the Tribe’s claim of irrevocability was illusory; that approval of the 2008 Amendment would conflict with NIGC’s regulations; and that the NIGC did not have the authority to enforce the

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[31] The Tribe also asserted in its approval request that that “when [BIA] wishes to include mitigation measures beyond its enforcement authority in its ROD, the Department may rely on alternative mechanisms, such as the enforcement authorities of its cooperating agencies.” AR001619-620. The wording of this request is very curious. First, why include a statement about what BIA may do with regard to the Tribe's trust application in a request to NIGC for approval of an amendment of a gaming ordinance? Furthermore, on what basis did the Tribe think that BIA would “wish[] to include mitigation measures beyond its enforcement authority in its ROD”? At the time that the Tribe submitted its application for approval of the 2008 Amendment to NIGC, BIA had only just completed its DEIS and was years from preparing its ROD. There is no basis for the Tribe to “assume” either that (1) BIA would be approving the Tribe's trust application or (2) BIA would “wish” to include mitigation measures beyond its authority.

EPHS Ordinance, as the Tribe suggested it would. *See e.g.,* NIGC AR000709-780, NIGC AR000750, NIGC AR000699-770. In fact, under the NIGC's own interpretive rule, it clearly could *not* enforce the EPHS Ordinance. *See NIGC Interpretive Rules*, 67 Fed. Reg. 46,109 (July 12, 2002) (noting that NIGC has limited authority over health and safety and explaining that NGC will enforce health and safety ordinances only when there is imminent jeopardy to life or property).

NIGC simply ignored these issues. An internal memorandum establishes that NIGC's position was that the questions of revocability and enforceability (including the expectation that NIGC would be doing the enforcing) "do not bear on the ordinance approval issue." NIGC AR000009. But that memorandum does not explain why that is the case. Counsel for NIGC also claimed that "IGRA does not establish a basis for disapproving a tribal gaming ordinance that may later be amended …," but did not provide any legal analysis for that conclusion. *Id.* NIGC's public decision memorandum was even more dismissive. It simply found that "the issues concerning enforceability" were "not properly addressed" in this context. NIGC AR000002.

NIGC cannot dismiss questions that the Tribe raised in its application or that multiple parties directly raised in response. The APA does not allow NIGC to bury its head in the sand. The 2008 Amendment raised expectations on the Tribe's part that NIGC would find that the EPHS Ordinance was irrevocable and that NIGC would enforce it. Plaintiffs challenged both expectations. The law requires agencies to consider "important aspect[s] of the problem," *State Farm*, 463 U.S. at 43, and "'articulate a satisfactory explanation'" for their action, *Butte Cnty.*, 613 F.3d at 194 (quoting *Tourus Records*, 259 F.3d at 737). Enforceability and revocability are very important aspects of the problem. NIGC's response that the goal of the Tribe and the concerns of the Plaintiffs "are not properly addressed here" has "all the explanatory power of the reply of Bartelby the Scrivener to his employer: 'I would prefer not to.' Which is to say, it provided no explanation." *See Butte Cnty.*, 613 F.3d at 195. NIGC's approval of the 2008 Amendment therefore violates the APA and provides a separate basis for invalidating the

NIGC's action.

III. The Secretary's Decision Violates the APA Because BIA Relied on NIGC's Unlawful Approvals

The legal errors inherent in the approval of the 2005 Gaming Ordinance and 2008 Amendment were not limited to the NIGC's decisions alone. Instead, they infected fundamental components of the Secretary's trust land approval as well, because BIA relied heavily on the EPHS Ordinance to grant the Tribe's request.

A. The Trust Land Acquisition Decision is Invalid Because It Relies upon Unlawful NIGC Actions

NIGC's regulation of gaming under IGRA is separate from BIA's 25 C.F.R. part 151 trust acquisition process under the IRA. In this case, however, the Tribe tethered the trust acquisition process under Part 151 to NIGC's gaming ordinance approval process. The decision to acquire the Casino Site in trust is dependent upon NIGC's approval of the 2005 Gaming Ordinance and the 2008 Amendment. In the ROD, BIA adopted the Tribe's EPHS Ordinance wholesale. The ROD states that "BlA has determined that compliance with federal regulations and provisions of the Tribal EPHS Ordinance are sufficient to reduce the environmental effects of the Proposed Action…" AR064690 [ROD 30]. In addition, the ROD states that the FEIS "recognizes that…the implementation of mitigation measures included as provisions of the 2004 MOU to avoid environmental effects *would be ensured through the Tribe's EPHS Ordinance*." AR064690 [ROD 30] (emphasis added). In its evaluation of the trust criteria under Part 151, BIA concludes that "[e]ffects upon Clark County are expected to be effectively mitigated under the Tribe's EPHS ordinance approved by NIGC as a provision of the Tribe's amended gaming ordinance, or through other mitigation specified in the Final EIS and this ROD." AR064772 [ROD 112].[32] Because NIGC's actions approving the 2005 Gaming Ordinance and the Tribe's

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[32] Impacts associated with the casino have been measured with the understanding that they would be mitigated by the Tribe through first, the MOU, and after it was ruled invalid, the EPHS Ordinance. This mitigation was deemed essential for numerous issues, including: 1) water supply, (AR064668-669)

2008 Amendment were ultra vires, as well as arbitrary and capricious, BIA could not rely on them. The trust land decision therefore must fall because, by its own terms, the ROD depended upon the NIGC's approvals.

B. The Trust Acquisition Decision Is Invalid Because It Incorrectly Relied on the EPHS Ordinance for Irrevocable and Enforceable Mitigation

Even if NIGC's approval of the 2005 Ordinance and 2008 Amendment were valid, the trust land acquisition must still be invalidated because BIA based its decision on two erroneous assumptions. First, BIA incorrectly assumed that the EPHS Ordinance is irrevocable. Second, BIA incorrectly assumed that NIGC can and will enforce the EPHS Ordinance. Neither is correct.

1. The EPHS Ordinance is Revocable

BIA treated the EPHS Ordinance as the legal equivalent of a contract. *See* AR064690 [ROD 30] ("The Tribe's EPHS Ordinance is enforceable through … the Tribe's grant of an irrevocable limited waiver of sovereign immunity which allows Clark County to seek relief in State Court."). It is not. Calling something irrevocable does not make it so.

The EPHS Ordinance is like any typical legislative action and can be revoked at any time. That one legislature (or tribal council) cannot bind another in perpetuity has long been established. "[O]ne legislature," Chief Justice Marshall wrote, "cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). "The correctness of this principle, so far as respects general legislation," he asserted, "can never be controverted." *Id. See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that, unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it"). *See, e.g.* NIGC AR000692-693. The Tribe's claim of "irrevocability" is fanciful, and BIA should not

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[ROD 8-9]; 2) for site drainage, AR06469 [ROD 9]; 3) law enforcement, AR06469 [ROD 9]; 4) fire protection services, AR06469 [ROD 9]; 5) development standards to address seismic issues, AR064674 [ROD 14]; 6) wetland protection, AR064676 [ROD 16]; 7) transportation impacts, AR064678 [ROD 18]; and 8) socioeconomic impacts, AR064678 [ROD 18].

have accepted the claim at face value.[33] BIA was required to address this issue, *see Butte Cnty.*, 613 F. 3d. at 195, but failed to.

In fact, if passing an "irrevocable" waiver or ordinance were meaningful, there would have been no reason for the Tribe to seek NIGC's approval of the 2008 Amendment. But NIGC's approval of the 2008 Amendment, and through it the incorporation of the EPHS Ordinance, does not transform the Tribe's unilateral action into an irrevocable commitment binding in perpetuity. The ROD clearly misunderstands this, erroneously stating that "specific provisions of the EPHS Ordinance including the Tribe's grant of a limited waiver of sovereign immunity, *may not be revoked without approval of NIGC*." *Id.* (emphasis added). NIGC regulations flatly contradict the ROD's conclusion. NIGC regulations provide that, "[a] governing body of a tribe, *in its sole discretion and without the approval of the Chairman*, may adopt an ordinance or resolution revoking any prior ordinance or resolution." 25 C.F.R. § 522.12 (emphasis added). IGRA similarly permits a tribe to amend an ordinance without limitation. *See id*. § 522.3. NIGC is required to approve an ordinance as long as it meets the regulatory requirements. *Id*. § 522.4. NIGC, in fact, acknowledged as much in its approval of the Tribe's 2008 Amendment when it dismissed legitimate concerns about enforceability on the grounds that "IGRA does not establish a basis for disapproving a tribal gaming ordinance *that may later be amended*…" NIGC AR000009. BIA had no basis for concluding that the EPHS Ordinance was irrevocable, did not explain its rationale, and ignored NIGC's statement that the Tribe could later amend the 2008 Amendment or the 2005 Ordinance. BIA's treatment of the EPHS Ordinance, and its reliance thereon, was arbitrary and capricious.

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[33] The Tribe argues that it has the authority to waive its sovereign immunity and make the EPHS Ordinance irrevocable. NIGC AR000776-777. There is little doubt that a tribe can waive its sovereign immunity and that such waivers can be irrevocable, but only *if* included in a legal agreement between parties for consideration. There is no such agreement here. Instead, the question is whether the Tribe can revoke a tribal ordinance that purports to include an irrevocable waiver of sovereign immunity, and it obviously can. There is nothing lawful that would prevent the Tribe from acting legislatively to revoke the EPHS Ordinance whenever it pleases.

2. BIA Incorrectly Concluded that NIGC Can and Will Enforce the EPHS Ordinance

BIA also incorrectly assumed that NIGC will enforce the EPHS Ordinance. The ROD states that "as the Ordinance is part of the Tribal gaming regulations, *the NIGC has the authority and ability to enforce the provisions* with powers that include closure of the gaming operation." AR064690 [ROD 30] (emphasis added). This assumption, which is key to the ROD, is also wrong.

When it approved the 2008 Amendment, NIGC deliberately did not address whether or how it would enforce the EPHS Ordinance. NIGC instead stated:

> [T]he issues concerning enforceability are not properly addressed here. The Tribe is providing more with regard to EPHS enforcement than is minimally required under IGRA. Even if there are legal or practical impediments regarding such extra measures, such impediments are not grounds for disapproval.

AR007499 (emphasis added). BIA simply ignored NIGC's reference to the legal and practical obstacles to enforcement, as well as the lack of any agreement from NIGC to enforce the EPHS Ordinance.

In fact, NIGC never agreed to enforce the EPHS Ordinance, because it could not. Doing so would violate NIGC's own interpretative rule:

> The Commission interprets section 2710(b)(2)(E) of IGRA to mean that *the Commission has a limited and discrete responsibility to provide regulatory oversight in relation to tribal compliance with this provision*. The Commission discerns nothing within the Act or the legislative history to suggest that Congress intended a more extensive role for the Commission or manifesting any intent to relieve tribal government of any measure of authority or regulatory primacy over issues concerning the environment, public health and safety in any area within the authority of the tribe or to shift, alter, or otherwise effect any transfer of responsibility from tribal government to the National Indian Gaming Commission.

Interpretive Rule: Environment, Public Health and Safety, 67 Fed. Reg. at 46,111 (emphasis added).[34]

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[34] Section 2710(b)(2)(E) requires NIGC to "approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on Indian lands within the tribe's jurisdiction if such

NIGC will enforce health and safety provisions "*only where no corrective action has been undertaken* within a reasonable time and such inaction results in a condition of *imminent jeopardy to the environment, public health and safety*." *Id.* at 46,112 (emphasis added). "Imminent jeopardy," exists "where conditions are present that pose a real and immediate threat: (1) To the environment, which, if uncorrected, would result in actual harm to life or destruction of property; or (2) to human health and well being, which, if uncorrected, could result in serious illness or death." *Id.* The imminent jeopardy standard cannot be reconciled with BIA's conclusion that "*the NIGC has the authority and ability to enforce the provisions* with powers that include closure of the gaming operation." AR064690 [ROD 30] (emphasis added). Failure to make payments to the County or to improve road performance or to protect wetlands does not constitute imminent jeopardy. BIA clearly envisioned something much more expansive than the limited enforcement capability that NIGC has the authority to undertake. Because the ROD relies on that erroneous assumption, the Secretary's decision is arbitrary and capricious and must be vacated.

IV. The Secretary's Determination that the Land is Eligible for Gaming Is Unlawful

NIGC issued a determination that the Casino Site was eligible for gaming under the restored lands exception of Section 20 as part of the NIGC's approval of the 2005 Gaming Ordinance. As discussed above, NIGC had no authority to do so.

The Secretary separately determined that the Casino Site was eligible for gaming under the initial reservation exception of Section 20. 25 U.S.C. § 2719(b)(1)(B)(ii). Both exceptions share a common approval requirement, however. For each, a tribe must demonstrate that it has a "significant historical connection" to the land. *Compare* 25 C.F.R. § 292.5 *with id.* § 292.12. DOI defines the phrase "significant historical connection" to mean that "the land is located

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ordinance or resolution provides that . . . the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety."

within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2. The Cowlitz failed to meet this test for either the initial reservation or the restored lands exception.

The Secretary's determination that the Casino Site satisfies the initial reservation exception violates the APA for two reasons. First, the Secretary's explanation as to the basis for his decision falls far short of the reasoned decision-making the APA requires. Second, the decision fails to consider extensive evidence in the record that demonstrates that the Casino Site does not qualify for gaming as an initial reservation (or any other exception in Section 20).

A. BIA Did Not Adequately Explain Its Initial Reservation Designation.

The ROD's explanation for the determination that the Casino Site qualifies as the Tribe's initial reservation is remarkably brief:

> [T]he parcel is located within an area in which the Tribe has significant historical connections, as explained in detail in the Tribe's amended fee-to-trust application, the Tribe's request for a restored lands opinion, and the NIGC Restored Lands Opinion, which relies heavily on facts already adjudicated by the BIA in the Tribe's acknowledgment proceedings and by the ICC in the Tribe's land claim litigation. These facts demonstrate "significant historical connections" within the meaning of Sections 292.6(d) and 292.2 of the regulations governing IGRA's "initial reservation" exception.

AR064776 [ROD 116].[35] These two conclusory sentences do not satisfy the "satisfactory

[35] The ROD mentions the question of the Tribe's historical connection to land in other sections, but still fails to provide the reasoned analysis required. In each case, the ROD's reference to the issue is conclusory. For example, in the review of non-NEPA matters, the ROD states that BIA "has determined that the [Casino Site] is within the area in which the Tribe has significant historical connections relating to trading, hunting, fishing, lodging and other traditional purposes" based on the ICC and the Restored Lands determination. AR064682 [ROD 22]. Likewise, the ROD states that the Tribe "believed it had aboriginal title to the land and applied to the ICC for compensation for the land surrounding La Center." AR064703 [ROD 43]. Although the ICC *rejected* the Tribe's claim to that area, the ROD brushes off the ICC's important conclusion by simply concluding that the Tribe "always has maintained its historical connection to these lands." *Id.* None of these statements explains how the Secretary interpreted "significant historical connection" or what specific facts the Secretary relied on to find that the initial reservation exception was met.

explanation for [the agency's] action" that the law requires. *State Farm*, 463 U.S. at 43. Indeed, the Secretary's explanation raises more questions than it answers. For example, the Secretary concludes that unidentified "facts" found by the NIGC and ICC in other proceedings "demonstrate 'significant historical connections,'" *id.,* but it is impossible to determine which findings the Secretary means to reference.

A review of the NIGC and ICC decisions does not show supporting facts. Indeed, the weight of the evidence contradicts the Secretary's conclusion that the Tribe has a "significant historical connection" to the Casino Site. For example, the ICC concluded that Clark County, and hence the Casino Site, is outside of the Tribe's area off exclusive use and occupancy when it rejected the Tribe's claim for compensation for that area. *Simon Plamondon, on the Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 170-71 (1969). Similarly, the NIGC concluded that "the documentation does not specifically identify the [Casino Site] as a historically important parcel." NIGC AR001653. And, contrary to the Secretary's finding, the BIA Cultural Resources Staff's issued a June 30, 2006 memorandum that determined that the DEIS incorrectly added the Cowlitz to the historical records that actually referred to the Chinook Tribe:

> Mr. Haugen observed that the language of the documents cited in the DEIS only refer to the Chinook Tribe, and that the DEIS appears to [be] a recitation of language from those documents *with the Cowlitz inserted* along with the Chinook. In staff review of the cited sources, Mr. Haugen's observations are supported.
> While generalized life ways of adjoining tribes can be combined, the DEIS author needs to be aware of the limitations of the referenced material, especially secondary sources. *In the present case, inserting the Cowlitz Tribe into discussion on the Chinook is not warranted due to the time frames and complexity of tribal occupation in the area.*

AR105904 (emphasis added).

In fact, NIGC had before it thousands of pages of material from the Tribe's recognition process, the Tribe's restored lands application and submissions from the Card Rooms/Al Alexanderson and Grand Ronde before reaching this conclusion. And, while NIGC concluded that "the documentation does not specifically identify the [Casino Site] as a historically

important parcel," it ultimately determined that the "lack of a specific nexus is not determinative in light of the *other factors* weighing in favor of the Tribe's assertion that these lands are restored lands." AR118251 (emphasis added). Those other factors related to the Tribe's temporal and modern connection to the land and have nothing to do with its historic connections. AR118251.

Here, by contrast, the Secretary must make a finding that a historical nexus exists. The ROD fails to explain how such a finding could be sustained based on the abundant evidence to the contrary. The APA requires more of an explanation than what the Secretary has provided. Because the Secretary failed to provide such an explanation, the Secretary's initial reservation designation violates the APA and must be vacated.

B. BIA Did Not Consider Fact Evidence Supplied by Plaintiffs that Demonstrates that the Land is Not Within an Area where the Tribe Has Significant Historical Connections

The Secretary's failure to consider counter evidence submitted by interested parties demonstrating the Tribe's lack of historical connection to the Casino Site provides another reason for finding that the Secretary violated the APA. See *Butte County*, 613 F.3d at 194. Shortly after NIGC issued its restored lands determination, the Card Rooms/Al Alexanderson, Grand Ronde and others submitted multiple requests to BIA for reconsideration of NIGC's decision. See, e.g., AR012913-918, AR013388, AR013397, AR013862. They provided BIA with abundant historical evidence that refuted the "significance" (indeed, the existence) of a historical connection between the Tribe and the Casino Site. See e.g., AR0135988- 136972, AR013803-822. BIA committed to conducting its own review of NIGC's determination. AR006438-457, AR001342, AR013036-051. Ultimately, however, BIA not only failed to meet that obligation, it lost the materials provided by Plaintiffs for BIA's review. MacLean Decl. ¶ 8.[36] Moreover, there is no analysis of the material that BIA did not lose, no response to the

[36] In reviewing the administrative record, Plaintiffs discovered that materials that Plaintiffs provided BIA regarding the restored lands decision, including expert reports, were not included in the

evidence Plaintiffs and Grand Ronde provided - in short, no evidence that BIA did anything other than rely on the Tribe's submissions.

BIA was grossly derelict by not only failing to evaluate contrary evidence but by actually losing evidence that refutes its decision. The APA requires that BIA evaluate all of the evidence before it, including *contrary evidence.* In *Butte County, California v. Hogen*, the D.C. Circuit held that the Secretary's failure to consider contrary evidence required a remand. 613 F.3d 190. That case involved the Mechoopda Tribe's trust application for a 645-acre parcel. The Secretary asked NIGC to provide an advisory opinion regarding whether the land would be eligible for gaming. *Id*. at 193. In 2003, NIGC issued a positive determination, and the Office of the Solicitor concurred that the "Tribe had a 'historical and cultural nexus'" to the site, making it eligible for gaming. *Id*. On June 16, 2006, Butte County disputed NIGC's finding with the Secretary and provided contradictory evidence. *Id*. Although the Secretary did not make a final decision to acquire the land in trust until 2008, he refused to consider the evidence Butte County provided, stating only that: "[w]e are not inclined to revisit [the NIGC] decision now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination." *Id*. at 193-94. The D.C. Circuit vacated the Secretary's decision, holding that "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action." *Id*. at 194. Further, the court stated that "[t]o refuse to evaluate that information because the Solicitor – who never looked at it – agreed with the Gaming Commission is totally irrational." *Id*. at 195.

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record. BIA was unable to locate those materials and requested that Plaintiffs provide them for inclusion in the record at the request of Federal Defendants. MacLean Decl. ¶¶ 8, 9. Because reviewing courts are generally limited to determining whether an the agency's decision is supported by the administrative record, "if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 470 U.S. 729, 744 (1985). The fact that the BIA was unable to locate the considerable quantity of material that Plaintiffs submitted regarding a determinative issue is clear evidence, however, that BIA did not consider all relevant factors.

The facts in this case are, if anything, more compelling than those in *Butte County*. Here, the Office of the Solicitor never concurred with the NIGC's restored lands determination and never reviewed the materials Plaintiffs and Grand Ronde submitted because BIA lost those records. BIA's failure to consider contrary evidence provided by the card rooms/Al Alexanderson and Grand Ronde renders the Secretary's decision arbitrary and capricious and the ROD invalid.

C. The Tribe Does Not Have a Historical Connection to the Casino Site Sufficient for an Initial Reservation or Restored Lands Determination

Had BIA properly considered all of the evidence regarding the historical connection issue, it would have concluded that the Casino Site does not qualify for the initial reservation exception in Section 20. As set forth in Section III.A of Grand Ronde's Motion for Summary Judgment and Memorandum in Support, filed in the related case *Confederated Tribes of the Grande Ronde Community of Oregon v. Salazar*, 11-CV-284 (D.D.C. Feb. 1, 2011), which Plaintiffs hereby adopt, the Tribe does not have a historical connection to the Casino Site. Its choice of the Casino Site is based solely on the financial importance of the proximity of the land to Portland. Neither BIA nor NIGC can allow the Tribe to avail itself of an exception to Section 20 to which it is not entitled. The facts demonstrate that the Tribe does not qualify under either the restored lands or the initial reservation exceptions. As a consequence, BIA's initial reservation determination is unlawful on the merits of the factual evidence. The same is true of NIGC's restored lands opinion

V. BIA Violated NEPA

Under the APA, an agency must provide "the necessary process" and take a "'hard look' at environmental consequences" of a proposed federal action such as the Cowlitz trust acquisition. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). BIA failed on both counts.

BIA did not take the required "hard look" at environmental consequences of the proposed

trust request. As discussed in Section III. B., BIA relied extensively on the EPHS Ordinance (as a substitute for the MOU) throughout the entire NEPA document.[37] BIA's assumptions regarding the revocability and enforceability of the EPHS Ordinance are erroneous, and consequently its conclusions about how the proposed action will impact the environment are incorrect.[38] Thus, BIA cannot be said to have taken a "hard look" at environmental consequences because it based its review on incorrect information. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005) ("To take the required 'hard look' at a proposed project's effects, an agency may not rely on incorrect assumptions or data in an EIS."). BIA failed to meet the requirements of the APA and NEPA.

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[37] The FEIS relies on the EPHS to mitigate numerous impacts associated with the preferred alternative to the proposed project. AR075841-843 [FEIS 1-10 to 1-12, 5-1]. Specific impacts addressed include: law enforcement, AR075843, AR075862, AR076408 [FEIS 1-12, 2-16, 5-21]; fire protection, AR075843, AR075862, AR076409 [FEIS 1-12, 2-16, 5-22]; inconsistencies with local land use plans, AR076388, AR076395, AR076399, AR076400, AR076408, AR076409 [FEIS 5-1, 5-8, 5-12, 5-13, 5-21, 5-22]; development of a health department and compliance with State and County health codes, AR075844 [FEIS 1-13]; payments to the County in lieu of sales tax, property tax, and hotel/motel or transient occupancy tax, AR076138 [FEIS 4.7-3]; compensation to problem gambling programs, AR076144 [FEIS 4.7-9]; traffic, including public road system improvements, AR075844, AR076172, AR076174, AR076183, AR076400 [FEIS 1-13, 4.8-10, 4.8-12, 4.8-21, 5-13]; development of, or connection to sewage treatment plants and treatment of wastewater, AR075844, AR075857-858, AR076082 [FEIS 1-13, 2-11 to 2-12, 4.3-4]; connection to existing utilities for water supply, AR075844, AR075857 [FEIS 1-13, 2-11]; development of stormwater facilities, AR076079 to AR076081 [FEIS 4.3-1 to 4.3-3]; erosion control, AR076072 [FEIS 4.2-2]; protection of wetlands, species of concern, and waters of the United States, AR076113, AR076116, AR076395 [FEIS 4.5-3, 4.5-6, 5-8]; and maintaining structural consistency with County ordinances, AR075844, AR076072 [FEIS 1-13, FEIS 4.2-2].

[38] Another clear example of BIA basing its review of the proposed action on the basis of incorrect assumptions is the FEIS's reliance on the incorrect land designation. The FEIS identifies the land use designation of the proposed site as "light industrial." AR076012-026 [FEIS Sec. 3.9]; AR076208-213 [FEIS 4.9-1 to 4.9-6]. The Casino Site is actually "agricultural resource lands" within a rural area and is afforded special protection under state law. Thus, the FEIS incorrectly states that "land uses proposed by the [casino] project and those allowed under the Light Industrial designation are both urban in nature and would result in similar effects. AR076213 [FEIS 4.9-6]. BIA claims that it is fine to use the FEIS as is, based on incorrect assumptions, because BIA's DEIS used the proper land designation and both the DEIS and the FEIS concluded that the proposed casino would not be consistent with local land use designations. AR064689 [ROD 29]. But the FEIS makes assumptions about the rapid industrialization and how that industrialization will be consistent with the proposed project, AR076213 [FEIS 4.9-6] which is based entirely on its assumption that the land was designated light industrial, and this is incorrect.

A. BIA's Purpose and Need Statement and Alternatives Analysis Violates the APA

BIA impermissibly used unreasonably narrow "feasibility criteria" to restrict the range of reasonable alternatives. NEPA requires an agency to "specify the underlying purpose and need to which the agency is responding" and to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. §§ 1502.13, 1502.14. The EIS fails to meet basic NEPA requirements.

The purpose and need statement is directly related to the range of alternatives because "[t]he goals of an action delimit the universe of the action's reasonable alternatives." *Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). An agency must craft an appropriate purpose and need statement to ensure that it considers an adequate range of alternatives. To that end, the D.C. Circuit has set two basic requirements for purpose and need statement – it cannot be too narrow and it cannot be too broad. "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Id.* at 196. "Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities." *Id.* (citation omitted).

Here, BIA managed to violate both limitations. The statement of purpose and need appears, on its face, to be very broad. The purpose of the proposed action is to allow the Tribe "to create a Tribal land base for its members and establish a Tribal Headquarters from which its Tribal Government can operate to provide housing, health care and other governmental services, and from which it can conduct economic development necessary to fund these Tribal Government services …" AR075837 [FEIS 1-6]. The Tribe *already has* a Tribal Headquarters from which it can and does provide services. AR064738 [ROD 78]. But putting that issue aside,

the Tribe's clear purpose is to conduct economic development – a purpose that is exceptionally broad. *Id.* The "need" for the action is also very general. In the DEIS, the need for the trust acquisition is to provide for the "unmet economic needs of the Tribe and Tribal members" whose economy lags behind the economy of the local community, with higher unemployment, lower median incomes, and lower home ownership. AR106633 [DEIS 1-6]. Thus, the Tribe's purpose is the obtain trust land to engage in the economic development that it needs to improve the current economic condition of the Tribe.

That generalized statement of the Tribe's purpose and need is obviously too broad to comply with NEPA. There are "an infinite number of alternatives [that] would accomplish those goals and the project would collapse under the weight of the possibilities." *See Citizens Against Burlington*, 938 F.2d at 196. BIA essentially acknowledges this in the DEIS: "The potential field of project alternatives is large. Different locations, sizes of casino and/or hotel, and alternative uses for properties are all potentially of interest." [DEIS 2-34].

To get around this problem, BIA created a range of "feasibility criteria," used to "screen" alternatives. AR106633 [DEIS 1-6]. These "feasibility criteria" are nothing more that a restatement of the purpose and need. The term "feasible or (much the same thing) reasonable" is not self-defining. *Citizens Against Burlington*, 938 F.2d at 195. Agency-defined criteria that "delimit the universe of an action's reasonable alternatives" are – by definition – statements of purpose and need, *id.* at 195-96, regardless of whether the agency chooses to identify them as such. The "feasibility criteria" BIA identified are, consistent with *Citizens Against Burlington*, BIA's actual, if not acknowledged, purpose and need statement.

When BIA's "feasibility criteria" are considered, it is apparent that BIA used an impermissibly narrow statement. BIA's "feasibility criteria" limit "reasonable alternatives" to sites: 1) in close proximity to the I-5 highway; 2) contiguous properties forming 20 acres or more; 3) with contiguous ownership; 4) available for purchase; 5) without any environmental constraints; 6) with public services available; and 7) apparently a favorable zoning designation. AR106633 [DEIS 1-6]. These feasibility criteria – i.e., the statement of purpose and need – are

not merely "unreasonably narrow," they are absurd. Not even the Casino Site meets these requirements. The Casino Site was made up of nine separate properties. AR0066046-130. It is now owned by one entity – Salishan- Mohegan – only because the Tribal Chairman's son had already obtained options on all nine parcels. *Id.* Even assuming that the Tribe could not purchase land from multiple owners, as the Chairman's son was able to do, the Casino Site is zoned agricultural, not commercial/industrial, and the City and County cannot provide it public services because doing so would violate the Growth Management Act. *See* AR074115-22; AR092271-73; AR100033-54. Moreover, the notion that BIA had to identify a specific parcel for sale on a real estate listing and that none existed within the Tribe's historic lands – which the record demonstrates was not the case – is similarly ridiculous.

In response to Plaintiffs' (and Grand Ronde's) objections to BIA's statement of purpose and need in comments on the DEIS, *see* AR009596-98; *see also* AR102781-83, BIA made the purpose and need statement even more restrictive.[39] Rather than relying on environmental constraints and the fact that the lands were not for sale, as BIA did in the DEIS, the new "predominant" basis, *see* AR078614 [FEIS Vol. IV.C, at C-131 (Response #434-10)], for excluding alternatives was that they did not "adequately meet the economic objectives and needs of the Tribal government." AR075886; AR078455 [FEIS B-8] ("[N]one of the . . . northern sites could adequately meet the Tribe's economic objectives and needs.").

To support that conclusion, BIA incorporated the Tribe's newly-minted "Unmet Needs Report" after public comment on the DEIS had completed. AR081569-95. The Unmet Needs Report stated that the Tribe needed $114 million per year to fund governmental services needed to provide for its 3,544 members - $32,000/member/per year or twice the amount the State of Washington spends on its citizens annually, including those members of the Tribe. *See*

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[39] BIA initially "screened" 19 parcels of land to determine if they met the project's purpose and need. AR075882 [FEIS 2-36]. This narrowed the list to 11 properties, including five properties within the Cowlitz's aboriginal territory. See AR075882-886 [FEIS 2-37-40]. Plaintiffs urged BIA to consider at least one site in the Tribe's historic lands, but BIA eliminated every alternative because of environmental constraints or because they were not for sale. AR106673 [DEIS 2-34].

AR081569-95 [FEIS App. Vol. VII.E, Exhibit A]; *see also* AR078453-54 [FEIS B-7]. To be a "reasonable alternative," a site now had to involve contiguous properties forming 20 acres or more owned by the same person, adjacent to I-5, immediately available for purchase, without any environmental constraints and access to public services available, with a favorable zoning designation and capable of generating for the Tribe $114 million per year. It is hard to conceive of a more restrictive statement of purpose and need.

Moreover, BIA's post-DEIS reliance on the Unmet Needs Report to avoid addressing reasonable sites within the Tribe's historic lands is unlawful for other reasons. The Unmet Needs report appears to have been conceived as an effort to avoid addressing reasonable alternatives. An August 4, 2006, memorandum between the Tribe and the environmental contractor preparing the EIS – Analytical Environmental Services (AES) suggests as much: [40]

> Several separate issues regarding the alternatives considered in the EIS were raised…. Several other parties including CARS suggested that an alternative near Toledo should/must be analyzed. CARS also indicated that Alternative D should not have been analyzed because it is economically infeasible.
>
> Introduction of a new alternative which could be selected and implemented would require issuance of a supplemental draft EIS. New alternatives can be interjected into the process is [sic] they are not subjected to detailed analysis, so they could not be selected. Alternatives may only be rejected if they do not meet purpose and need.
>
> So far we propose interjecting 3 new site locations and demonstrating that they do not meet purpose and need. These locations are in Cowlitz and Lewis County.

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[40] There is a reasonable argument that BIA abdicated its responsibility for and oversight of the NEPA process. AR000002-009.The record demonstrates that throughout the process, AES worked directly with the Tribe – with no BIA involvement or oversight – constructing the EIS. Plaintiffs brought this issue to the attention of BIA on April 28, 2010, and provided BIA with the results of a Freedom of Information Act challenge, *Dragonslayer, Inc. v. Salazar*, No. 09-135 (D. Or. 2010). AR058594-603. There are pages of agendas that discuss the major elements of the EIS, but BIA did not participate in any of those meetings. AR058625-749. BIA's response to these concerns is that the Tribe was a cooperating agency – like Clark County and the City of Vancouver – and that all AES work was performed under BIA direction, as required by 40 C.F.R. 1506.5 AR064687-688 [ROD 27-28]. As evident from the record, neither Clark County nor Vancouver had regular meetings with AES, with BIA not in attendance, during which time they agreed with AES to avoid reviewing reasonable alternatives. BIA's response does not answer the questions Dragonslayer and Michels Development raised and are incorrect to the extent that BIA suggests that the Tribe's interaction with AES was business as usual for cooperating agencies. *See Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 830 (9th Cir. 2008).

> However, Grand Ronde has presented a number of alternative locations in Cowlitz and Lewis County they feel should have been analyzed. Grand Ronde's comments even include an Innovations market study of the site.

See AR058651. By October 4, 2006, AES and the Tribe identified as an agenda item "Rewrite of Purpose and Need – AES (started, pending receipt of Economic Development Plan from the Tribe)." AR000007. That rewrite of the purpose and need statement was the basis for determining that a site within Cowlitz or Lewis County would not be economically viable. See AR075832-846 [FEIS 1-1 - 1-15]; AR075882 [FEIS 2-36]; AR075882-886 [FEIS 2-37-40]; AR078614 [FEIS Vol. IV.C, at C-131 (Response #434-10)]; AR075886 [FEIS 2-40]; AR078455 [FEIS B-8].

Second, BIA undermined the critical participation rights NEPA was designed to guarantee. The Unmet Needs Report redefined the purpose and need statement (again). The purpose and need statement and the resulting alternatives review are the most critical elements of an EIS. The "alternatives analysis is the heart of an EIS." 40 C.F.R. § 1502.14; *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004). Modifying the purpose and need statement to explain why a reasonable alternative had already been excluded is particularly egregious. "It is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal." *Block*, 690 F.2d at 771. *Post hoc* examination of data to support a predetermined conclusion is not permissible because "[t]his would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1025 (9th Cir. 2007) (quoting *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (citation omitted)).

Third, BIA did not confirm the accuracy or reasonableness of the Unmet Needs Report. When an agency relies on information submitted by an applicant in preparing an EIS, the agency must "independently evaluate the information submitted" and will be held "responsible for its accuracy." 40 C.F.R. § 1506.5(a); *Native Ecosystems Council v. U.S. Forest Service, an agency*

of U.S. Dep't of Agriculture, 418 F.3d 953, 965 (9th Cir. 2005) (*citing* 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.")). Failure to conduct such independent analysis violates NEPA. It may be the case that the "tribe has the sovereign right to determine the needs of its tribal government and its own members and to determine how to finance those needs," but an EIS is still governed by the "rule of reason."

The Tribe's estimated needs are simply unreasonable. For example, according to the Tribe, its health care needs are $71,810,487 per year for the Tribe's 3,544 members, which breaks down to $20,263 per tribal member or $63,828 per average family. Approximately $39,600,000 would be used for health insurance at an estimated cost of $11,174 per person. In contrast, the average premium for health insurance from the State's largest provider is $2,491 per person. The American Indian Health Commission estimates the level of need of other Washington tribes in the area of healthcare to be $4,025 per tribal member, when adjusted for inflation. Further, Medicare, Medicaid, private insurance, and the Indian Health Services fund 53.06% of those total needs. Thus, costs are approximately $1,889 per person, not the $11,174 stated.[41]

The purpose and need statement, and the manipulation of the statement post-DEIS, compromised both the process and the substance of the document. BIA's actions are unlawful.

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[41] BIA's statement that it "believes that the Cowlitz Tribe accurately has reported the cost of and need for Tribal programs," AR064692 [ROD 32] is belied by its meandering explanation of how the Tribe might want to develop a health clinic, which would require additional costs. As the ROD explains "many Tribal health clinics serve patients from the local population in addition to Tribal members, and frequently these clinics serve an important purpose by providing health care to patients, the uninsured or the underinsured, and those who would otherwise be able to access care only through emergency rooms. Providing health care is a legitimate governmental function, and it is reasonable for the [Tribe] to make it a priority." AR064692 [ROD 32]. This proposal, however, is for a casino, not a health care clinic. BIA cannot justify alternatives on the basis of the "unmet needs" of the Tribe when those needs are quantified on the basis of providing health care to non-Tribal members, many of whom oppose the casino. This is an absurd justification for the numbers the Tribe proposed. This is not the degree of skepticism that the agency is expected to exercise when s "dealing with self-serving statements from a prime beneficiary of the project." *Busey*, 938 F.2d at 209 (Buckley, J. dissenting).

B. BIA Erred in Evaluating Adverse Impacts on Water Quality

The proposed casino cannot operate without a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit. It is likely that the Tribe will be unable to obtain a NPDES permit. The EIS contains almost no consideration of this problem, and the consideration given is wrong and violates NEPA's requirement to provide an accurate evaluation of impacts. 40 C.F.R. §§ 1502.16, 1502.24.

The CWA prohibits the discharge of any pollutant from a point source without a permit. 33 U.S.C. § 1341. The NPDES permit program controls water pollution by regulating point sources. Id. § 1342. Facilities must obtain permits if they discharge directly into surface waters. NPDES permits contain the more stringent of technology-based or water quality–based discharge limits. 40 C.F.R. § 122.29. Water quality-based discharge limits ensure compliance with standards developed by states. 33 U.S.C. § 1313(b)(1)(c); 40 C.F.R. § 122.44(d). Under section 303(d) of the CWA, the states, territories, and authorized tribes develop lists of impaired waters, establish priority rankings for waters on the lists, and establish total maximum daily loads (or TMDLs) for these waters. 33 U.S.C. § 1313(d). A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and meet water quality standards. Id. CWA regulations prohibit discharges from new sources into impaired waters if there is no approved TMDL. See 40 C.F.R. § 122.4(i).

The FEIS states that the East Fork Lewis River and McCormick Creek "are listed as Category 5 impaired waters based on fecal coliform numbers." AR075916 [FEIS 3.3-12]. These waters are also listed as "Category 2 impaired waters based on temperature issues." AR075916 [FEIS 3.3-12]. The FEIS acknowledges that there are no TMDLs in place for the East Fork Lewis River for both fecal coliform and temperature. Id. Thus, EPA cannot authorize a NPDES permit for the casino unless a TMDL is developed or unless the discharge contains none of the pollutants causing the impairment.

Neither the FEIS nor the ROD explain how the casino will address these significant regulatory hurdles. The FEIS does not address the process for obtaining a NPDES permit given

that no TMDLs are in place. AR076082 [FEIS 4.3-4]. The ROD devotes even less attention to these issues, merely assuming that a NPDES permit will be issued. AR64696 [ROD 36]. Neither the FEIS nor the ROD address what happens if a NPDES permit is not issued, and that is the result currently required by the CWA.[42] Instead, the FEIS inaccurately represents and assumes that the treatment system used to mitigate the fecal coliform and temperature impacts will be sufficient to address these deficiencies. With respect to temperature, the FEIS acknowledges that, if untreated, the temperature of the wastewater discharge will be too high to comply with the applicable water quality standard of 16 degrees C. AR076085 [FEIS 4.3-7]. The ROD only indicates that wastewater will be treated so that its anticipated average temperature is 16 degrees C. AR064720 [ROD 60]. However, the water quality standard does not include an "averaging" component. The FEIS also is misleading in its statements that treatment of fecal coliform will be adequate. See AR075916; AR076083 [FEIS 3.3-12; 4.3-5]. The receiving waters remain impaired for fecal coliform. Even if the proposed treatment system is effective in removing much of the fecal coliform from the casino's wastewater discharge, the fact remains that the casino's discharge will contain this pollutant, resulting in a net increase in the receiving water, in violation of the CWA. AR076083 [FEIS 4.3-5]. This error on a critically important issue requires remand of the EIS.

C. The EIS Relies on the Illegal EPHS Ordinance for Mitigation

The Casino Site is designated for agricultural use under the Clark County Comprehensive Land Use Plan. A casino resort is obviously at odds with this designation.

Under NEPA, an EIS must consider the effects of the proposed action on land use. 40 C.F.R. § 1512.16. As the D.C. Circuit has ruled, "more careful scrutiny" is required when, as in

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[42] As a potential alternative to the NPDES permit, the Tribe entered into an agreement with the City of La Center to pay for an extension of the municipality's sewer system. Due to violations of state law, the City rescinded the sewer agreement on June 4, 2012, in response to a legal challenge by some of the Plaintiffs in this case. *Alexanderson v, City of La Center*, WWGMHB No. 12-2-0041 Order on Dispositive Motion (May 4, 2012), available at http://www.gmhb.wa.gov/LoadDocument.aspx?did=2853.

the case of a trust land acquisition, the federal government "exercises its sovereignty so as to override local zoning protections." *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1037 (D.C. Cir. 1973). *See Isle of Hope Historical Ass'n. v. United States Army Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981) (NEPA requires closer scrutiny of measures which conflict with local interests as expressed through appropriate government entities). The Cowlitz EIS not only failed to provide the higher level of scrutiny, it made a fundamental error by relying on the EPHS Ordinance as the source of mitigation to the severe impacts on the agricultural lands subject to the casino proposal. The FEIS makes multiple references to the EPHS Ordinance as the source of mitigation sufficient to reduce the negative land use impacts to an acceptable level.[43] But as shown *infra* at Section III.B., the EPHS Ordinance is not irrevocable or enforceable; its guaranteed mitigation is illusory. Consequently, there is no mitigation authority that would compensate for the impacts of casino development on agricultural lands or for any of the other significant adverse impacts of the casino. The failure of the FEIS to recognize the flaws in the claimed mitigation mechanism results in an inadequate analysis that does not fulfill NEPA's purpose to "consider every significant aspect of the environmental impact of the proposed action." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1974).

CONCLUSION

For the reasons stated above, this Court should vacate the Record of Decision and NIGC's approvals of the 2005 Ordinance and 2008 Amendment.

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[43] *See* supra note 37.

DATED : June 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2012, I have caused service of the **PLAINTIFFS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT FOR SUMMARY JUDGMENT** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: June 20, 2012
Washington, D.C.

/s/ *Jennifer A. MacLean*
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