IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CLARK COUNTY, WA, et al. **Plaintiffs,**	)	
v.	)	**Case No. 1:11-cv-00278-RWR** Judge Richard W. Roberts
UNITED STATES DEPARTMENT OF THE INTERIOR, et al. **Defendants,**	)	
and	)	
COWLITZ INDIAN TRIBE **Intervenor-Defendant**	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants, the United States Department of the Interior ("DOI"), Kenneth L. Salazar, in his official capacity as Secretary of the Interior, the Bureau of Indian Affairs ("BIA"), Kevin Washburn, in his official capacity as Assistant Secretary of the Interior – Indian Affairs,[1] the National Indian Gaming Commission ("NIGC"), and Tracie Stevens, in her official capacity as Chairwoman of the NIGC (collectively the "Federal Defendants"), by undersigned counsel, hereby respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion in Support of Summary Judgment. For the reasons described below, and based upon the Administrative Record ("AR")[2] supporting DOI's determination to accept land into trust for the benefit of the Cowlitz Indian Tribe ("Cowlitz" or "Cowlitz Tribe"), and the AR supporting NIGC's approval of the Cowlitz Tribe's gaming ordinance and the amendment to that ordinance, the Court should grant the United States' Motion for Summary Judgment on all of Plaintiffs' claims.[3]

[1] Mr. Washburn is substituted for Larry Echo Hawk pursuant to Federal Rule of Civil Procedure 25(d).

[2] Because the NIGC and DOI administrative records have the same Bates numbers, the NIGC record cites will be referred to as "NIGC ARXXXX" and the DOI record cites will be referred to as "BIA ARXXXXXX".

[3] Two lawsuits were filed. The first lawsuit was filed on January 31, 2011 (Case No. 11-cv-00278-RWR ("Clark County Plaintiffs")), and the second on February 1, 2011 (11-cv-00284-RWR ("Grand Ronde Plaintiff")). The Grand Ronde Plaintiff does not challenge the NIGC's action, but for ease of reference both Plaintiffs will be referred to collectively, except in relation to the separate claims in each case, if necessary.

BACKGROUND

I. Statement of the Case

Plaintiffs challenge two federal agency actions, one taken by the NIGC Chairman and one taken by the Secretary, that relate to the potential acquisition into trust of property for the Cowlitz Tribe's benefit. Clark Cnty. Compl. at 3, 12-13 (ECF No. 1 in Case No. 11-cv-00278); Grand Ronde Compl. at 2 (ECF No. 1 in Case No. 11-cv-00284).[4] The land at issue is comprised of nine parcels equaling approximately 151.87 acres located in Clark County, Washington ("Cowlitz Property") on which the Cowlitz plans to construct and operate a gaming facility under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. First, Plaintiffs challenge the Secretary's decision to take the Cowlitz Property, located within Clark County, Washington, into trust on behalf of the Tribe pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. The Clark County Plaintiffs also challenge the Secretary's application of the IRA's regulatory factors as part of that decision. Second, Plaintiffs challenge the Secretary's determination that if the property is taken into trust and declared a reservation, the Cowlitz Property will be eligible for gaming pursuant to IGRA, and third, Plaintiffs challenge the Secretary's compliance with the Environmental Impact Statement prepared pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370 for the action in question. Clark Cnty. Compl. at 19-22, 23-24; Grand Ronde Compl. at 14-22. Fourth, the Clark County Plaintiffs challenge the NIGC Chairman's approval under IGRA of the Cowlitz Tribe's gaming ordinance and an amendment to the Tribe's gaming ordinance relating to the Cowlitz Property. Clark Cnty. Compl. at 22-23.

[4] For ease of reference, the citations to ECF numbers will be to the Clark County case docket, unless specified.

The Cowlitz Tribe was acknowledged as a federally recognized tribe in 2002 through the DOI's administrative acknowledgment process ("Federal acknowledgment process" or "FAP"). BIA AR000025; Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Tribe ("Reconsidered Determination"), 67 Fed. Reg. 607-01 (Jan. 4, 2002). The Cowlitz Property will be the first parcels of land held in trust by the United States for the Cowlitz and once it is declared a reservation pursuant to Section 7 of the IRA, 25 U.S.C. § 467, it will be eligible for gaming under the "initial reservation" exception in IGRA. 25 U.S.C. § 2719(b)(1)(B)(ii); BIA AR000141-45. As part of the ordinance approval, the NIGC also determined that the Cowlitz Property would be eligible for gaming under the "restored lands" exception in IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). NIGC AR001622.

II. Statutory and Regulatory Background

A. Indian Reorganization Act

In deciding to accept the Property into trust, the Secretary acted pursuant to the IRA. In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973). This "sweeping" legislation, Morton v. Mancari, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." United States v. Celestine, 215 U.S. 278, 290 (1909). The IRA thus repudiated the previous land policies of the General Allotment Act. The IRA prohibited any further allotment of reservation lands, 25 U.S.C. § 461; extended indefinitely the periods of trust or restrictions on alienation of Indian

lands, 25 U.S.C. § 462; and prohibited any transfer of Indian lands (other than to the tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations," 25 U.S.C. § 464.

The "overriding purpose" of the IRA, however, was broader and more prospective than remedying the negative effects of the General Allotment Act. Morton, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Id. Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477. Congress also authorized or required the Secretary to take specified steps to improve the economic and social conditions of Indians, including: adopting regulations for forestry and livestock grazing on Indian units, 25 U.S.C. § 466; assisting financially in the creation of Indian-chartered corporations, 25 U.S.C. § 469; making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of tribes, 25 U.S.C. § 470; paying tuition and other expenses for Indian students at vocational schools, 25 U.S.C. § 471; and giving preference to Indians for employment in positions relating to Indian affairs, 25 U.S.C. § 472.

Of particular relevance here, Section 5 of the IRA provides in pertinent part that:

> [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
> …
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the

> land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

Section 19 of the IRA provides an inclusive definition of those who are eligible for its benefits. That section provides that "Indian" "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The IRA also includes within its definition of "Indian" "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." Id. In a recent Supreme Court decision, Carcieri v. Salazar, 555 U.S. 379 (2009), the Court interpreted the first definition of Section 19 of the IRA to be limited to tribes that were under Federal jurisdiction in 1934, in overturning the Secretary's approval to take land into trust for the Narragansett Indian Tribe of Rhode Island.

Pursuant to authority expressly delegated to the Secretary to prescribe regulations "carrying into effect the various provisions of any act relating to Indian affairs," 25 U.S.C. § 9; see 25 U.S.C. § 2; 5 U.S.C. § 301, the Secretary has issued regulations governing the implementation of his authority under Section 5 to take land into trust. 25 C.F.R. Part 151. They provide that the Secretary may acquire land into trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Section 151.10 requires the Secretary to notify the state and local governments having regulatory jurisdiction over the proposed land of the proposed trust acquisition so that they can provide written comments on the potential impacts on jurisdiction, taxes and assessments. Id. The provision also obligates the Secretary to consider factors such as: the need of the tribe for the land; the purposes for which the land will be used;

the impact on the state and its political subdivisions resulting from the removal of the land from its tax rolls; jurisdictional problems and potential conflicts of land use; whether the BIA is equipped to discharge any additional responsibilities resulting from the trust status; and compliance with NEPA. See id. § 151.10(b)-(d), (f)-(h). Here, the Secretary made the required notifications and considered the appropriate factors.[5]

In addition to providing the Secretary with authority to accept land into trust, the IRA also authorizes the Secretary to consider such lands as part of a tribe's reservation. Specifically, the IRA provides:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 467 (emphasis in original). As the Record of Decision ("ROD") indicates, the Secretary has issued guidelines implementing the reservation proclamation provision. BIA AR000141.

B. The Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA to regulate gaming operations owned by Indian tribes. IGRA's purpose is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); Citizens Exposing Truth About Casinos v. Kempthorne ("CETAC"), 492 F.3d 460, 462 (D.C. Cir. 2007) (quoting Taxpayers of Mich. Against Casinos v. Norton ("TOMAC"), 433 F.3d 852, 865 (D.C. Cir. 2006)).

[5] The Secretary's summary of his consideration of these factors is included in the BIA administrative record at BIA AR000105-141.

IGRA provides that gaming regulated under the statute shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions in Section 20 of IGRA apply. [6] See 25 U.S.C. § 2719(a)-(b). There are several exceptions to this general prohibition, including when:

> (B) lands are taken into trust as part of --
>
> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1)(B).

The pertinent exceptions here are "restored lands," under which gaming is permitted on lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition," 25 U.S.C. § 2719(b)(1)(B)(iii), and "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii). These exceptions serve the purpose of, "ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones," City of Roseville v. Norton, 348 F.3d 1020, 1030 (D.C. Cir. 2003), and to provide "some sense of parity between tribes that had been disbanded and those that had not." City of Roseville v. Norton, 219 F.Supp. 2d 130, 161 (D.D.C. 2002).

[6] On May 20, 2008, (after the NIGC's restored lands decision at issue here, but before DOI's initial reservation decision) the Bureau of Indian Affairs published regulations implementing Section 20 of IGRA. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008) (codified at 25 C.F.R. Part 292). The regulations became effective August 25, 2008. Gaming on Trust Lands Acquired After October 17, 1988; Correction, 73 Fed. Reg. 35,579-02 (June 24, 2008).

Among other requirements, the governing body of a tribe must also adopt a gaming ordinance and the NIGC Chairman must approve it before Class II or Class III gaming activities may occur on Indian lands. 25 U.S.C. § 2710(b)(1)(B) (Class II); 25 U.S.C. § 2710(d)(2)(A) (Class III).[7]

Pursuant to Sections 2710(b)(2) and (d)(2) of IGRA, a tribe desiring to conduct Class II or Class III gaming must also adopt and enact an gaming ordinance and submit that gaming ordinance to the Chairman of the NIGC for his approval. Unless the Chairman determines that the ordinance does not meet the requirements of IGRA and the NIGC's implementing regulations, the Chairman approves such ordinance within 90 days of its submission. 25 U.S.C. § 2710(e).

C. The National Environmental Policy Act

Congress passed NEPA to focus governmental and public attention on the potential environmental effects of any proposed "major federal action." See 42 U.S.C. § 4332(2)(C); Marsh v. Or. Natural Res. Def. Council, 490 U.S. 360, 371 (1989). Council on Environmental Quality ("CEQ") regulations, 40 C.F.R. §§ 1500–1508, provide guidance to agencies in applying NEPA. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–53 (1989).

NEPA is an "essentially procedural" statute. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). NEPA does not mandate particular results, but instead prescribes a process to ensure that federal decision-makers consider, and that the

[7] Under IGRA, gaming is divided into three classes. Tribes have exclusive authority over "Class I" social and traditional games with prizes of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain "non-banking" card games, see id. § 2703(7)(A)(i), can occur if the state allows such gaming for other groups. See id. §§ 2704, 2710(b). The tribes and NIGC share regulatory duties over Class II gaming. Id. § 2710(b). Class III gaming, which includes more traditional "casino" games, can occur lawfully only pursuant to a tribal-state "compact." Id. § 2710(d). Regulatory and enforcement oversight of Class III gaming activities is also provided under IGRA by NIGC. Id. §§ 2705(a), 2710(d).

public is informed about a proposed action's potential environmental consequences. Robertson, 490 U.S. at 350; Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983). To achieve those twin aims, NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS is a statement regarding "the environmental impacts of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action." Id. § 4332(2)(C)(i)–(iii). In instances where the need for an EIS is not evident from the outset, agencies can use an Environmental Assessment to determine if a proposal's potential effects would be "significant" and therefore require an EIS. See 40 C.F.R. § 1501.4(b), (c). CEQ regulations include several requirements for public involvement in the development of an EIS. See, e.g., id. §§ 1503.1(a)(4), 1506.6.

III. Statement of Undisputed Material Facts[8]

A. Brief History of the Cowlitz Indian Tribe

The Cowlitz Tribe was administratively recognized under the Federal Acknowledgment Process ("FAP") (25 C.F.R. Part 83) in 2000. The Cowlitz Tribe descends from the Lower Cowlitz and the Upper Cowlitz Bands of Southwestern Washington. 62 Fed. Reg. 8,983-01 (Feb. 27, 1997). Its members are descendants of the Lower Cowlitz Indians who were represented in 1855 at the Chehalis River Treaty negotiations held between several Indian tribes in Southwest Washington and the Federal government. Id. Although the Lower Cowlitz Band

[8] Pursuant to Local Rule of Civil Procedure 7(h)(2), a separate statement of material facts will not be filed. "[A]ll material facts are within the administrative record," LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham, 215 F.Supp. 2d 73, 84 n.5 (D.D.C. 2002), vacated on other grounds, 347 F.3d 315 (D.C. Cir. 2003), and therefore, nothing outside the record should be considered.

refused to sign the Chehalis River Treaty, in its initial proposed findings,[9] DOI's Branch of Acknowledgment and Research found that the Lower Cowlitz Tribe's participation in the treaty negotiations constituted unambiguous federal acknowledgment as of the date of the treaty negotiations. Id. The Department continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because they recognized that Indian title to the land had never been properly ceded, BIA AR000127, (citing Cowlitz Tribe of Indians v. United States, 25 Ind. Cl. Comm. 442, 454-56 (June 23, 1971)), and throughout the 1860s, its Office of Indian Affairs made several attempts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation. Id.

The Cowlitz Tribe was administratively recognized under the FAP (25 C.F.R. Part 83) in 2000. The FAP, among other things, required the Tribe to show – and the Department to find – that the Tribe had a continuous political and community existence which commenced from at least the time of the 1855 Chehalis River treaty negotiations:

> The CIT [Cowlitz Indian Tribe] meets criterion 83.7(a), as modified by the application of § 83.8(d)(1), which requires external sources to identify the petitioner from the date of last Federal acknowledgment until the present not only as an Indian entity, but also as the same entity, which was previously acknowledged. The proposed finding found that certain Federal records, ethnographers, local historians and newspapers have identified the CIT as an Indian entity on a substantially continuous basis since 1855.

[9]The final determination to acknowledge the Cowlitz Indian Tribe was issued in February 2000. Final Determination To Acknowledge the Cowlitz Indian Tribe ("Final Determination"), 65 Fed. Reg. 8,436 (Feb. 18, 2000). The Quinault Indian Nation requested reconsideration of the decision before the Interior Board of Indian Appeals. In re Federal Acknowledgment of the Cowlitz Indian Tribe, 36 IBIA 140 (May 29, 2001). The IBIA affirmed the final determination, but referred three issues back to the Secretary for further consideration. Id. In December 2001, the Assistant Secretary-Indian Affairs issued the Reconsidered Determination reaffirming the initial ruling and addressing the concerns outlined by the IBIA. Reconsidered Determination, 67 Fed. Reg. 607. The reconsidered final determination supplements the final determination and supersedes it to the extent it is inconsistent. Id.

65 Fed. Reg. 8,436 (Feb. 18, 2000). In the Final Determination to acknowledge the Cowlitz Tribe, DOI altered the date of previous unambiguous federal acknowledgment[10] to 1878-1880:

> [W]hen Federal Indian agents appointed Atwin Stockum chief in 1878 and included both the Lower Cowlitz and Upper Cowlitz bands in Office of Indian Affairs censuses taken in 1878 and 1880. The proposed finding found that the government administratively joined the Lower Cowlitz, which included the Lower Cowlitz meltis [sic], and the Upper Cowlitz. Although Government documents of the 1860's and 1870's noted separate groups, they handled them together.

Final Determination, 65 Fed. Reg. 8,436-01. None of the Plaintiffs in this case filed a challenge to DOI's determination to acknowledge the Cowlitz Tribe.

B. The Cowlitz Property and Administrative Proceedings

The Cowlitz Tribe seeks to have the Cowlitz Property, consisting of approximately nine parcels totaling 151.87 acres, taken into trust by the United States for the benefit of the Tribe.[11] The Cowlitz Tribe submitted its application to have the Cowlitz Property taken into trust on January 4, 2002. BIA AR000030. The Cowlitz Property is located on the western side of Interstate 5 near the City of La Center,[12] about sixteen miles north of Vancouver, Washington. BIA AR000031; BIA AR075920; BIA AR076441–43 (maps). The Cowlitz Tribe proposes to use the Cowlitz Property to develop "Tribal government facilities, Tribal elder housing, a Tribal cultural center, a casino, a hotel, a convention facility, an RV park, park facilities and a wastewater treatment plant." BIA AR000030–31; BIA AR076444. The purpose is to "establish and operate a Tribal Government Headquarters to provide housing, health care, education and

[10] "Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment." 25 C.F.R. § 83.8(a), (d). Unambiguous previous Federal acknowledgment obviates the need for a tribe to prove existence as a tribal entity prior to that date. Id.

[11] For a description of the parcels, see BIA AR000010-15; Land Acquisitions; Cowlitz Indian Tribe of Washington,76 Fed. Reg. 377 (January 4, 2011).

[12] The City of La Center is currently home to four "card room" gaming establishments. See BIA AR076347.

other governmental services to its members and conduct the economic development necessary to fund these Tribal Government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient" and achieve self-determination. BIA AR000031; BIA AR075785; BIA AR075837.

DOI's approval of the Cowlitz Tribe's application would constitute a "major federal action" under NEPA. The Cowlitz therefore submitted an Environmental Assessment ("EA") of the proposed development's potential environmental effects (see BIA AR129710–94), which was noticed for public comment in April 2004. See BIA AR131351–52. In reviewing the EA, however, DOI determined that there was "a need for a much greater analysis of impacts and their effect on the environment" and that an Environmental Impact Statement ("EIS") would need to be completed. See BIA AR131367–75; BIA AR123958–59. DOI requested public comment on the scope of an EIS and hosted a public scoping meeting in Vancouver, Washington, in December 2004. BIA AR123662–63. Based upon the comments and meeting, DOI developed a scoping report for the forthcoming EIS. BIA AR122867–98.

DOI issued a Draft EIS ("DEIS") for public comment on April 12, 2006. See 71 Fed. Reg. 18,767–68 (April 12, 2006); 106546–48; BIA AR106588–627 (DEIS executive summary). In response to public requests to extend the comment period, DOI accepted comments on the DEIS for more than four months. See BIA AR102715. Public hearings on the DEIS were held in Vancouver, Washington, on June 14 and June 15, 2006. BIA AR000033. After two years of additional review and responding to public comments, DOI issued the Final EIS ("FEIS") for public comment on May 30, 2008. See BIA AR074228–29 (73 Fed. Reg. 31,143–44 (May 30, 2008)); BIA AR075769–831 (FEIS executive summary). After again extending the comment

period at the public's request, DOI accepted comments on the FEIS through August 11, 2008. See 73 Fed. Reg. 39,715 (July 10, 2008).

As discussed above, the procedures and policies concerning the Secretary's exercise of discretion for acquiring land in trust for Indian tribes and individuals are set forth at 25 U.S.C. § 465 and 25 C.F.R. Part 151. In addition to NEPA, as part of DOI's review of the Cowlitz Tribe's application, it considered the factors listed in 25 C.F.R. Part 151, including the purpose of the land acquisition, the impact on the State of Washington and its political subdivisions of removing the Cowlitz Property from the tax rolls, jurisdictional problems and potential conflicts of land use, and whether BIA is equipped to discharge the additional responsibilities resulting from the acquisition. BIA AR000105-106; BIA AR000136-141. DOI also considered the impact of the Supreme Court's recent decision in Carcieri v. Salazar, 555 U.S. 379 (2009), on the Secretary's authority to acquire the Clark County Parcels. BIA AR000106-135.

Because the Cowlitz Tribe intends to conduct Class II gaming on the Cowlitz Property,[13] the Secretary also made a determination regarding whether the Cowlitz Property would be eligible for gaming if the land is taken into trust. Here, the DOI Office of the Solicitor opined that the Property qualifies as the Cowlitz Tribe's "initial reservation" under Section 2719(b)(1)(B)(ii) if it is declared a reservation under 25 U.S.C. § 467, and would be eligible for gaming. BIA AR000145. On October 1, 2012, the DOI Office of the Solicitor issued a revised opinion replacing and superseding the previous opinion. ECF No. 67-2 ("Revised Cowlitz Indian Land Op."). The BIA adopted the opinion as part of its final determination to accept the land into trust. ECF No. 67-1. In the revised opinion, the Solicitor's Office at DOI determined that, although the acquisition post-dates the cut-off date for IGRA's prohibition on gaming for lands acquired in trust after October 17, 1988, once the Property is taken into trust and declared a

[13] The Cowlitz Tribe eventually seeks to conduct Class III gaming. BIA AR075786.

reservation, it will meet the requirements of the initial reservation exception to that prohibition. 25 U.S.C. § 2719(b)(1)(B)(ii); Revised Cowlitz Indian Land Op. at 2, 24.

In approving the Cowlitz Tribe's gaming ordinance, the NIGC also made a determination that the Cowlitz Property would be eligible for Section 20's restored lands exception to the prohibition on gaming, 25 U.S.C. § 2719(b)(1)(B)(iii). NIGC AR001622. The Chairman of the NIGC approved the Cowlitz Tribe's Class II gaming ordinance on November 23, 2005, and in doing so, adopted the legal opinion of the NIGC's Office of General Counsel that the Cowlitz Property will qualify as "the restoration of lands for an Indian tribe that is restored to Federal recognition" under Section 2719(b)(1)(B)(iii) if the land is taken into trust. NIGC AR001622-23. The Chairman of the NIGC later approved an amendment to the Cowlitz Tribe's Class II gaming ordinance that pertains to the Environment and Public Health and Safety provision of the ordinance. NIGC AR000001.

After further review and consideration of public comments submitted pursuant to NEPA, the factors listed in 25 C.F.R. Part 151, the statutory authority delegated pursuant to the IRA, and whether the Cowlitz Property is eligible for gaming, DOI signed its Record of Decision ("ROD") for the Cowlitz Tribe's application on December 17, 2010, deciding to implement the Tribe's preferred alternative. See BIA AR000024–146; 76 Fed. Reg. 377–01 (Jan. 4, 2011). With respect to NEPA, the ROD summarized the alternatives considered, potential environmental effects and possible mitigation, and responded to public comments. AR000030–102. The ROD discussed the reasoning for Interior's decision to select the preferred alternative. AR000102–105. The ROD discusses the 25 C.F.R. Part 151 factors, BIA AR000105-106; BIA AR000136-141, the Secretary's statutory authority, BIA AR000106-135, and whether the Property is eligible for the conduct of gaming. BIA AR000145-146.

C. The Challenged Decisions

In early 2011, parties opposed to the Cowlitz Tribe's proposal brought suit challenging the Interior ROD and NIGC determination under the Administrative Procedure Act. See Compl. for Declaratory & Injunctive Relief ("Clark Cnty. Compl.") (ECF No. 1); Compl. for Declaratory & Injunctive Relief ("Grand Ronde Compl.") (ECF No. 1). Clark County, the City of Vancouver, a non-profit organization, three individuals, and corporations owning the La Center card rooms (collectively, "Clark County" or "Clark County Plaintiffs") allege that Interior's decision to accept the Cowlitz Property in trust violated the IRA and NEPA, and that Interior's determination that the Parcel is eligible for gaming was contrary to IGRA. See Clark Cnty. Compl. ¶¶ 67–80, 85–94. The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), which owns and operates a casino eighty-five miles south of the Cowlitz Property, makes similar allegations in a separate suit. See Grand Ronde Compl. ¶¶ 13, 47–78. The Clark County Plaintiffs, but not Grand Ronde, also allege that the NIGC's determination that the Cowlitz Property is eligible for gaming was contrary to the Indian Gaming Regulatory Act. See Clark Cnty. Compl. ¶¶ 81–84. Clark County and Grand Ronde both seek declaratory relief, vacatur of Interior's land-into-trust decision, and an injunction prohibiting Interior from accepting the Cowlitz Property in trust. See Clark Cnty. Compl. Prayer for Relief; Grand Ronde Compl. Prayer for Relief.

Clark County and Grand Ronde filed their motions for summary judgment on June 20, 2012. See Pls.' Mot. & Memo. of Points & Authorities in Supp. for Summ. J. ("Clark Cnty. Br.") (ECF No. 53); Mem. of Points & Authorities in Support of Pl.s' Mot. for Summ. J. ("Grand Ronde Br.") (ECF No. 45). Pursuant to the Court's direction at the February 10, 2012, scheduling conference, Federal Defendants are responding to the Clark County and Grand Ronde motions for summary judgment, and cross-moving, in a single brief, which will be filed in both

cases. Pursuant to the Court's order denying DOI's request for a voluntary remand, but granting an extension of the briefing schedule, the Federal Defendants' brief is due October 5, 2012. ECF No. 66.[14]

D. Taking the Cowlitz Property Into Trust

As the IRA regulations require, the Notice published in the Federal Register on January 4, 2011, stated that the Secretary would not take the land into trust until 30 days after publication. 25 C.F.R. § 151.12. Plaintiffs filed this action within the 30-day time period. By Letter of February 1, 2011, the United States notified Plaintiffs that the Secretary voluntarily agreed not to take the land into trust during the pendency of this litigation, in order to allow Plaintiffs ample time to seek judicial review of the Secretary's decision. See Ex. A. That voluntary agreement was conditioned upon Plaintiffs' agreement to expeditiously pursue briefing on the merits.

IV. Applicable Standards

A. The Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 is "an integral part of the Federal Rules as a whole" insofar as it allows for the dismissal of "factually insufficient claims" before trial, and thereby prevents

[14] However, in compiling the administrative record, DOI was unable to locate certain documents submitted by the Clark County Plaintiffs in this case addressing the merits of the NIGC's determination that the Cowlitz Property qualifies as restored lands under IGRA. ECF. No. 53-2 at ¶¶ 3-5. Because DOI's initial reservation determination relied in part on the facts of the restored lands decision, the documents also potentially impacted DOI's IGRA determination. Therefore, the Federal Defendants argued that the initial reservation determination should be voluntarily remanded to DOI so the agency could review its determination in light of the documents. On August 29, 2012, the Court denied the Federal Defendants' motion, but extended the briefing schedule to allow DOI time to reconsider the determination. On October 1, 2012, DOI filed a supplemental ROD that adopted and incorporated a Revised Cowlitz Initial Reservation determination, dated October 1, 2012. ECF 67-2.

the "unwarranted consumption of public and private resources" required by a trial of such meritless claims. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The initial burden of production under Rule 56 rests with the moving party who must make a prima facie showing that it is entitled to summary judgment. See id. at 330. The moving party may satisfy this burden by demonstrating to the court "that there is an absence of evidence to support the nonmoving party's case." Id. at 325. However, the moving party need not "negate the elements of the nonmoving party's case." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990). Rather, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The burden then shifts to the nonmoving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (internal quotations omitted). See also Bias v. Advantage Int'l, 905 F.2d 1558, 1560-61 (D.C. Cir. 1990).

B. Review of Agency Action Under the APA

Plaintiffs in both cases bring their claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §706, which generally provides for judicial review of final agency action. Section 706(2)(A) of the APA provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard encompasses a presumption in favor of the validity of agency action. Thus, "[t]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Small Refiner Lead Phase-Down v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has

been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706; see also Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 420. Thus, the Court's review is limited to the administrative record. See TOMAC, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing Overton Park, 401 U.S. at 420).

Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). Under this deferential standard, there is a strong presumption in favor of upholding decisions where agencies have acted within their scope of agency expertise. Marsh, 490 U.S. at 376, 378; Friends of the Earth v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30, 35–36 (D.D.C. 2000). "[A]gency action is arbitrary and capricious if an agency has entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id. at 34 (internal quotation marks and citations omitted).

The Secretary's decision to approve the Cowlitz Tribe's trust application is entitled to the deference normally accorded agencies. Lyng v. Payne, 476 U.S. 926, 939 (1986) (agency's construction of its own regulations is entitled to substantial deference); EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980). The courts will grant an agency's interpretation of its own regulations considerable legal leeway. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (Secretary's interpretation of own regulations are controlling unless "plainly erroneous or inconsistent with the regulation."). "[I]f the reviewing court simply cannot evaluate the

challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

C. Deference to the Agency's Interpretation of a Statute[15]

Both the Secretary's and the Chairman's decisions are entitled to Chevron deference. See Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F.3d 667 (8th Cir.1997) (agency interpretation of the IRA deserves Chevron deference) (citing Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984)). Under Chevron, the first question is whether the statute is silent or ambiguous on the matter. See Chevron, 467 U.S. at 843. If so, the courts will defer to the agency's interpretation so long as it is reasonable. See United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citing Chevron, 467 U.S. at 842-845). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding," but only that the agency's interpretation is reasonable and is not contrary to congressional intent. Chevron, 467 U.S. at 843 n.11 (1984) (citations omitted). The Secretary promulgated regulations to implement the IRA's directive and to provide detailed criteria and procedures for trust land acquisitions. See 25 C.F.R. Part 151. Because the Secretary's decision to acquire the Cowlitz Property was made according to formally promulgated regulations pursuant to an express delegation of authority, the Secretary's

[15] In addition to Chevron and Skidmore deference, ambiguous statutes and ambiguous statutory provisions enacted for the benefit of Indians are to be construed liberally in their favor. See Bryan v. Itasca Cnty., 426 U.S. 373 (1976); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 158-59 (D.D.C. 2000). The IRA and Section 20 of IGRA were enacted for the benefit of Indian tribes. This Court has concluded that Section 20 of IGRA is ambiguous, requiring its provisions to be interpreted in the tribe's favor. See Coos, 116 F. Supp. 2d at 162.

interpretation of the IRA and implementing regulations deserve Chevron deference. See Mead, 533 U.S. at 226-27.

SUMMARY OF ARGUMENT

Based on the Administrative Records before the Court, the Court should grant the United States summary judgment on Plaintiffs' claims. Plaintiffs challenge the Department's trust decision in a number of respects. First, both Plaintiffs allege that the IRA does not apply to the Cowlitz because the Cowlitz Tribe was not under Federal jurisdiction at the time of the statute's enactment. Clark Cnty. Compl. at 19; Grand Ronde Compl. at 14. Summary judgment should be granted on that claim because the Cowlitz have been under Federal jurisdiction since at least 1855, when the United States attempted to negotiate a treaty with the Tribe for cessation of their lands and removal to a reservation. Both Plaintiffs also challenge the Secretary's decision that the Cowlitz Property meets the requirements of IGRA's Section 20 initial reservation exception, and therefore would be eligible for gaming. Clark Cnty. Compl. at 21; Grand Ronde Compl. at 16. In short, Plaintiffs claim that the Cowlitz Tribe lacks a significant historical connection to the Cowlitz Property. Summary judgment should be granted on that claim because the facts establish that the Cowlitz Tribe maintained a strong presence in the vicinity of the Cowlitz Property, more than sufficient to establish a significant historical connection to the property. Plaintiffs also allege that the Secretary failed to comply with NEPA. Clark Cnty. Compl. at 23; Grand Ronde Compl. at 19. Grand Ronde, however, lacks standing to even bring NEPA claims. Regardless, the EIS adequately assessed the proposed action's alternative and potential environmental effects. Summary judgment in favor of the Federal Defendants is therefore appropriate.

The Clark County Plaintiffs assert two additional counts. They raise a number of claims challenging DOI's compliance with its land-to-trust regulations and their underlying policies. Clark Cnty. Compl. at 20-21. DOI's consideration of the factors required by its regulations is adequately documented in the ROD, which presents a lengthy and careful analysis of how acquiring land into trust may impact local government tax rolls, may result in potential jurisdictional problems and land-use conflicts, and whether DOI has capacity to shoulder the new administrative responsibilities that will arise with the trust acquisition. BIA AR000136-39. The Clark County Plaintiffs also allege that the NIGC violated IGRA because it lacked the authority to approve the gaming ordinance and the later amendment of that ordinance for the Cowlitz Tribe. Clark Cnty. Compl. at 22-23. Summary judgment should be granted in favor of Federal Defendants on that claim as well because the NIGC had the statutory authority to approve the Cowlitz Tribe's gaming ordinance and its amendments.

For the following reasons, all of Plaintiffs' claims lack merit and the Court should grant summary judgment in favor of the United States.

ARGUMENT

I. The Secretary's Exercise of His Authority to Acquire the Land Into Trust Pursuant to the IRA is Consistent with the Statute and the Supreme Court's Decision in Carcieri v. Salazar and is Entitled to Chevron Deference.

In count one of both complaints, the Plaintiffs challenge the Secretary's authority under the IRA to acquire land into trust for the Cowlitz Tribe. For the following reasons, summary judgment should be granted in the Federal Defendants' favor on count one of Plaintiffs' complaints.

A. The Carcieri Decision

In February 2009, the United States Supreme Court issued its decision in Carcieri v. Salazar, 555 U.S. 379 (2009). Carcieri involved a challenge to DOI's decision to accept land into trust for the benefit of the Narragansett Tribe of Rhode Island, a tribe that the Court found "was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." Id. at 384. The Court interpreted the word "now," in the phrase "now under Federal jurisdiction" to mean in "under federal jurisdiction in 1934." Finding that the Narragansett Tribe was not under federal jurisdiction in 1934, the Court concluded that the Secretary lacked authority under the IRA to take the parcel at issue into trust. The majority did not elaborate on how a tribe might demonstrate that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in effect had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934. Id. at 395-96. Nor did the majority address the term, "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

In his concurrence, Justice Breyer addressed the relationship between these two terms, noting that the word "now" in the IRA modifies "under Federal jurisdiction" not "recognition," and concluded that the IRA "imposes no time limit upon recognition." Id. at 397-98. Moreover, Justice Breyer noted that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." Id. at 397.

In short, Carcieri requires the Secretary to establish that any "recognized Indian tribe" that applies for land to be taken into trust under the first definition of Indian in Section 19 of the IRA was "under federal jurisdiction" at the time of the passage of the IRA in 1934. Because the term "now" in the IRA does not modify the term "recognized Indian tribe," however, there is no

requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not" recognize it "at the time." Id. at 397 (Breyer, J.). Plaintiffs' assumption that the term "recognized Indian tribe" also carries with it a temporal component dating back to 1934, such that the tribe was considered federally recognized in 1934, is therefore incorrect and contrary to the language of the statute.

B. The IRA Does Not Define the Phrase "under Federal jurisdiction" and DOI's Interpretation of That Phrase is Reasonable and Entitled to Deference.

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." BIA AR000112-113; BIA AR000123. Nor does the legislative history clarify the meaning of the phrase. BIA AR000113-116; BIA AR000123. Indeed, in a 1934 memorandum drafted by Assistant Solicitor Felix Cohen in Solicitor's Office of DOI that compared the Senate and the House versions of the bill, Cohen stated that the Senate bill, "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' whatever that may mean," and recommended removal of the phrase because it would likely provoke too many questions regarding interpretation. BIA AR000115.

Therefore, in exercising the Secretary's delegated authority to interpret and implement the IRA, and having closely considered the text of the IRA, its remedial purposes, legislative history, the Carcieri decision, and the Department's early practices, as well as the Indian canons of construction, DOI construes the phrase "now under federal jurisdiction" as entailing a two-part inquiry: 1) whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, and 2) whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status was never terminated before, and therefore remained through the passage of the IRA in 1934. BIA AR000123-124. DOI took significant

care in drafting its interpretation, reviewed extensive comments submitted by Plaintiffs, other tribes, and tribal representative groups, and considered several potential alternative constructions of the statutory language. BIA AR000124-26. DOI's two-part test is entitled to Chevron deference, as is the application of that test to the Cowlitz Tribe. In articulating the two-part test, DOI carefully construed an ambiguous statutory phrase in a manner that relied on the Agency's regulatory expertise and was consistent with its past practices and policies. Accordingly, its interpretation – and the application of the test to the Cowlitz Tribe – is entitled to a high degree of deference from this Court.[16] In any event, DOI's determination was neither arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, nor was it in excess of its statutory authority.

The first inquiry in the two-part test is whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for, or on behalf of, the tribe that are sufficient to establish, or that reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. BIA AR000123. DOI explained that some federal actions may in and of themselves demonstrate that a tribe was at some identifiable point or period in its history under federal jurisdiction. In other cases, an array of actions when viewed in

[16]This Court should apply Chevron deference to the Secretary's interpretation, rather than the deference standard in Skidmore v. Swift & Co., 323 U.S. 134 (1944), even though the Secretary's legal interpretation arose through a case-by-case determination, rather than notice-and-comment rulemaking. Chevron provides "the appropriate legal lens through which to view the legality of the Agency interpretation," Barnhart v. Walton, 535 U.S. 212, 222, (2002), because of the "interstitial nature of the legal question" and the "related expertise of the Agency," id. See also Cal. Valley Miwok Tribe v. U.S., 515 F.3d 1262, 1266 (D.C. Cir. 2008). In any event, Skidmore deference is more than sufficient to uphold the Secretary's interpretation and determination in this case.

concert may demonstrate that a tribe was under federal jurisdiction. Id. Once having established that the tribe was historically under federal jurisdiction, the second question is to ascertain whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact in 1934. BIA AR000124.

C. DOI's Finding that the Cowlitz Tribe Was "Under Federal Jurisdiction" in 1934 Is Correct and Should Be Upheld.

DOI carefully and properly reviewed all documents submitted by the Cowlitz Tribe and the documents submitted by interested parties, including arguments and materials submitted by Plaintiffs, as well as the factual and historical evidence pertinent to types of actions that could constitute evidence of a tribe being under federal jurisdiction. BIA AR000124-26; BIA AR000103-106. Based on this analysis, DOI concluded that the record reflects a course of dealings between the United States and the Cowlitz Tribe during the 1850s and that there is sufficient subsequent evidence that the Tribe remained under federal jurisdiction through the passage of the IRA in 1934. BIA AR000126.

In accordance with step one of the two part inquiry, DOI reasonably concluded that the first clear expression that the Cowlitz Tribe (or its predecessors) was under federal jurisdiction is reflected by the United States' treaty negotiations with the Lower Band of Cowlitz Indians.[17] While the negotiations did not result in a treaty, DOI determined that these events clearly reflect

[17] In February 1855, Governor Stevens engaged in a week of negotiations with the Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians at a location on the Chehalis River just east of Grays Harbor. BIA AR000126. The proposed treaty presented to the Indians during the negotiations called for them to cede all their claims to territory covering much of southwestern Washington in exchange for a single reservation to be provided later. Id. When the Indian negotiators from the inland tribes rejected these provisions due to their location and the Government's insistence on locating all the tribes together, Governor Stevens ended the negotiations. Id. (citing Cowlitz Tribe of Indians v. United States, 21 Ind. Cl. Comm. 143, 167-69 (June 25, 1969)).

the existence of a relationship with the Cowlitz Tribe (or its predecessors) and that the Federal Government had demonstrated responsibility for the Tribe (or its predecessors). Id. [18]

As discussed supra., the Final Determination to acknowledge the Cowlitz Tribe extended the date of previous unambiguous federal acknowledgment to 1878-1880, "when Federal Indian agents appointed Atwin Stockum chief in 1878 and included both the Lower Cowlitz and Upper Cowlitz bands in Office of Indian Affairs censuses taken in 1878 and 1880. The proposed finding found that the government administratively joined the Lower Cowlitz, which included the Lower Cowlitz me1tis[sic], and the Upper Cowlitz. Although Government documents of the 1860's and 1870's noted separate groups, they handled them together." 65 Fed. Reg. 8,436-01 (Feb. 18, 2000); BIA AR000127. Therefore, DOI reasonably and permissibly found, as the starting point in its analysis, that the Cowlitz Tribe was unambiguously under federal jurisdiction at least as of 1880.[19]

DOI further concluded that through the rest of the 19th Century, the federal government continued to identify the Cowlitz Indians as under its jurisdiction to provide services to them. Id. For example, in 1894 the local Superintendent stated that the Federal Government continued to provide for non-reservation Indians via schools and the provision of medical services. Id.

[18] Notwithstanding the lack of reservation for the Cowlitz, the Federal Government continued a course of dealings with both the Tribe and its members. BIA AR000127. During the rest of the 1850s and into the 1860s, officials of the Department continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because they recognized that Indian title to the land had never been properly ceded. BIA AR000127. For example, in his 1862 report, Superintendent C. H. Hale requested that treaties be entered into with the Chehalis, Cowlitz and other tribes. Additionally, during the 1860s, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation. BIA AR000127.

[19] As discussed supra., none of the Plaintiffs in this case challenged that determination made during the FAP and that determination is entitled to deference as part of the agency's application of regulations promulgated through notice and comment rulemaking.

DOI noted that the provision of services to, and actions on behalf of, Cowlitz Indians by the Federal Government also continued into the 20th Century. BIA AR000128. These services included attendance by Cowlitz children at BIA operated schools and authorization of the expenditure of money held by the Department for health services, funeral expenses, or goods at a local store on behalf of Cowlitz Indians. Id. The local Indian Agency representatives repeatedly included Cowlitz Indians as among those for whom they believed they had supervisory responsibilities. Id. For example, during the 1920s the Superintendant in the Taholah Agency represented the interests of the Cowlitz Tribe *vis a vis* state parties for purposes of asserting fishing rights. Id. In January 1927, the Superintendent of the Taholah Agency responding to an inquiry about a possible claim against the Government by the Cowlitz noted that "[t]he Cowlitz band are under the Taholah Agency" not the Tulalip Agency. Id. Later that year, the same Superintendent wrote to the principal of a school on the Yakama Reservation to seek information about certain students who attended school there. Id. He stated that "[m]y jurisdiction includes all those Indians belonging to the Quinaielt, Quileute, Chehalis, Nisqually, Skokomish, Cowlitz, and Squaxin Island Tribes." Id. A later example is the Annual Report for 1937 in which a figure of 500 "unattached Indians largely of Cowlitz tribe" are identified as "Indians under the supervision of the Office of Indian Affairs whose names do not appear on the census rolls at Indian agencies . . . ." Id.

Indeed, some representatives even spoke in terms of a Cowlitz "reservation" although none was ever established for the Tribe. Id. For example, in April 1923, the Superintendent wrote to the Commissioner of Indian Affairs regarding traveling expenses to describe "the reservations under this jurisdiction, also the country inhabited by the detached Indian

homesteaders." Id. Included among the reservations is a reference to "the Cowlitz Reservation located in the Cowlitz River Valley." Id.

In 1904, the Cowlitz began a prolonged effort to obtain legislation to bring a claim against the United States for the taking of their land. BIA AR000129. Evidence supporting this claim was presented to the Department, and in 1910, the Department requested that Special Indian Agent Charles McChesney prepare a report on their claim. BIA AR000129. McChesney's report concluded that the claim of Cowlitz Indians was a just one, and that they should receive compensation for land they had occupied and never ceded. Id. The local Superintendent supported this report and described Cowlitz as follows:

> These Indians, like the Clallams, have never had any recognition at the hands of the Government and were active allies of the United States during the Indian troubles of the early days. These Indians are industrious and should be accorded recognition. I estimate that there are about 100 members of this tribe. The Clallam and the Cowlitz Tribes are the only two tribes in Southwestern Washington who have preserved their tribal identity who have not had any recognition from the government.

Id. Ultimately, the Tribe was not successful in obtaining special legislation, but was awarded a judgment for its land from the Indian Claims Commission. Id.

The Cowlitz Indians were also enumerated in the federal censuses. For example, from 1914 through 1923, the population tables at the end of the Annual Reports included a figure for "unattached Indians" in southwest Washington State that set forth an estimated number of Cowlitz. Id. From 1930 through 1938, the total population of unenumerated Indians was listed separately from those enumerated, and each year a population of approximately 500, identified as associated with the Taholah Agency, is described as either "scattered bands" or "unattached Indians largely of the Cowlitz Tribe." Id. Although not identified in the census as a "tribe," the inclusion of Cowlitz Indians demonstrates evidence that those Indians were accounted for in

official federal records, and that while they lacked a land base they were still subject to federal oversight. Id.

In addition to membership rolls or censuses, BIA also kept separate census counts by reservation that would include all individuals who obtained rights to that reservation's land through allotments. BIA AR000130. This is further evidence of federal superintendence. For the roll associated with the Quinault Reservation, individuals, including Cowlitz, were identified as being members of their own tribes and not members of the Quinault Tribe. Id. The distinction is explained in a March 16, 1934, instruction to the Taholah Superintendent from Commissioner Collier. Id. Collier explains that receipt of an allotment on the Quinault Reservation by a Chinook, Chehalis or Cowlitz Indian did not mean that such Indian should be included on the tribal roll for Quinault, only that he or she should be included on the census roll for the Quinault Reservation. Id. He continued by stating that "they should be enrolled, if under your jurisdiction, as Chinook, Chehalis, and Cowlitz Indians." Id.

Other evidence of federal jurisdiction and a continuing course of dealings relates to allotments issued to Cowlitz Indians. Id. The first allotment issued to a Cowlitz Indian occurred in 1888, pursuant to the amended Indian Homestead Act, Act of July 4, 1884, Ch. 180 23 Stat. 76, 96.

According to information gathered for the acknowledgment decision, approximately 20-30 other off-reservation allotments were ultimately issued to Cowlitz Indians, some of which were granted as homesteads under the Homestead Act and some as Section 4 (public domain) allotments under the General Allotment Act. Id. The Department's view at the time of acknowledgment was that "the law establishing the public domain allotments appears to treat non-reservation groups whose members got such allotments as having the same status as clearly

recognized, reservation tribes . . . . There is supporting evidence that the allotment was based on a [f]ederal relationship." BIA AR000130-131. Furthermore, at the time the IRA was passed, Indians possessing homestead allotments on the public domain were still eligible to organize. BIA AR000131 n.124.

Some Cowlitz Indians also received allotments on the Quinault Reservation if they had not received one on another reservation or the public domain. BIA AR000131. The basis for such allotments is found in the Executive Order creating the Quinault Reservation and a 1911 Act: The November 4, 1873, Executive Order established the Reservation for "the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast;" and the Act of March 4, 1911, confirmed pre-existing allotment activity by directing the Secretary to make allotments on the Quinault Reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Id.

In Halbert v. United States, 283 U.S. 753 (1931), a suit filed by members of various tribes who had been denied allotments, the Court held that "the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." Id. at 760; BIA AR000131. Based on the reference to the "Cowlitz Tribe" in the Halbert decision of 1931, the action by Congress to provide allotments for "other tribes of Indians in Washington" in the 1911 Act and its implementation as to Cowlitz Indians, and the virtually consistent position taken by the DOI to grant allotments to eligible Cowlitz Indians during the period from 1905 to 1930, the Secretary concluded that the Cowlitz Tribe was under federal jurisdiction during this period of time. Id.

Finally, DOI's approval of an attorney contract for the Tribe in 1932 is a key indicator that DOI regulated the affairs of the Cowlitz Tribe, and therefore the Tribe was under Federal jurisdiction. BIA AR000132. The Act of May 21, 1872, Revised Statutes § 2103, required that contracts between Indian tribes and attorneys had to be approved by both the Commissioner of Indian Affairs and the Secretary of the Interior in order to be valid. Id. This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to the statutory requirement for Department supervision of its attorney contracts, and thus "under federal jurisdiction." Id.

Based on all of the foregoing evidence, DOI reasonably determined that the historical record demonstrates that the Cowlitz Tribe retained that jurisdictional relationship up to and including 1934, thereby fulfilling the second part of DOI's two-part inquiry. BIA AR000127. Furthermore, DOI concluded that there is no conclusive evidence that the United States administratively or congressionally terminated the Cowlitz Tribe's jurisdictional status or that the Tribe otherwise lost that status, at any point from 1880 through present times. BIA AR000126. Because of DOI's expertise on these issues, these conclusions are entitled to deference. See Cal. Valley Miwok Tribe, 515 F.3d at 1266 (deferring to the agency "because of the 'interstitial nature of the legal question' and the 'related expertise of the Agency'").

The Clark County Plaintiffs argue that the Secretary's evidence is insufficient because a failed treaty negotiation cannot provide evidence that a tribe was under Federal jurisdiction. Clark Cnty. Br. at 21-23.

As to the Clark County Plaintiff's first contention, it is easily dismissed. The Clark County Plaintiffs devote several pages to the argument that federal recognition is necessary for a tribe to be "under Federal jurisdiction." Clark Cnty. Br. at 14-19. However, as discussed supra.,

because the term "now" in the IRA does not modify the term "recognized Indian tribe," there is no requirement that the tribe prove that it was viewed by the federal government as a "recognized" tribe in 1934. Moreover, through the FAP process, Interior previously determined that the failed treaty negotiation constituted the initiation of the federal relationship with the Cowlitz Tribe and was an unambiguous federal acknowledgment of the Tribe. 62 Fed. Reg. 8,983 (Feb. 27, 1997). As discussed supra., that date was later extended to 1880. 65 Fed. Reg. 8,436-01 (Feb. 18, 2000). Plaintiffs failed to challenge either determination during the FAP and are precluded from challenging that decision in this case. In addition, federal treaty negotiations demonstrate that the United States thought that the Cowlitz constituted a tribal entity with which a treaty was feasible, see Worcester v. Georgia, 31 U.S. 515, 559-60 (1832), and "reflect the existence of a relationship with the Tribe . . . and acknowledged responsibility for the Tribe." BIA AR000126.

Plaintiffs also argue that DOI's determination conflicts with NIGC's earlier finding in its restored land opinion that the Cowlitz had been terminated. Clark Cnty. Br. at 19-20, 24-26. This argument fails because a determination made by NIGC under IGRA does not affect the Secretary's exercise of authority under the IRA. The NIGC is not charged with administering the IRA and the NIGC has no special expertise in determining the legal status of tribes.

Furthermore, the United States originally argued that the "restored lands" exception in IGRA only applied to tribes that were terminated by Congress and that the term "restored" was a term of art that applied "only to a process of restoration by way of Congressional action or by order of the court, not by agency acknowledgment." See Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 46 F. Supp. 2d 689, 697 (W.D. Mich. 1999), aff'd 369 F.3d 960 (6th Cir. 2004). Therefore, the restoration of lands could only be by Congressional

action. Id. at 697. Under this interpretation of IGRA, a tribe recognized through FAP, such as the Cowlitz Tribe, could never fit in the restored lands exception because that tribe's ability to be recognized through the FAP is premised on it never being terminated. A tribe may only be acknowledged through the FAP if, "[n]either the petitioner [tribe] nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." 25 CFR § 83.7(g).[20] However, the courts disagreed that "restoration" or "restored" were terms of art that only applied to congressionally restored tribes, so those definitions in IGRA were judicially expanded. See id.; Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155 (D.D.C. 2000).[21] So for purposes of IGRA, the terms "restored" and "restoration" – and the inverse of restoration, "termination" – have a broader meaning.

II. The Secretary Properly Interpreted the Ambiguous Terms of the IRA and that Interpretation is Entitled to Chevron Deference.

Plaintiffs in effect make two general arguments as to why the Secretary's interpretation of the IRA is incorrect: that "now" in the phrase "recognized Indian tribe now under Federal jurisdiction" modifies "recognized Indian tribe," as well as "under Federal jurisdiction"; and in 1934, the term "recognized tribe" was interpreted as the political concept of a government-to-government relationship. Both arguments fail.

A. The Secretary Properly Construed the Phrase "Recognized Indian Tribe" as Not Having a Temporal Qualification.

The Secretary concluded that in the definition of "Indian" in the IRA, the word "now" modifies the phrase "under Federal jurisdiction," and not the phrase "recognized Indian tribe." If

[20] Instead, a tribe recognized through FAP could acquire lands through the initial reservation exception.

[21] DOI has since narrowed the ability of a tribe to avail itself of both the restored lands and initial reservation exception in the regulations implementing Section 2719 of IGRA, codified at 25 C.F.R. Part 292. See 25 C.F.R. § 292.6.

Congress had intended a different interpretation, it would have done so by referencing a particular date or time frame. The Secretary, in effect, adopted the interpretation set forth by Justice Breyer in his concurrence in Carcieri. Justice Breyer concluded that the IRA "imposes no time limit upon recognition." Carcieri, 555 U.S. at 398.

Pursuant to this interpretation, the Secretary properly determined that he had authority to acquire land in trust for the Cowlitz Tribe based on the acknowledgment of the Cowlitz Tribe in 2002 and the determination that the Tribe was under Federal jurisdiction in 1934.[22]

B. The Clark County Plaintiffs Have Agreed with the Secretary's Interpretation of the IRA.

The Clark County Plaintiffs' argument that the Secretary's interpretation of the IRA is contrary to the plain language and legislative history of the Act, as well as the majority opinion in Carcieri, Clark Cnty. Br. at 13-21, is not only without merit, but undermined by their submissions during the administrative process in which they conceded that "under Federal jurisdiction" was left undefined by the Court. BIA AR023071. It is anomalous to argue on the one hand that the Secretary's interpretation of the IRA post-Carcieri is contrary to the plain statutory text and the majority's opinion in Carcieri because the language is unambiguous, Clark Cnty. Br. at 14-15, while on the other hand, arguing, "[t]he Court's decision admittedly left uncertain precisely which post-1934 federally recognized tribes qualify for trust acquisition pursuant to section 5 of the IRA, 25 U.S.C. § 465, because it did not define the phrase, 'under federal jurisdiction' in section 19 of the IRA, 25 U.S.C. § 479." BIA AR023071. Aside from

[22] Grand Ronde challenges the Secretary's interpretation on grammatical grounds by comparing the text of the IRA to fictional statutes that regulate the practice of medicine or the regulation of automobiles. Grand Ronde Br. at 10. This argument rests on the false premise that ambiguous, highly complex, and evolving concept of a "recognized Indian tribe," discussed infra., operates in the same manner as readily defined terms such as "state resident" and "automobiles." Even if Grand Ronde's grammatical model were sound, the Cowlitz Tribe was both a recognized Indian tribe (in an anthropological sense) and under Federal jurisdiction in 1934.

the settled law that "claims not presented to the agency may not be made for the first time to a reviewing court," United Transportation Union v. STB, 114 F.3d 1242, 1244 (D.C. Cir. 1997) (citation omitted), their current litigation stance is directly contrary to their position during the pendency of the matter at DOI. Indeed, the purpose of the submission was to refute the Cowlitz Tribe's Carcieri submission that the Secretary should adopt a plain meaning definition of "under Federal jurisdiction," BIA AR023077, the position they now apparently adopt.

Moreover, in refuting the Cowlitz Tribe's assertion that DOI should use the dictionary definition of "jurisdiction,"[23] Clark County argued that:

> the Court held that "now" under the IRA meant 1934, and, accordingly, that the Secretary cannot acquire lands in trust for tribes that were not under federal jurisdiction in 1934. Whether a tribe also had to be federally recognized in 1934 was not resolved, but if not, it must still have been "under federal jurisdiction."

BIA AR023074 (emphasis added). Despite acknowledging that the phrase "under Federal jurisdiction" was undefined by the Court and that the issue of whether a tribe had to be federally recognized in 1934 was left unresolved, the Clark County Plaintiffs now contend that both issues were clearly addressed in Carcieri and that the Secretary's interpretation of the statute is contrary to the plain language of the IRA and the Carcieri decision. Compare BIA AR023071; BIA AR023076 and Clark Cnty. Br. at 13-21. As they previously recognized, that is simply not the case. "[T]hree of the nine Justices took the position that federal recognition is not synonymous with being under federal jurisdiction . . . [and] the majority took no position on the matter whatever . . . . Thus, the decision does not resolve the question of whether 'under federal jurisdiction' and recognition are coextensive." BIA AR02376-77 (Perkins Coie submission to Larry Echo Hawk, Assistant Secretary-Indian Affairs, and Hilary Tompkins, Solicitor) (internal citations omitted).

[23] The Secretary did not adopt the Cowlitz Tribe's interpretation of the statute. Compare BIA AR000112-113 and BIA AR059496-97.

C. Even if the IRA is Interpreted to Require Recognition in 1934, the Cowlitz Tribe Would Qualify.

As explained above, the language of the IRA does not impose a temporal requirement on the term "recognized Indian tribe." If this Court interprets the IRA to the contrary, as both Plaintiffs now argue, Clark Cnty. Br. at 14-16; Grand Ronde Br. at 9-13, the Cowlitz Tribe constituted a recognized Indian tribe in 1934.

1. The IRA Did Not Require Formal Federal Recognition in 1934.

The concept of formal federal recognition was being developed in 1934. As the Secretary observed:

> The members the Senate Committee on Indian Affairs debating the IRA appeared to use, the term 'recognized Indian tribe' in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term 'recognized Indian tribe,' even though '[t]he Government has not found out that they live yet, apparently. In fact, the Senate Committee's concern about the breadth of the term 'recognized Indian tribe' arguably led it to adopt the phrase 'under federal jurisdiction' in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as 'under federal jurisdiction,' if the IRA had incorporated the rigorous, modern definition of federally recognized Indian tribe.

BIA AR000117.[24]

Only in the years subsequent to the enactment of the IRA did the Department actively begin to engage in tribal recognition, making determinations that were largely conducted on a case by case basis for a large number of Indian groups. For example, in the 1930s alone, the Department of the Interior's Solicitor's Office was called upon repeatedly to determine the status of groups seeking to organize under the IRA. Memo from Associate Solicitor, Indian Affairs to

[24] Based on this discussion in the legislative history, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits" in reference to the Stillaguamish Tribe. See Memo from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, BIA AR064398; BIA AR000111 n.31; BIA AR000117 n.60; BIA AR000119.

Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, BIA AR064398 (discussion of the case by case determinations for tribes seeking to organize under the IRA).

Plaintiffs argue that the term "recognized Indian Tribe" refers to political entities having a government-to-government relationship with the United States in response to the Secretary's statement that it is sufficient that the Cowlitz were recognized in a "cognitive" or "quasi-anthropological sense." Grand Ronde Br. at 13-17; Clark Cnty. Br. at 16-19. While Plaintiffs' understanding may be the current view of the federal relationship with federally recognized Indian tribes, the contours of that relationship were not as well-defined in the 1930s. In fact, formal regulatory parameters for recognition were not established until well after the IRA's enactment. Felix Cohen, former Solicitor at DOI and the author of the original Cohen's Handbook on Federal Indian Law, developed the "Cohen criteria"[25] which lists the type of evidence the BIA considered when determining tribal status at that time. Felix Cohen, Handbook of Fed. Indian Law 271 (1941); see also Statement of Hazel Elbert, Deputy to the Assistant Secretary – Indian Affairs [Indian Services], Department of the Interior, Hearing Before the Senate Select Committee on Indian Affairs, United States Senate, Oversight Hearing on Federal Acknowledgment Process ("FAP"), S. Hrg 100-823, pages 2-10, 61-62 (May 26,

[25] Those factors are:

> (1) That the group has had treaty relations with the United States.
> (2) That the group has been denominated a tribe by act of Congress or Executive order.
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
> (4) That the group has been treated as a tribe or band by other Indian tribes.
> (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Cohen, Handbook of Fed. Indian Law at 271. Cohen states that these factors were considered singly or jointly in making the determination.

1988) (discussing various factors BIA considered prior to the FAP – treaty relations, legislation, denomination as a tribe by the government or other tribes, existence of a tribal council or other body of government that is exercising political authority and ethnology, history and social solidarity); see also Allen v. United States, -- F. Supp. 2d --, 2012 WL 1710869, at *6-8 (N.D. Cal. 2012). The BIA also relied on a mixture of court opinions, limited statutory guidance, treaty law, and evolving departmental policy and practices, but lacked a clear and consistent system to apply these factors and recognize a tribe until the FAP. Id. In fact, DOI's considerations lacked precision and "led to inconsistencies in the BIA's final determinations of tribal status." Id. at 6.

The reality is that there was no formal process or method for recognizing a tribe until the establishment of the FAP in 1978.[26] Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978). However, tribes acknowledged through the FAP must prove their continuous existence not just as Indians, but as a tribal entity as well. The Cowlitz Tribe has met that exacting burden and by doing so, necessarily meets the criteria of the Cohen factors developed in the 1930's. 65 Fed. Reg. 8,436 (Feb. 18, 2000). None of the Plaintiffs in this case challenged the Secretary's FAP findings. Those findings are conclusive and unquestionably entitled to Chevron deference because those regulations are the result of notice and comment rulemaking. Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745, 754 (D.C. Cir. 2007) ("If the agency enunciates its interpretation

[26] Grand Ronde cites the D.C. Circuit's decision in California Valley Miwok Tribe v. United States, 515 F.3d 1262 (D.C. Cir. 2008), for the proposition that recognition was a clearly defined term that predated the IRA and recognition was accomplished through treaties, executive orders or statutes. The passage cited by Grand Ronde is very general and certainly not a test for what recognition was in 1934. However, the very tribe that is involved in that case was not recognized through a treaty, executive order or a statute, but nonetheless, it was allowed to vote on the application of the IRA to its Rancheria (Sheep Ranch Rancheria) in 1934. California Valley Miwok Tribe v. United States, 424 F. Supp. 2d 197, 197-98 (D.D.C. 2008).

through notice-and-comment rule-making or formal adjudication, we give the agency's interpretation Chevron deference.").

2. The FAP Recognized the Cowlitz Tribe as Continuously Existing From Historical Times.

Pursuant to the FAP, a tribe must establish that it, "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 CFR § 83.7(c). As a result, a tribe recognized through the FAP constitutes a tribe that existed as a government and community from historical times. In its proposed findings to acknowledge the Cowlitz Tribe, DOI found:

> The evidence also indicated that throughout the period since 1855, the named leaders were identified by knowledgeable external authorities, primarily Federal officials, as exercising a sufficient amount of political influence or authority within the overall membership to meet criterion 83.7(c), which is intended to establish continuous tribal political existence. Evidence from BIA documentation was ample for this purpose for the period through the late 1930's, and there was also sufficient evidence for the more recent period. In 1953, the BIA notified the Cowlitz Tribe of Indians (CTI), through its elected leader, of the pending western Washington termination legislation. In 1964, the council and some of the general membership became involved in a dispute concerning the approval of an attorney contract for pursuing claims litigation under the 1946 Indian Claims Commission (ICC) Act. While there is no evidence that the disputants aligned themselves along factional lines, the disputes were perceived by Federal officials as a threat to the leadership's stability, indicating that the membership exerted influence on the formally elected leadership.

Proposed Finding for Federal Acknowledgment of the Cowlitz Indian Tribe, 62 Fed. Reg. 8,983-01, 8,984 (Feb. 27, 1997). This finding establishes that even if the IRA were correctly read to provide authority to acquire land in trust for the Cowlitz Tribe only if the Tribe was federally recognized in 1934, the record shows that it met that standard throughout, as DOI formally acknowledged later in the FAP.

3. Voting on the IRA's Application

Grand Ronde's assertion that the IRA's voting requirement provides clear evidence that a tribe had to be recognized in 1934 and that the list of tribes that voted constitutes the entire universe of tribes that were eligible for benefits under the IRA, Grand Ronde Br. at 10, 24-25, is without basis in the statutory text. For example, Grand Ronde's argument completely ignores the language of the voting provision of the statute, which states, "[t]his Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478 (emphasis added). Nowhere in this section is there a mention of a "recognized tribe" voting on the IRA. Indeed, tribes that did not vote on the IRA [St. Croix Chippewa Indians of Wisconsin] appear in Table B of the Haas Report, which Grand Ronde cites, as organizing under the IRA. See BIA AR134256 (Haas Report). Furthermore, some tribes that were permitted to vote on the IRA's application were later denied organization under the IRA, as in the case of the Nooksak Tribe, BIA AR134278 (Haas Reprt);[27] M-35013 (Organization of the Nooksack Indians Under the Indian Reorganization Act) (Dec. 9, 1947), and Cowlitz members residing on the Quinault reservation were eligible to vote on the application of the IRA to the Quinault reservation when the votes were conducted in 1935 as, "descendants of such members [of a recognized Indian tribe] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479 (the second definition of "Indian"); BIA AR00131. Based on the uneven

[27] In 1947, Theodore H. Haas, Chief Counsel, United States Indian Service, wrote a pamphlet entitled, "Ten Years of Tribal Government Under I.R.A." Available at BIA AR134256. The report contains several tables regarding the organization of tribes under the IRA. Table A lists the tribes that voted to accept or reject the IRA and this list is frequently cited for the mistaken proposition that tribes that voted on the IRA were the only ones recognized as eligible to organize under the IRA's provisions. Table B lists the tribes that have IRA constitutions and charters. If only those that voted were eligible to organize, every tribe in Table B should be listed in Table A, but that is not the case.

interpretation of the provisions of the IRA and its application to various tribes, see Allen, 2012 WL 1710869, at *6-7, it is clear that the statute is ambiguous.

4. The IRA Case Law Supports the Secretary's Determination

Plaintiffs claim that every court to address the issue has held that the IRA only authorizes the Secretary to take land into trust only for tribes that were recognized in 1934. Grand Ronde Br. at 11; Clark Cnty. Br. at 15 n.13. This argument is erroneous. The cases upon which Plaintiffs rely either do not pertain to the definition at issue in this case or were superseded by the Supreme Court's decision in Carcieri. Plaintiffs quote United States v. John, 437 U.S. 634 (1978), for example, which addressed whether the United States had criminal jurisdiction over the defendant, a member of the Mississippi Band of Choctaw Indians. In John, the State of Mississippi argued that the IRA, 25 U.S.C. §§ 460-479, could not apply to the Mississippi Choctaw because the Act was not meant to apply to Indians that were "fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." John, 437 U.S. at 652. The Court rejected that argument, stating:

> The 1934 Act defined 'Indians' not only as 'all person of Indian descent who are members of any recognized [in 1934] tribe not under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all person of one-half or more Indian blood.' 48 Stat. 988, 25 U.S.C. § 479 (1976 ed.). There is no doubt that persons of this description lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior, at that time the Act was passed.

Id. at 650. However, the Supreme Court did not address what it meant to be "recognized" or "under Federal jurisdiction" in 1934. Indeed, if it had addressed the issue, there would have been no reason for Carcieri to be litigated because John would have been binding precedent. In

John, the Supreme Court simply did not address the temporal requirement. Instead, the Supreme Court concluded that:

> Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.
>
> …
>
> It is true that this treaty [Treaty at Dancing Rabbit Creek] anticipated that each of those electing to remain in Mississippi would become 'a citizen of the States,' but the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them.

Id. at 653.

Plaintiffs also rely on Maynor v. Morton, 510 F.2d 1254 (D.C. Cir. 1975), which likewise has nothing to do with interpreting what "under Federal jurisdiction" or "recognized" meant in 1934. Grand Ronde Br. at 12. In Maynor, plaintiff was one of 22 individuals who in 1938 received one-half blood Indian status certification from the BIA and therefore, was eligible for benefits under the IRA. Maynor needed such certification because he was Lumbee, which did not have "any tribal designation, organization, or reservation at the time." Maynor, 510 F.2d at 1256. Thereafter, Congress officially designated the Indians living in Robeson and adjoining counties, North Carolina, as the "Lumbee Indians," but expressly precluded them from receiving federal services. Lumbee Act of 7 June 1956, 70 Stat. 254 (June 7, 1956). The court concluded that Maynor's designation as an Indian under the IRA was not abrogated by the 1956 Act, specifically finding that "no implication of a repeal of the certified Indian status of Maynor arises by such legislation conferring a tribal name on a group of North Carolina Indians, even if the group included Maynor." Maynor, 510 F.2d at 1259. Thus, unlike the situation in Maynor, in the present matter, the Federal Government was well aware of and directly involved with the Cowlitz Tribe in 1934. The Federal Government, in fact, entered into treaty negotiations with

the Cowlitz and listed Cowlitz Indians on official agency census rolls well before 1934. BIA AR000126; BIA AR000130. Plaintiffs would like this Court to believe that the Lumbee's lack of a tribal designation or reservation in 1934 is the same as the Federal Government ignoring its obligations to the Cowlitz Tribe, but the circumstances of the Lumbee simply are not relevant to the present matter. More importantly, as discussed in the ROD, the Federal Government did have involvement with the Cowlitz Tribe in 1934.

The other cases Plaintiff cites are also inapplicable. United States v. State Tax Comm'n of State of Miss., 505 F.2d 633 (5th Cir. 1974), was superseded by the Supreme Court's decision in John:

> On appeal [of Mr. John's conviction], the Supreme Court of Mississippi, relying on its earlier decision in Tubby v. State, 327 So.2d 272 (1976), and on the decision of the United States Court of Appeals for the Fifth Circuit in United States v. Tax Comm'n, 505 F.2d 633 (1974) . . . held that the United States District Court had had no jurisdiction to prosecute Smith John . . . .

John, 437 U.S. at 637 (reversing the Fifth Circuit and the Supreme Court of Mississippi's decisions that the Federal government lacked jurisdiction over defendant). Finally, City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), supports the Secretary's decision:

> First, although the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe *deserved* recognition in 1934. The 1972 Memorandum constitutes such subsequent recognition.

City of Sault Ste. Marie at 161 (concluding that the later recognition of the Sault Ste Marie Band did not preclude the Secretary from subsequently applying the IRA to the Band).

III. The Secretary's Revised Gaming Determination Has Been Revised and Is Entitled to Deference.

Both Plaintiffs also challenge the Secretary's determination that the Cowlitz Property is eligible for gaming under IGRA, Clark Cnty. Compl. at 21; Grand Ronde Compl. at 16. However, as DOI explains in its Revised Initial Reservation Opinion for the Cowlitz Property, it clearly meets the statutory and regulatory requirements to be eligible for the conduct of gaming. See Revised Cowlitz Indian Land Op.

A. The Secretary's Remand Request

As discussed in the Federal Defendants' motion for voluntary remand, ECF. No. 56, DOI was unable to locate certain documents submitted by the Clark County Plaintiffs in this case addressing the merits of the NIGC's determination regarding the Cowlitz Property. Decl. Jennifer Maclean ECF. 53-2 at ¶¶ 3-5. Because DOI's initial reservation determination relied in part on the facts of NIGC's restored lands decision, the documents also potentially were relevant to DOI's IGRA analysis. Therefore, the Federal Defendants argued that the initial reservation determination should be voluntarily remanded to DOI so the agency could review its determination in light of the documents. On August 29, 2012, the Court denied the Federal defendants motion, ruling that:

> Neither a remand nor a stay, however, is necessary to enable the federal defendants to review and reconsider the determination. Instead, the deadline for the defendants to file oppositions to the plaintiffs' summary judgment motion will be extended. Should the federal defendants decide in the interim to rescind or otherwise alter their determination, they shall file promptly a notice of such action.

ECF No. 66 at 3.

B. The Revised Cowlitz Opinion

In the interim, DOI reevaluated its initial reservation determination in light of the documents provided by the Clark County Plaintiffs. DOI based its review on the administrative record filed on February 15, 2012, ECF. No. 43, and a review of the supplemental administrative record documents filed on April 30, 2012, ECF. No. 46, which includes the subject documents. Revised Cowlitz Indian Land Op. at 3. On October 1, 2012, DOI filed a notice rescinding its prior initial reservation determination and issuing a revised one. ECF No. 67-1.

Because the Cowlitz Property would be acquired in trust after October 17, 1988, gaming would be lawful only if the Cowlitz Tribe's request meets one or more of the exceptions to the general prohibition against gaming on newly acquired lands found in IGRA. The Cowlitz Tribe's application requested that DOI accept the Cowlitz Property into trust as part of its initial reservation, making the parcel eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(B)(ii) (the "initial reservation exception"). The initial reservation exception of IGRA provides that the general prohibition on gaming on lands acquired after October 17, 1988, does not apply when: "lands are taken into trust as part of the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." Id. The regulations implementing Section 2719 of IGRA require two inquiries for the analysis of whether a tribe's request meets the requirements of the initial reservation exception: "(1) was the tribe acknowledged through the Federal acknowledgement process?; and (2) is the subject land eligible to be taken into trust as part of the Tribe's initial reservation?" Revised Cowlitz Indian Land Op. at 1-2. In its revised initial reservation opinion, DOI determines that the answer to the first inquiry is undoubtedly yes, and therefore, focuses on the second inquiry.

Pursuant to DOI's regulations implementing Section 2719 of IGRA, 25 C.F.R. Part 292, the initial reservation exception allows for gaming on newly acquired lands if the following conditions are met:

> (a) The tribe has been acknowledged (federally recognized) through the administrative process under part 83 of this chapter.
>
> (b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.
>
> (c) The land has been proclaimed to be a reservation under 25 U.S.C. 467 and is the first proclaimed reservation of the tribe following acknowledgment.
>
> (d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has *significant historical connections* and one or more of the following modern connections to the land:
>
> (1) The land is near where a significant number of tribal members reside; or
>
> (2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or
>
> (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

25 C.F.R. § 292.6 (emphasis added). Because the Cowlitz Tribe had no proclaimed reservation on the effective date of the Part 292 regulations, DOI applied 25 C.F.R. § 292.6(d).[28]

The key issue in subsection 292.6(d) is whether the land at issue is "within an area where the tribe has significant historical connections." The term "significant historical connections" is

[28] As discussed above, the Cowlitz Tribe was acknowledged through the FAP and currently has no trust land and does not operate a gaming facility. Revised Cowlitz Indian Land Op. at 6-7, 9-10. Therefore, DOI concluded, and Plaintiffs have not disputed, that the Tribe meets the first three requirements of 25 C.F.R. § 292.6, because it would be the first reservation proclaimed for the Tribe. Id. at 10.

defined in IGRA's implementing regulations to mean, "the land is located 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 (emphasis added). DOI concluded that there is sufficient evidence of historic use and occupancy *in the vicinity* of the Cowlitz Property to conclude that the Tribe has significant historical connections to the parcel pursuant to the regulations. Revised Cowlitz Indian Land Op. at 11. DOI based its conclusion on evidence such as: the Indian Claims Commission ("ICC")[29] findings that the Cowlitz Tribe's exclusive aboriginal territory is located only fourteen miles from the Cowlitz Property, id. at 12, the Cowlitz Tribe's presence at Warrior's Point located only three miles northeast of the Cowlitz Property, id. at 15, the Cowlitz Tribe's presence at Bellevue Point located only ten miles south of the Cowlitz Property, id. at 16, the location of a significant battle between the Cowlitz and the Chinook Tribes only three miles away from the Cowlitz Property, id. at 20-21. DOI reached its conclusion based on its review of the FAP findings and ICC proceedings, as well as the material submitted by Plaintiffs, and concluded that the Cowlitz Tribe has significant historical connections to the Cowlitz Property to meet the requirements of the initial reservation exception. Id. at 23. DOI also concluded that the Cowlitz Tribe has a modern connection to the Cowlitz Property based on the fact that it maintains its governmental headquarters in Longview, Washington, only 22 miles away, satisfying the requirements of 25 C.F.R. § 292.6(d)(2), and because a significant number of tribal members reside near the Cowlitz Property (104 members living in Clark County), Revised Cowlitz Indian Land Op. at 23-24.

[29] "In 1946, Congress enacted the Indian Claims Commission Act, establishing a tribunal with power to decide tribes' claims against the Government." Arizona v. California, 530 U.S. 392, 393 (2000).

Plaintiffs argue that the Cowlitz Tribe lacks a significant historical connection to the Cowlitz Property because the Tribe's connections are too attenuated and too geographically distant from the Cowlitz Property. Clark Cnty. Compl. at 21-22; Clark Cnty. Br. at 40-45; Grand Ronde Br. at 32. In making their arguments, Plaintiffs would like this Court to believe that DOI has departed dramatically from its prior application and interpretation of the term "significant historical connection" in finding that the Cowlitz Property is eligible for the "initial reservation exception." This is not true. Plaintiffs cite to several Indian land opinions in their brief, Grand Ronde Br. at 33-34, quoting selectively from these opinions in attempt to argue their case. However, Plaintiffs leave out several important factors in those decisions, namely the distances that those parcels were from each tribe's territory. For example, Grand Ronde cites the NIGC's Bear River opinion, Grande Ronde Br. at 34 n.18, but fails to point out that the parcel was six miles from the boundary of the Bear River Band's Rancheria and outside the boundary of a negotiated but unratified treaty with the tribe. Bear River Band Rohnerville Rancheria Approval at 8-9 (Aug. 5, 2002), available at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx. The NIGC also found that it was three to six miles away from several other important sites for the tribe, concluding that the tribe nonetheless had a significant historical connection because it was in the vicinity. [30]

[30] More examples are: the approval for the Poarch Band of Creek Indians at 23-24 (the land was 12 miles from the Poarch Reservation, the last governmental center of the Creek Nation before its removal westward in the 1830s); Mooretown Rancheria Restored Lands Opinion at 10 ("The Feather Falls Site lies just outside Oroville, approximately 15 miles from the original Rancheria."); The St. Ignace Parcel Does Not Qualify As The Restoration of Lands for An Indian Tribe Restored to Federal Recognition (Sault Ste. Marie Tribe of Chippewa Indians) at 11-12 (the parcel satisfied the significant historical connection requirement, even though 50 miles from the Tribal center in Sault Ste. Marie, Michigan); Legality of Gaming Under the IGRA on the Shriner Tract owned by Wyandotte Tribe at 21 (175 miles was too far to qualify); Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria at 9 (10 miles from the Tribe's original

In finding the Cowlitz Property eligible for gaming, DOI similarly concludes that the Cowlitz were in the vicinity of the Cowlitz Property based on information that shows their presence three miles away at Warrior's Point, Revised Cowlitz Indian Land Op. at 15, at Bellevue Point, which is ten miles south of the Cowlitz Property, id. at 16, on the Cowlitz trade route three miles from the Cowlitz Property, id. at 17, and the ICC's finding that the aboriginal title area of the Cowlitz Tribe is only 14 miles north of the Cowlitz Property, id. at 6; see figure 1, which maps these points in relation to the Cowlitz Property. ECF No. 67-3. All of this evidence, considered together, led DOI to appropriately conclude that the Cowlitz Tribe established that it was in the vicinity of the Cowlitz Property and that decision and DOI's interpretation of its regulations implementing IGRA are entitled to deference.

Grand Ronde claims that the ICC findings bar DOI from concluding that Cowlitz maintained a presence anywhere outside of the ICC adjudicated area. Grand Ronde Br. at 35-37. However, Grand Ronde misunderstands the standards used by the ICC in adjudicating claims. The ICC interpreted the ICCA provision allowing claims for taking of lands "owned or occupied" by a tribe to authorize recovery of damages only where the tribe could show that it had "aboriginal title" to lands. Revised Cowlitz Indian Land Op. at 5. "The ICC adopted the strict standard for establishing aboriginal title announced by the Supreme Court in 1941 in United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941)." Revised Cowlitz Indian Land Op. at 5. As a result, a tribe was required to show actual, exclusive, and continuous use and occupancy prior to loss of the land in order to be compensated for a taking of their aboriginal title. Id. at 6. There is no dispute that the Cowlitz could not establish exclusive use and occupancy of the Cowlitz Property because the Cowlitz shared that area with another tribe, the

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Rancheria). All of these opinions are available at the NIGC website: http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

Chinook. Simon Plamondon, On Relation of the Cowlitz Tribe of Indians v. United States, 21 Ind. Cl. Comm. 143, 146-47 (June 25, 1969). That does not mean, however, that the Cowlitz never used the property or that they were never in the vicinity. Indeed, the ICC states that, "the Lewis River area was *used by various Indian groups* throughout the first half of the nineteenth century. It could perhaps be described as a transitional area of *shifting Indian use*." Id. at 147 (emphasis added). Furthermore, the regulatory standard that is applicable here does not include the same limitation.

DOI's determination that the Cowlitz Property would qualify under the "initial reservation exception" is consistent with prior Indian land opinions addressing whether a tribe has "significant historical connections" to a parcel to justify their ability to operate a gaming facility on that land. Moreover, Plaintiffs' arguments completely ignore the standard of review of agency actions such as DOI's determination. Courts may not overturn an agency's decision simply because there may be conflicting evidence, and "in the absence of evidence to the contrary, courts presume that [agencies] have properly discharged their official duties." Nat'l Archives & Record Admin. v. Favish, 541 U.S. 157, 174 (2004). Moreover, an agency decision must be upheld so long as the agency examines the relevant data and sets out a satisfactory explanation 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 v. United States, 371 U.S. 156, 168 (1962)). That is all that is required, and the only question before the Court at present is a legal one: whether DOI's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Demonstrating this is Plaintiffs' burden. See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 37 (D.C. Cir. 1986) ("the party challenging an

agency's action as arbitrary and capricious bears the burden of proof."). DOI used the appropriate standards in analyzing whether the Cowlitz Property met the requirements of DOI's regulations implementing Section 2719 of IGRA and that determination is entitled to deference.

IV. The Department of the Interior Fully Complied with NEPA.

Summary judgment as to Plaintiffs' NEPA claims should be also granted in favor of the Department of the Interior. Notably, the Grand Ronde Community asserts a purely economic interest and therefore lacks standing to pursue claims under NEPA. Regardless, and with respect to the Clark County Plaintiffs' claims, Interior undertook years of environmental review, marked with three rounds of public comment and culminating in the expansive FEIS that Plaintiffs now challenge. That FEIS more than adequately informed the public and agency decision-makers as to potential alternatives to the Cowlitz Tribe's proposal, as well as the potential environmental effects that could result from that proposal and its alternatives.

A. The Grand Ronde Community Lacks Standing for its NEPA Claims.

Initially, the Court need not reach any of the NEPA arguments brought by the Confederated Tribes of the Grand Ronde Community because Grand Ronde lacks standing to make such claims.

"Standing is an essential and unchanging part of [Article III's] case-or-controversy requirement." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A plaintiff has standing to enforce procedural rights, such as those that NEPA affords, only if the applicable procedural requirement was "designed to protect some threatened concrete interest" of the plaintiff. Id. at 573 n.8; see Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc). "NEPA, of course, is a statute aimed at the protection of the environment." ANR Pipeline Co. v. FERC, 205 F.3d 403, 408 (D.C. Cir. 2000). A plaintiff challenging an agency's

alleged failure to follow one of NEPA's procedural requirements must therefore show harm to a "particularized environmental interest." Fla. Audobon Soc'y, 94 F.3d at 665. In addition to Article III's standing requirements, see Lujan, 504 U.S. at 560–61, the judiciary has placed several prudential limits on standing. When a plaintiff brings claims under the APA, he or she must allege grievances that "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982) (citations omitted); see ANR Pipeline Co. v. FERC, 205 F.3d at 408 (D.C. Cir. 2000). Under that principle, "a NEPA claim may not be raised by a party with no claimed or apparent environmental interest." Town of Stratford v. FAA, 285 F.3d 84, 88 (D.C. Cir. 2002).

Grand Ronde lacks standing for its NEPA claims because it does not raise a particularized environmental interest. Nor likely could it. The Spirit Mountain Casino, which provides the basis for Grand Ronde's alleged harm, is *eighty-five miles* from the Cowlitz Property. See BIA AR082244. The injury that Grand Ronde does allege is purely economic: lost revenue from increased competition to its own casino. See Grand Ronde Br. at 46; BIA AR102778 (letter from Grand Ronde stating that it "has an important economic interest at stake"). The United States Court of Appeals for the District of Columbia Circuit has squarely held that such economic harm, when not interrelated with environmental effects, is insufficient for purposes of standing under NEPA. See Town of Stratford, 285 F.3d at 89; ANR Pipeline, 205 F.3d at 408. This Court has followed suit, recognizing in the context of an Interior decision to accept land in trust for a tribe, that, to fall within NEPA's zone of interests, any economic interest must stem from the federal action's environmental impacts. See City of Roseville v. Norton, 219 F. Supp. 2d 130, 165 (D.D.C. 2002) (citing City of Olmstead Falls v. FAA, 292 F.3d

261, 267–68 (D.C. Cir. 2002)).[31] Grand Ronde's alleged harm does not fall into that category, and it therefore lacks standing to pursue its NEPA claims.

B. Interior Properly Considered a Reasonable Range of Alternatives to the Proposed Action.

Plaintiffs' NEPA arguments primarily relate to the FEIS's analysis of project alternatives. But the arguments fail. The FEIS reasonably defined the project's purpose and need, properly relying on the Cowlitz Tribe's stated goals for the project. The FEIS then analyzed six potential alternatives in detail and, as NEPA requires, briefly discussed those alternatives not chosen for detailed analysis. The public and the decision-maker were fully informed as to the potential alternatives to the Cowlitz Tribe's proposed action, and Interior therefore complied with NEPA.

1. Interior Reasonably Defined the Purpose and Need.

Interior's definition of the project's purpose and need is more than reasonable.[32] The FEIS specifies the proposed action's purpose as creating a Tribal land base for the currently-landless Cowlitz Tribe. BIA AR075837. The Tribe will use the land to "establish a Tribal

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[31] See also Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (holding plaintiff lacked standing where it had "not linked its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the EIS"); Lower Ark. Valley Water Conservancy Dist. v. United States, 578 F. Supp. 2d 1315, 1338 (D. Colo. 2008) (holding plaintiff lacked standing where it asserted loss in tax revenue and ability to lease water); Hurd Urban Dev., L.C. v. Fed. Highway Admin., 33 F. Supp. 2d 570, 572–74 (S.D. Tex. 1998) (holding plaintiff lacked standing for claimed interest "to avoid a loss of business from the reduced traffic flow").

[32] The reasonableness of an agency's selection of alternatives is determined with reference to the action's objectives. NEPA requires that an agency briefly specify the underlying purpose and need for the proposed action. 40 C.F.R. § 1502.13. An agency may not define its objectives "in terms so unreasonably narrow that only one alternative . . . would accomplish the goals" or "in terms so unreasonably broad that an infinite number of alternatives would accomplish [its] goals . . . ." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). "[T]he court will 'uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable . . . .'" Theodore Roosevelt Conservation P'ship v. Salazar, 744 F. Supp. 2d 151, 161 (D.D.C. 2010) (quoting Busey, 938 F.2d at 196). Interior's FEIS easily meets that standard.

Headquarters from which its Tribal Government can operate to provide housing, health care and other government services, and from which it can conduct the economic development necessary to fund these Tribal Government services and provide employment opportunities for its members." Id. The FEIS makes clear that the need for the project derives from the Cowlitz's current lack of "meaningful opportunities for economic development and self-sufficiency of the Tribe and its members." Id. More important, see Busey, 938 F.2d at 196, the stated purpose and need is in accord with the statutory authority under which Interior would be acting here. See BIA AR000032. The Indian Reorganization Act "provides the Secretary with the broad authority to acquire land in trust status for Indian tribes in furtherance of the statute's broad goals of promoting Indian self-government and economic self-sufficiency." BIA AR000032; see 25 U.S.C. § 465 ("The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians."). These statements meet NEPA's requirement to "briefly specify the underlying purpose and need." 40 C.F.R. § 1502.13.

Contrary to Plaintiffs' arguments, the purpose and need statement did not inappropriately limit the agency's choice of alternatives.[33] Clark County argues Interior's use of feasibility criteria make the statement is too narrow. See Clark Cnty. Br. at 48–49. But Clark County confuses two related but distinct concepts. The FEIS did not use the feasibility criteria to define

[33] Even if Interior had established its purpose and need as simply acting upon Cowlitz's proposal, the agency would not necessarily have violated NEPA. The D.C. Circuit has approved such narrow purpose and need statements. See Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73 (D.C. Cir. 2011); Busey, 938 F.2d at 196–98.

the purpose and need; rather, it used them to determine which, if any, of nineteen additional potential locations were "reasonable" alternatives. See BIA AR075882.[34]

Similarly, the statement of purpose and need is not overly-broad. It includes limiting parameters of a need for land that provides for Tribal employment, sustainable revenue, and housing near Tribal offices. See BIA AR075837–38. In arguing for over-breadth, Clark County focuses on the Cowlitz's need for sustainable revenue, but ignores the other two needs.[35] See Clark Cnty. Br. at 48. And, as the FEIS's analysis of alternatives demonstrates, the reasonable alternatives were far from infinite. See BIA AR075882–86.

Plaintiffs offer two additional reasons why they believe the purpose and need statement to be faulty: (1) a claim that Interior inappropriately relied upon the Cowlitz Tribe's statement of its unmet needs (Grand Ronde Br. at 43–44; Clark Cnty. Br. at 49–50, 51–52); and (2) a claim that Interior acted contrary to NEPA by modifying the purpose and need statement in the FEIS (Grand Ronde Br. at 42–43; Clark Cnty. Br. at 49–50). Neither has merit.

[34] Agencies need not consider alternatives that are "too remote, speculative, or impractical or ineffective," regardless of whether those alternatives could possibly meet the purpose and need. Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1039 (10th Cir. 2001) (citation omitted); see Vt. Yankee, 435 U.S. at 551 (in order for an EIS to be "more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility").

[35] The Clark County Plaintiffs' assertion that the purpose and need statement is overly broad is surprising. Some of those Plaintiffs conceded during the administrative process that the statement was properly scoped and, if anything, too narrow. See BIA AR109178 (comments from Citizens Against Reservation Shopping stating the purpose and need statement in the DEIS was "sufficiently broad"); BIA AR009597 (comments from Dragonslayer, Inc stating same).

First, it is entirely appropriate for agencies to consider the applicant's needs and objectives in defining project purpose.[36] In fact, agencies are "precluded from completely ignoring a private applicant's objectives." Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999). Interior regulations governing review of land-into-trust applications contemplate that tribal-applicants will submit information upon which the agency can base its NEPA review. See 25 C.F.R. § 151.11(a) (referencing 25 C.F.R. § 151.10(h)).

Both Grand Ronde (Br. at 43) and Clark County (Br. at 51–52) attempt to overcome these NEPA principles by relying upon 40 C.F.R. § 1506.5(a). But that provision prohibits agencies from relying upon an applicant's submissions without independent evaluation; it does not force agencies to determine for themselves what an applicant's needs should be. See Busey, 938 F.2d at 199 ("Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."). The fact that the applicant here is a sovereign tribal nation only buttresses the point. Federal government adjustment to a tribe's internal economic budgetary planning and needs would be inappropriate and contrary to federal Indian policies encouraging tribal sovereignty and self-determination. See AR000054.

Grand Ronde's citation to Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997), is similarly off point. Grand Ronde Br. at 43. In Simmons, the United States Court of Appeals for the Seventh Circuit found the agency had misstated the applicant's purpose. 120 F.3d at 669. While the applicant had sought a permit to supply water to a town and a water district, the agency had narrowed that purpose to one that supplied water from a single source, thus effectively leaving only one alternative. See id. Here, by contrast, Interior's chosen

[36] City of Grapevine, Texas v. U.S. Dep't. of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994); Busey, 938 F.2d at 196–98. "When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application" and "cannot redefine the goals of the proposal that arouses the call for action." Busey, 938 F.2d at 196, 199 (citation omitted).

purpose, though relying on the Tribe's stated needs, does not inappropriately restrict the consideration of alternatives. Indeed, after an initial feasibility screening, the FEIS looked into a total of 13 potential locations for the Cowlitz's preferred site (BIA AR075847–80, BIA AR075882–86), analyzing in detail two alternative sites and several on-site alternatives (BIA AR075847–80).[37]

Plaintiffs' disagreement with the Cowlitz's estimation of its own needs also does not trump Interior's ability to take the Cowlitz's stated needs into account. See Grand Ronde Br.at 43–44; Clark Cnty. Br. at 52. "[Courts] [are to] 'uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable.'" Theodore Roosevelt Conservation P'ship, 744 F. Supp. 2d at 161 (quoting Busey, 938 F.2d at 196). It is hardly unreasonable to believe that a landless, and, thus, largely incomeless Tribe with over 3,500 members needs an annual revenue of $113 million to provide its growing (and aging) membership with health care, government and social services, and housing assistance. See BIA AR000060–61; BIA AR081569–95; BIA AR083808–15 (response from Cowlitz Tribe). The Cowlitz need to develop these programs from a budgetary baseline of nearly zero.[38]

Nor is there any merit to Clark County's contention that the Unmet Needs Report was

[37] Grand Ronde's citation to Sierra Club v. Van Antwerp, 709 F. Supp. 2d 1254, 1267–68 (S.D. Fla. 2009), is also misplaced. Grand Ronde Br. at 44. The portion of the opinion to which Grand Ronde cites addresses requirements under the Clean Water Act, not NEPA. See id.

[38] Plaintiffs' issue with the Cowlitz's estimated annual health care costs is particularly shocking. See Grand Ronde Br. at 44; Clark Cnty. Br. at 52. An annual health insurance rate of $11,000 per person is nowhere near unreasonable. Grand Ronde even concedes that it spends more than the Clark County Plaintiffs claim is necessary. Compare Clark Cnty. Br. at 52 (claiming the Cowlitz only need to spend $1,889 per member annually) with Grand Ronde Br. at 44 (claiming to spend about $5,500 per member annually). And Grand Ronde's objection to some of the Cowlitz's upfront costs to establish government programs and a health care clinic is simply irrelevant. See Grand Ronde Br. at 43–44. The FEIS purpose and need statement focused on the need for a sustained revenue stream to meet annual budgetary requirements. See BIA AR075837.

developed to avoid addressing reasonable alternative sites. See Clark Cnty. Br. at 50–51. The memorandum from which Clark County quotes makes no mention of revising the purpose and need statement. See BIA AR058651 (summarizing discussions between BIA and its contractor regarding public comments on the DEIS's alternatives analysis). Further, the Cowlitz did not submit the Report for NEPA purposes; it is a requirement under Interior's land-into-trust regulations. See 25 C.F.R. §§ 151.10(b), 151.11(a), (c); BIA AR092977 (Mar. 12, 2007 cover letter submitting Report); BIA AR091908. Information from the Report was incorporated into the purpose and need statement in response to public comments on the DEIS that requested the information. See BIA AR102780–83, BIA AR102789; BIA AR075837–38 (general response to comment); AR078614 (itemized responses to Grand Ronde comments). Thus, Clark County takes Interior to task for including in the FEIS the additional detail that the public requested.[39]

Second, the FEIS's reliance on the Cowlitz's Unmet Need Report did not undercut the public's ability to meaningfully participate in the decision-making process or violate NEPA. Notably, Plaintiffs ignore the vast public involvement that occurred here. Interior hosted three public meetings (BIA AR123662–63, BIA AR000033); publicly circulated an initial EA for

[39] There is also no substance behind Clark County's argument that "BIA abdicated its responsibility for and oversight of the NEPA process." See Clark Cnty. Br. at 50 n.40. CEQ regulations expressly allow development of NEPA documentation by contractors. See 40 C.F.R. § 1506.5(c); BIA AR000056–57. Here, Interior vetted several potential contractors, see BIA AR123946–48, ultimately selecting the chosen contractor based upon experience. BIA AR000057. BIA maintained responsibility for directing and controlling all contractor work. See BIA AR1237456; BIA AR123745–62. The fact that the Cowlitz, as the project applicant and a cooperating agency, at times may have worked directly with the contractor is fully in accord with NEPA; development of a comprehensive NEPA document necessarily requires information from the project applicant regarding project specifics. In fact, NEPA even allows for applicants to submit their own information for review and consideration as part of the agency's decision-making process. See 40 C.F.R. § 1506.5(a). And BIA provided the proper oversight here. The administrative record documents some of the numerous conference calls that BIA held with its contractor, see BIA AR099336–53, as well as the BIA's review and revisions to the preliminary final EIS and other documents. See BIA AR086652–59; BIA AR074236 (cover memo); BIA AR064534; BIA AR066844–985 (compilation of correspondence between contractor and BIA).

public comment (BIA AR131351–52); publicly circulated the DEIS with a total of 145 days for public comment (BIA AR106546–48, BIA AR102715, BIA AR000033); and publicly circulated of the FEIS with a total of seventy-one days for public comment (BIA AR000050–51, BIA AR074012). All told, Interior granted the public more than twice the review time envisioned by CEQ regulations. Compare 40 C.F.R. § 1506.10(b). Interior dedicated three FEIS appendices (covering 260 pages) to public comments. See BIA AR078415–677. Interior logged all the public comments to the DEIS, see BIA AR078419–47 (FEIS Appendix A); provided responses to general and over-arching comments, see BIA AR078448–83(FEIS Appendix B); and provided detailed responses to 39 substantive comment letters broken down by specific comment, see BIA AR078484–677 (FEIS Appendix C).[40] This included public comment and agency response on the purpose and need statement. See BIA AR078453–54. The public had more than sufficient opportunity to meaningfully participate in the administrative process.

Plaintiffs also ignore the limited manner in which Interior modified the purpose and need statement. The modification was not the wholesale change that Plaintiffs make it out to be. Instead, in response to public comments—including comments by these Plaintiffs—Interior focused one paragraph of the statement on the Unmet Needs Report's monetary quantification of need, rather than the DEIS's narrative comparison of the Cowlitz's socioeconomic conditions with those of the surrounding community. Compare BIA AR075837 (FEIS) with BIA AR106633 (DEIS); see also BIA AR122871–73 (purpose and need as stated in Feb. 2005 NEPA scoping report). The remainder of the statement and the basis of the Tribe's need—thus, the purpose and need that informed public comment and agency decision-making—did not change. Courts have upheld agency modification of purpose and need statements in similar

[40] Copies of the 39 comment letters, as marked to identify each specific comment, can be found in the remainder of Appendix C beginning at BIA AR078678.

circumstances. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155–56 (9th Cir. 1997); City of Grapevine, 17 F.3d at 1506–07.

Regardless, the public did have the opportunity to comment directly on the Unmet Needs Report during the public review period for the FEIS. See BIA AR074228–29 (73 Fed. Reg. 31,143–44 (May 30, 2008)). Plaintiffs themselves took advantage of that opportunity. See BIA AR071480–12; BIA AR000287–92. Interior considered and responded to those comments in reaching its final decision. See BIA AR000060–61. Contrary to what Plaintiffs seem to expect, NEPA regulations do not require circulation of a never-ending parade of draft EISs in response to comments. See 40 C.F.R. § 1503.4. "The very purpose of a DEIS is to elicit suggestions for change." City of Grapevine, 17 F.3d at 1507. To that end, the regulations require that an FEIS respond to comments received on the DEIS. See 40 C.F.R. § 1502.9(b). That is precisely what Interior did here. This was not "*post hoc* examination." Clark Cnty. Br. at 51. It was implementation of NEPA.

Thus, Grand Ronde's demand for a supplemental or new EIS is particularly unwarranted. See Grand Ronde Br. at 43, 50. CEQ regulations require agencies to supplement existing NEPA documentation where some major federal action remains and there are "substantial changes in the proposed action that are relevant to environmental concerns," or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). The FEIS's modification of the purpose and need in response to public comment does not fall into either of those categories. BIA AR000054. As one of the very cases to which Clark County cites, Clark Cnty. Br. at 51, aptly summarizes: "[R]equiring agencies to repeat the public comment process when only minor modifications are made promises to prolong endlessy the NEPA review process." California v.

Block, 690 F.2d 753, 771 (9th Cir. 1982). NEPA's purpose is to inform, rather than prevent, agency decision-making. The public involvement here fulfilled that purpose.

2. Interior Considered a Reasonable Range of Alternatives.

Under the stated purpose and need, Interior properly considered a reasonable range of alternatives. NEPA requires agencies to "objectively evaluate all *reasonable* alternatives," and briefly discuss those that were eliminated from detailed study and the reasons therefore. 40 C.F.R. § 1502.14(a) (emphasis added). A "rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'" Busey, 938 F.2d at 195 (citation omitted) (emphasis in original). An agency need not consider alternatives which do not meet the proposed action's purpose and need, *or* which can be rejected as "too remote, speculative, or impractical or ineffective." Custer Cnty., 256 F.3d at 1039; Busey, 938 F.2d at 195–96. "[T]he Court will 'uphold an agency's . . . discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail.'" Theodore Roosevelt Conservation P'ship, 744 F. Supp. 2d at 161 (citation omitted).

The FEIS's alternatives discussion was expansive. BIA AR075847–87. The FEIS analyzed in detail the potential effects of six alternatives, including: the Cowlitz's proposed project (Alternative A); an alternative location at the Ridgefield Interchange two miles to the south (Alternative E); non-casino and no-action alternatives (Alternatives D and F); and alternative development configurations (Alternatives B and C). BIA AR075847–82; BIA AR076068–387. In addition, Interior looked at a total of 19 other potential alternative sites. BIA AR075882. The FEIS used seven feasibility criteria to narrow the 19 other potential sites to

11.[41] As NEPA requires, Interior briefly discussed why those 11 alternative sites were eliminated from detailed study. Six of those 11 sites, which had also been identified in the DEIS, were not available for sale. See BIA AR106673–74; BIA AR075882–86. The remaining five sites were assessed in response to public comments stating that sites farther to the North—and, thus, farther away from the Vancouver, Washington, and Portland, Oregon, market—should be considered. See BIA AR075883–86; BIA AR078454–56 (response to comments). Interior assessed these sites and, using three different market analyses, determined the sites would not meet the Cowlitz's need for sustained revenue. BIA AR000035; BIA AR000061–62; BIA AR075886; see BIA AR082328–52.

Plaintiffs do not take issue with the FEIS's selection of the six alternatives considered in detail. Instead, they argue that Interior should have further explored one or more of the Northern sites. See Grand Ronde Br. at 45–46; Clark Cnty. Br. at 49. But Interior reasonably selected the six alternatives to discuss in detail, a discussion that fully-informed the decision-maker and the public as to the potential alternatives to the Cowlitz's proposal. The FEIS therefore complied with NEPA. See Busey, 938 F.2d at 195. For reasons of competition and others, Grand Ronde and the Clark County Plaintiffs are displeased with the Cowlitz's chosen location. But NEPA is not an outcome-determinative statute. Robertson, 490 U.S. at 350. Instead, it is aimed at informing decision-makers and the public about the potential environmental effects of a proposed action and that action's reasonable alternatives. Balt. Gas, 462 U.S. at 97. That is exactly what occurred here.

[41] The criteria included: 1) proximity to the I-5 freeway; 2) contiguous properties forming 20 acres or more; 3) contiguous ownership; 4) availability for purchase; 5) environmental constraints; 6) availability of public services; and 7) underlying zoning designation. BIA AR075882. Confusingly, Clark County cites to page 1-6 of the DEIS. See Clark Cnty. Br. at 48 (citing BIA AR106633). That portion of the DEIS does not discuss the feasibility criteria. Discussion of the feasibility criteria can be found in the DEIS at BIA AR106673.

C. Interior Took the Requisite "Hard Look" at the Proposed Action's Potential Impacts.

"NEPA requires that agencies take a 'hard look' at the environmental consequences of the proposed course of action." Theodore Roosevelt Conservation P'ship, 744 F. Supp. at 159 (citations omitted); see 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. The Court's role is to ensure the agency takes that look, "'not to interject its own judgment as to the course of action to be taken.'" Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52, 59 (D.D.C. 2009) (quoting Hammond v. Norton, 370 F. Supp. 2d 226, 240 (D.D.C. 2005)).

Interior's FEIS took the requisite "hard look." Among others, the FEIS discussed potential impacts, if any, to soils (BIA AR076071–78), water resources (BIA AR076079–92), air quality (BIA AR076092–110), biological resources (BIA AR076111–30), cultural resources (BIA AR076131–35), socioeconomics (BIA AR076136–62), transportation (BIA AR076163–207), and land use (BIA AR076208–22), as well as any cumulative effects of those impacts (BIA AR076344–84). The FEIS summarized for the public and agency decision-makers the unavoidable adverse effects that would result from the proposed action. BIA AR076385–87; see BIA AR000042–50 (summary in ROD).

Of the more than 300 pages of impacts analyses in the FEIS, Plaintiffs take issue with only three specific items: (1) potential economic effects on the Grand Ronde (Grand Ronde Br. at 46–50); (2) effects on water quality (Clark Cnty. Br. at 53–54); and (3) effects on land use (Clark Cnty. Br. at 54–55, 46 n.38). As detailed above, the Court need not even reach the Grand Ronde's argument that Interior failed to consider the revenue-based impacts on the Spirit Mountain Casino because the Grand Ronde lacks standing for its claims under NEPA. Regardless, none of the three amount to a violation of NEPA.

1. NEPA Does Not Require Interior to Consider the Purely Economic Harm to Grand Ronde from a Reduction in Gaming Revenue.

NEPA does not require consideration purely of economic interests. "Only when socioeconomic effects somehow result from a project's environmental impact must they be considered. Whether an impact on the 'human environment' must be addressed depends on 'the closeness of the relationship between the change in the environment and the "effect" at issue.'" Hammond v. Norton, 370 F. Supp. 2d at 243 (D.D.C. 2005) (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 771–72 (1983)). As the United States Supreme Court has articulated:

> The theme of § 102 [of NEPA] is sounded by the adjective "environmental": NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequence . . . that some one thought "adverse."

Metro. Edison Co., 460 U.S. at 772.

Here, the potential for revenue reduction at the Grand Ronde's Spirit Mountain Casino is a purely economic effect. Grand Ronde admitted as much during the administrative process. BIA AR102778. Grand Ronde's effort to now articulate a competition-based loss in casino revenue as a "socioeconomic impact" does not change the fact that its revenues have no link whatsoever to any environmental effect at or near the Cowlitz Property. Grand Ronde Br. at 46-47. Interior recognized as early as February 2005 that the potential for revenue-related effects on the Spirit Mountain Casino was not a NEPA issue; but the agency nonetheless provided the information to "encourag[e] informed comment by the public and consideration of decision makers." See BIA AR122896–97 (portions of Feb. 2005 NEPA scoping report).

Even if NEPA had applied to Interior's consideration of economic impacts, Interior would have met NEPA's requirements. Specifically, the FEIS concluded that, when other proposed future gaming facilities are considered in conjunction with the Cowlitz's proposal, "impacts to Spirit Mountain may be significant for a time." BIA AR078475; see BIA AR082240–72. But the Cowlitz casino "could operate without substantial long-term adverse effects to operations of the existing Spirit Mountain facility." BIA AR076140. All told, the various reports and information before Interior estimated a potential revenue loss at somewhere between 13.1 percent and 41 percent. See BIA AR082267–68 (13%); BIA AR103131 (35.99%); BIA AR006685 (31.5%, 41.37%, and 31.99%); BIA AR064873 (25.9% and 31.5%). For purposes of its decision-making, Interior focused on an estimate of 25.9 percent, noting that Spirit Mountain already appears to be gathering revenue in excess of that expected for its current share of the market, and that a comparison of similar situations showed Spirit Mountain's revenues would continue to grow even after the Cowlitz development.[42] See BIA AR000076. Thus, as NEPA would have required, the FEIS assessed the potential impact and informed the public and the decision-maker of the potential outcome.[43]

[42] Grand Ronde cites to a non-record website to support its arguments. See Grand Ronde Br. at 49 (citing N.J. Division of Gaming Enforcement, Historical Operating Statistics, available at http://www.nj.gov/oag/ge/historicalstatistics.html). But the citation does not indicate from where or how Grand Ronde derived its purported statistics. Regardless, the information was not before Interior decision-makers and is therefore outside this Court's scope of review under the APA. See Franks v. Salazar, 751 F. Supp. 2d 62, 67 (D.D.C. 2010). Similarly, the website Grand Ronde provides to purportedly substantiate its income numbers does not appear to be a functioning website. See Grand Ronde Br. at 49 n.24 (citing "http://censtats.gov").

[43] Grand Ronde is also incorrect that Interior's allegedly inadequate consideration of financial impacts to the Grand Ronde's Spirit Mountain Casino violated Interior's trust responsibilities. See Grand Ronde Br. at 50. As detailed in the text, Interior assessed the potential revenue impacts on the Grand Ronde, despite no requirement in NEPA to do so. See also BIA AR000052–53 (responding to Grand Ronde comments). Further, "[t]he federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources. The elements of this type of common law trust are a trustee (the

2. Interior Took the Requisite "Hard Look" at Potential Impacts on Water Quality and Land Use.

The Clark County Plaintiffs' arguments that Interior failed to assess impacts on water quality and land use are similarly off-base.

Clark County's sole point with respect to water quality is that Interior did not discuss what would happen if a National Pollutant Discharge Elimination System ("NPDES") permit does not issue for the Cowlitz development. See Clark Cnty. Br. at 54. NEPA , however, requires no more than that agencies "list all Federal permits . . . which must be obtained in implementing the proposal." 40 C.F.R. § 1502.25(b). Interior complied with that requirement here. See BIA AR076082; BIA AR000038.

In addition, the FEIS's appendices include extensive reports on wastewater treatment. See BIA AR077191–233; BIA AR081597–726. These, in addition to discussions in the FEIS itself (BIA AR76079–92), were more than sufficient to inform the public and agency decision-makers about potential impacts from wastewater. See also BIA AR000064–65. Indeed, the U.S. Environmental Protection Agency, after reviewing the FEIS, stated: "[t]he measures taken to obtain additional baseline data, and address water temperature, fecal coliform and wetland issues should assure that water and air quality standards will be met and biological resources will be protected." BIA AR074071.

United States), a beneficiary . . . and a trust corpus (the regulated Indian property, lands or funds)." Inter Tribal Council of Ariz., Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (citations and quotations omitted). But, even if Grand Ronde's casino revenues were trust assets (which is not the case here, AR000052), *future* revenues would not yet be held in trust. Thus, there is no "control or supervision over tribal monies" from which "the fiduciary relationship [would] normally exist[ ] with respect to such monies." Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (citation omitted). The essential element of a trust corpus is missing. See Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297–98 (D.N.M. 1996), aff'd 104 F.3d 1546 (10th Cir. 1997).

Clark County's concern with the proposed site's land use designation, which the County primarily relegates to a footnote, is even further misplaced. See Clark Cnty. Br. at 46 n.38. In short, the concern is that, immediately prior to the FEIS, a decision by the Western Washington Growth Management Hearings Board remanded to Clark County the County's growth management plan. See BIA AR000057. The effect of that remand, the argument goes, was to revert the Cowlitz Property's land use designation back to "Agricultural with an Industrial Urban Reserve" from the plan's designation of "Light Industrial with an Urban Holding." See id. But, as Interior noted in the ROD, that Board ruling was subsequently reversed, and further appeals were pending at the time of the agency's decision. Id. Regardless of the designation, however, the FEIS noted the current land use at the site and in the surrounding area (BIA AR076012–13), and described how Cowlitz's proposal would affect those uses (BIA AR076211–14; see BIA AR000048). The potential change in land use designation therefore did not present any significant new information bearing on the proposed action's impacts. See BIA AR000058; BIA AR000081.

Nor did the FEIS's reference to the Cowlitz's Environment, Public Health, and Safety Ordinance as a source of mitigation violate NEPA. The Ordinance contains several commitments that the Cowlitz Tribe will undertake to mitigate local impacts. See BIA AR082804–11; BIA AR075842–45; BIA AR083093 (Cowlitz letter to Clark County); BIA AR083095–96 (Clark County letter to Interior). It also waives the Cowlitz Tribe's sovereign immunity to allow Clark County to sue the Tribe for specific performance of the Ordinance's obligations. See BIA AR082805. Clark County argues that the Ordinance will not provide for effective mitigation because it can be revoked and is not enforceable. See Clark Cnty. Br. at 46 n.38, 54-55. But NEPA does not require the mitigation discussed in an EIS to be irrevocable or

enforceable. Instead, an EIS must contain "a reasonably complete discussion of possible mitigation measures." Robertson, 490 U.S. at 352; Defenders of Wildlife v. Salazar, 698 F. Supp. 2d 141, 149–50 (D.D.C. 2010); see 40 C.F.R. §§ 1502.14(f), 1502.16(h).[44] Interior complied with that requirement here, discussing possible mitigation in the FEIS (AR076388–411) and the ROD (AR000086–102), and considering a mitigation plan in its decision-making (AR066017–45). Those discussions "'permit[ted] a decisionmaker to fully consider and balance the environmental factors.'" Defenders of Wildlife, 698 F. Supp. 2d at 149 (quoting Sierra Club v. Adams, 578 F.2d 389, 393 (D.C. Cir. 1978)).

* * *

In sum, Interior reasonably defined the purpose and need for, and analyzed a reasonable range of alternatives to, the Cowlitz Tribe's proposal. Interior also took the requisite hard look at the project's potential environmental effects. The FEIS fully informed the public and agency decision-makers regarding the potential effects of the proposal and its alternatives. Interior therefore fully complied with NEPA.

V. The NIGC's Approval of the Cowlitz Tribe's Gaming Ordinance.[45]

In the Fourth Claim of their Complaint, the Clark County Plaintiffs allege that the NIGC's approval of the 2005 ordinance and the 2008 amendment thereto were arbitrary and

[44] The cases that Clark County do not create a more-demanding mitigation requirement. Clark County Br. at 55; Maryland-National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973), involved an Environmental Assessment, not an EIS, and the question thus turned on the "significance" of the environmental impact, not on whether appropriate mitigation measures were addressed. Id. at 1034–36. And, as the United States Court of Appeals aptly stated in Isle of Hope Historical Assocation, Inc. v. U.S. Army Corps of Engineers, 646 F.2d 215, 221 (5th Cir. 1981), "[t]he proper function of the [BIA] was to assess the environmental impact of the [proposal], not to act as a zoning interpretation or appeal board."

[45] Plaintiffs do not make specific allegations regarding the substance of the Indian lands opinion issued as part of the 2005 ordinance approval by the Chairman of the NIGC as part of that claim.

capricious because NIGC lacked approval authority.[46] Clark Cnty. Compl. at 22-23. As discussed below, because the Chairman of the NIGC had the authority to approve both the 2005 Cowlitz Tribe gaming ordinance and the 2008 amendment thereto, the Federal Defendants should be granted summary judgment on the fourth claim of their complaint.

A. NIGC had the Authority to Approve the 2005 Gaming Ordinance and the 2008 Amendment.

On August 29, 2005, the Cowlitz Tribe submitted a proposed tribal gaming ordinance to the NIGC for approval. NIGC AR001662. Aside from the ordinance's definition of "Tribe's Indian Lands," it follows the NIGC model tribal gaming ordinance. Id. The ordinance's definition of "Tribe's Indian Lands" contains a site-specific description of the Cowlitz Property. Id. Because the Secretary had not yet made the decision to acquire the Cowlitz Property into trust, the Chairman of the NIGC explained that the approval was "expressly contingent on the United States first accepting trust title to the site and the Tribe first exercising governmental power over the site." Id. Furthermore, the Chairman stated that "this approval does not authorize the Tribe to conduct gaming on the subject site. In order to conduct gaming on the subject site, the Department of the Interior must first accept the land into trust, and the Tribe must first exercise government authority over the site." NIGC AR001623.

Because the ordinance contains a site-specific description of the land that the Cowlitz Tribe intends to game on, the NIGC conducted a legal analysis to determine whether any of the

[46]The city of Vancouver, one of the plaintiffs in the Clark County case, previously challenged the NIGC Chairman's approval of the Cowlitz Tribe's gaming ordinance and its amendment. The case was dismissed because the City did not have Article III standing. City of Vancouver v. Skibine, 393 Fed.Appx. 528, 529 (9th Cir. 2010) ("Thus, we reject the City's contention that the Commission violated a procedural rule by approving an amendment to the gaming ordinance before the Department had acted on the Tribe's fee-to-trust application. . . . As the City has not established a procedural injury resulting from the timing of the Commission's approval, it does not have Article III standing to maintain this suit.").

exceptions in Section 20 of IGRA applied to the Cowlitz Property, such that the Tribe could game on the land, although it would be taken into trust after October 17, 1988. Id. The NIGC's Office of General Counsel concluded that the Tribe fit within the "restored lands" exception in Section 20 of IGRA because the Tribe was "restored to Federal recognition" and the acquisition of the land into trust would be part of the "restoration of lands" for the Tribe. NIGC AR001622. Chairman Hogen adopted the Office of General Counsel's opinion and analysis in the 2005 ordinance approval. Id.

As Chairman Hogen acknowledged in his approval of the amendment to the 2008 Cowlitz gaming ordinance, "[c]onsistent with IGRA, 25 U.S.C. § 2710(b)(2), and the NIGC regulations, 25 C.F.R. § 522.4, I approve tribal gaming ordinance and ordinance amendments if the submissions do not conflict with IGRA, the NIGC's regulations, or other federal law." NIGC AR000002. In doing so as to the 2005 ordinance, Chairman Hogen interpreted IGRA to permit approval. Chairman Hogen's 2005 approval found that, "if the Department of the Interior accepts trust title to the [] site, such trust acquisition will be part of the 'restoration of lands' for the Tribe, as those terms are used in 25 U.S.C. § 2719 (b)(1)(B)." NIGC AR001622. In its approval of the 2005 ordinance, the NIGC further explained that to consider the ordinance, it had to "conduct a legal analysis . . . in order to determine whether the Tribe will be allowed to conduct gaming activities on the site if the Department of the Interior accepts the land into trust for the benefit of the Tribe." NIGC AR001622. The Cowlitz Tribe Restored Lands Opinion, a seventeen page legal analysis of the issue prepared by the NIGC's Acting General Counsel Penny Coleman, NIGC AR001643-1659, addressed the restored lands question in detail and was adopted as part of the NIGC's approval of the ordinance. NIGC AR001622. Thus, the NIGC approved the ordinance only after it determined that the ordinance was consistent with IGRA in

that gaming could occur on the subject site only if and when it became Indian lands through trust acquisition. Id.

In a recent denial of an ordinance approval for the Tohono O'odham Nation, the current Chairwoman of the NIGC has changed the agency's position on approving site-specific gaming ordinances for land that is not yet in trust. Tohono O'odham Nation Class III site-specific, conditional gaming ordinance amendment (Aug. 24, 2011) ("TON Denial"), available at www.nigc.gov/Reading_Room/Freedom_of_Information_Act.aspx. In the TON Denial, the Chairwoman acknowledges that:

> Chairman Hogen took the reasonable approach [in approving the Cowlitz Tribe's ordinance] of allowing land not yet taken in trust to qualify for an exception to the general prohibition against gaming on after-acquired trust land to enable approval of the ordinance. This was the prior NIGC approach and a reasonable interpretation of IGRA, § 2719.

TON Denial at 8. However, the Chairwoman now interprets, "§ 2719(a) and (b)(1)(B), to require that land actually be 'acquired' and 'taken into trust' for it to qualify under a § 2719 exception." Id. The Chairwoman goes on to note that, "although this interpretation differs from former Chairman Hogen's, an agency with authority to interpret a statue has the authority to change its interpretation, and a reinterpretation of a statute is 'entitled to no less deference . . . simply because it has changed over time.'" Id. (citing Nat'l Home Equity Mort. Ass'n v. Office of Thrift, 373 F.3d 1355, 1360 (D.C. Cir. 2004)) (quoting Chevron, 467 U.S. at 863-63). The Chairwoman explained why she reinterpreted Section 2719 of IGRA to require that land be taken into trust *before* it can qualify for one of the exceptions listed therein. Id.[47]

Despite the Chairwoman's express statement that she reinterpreted an ambiguous statute, Plaintiffs argue that no deference is due to the Cowlitz gaming ordinance approval and the

[47] Similarly, the Secretary's views regarding whether IGRA allows DOI to approve a tribal-state compact before a tribe possesses trust land has varied over the years. See KG Urban Enters., LLC v. Patrick, --- F.3d ---, 2012 WL 3104195, *19 (1st Cir. 2012).

restored lands determination because the Chairwoman concluded the statue was not ambiguous in the recent Tohono O'odham decision. Clark County Br. at 32. Plaintiffs are incorrect – the Chairwoman concluded that the statute was ambiguous because, "IGRA does not explicitly address whether an exception to the § 2719 prohibition applies to a parcel of land not yet in trust, an interpretation is necessary under step 2 of the *Chevron* Analysis." TON Denial at 9.

The Clark County Plaintiffs make great hay of this change in position in their Motion for Summary Judgment. Clark County Br. at 29-33. Despite what Plaintiffs argue, there is nothing remarkable in an agency changing its interpretation of an ambiguous statute. It is axiomatic that an agency can change its policy choices or statutory interpretations. EME Homer City Generation, L.P. v. E.P.A., 2012 WL 3570721 (D.C. Cir. 2012). "[A]n agency is not forever restricted to its previous policy choices or statutory interpretations; instead, it may change course provided it acknowledges it is doing so, presents 'good reasons' for doing so, and its approach is 'permissible under the statute.'" Id. at *34, (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). Furthermore, an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." FCC v. Fox Television Stations, Inc., 556 U.S. at 515 (emphasis in original). Like EPA in EME Homer City, NIGC acknowledged its approaches and the reasons for those approaches in both the Cowlitz and the Tohono O'odham ordinance approvals. NIGC AR000001-2; NIGC AR001622-23; TON Denial at 8.

Plaintiffs next argue that even if IGRA is ambiguous, the Chairman's 2005 decision still is not entitled to deference because NIGC did not offer a reasoned explanation or interpretation. Clark County Br. at 32-33. However, as the Chairman explains, "[a]side from the ordinance's definition of 'Tribe's Indian Lands,' the tribal gaming ordinance generally follows the NIGC's

model tribal gaming ordinance and is consistent with the requirements of the Indian Gaming Regulatory Act (IGRA) as well as the NIGC's implementing regulations." NIGC AR001622. Further the approval explained that the land at issue would qualify under Section 2719 once taken in trust. NIGC AR001622. Thus, because the Chairman found that the ordinance comported with IGRA and NIGC regulations, he approved it. 25 U.S.C. § 2710(e).

In fact, NIGC routinely approves non-site-specific gaming ordinances[48] before the land is taken into trust.[49] The only distinguishing factor in the approval of a non-site-specific gaming ordinance versus a site-specific gaming ordinance is the issuance of an Indian lands decision addressing whether the parcel will qualify under the definition of Indian lands in IGRA and the applicability of IGRA's Section 20 exceptions to the parcel identified in the site-specific ordinance.

Further, Plaintiffs' contend that "IGRA imposes clear requirements for NIGC action on a gaming ordinance," and that "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); Clark County Br. at 30. The language of the statute does not say that upon ascertaining the existence of Indian lands the Chairman may then review a proposed gaming ordinance. The term "Indian lands" appears in the prepositional phrase that begins with the word "concerning" and which modifies "tribal ordinance or resolution." In other words, it elaborates

[48] Courts have held that the NIGC is not required to issue an Indian lands opinion for non-site-specific gaming ordinances. N. Cnty. Cmty. Alliance, Inc. v. Salazar, 573 F.3d 738, 740-741 (9th Cir. 2009); Neighbors of Casino San Pablo v. Salazar, 773 F. Supp. 2d 141, 146 (D.D.C. 2011).

[49] See March 4, 2005 approval of the Cloverdale Rancheria Pomo Indians of California's ordinance; May 12, 2005 approval of Guidiville Indian Rancheria's ordinance; and the February 8, 2007 approval of the Mechoopda Indian Tribe of Chico Rancheria's ordinance. Available at http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx

on what kind of "tribal ordinance or resolution" is appropriate for approval – those ordinances or resolutions that have, as their subject, gaming on Indian lands under the tribe's jurisdiction. Nothing in that language suggests a sequential requirement, i.e., that first a tribe must acquire Indian lands, then it may submit a gaming ordinance to the NIGC.[50] So, the Cowlitz Tribe could submit a non-site-specific gaming ordinance to the NIGC and pursuant to the current NIGC interpretation, the Chairwoman could approve that non-site-specific gaming ordinance without issuing an Indian lands decision, although the Cowlitz currently has no trust land.

Finally, Plaintiffs contend that the 2005 Cowlitz ordinance approval is the only instance in which the NIGC has approved a site-specific gaming ordinance for lands not yet in trust. Clark County Br. at 28. That is legally irrelevant. The question for a court is not how many times has the NIGC approved such ordinances, but whether in approving the Cowlitz ordinance the Chairman made a reasonable interpretation of IGRA and that interpretation is entitled to deference.[51]

In this case, the NIGC reasonably interpreted IGRA to allow approval and, as part of its approval of the Tribe's original gaming ordinance submitted on August 29, 2005, the NIGC adopted an "Indian lands" legal analysis that addressed the question of whether the lands on which the proposed gaming is planned to occur would qualify as gaming-eligible "Indian lands"

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[50] See Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2d Cir. 1990) (rejecting interpretation of IGRA that would require approval of a gaming ordinance before a tribe and state may negotiate a compact for class III gaming).

[51] Plaintiffs also offer the February 1, 2006, congressional testimony of the NIGC's Acting General Counsel, Penny Coleman. Clark Cnty. Br. at 28 n.25. Ms. Coleman does discuss the Cowlitz Tribe's gaming ordinance approval and characterizes it as "an anomaly" and "unusual." Off-Reservation Gaming: Oversight Hearing for the Process for Considering Gaming Applications Before the S. Comm. on Indian Affairs, 109th Cong. 9-10 (2006). However the ordinance approval was only unusual because typically gaming ordinances are not site specific and an Indian lands determination therefore generally cannot be done prior to approving the ordinance.

within the meaning of IGRA *if the land were taken into trust.* NIGC AR001622-23. Because the Cowlitz Tribe is a tribe recently restored to recognition with no existing tribal reservation, it currently has no Indian lands. The 2005 ordinance authorized Class II gaming on a proposed casino site contingent upon DOI accepting the land into trust and the Tribe exercising governmental power over it. Id. In approving the ordinance, the NIGC explained that the Tribe's submitted ordinance addressed planned gaming that was "expressly contingent on the United States first accepting trust title to the site and the Tribe first exercising governmental power over the site." Id. If these two contingencies occurred, the land would meet the Indian lands definition of 25 U.S.C. § 2703(4)(B).

By approving the ordinance, the NIGC determined that when and if the land is taken into trust, it will have approved tribal regulations that comport with the requirements of IGRA. The NIGC was clear, however, that "this approval does not authorize the Tribe to conduct gaming on the subject site." NIGC AR001623. In approving the ordinance, the NIGC did not purport to carry out monitoring or enforcement activities on Indian lands. Rather, obtaining approval of the gaming ordinance is just one of several preliminary steps the Tribe must take before it can begin gaming on Indian lands. Accordingly, NIGC's approval of the Cowlitz gaming ordinance comported with IGRA.

B . NIGC had the Authority to Approve the 2008 Amendment to the Cowlitz Tribe's Class II Gaming Ordinance.

Because the NIGC had authority to approve the underlying Class II gaming ordinance for the Cowlitz Tribe in 2005, it necessarily had the authority to approve the 2008 Environment and Public Health and Safety amendment ("EPHS Amendment") to that ordinance. Contrary to Plaintiffs' assertions, Clark County Br. at 33-35, the NIGC did not ignore the issues that the EPHS Amendment presented. In approving the EPHS Amendment, the Chairman explains that

his, "approval under IGRA does not implicate any other state or federal statute. Specifically, my decision does not affect the status of the Tribe-County memorandum of understanding under state law or the public's right to participate in the analyses being conducted by the federal government under NEPA." NIGC AR000002. Furthermore, because the Cowlitz Tribe, "provided more with regard to EPHS enforcement than is minimally required under IGRA" the Chairman was obligated to approve the EPHS Amendment, "even if there are legal or practical impediments regarding such extra measures[.]" Id. The Chairman goes on to state that, "[w]hether the Tribe's approved ordinance amendment also will serve a purpose under NEPA is a separate issue that should be addressed in the NEPA process."[52] Id.

The Chairman clearly addressed the issues presented, recognized that while the Cowlitz Tribe could choose to waive its sovereign immunity for specific performance of the obligations listed in the EPHS Amendment, his role was not to second guess that waiver or to counsel a sovereign Indian tribe on when it should or should not waive its sovereign immunity. The Chairman also recognized that the appropriate place to address the role of the EPHS Amendment vis-a-vis NEPA is during the NEPA process.[53]

C. The EPHS Amendment is Enforceable and BIA Appropriately Relied on the Mitigation Measures in the Amendment.

As the ROD recognizes, the Chairman of the NIGC has, "the authority and ability to enforce the Tribe's gaming regulations with powers that include closure of the gaming

[52] As discussed supra., it was addressed in the NEPA process.

[53] Furthermore, nothing in IGRA or NEPA requires a tribe to waive its sovereign immunity for enforcement of mitigation measures and therefore, any waiver that is willingly put forth by a tribe could always be revocable. Finally, "NEPA does not contain 'a substantive requirement that a complete mitigation plan be actually formulated and adopted.' An EIS's discussion of mitigation measures need be only 'reasonably complete.' It need not present a mitigation plan that is 'legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.'" San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1054 (10th Cir. 2011) (citations omitted).

operation." BIA AR000085. As long as the EPHS Amendment remains in effect, the Chairwoman of the NIGC has the authority to issue a Notice of Violation to any tribe that violates its own gaming regulations, 25 C.F.R. § 573.3, and therefore, the authority to issue a Notice of Violation if the Cowlitz Tribe does violate the EPHS Amendment or any other provisions of its gaming ordinance. If the Cowlitz Tribe revoked its ordinance, it would have to submit a new gaming ordinance in order to engage in Class II gaming. Furthermore, the language of the EPHS Amendment itself provides that if the Tribe were to revoke or amend the EPHS Amendment and the waiver of sovereign immunity, Clark County will have the opportunity to sue the Cowlitz Tribe in state court for specific performance:

> (B) Term of Effectiveness and Irrevocability: The Tribe shall not revoke or modify the waiver of sovereign immunity provision in subsection (A) of this Section, or the environment, health and safety mitigation provisions in Section 3 of this Ordinance throughout the entire life of the Tribe's proposed gaming development on the Tribe's trust land in Clark County, Washington. The Tribe acknowledges that any effort to revoke or modify the waiver of sovereign immunity described above in subsection (A) by future tribal administrations during ths time period may itself be subject to an action by the County for specific performance.

NIGC AR000780 (emphasis added). As a result, and contrary to Plaintiffs' assertions, Clark Cnty. Br. at 37-40, there are actually two enforcement mechanisms: the Chairwoman of the NIGC could issue a Notice of Violation if the Cowlitz Tribe is in violation of its own gaming regulations and Clark County has the ability to sue the Cowlitz Tribe in state court.

Plaintiffs statement that the Cowlitz Tribe has no intention of keeping its commitment or to refer to the commitments of the Cowlitz Tribal government as "fanciful" is purely speculative. Clark Cnty. Br. at 37. Furthermore, it is misleading, particularly for Clark County, which would have the ability to enforce the waiver of sovereign immunity, to state that it is not enforceable.

Because the EPHS Amendment is enforceable, BIA's decision to rely on it for the mitigation measures is entitled to deference and is not arbitrary or capricious.

For the foregoing reasons, NIGC had the authority to approve the Cowlitz Tribe's 2005 gaming ordinance and the 2008 EPHS amendment to that ordinance and summary judgment on the Clark County Plaintiffs fourth claim should be granted in favor of the Federal defendants.

VI. DOI Considered the Necessary Factors under the Land Into Trust Regulations.

The Clark County Plaintiffs' second claim, Clark Cnty. Compl. at 20-21, alleges that the Secretary failed to adequately consider the impacts of the trust acquisition on the County as required by 25 C.F.R. § 151.10(e) and did not properly account for the jurisdictional problems and potential conflicts of land use which may arise as required by 25 C.F.R. § 151.10(f) because it improperly relies on the NIGC's approval of the 2008 EPHS amendment to the gaming ordinance and the Cowlitz Tribe's Unmet Needs Report. However, the Secretary considered and analyzed all of the factors and is his determination is entitled to deference. See Cnty. of Charles Mix v. U.S. Dep't of Interior, 674 F.3d 898, 904 (8th Cir. 2012) (deferring to the Secretary's analysis of the Part 151 factors).

A. 25 C.F.R. § 151.10(e).

DOI analyzed the impact to the State and its political subdivisions resulting from the removal of the Cowlitz Property from the tax rolls. BIA AR000136-37. DOI determined that the impacts of removing the subject property from the tax rolls was not significant because of the degree to which the Cowlitz Tribe's direct (payments directly to the State and County in lieu of property taxes for revenue lost) and indirect payments (payments for community impacts and charitable contributions) to the State and Clark County would offset the loss of real property taxes that would occur. Id. Furthermore, DOI concluded that even if there were a significant tax

loss, the benefit of providing a reserved land base for a landless tribe outweighs the burdens imposed by a modest loss of tax income to local governments. BIA AR000137.

B. 25 C.F.R. § 151.10(f).

DOI concluded that despite litigation[54] involving the designation of the Cowlitz Property as an urban growth area or agricultural zoning, the Preferred Alternative will conflict with both designations because a gaming facility is inconsistent with both the light industrial designation imposed under the urban growth area expansion and the agricultural zoning designation. BIA AR000138. Despite this conflict, BIA concluded that the benefits to the Tribe of providing a reserved land base outweigh concerns related to these conflicts. Id. Furthermore, BIA concluded that concerns over environmental regulation of the Cowlitz Property were mitigated by the EPHS amendment to the Cowlitz Tribe's gaming ordinance and the concerns identified were actually arguments about which government should have jurisdiction over the Tribe's land, not concerns about significant actual deficiencies in the Tribe's ability to manage its lands. Id. Therefore, the BIA concluded that the combination of Federal and Tribal regulatory oversight would avoid potential adverse consequences caused by the tribe exercising governmental authority over the Cowlitz Property. BIA AR000139.

The County alleges that DOI failed to adequately consider the land use conflicts and jurisdictional problems. However, the County fails to elaborate on what these specific land use conflicts might be or what jurisdictional problems might exist. Instead, the County alleges that DOI inappropriately relied on the EPHS amendment to the Cowlitz Tribe's gaming ordinance. As discussed supra., the NIGC had authority to approve that ordinance and DOI was justified in relying on the provisions contained therein.

[54] Clark County 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).

For the foregoing reasons, summary judgment should be granted in the Secretary's favor on the Clark County Plaintiffs' Second Claim.

CONCLUSION

For the reasons stated above, the United States should be granted summary judgment on all of Plaintiffs' claims in both the Clark County and the Grand Ronde cases and the complaints should be dismissed.

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Respectfully submitted,

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