IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON Plaintiff, v. **SALLY JEWELL** **KEVIN WASHBURN** **STANLEY M. SPEAKS** **UNITED STATES DEPARTMENT OF THE INTERIOR** Defendants, v. **THE COWLITZ INDIAN TRIBE** Intervenor Defendant.	Civ. No. 13-cv-00849-BJR Judge Barbara J. Rothstein **ORAL ARGUMENT REQUESTED**

PLAINTIFF GRAND RONDE'S MOTION FOR SUMMARY JUDGMENT

Plaintiff The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for summary judgment against Defendants on the Counts set forth in its Complaint. See ECF No. 1. Grand Ronde challenges the April 22, 2013, Record of Decision (ROD) issued by the Secretary of the U.S. Department of the Interior through her designee the Assistant Secretary – Indian Affairs. In the challenged decision, the Secretary approved the acquisition of a parcel of land to be held in trust for the Cowlitz Indians, stated her intent to declare the land a reservation for the Cowlitz, and declared the land to be eligible for gaming. Grand Ronde alleges, among other

things, that the ROD is arbitrary, capricious, contrary to law, and in excess of statutory authority under 5 U.S.C. § 706(2). Grand Ronde requests the Court to enter judgment in accordance with the attached Proposed Order.

The grounds for this Motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment.

Dated: September 23, 2013

Respectfully Submitted,

/s/ Lawrence S. Robbins

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF GRAND RONDE'S
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INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Secretary of the U.S. Department of the Interior (DOI) approved the acquisition of a parcel of land in Clark County, Washington (the "Parcel"), to be held in trust for the Cowlitz Indians; stated her intention to proclaim the land a reservation for the Cowlitz; and declared the land to be eligible for gaming. This Court should vacate the Secretary's decision for three independent reasons.

First, the Secretary lacks statutory authority to take trust title to the Parcel. The Indian Reorganization Act (IRA) authorizes the Secretary to acquire land in trust only for "members of any recognized Indian tribe now under Federal jurisdiction." As the Supreme Court made clear in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), the term "now under Federal jurisdiction" refers to tribes that were "under Federal jurisdiction" when the statute was enacted in 1934. But the Department has consistently taken the position that the Cowlitz did not even *exist* as a tribal entity in 1934, and the Secretary conceded below that the Cowlitz were terminated throughout the twentieth century. The Cowlitz were therefore neither "recognized" nor "under Federal jurisdiction" in 1934. The Secretary's decision nevertheless to take trust title to the Cowlitz Parcel violates the IRA's text and is a transparent end-run around the *Carcieri* decision.

Second, the Parcel is not eligible for gaming. The Indian Gaming Regulatory Act (IGRA) prohibits gaming on land acquired after 1988 unless one of the statute's narrow exceptions applies. The Secretary concluded the Cowlitz Parcel qualifies for the "initial reservation exception," which requires the Cowlitz to show that they have "significant historical connections" to the Parcel. But the Department itself has repeatedly found that the Cowlitz have *no* historical connection to the Parcel, which is located 50 miles away from the heart of the Cowlitz's historical territory. The Cowlitz simply handpicked the Parcel because it is a prime

location for a casino-resort complex—and will be far more lucrative than a complex built on their historical lands. A long line of agency decisions, however, squarely prohibits gaming on lands so far removed from a tribe's historical territory. The Secretary's contrary decision represents a clear break from that longstanding precedent, and reflects a wholesale abdication of the agency's responsibility to provide a reasoned explanation for its changed interpretation.

Third, the Secretary failed to take a "hard look" at the environmental and socioeconomic consequences of her proposed action, as required by the National Environmental Policy Act (NEPA). The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde") owns and operates Spirit Mountain Casino on its reservation, which (unlike the Cowlitz Parcel) is located within the center of the tribe's historical reservation, approximately 65 miles southwest of Portland, Oregon. The Secretary's decision turned a blind eye to the devastating impact that the Cowlitz Parcel would have on Grand Ronde, which uses Spirit Mountain revenues to provide its members essential services such as health care, education, and housing. What's more, the agency's environmental analysis was prepared without meaningful public participation in the development of the project's final purpose and need statement, as required by NEPA regulations.

STATEMENT OF FACTS

I. STATUTORY AND LEGAL FRAMEWORK

A. The Indian Reorganization Act Of 1934

The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire land and hold it in trust only "for the purpose of providing land *for Indians*." 25 U.S.C. § 465 (emphasis added). Section 19 of the Act defines the term "Indian" as follows:

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

25 U.S.C. § 479.

This case involves the IRA's first definition of Indian. The Supreme Court addressed that definition in *Carcieri* v. *Salazar*, 555 U.S. 379, 395 (2009), which held that "the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." The Court therefore concluded that the Secretary lacked authority to take land in trust for an Indian tribe that was formally recognized by the United States in 1983 but was "neither federally recognized nor under the jurisdiction of the federal government" in 1934. *Id.* at 395-96.

B. The Indian Gaming Regulatory Act

Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988 to establish a statutory basis for gaming on Indian lands by Indian tribes. Pub. L. No. 100-497, § 5, 102 Stat. 2467, 2469-70 (1988); 25 U.S.C. § 2701. IGRA created the National Indian Gaming Commission (NIGC), an agency within the DOI, to implement the Act. 25 U.S.C. § 2704.

Section 20 of IGRA generally prohibits gaming on land acquired after October 17, 1988, with two relevant exceptions: for "restored lands" and for "initial reservation[s]." 25 U.S.C. § 2719. To satisfy either exception, a tribe must show "significant historical connections" to the land in question (25 C.F.R. § 292.6(d)), which requires, in pertinent part, the tribe to "demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." *Id.* § 292.2.

C. The National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, requires federal agencies to prepare a detailed Environmental Impact Statement (EIS) when contemplating any "major Federal action[] significantly affecting the quality of the human

environment." 42 U.S.C. § 4332(2)(C); see 40 C.F.R. § 1501.4. The EIS must "specify the underlying purpose and need" of the contemplated project, 40 C.F.R. § 1502.13, and "provide [a] full and fair discussion" of its "significant environmental impacts," including its potential socioeconomic effects, *id.* §§ 1502.1, 1508.8, 1508.14. The EIS must also carefully consider "reasonable alternatives" to the proposed action, "which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Id.* § 1502.1.

II. THE PRESENT DISPUTE

A. Background

Grand Ronde, which has more than 5,000 members, comprises more than 25 tribes and bands that have lived in their ancestral homelands in western Oregon, northern California, and southern Washington for thousands of years. AR051304. Grand Ronde's present-day reservation is located within the exterior boundaries of its historical reservation. AR051304. The tribe owns and operates Spirit Mountain Casino on its reservation, approximately 65 miles southwest of Portland, Oregon. *Ibid.* Spirit Mountain's revenues are vital for funding such tribal services as health care, education, housing, elder care, and per capita, pension, and disability payments. AR006520.

The Cowlitz Indians live in western Washington. They maintain governmental offices and services in Cowlitz and Lewis Counties, within their aboriginal lands. AR000281. Following their federal acknowledgment by the Secretary pursuant to the Federal Acknowledgment Process (FAP) (65 Fed. Reg. 8436 (Feb. 18, 2000); 67 Fed. Reg. 607 (Jan. 4, 2002)), the Cowlitz sought to have the Parcel acquired by the federal government and held in trust for development of a casino-resort complex. The Parcel is a 151.87-acre plot in Clark County, Washington, near the city of La Center, Washington. AR000030-31; AR000034-35

(ROD at 1-2; 5-6). It is located just off Interstate 5 in the Portland-Vancouver metropolitan area. *Ibid*. The Parcel is approximately 25 miles from the Cowlitz administrative offices, located near Kelso, Washington, and 50 miles away from tribal housing and the Cowlitz Elders Program and Senior Nutrition Center, located in Toledo, Washington. AR000281. The Cowlitz's proposed casino would have a footprint of nearly 800,000 square feet. AR140392 (ROD at 11).

In 2004, the Cowlitz applied to have the Parcel taken into trust. AR140382 (ROD at 1).[1] The Cowlitz also requested that the NIGC declare the Parcel eligible for gaming under IGRA's "restored lands" exception. See AR014762-800. To meet that exception, the Cowlitz asserted in substance that they were unrecognized and not under federal jurisdiction from the early 1900s through 2002. See 25 C.F.R. § 292.7. In 2005, the NIGC granted the request, finding that the Cowlitz were neither recognized nor under federal jurisdiction throughout the twentieth century (including in 1934). AR008193-8216 ("Restored Lands Op.").[2]

In November 2004, the Secretary announced the Bureau of Indian Affairs' (BIA's) intent to prepare an EIS evaluating the Cowlitz's proposed fee-to-trust transfer. 69 Fed. Reg. 65,447 (Nov. 12, 2004). In May 2008, the agency published a Final EIS (FEIS) identifying the proposed Cowlitz casino as the "Preferred Alternative." See 73 Fed. Reg. 31,143 (May 30, 2008).

B. The Decision Below

On April 22, 2013, the Secretary issued the Record of Decision (ROD) on the Cowlitz's fee-to-trust application. AR140376-519. See Ex. A (attached).[3] The Secretary first found that

[1] In 2009, the Cowlitz submitted a supplement to address the Supreme Court's intervening decision in *Carcieri*. AR002749-2834; see AR140460 (ROD at 79).

[2] The Cowlitz made these representations, and the NIGC accepted them, several years before the Supreme Court held in *Carcieri* that the term "now under Federal jurisdiction" in the IRA means under federal jurisdiction *in 1934*.

[3] The agency issued an initial ROD on the Cowlitz's fee-to-trust application on December 17, 2010. AR000024-146. Grand Ronde filed a Complaint in this Court challenging the 2010 ROD. Civ. No. 11-00284 (Dkt. No. 1). After Grand Ronde filed its motion for summary judgment, which (among other things) challenged the agency's failure to provide any reasoned explanation for its initial-reservation decision, the government submitted to the

she was authorized to take trust title to the Parcel because the Cowlitz were both a "recognized Indian tribe" and "under Federal jurisdiction." 25 U.S.C. § 479; AR140462 (ROD at 81 n.16). The Secretary acknowledged that under *Carcieri* the phrase "now under Federal jurisdiction" refers to tribes that were "under Federal jurisdiction" ***in 1934***. With respect to the "recognized" requirement, however, the Secretary stated that "the date of federal recognition does not affect the Secretary's authority under the IRA." AR140470 (ROD at 89). The Secretary therefore concluded that federal acknowledgment of the Cowlitz in ***January 2002*** constitutes "recognition" of the Cowlitz under the IRA. *Ibid.* The Secretary also stated that the word "recognized" in the IRA connotes "cognitive" or "quasi-anthropological" recognition and does not require recognition in any political or jurisdictional sense." AR140468 (ROD at 87).

With respect to the "under Federal jurisdiction" requirement, the Secretary found that unsuccessful treaty negotiations between the United States and the Lower Cowlitz in 1855 constituted "sufficient evidence of federal jurisdiction as of at least 1855." AR140478 (ROD at 97). The Secretary concluded that there was "no clear evidence" that the Cowlitz's jurisdictional status had thereafter been "terminated" or lost. AR140479 (ROD at 98).

The Secretary next determined that the Parcel was eligible for gaming under IGRA's "initial reservation" exception, which requires the tribe to have had "significant historical connections" to the land on which gaming will take place. AR140518 (ROD at 137). In support, the Secretary stated that Cowlitz Indians historically passed within miles of the Parcel on their

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Court a "Notice of Filing Supplemental ROD" (Dkt. No. 57) along with a "Revised Initial Reservation Opinion for the Cowlitz Indian Tribe"—a 24-page memorandum outlining the Associate Solicitor's belief that the Cowlitz parcel would qualify for IGRA's "initial reservation" exception. Dkt. No. 57-2. On March 13, 2013, this Court issued an Order remanding the action to the agency, holding that "the Federal Defendants did not have the authority to supplement the 2010 ROD with the 2012 Revised Initial Reservation Decision." Dkt. No. 83. at 10. The Secretary then issued the 2013 ROD—the agency action we challenge here—which again announced the Secretary's decision to take trust title to the Cowlitz Parcel and declare the land eligible for gaming.

way to other places, that Cowlitz Indians had been sighted in three isolated instances within several miles of the Parcel, and that individual Cowlitz members lived in the same county as the Parcel in the late 1800s and early 1900s. AR140508-516 (ROD at 127-135).

Last, the Secretary addressed the FEIS, concluding that acquiring trust title to the Parcel and authorizing a resort and casino is the "preferred alternative." The Secretary acknowledged that the BIA had erroneously estimated the economic impact on Spirit Mountain Casino, but surmised that Spirit Mountain would not likely suffer "a long-term revenue decrease . . . ." AR140429 (ROD at 48).

On June 6, 2013, Grand Ronde filed a Complaint for Declaratory and Injunctive Relief. Plaintiff now moves for summary judgment.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, this Court must set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). An agency decision is arbitrary and capricious if it has "failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or departs from prior agency interpretations without explanation, *Jicarilla Apache Nation* v. *DOI*, 613 F.3d 1112, 1119-20 (D.C. Cir. 2010). NEPA challenges require courts to determine whether the agency "has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97-98 (1983).

II. THE SECRETARY LACKS AUTHORITY UNDER THE IRA TO TAKE TRUST TITLE TO THE PARCEL BECAUSE THE COWLITZ WERE NEITHER "RECOGNIZED" NOR "UNDER FEDERAL JURISDICTION" IN 1934

The IRA authorizes the Secretary to accept land in trust only for the purpose of providing land for "Indians," as defined in section 19 of the Act. 25 U.S.C. §§ 465, 479. In this case, the Secretary invoked section 19's first definition of "Indian"—*i.e.*, that the Cowlitz were a "recognized Indian tribe now under Federal jurisdiction." *Id.* § 479.

But the Cowlitz themselves have vigorously contended otherwise. In their request for a restored lands opinion under IGRA, the Cowlitz acknowledged that they were "administratively terminated in the early twentieth century, as evidenced by numerous and unambiguous statements from federal officials." AR014777. They further argued—backed up by voluminous historical documentation—that the Cowlitz "no longer enjoyed federal recognition as a tribal entity" at the time of the IRA's enactment in 1934. AR014775. Relying on numerous pronouncements from the Department of the Interior, the NIGC agreed. It held that "the historical evidence establishes that the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002," and that the Department's consistent position was that the United States "no longer had a government-to-government relationship with the" Cowlitz. AR008199-8200 (Restored Lands Op. at 5-6) (Ex. B, attached).

The Secretary did not dispute any of this in the decision below. To the contrary, she conceded that the Cowlitz's "government-to-government relationship with the United States had been terminated" throughout the twentieth century. AR140487 (ROD at 106). The sole question for this Court under the IRA, then, is purely one of law: Can a tribe that was "not recognize[d]," was "terminated," and which lacked a "government-to-government relationship" with the United States as of 1934, nevertheless have been ***both*** a "recognized Indian tribe" ***and*** "under Federal jurisdiction" within the meaning of the IRA? As every authority to address the issue has rightly

concluded, the answer to that question is no. Because that conclusion is compelled by the statute's plain text, the Secretary's contrary conclusion is entitled to no deference from this Court. See *Carcieri*, 555 U.S. at 391-92.

A. The Cowlitz Were Not A "Recognized Indian Tribe" Within The Meaning Of The IRA

The Secretary stated that to be eligible for benefits under the IRA, a "tribe need only be 'recognized' as of the time the Department acquires the land into trust"—not when the IRA was enacted in 1934. AR140470 (ROD at 89). She therefore concluded that the "Cowlitz Tribe's federal acknowledgment in 2002"—nearly 70 years after the IRA was enacted—"satisfies the IRA's requirement that the tribe be 'recognized.'" *Ibid.* The Secretary also suggested (but did not decide) that the IRA uses the term "recognized" in what she called the "cognitive" sense and that the Cowlitz were recognized in that limited sense in 1934. AR140468, AR140469 (ROD at 87, 88). The Secretary was wrong on both counts.

1. *The IRA Authorizes The Secretary To Take Land In Trust Only For Indian Tribes That Were "Recognized" In 1934*

The IRA authorizes the Secretary to take land in trust for "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It is undisputed that, under *Carcieri*, the phrase "now under Federal jurisdiction" refers to tribes that were under federal jurisdiction in 1934. It is also undisputed that the phrase "now under Federal jurisdiction" modifies the term "recognized Indian tribe." See AR140475 (ROD at 94). It follows that the Act requires the tribe to be "recognized" at the same time at which it was "under Federal jurisdiction"—*i.e.*, in 1934. That is because the temporal limitation of the modifying term ("now under Federal jurisdiction") necessarily applies to the modified term ("recognized Indian tribe"). After all, a tribe plainly cannot be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934.

Imagine, for example, a statute that applies to "any state resident now practicing medicine." If the statute covers only those persons who were "practicing medicine" in 1934, would it apply to a physician who practiced medicine in a foreign country in 1934 but did not become a "state resident" until 2002? No, because you obviously cannot be "a state resident practicing medicine" in 1934 if you were not a "state resident" in 1934. Or imagine a statute that regulates "all automobiles now having more than 200,000 miles." If the statute required the automobile to have had 200,000 miles in 1934, would an automobile built 70 years *after* that date be covered under the statute? Of course not. The text of the IRA compels the conclusion that "recognized," like "under Federal jurisdiction," is temporally limited to 1934.

The IRA's legislative history confirms the point. Section 19's first definition of "Indian" originally included just the "recognized Indian tribe" requirement (and not the "under Federal jurisdiction" proviso). See AR140466 (ROD at 85). Senator Wheeler (the IRA's Senate sponsor) unequivocally stated that Indians would not qualify as members of a "recognized" Indian tribe "unless they are enrolled *at the present time*." AR135299 (emphasis added) (S. 2755 Hearing at 264). The IRA's House sponsor similarly explained that the Act "recognizes the status quo of the *present* reservation Indians" and precludes persons "who are not *already* enrolled members of a tribe" from claiming benefits under the Act. Congressional Debate on Wheeler-Howard Bill (1934), at 12,056, reprinted in THE AMERICAN INDIAN AND THE UNITED STATES, Vol. III, at 1972-73 (Random House, 1973).

Congress's intent to limit "recognized" to tribes that were recognized in 1934 is further evidenced by other provisions of the Act in which "Congress explicitly referred to current events." *Carcieri*, 555 U.S. at 389. For example, section 18 of the IRA required tribes to vote on whether to accept or reject the Act within a year of its enactment. 25 U.S.C. § 478. As this

Court has explained, the fact "[t]hat this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized *at the time of passage*." *City of Sault Ste. Marie* v. *Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (emphasis added). The Secretary's conclusion that a tribe can be "recognized" some 70 years after 1934 is also impossible to square with section 19's second definition of "Indian," which covers descendants of members of recognized tribes who were living on reservations in 1934. See 25 U.S.C. § 479. Tribes "recognized" in 2002 do not have "descendants" living on reservations in 1934.

"A court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). It would be anomalous for Congress to attach a temporal limitation to the jurisdiction requirement, to the voting requirement, and to the residency requirement, but allow the "recognized" requirement to float in time to encompass tribes that were recognized 70 years *after* the IRA was enacted. Reading "recognized Indian tribe" in the context of the statute as a whole therefore "provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment." *Carcieri*, 555 U.S. at 389.

Given the unambiguous text, it is hardly surprising that every court to address the issue has stated that the IRA authorizes the Secretary to take land in trust only for tribes that were recognized in 1934. In *United States* v. *John*, 437 U.S. 634 (1978), the Supreme Court held that the IRA's first definition of "Indian" was limited to tribes recognized in 1934 but that its third definition (the so-called blood quantum requirement) was not. The Court quoted section 19's definition of "Indian," adding the bracketed language as follows (*Id.* at 650):

> The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,"

> and their descendants who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood."

The lesson from *John* is clear: The term "recognized" unambiguously refers to tribes that were recognized "in 1934." *Ibid.* Every other court has reached the same conclusion. In *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975), for example, the D.C. Circuit stated that "the IRA was primarily designed for tribal Indians, and neither [the plaintiff] nor his relatives had any tribal designation, organization, or reservation *at that time*"—*i.e.*, when the IRA was enacted in 1934. *Id.* at 1256 (emphasis added). In *United States* v. *State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974), the Fifth Circuit held that "[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934." And in *City of Sault Ste. Marie*, 532 F. Supp. at 161 n.6, this Court explained that "the IRA was intended to benefit only those Indians federally recognized at the time of passage."[4]

Tellingly, the Secretary did not cite *any* of these authorities—the only federal decisions to address the question at issue in this case. Instead, she relied exclusively on Justice Breyer's concurring opinion in *Carcieri*, which stated that the '"IRA imposes no time limit upon recognition."' AR140470 (ROD at 89) (quoting *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)). But the *majority* opinion in *Carcieri* provides absolutely no support for the Secretary's interpretation of the statute. To the contrary, the majority stated that "*[i]n 1934*, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." *Carcieri*, 555 U.S. at 395-96 (internal quotation marks omitted) (emphasis added). Moreover, the Secretary misread Justice Breyer's concurrence. Justice Breyer never

[4] In *New York* v. *Salazar*, No. 08-644, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012), the court similarly held that "the operative question for a court or the Agency in determining whether trust authority may properly be exercised is whether the tribe in question was federally recognized and under federal jurisdiction *in 1934* as opposed to whether the tribe was federally recognized and under federal jurisdiction at the time of the trust decision." *Id.* at *14 (emphasis added).

said that recognition through the Federal Acknowledgment Process necessarily satisfies the IRA's recognition requirement. If that were true, then the Narragansett would have been "recognized" within the meaning of the Act—a notion that the Court plainly rejected in *Carcieri*. Rather, Justice Breyer simply said that a tribe could have been effectively recognized or under federal jurisdiction in 1934 even if the government did not know it at the time because, for example, the government was unaware of an extant treaty between the United States and the tribe. See *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring); AR140463 (ROD at 82).

The Secretary's fundamental error—her determination that "the date of federal recognition does not affect the Secretary's authority under the IRA" (AR140470 (ROD at 89))—requires that the ROD be vacated. It is, after all, settled that an agency decision cannot be upheld on a ground other than that invoked by the agency. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). But as we next show, there is no reason to give the Secretary a do-over. When the term "recognized" is given its correct—and plain—meaning, the record indisputably shows that the Cowlitz were not recognized in 1934 within the meaning of the IRA.

2. *The Term "Recognized Indian Tribe" Refers To Political Entities Having A Government-to-Government Relationship With The United States*

Relying on a law-review article, the Secretary stated that the term "recognized Indian tribe" has been used in two senses. First, the Secretary asserted, it has been used in what she variously referred to as the "cognitive," "ethnological," or "quasi-anthropological sense." AR140468 (ROD at 87 & n.57) (relying on Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 333 (1990)). Second, the Secretary acknowledged, the term "recognized" has also been used in the "political" sense, in which a "recognized" tribe is a "governmental entity" having a government-to-government "relationship with the United States." AR140468 (ROD at 87). The Secretary

dismissed the "political" recognition concept as a uniquely "modern notion," and stated that the Cowlitz were recognized in the cognitive sense in 1934. *Ibid.*

The D.C. Circuit and the Supreme Court, however, have both held that the IRA uses the term "recognized" in the political sense—not in the vague "cognitive" or "ethnological" sense espoused by the Secretary. In *California Valley Miwok Tribe* v. *United States*, 515 F.3d 1262 (D.C. Cir. 2008), for example, the D.C. Circuit defined the term: "[R]ecognition," the court stated, is "a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government. The federal government has historically recognized tribes through treaties, statutes, and executive orders." 515 F.3d at 1263.

The Secretary's theory also conflicts with the Supreme Court's decision in *Morton* v. *Mancari*, 417 U.S. 535 (1974). The plaintiffs in *Mancari* were non-Indian BIA employees who challenged as discriminatory the civil-service employment preference for "Indians" established by the IRA. See 25 U.S.C. § 472. Rejecting that challenge, the Supreme Court held that the IRA's hiring preference "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes"—a category that "is *political* rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24 (emphasis added).

The Secretary has now adopted the very definition of "Indian" emphatically *rejected* by the Supreme Court in *Mancari*. The Secretary asserted that the IRA uses "recognized" in the "ethnological" sense. AR140468 (ROD at 87 n.57). But "ethnological" is just another way of saying "racial." See Webster's New Int'l Dictionary 878 (2d ed., copyright 1934; 1941 printing) (defining "ethnology" as the science dealing with the "division of mankind into races"). There is simply no way to square the Secretary's claim that the IRA uses the term "recognized" in the

"ethnological" sense with the Supreme Court's holding that the Act uses "recognized" in the "political"—not ethnological—sense.[5]

The IRA's legislative history confirms that Congress used the term "recognized Indian tribe" in the political sense. The Senate colloquy on the IRA repeatedly referred to tribal members that were "registered" and "enrolled" with the Indian Office—*i.e.*, to refer to tribes that were politically recognized, not "cognitively" recognized. AR135298-99 (S. 2755 Hearing at 263-64). As the Supreme Court has repeatedly observed, moreover, the core purpose of the IRA was to promote tribal "self-government, both politically and economically." *Mancari*, 417 U.S. at 542. Consistent with that purpose, the IRA authorized tribes to adopt constitutions, establish bylaws, and approve articles of incorporation. 25 U.S.C. §§ 476, 477. "Cognitive" entities don't adopt constitutions; *political* entities do. The IRA is, at its essence, a political statute, and it refers to recognized Indian tribes as governmental entities—not as "ethnological" ones.[6]

Significantly, "the Secretary's current interpretation"—that the IRA uses "recognized" in the "cognitive" rather than "political" sense—is "at odds with the Executive Branch's

[5] In *Stand Up For California!* v. *Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013), the court, on motion for a preliminary injunction, approved the "cognitive" recognition theory invoked by the Secretary in this case (though no party had briefed the "cognitive" theory). The court did not engage in any analysis of the relevant case law or legislative history. Echoing the ROD in this case, the court simply stated that "using the phrase 'recognized Indian tribe' in a jurisdictional sense would be redundant because the statute further modifies 'recognized Indian tribe' by the phrase 'now under Federal jurisdiction.'" *Id.* at 69. But that statement misunderstands the distinction between the two statutory requirements. "[R]ecognition . . . is a formal *political* act"—not a jurisdictional act—"confirming the tribe's existence as a distinct political society." *California Valley*, 515 F.3d at 1263. In contrast—and as the Secretary herself acknowledged here, AR140478 (ROD at 97)—the "under Federal jurisdiction" term requires the *exercise* of supervision and control over a tribe. See *infra*, at 21. Thus, treaty negotiations between the United States and a tribe may constitute "recognition" of the tribe as a political entity, but only a ratified treaty creating U.S. supervision over the tribe can place the tribe "under Federal jurisdiction."

[6] Indian tribes are therefore "recognized" as sovereign nations the same way that foreign nations are. The Supreme Court has long held that under the "law of nations," Indian tribes are "sovereign and independent states." *Worcester* v. *Georgia*, 31 U.S. 515, 561 (1832); see *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 13 (1831) (referring to Indian tribes as "domestic dependent nations"). When viewed from this international-law perspective, the Secretary's "cognitive" recognition theory is simply a nonstarter: If the United States negotiates a treaty with Tibet, it is officially recognizing Tibet as a sovereign *political* entity; it is not merely recognizing the existence of Tibetans.

construction of this provision at the time of enactment." *Carcieri*, 555 U.S. at 390. For example, a 1934 opinion of the Interior Department's Solicitor unequivocally stated that a "tribe" within the meaning of the IRA is a "political entity." Solicitor's Op., *Definition of Tribe as Political Entity* at 478 (Nov. 7, 1934), http://thorpe.ou.edu/sol_opinions/p476-500.html. In a 1936 memorandum, the Solicitor similarly explained that although a certain group of Indians present on a reservation were "*ethnologically*, of two tribes," those two tribes had been "*recognized politically* as a single tribe for many years," and could therefore organize as a single tribe under the IRA. Solicitor's Op., *Ft. Belknap Land Purchase—Reorganization Act* at 613 (March 20, 1936) (emphasis added), http://thorpe.ou.edu/sol_opinions/p601-625.html. More recently, a 2008 opinion from the Interior Board of Indian Appeals (IBIA) defined the term "recognized Indian tribe" as follows:

> The Federal Government's recognition or acknowledgment of an entity as an Indian tribe, however manifested, institutionaliz[es] the government-to-government relationship between the tribe and the [F]ederal government. Congressional authority over Indian affairs under the Constitution is based on tribes' political status, and if the Department has determined that a group is not a political entity with whom the Federal Government has a government-to-government relationship, that group cannot be considered a "tribe" within the meaning of the IRA.

Estate of Elmer Wilson, Jr., 47 IBIA 1, 11 (2008) (internal citations omitted).[7]

In a 180-degree turnaround, the Secretary now asserts that the IRA uses the term

[7] In her novel *The Round House*, Louise Erdrich illustrates why the cognitive recognition concept invoked by the Secretary here "has nothing to do with government":

> From the government's point of view, the only way you can tell an Indian is an Indian is to look at that person's history. There must be ancestors from way back who signed some document or who were recorded as Indians by the U.S. government, someone identified as a member of a tribe. And then after that you have to look at that person's blood quantum, how much Indian blood they've got that belongs to one tribe. In most cases, the government will call the person an Indian if their blood is one quarter—it usually has to be from one tribe. But that tribe has also got to be federally recognized. In other words, being an Indian is in some ways a tangle of red tape. On the other hand, Indians know other Indians without the need for a federal pedigree, and this knowledge—like love, sex, or having or not having a baby—has nothing to do with government.

Louise Erdrich, THE ROUND HOUSE 30 (2012).

"recognized" in the "cognitive" sense because political recognition is an entirely "modern" concept. But the sole authority cited by the Secretary directly *contradicts* that conclusion. The Quinn article quoted by the Secretary (at AR140468 (ROD 87)) states that, "in the early documentary record," the term "recognized" was sometimes used "in the cognitive sense, i.e., [to mean] that federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize,' for example, the existence of a large Irish population in Boston." 34 AM. J. LEGAL HIST. at 333. In the *same paragraph* selectively quoted by the Secretary, however, Quinn goes on to explain that "at least since the Indian Reorganization Act of 1934 (hereafter IRA) the term 'recognized' has been used *almost exclusively in the jurisdictional sense* by all branches of the government" to mean that "the federal government formally acknowledges a tribe's existence as a 'domestic dependent nation' with tribal sovereignty and deals with it in a special relationship on a government-to-government basis." *Id.* at 333-34 (emphasis added).

Indeed, the whole point of the article relied on by the Secretary is that the IRA marked the triumph of the "political" recognition concept over the vague "cognitive" recognition concept: With the IRA's passage, "[r]ecognition had become, at last, a declaration, and its usage had shifted from a cognitive sense to a wholly jurisdictional sense." *Id.* at 356. The Secretary's reliance on—and selective quotation of—an authority that directly contradicts her position is palpably arbitrary. See *State Farm*, 463 U.S. at 43 (agency cannot "offer[] an explanation for its decision that runs counter to the evidence before the agency"); *Butte County* v. *Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency cannot ignore evidence contradicting its position.").[8]

[8] In any event, as shown above, the political recognition concept obviously predates the IRA. See *California Valley Miwok Tribe*, 515 F.3d at 1263 ("The federal government has historically recognized tribes through treaties, statutes, and executive orders."); AR008198 (Restored Lands Op. at 4) ("Before the modern era of federal Indian law, one method by which the United States Government recognized the governmental status of an Indian tribe was to conduct government-to-government negotiations with the intent to enter into a treaty with the tribe."). There is simply no support for the Secretary's claim that "political" recognition is a "modern" concept that would have been alien to the Congress that enacted the IRA in 1934. See, *e.g.*, Act of March 3, 1871, § 1, 16 Stat. 544, 566

3. *The Cowlitz Were Not A "Recognized Indian Tribe" Within The Meaning Of The IRA Because They Were Not Recognized As A Political Entity In 1934*

As shown above, the term "recognized Indian tribe" unambiguously refers to tribes that (1) were recognized as political entities having a government-to-government relationship with the United States (2) in 1934. The undisputed evidence shows that the Cowlitz flunk that test.

The entire premise of the NIGC's restored lands opinion—which was essentially incorporated by reference in the ROD—is that "the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." AR008199 (Restored Lands Op. at 5). That conclusion was based on the Cowlitz's own argument that they "no longer enjoyed federal recognition as a tribal entity" in the 1900's, AR014775, and the Department's "position that it no longer had a government-to-government relationship with the Tribe" at that time, AR008200 (Restored Lands Op. at 6). Indeed, Commissioner Collier stated in 1933—just a year before the IRA's enactment—that the Cowlitz were "no longer in existence as a communal entity." *Ibid.* (quoting 1933 Collier Letter); see *Carcieri*, 555 U.S. at 390 n.5 ("Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it.").

Faced with that incontrovertible evidence, the Secretary conceded that the Cowlitz had "no formal government to government relationship (formal federal recognition)" in 1934, AR140485 (ROD at 104); she conceded that the Cowlitz "'have never had any recognition at the hands of the Government'" as of 1910, AR140481 (ROD at 100) (quoting BIA official); and she conceded that "the [Cowlitz's] government-to-government relationship with the United States

("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.").

had been terminated" in the twentieth century, AR140487 (ROD at 106). Those concessions are fatal to the Secretary's argument. The Cowlitz plainly cannot have been a "recognized Indian tribe" in 1934 if "the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." AR008199 (Restored Lands Op. at 5).[9] The Secretary's decision to accept trust title to the Cowlitz parcel was therefore in excess of her statutory authority and contrary to law. 5 U.S.C. § 706(2).

The Secretary's decision is deficient for still another reason. The Department has consistently found that the Cowlitz failed to satisfy the IRA's "recognized Indian tribe" requirement, *however* that term is defined in the IRA. In 1980, for example, the IBIA heard an appeal of a BIA decision refusing to allow an Indian to deed a portion of his allotment to his nephew, who was a Cowlitz member. *Brown* v. *Commissioner of Indian Affairs*, 8 IBIA 183 (1980). The BIA argued that "the Cowlitz Tribe, in which [the nephew] is a member, neither now nor in the past has received Federal recognition, thereby precluding compliance with the statutory classification of 'persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.'" *Id.* at 186. The IBIA agreed. It held that the Cowlitz member was not "a member of a federally recognized tribe on June 18, 1934 (the date of enactment of section 19)." *Id.* at 188.[10]

The Secretary did not—and cannot—provide any explanation for taking a contrary position now. "[T]he requirement that an agency provide reasoned explanation for its action

[9] Further, as discussed below, it is undisputed that the Cowlitz were terminated as a tribe in 1934; that termination "extinguished" any federal recognition of the Cowlitz. *United States* v. *Lara*, 541 U.S. 193, 203 (2004) (noting that termination is the opposite of recognition); see also AR002770 (Cowlitz's supplemental submission conceding that termination is synonymous with the termination of a "tribe's federally recognized status").

[10] Similarly, in response to Congress's request for the Department's view on a 1975 bill that would have given the Cowlitz the right to obtains funds from Indian Claims Commission (ICC) judgments, the Commissioner of Indian Affairs stated that the Cowlitz tribe "is not"—and never was—"a Federally-recognized tribe." AR015049. A BIA official further explained that "the Secretary is *not empowered to take . . . land in trust* [for the Cowlitz under the IRA] because there is no federally recognized group involved." AR015064 (emphasis added).

would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio*." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Yet that is precisely what the Secretary has done here.

B. The Cowlitz Were Not "Under Federal Jurisdiction" In 1934

The Secretary lacks authority to take trust title to the Cowlitz Parcel for another reason: The Cowlitz were not "under Federal jurisdiction" in 1934. 25 U.S.C. § 479; *Carcieri*, 555 U.S. at 395. The term "under Federal jurisdiction" encompasses four requirements.

First, a tribe "under Federal jurisdiction" must be under the supervision and control of the federal government. The federal government asserts such supervision and control through treaties and other formal acts that place tribes "under the protection of the United States." *Cherokee Nation*, 30 U.S. at 12; see *Worcester*, 31 U.S. at 542 ("[T]he very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction."); AR140487 (ROD at 106) ("under Federal jurisdiction" requires actions that "reflect[] federal supervision of the Tribe").[11]

Indeed, the IRA's legislative history shows that Congress added the "under Federal jurisdiction" proviso specifically to limit the Act to tribes that were under federal supervision in 1934. During the colloquy on the Act, several Senators expressed concern that if "Indian" were defined only as "members of any recognized Indian tribe," then the statute would embrace Indians who were members of tribes that were formally "recognized" but that were not under active "Government supervision and control" at the time. AR135299 (S. 2755 Hearing at 264).

[11] See also *Heckman* v. *United States*, 224 U.S. 413, 429 (1912) ("By this treaty, the Cherokees acknowledged that they were under the protection of the United States of America."); *Truscott* v. *Hurlbut Land & Cattle Co.*, 73 F. 60, 64 (9th Cir. 1896) (through treaty and agreements "between that tribe and the United States, the reservation in question is within the sole and exclusive jurisdiction of the United States); *United States* v. *Washington*, 476 F. Supp. 1101, 1110 (W.D. Wash. 1979) (through "treaties and by other actions of the United States, the Indian tribes which were parties to said treaties . . . came under the jurisdiction of the United States").

To address that concern, Commissioner Collier proposed adding the phrase "now under Federal jurisdiction" to ensure that section 19 was limited to tribes that were under "Government supervision and control" in 1934. AR135299-301 (S. 2755 Hearing at 264-266).

Second, the United States must exercise that supervision and control over the tribe as a *group*—not just over individual Indians. That requirement flows from Congress's use of the term "tribe" in the phrase "members of any recognized tribe now under Federal jurisdiction." 25 U.S.C. § 479; see AR140473 (ROD 92) (supervision must be exercised over "particular tribes").

Third, the federal government must actually *exercise* jurisdiction over the Indian tribe; the mere *authority* to do so is not enough. Indeed, the Secretary squarely rejected the argument that the term "under Federal jurisdiction" requires only the authority to assert jurisdiction over a tribe, explaining that a "tribe must make a further showing that the United States has exercised its jurisdiction" over the tribe. AR140478 (ROD at 97).

Finally, a tribe "under Federal jurisdiction" must, like any other "recognized" tribe, have a government-to-government relationship with the United States. That requirement is the logical consequence of the fact that jurisdiction is the exercise of supervision by one government (the United States) over another (the Indian tribe). Ratified treaties, for example, are the result of negotiations between two sovereigns and manifest a government-to-government relationship between those sovereigns. See *Cherokee Nation*, 30 U.S. at 13; *Worcester*, 31 U.S. at 555.

This interpretation of "under Federal jurisdiction" is the very approach suggested by Justice Breyer in his concurring opinion in *Carcieri*. The term "under Federal jurisdiction," he stated, requires "a 1934 *relationship* between the tribe and Federal Government that could be described as jurisdictional." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) (emphasis added). He then explained that such a government-to-government relationship could be established by "a

treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office"—*i.e.*, through formal actions that demonstrate the exercise of federal supervision and control over a tribe. *Ibid.* Finally, he indicated that the exercise of federal jurisdiction requires contact with the tribe "as a group" rather than isolated contacts with individual members of the group. *Id.* at 399-400.

As shown below, the Cowlitz were not "under Federal jurisdiction" in 1934 because they were administratively terminated by, and lacked a government-to-government relationship with, the United States throughout the twentieth century.

1. *The Cowlitz Were Not "Under Federal Jurisdiction" In 1934 Because They Were Terminated As A Tribe And Lacked An Ongoing Government-to-Government Relationship With The United States As Of That Date*

In their request for a restored lands opinion, the Cowlitz acknowledged that they were "administratively terminated in the early twentieth century." AR014777. The NIGC agreed, finding that the Cowlitz "no longer had a government-to-government relationship with the Tribe" throughout the twentieth century. AR008200 (Restored Lands Op. at 6). In support, the agency cited Commissioner Collier's 1933 statement that the Cowlitz were "no longer in existence as a communal entity" and were not "wards" of the government. *Ibid.* The Secretary, too, concluded in the ROD that "the Tribe's government-to-government relationship with the United States had been terminated" by the time the IRA was enacted. AR140487 (ROD at 106).

That evidence is dispositive. "Termination" denotes the cessation of "federal supervision and control" over an Indian tribe and the abrogation of "the special relationship between those tribes and the federal government." Cohen's Handbook of Federal Indian Law 91 (2005 ed.); see *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 503 (1986). In other words, termination is the *antithesis* of "Federal jurisdiction." Indeed, in *TOMAC* v. *Norton*, 433 F.3d 852 (D.C. Cir. 2006), the D.C. Circuit specifically equated termination with the inability to organize under the

IRA. *Id.* at 854 ("After years of dealing with the United States in government-to-government relations, the Tribe was administratively terminated in 1935, when its application for recognition was denied under the Indian Reorganization Act of 1934.").[12]

The Cowlitz agree. They stated in their supplemental fee-to-trust application that by "terminating" Indian tribes, "Congress terminated the United States' supervisory activities (*i.e.*, the *exercise of jurisdiction*)" over those tribes. AR002768-69 (emphasis added). They further argued that administrative termination is no different than Congressional termination; both actions, they explained, eliminate "all obligations on the part of the government to the Indian." AR014774. As the Secretary correctly held, the term "under Federal jurisdiction" requires the exercise of jurisdiction over a tribe—not just the authority to do so. Thus, by conceding that termination vitiates the "exercise of jurisdiction," the Cowlitz conceded that they were not "under Federal jurisdiction" under the Secretary's test.[13]

That conclusion is reinforced by Supreme Court decisions holding that termination destroys federal "jurisdiction" under other statutes governing federal jurisdiction over Indian tribes. In *Mattz* v. *Arnett*, 412 U.S. 481, 483 (1973), for example, the Court explained that a reservation that was "terminated" ceases to be "Indian country"—and therefore ceases to be "under the jurisdiction of the United States Government," 18 U.S.C. § 1151. Similarly, in *United States* v. *Antelope*, 430 U.S. 641, 646 n.7 (1977), the Court held that members of tribes "whose official status has been terminated" are "no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act." The Secretary's determination that

[12] Because the tribe in *TOMAC* was terminated, Congress enacted legislation in 1994 that specifically authorized the Secretary to acquire real property for the tribe. *TOMAC*, 433 F.3d at 856. Congress must do the same here to authorize the Secretary to take land in trust for the Cowlitz, which were terminated as of 1934.

[13] The Secretary, like the Cowlitz, acknowledged that termination vitiates "federal supervision over" Indian tribes. AR140474 (ROD at 93 n.91).

the Cowlitz were "under Federal jurisdiction" in 1934 is irreconcilable with the undisputed fact that the United States had terminated "the exercise of jurisdiction" over the Cowlitz at that time.

The parties also agree that the Cowlitz lacked a "government-to-government relationship" with the United States in 1934. AR140487 (ROD at 106). The Secretary stated—without any analysis—that the absence of such a relationship was "not fatal to the determination that the Tribe was under federal jurisdiction in 1934." AR140485 (ROD at 104). But as discussed above, the existence of a government-to-government relationship is the *sine qua non* of federal jurisdiction. If the term "under Federal jurisdiction" means anything, it means there exists some government-to-government "relationship between the tribe and Federal Government that could be described as jurisdictional." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring). It simply blinks reality to say that a tribe that had no relationship with the federal government could nevertheless be under the active supervision and control of that government.

Indeed, in *Stand Up For California!* v. *Dep't of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013) the court expressly adopted Justice Breyer's interpretation of "under Federal jurisdiction"—including the requirement that a tribe have a "government-to-government relationship" with the United States in 1934. *Id.* at 66-67. The court concluded that the North Fork Tribe was "under Federal jurisdiction" in 1934 because the tribe voted on the IRA in 1935 (the sole ground for the Secretary's decision) and because the DOI purchased land to establish the "North Fork Rancheria" in 1916—the equivalent of establishing a reservation for the tribe. *Id.* at 68, 69. Here, in contrast, it is undisputed that: (1) the Cowlitz lacked any government-to-government relationship with the United States in 1934; (2) the BIA expressly *denied* the Cowlitz the right to vote on the IRA, see AR014785; AR015552; and (3) the DOI never

established a reservation for the Cowlitz. The Cowlitz were not "under Federal jurisdiction" in 1934 under Justice Breyer's definition—or under any proper interpretation of the phrase.

2. *Until This Case, The Department Had Consistently Determined That The Cowlitz Were Not Under Federal Jurisdiction In 1934*

There is one surefire way to tell which tribes were, and were not, "under Federal jurisdiction" within the meaning of the IRA. At the time of the IRA's enactment, Commissioner Collier—the architect of the IRA and the author of the "under Federal jurisdiction" proviso—created a list of 258 tribes that were eligible to vote to organize under the Act. Quinn, 34 AM. J. LEGAL HIST. at 356. The Cowlitz were excluded from that list and denied the right to vote on the IRA. See Haas, *Ten Years of Tribal Government Under I.R.A.* 13-20 (1947) (AR134271-278).

The Secretary now disavows that history. According to the Secretary, "many tribes that were clearly under the jurisdiction of the federal government chose not to organize under the IRA." AR140484 (ROD at 103 n.143). That misses the point. The Cowlitz didn't *choose* not to organize under the IRA. Rather, Cowlitz Indians sought to vote on the IRA, and the BIA expressly *rejected* their right to do so. See AR014785; AR015552.

Nor were Cowlitz Indians enrolled with the Indian office in 1934 or enumerated on the annual Indian censuses at the time. The Appropriations Act of July 4, 1884, required each Indian agent to submit in his annual report "a census of the Indians at his agency or upon the reservation under his charge." 23 Stat. 76, 98. The Cowlitz conceded below, however, that the "BIA *never* kept an 'official' census or roll for the Cowlitz." AR002826 (emphasis added). The Secretary, too, acknowledged that the Cowlitz "were not enumerated in the annual censuses required by the Appropriations Act." AR140481 (ROD at 100). And, in 1933, Commissioner Collier expressly rejected an individual Indian's request to enroll with the Cowlitz on the ground that '"[n]o enrolments . . . are now being made with the remnants of the Cowlitz tribe which in fact, is no

longer in existence as a communal entity."' AR015544 (quoting Collier Letter).[14]

This might be a more challenging case if the Cowlitz were left off one list but were on another—if, say, they were not included on Commissioner Colliers's list of tribes eligible to vote on the IRA but were named parties to treaties in 1934 of which the BIA was unaware at the time. But that is not the case here—the Cowlitz were not on *any* list. The Cowlitz were expressly denied the right to vote on the IRA; they never had any reservation; they did not enter into any treaty with the United States; they were not enrolled with the Indian Office or listed on the annual Indian census; the Department strenuously opposed all efforts by Congress to assert jurisdiction over the Cowlitz; and the BIA consistently maintained that the Cowlitz no longer qualified as wards of the government, lacked any government-to-government relationship to the United States, and did not even *exist* as a tribal entity in 1934. The Secretary's determination that the Cowlitz were nevertheless "under Federal jurisdiction" in 1934 stretches the term beyond the breaking point.

3. *The Secretary's Own "Two-Part Inquiry" Demonstrates That The Cowlitz Were Not "Under Federal Jurisdiction" In 1934*

The Secretary set forth a "two-part inquiry" for determining whether a tribe was "under Federal jurisdiction" within the meaning of the IRA. AR140475 (ROD at 94). The first question, according to the Secretary, is "whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction." *Ibid.* "Once having identified that the tribe was under federal jurisdiction, the second question is to ascertain whether the

[14] The Department took still other affirmative steps to prevent the Cowlitz from coming "under Federal jurisdiction." For example, a series of bills introduced in the 1920's would have given the Court of Claims jurisdiction over claims brought by the Cowlitz. "[I]n accordance with the official Federal Government policy at the time, the Department of the Interior opposed the proposed legislation." AR015547 (Historical Technical Report prepared by the Department). As grounds for its opposition to federal jurisdiction over the Cowlitz, the Bureau stated that the Cowlitz were "scattered through the southern part of the State of Washington," and that they were "without any tribal organization, [were] generally self-supporting, and ha[d] been absorbed into the body politic." *Ibid.* As noted above, the "under Federal jurisdiction" provision was added to the IRA specifically to exclude tribes that, like the Cowlitz, were "absorbed into the body politic."

tribe's jurisdictional status remained intact in 1934." AR140475 (ROD at 95).

That entire analysis ignores the undisputed—and case-dispositive—record evidence discussed above. There is simply no way that a tribe that was terminated in 1934, had no government-to-government relationship with the United States at that time, and was specifically denied the right to vote on the IRA, could possibly have been "under Federal jurisdiction" in 1934. But even under the Secretary's two-part analysis, the Cowlitz were not "under Federal jurisdiction" within the meaning of the Act.

First, the Secretary did not establish—under step one of her analysis—that the Cowlitz were *ever* "under Federal jurisdiction" prior to 1934. The Secretary relied on a single non-event: "the United States' treaty negotiations with the Lower Band of Cowlitz Indians" in 1855. AR140478 (ROD at 97). But as the Secretary acknowledged, *those negotiations failed*. *Ibid.* Because a treaty was never ratified, the government never actually *exercised* jurisdiction—which the Secretary herself conceded to be an essential ingredient of "under Federal jurisdiction." *Ibid.* Indeed, by rejecting the proposed treaty, the Cowlitz manifestly *refused* to submit to federal jurisdiction. See *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) (only a treaty "in effect" in 1934 can support a conclusion that a tribe was "under Federal jurisdiction").

The Secretary's "step two" analysis—concluding that there was "no clear evidence" that the Cowlitz lost the jurisdictional status they supposedly obtained in 1855 (AR140479 (ROD at 98))—is just as threadbare. Everyone—including the Secretary—agrees that the Cowlitz were "terminated" as of 1934. It is also undisputed that the Department refused to allow the Cowlitz to vote on the IRA, refused to make enrollments for the tribe, and refused to engage in any government-to-government relationship with the Cowlitz in 1934. See *TOMAC*, 433 F.3d at 854 (federal government's refusal to allow tribe to vote on IRA constitutes termination of the tribe).

Under "step two," then, the Cowlitz cannot be said to have "remain[ed]" under federal jurisdiction in 1934.

Nor is the "step two" analysis strengthened by the Secretary's citation to isolated and sporadic contacts with individual Cowlitz Indians. First and foremost, the term "under Federal jurisdiction" requires the exercise of supervision and control over a tribe. Mere "dealings" with a tribe (much less with individual Indians), AR140476 (ROD at 95), is insufficient to render a tribe "under Federal jurisdiction" within the meaning of the Act. See AR140475 (ROD at 94).

And a closer look at the "dealings" relied on by the Secretary weakens her case further:

- The Secretary relied on an 1868 attempt by the local BIA superintendent to distribute goods to individual Cowlitz Indians as evidence that the Cowlitz were under Federal jurisdiction in 1934. AR140479 (ROD at 98). But the Indians *refused* those goods. They did so, moreover, because they believed that accepting the goods would amount to a surrender of title to their lands—*i.e.*, precisely because they believed that accepting the goods would place the tribe under federal jurisdiction. See AR015496. That *contradicts*, rather than supports, the Secretary's theory that the Cowlitz were "under Federal jurisdiction."
- The Secretary noted that when the Cowlitz tried (unsuccessfully) to obtain legislation to bring claims against the United States, the BIA stated—twice—that the Cowlitz "have not had any recognition from the government" as of 1910. AR140481 (ROD at 100). Again, that only contradicts the Secretary's theory: It proves that the Cowlitz were not even "recognized" by the United States, much less "under Federal jurisdiction."
- The Secretary stated that the government had provided for the "medical needs" of "individual Indians" and allowed individual Cowlitz Indians to attend BIA-operated schools. AR140480 (ROD at 99). But federal jurisdiction requires government-to-government contact with a tribe as a *group*—not isolated contacts with "individual Indians." In any event, the provision of medical and educational support does not constitute the exercise of federal jurisdiction over a tribe. See AR135300 (Commissioner Collier's statement during Senate colloquy that educational and health aid does not place a tribe "under the guardianship of the Government").[15]
- The Secretary made much of statements by local BIA officials that the Cowlitz were within the "jurisdiction" of one local agency rather than another. AR140480 (ROD at

[15] The Secretary also cited evidence of allotments to individual Cowlitz Indians. AR140482 (ROD at 101). Most of the cited allotments, however, were issued to individuals under the Indian Homestead Act of 1884. See AR015855. As the Department explained in its Historical Technical Report, those allotments were given to Indians "who have abandoned . . . tribal relations," AR015511, and thus do "not provide good evidence [of] an acknowledged government to government relationship with a tribe," AR015512.

99). But the Department itself made clear in its Historical Technical Report that those statements reached the "point of overstepping technical accuracy," AR015542, and were "not backed by policy statements from the office of the Commissioner of Indian Affairs," AR015544, who stated in 1933 that "the Cowlitz were "no longer in existence as a communal entity" and were not "Federal wards," AR015544-45. Statements by individual local officials cannot trump the official position of the agency.[16]

- The Secretary stated that the agency's approval of two attorneys representing the Cowlitz suggests that the Cowlitz were under federal jurisdiction at that time. AR140484. But there is no authority for the proposition that approval of attorney contracts is sufficient to render a tribe "under Federal jurisdiction." To the contrary, the sole authority cited by the Secretary (a Solicitor's Opinion entitled *Status of Wisconsin Winnebago* (March 6, 1937)) shows just how much it takes to qualify as "under Federal jurisdiction"—and that the Cowlitz clearly fall short of the mark. The memo cited by the Secretary states that (1) in 1881, Congress enacted a statute specifically citing the Winnebago Indians; (2) in 1909, Congress enacted another statute directing the Secretary to "make an enrollment of all Winnebago Indians"; (3) the Department then "made rolls of these two groups of Indians, which ha[d] been designated as band or tribal rolls"; and (4) Congress then enacted the jurisdictional act of December 17, 1928, which specifically authorized "the Court of Claims to adjudicate all" claims by the tribe against the United States. AR135012-014. It was the combination of those factors—not merely the approval of attorney contracts—that rendered the Winnebago "under Federal jurisdiction."[17]

- The Secretary relied on the Supreme Court's decision in *Halbert* v. *United States*, 283 U.S. 753, 760 (1931), which held that individual members of the Cowlitz were among those "entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." The Secretary stated that "[t]he reference to the 'Cowlitz Tribe' in the *Halbert* decision of 1931 . . . supports a conclusion that the Cowlitz Tribe was under federal jurisdiction during that period of time." AR140483-484 (ROD at 102-103). But the mere reference to a "tribe" says nothing about whether that tribe was "under Federal jurisdiction." Indeed, *Halbert* "was concerned only with allotment and addressed the rights of individual Indians, not tribal rights." *Confederated Tribes of Chehalis Indian Reservation* v. *Washington*, 96 F.3d 334, 340 (9th Cir. 1996). The BIA has made clear, moreover, that individual Cowlitz members received allotments on the Quinaielt Reservation on the sole ground that they were "'fish-eating' Indians of this particular section, and *not* because they had any rights to such allotments . . . *as Cowlitz Indians*.'" AR015559-60 (Historical Technical Report, quoting 1940 BIA letter).

- The Secretary suggested that the Cowlitz were necessarily under federal jurisdiction in

[16] In light of agency policy, these isolated comments clearly refer to a local agency's "jurisdiction" in the geographic sense—*i.e.*, that some individual Cowlitz Indians were within the geographical area covered by one local agency or another.

[17] The Secretary cited the Department's 1878 "acknowledge[ment]" of two individuals as "chiefs" of the Lower and Upper Bands of the Cowlitz as "unambiguous federal jurisdiction over the amalgamated bands as [a] single entity." AR140479(ROD at 98). But that acknowledgment was, at best, just that: *acknowledgment* of the Cowlitz, not the exercise of jurisdiction over the tribe. In any event, the acknowledgment of two chiefs 56 years before the enactment of the IRA cannot possibly demonstrate the exercise of federal jurisdiction in 1934, the sole question at issue here.

> 1934 because their 2002 acknowledgment was "based on evidence of a continuous political existence since at least 1855." AR140487 (ROD at 106). But the 2002 federal "recognition" of the Cowlitz says nothing about whether the tribe was "under Federal jurisdiction" in 1934. Indeed, the Department's 2000 acknowledgment decision expressly states that acknowledgment of the Cowlitz did *not* entail recognition of a "government-to-government" relationship between the Cowlitz and the federal government. 65 Fed. Reg. 8436, 8436. And *Carcieri* confirms that federal acknowledgment does not mean that a tribe was under federal jurisdiction in 1934. After all, the Narragansett, like the Cowlitz, were acknowledged through the FAP. Under the Secretary's theory, then, the Narragansett would have been under federal jurisdiction in 1934—a conclusion that directly contradicts the holding in *Carcieri*.

The attenuated "dealings" cited by the Secretary are just a distraction. It is undisputed that the Cowlitz refused to enter into any treaty with the United States and that they were terminated by, and lacked a government-to-government relationship with, the United States as of 1934. There is therefore no way that the Cowlitz were "under Federal jurisdiction" at that time, and the Secretary's decision to take trust title to the Parcel was in excess of statutory authority and contrary to law. 5 U.S.C. § 706(2).

III. THE SECRETARY'S DECISION THAT THE PARCEL IS ELIGIBLE FOR GAMING UNDER IGRA IS UNLAWFUL

IGRA prohibits gaming on land acquired after October 17, 1988, with two pertinent exceptions found in section 20: for "restored lands" and for "initial reservations." The Secretary held that the Parcel, which was acquired well after 1988, was eligible for gaming under the "initial reservation" exception, which requires that the Cowlitz show "significant historical connections" to the Parcel. 25 C.F.R. § 292.6(d). But contrary to the Secretary's conclusion, the Cowlitz simply do not have *any* "historical connection" to the Parcel—much less "significant historical connections."

The heart of the Cowlitz Indians' historical land is approximately 50 miles north of the Parcel, and the southernmost village 25 miles north. See Map attached as Exhibit D;

AR140545.[18] The Parcel is well outside the territory to which the tribe was found to have a legitimate claim by the Indian Claims Commission (ICC). *Ibid.* Indeed, neither the Cowlitz nor the Secretary contends that the Parcel is within the Cowlitz's ancestral homelands. Instead, the ROD relies on inconclusive and isolated sightings of Cowlitz Indians within a few miles of the Parcel, and on evidence that the Cowlitz were present in an area of the Pacific Northwest encompassing hundreds of miles. Such attenuated connections to the Parcel do not fall within the plain language of the regulation. In the thirty years since IGRA was enacted, no other petitioning tribe has been found to have a historical connection to land on facts like these.

A. The "Significant Historical Connections" Requirement Must Be Strictly Construed

The word "significant" in "significant historical connections" (25 C.F.R. § 292.6(d)) means "important, weighty, [or] notable." Webster's Third New Int'l Dictionary 2116 (3d ed. 1986). Tribes may meet this test by showing "the existence of the tribe's villages, burial grounds, occupancy or subsistence use" (25 C.F.R. § 292.2)—each criterion connoting a *long-term and regular* interaction with the land.[19] And geographically remote connections, even if sufficiently continuous, will not do; the regulations require that the activity be in "in the *vicinity* of the land." *Ibid.* (emphasis added). "Vicinity" means "a *surrounding area* or district." Webster's Third, at 2550 (emphasis added).

These textual limitations do not encompass lands miles away from the Parcel, nor do they

[18] The map attached as Exhibit D shows the geographical relationship between the Cowlitz's territory, historical villages, and modern government (all located along the Cowlitz River in Lewis and Cowlitz Counties) and the Parcel (in Clark County).

[19] "Subsistence use[]," for instance, is defined elsewhere in federal law as requiring "*customary and traditional* uses." See, *e.g.*, 50 C.F.R. § 100.4 (emphasis added); 36 C.F.R. § 242.4; 16 U.S.C. § 3113. "Customary and traditional" use, in turn, means "long-established, consistent pattern of use." 36 C.F.R. § 242.4; 50 C.F.R. § 100.4. Sporadic, isolated individual hunting trips or nearby trade routes do not constitute subsistence use under the plain meaning of the word. See, *e.g.*, Webster's Third New Int'l Dictionary 2279 (3d ed. 1986) ("subsistence" is "the irreducible minimum (as of food and shelter) *necessary to support life*." (emphasis added)).

cover merely transient activities. The section 20 exceptions are, after all, *exceptions* to IGRA's general prohibition of gaming on Indian lands acquired after 1988, and must therefore be strictly construed. See *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

A broad reading of the exception would also defy the purpose of IGRA. As the DOI has recognized, the section 20 exceptions were not intended "to substantially undercut the general prohibition on gaming on lands acquired after IGRA's passage." Solicitor's Op., *Confederated Tribe of Coos* (Dec. 5, 2001), at 12 ("Coos Op.").[20] IGRA allowed Indians to conduct gaming on their pre-existing reservations (and only on their reservations). Those pre-existing reservations were, by definition, land to which the tribes had close historical and cultural connections. The general prohibition of gaming on lands acquired after IGRA was designed to prevent tribes from opportunistically placing their new reservations near lucrative gaming markets, instead of on land to which they had a close historical connection. A broad reading of the initial reservation exception would, perversely, give newly recognized tribes an advantage over pre-existing tribes, which could not choose the location of their land acquisitions so as to maximize casino revenue. See *Citizens Exposing Truth About Casinos* v. *Norton*, CIV A 02-1754 TPJ, 2004 WL 5238116, at *3 n.5 (D.D.C. Apr. 23, 2004) *aff'd* 492 F.3d 460 (D.C. Cir. 2007) ("[t]hese statutory exceptions were intended to ensure *parity* between newly acknowledged or restored tribes which lacked a reservation prior to 1988 and existing tribes") (emphasis added).

Relatedly, the regulation must be read to require a connection that is no weaker than other tribes' connections to the same land. That reading is dictated by principles of Indian law: The

[20] All Solicitor and NIGC gaming opinions cited in Section III are attached as Exhibit C and are also available at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

federal government has a common-law duty not to act for the benefit of one Indian tribe at the expense of another, *Confederated Tribes of Chehalis Indian Reservation*, 96 F.3d at 340, and a statutory responsibility to treat each tribe equally, 25 U.S.C. § 476(f).[21] This does not by any means suggest that a tribe must demonstrate *exclusive* use of the land throughout history. But if the Secretary is to treat similarly situated tribes equally, the regulations cannot be read to allow overlapping claims by numerous tribes to the same land. Instead, they must limit tribes' claims to gaming land based on a valid claim of historical ownership or possession of that land.

B. The Cowlitz Plainly Do Not Meet The "Significant Historical Connections" Requirement

There are simply no facts in the record, nor is there any reasonable interpretation of the regulation, that can support the Secretary's conclusion that the Cowlitz meet the "significant historical connections" requirement. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (an agency decision interpreting its own regulations cannot be upheld if it is "plainly erroneous or inconsistent with the regulation"). The Secretary does not (and cannot) dispute one fundamental, and dispositive, fact: The Parcel is not only outside of the Cowlitz's historical territory—it is not even adjacent to that territory. Indeed, in adjudicating an earlier Cowlitz claim, the ICC found that the southernmost edge of the land to which the Cowlitz had a legitimate ownership claim was approximately 14 miles north of the Parcel. See AR014786; see also AR140545. In fact, the ICC explicitly *rejected* the Cowlitz claim that their ancestors lived near the Lewis River, which flows within two miles of the Parcel. AR014812 ("[V]irtually all of the contemporary as well as the historical and anthropological reports have identified the aborigines on the Lewis

[21] Nor may the Secretary accept as "significant" claims to land that are potentially limitless. See NIGC Op., *Wyandotte Nation Amended Gaming Ordinance* (Sept. 10, 2004) ("Wyandotte Op.") at 12 (if NIGC accepted as sufficient tribe's connection to a site where it had lived only temporarily (even for as long as 11 years), it "would conceivably be bound to find that the Tribe also had an historical nexus to Michigan, Ohio, Pennsylvania and Missouri," and have to permit gaming there as well).

River as belonging to other tribal groups—specifically the Chinook and the Klickitat.").

The ICC finding that the Parcel was well outside the Cowlitz's aboriginal territory is strong evidence that the tribe did not live on or adjacent to the parcel.[22] There is simply no suggestion that the Cowlitz made the 14-mile trek from the edge of their tribal land to the Parcel regularly enough to establish significant connections to the Parcel. In this case, therefore, the undisputed distance between the Cowlitz's ICC-adjudicated land and the Parcel supports a conclusion that the Cowlitz lacked "significant historical connections" to the Parcel.

And there is much more evidence that the Cowlitz have no connection to the Parcel land. During the course of the Cowlitz's federal acknowledgment proceedings, the BIA, like the ICC, rejected the Cowlitz's claims to the Parcel area. As the ICC and BIA unequivocally concluded, the Indians who controlled and occupied the area closest to the Parcel were some combination of Chinookan and Klickitat—they were conclusively *not* Cowlitz. See AR014812-13; AR015422; AR015471; AR015750.[23] The BIA identified five anthropological groups representing all members of the modern-day Cowlitz and concluded that *none* of them had roots near the Lewis River. AR015599-603. Indeed, BIA historians documented that almost no Cowlitz Indians lived in Clark County—the county in which the Parcel lies—between 1850 and 1920: In each census taken between 1850 and 1910, between zero and three families related to the modern-day Cowlitz were found in Clark County. AR015795-96. In the 1919 Roblin Roll (a census of

[22] Of course, such a finding, without more, is not *necessarily* dispositive in an IGRA determination because the ICC used an "exclusive use" standard to define the Cowlitz's aboriginal territory, not the "significant historical connections" IGRA standard. Land outside a tribe's exclusive use area could, for instance, be shown to have been the location of a tribal village or burial ground and could therefore potentially qualify as a gaming site. But the ROD makes no finding that the Cowlitz lived or buried their dead on or adjacent to the Parcel. See *infra* Section III.D.

[23] In fact, Grand Ronde also have a connection to the land more significant than the connection claimed by the Cowlitz. The Multnomah Chinookans who lived at the mouth of the Lewis River are among the ancestors of Grand Ronde, and one of the Grand Ronde Treaties, the Willamette Valley Treaty of 1855, recognized that Grand Ronde bands had legitimate claims to lands on the north shore of the River. AR008558-AR008559.

Indians in western Washington who did not live on reservations), less than *half of one percent* of the total Cowlitz Indians identified were found to live in Clark County—in fact, significantly more Cowlitz were documented in each of Oregon, California, Alaska, and British Columbia. AR015736-38; AR004336-AR004337.[24]

The ROD takes this census data out of context by using it to point out that individual Cowlitz Indians lived in the same county as the Parcel beginning in the 1870s. AR140516-57 (ROD at 135-136). But the percentage of Cowlitz Indians living in Clark County was vanishingly small when compared to the numbers of Cowlitz living throughout the rest of the United States and parts of Canada. AR015736-38; AR004336-37. If such evidence can be used to demonstrate "significant historical connections," the Cowlitz could demonstrate a "significant" connection to virtually anywhere in the Pacific Northwest. See DOI Op., *Guidiville Band of Pomo Indians* (Sept. 1, 2011) ("Guidiville Op.") at 18 & n.92 (individual Indians' birth places are "not necessarily indicative of *tribal* occupation or subsistence use" and "could just as easily indicate that the Band occupied and used different lands far to the north of the Parcel.").

The Secretary cannot dispute that Cowlitz territory did not overlap with the Parcel, and was not even adjacent to it. The heart of the Cowlitz's territory was, historically, at Cowlitz Prairie on the Cowlitz River (present-day Toledo), approximately 50 miles from the Parcel. See AR014811; AR015436. See also Ex. D. Census data from the late 1800s consistently showed the "overwhelming majority" of Cowlitz families living in Lewis County, Washington, the southernmost border of which is approximately 50 miles north of the Parcel (indeed, Lewis County does not even border Clark County, where the Parcel is located). See AR015787; Ex. D.

[24] Similarly, although the NIGC (incorrectly) concluded that the Cowlitz were eligible for the restored lands exception, it held that "the documentation *does not* specifically identify the Lewis River Property as a historically important parcel"; that "the area *was not* within the core of the Tribe's historical territory"; and that the tribe "was *not* the dominant tribe" in the area. AR008204, AR008205, AR008208 (emphases added).

Even at the height of the tribe's expansion, no Cowlitz village ever existed further south than the village at Kelso, approximately 25 miles from the Parcel. The undisputed distance between Cowlitz territory and the Parcel forecloses a finding of "significant historical connections."

Importantly, even the fourteen-mile distance that the ICC found between the southernmost edge of the Cowlitz territory and the Parcel—much less the 50 miles from the undisputed center of Cowlitz territory—was no small feat to travel before the days of the modern interstate. See AR006356-006357; AR009971 ("it was difficult to get from the Clarke [sic] County communities of Kalama and the Lewis River to their distant county seat, Vancouver"—the Lewis River is approximately 15 miles from Vancouver). The heavily forested terrain of the area "made water travel a necessity" for the Cowlitz, as for most of the tribes in the region. See AR005087. Via canoe, a round trip from the center of Cowlitz territory to and from the Parcel could have taken days or weeks. See AR010039. These distances might be less dispositive if there were evidence—*any* evidence—that, despite these distances, the Cowlitz developed a strong connection to the Parcel. But there is no such showing here. See *infra* Section III.D.

C. The Secretary's Decision Departs From Decades Of Otherwise Consistent Agency Precedent

In addition to being foreclosed by the language of the regulation, and the remoteness of the Cowlitz's historical territory from the Parcel, the Secretary's decision constitutes a wholesale departure from every other application—before or since—of the historical connections requirement. Although the ROD strives mightily to wedge the Cowlitz decision into agency precedent, it does so only by mischaracterizing the Secretary's other decisions. The Cowlitz decision, in short, is a "restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). As such, the decision in this case is entitled to no deference. *Comau, Inc.* v. *NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012)

("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.") (internal quotations omitted).

Prior to the Cowlitz decision the agency had consistently required petitioners to show that their desired gaming site was within their historical territory, and often even required the site to be at the *heart* of the tribe's territory, as opposed to the fringes.[25] A showing that the gaming site is in the heart of the tribe's territory allows the agency to infer that the site *itself* was important to the petitioner, even when there is no direct evidence of significant activity on the land. NIGC Op., *Bear River Band of Rohnerville Rancheria* (Aug. 5, 2002) ("Rohnerville Op.") at 13 ("Because the parcel is located in the middle of these many sites that were used by the Wiyot, we can assume that the parcel, too, was used by the Wiyot").

Given this precedent, the Cowlitz cannot possibly satisfy the historical connections requirement as it was interpreted by the agency for the thirty years following the enactment of IGRA.[26] There is simply no denying the stark difference between the present case and every agency precedent—in *all* of the prior opinions cited by the ROD, the tribe's gaming sites were conclusively shown to be well within territory that the tribe ceded to the United States, settled on, or aboriginally controlled (or some combination of the three).[27] In no case did the agency

[25] See, *e.g.*, Solicitor's Op., *Pomo of Upper Lake Indian Lands Determination* (Nov. 21, 2007) ("Pomo Op.") at 6-7 (the land was not "nearby or peripheral—it is central . . . [to the] aboriginal territory . . . [and] centrally within the sacred territory . . . as practiced in their religion"); NIGC Op., *Turtle Creek Casino Site, Grand Traverse Band* (Aug. 31, 2001) at 19 (land was "at the heart of the Band's culture throughout history"); NIGC Op., *Ft. Sill Apache Tribe Luna Co., NM Property* (May 19, 2008) ("Ft. Sill Apache Op.") at 24-25 (the land was part of the tribe's aboriginal territory "from time immemorial"); Coos Op. at 9 (land was within tribal reservation and on land continuously owned by tribal members since the 1800s).

[26] This fact alone forecloses the Secretary's contrary decision. The agency's prior interpretations were later codified in the Part 292 regulations, *Butte County* v. *Hogen*, 613 F.3d 190, 192 (D.C. Cir. 2010), and the agency cannot now interpret the regulations in a way that conflicts with the meaning intended at the time of their promulgation. See *S.G. Loewendick & Sons, Inc.* v. *Reich*, 70 F.3d 1291, 1295 (D.C. Cir. 1995).

[27] See, *e.g.*, NIGC Op., *Poarch Band of Creek Indians* (May 19, 2008) (parcel was in the center of land that exclusively belonged to tribe's ancestors and was ceded to U.S. by tribe's ancestors); NIGC Op., *Mooretown Rancheria* (Oct. 25, 2007) ("Mooretown Op.) (parcel was within aboriginal territory); NIGC Op., *Sault Ste. Marie Tribe* (July 31, 2006) ("Sault Ste. Marie Op.") (site was within the territory ceded to the United States via treaty);

even intimate that "14 miles [from the *edge* of a tribe's territory] is consistent with a finding of significant historical connection." AR140508 (ROD at 127 n.229).[28] And in *every* case, there was evidence of additional important connections to the land.[29] This abrupt break in the precedent forfeits any plausible claim of deference.

Two agency decisions issued since the original ROD serve only to confirm that the Cowlitz decision is sui generis.[30] In Guidiville, for example, the Secretary rejected a gaming application under IGRA because the tribe was "unable to demonstrate that it had any village or burial ground anywhere" in either the city or county in which the tribe's parcel was located. Guidiville Op. at 19. And in Scotts, the Secretary, in rejecting the tribe's application, explained that the word "vicinity" cannot be stretched too far. Rather, the agency stated, a parcel is in the "vicinity" of historic lands only if "the nature of the tribe's historic use and occupancy . . . lead to the natural inference that the tribe *also used or occupied*" the parcel itself. Scotts Op. 15. (emphasis added). The agency explained that "Part 292's inclusion of the word 'vicinity' was not meant to expand" the types of lands eligible for gaming, which "always ha[ve] been limited

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NIGC Op., *Mechoopda Indian Tribe of the Chico Rancheria* (March 14, 2003) ("Mechoopda Op.") at 10 (parcel was "squarely within th[e] boundaries" of 23 aboriginal villages); Rohnerville Op. at 13 (parcel was "in the middle of" 25 different sites known to be inhabited and used by the tribe). In one decision, the parcel was either within or adjacent to the tribe's ancestral territory and, at any rate, was at the site of an aboriginal tribal village. NIGC Op., Karuk Tribe of Cal. (Apr. 9, 2012) at 10.

[28] The ROD attempts to camouflage the agency precedent by conflating the distance from a tribe's former *reservation* and the distance from a tribe's *historical territory*. AR140508 (ROD at 127 n.229). A reservation is a relatively small piece of land set aside for a tribe in exchange for the tribe ceding the vast majority of its larger area of historical territory. See *United States* v. *Dion*, 476 U.S. 734, 737 (1986); *Francis* v. *Francis*, 203 U.S. 233, 237 (1906). Thus, a potential gaming parcel could very easily be—and often is—many miles from the tribe's former reservation and yet well within the tribe's territory. See, *e.g.*, Sault Ste. Marie Op. at 11-14; Mooretown Op. at 10-11. The distances from *reservations* cited by the Secretary are completely inappropriate comparisons to the 14-mile distance from *the outside edge of Cowlitz territory*.

[29] See, *e.g.*, Pomo Op. at 7 (land was less than a mile from the tribe's burial grounds); Mechoopda Op. at 10-11 (parcel was crossed by trails linking several nearby tribal villages and was one mile from three buttes with cultural significance for the tribe); Ft. Sill Apache Op. at 24-25 (subsistence use in the area surrounding the land); Poarch Op. at 22 (two burial mounds at parcel site); Rohnerville Op. at 12-13 (one to four miles from multiple aboriginal villages, major trails, and natural landmarks with cultural significance); Coos Op. at 9 (adjacent to tribal burial ground).

[30] See Guidiville Op.; DOI Op., *Scotts Valley Band of Pomo Indians* (May 25, 2012) ("Scotts Op.").

to lands that a tribe used or occupied." *Id.* at 15. Put another way, only by requiring that the parcel be *within* the tribe's "historic use" area—which no one contends to be true here—can the agency be assured that *the Parcel itself* was in the "vicinity" of land to which the tribe had "significant historical connections."

The ROD does not acknowledge its departure from its recent interpretation of the word "vicinity." It cites the Scotts definition, AR140507 (ROD at 126), but fails to even attempt to apply it. The Secretary never claims any "natural inference" that the Cowlitz, as a tribe, used the Parcel itself. Instead, it just asserts that any Cowlitz presence within 15 miles of the Parcel (or, in some cases, much farther away) is in the "vicinity." But just last year, the agency rejected this very definition of "vicinity" in the opinion on which the government now relies: "[a] definition of 'vicinity' based solely on proximity would expand 'restored land' beyond land that was historically used or occupied by a tribe." Scotts Op. at 15.

But it gets worse. Both the Guidiville and Scotts opinions flatly hold that a tribe's connection to its gaming site must be both long-standing *and* clearly demonstrated. The agency held that "occasional[] visit[s]" to the gaming site do not support a significant historical connection, Scotts Op. at 17, and that trade-related travel near the parcel does not constitute subsistence use or occupancy, Guidiville Op. at 14-15. In both opinions, the agency also required that any evidence of historical activity be *conclusive*, repeatedly rejecting evidence that was open to debate or that required extrapolation from the record. See, *e.g.*, Scotts Op. at 10, 11 & n.43; Guidiville Op. at 16-18.

For whatever reason, when it comes to the Cowlitz the Secretary just casts these limiting principles to the wind. The break with precedent is startling and inexplicable. And the agency's lack of reasoned explanation for the change is, by itself, a hallmark of arbitrary and capricious

decisionmaking. See, *e.g.*, *Comau*, 671 at 1236.

D. The Facts Cited In The ROD Do Not Support The Secretary's Decision

The original 2010 ROD contained no rationale whatsoever for the Secretary's conclusion that the Cowlitz met the "significant historical connections" requirement for gaming on the Parcel. After remand, the agency attempted to beef up its analysis while relying on the same underlying historical record. But the new ROD does nothing to counteract the dispositive fact that the Cowlitz territory is miles away from the Parcel. Its newly articulated rationale merely confirms that the Secretary's decision is utterly threadbare.

In the ROD, the agency has gathered a pocketful of isolated or transient activities, somewhere around the Parcel, and then proclaimed these activities to constitute "occupancy." But the Secretary never tells us what she means by "occupancy"; plainly, she cannot mean its ordinary meaning of "[a]ct of taking or holding *possession*" given that the Cowlitz never possessed the Parcel or adjacent land. See Webster's New Int'l Dictionary 1684 (2d ed., copyright 1934; 1941 printing) (emphasis added). And the ROD baldly states that the Cowlitz's activities are in the "vicinity" of the Parcel without telling us how these activities meet the agency's own definition of "vicinity"—which, as noted, requires a use of such closely connected historical land as to give rise to the "natural inference" that the tribe used the Parcel itself.

At most, the agency's newly articulated evidence shows that the Cowlitz were present in an area of the Pacific Northwest encompassing hundreds of miles. For instance, the agency relies on the Cowlitz's use of the Columbia River, which flows within several miles of the Parcel. But the Columbia River is over 1200 miles long, flowing from British Columbia through Washington and Oregon to the Pacific coast. Cowlitz presence in such a large area is wholly without significance. See NIGC Op., Karuk Tribe, at 8 (Oct. 12, 2004) (evidence that tribe

"likely" lived on the same stretch of a river as the parcel was insufficient); Guidiville Op. at 13 (evidence that the tribe had connections to the counties near the parcel and the "Bay Area" as a whole was insufficient). Similarly, the Cowlitz's "trade presence" along a route along a 200-mile route to Puget Sound is no better evidence. Recent agency precedent specifically holds that a trade route that brought a tribe near its desired gaming site *does not* constitute subsistence use or occupancy. See Guidiville Op. at 14 ("the Band cannot establish its subsistence use or occupancy based on the fact that its ancestors traveled to various locations [near the parcel] to trade and interact with other peoples and then returned to [their home territory]").

What is more, much of the government's evidence is entirely conjectural. The agency cites, for example, the "possibility" of Cowlitz presence along a 100-mile stretch of the Columbia River between Mount Coffin and Fort George. AR140509 (ROD at 128). But an anthropologist's report speculating that the Cowlitz "*may have* indeed have had some sort of presence along the Columbia," *ibid.* (emphasis added), is exactly the sort of inconclusive evidence that the agency has invariably rejected—except when it comes to the Cowlitz. See, *e.g.*, Scotts Op. at 10-11. Similarly, the government cites evidence that Cowlitz Indians "*may well* have manned the boats between the Cowlitz and Fort Vancouver as well, passing the mouth of the Lewis River on their way"; but there is no basis to infer that the Cowlitz actually *exited* the river to use the Parcel. AR140515-16 (ROD at 134-35) (emphasis added). In any other context, the Secretary would never have tolerated evidence as paltry as this.

Most of the government's remaining evidence consists of three isolated sightings of Cowlitz Indians within several miles of the Parcel. This is how meager the government's case is: It actually invokes a single sighting of a single Indian named "Zack," who was apparently hunting on the Chelatchie Prairie. AR140515 (ROD at 134). Even the government cannot bring

itself to contend that Zack's one-time hunting trip means that the Cowlitz *as a tribe* used the Chelatchie Prairie for subsistence hunting, much less that they used the Parcel, six miles downstream.

Similarly, an ornithologist's reported sighting of Cowlitz "lodges" "near" Warrior's Point in the 1800s, even if accurate,[31] does not suggest that the Parcel itself was used by the Cowlitz. See AR140509 (ROD at 128). Most importantly, the isolated sighting contains no indication of a long-term presence such as a village or burial ground in the area.[32] In fact, the evidence is exactly to the contrary: The source cited by the agency concludes that *if* the lodges were correctly identified as belonging to Cowlitz Indians, the Cowlitz were probably there only en route to another location. AR140511 (ROD at 130) (citing AR004830). Compare Wyandotte Op. at 12 (temporary occupancy does not constitute a sufficient historical connection).

Furthermore, a battle between Cowlitz and Chinook Indians three miles from the Parcel demonstrates that the *Chinook*, not the Cowlitz, occupied and controlled the area south of the Cowlitz's territory. The historical account of this battle shows that the Cowlitz *failed* to encroach on the Chinook's land, and instead "returned home" after the fight. AR140515 (ROD at 134). Although it acknowledges this fact, the ROD nonetheless continues to cite the battle in support of its decision.

At no point does the agency explain how any of the isolated Cowlitz activity on which it relies, or even the sum of those activities, constitutes "significant" connections to the Parcel. Even on its second attempt—and with the benefit of reading our motion for summary judgment

[31] Contrary to the agency's assertion, AR140510 (ROD at 129), neither the ICC nor the BIA accepted the accuracy of the account. See AR015446-47 (Historical Technical Report at 25-26) (citing the account immediately before citing several pieces of countervailing evidence that the Indians in the area were actually Klickitat or Chinookan). And as the agency acknowledges, three reports in the administrative record also challenge the accuracy of the sighting. AR140510 (ROD at 129).

[32] Furthermore, it is unknown how far the encampment was from Warrior's Point (which is itself several miles from the Parcel). AR140510 (ROD at 129).

in the previous litigation—the government *still* cannot cobble together evidence of "significant historical connections." But how could it? The evidence is simply not there, and all the deference in the world is no substitute for actual facts.

IV. THE SECRETARY FAILED TO COMPLY WITH NEPA

A. The Final EIS (FEIS) Incorporated Untimely And Incorrect Modifications To Its Purpose And Need Statement

In its statement of purpose and need, an EIS must "specify the underlying purpose" of the project, as well as the "need to which the agency is responding" in presenting its proposed action. 40 C.F.R. § 1502.13. The "agenc[y] must look hard at the factors relevant to the definition of purpose" and "should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The agency must also afford key stakeholders adequate opportunity to comment on a draft EIS (DEIS), 40 C.F.R. § 1503.1(a)(1)-(4), and provide meaningful responses to those comments in its FEIS, *id.* §§ 1502.9(b), 1503.4.

Following publication of its draft EIS, the BIA received comments that the document's "purpose and need" section failed to adequately describe the Cowlitz's need for the proposed casino. See AR102781-83; AR009596-98. In response to those comments—but without giving the public a chance to comment—the agency added a statement in the FEIS that the Cowlitz had unmet financial needs of over $113 million, a figure simply cribbed from the Cowlitz Tribal Business Plan, which the BIA appended to the FEIS. AR081569-95; see also AR078453-54; compare AR106633-35 with AR075837. The BIA also made the ability to satisfy the Cowlitz's supposed need "the predominant criterion of the Proposed Action." AR078614.

The BIA's last-minute inclusion of the Cowlitz's unmet-needs assertion violates NEPA's central tenet that the agency facilitate meaningful public participation in its decision-making

process. Stakeholders and the public were denied the chance to comment on *either* the suitability of tying the project's purpose and need to a specific dollar amount *or* the reasonableness of that amount. BIA's failure to make such commentary possible during the NEPA process effectively circumvented the requirement that the agency publish responses to the public comments in the FEIS, 40 C.F.R. § 1503.4, and discuss "any responsible opposing view which was not adequately discussed in the draft statement," *id.* § 1502.9(b). The agency should be required to prepare a revised EIS to afford the public an opportunity to address the project's purpose and need.

Preparation of a new EIS is especially warranted here because the BIA's untimely modifications contained an unanalyzed—and almost surely exaggerated—assertion of unmet needs from the Cowlitz. It is well settled that an EIS that relies on flawed data, methodology, or assumptions cannot satisfy NEPA's "hard look" requirement. See 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.24; *NRDC* v. *U.S. Forest Service*, 421 F.3d 797, 811 (9th Cir. 2005). Moreover, when an agency relies on information submitted by an applicant in preparing an EIS, the agency must "independently evaluate the information submitted." 40 C.F.R. § 1506.5(a); *Simmons* v. *U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (Corps' "wholesale acceptance of [the permit applicant's] definition of purpose" did not comply with NEPA).

In this case, the BIA simply rubber-stamped the Cowlitz data; the FEIS contains no indication that the BIA conducted *any* analysis of the data or assumptions in the Cowlitz Business Plan. AR075837. The agency thus failed in its "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Busey*, 938 F.2d at 209 (Buckley, J., dissenting). What's worse, the Cowlitz's submission almost certainly overstates the costs of many or all of the tribe's desired programs and services. For example, the Business Plan includes a number of non-essential programs with no apparent

consideration of their cost effectiveness. It claims that the Cowlitz will require a horse program costing an initial $22.6 million, a fishery program ($23 million), and a native forestry and plants program ($13.6 million). AR081569-95; see also AR071395-96, AR071405, AR071408-12 (comment to FEIS, noting "[s]ubstantial exaggeration of tribal need"). And, when planning for more essential programs, the Business Plan fails to adequately account for significant outside sources of income, such as Indian Health Service funding for health care costs and Housing and Urban Development funding for housing costs. AR000289; AR006846-54; AR071411.

The size of the Cowlitz's desired programs is also extravagant compared to the tribe's membership and the land base that it seeks as its reservation. For instance, the Business Plan claims a need for tribal health insurance to cover the tribe's 3,554 members at the annual cost of $39.6 million. AR000288; AR081583. By contrast, Grand Ronde, which has a tribal membership of approximately 5,100, spends about half of that amount each year. AR000287-88; see also AR071411; AR006843-54 (comment to FEIS, noting that the Cowlitz's anticipated costs "are several-fold higher than similar needs measures of other populations, including some of which are o[f] poorer socioeconomic standing," and are "well in excess of the federal, state, and local government spending for Washington residents").

While the agency may arguably be free to give *some* weight to the Cowlitz's stated goals and objectives, it may *not* abdicate its duty to evaluate the information it receives, particularly when that information is submitted directly by the applicant. 40 C.F.R. § 1506.5(a); *Simmons*, 120 F.3d at 669; *Sierra Club* v. *Van Antwerp*, 709 F. Supp. 2d 1254, 1267-68 (S.D. Fla. 2009). Had agency officials made *any* effort to verify the Cowlitz's unmet needs assertion—either during the EIS process or during the preparation of the ROD—they would have unearthed the serious deficiencies in the Cowlitz's projections and been obligated to modify the EIS's purpose

and need statement accordingly. But by adopting the Cowlitz's own submission *after* the close of public comment, the agency ensured that it need not hear—or reckon with—contrary data.

B. The Modifications To The FEIS Improperly Removed Alternatives From Serious Consideration And Prejudiced Grand Ronde

An agency "may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Busey*, 938 F.2d at 196. Here, the BIA initially screened nearly twenty parcels of land to determine if they met the project's purpose and need. AR075882. After narrowing that list down to 11 properties, the agency identified five properties to the north of the proposed location that fell within the Cowlitz's aboriginal territory. See AR075882-86. Public comments had urged that those sites would be most appropriate for development of a Cowlitz casino, largely because of the parcels' proximity to the Cowlitz's historical territory. AR075886. The agency nevertheless eliminated those alternatives from consideration on the ground that they would not "adequately meet the economic objectives and needs of the Tribal government." AR075886; AR078455.

By making the Cowlitz's supposed need its top priority and then eliminating alternatives that it found would not meet that need, the BIA ensured that *only* the Cowlitz's preferred alternative would satisfy the project's stated objectives. See AR075887. Had the agency given due weight to the need to locate the proposed casino on the Cowlitz's historical lands, it might not have rejected the northern sites. Likewise, had the agency properly evaluated the Cowlitz Business Plan—and recognized just how inflated the tribe's unmet needs assertion was—it would have been evident that a casino located at any of the northern sites would be more than adequate to meet legitimate tribal needs. See AR006826-54; AR102788-89. The agency's

contrary approach is precisely the sort of result-oriented analysis that NEPA prohibits. See *Busey*, 938 F.2d at 196.

Moreover, the BIA's refusal to seriously consider the alternative locations severely prejudiced the interests of Grand Ronde. Development of a Cowlitz casino at any of the alternative sites would damage Grand Ronde far less than will development on the selected parcel. See AR000293; AR006515; AR102800-02. The agency should be required to correct the deficiencies in its analysis—by properly evaluating *all* of the development alternatives, taking into account *both* the Cowlitz's legitimate tribal needs *and* the effect that development would have on surrounding communities—in a revised EIS.

C. Both The FEIS And The ROD Erroneously Calculated The Adverse Effect Of The Proposed Casino On Grand Ronde

1. As the Secretary acknowledged, AR140429 (ROD at 48), the FEIS underestimated the extent to which the proposed Cowlitz casino would damage Grand Ronde. That error, in turn, caused the BIA to fail to address measures necessary to mitigate the adverse effects of the project, as required by NEPA. See 40 C.F.R. §§ 1502.14(f), 1502.16(h).

To assess the socioeconomic impact of the Cowlitz proposal, as required by NEPA, *id.* § 1508.8, the FEIS relied on an economic study containing numerous errors, including:

- use of an inaccurate 2005 revenue estimate for Spirit Mountain, which was based on "market information that *may or may not be representative*" of Spirit Mountain revenue, rather than *actual* casino revenue, AR082262 (emphasis added);
- failure to incorporate the study's own conclusion that Spirit Mountain's revenue would grow five percent annually (AR082263) when projecting the effect the Cowlitz casino would have on Spirit Mountain's 2011 revenue (compare AR082262 and AR082267);
- an apples-to-oranges comparison of estimated *2005* revenue (without the Cowlitz casino) to projected *2011* revenue (with the Cowlitz casino)—instead of a comparison of projected 2011 revenue with and without the Cowlitz casino (AR082267)—to determine the impact the new casino would have on Spirit Mountain.

Had the FEIS properly accounted for *actual* Spirit Mountain revenue, consistently

incorporated a five percent revenue growth assumption for Spirit Mountain in its analysis, and made appropriate financial comparisons, it might have better estimated the extent to which development of the Cowlitz casino would harm Grand Ronde. See AR006681-88. Because the agency failed to appreciate the extent of that harm, it did not include in the FEIS measures necessary to mitigate that significant adverse effect, as required by NEPA. See 40 C.F.R. §§ 1502.14(f), 1502.16(h); see also AR076388-411.[33]

2. In comments on the FEIS, Grand Ronde brought the above errors to the agency's attention. AR006497-813. As Grand Ronde explained, the Cowlitz casino would cause a 31 percent—not a 13.1 percent, as the FEIS initially concluded—decline in Spirit Mountain's 2011 revenues. AR006516-20, AR006680-714. Such a dramatic revenue loss—not to mention the inevitable job losses at Spirit Mountain—would devastate Grand Ronde's economy. AR006520. Revenue from Spirit Mountain funds such services as health care, education, and housing, and per capita payments provide tribal members with a crucial source of income. All of those programs would be severely threatened, and some eliminated entirely, by development of the Cowlitz casino. AR006520.

In response to Grand Ronde's comments, the Secretary revised certain calculations, and yet still underestimated the project's damage to Grand Ronde. For example, whereas she had accepted the Cowlitz's unmet needs assertions at face value, she parsed Grand Ronde's submissions, insisting that Spirit Mountain would suffer "only" a 25.9 percent reduction in gross revenue at most. AR140429 (ROD at 48); AR002999-3003. The Secretary concluded that this revenue loss would *not* impair essential tribal programs, because it could be offset by reductions in per capita payments. AR140429 (ROD at 48).

[33] NEPA, as well as its implementing regulations, are clear that NEPA is concerned with the economic effects of federal actions, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8 (emphasis added); 42 U.S.C. § 4331.

The Secretary is dead wrong. As explained below, not only would Spirit Mountain's expected losses completely *eviscerate* per capita payments—on which many tribal members heavily rely—but they would also require the tribe to make significant cuts to other essential programs and services. Even *accepting* the BIA's (inaccurate) assumptions about Spirit Mountain's base and future revenue, the proposed Cowlitz development would *still* cause a nearly *32* percent—*not* a 25.9 percent—decline in Spirit Mountain's 2011 revenue.[34]

The ROD's contention that, because Grand Ronde "currently allocates 33% of net income from Spirit Mountain to per capita payments," a "13% to 26% reduction in net income would not affect the ability of the Tribe to operate essential programs" is utterly inexplicable. See AR140429 (ROD at 48). The Secretary has conflated two distinct financial terms; the "13% to 26% reduction" to which she refers is actually a reduction in *gross revenue*, not net income. In fact, Grand Ronde's anticipated 32 percent decline in gross revenue would result in an even *greater* decline in net income.

In the casino industry, when revenue falls, operating costs (which include expenses like insurance premiums, facilities maintenance, and staffing) typically cannot be reduced at an equivalent rate. Thus, declines in gross revenue will cause a disproportionate decline in net income. That phenomenon was borne out when new gaming facilities opened in Pennsylvania; Atlantic City casinos experienced a 22 percent decrease in gross revenue but a *47 percent* decrease in net income. For every dollar gross revenue fell, the casinos lost 58 cents in net income—a disproportionately large drop in net income, since net income is much less than 58

[34] The BIA estimates Spirit Mountain's 2005 revenue to be $130,689,375 and projects that, if the Cowlitz did *not* open the proposed casino, that amount would grow at five percent annually, reaching $166,916,756 in 2011. AR082345; AR082262, AR082264; see also AR006518. The BIA further estimates that opening of the Cowlitz casino would cause Spirit Mountain's 2011 revenue to fall to $113,504,847. AR082267. The difference between those two projections for 2011 ($53,411,909) constitutes a 31.99 percent decrease in Spirit Mountain's gross revenue. See AR006687-89.

percent of gross revenue. N.J. Division of Gaming Enforcement, Historical Operating Statistics, http://www.nj.gov/oag/ge/historicalstatistics.html. There is no reason to suppose that Grand Ronde would be spared a similar fate; thus, if the Secretary's 32 percent revenue loss projection ($53,411,909 for 2011) were correct, the Cowlitz casino would cause a $30,978,907 loss in net income for Spirit Mountain.

In 2010, Grand Ronde allocated only about $18 million to per capita payments. Confederated Tribes of Grand Ronde, Budget Data. If the 2011 allocation were comparable, then the 2011 loss ($30,978,907) would, in fact, *exceed* per capita distribution by close to $13 million. Thus, contrary to the Secretary's claim in the ROD, Spirit Mountain's expected losses would completely *eliminate* per capita payments and would also entail significant budget cuts for other essential programs and services.

What is more, even if the Secretary were correct (which she is not) that revenue losses would only *reduce*, but not completely eliminate, per capita payments, such a conclusion nevertheless ignores the fact that those payments, themselves, are essential tribal services. Cutting them would drastically reduce Grand Ronde tribal members' already low level of income.[35] Moreover, that drop in income (on top of job losses at Spirit Mountain) would put even greater pressure on tribal services at a time when the tribal budget was also being cut. Indeed, the tribe easily could be rendered unable, for example, to provide the level of health care services that the Secretary herself recognized as a "priority" when justifying her decision to accept, without question, the Cowlitz's unmet-needs estimate. AR140413 (ROD at 32).

In light of the devastating effect the Cowlitz casino would have on Grand Ronde, the

[35] Members of the Grand Ronde community have a much lower income level ($20,506 per capita in 2009) than the state average ($25,893). Cutting per capita payments, which amounted to $3,512 in 2010, would cause per capita tribal income to fall 17 percent, to $16,994—$8,899 below the state average. Confederated Tribes of Grand Ronde, Budget Data; U.S. Census, USA Counties Database, http://censtats.gov.

Secretary's decision reflects an inadequate effort to balance the BIA's trust responsibility to the Cowlitz with its trust responsibility to Grand Ronde. See *Confederated Tribes of Chehalis Indian Reservation*, 96 F.3d at 340; *Nance* v. *EPA*, 645 F.2d 701, 710-12 (9th Cir. 1981); *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). Because the BIA's approval of the Cowlitz project would unquestionably cause significant harm to Grand Ronde, the government's trust responsibility requires that the agency take a hard look at the true needs of the Cowlitz and weigh those needs against the demonstrated losses that Grand Ronde would suffer if the project were approved.

D. The BIA Must Prepare A New—Or At Least Supplemental—EIS

In order to correct the errors in the FEIS and provide the public an adequate opportunity to consider and comment on its decision-making process, the agency should be required to prepare a new EIS. But at the very least, the agency should be required to prepare a supplement. Supplementation of an EIS is required when new information arises showing that the action will "'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered'" in the original EIS. *Marsh* v. *Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. § 4332(2)(C)); 40 C.F.R. § 1502.9(c)(1)(i-ii). Where, as here, an agency fails to consider the "full range of impacts" of its action in the FEIS, it must supplement its original analysis. See, *e.g.*, *Lemon* v. *McHugh*, 668 F. Supp. 2d 133, 141-42 (D.D.C. 2009).

CONCLUSION

For the reasons stated above, this Court should vacate the Record of Decision.

Dated: September 23, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2013, I have caused service of **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** and **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: September 23, 2013
Washington, D.C.

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