IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

and

CLARK COUNTY, WASHINGTON, *et al.*,

Plaintiffs,

v.

S.M.R. JEWELL, in her official capacity as Secretary of the United States Department of Interior, *et al.*,

Defendants,

and

COWLITZ INDIAN TRIBE,

Intervenor-Defendant.

Case No. 1:13-cv-00849 BJR

ORAL ARGUMENT REQUESTED

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

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Intervenor-Defendant.

Civil No. 1:13-cv-00849-BJR

ORAL ARGUMENT REQUESTED

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Clark County, City of Vancouver, Citizens Against Reservation Shopping (CARS), Al Alexanderson, Greg and Susan Gilbert, Dragonslayer, Inc. and Michels Development, LLC, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court for summary judgment against Defendants on the Counts set forth in its Complaint. *See* Case No. 1:13-cv-00850 (Dkt. 1) (consolidated with Case No. 1:13-cv-00849). Plaintiffs challenge 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 and the

final decision announced in the Federal Register on May 8, 2013. 78 Fed. Reg. 26,802 (May 8, 2013). 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. Plaintiffs allege, 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). Plaintiffs request that the Court 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 Plaintiffs' Motion for Summary Judgment.

DATED : September 23, 2013

Respectfully submitted,

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INTRODUCTION

The challenged decision is the Bureau of Indian Affairs' (BIA) second attempt to approve the trust acquisition of a parcel of land located in Clark County, Washington (the Site) for the Cowlitz Tribe (Cowlitz or Tribe). This second attempt fares no better than BIA's first.

BIA acknowledged the Cowlitz Tribe in 2002. In 2005, the Tribe submitted a site-specific gaming ordinance to the National Indian Gaming Commission (NIGC) for approval, accompanied by a request that the NIGC determine that the Site qualified as "restored lands" — an exception to the gaming prohibition on newly-acquired trust land. Relying on evidence BIA adduced during the acknowledgment process, the Tribe argued, and the NIGC concluded, that the "historical evidence establishes that the United States did not recognize the Cowlitz as a government entity from at least the 1900's to 2002." This conclusion enabled the Tribe to show that it was "restored tribe" within the meaning of the exception to the gaming prohibition.

What was helpful in 2005 became an obstacle in 2009, however, when the Supreme Court determined that the Secretary could only acquire land in trust under the Indian Reorganization Act (IRA) for tribes that were "recognized" and "under Federal jurisdiction" in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). Because the Tribe had been terminated during the 20th century, as the NIGC concluded, it cannot satisfy Section 19's definition of a recognized tribe under federal under jurisdiction in 1934.

Notwithstanding the NIGC's determination that the Cowlitz were terminated throughout the 20th century, BIA concluded that it *does* have the authority to acquire land in trust for the Tribe, because a tribe can apparently be both terminated and "under Federal jurisdiction" at the same time. To reach this inherently contradictory conclusion, BIA proffers an interpretation of Section 19 that is contrary to the plain meaning of the Act and the Supreme Court's interpretation of it.

BIA did not limit its errors regarding the scope of its authority to acquire land in trust to its interpretation of Section 19 of the IRA. BIA also ignored limitations on its acknowledgment

regulations, which do not permit BIA to take action on behalf of tribes that have substantially expanded their tribal rolls after acknowledgment. The Cowlitz Tribe, only 1,482 members in 2002, has added more than 2,000 members to its roll. This sort of expansion of tribal rolls is prohibited by regulation, and further makes it impossible to determine whether the Tribe qualifies for trust land under the IRA.

BIA also erroneously concluded that the Site qualifies for gaming because the Tribe has a "significant historical connection" the Site. The Tribe has never had a reservation in the area; nor has it had any villages; there are no burial grounds; and there is not even evidence of any occupancy of the area, except that consistent with transitory use, which BIA has determined is not sufficient to establish a significant historical connection, let alone the assessment that the regulations actually requires — i.e., that Site be located "*within an area* where the Tribe has significant historical connections."

Finally, BIA's environmental review of the proposed action suffers from critical flaws, including: 1) erroneous assumptions regarding the availability and enforceability of mitigation; 2) a review of alternatives that improperly excludes alternatives located within the Tribe's undisputed historic lands; and 3) a failure to consider impacts on water resources, including new laws that fundamentally affect BIA's 2008 evaluation.

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

A. Tribal Acknowledgment

BIA promulgated regulations in 1978 establishing standards for acknowledging tribes. 43 Fed. Reg. 39361 (Sept. 5, 1978) (originally codified at 25 C.F.R. part 54; now located 25 C.F.R. part 83). A tribe must demonstrate, among other things, that its "membership consists of individuals who descend from a historical Indian tribe." *Id.* § 83.7(e). The list of members a tribe submits in the acknowledgment process is its complete base roll for Federal funding and other administrative purposes. *Id.* § 83.12(b). Any additions to the base roll, other than

descendants of members of the base roll who meet tribal criteria, are limited to individuals who have maintained the same relationship with the tribe as those listed on the base roll and who meet the requirements in section § 83.7(e). *Id.* § 83.12(b).

B. The Indian Reorganization Act of 1934

The IRA authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians."[1] Ch. 576, § 5, 48 Stat. 985 (1934), 25 U.S.C. § 465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479. The word "now" means 1934; accordingly, the Secretary's authority to acquire land in trust is limited to those tribes that were recognized and under federal jurisdiction in 1934. *Carcieri v. Salazar*, 555 U.S. at 395.

Regulations implementing Section 5 of the IRA are set forth at 25 C.F.R. part 151. The regulations require BIA to address the existence of its statutory authority to acquire land in trust, limitations on that authority, the tribe's need to have trust land held, and the impacts of the acquisition and the jurisdictional consequences for state and local governments. *Id.* § 151.10.

C. The Indian Gaming Regulatory Act

Congress passed IGRA to govern gaming on "Indian lands" and created the NIGC, an independent commission, to implement the Act. Pub. L. No. 100-497 § 5, 102 Stat. 2469 (1988) (codified at 25 U.S.C. §§ 2701 *et seq.*). Section 20 of IGRA prohibits gaming on land acquired in trust after October 17, 1988. *Id.* § 2719(a)(1). There are three exceptions to the Section 20 prohibition. *Id.* § 2719(b)(1)(B)(i-iii). Relevant here are the "initial reservation exception," *id.* § 2719(b)(1)(B)(ii), which permits gaming on land the Secretary declares the "initial reservation," and the "restored lands" exception, *id.* § 2719(b)(1)(B)(iii), which permits gaming

[1] The Secretary of the Interior has delegated her authority to implement Section 5 of the IRA to the Assistant Secretary-Indian Affairs. For ease of reference, Plaintiffs refer to BIA generally as the decision-maker.

the "restored lands" of a tribe "restored" to "federal Recognition." The BIA may declare land an "initial reservation" only if it is "within an area where the tribe has significant historical connections," and modern connections. *Id.* § 292.6(d). Likewise, for land to qualify as "restored lands," a tribe must show a "significant historical connection" to the land. *Id.* § 292.12(b).

D. National Environmental Policy Act

NEPA requires federal agencies to prepare an environmental impact statement (EIS) when contemplating any "major Federal action[] significantly affecting the environment," such as a trust acquisition. 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4. The EIS must specify the underlying purpose of a project and the need to which the agency is responding, *id.* § 1502.13, and explore and objectively evaluate all "reasonable" alternatives to a proposed action, *id.* § 1502.14. A "supplemental" EIS (SEIS) is required when (1) "the agency makes substantive changes in the proposed action that are relevant to environmental concerns" or (2) there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* § 1502.9(c)(1)(i)-(ii).

II. THE DISPUTE OVER THE COWLITZ CASINO

A. Federal Acknowledgment of the Tribe

Until 2002, the Cowlitz Tribe's "landless status [had] caused the United States to determine that the Tribe's government-to-government relationship with the United States had been terminated." AR140487 [ROD 106]. In 1975, the Cowlitz Indians petitioned for federal acknowledgment pursuant to 25 C.F.R. part 83. AR6441. In 2000, BIA issued a final determination to acknowledge the Cowlitz Tribe, after BIA concluded, among other things, that the members of the petitioner group met the applicable criteria for acknowledgment upon careful review by a team of genealogists, anthropologists and other historians. *See* AR6039; *see also* 65 Fed. Reg. 8436-01 (Feb. 18, 2000). BIA issued a Reconsidered Final Determination acknowledging the Tribe in 2002. 67 Fed. Reg. 607-01 (Jan. 4, 2002).

Between 2002 and 2007, the Tribe increased its enrollment by almost 150%, from 1,482 to 3,544 members. *See* AR6475, AR90577, AR90599.

B. The Proposed Casino Site

The land the Tribe proposes be acquired in trust for casino development is a 151.87-acre parcel of agricultural land in Clark County, Washington, located near the City of La Center, Washington. AR140382 [ROD 101]. The Site is located just west of Interstate 5 at the NW 319th Street Interchange, in the Portland-Vancouver metropolitan area. AR140383 The Site is approximately 25 miles south of the Tribe's administrative offices near Kelso, Washington, and 50 miles south of Toledo, Washington, where the Tribe maintains tribal housing and its Elders Program and Senior Nutrition Center. AR281. The Site is located outside of the Tribe's historic territory, as determined by the Indian Claims Commission. AR280; *see also Simon Plamondon, on the Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 170-71 (1969).

C. BIA's Review of the Tribe's Fee-to-Trust Applications

On January 4, 2002, the Tribe filed a request with BIA asking it to acquire the Site in trust on the Tribe's behalf (Trust Request), AR123996, and stated that it did not intend to change the current agricultural use of the land, AR131366. The Tribe withdrew its request during the summer of 2003, after BIA required the Tribe to state its intended use of the Site. AR103476; AR131378; *see also* AR131365. The Tribe approached Clark County soon after to negotiate an agreement to mitigate the impacts of any development project the Tribe might undertake on the Site, which the Tribe represented might include gaming (Project). AR107190 [DEIS App. A]. The Tribe and Clark County executed a Memorandum of Understanding (MOU) on March 2, 2004. AR107192-202 [DEIS App. C]; NIGC AR787.

Upon execution of the MOU, the Tribe filed another Trust Request for the Site and identified gaming as a possible use. AR124121-122; AR129741; AR16005. The Tribe also asked the Secretary to designate the Site as its "initial reservation" eligible for gaming under IGRA. AR128840. Although the Tribe had requested an "initial reservation" determination from the Secretary in 2004 to authorize gaming, the Tribe separately sought a "restored lands" determination—a separate exception to the Section 20 gaming prohibition—from NIGC in 2005. NIGC AR5613-57 [Restored Lands Request]. The Tribe attached the Restored Lands Request to a site-specific gaming ordinance (2005 Ordinance). NIGC AR5609. The Tribe argued in the Restored Lands Request that it had been terminated for most of the 20th century, citing the substantial documentation BIA developed during acknowledgment. NIGC AR5624-28; NIGC AR3316-18. NIGC agreed, concluding 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." NIGC AR1647.

Pursuant to NEPA, BIA issued a notice of intent to prepare a draft EIS (DEIS) on November 12, 2004. AR15935. BIA relied heavily on the MOU in the DEIS as evidence that the impacts of the proposed casino would be mitigated.[2] AR106593. On October 17, 2006, the Washington Court of Appeals concluded that the MOU violated the Washington State Growth Management Act, and the Western Washington Growth Management Appeals Board subsequently invalidated the MOU. AR63381. *See Clark Cnty. v. W. Wash. Hearings Review Bd.*, 254 P.3d 862 (Wash. Ct. App. 2011). To "substitute" for the MOU, the Tribe passed an amendment to the 2005 Ordinance on October 17, 2007, which incorporated a new Environmental, Public Health, and Safety Ordinance (EPHS Ordinance). NIGC AR770-772.

[2] BIA ultimately analyzed a 1,183,635 square-foot casino resort, with up to 3,000 slot machines, 135 gaming tables, restaurant and retail facilities, a convention center, a 250-room hotel, and parking for 7,250 vehicles. AR106590; AR106642; AR106648-649 [DEIS ii, 2-3, 2-9 to 2-10].

NIGC approved the Tribe's amendment on January 8, 2008 (2008 Amendment). AR7498. BIA issued the Final EIS (FEIS) in May 2008, substituting references to the invalidated MOU in the FEIS with references to the new EPHS Ordinance. AR075768-AR76440.

On February 24, 2009, the Supreme Court held that the Secretary's authority to acquire land in trust for tribes was limited to federally recognized tribes under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 395. On June 18, 2009, the Cowlitz submitted a supplement to its Trust Request to address the *Carcieri* decision. AR2837; AR2749. The Tribe argued that it was under federal jurisdiction in 1934 and that the United States provided substantial oversight of the Tribe throughout the 20th century. AR2749-2834. BIA concluded that the Tribe was under federal jurisdiction in 1934. AR107-108 [ROD 78-79].

D. The 2010 Record of Decision

On December 17, 2010, the Secretary issued a Record of Decision (2010 ROD) approving the Tribe's Trust Request and designating the Site an "initial reservation" for the Tribe. AR24; *see* 76 Fed. Reg. 377 (Jan. 4, 2011). Plaintiffs filed suit on January 31, 2011. Civ. No. 1:11-cv-00278-BJR (Dkt. No. 1). Plaintiffs filed a motion for summary judgment and supporting papers on June 20, 2012 (Dkt. No. 53), challenging, among other things, BIA's failure to address documents Plaintiffs provided during the review process or provide a reasoned explanation for its initial reservation decision. On October, BIA filed a "Notice of Filing Supplemental ROD" and a "Revised Initial Reservation Opinion for the Cowlitz Indian Tribe" to attempt to cure certain legal deficiencies in its 2010 ROD. Dkt. No. 67. The Court dismissed the case and remanded the 2010 ROD to the BIA, because BIA "did not have the authority to supplement the 2010 ROD with the 2012 Revised Initial Reservation Decision," while the case was before the Court on judicial review. Dkt. No. 90, at 10.

E. The 2013 Record of Decision

BIA signed a second ROD on April 22, 2013 (ROD) for the Tribe's Trust Request. AR140376. BIA again concluded that it had authority to acquire land in trust because the Cowlitz was a "recognized Indian tribe" and "under Federal jurisdiction" in 1934. AR140460 [ROD 79]. BIA also concluded that the Site was eligible for gaming under IGRA's "initial reservation" exception because the Tribe had "significant historical connections" to the Site. AR140508 [ROD 127]. Finally, BIA concluded that the impacts of the Project would be adequately mitigated by the EHPS Ordinance and that the EIS, completed in 2008, was adequate. AR140412 [ROD 31], AR140497 [ROD 116]. Notice of the decision was published in the Federal Register on May 8, 2013. 78 Fed. Reg. 26802 (May 8, 2013).

On June 6, 2013, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief. Civ. No. 13-cv-00850-BJR (Dkt. No. 1). On July 17, 2013, the Court consolidated this case with the related case, *Confederated Tribes of the Grand Ronde Community v. Jewell, et al.*, under Civ. No. 13-cv-849-BJR. Dkt. No. 21. Plaintiffs now move for summary judgment.

STANDARD OF REVIEW

The Court must review the ROD to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

ARGUMENT

I. BIA HAS NO AUTHORITY TO ACQUIRE LAND IN TRUST FOR THE COWLITZ TRIBE

The Cowlitz Tribe does not qualify for trust land under the IRA. The Supreme Court held in *Carcieri* that the Secretary's authority to acquire land in trust was limited to recognized tribes under federal jurisdiction in 1934. 555 U.S. at 395. The Tribe argued in its 2005 Restored Lands Request, NIGC AR5624-28, and its supplement to that request, NIGC AR3315-23, that it was neither. NIGC agreed, finding the Tribe had been terminated during the 20th century, including 1984, and that the Site is eligible for gaming as the "restored lands" of a "tribe restored to Federal recognition," NIGC AR1647-50.

BIA agrees with NIGC's conclusion that the Tribe's relationship with the United States was terminated during the 20th century. AR140487 [ROD 106]. Yet at the same time, BIA also concludes that the Tribe was "under Federal jurisdiction" in 1934. AR140486 [ROD 105]. It is nonsensical to conclude that a tribe was both terminated and under federal jurisdiction at the same time. Semantic arguments that contort the meanings of "recognition," "jurisdiction," or "termination" cannot rescue BIA's fundamentally irreconcilable conclusions.

BIA also lacks the authority to acquire land for the Tribe due to its greatly expanded membership. Membership in the Tribe has increased from 1,482 members at the time of 2002 administrative recognition, AR6475; to more than 3,500 individuals in 2007, AR92981. BIA regulations do not permit a Tribe to expand its enrollment in this fashion, *see* 25 C.F.R. § 83.12(b), because such an expanded roll "may well constitute a wholly new and different community than that described in the original [acknowledgment] petition," Ex. 1 (Letter from B.D. Ott, Acting Regional Director, Eastern Area Office, BIA to Narragansett Indian Tribe (Nov. 5, 1984)). Uncertified tribal expansion also precludes a finding that the Trust Request is on behalf of an entity that satisfies the definition of "Indians" in Section 19 of the IRA. *See* 25 U.S.C. § 479. BIA has not complied with its regulations regarding the membership rolls of tribes acknowledged through 25 C.F.R. part 83 with respect to the Cowlitz Tribe. It thus lacks

authority to acquire land pursuant to Section 5 because BIA could not have concluded on the record before it that the Tribe meets the IRA definition of "Indians."

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

The IRA empowers BIA to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. To approve the Tribe's Trust Request, the Tribe must meet the IRA definition of "Indian." BIA concluded that the Tribe qualifies under the first definition set forth in Section 19—*i.e.*, "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," *id.* § 479. *See also* AR140464 [ROD 83]. A tribe must meet both the "recognition" and "jurisdiction" prongs of the definition.

The Cowlitz Tribe has never had a reservation, was not recognized by treaty, and has never been the subject of any Congressional legislation when Congress passed the IRA in 1934. AR140460 [ROD 79]. The ROD does not claim otherwise. Instead, the ROD asserts that "the date of federal recognition does not affect" BIA's authority to take land into trust under the IRA, and that "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." AR140470 [ROD 89]. This argument, however, is the same temporal argument the Supreme Court rejected in *Carcieri*. Perhaps recognizing that the argument is likely to fail again, BIA hedges that if the IRA does require that the Tribe be "recognized" in 1934, Congress "appeared to use the term 'recognized Indian tribe'" only in a "'cognitive' or quasi-anthropological sense," not in the formal or "jurisdictional" sense, and the Tribe satisfied this meaning. AR140468-469 [ROD 87-88]; AR140485 [ROD 104]. BIA further concluded that it "need not reach the question of the precise meaning" of this statutory language. AR140469 [ROD 88]. BIA's interpretation of "recognized Indian tribe" is contradicted by the Act.

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

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

Rather than accept the temporal limitation that *Carceri* places on its authority, BIA invokes a concurring, rather than the majority, opinion to support its present position that "the word 'now' modifies only the phrase 'under federal jurisdiction'; it does not modify the phrase 'recognized tribe.'" AR140470 [ROD 89] (citing *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring)). In other words, BIA claims the temporal restriction of the IRA — i.e., 1934 — applies only to the back half of the definitional clause ("under Federal jurisdiction") but not the front half ("any recognized Indian tribe").

This position is contrary to both the plain statutory text and the *majority's* opinion in *Carcieri*. By holding that "the phrase 'now under Federal jurisdiction' refers to a *tribe* that was under federal jurisdiction at the time of the statute's enactment," 355 U.S. at 383 (emphasis added), the Court recognized that phrase "now under Federal jurisdiction" modifies the preceding phrase "any recognized Indian *tribe*." *See id.* ("As a result, § 479 limits the Secretary's authority to tak[e] land into trust for the purpose of providing land to members of a *tribe* that was under federal jurisdiction when the IRA was enacted in June 1934.") (emphasis added)). This finding is consistent with the Court's earlier decision in *United States v. John*, in which the Court noted that the IRA "defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation." 437 U.S. 634, 650 (1978)

(bracketed date in original).[3] Although BIA concedes that "now under Federal jurisdiction" modifies "recognized Indian tribe," *see* AR140469 [ROD 88], its conclusion that the definition is satisfied by "recognition" that occurs at any time – even decades after the Act's enactment – illogically severs "now" from that phrase.[4]

Applying the temporal restriction to "recognition" is appropriate for another reason — Congress intended to limit the universe of tribes eligible for trust land. Because the relevant language in the IRA is unambiguous, BIA's interpretation is not entitled to deference; the statute is to be applied strictly by its terms and without regard to legislative history.[5] *See Carcieri*, 555 U.S. at 392. Nonetheless, BIA acknowledges that legislative history shows that the phrase "under Federal jurisdiction" was adopted "in order to clarify *and narrow*" the term "recognized Indian tribe." AR140469 [ROD 88] (emphasis added). But the ROD misapplies this reasoning.

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[3] Other courts have reached similar conclusions. *See United States v. State Tax Comm'n of Miss.*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction,' and the additional language to like effect."); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (summarizing authority supporting position that the IRA's recognition requirement requires federal recognition as of 1934).

[4] That the Act requires recognition as of 1934 is further supported by the second alternative definition of "Indian" in Section 19, which provides:

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

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

[5] Since *Carceri* found no ambiguity in the IRA's first definition and concluded that BIA had misinterpreted its authority under the IRA for 75 years, it is hard to justify deferring to the BIA's current interpretation of the same authority. In any event, there is no obvious ambiguity in either "any recognized tribe" or "under federal jurisdiction," and the ROD does not explain which words are ambiguous or why they are. Instead, the ROD simply asserts that ambiguity exists and demands the widest latitude to define agency powers.

Since the universe of recognized tribes expands each time BIA acknowledges a new tribe, the limiting language will not operate as any limit. By reasoning that "now" does not modify "any recognized tribe," BIA may have ascribed to Congress the intent to narrow the number of eligible tribes, but BIA plainly does not adhere to it. BIA's interpretation is both grammatically implausible and inconsistent with Congressional intent.

2. The recognition requirement in Section 19 requires "formal" or "jurisdictional" recognition

BIA offers in the alternative that, if 1934 does modify "recognized Indian tribe," then "recognized" appears to mean recognition in a "cognitive or quasi-anthropological sense," and the Cowlitz satisfies the "cognitive" recognition requirement. AR140469 [ROD 88]. BIA asserts that the "formal" or "jurisdictional" sense of "recognition" did not emerge until the 1970s. AR140469 [ROD 87]. There is no factual or legal support for either proposition.

Congress used the word "recognized" in a formal, jurisdictional sense long before it enacted the IRA. In 1871, Congress abrogated the Executive's power to treat with Indian tribes with language that is unequivocally political or jurisdictional: "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." 25 U.S.C. § 71 (emphasis added). In 1904, the Supreme Court explained the end of the treaty era in a formal, jurisdictional sense, as well:

> The practice of dealing with Indian tribes as separate nations was changed by a proviso inserted in the Indian appropriation act of March 3. 1871 (16 Stat. at L. 566, chap. 120, carried into § 2079 Rev. stat.), which reads: '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." From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating tribes on separate reservations and perpetuating the communal or tribal life.

In re Heff, 197 U.S. 488, 508 (1905), *overruled in part on other grounds*, *United States v. Nice*, 241 U.S. 591 (1916). Usage of the term "recognized" as it relates to tribes, like in the 1871 act, cannot reasonably be described as cognitive or quasi-anthropological. BIA's claim that the formal sense of recognition did not evolve until the 1970s, AR140469 [ROD 87], is not credible.

Judicial decisions around the time of the IRA's passage also suggest that usage of the word "recognition" was made in a jurisdictional or political sense. In 1933, the Supreme Court held that only Congress had the power to determine "'to what extent, and for what time [Indian tribes] *shall be recognized and dealt with as dependent tribes* requiring the guardianship and protection of the United States.'" *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting *United States v. Sandoval*, 231 U.S. 28, 45 (1013) (emphasis added). More recently, the Supreme Court construed the term "federally recognized" in Section 19 as designating a political rather than a racial or anthropological status. *See Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974).

Even the primary authority upon which the ROD relies for the definition of "cognitive recognition" does not support BIA's interpretation of what "recognized" meant in 1934. *See* AR140468 [ROD 87] (citing William Quinn Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 333 (1990)) (hereinafter, "Quinn"). Quinn concludes that the "cognitive" sense of recognition was only used "in the early documentary record" long before the enactment of the IRA. Quinn, *supra*, at 333. He explains that, by 1934, the term "recognition" had been used by Congress in the jurisdictional sense for over fifty years:

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

> government-to-government basis. . . . One cannot ascribe to any exact moment when the jurisdictional sense superseded the cognitive sense in the minds of government officials, but at least since the [IRA] of 1934 . . . the term "recognized" has been used almost exclusively in the jurisdictional sense by all branches of the government.

Id. at 333-34. *See also id*. at 355 (concluding that, by the end of the period leading up to the enactment of the IRA, "[o]ne can at least say that no longer does the record show that the terms ['recognize' and 'recognition'] were ever used in simply a cognitive sense" and "[w]ith the advent of the [IRA], the concept is firmly established, and the term is consistently used to signify the [jurisdictional] concept").[6] Relying on an article for a conclusion that the article directly contradicts is the epitome of arbitrary decision-making.

Even if the Court were to conclude, contrary to all prevailing authority, that Congress used "recognition" in a "cognitive" sense, the Cowlitz Tribe fails the test. In 1933, Commissioner Collier (the IRA's author) wrote a letter stating that the Cowlitz were "without any tribal organization, and [were] generally self-supporting, and [had] been *absorbed into the body politic*." AR140482 [ROD 101]. As a consequence, Collier found that a Cowlitz Indian was not entitled to requested Indian services. *See id*. Collier's letter demonstrates that the Cowlitz was neither formally nor cognitively recognized in 1934.

B. BIA's Interpretation of "Under Federal Jurisdiction" is Inconsistent with the Plain Language of Section 19 and Its Application to the Cowlitz Is Contrary to Fact

The question whether the Tribe was "under Federal jurisdiction" was clearly resolved against the Tribe in 2005. As part of its Restored Lands Request, the Tribe provided substantial evidence to NIGC that it had been terminated, *see* NIGC AR5624-28, NIGC AR3316-18; NIGC agreed, *see* NIGC AR1647-50; and BIA reached the same conclusion, *see* AR140487 [ROD 106]. Those findings and the evidence that supports them are dispositive and conclusively show

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

that the Tribe could not have been "under Federal jurisdiction" in 1934. BIA, however, takes the position that termination doesn't mean termination and that somehow a terminated tribe can still be under jurisdiction. Termination of the Tribe's relationship with the United States for most of the 20th century, however, is fatal to BIA's authority to make the trust acquisition. BIA's proffered definition of "under federal jurisdiction" to avoid that conclusion is. In addition, the evidence in the record does not satisfy the ROD's proposed interpretation of "under federal jurisdiction," and BIA fails to explain adequately or discuss meaningfully the significant evidence that shows that the Tribe was not "under Federal jurisdiction" in 1934.

1. BIA has impermissibly ignored the temporal restriction on its authority and relies on evidence of jurisdiction over individual Indians, not tribes

BIA construes the term "under Federal jurisdiction" as requiring a "two-part inquiry." The first part of BIA's test has four general requirements. A tribe must show that (1) an agent of "the United States, in 1934 *or at some point in the tribe's history prior to 1934*," (2) "[took] an action or series of actions," (3) "for or on behalf of the tribe *or . . . tribal members*" (4) "sufficient to establish, or that generally reflects federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." AR140475-476 [ROD 94] (emphasis added). The second part of the inquiry merely requires that there be no "probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934." AR140476 [ROD 95].

BIA's position fails for two reasons. First, *Carcieri* held that "now under federal jurisdiction," means in June of 1934. 555 U.S. at 382. BIA's claim that "now" is satisfied by events occurring "at some point in the tribe's history prior to 1934" is inconsistent with the plain text of the IRA and the express holding of *Carcieri*. Second, BIA's assertion that "under Federal jurisdiction" is satisfied by actions taken for "tribal members" is contrary to the statutory text, which requires that a "recognized tribe," a political entity – not individual Indians – be under

federal jurisdiction at the time of the IRA's passage in 1934. 25 U.S.C. § 479 (defining "Indian" as "members of any recognized Indian *tribe* now under Federal jurisdiction . . .") (emphasis added).

BIA's overly broad interpretation of the phrase "under Federal jurisdiction" is also contrary to the ROD's recital of the legislative intent. The ROD states that Congress adopted the phrase "under Federal jurisdiction" "in order to clarify and narrow" the term "recognized Indian tribe." AR140469 [ROD 88]. BIA's interpretation of "under Federal jurisdiction" does not narrow the universe of recognized Indian tribes, if "under Federal jurisdiction" can be predicated on any interaction between an individual Indian and the government, a notion that is directly contradicted by *Mancari*, which construed a "federally recognized" tribe in the IRA as a political rather than a racial status. 417 U.S. at 554 n.24. Virtually any tribal group will have members who have interacted with or received benefits from the United States. And BIA continues to recognize new tribes, like the Cowlitz Tribe in 2002, BIA will conclude that virtually all of them were "under Federal jurisdiction." The standard in the ROD is so easily met that it will not function as a limitation at all.

Moreover, because the ROD rejects the possibility that "recognition" or "jurisdiction" requires formal or jurisdictional status, it is unclear why these casual relationships would ever be subject to official, affirmative acts to "terminate" recognition or jurisdiction, as the second part of BIA's definition demands. AR140475-476 [ROD 94-95]. The second part of the inquiry imposes no meaningful limitation on the first because it infers confirmation of jurisdiction from a lack of evidence. It is unlikely that the United States would ever formally terminate the sort of casual relationship that BIA claims being "under Federal jurisdiction" entails. Any tribe can meet BIA's two-part inquiry, a result contrary to the plain text of the statute and its legislative

intent. Because BIA based its determination on a misconception of the law, the trust decision "may not stand." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

2. The evidence does not show that the Cowlitz Tribe was "under Federal jurisdiction" in 1934

Even if its interpretation were reasonable, BIA's approval of the Cowlitz's trust request must be vacated because the evidence upon which it relies fails to satisfy the ROD's definition of "under Federal jurisdiction." The ROD embraces a 1980 memorandum from the Associate Solicitor, Indian Affairs, involving the Stillaguamish Tribe. AR140471-472 [ROD 90-91]. The ROD quotes the memorandum as saying that the phrase "'recognized tribe now under [f]ederal jurisdiction' … includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not the obligation was acknowledged at that time." AR140471 [ROD 90].

One assumes that even BIA agrees that the United States cannot plausibly have a continuous course of dealings with a tribe that is unknown to it. It may be possible that the United States had a legal obligation in 1934 that it overlooked, or of which, through error, the United States was not aware. But a legal obligation to a tribe as a group of Indians must necessarily arise from an event or formal action that creates in the United States a legal promise or obligation and in the tribe a legal right or benefit—an action such as a treaty, a statute or an executive order. The ROD does not point to any event or affirmative action identified with the Cowlitz because there was none. Indeed, every formal statement made by Federal officials with authority conclude that the government owed no obligation to and exercised no jurisdiction over the Tribe at all. *See* NIGC AR5624-28; NIGC AR3316-18 (citing findings of federal officials). Accordingly, even accepting the carefully selected definitions in the ROD, there is no reasonable claim that the Cowlitz was under federal jurisdiction in 1934.

The evidence BIA relies on falls into one of two categories, neither of which has any support in the statutory language. BIA relies on: (1) evidence that *individual Indians*, identified

as Cowlitz, received services from representatives of the local agency[7]; or (2) evidence that the Cowlitz, as a tribe, refused to cede its lands, enter into a treaty, and accept services from Government officials. Evidence falling into the first category cannot demonstrate jurisdiction because it is contrary to the text of the IRA, which requires that the *tribe*, not individual Indians associated with the tribe, be "under Federal jurisdiction" in 1934.

Evidence falling into the second category cannot support BIA's conclusion that the Cowlitz were "under Federal jurisdiction" in 1934, because such evidence establishes that the Tribe *refused* to be under federal jurisdiction. For example, 19th century evidence consists of failed treaty negotiations, AR140478 [ROD 97], and tribal refusals to accept services and/or goods for fear that doing so would be interpreted as agreement to cede lands, AR140479 [ROD 98].[8] The evidence BIA relies on fails to meet an essential part of the ROD's announced two-part inquiry, which requires that the government action was "sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the

[7] Evidence cited by the ROD that falls into this first category includes the fact that, in and around the late 1880's, a total of twenty to thirty land allotments were made to Cowlitz Indians pursuant to (1) the Indian Homestead Act, under which the Government gave allotments of private land to individual Indians who agreed to anglicize their names and who, upon taking ownership of the land, became entitled to full U.S. Citizenship; and (2) the General Allotment Act, which similarly provided for the allotment of land to individual Indians, AR140482-483 [ROD 101-102]. In addition, beginning in 1894 and into the twentieth century, the federal government provided certain services (including school and authorization of expenditure for health services) for some individuals who defined themselves as Cowlitz Indians, *see* AR064758-759 [ROD 98-99]; and in or around the early 1900s, some individual Cowlitz Indians received allotments of land on the Quinault Reservation, AR064762 [ROD 102].

[8] Evidence cited by the ROD that falls into this second category includes the assertion that, in 1855, the Cowlitz were among several tribes that engaged in failed treaty negotiations with Washington State's first territorial Governor Isaac Stevens, AR140478 [ROD 97]; through "the rest of the 1850's and into the 1860's, officials of the Department continued to recommend that the United States enter into a treaty with . . . the Cowlitz, *because they recognized that Indian title to the land had never been properly ceded*," AR140479 [ROD 98] (emphasis added); "during the 1860's, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation," however, these efforts were unsuccessful, AR140478-79 [ROD 97-98]; in June 1868, "the local Superintendent attempted to distribute goods and provisions" at a meeting with the Cowlitz (and presumably the Chehalis) Tribe on the Chehalis Reservation, but the Cowlitz "*refused* to accept either goods or provisions, believing, as they declared, that the acceptance of presents would be construed into a surrender of their title" to the lands where they lived, AR140479 [ROD 98](emphasis added).

Federal Government." AR140476 [ROD 95]. A failed treaty negotiation is a legal nullity. U.S. Const., art. II, cl. 2 (requiring ratification before a treaty has any legal effect. *See also S.E.C. v. International Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990). A failed treaty could never serve to bring a tribe under federal jurisdiction, because such failed negotiations create no "obligations, duties, responsibility for or authority over the tribe" by the United States. AR140476 [ROD 95]. By relying on failed treaty negotiations as "evidence" that the Cowlitz was under federal jurisdiction, the ROD necessarily – and without reasoned explanation – equates an enacted treaty with an unratified treaty or a failed effort to negotiate a treaty, despite the obvious and critical differences between each. In doing so, the ROD undermines its endorsed definition of the term "under Federal jurisdiction."

The Court need not even find the ROD's definition of "under Federal jurisdiction" unreasonable to vacate its approval of the Cowlitz application. It need only find that having announced a standard requiring a tribe to identify government actions "sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe," BIA failed to meet that standard because it was unable to identify any action that created a duty. The Court must vacate decisions that are not supported by the factual record. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007) (holding that where an agency's decision is internally contradictory or legally inconsistent, the proper course is to remand to the agency). *Cf. Kansas City, Mo. v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decision making, and cannot survive review under the arbitrary and capricious standard."). On these grounds, this Court should invalidate the trust acquisition.

3. BIA ignored facts in the Record that show that the Cowlitz Tribe was not "under Federal jurisdiction" in 1934

BIA's discussion of why the Cowlitz Tribe was "under Federal jurisdiction" is a study in contradictions. NIGC determined in 2005—*relying on facts BIA adduced during the*

acknowledgment process—that "the historical evidence establishes that the United States did not recognize the Cowlitz as a government entity from at least the 1900s until 2002," NIGC AR1647, and that the Federal Government "made numerous statements on the record evidencing the Federal Government's position that the Cowlitz Tribe was no longer Federally-recognized," NIGC AR1650. BIA concludes in the ROD that "the Tribe's landless status caused the United States to determine that the Tribe's government-to-government relationship with the United States had been terminated."[9] AR140487 [ROD 106].

To be "terminated" means that the United States ended federal supervision and control and has abrogated "the special relationship between those tribes and the federal government." Cohen's Handbook of Federal Indian Law 91 (2005 ed.). "'Termination is truly a word of ill omen to tribal Indians. Its meaning in Indian affairs is the termination of 'Federal responsibility,' the responsibility of the Federal Government to act as trustee for Indian lands, rights, and resources; the responsibility to protect Indian groups in these rights and possessions." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 639 n.6 (1970) (citation omitted). With no responsibility and no obligation, there cannot be said to be any evidence "reflecting federal obligations or duties." The conclusions are irreconcilable.

Yet after acknowledging that the Tribe was terminated, AR140486 [ROD 105], BIA concludes that the Tribe was "under Federal jurisdiction" in 1934, based on "the lack of clear evidence of termination of the jurisdictional relationship," AR140487 [ROD 106]. BIA's conclusions cannot be squared. Any test that produced two such irrational and contradictory conclusions is arbitrary and capricious. *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 n.56 (D.C. Cir. 1983).

[9] This statement is consistent with an 1897 opinion from the Assistant Attorney General, which concludes that landless Indians who own fee land and are citizens, like the Cowlitz, were no longer recognized. *See* NIGC AR3317 n.3 (Cowlitz supplemental submission citing *Miami Nation of Indians, Inc. v. Lujan*, 832 F. Supp. 253 (N.D. Ind. 1993)).

BIA tries to defend its conclusions by dismissing unfavorable evidence as being inconsistent with the acknowledgment decision. Thus, BIA dismisses powerful evidence such as:

- BIA "opposed a series of bills introduced in Congress that would have given the U.S. Court of Claims jurisdiction to hear the Tribe's [land] claims, based in part on the Department's position that it no longer had a government-to-government relationship with the Tribe," AR118246;

- In 1924, the Secretary wrote a letter to the Senate Committee on Indian Affairs stating that the Cowlitz "are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic," AR118246 (quoting Letter from Secretary Hubert Work, Dept. of the Interior, to the Honorable J.W. Harreld, Chairman (Mar. 28, 1924));

- Commissioner Collier's 1933 letter, which rejected an application from a Cowlitz Indian for enrollment on the ground that the tribe did not exist as an entity under governmental control. AR118246 (quoting Letter from John Collier, Comm., Bureau of Indian Affairs, to Lewis Layton (Oct. 25, 1933);

- The Secretary concluding in 1975 that the Cowlitz Tribe "is not a Federally-recognized tribe . . . there is presently no successor to the aboriginal entity aggrieved in 1863," AR118247 [NIGC Op. 7] (quoting Letter from Morris Thompson, Comm. of Indian Affairs, to the Chair of the Senate Subcommittee on Indian Affairs (Sept. 24, 1975);

- A 1975 statement from the Department explaining that "throughout the 1850's and 60's the United States made a concerted effort to conclude a treaty with the Cowlitz Indians. Despite these efforts, no treaty was ever executed between the United States government and the Cowlitz Indians. *From that time to the present, there has been no continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians*." AR118247 [NIGC Op. 7] (quoting Letter from Thompson to the Honorable James Abourezk, United States Senate (Oct. 29, 1975)).

See e.g., AR140469 n.61 [ROD 88] (dismissing Collier's 1933 letter as rejected as part of acknowledgment); AR140486 [ROD 105] (dismissing 1975 letter regarding lack of continuous contact as written before 1978 acknowledgment regulations) or as confusing the concepts of recognition and "under Federal jurisdiction." AR140486 [ROD 105]. But *all of this evidence* was developed by and used *in the acknowledgment proceeding*. *See generally* AR2066-2232 [Historical Technical Report (HTR)].

Moreover, there is no reason to conclude that evidence tending to negate being "under Federal jurisdiction" is inconsistent with acknowledgment. Indeed, BIA's summary in the HTR belies BIA's 2013 position that if a tribe is acknowledged, it was necessarily "under Federal jurisdiction":

> In the 1890s in accordance with the prevailing Indian policy of the Federal Government the OIA [Office of Indian Affairs] maintained that the Cowlitz had dispersed among the white population and did not exist as an entity. At the time Indians living off reservations were not seen as wards but as citizens. *Therefore, the Cowlitz Indians were not considered legal wards of the Government since they did not have reservation*. Both full-blood Cowlitz and Cowlitz metis families did, however, continue to be treated as Indians on an individual basis for such purposes as attendance at BIA schools and heirship determinations for public domain trust allotments and homesteads.

NIGC AR2072. (emphasis added). When a tribe is acknowledged under 25 C.F.R. Part 83, it need only show that it was identified as an American Indian *entity*, *see* 25 C.F.R. § 87.3, from the last date of "unambiguous previous federal acknowledgment," *id.* § 83.8(a).[10] The regulations do not require a showing that the tribe was "under Federal jurisdiction" or even that the United States interacted with the tribe at all. *See id.* § 83.7(a)(listing evidence to show the group exists as an entity, but not requiring federal identification). Acknowledgment is not evidence that the Federal government exercised jurisdiction over a tribe *before*. As the Tribe stated in its Restored Lands Request:

> Indeed, a finding that the Cowlitz Tribe had not been terminated would produce the almost perverse result that the Tribe enjoyed federal recognition since 1855, and, as a consequence, it was entitled to obtain trust land and conduct gaming operations under IGRA before obtaining federal acknowledgment through the Federal Acknowledgment process in 2002.

NIGC AR5628.

Ultimately BIA relies on an incorrect premise in the ROD for concluding that the Tribe was "under Federal jurisdiction." The ROD states "the Cowlitz Tribe was federally recognized

[10] The Cowlitz Tribe had to demonstrate its identification from 1880, the last date of "unambiguous previous federal acknowledgment." See NIGC AR6043 [Summary under the Criteria, Final Determination].

as a tribe in 2002 based on evidence of a continuous political existence since at least 1855." AR140469 [ROD 106]. The evidence that acknowledgment requires of a "continuous political existence," however, is evidence that the "petitioner has maintained political influence or authority *over its members* as an autonomous entity." 25 C.F.R. § 83.7(c). This criterion has nothing to do with the exercise of federal jurisdiction.[11] *See also* NIGC AR6042-43 [Summary Under the Criteria] (explaining that a challenger to Cowlitz findings "confused the concepts of 'recognition' and 'identification.' 'Recognition' refers to an actual government-to-government relationship …, and 'identification," as required under 83.7(a) refers to naming the petitioner as an Indian entity, without analyzing the actual political, ancestral or social character of the entity or the political relationship that entity may or may not maintain with the Federal government.").

BIA cannot pretend that the evidence it relied on to acknowledge the Tribe does not exist or that acknowledgment means something it does not. BIA exceeded its authority, and its decision to acquire land in trust should be vacated.

C. The Tribe's Unconfirmed Expanded Enrollment Precludes BIA from Taking Any Action

BIA acknowledged the Tribe in 2002. AR6003-04. The BIA press release stated that the Cowlitz base roll consisted of 1,482 members. AR6475; Press Release, BIA, McCaleb Approves Reconsidered Final Determination to Recognize the Cowlitz Indian Tribe of Washington (Jan. 3, 2002), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc013730.pdf. By 2007, the Tribe reported having 3,544 members in its Business Plan. AR92981. The Tribe increased membership by more than 150 percent in only five years.

When a tribe expands its enrollment after acknowledgment, BIA must confirm that the new members have maintained social and political ties with the tribe and either descend from members on the base roll or from the historic tribe. The regulations provide:

[11] At the time of Cowlitz acknowledgment in 2002, *Carcieri* had not been decided, and BIA was still of the erroneous view that it had authority to take land in trust if a tribe was under federal jurisdiction at the time of the trust acquisition. BIA did not then claim that under Federal jurisdiction was co-extensive with the acknowledgment decision.

> Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioner's documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. *For Bureau purposes, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).*

25 C.F.R. § 83.12(b) (emphasis added).

BIA promulgated 25 C.F.R. § 83.12(b) in 1994 is to ensure the integrity of acknowledgment decisions:

> The provision was included to clearly define tribal membership prior to acknowledgment. It was also included so that membership for purposes of Federal funding cannot later be so greatly expanded that the petitioner becomes, in effect, a different group than the one acknowledged. The acknowledgment decision rests on a determination that members of the petitioner form a cohesive social community and exercise tribal political influence. *If the membership after acknowledgment expands so substantially that it changes the character of the group, then the validity of the acknowledgment decision may become questionable. The language of this section does allow for the addition to the base roll of these individuals who are politically and socially part of the tribe and who meet its membership requirements.*

59 Fed. Reg. 9280, 9292 (Feb. 25, 1994) (emphasis added).

In addition to ensuring "the validity of the acknowledgment decision," *id*., section 83.12(b) is necessary to protect trust assets and property by ensuring that for "purposes of Federal funding and other administrative purposes," new members added to the roll meet the tribal descent requirement and maintain tribal political and social relationships. 25 C.F.R. § 83.12(b) (emphasis added). Maintaining social and political relationships is key to tribal recognition: "Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable." 43 Fed. Reg. 39,361 (Sept. 5, 1978); 25 C.F.R. § 83.1 (2008) ("Tribal relations means participation by an individual in a political and social relationship with an Indian tribe."); *see also Mancari*, 417 U.S. at 554 n.24. Thus, if BIA has not confirmed the

validity of the expansion in a tribe's membership, under section § 83.12(b) it cannot take action for "administrative purposes."

Abuse of the acknowledgment process has been a concern since BIA first promulgated regulations. In fact, in 1980, the Grand Traverse Band of Ottawa and Chippewa Indians—proposed changes to its membership criteria immediately after acknowledgment that would have greatly expanded its base roll. *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243, 299 (2009) (discussing letter from Scott Keep, Asst. Sol., Div. of Indian Affairs, Dep't of the Interior to William Rastetter, Attorney for the Grand Traverse Band of Ottawa and Chippewa Indians (Jul 2, 1985) and letter from John Fritz, Deputy Assistant Sec'y, Indian Affairs, to Joseph C. Raphael, Chairman, Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 4, 1983) (explaining that the bilateral, political relationship derives its legal significance from, and is dependent upon, an interaction between the individual and the tribal community). BIA insisted that the Band adopt membership rules that would "maintain the integrity of the acknowledgement decision" by ensuring that members were "descended from individuals of the historical Grand Traverse bands" and "have maintained political and community ties to the modern-day tribal entity," or BIA would not designate a reservation. *Id*.

The acknowledgment regulations "require that a list of all known current members of the petitioning group be submitted. Such a list constitutes a statement that what is submitted is an accurate representation of the complete membership of the group." Ex. 2 (Letter from BIA to Narragansett Tribe, at 3 (Nov. 5, 1984)); *see also* 25 C.F.R. § 83.7(e)(2). "The only changes to this roll that will be considered acceptable by the Bureau will be those which allow for small increases due to natural population growth or technical corrections on the original roll." Ex. 2 at 1. When the Narragansett Tribe proposed to add 1,000 members, BIA stated that "such an increase in membership may well constitute a wholly new and different community than that described in the original petition." *Id.* "It is essential that the Department take steps to protect against an effort by groups which have successfully petitioned the Department for

acknowledgment to expand substantially their membership relying on the principle that it is for tribes to determine who their members are for tribal purposes." Ex. 3 (Memorandum from Assoc. Sol., BIA to Asst. Sec. Indian Affairs (Dec. 15, 1980)).

Not only does the Tribe's expanded enrollment violate 25 C.F.R. part 83, it prevents BIA from taking action under the IRA. BIA did not determine that the Cowlitz in its expanded form satisfy Section 19 and did not determine that it would be acting on behalf of "persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," 25 U.S.C. § 479, because it could not. BIA does not know if the expanded membership consists of "persons of Indian descent" and it does not know if the expanded membership satisfies 25 C.F.R. §83.7(e). More importantly, it cannot know whether the expanded membership qualifies under Section 19 because the expanded rolls show it is likely dealing with a wholly new and different community than that described in the Tribe's earlier acknowledgment petition.

BIA's responsibility is clear—if the membership has expanded, it must certify that the expanded enrollment meets 25 C.F.R. § 83.7(e), and that the applicant satisfied Section 19 of the IRA. *See also* Tribal Programs 83 BIAM 8, § 8.2 (Release 83-4, 11-1-59) (explaining that "[p]roperty rights attached to membership [e.g., trust land] are generally under the control of the Secretary of the Interior rather than the tribe," even if tribal membership is controlled by the tribe); 83 BIAM Supp. 2, § 2.8 (enrollment for tribal purposes may differ from the members recognized by BIA). Under these principles, and as required by section 83.12(b), until BIA confirms the legitimacy of the expanded Cowlitz membership roll under the acknowledgment criteria in 25 C.F.R. part 83, including that all of the new members maintained social and political relationships with the Tribe consistent with what BIA required of the base roll, the actions taken for administrative purposes challenged in this case must be vacated.

There is no evidence to suggest that BIA meet this basic require.[12] The court must set aside a decision when the agency "has entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. at 658 (*quoting State Farm*, 463 U.S. at 43).

II. BIA FAILED TO MEET BASIC REGULATORY CRITERIA IN CONCLUDING THAT THE SITE QUALIFIES FOR GAMING UNDER THE "INITIAL RESERVATION" EXCEPTION

BIA determined that the Site is eligible for gaming under the initial reservation exception of Section 20. 25 U.S.C. § 2719(b)(1)(B)(ii). To satisfy that exception, a tribe must demonstrate that the land is located "*within an area* where the Tribe has significant historical *connections*," *id*. § 292.6(d) (emphasis added). An significant historical connection is established with historical documentation showing that "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or land in which a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or *subsistence use in the vicinity of the land*," *id*. § 292.2 (defining "significant historical connection"). Satisfying the "significant historical connection" definition does not automatically satisfy the broader requirement that the land be "within an area where the Tribe has significant historical connections."

BIA erred in concluding that the Site qualifies under this definition for two reasons. First, BIA did not address the question of whether the Site is "within an area where the Tribe has

[12] Parties commenting on the Tribe's fee-to-trust request raised concerns over the Tribe's growing membership roll on many occasions. In fact, commentors raised concerns that the Tribe was increasing its membership rolls to improve the prospects for a favorable decision from BIA. For example, the Card Rooms commented on the DEIS that the exponential growth in the size of the Tribe could be an effort by the Cowlitz to have more of its members reside in Clark County, to improve its claim of having a "modern tie" to the Site for purposes of obtaining an initial reservation designation under 25 C.F.R. § 292.6(d)(1). AR101873-74 [DEIS comments 21 -22]. Comments also addressed that the Tribe's "Unmet Needs Report" relied on the high enrollment to inflate the Tribe's economic need for the purpose of excluding from detailed consideration under NEPA sites located in the Tribe's historic lands. AR1018602. CARS also commented on the rapid post-acknowledgment growth of the Tribe's membership. AR73294-95.

significant historical connections," *id*. § 292.6(d). Second, BIA erred in concluding the Tribe "can demonstrate by historical documentation" the existence of "subsistence use in the vicinity of the land."

A. BIA Failed to Address Whether the Site is Located "Within an Area Where the Tribe has Significant Historical Connections," as its Regulations Require

BIA devotes almost the entirety of its "initial reservation" analysis focusing on whether the Tribe has "significant historical connections" to the Site, AR140531-542, but fails to address the overarching requirement that the Site also be "*within an area* where the Tribe has significant historical c*onnections*," *id*. § 292.6(d). The plain language of the regulation requires that the Tribe show that land be "within an area" where the tribe has "significant historical connections," not that the proposed parcel is in the vicinity of subsistence use.

The structure of the regulation makes this clear. It is not sufficient to identify a single parcel of land and establish a significant historical connection" to that parcel because the regulation requires the site to be within an area of historical importance. BIA chose to use the plural "connections" because one cannot determine whether a piece of land is "within an area" without multiple reference points. In other words, it is not sufficient under the regulation to establish a single "significant historical connection" because a single connection cannot establish the land is in an area of demonstrated importance. Once can readily imagine a piece of land that is within the vicinity of an historically important area, but not within the area itself. The Cowlitz is just such an example.

BIA does not address the question of whether the Site was "*within an area* where the Tribe has significant historical c*onnections*," in its initial reservation decision, and its failure to do so is fatal to its initial reservation determination. In evaluating agency decision making under the APA, the Court's must determine whether "the decision was based on a consideration of the relevant factors . . . ." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *see also Baltimore Gas &*

Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983). BIA did not and its decision must be vacated.

Moreover, the evidence BIA addresses clearly demonstrates that the Site is not within a larger area where the Cowlitz Tribe has multiple "significant historic connections." As the Indian Claims Commission definitively found, the Tribe's historic land is located to the north and consists of a 2,500 square mile area of exclusive use and occupancy. *Simon Plamondon*, 21 Ind. Cl. Comm. at 170-71. The Site the Tribe seeks for casino development is, at best, adjacent to (or in the vicinity of) the Columbia River, which was extensively used by many tribes for fishing and trade purposes. Indeed, if BIA did not include the requirement that land be "within an area" where a tribe has multiple "significant historic connections," any tribe that occasionally passed through an area could satisfy the subsistence use standard. That is why the regulations require more.

B. BIA's Determination that the Tribe has Significant Historical Connections to the Site Was Also Erroneous

In 2005, NIGC concluded that "the documentation does not specifically identify the [Site] as a historically important parcel." NIGC AR1653. There are no tribal villages in the area, no cemeteries or burial grounds. There are no sites of religious importance. All of those indicia of significance will only be found in the 2,500 square miles of land, primarily in Lewis and Cowlitz counties that the Tribe exclusively used and occupied. In fact, BIA does not even find that the Tribe definitively used the Site for any purpose.

Instead, BIA relies on a few weak pieces of evidence to support its conclusion that the Cowlitz Tribe has a significant historic connection to the Site. BIA cites to:

- Governor George Simpson, whom BIA identifies as an authoritative observer of tribal use of the Columbia River, stating that the "population [of Indians] on the banks of the Columbia River is much greater than in any other part of North American I have visited," AR140534, without identifying the Cowlitz;
- The Boyd report, which was based on a report of an 1825 incident, that discussed the possibility of a Cowlitz presence somewhere along a 55-mile stretch of the

Columbia River between Mount Coffin in Cowlitz County and Fort George where the Tribe "'may have indeed have had some sort of presence along the Columbia during this period,'" *id.*, without identifying where; and

- An observation of several lodges and about 100 "Kowalitsk" Indians on a plain approximately 3 miles northwest of the Site, AR140535; and

- Cowlitz use of the Columbia River as a trade route from the base of the Puget Sound to Wakanasisi, AR140537, an approximately 60-mile stretch of river.

The first two cites fall far short of the "historical documentation [demonstrating] the existence of … occupancy or subsistence use in the vicinity of the land" BIA's regulations require. *See* 25 C.F.R. § 292.2. The first example does not identify the Cowlitz Tribe specifically at all. And the second example merely suggests that the Tribe "might have had some sort of presence" along a 55-mile stretch of the Columbia River. Neither of these can be treated as the "historical documentation" of subsistence use in the vicinity of the land that the regulations require because neither fact identifies a location, in particular, and one fact does not identify the Cowlitz specifically, at all.

Nor is the third "fact," a single observation claiming the existence of several lodges and about 100 "Kowalitsk" Indians on a plain approximately 3 miles northwest of the Site, AR140535, sufficient evidence of a "subsistence use." Indeed, that single observation is consistent with having "merely passed through," which BIA expressly disclaims as insufficient in the preamble to its regulations and in its initial reservation opinion. *See* AR140539; *see also* 73 Fed. Reg. 29354, 29360 (May 20, 2008)(adopting regulation to prohibit gaming on land where tribe only had "transient" connection).

BIA relies heavily on its fourth "fact," which it treats as evidence that the Tribe used the river heavily for trade. Many tribes used water ways for trade purposes, including through enemy territory. Trade routes were established for a reason. But if a trade route is sufficient to establish a "significant historic connection," the exception will swallow the rule and allow tribes to expand far beyond their historic reach. As set forth in the Grand Ronde's Motion for

Summary Judgment Sec. B, BIA's conclusions are factually inaccurate and inconsistent with all prior cases.

The record evidence shows that the Tribe's historic lands, governmental offices, villages and other indicia of significance lie to the north, and that at best, the Tribe used the Columbia River, which is located to the west of the Site. Such use cannot satisfy the "significant historical connections" requirement. Nonetheless, the Court need not delve into the historical analysis, because the record definitively shows that BIA: 1) did not conclude that the Site is "within an area where the Tribe has significant historical connections," as 25 C.F.R. § 292.6(d) requires; and 2) there is no historical documentation to support a finding that the Site could possibly meet this requirement.

III. BIA'S ASSESSMENT OF ENVIRONMENTAL AND JURISDICTIONAL IMPACTS IS IMPERMISSIBLY PREDICATED ON INACCURATE ASSUMPTIONS AND OUT-DATED INFORMATION

BIA's assessment of environmental and jurisdictional impacts is arbitrary and capricious for two reasons. First, BIA failed adequately to assess impacts because it arbitrarily and capriciously concluded that impacts would be mitigated through the EPHS Ordinance. Second, BIA violated NEPA by impermissibly restricting its review of alternatives, relying on an outdated and inaccurate EIS, and improperly addressing impacts on water resources.

A. BIA Improperly Concluded that Impacts Would be Mitigated through the EHPS Ordinance

The Tribe passed the EPHS Ordinance in 2007 as a substitute for the MOU, AR83787-88, which was found to violate state law earlier that year. AR140389 [ROD 8]. Rather than prepare a supplemental EIS, BIA accepted the Tribe's argument that the EPHS Ordinance was irrevocable. AR83479. BIA substituted all references to the MOU in the EIS with the EPHS Ordinance, AR83118-140, concluded that the EPHS Ordinance was "sufficient to reduce" impacts on the County for NEPA purposes, AR140411 [ROD 30], AR140389-90 [ROD 8-9], and approved the trust request relying on the mitigation contained therein, AR140488-89, 140493 [ROD 107-08, 112].

BIA predicated these actions on its view that the EPHS Ordinance is enforceable through two mechanisms: 1) the Tribe's purported "irrevocable" waiver of sovereign immunity in favor of the County; and 2) NIGC's ability and authority to enforce the Ordinance. AR140412 [ROD 31]. Not only did BIA fail to explain how it reached these conclusions, it did not respond to questions the parties raised, and BIA is wrong as a matter of law, requiring the ROD to be vacated.

1. NIGC's Approval of the EPHS Ordinance Did Not Address the Enforceability or Irrevocability of the EPHS Ordinance

NIGC is responsible for approving ordinances, 25 U.S.C. § 2710, covering issues such as the use of gaming revenues, supply contracts, background investigations, etc., *see* 25 C.F.R. part 522. NIGC must approve an ordinance if it includes all required elements. *Id.* §§ 522.4, 522.6.

The Tribe submitted a site-specific gaming ordinance (2005 Ordinance) to NIGC,[13] NIGC AR5608-012, which NIGC approved on November 23, 2005, NIGC AR1642. In October 2007, the Tribe submitted an amendment to the 2005 Ordinance, which incorporated by reference the EPHS Ordinance. NIGC AR774-78. The Tribe claimed that the EPHS Ordinance

[13] The Tribe's submittal of the 2005 Ordinance generated controversy, including with NIGC, because NIGC does not approve site-specific ordinances before land is acquired in trust. *See e.g.*, AR1090-94, 993-1078. General Counsel for NIGC testified before Congress that the 2005 Ordinance was "really an anomaly. It's the only time that we've been in this situation where it was trust acquisition that hadn't happened and we had a site-specific ordinance." She also testified that "this was a very unusual situation and it is generally much better to let the processes go through." AR1092.

In fact, NIGC has since concluded that it lacks authority to approve site-specific gaming ordinances prior to trust acquisition. *See* Tohono O'Odham Nation Class III site-specific, conditional gaming ordinance amendment at 11 (NIGC, Aug. 24, 2011) ("Tohono Opinion"), *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=Jvuw-_gdYyE=. NIGC concluded that "it is unreasonable for the NIGC to make speculative gaming eligibility determinations for parcels that may or may not be taken in trust at some point in the future." *Id*. When a gaming ordinance is site-specific, as the Cowlitz Tribe's was, NIGC is powerless to approve it until the land is acquired in trust. *Id*. at 11 (emphasis added). Thus, NIGC's approvals of the 2005 Ordinance and the 2008 Amendment exceeded its authority and should be vacated. Moreover, BIA is not entitled to rely on the ultra vires action of another agency.

guarantees the mitigation previously assured by the voided MOU between the Tribe and County.[14] *Id*.

Parties raised concerns about the EPHS Ordinance's revocability, NIGC's lack of approval authority, and NIGC's lack of authority and expertise to enforce it. *See e.g*., NIGC AR752-60, 701-18, 689-700. NIGC approved the amendment on January 8, 2008, stating:

> The issues concerning enforceability are not properly addressed here. The Tribe is providing more with regard to EPHS enforcement than is minimally required under IGRA. Even if there are legal or practical impediments regarding such extra measures, such impediments are not grounds for disapproval. Whether the Tribe's approved ordinance amendment also will serve a purpose under NEPA is a separate issue that should be addressed in the NEPA process.

NIGC AR2. Thus, NIGC did not address the questions raised by governmental officials or the public or define the scope of its authority.

2. BIA Violated the APA by Determining, Without Explanation, that the EPHS Ordinance Was Irrevocable and that NIGC Will Enforce It

a. BIA Erred in Concluding that the EPHS Ordinance is Irrevocable.

BIA concluded that the EPHS Ordinance is irrevocable, apparently because it purports to be irrevocable, AR75842 [FEIS 1-11]; the County said that it would rely on it, AR75843 [FEIS 1-12], 140412 [ROD 31]; and NIGC approved it, AR75842 [FEIS 1-11]. But the record demonstrates that there were substantial legal questions regarding these issues, *see e.g*., NIGC AR752-60, 701-18, 689-700, which even NIGC emphasized BIA must address in its final decision, *see* NIGC AR9-10 (questions raised "should be addressed in the final EIS or [ROD] produced under NEPA, because they relate to how confident the federal government should be that the relevant mitigation measures will be implemented"). But just as with its "initial reservation" decision in the first round of litigation, *see* Civ. No. 1:11-cv-00278-BJ (Dkt. No.

[14] The Tribe previously submitted an earlier version of the EPHS Ordinance on July 10, 2007. NIGC AR1567-91. *See also* NIGC AR1082-1397, 1398-1430. The original EPHS Ordinance did not provide a waiver of sovereign immunity in favor of Clark County. AR83788.

67)(filing supplemental ROD), BIA failed to explain its conclusions, violating the APA. *See State Farm*, 463 U.S. at 49 (requiring cogent explanation for decision).

Not only did BIA fail to explain its acceptance of the EPHS Ordinance, the apparent grounds upon which it concluded that it could rely on that document are incorrect. BIA appears to treat the EPHS Ordinance as the legal equivalent of a contract. *See* AR140412 [ROD 31] (citing to the Tribe's "irrevocable" waiver of immunity). Ordinances, however, are unilateral and revocable. "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that as act is "alterable when the legislature shall please to alter it"). This principle is no less true because a tribe is involved. BIA ignored the question.

BIA cites an April 2009 "rescission agreement" between the Tribe and the County that "confirms the Tribe's limited waiver of sovereign immunity which allows Clark County to enforce the Tribe's obligations." AR140412 [ROD 31]. If BIA is suggesting, by this statement, that the "agreement" precludes revocation, it is wrong again. That document is a recital of the Tribe's and County's view that the EPHS Ordinance includes a waiver of immunity and that they intend to rely on it, nothing more. *See* AR67057. But again, BIA did not explain its decision.

BIA then rests the EPHS Ordinance's supposed irrevocability on NIGC's shoulders, stating that the "specific provisions of the EPHS Ordinance, including the Tribe's grant of a limited waiver of sovereign immunity, may not be revoked without approval of NIGC." AR140412 [ROD 31]. But neither NIGC's regulations nor its approval of the 2008 Amendment supports this supposition. NIGC regulations provide that, "[a] governing body of a tribe, *in its sole discretion and without the approval of the Chairman*, may adopt an ordinance or resolution ***revoking any prior ordinance or resolution***." 25 C.F.R. § 522.12 (emphasis added). Moreover, NIGC "shall" approve an ordinance if it meets regulatory requirements. *Id.* § 522.4. NIGC's 2008 Amendment approval made this point: "IGRA does not establish a basis for disapproving a tribal gaming ordinance *that may later be amended* or that contains detailed EPHS requirements that go beyond what the NIGC typically enforces." NIGC AR10 (emphasis added). BIA was

obligated to address these questions, *see e.g.,* AR7461, which even NIGC concluded in 2008. *See* NIGC AR9-10. Its failure to do so violates the APA. *See Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency cannot ignore evidence contradicting its position.")

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

BIA compounded its errors by relying on NIGC "to enforce the Tribe's gaming regulations with powers that include closure of the gaming operation." AR140437 [ROD 56]. In its recommendation memorandum, however, NIGC described the "detailed EPHS requirements" as "go[ing] beyond what the NIGC typically enforces." NIGC AR10. BIA did not respond to that statement or comment letters raising this issue, *see e.g.*, NIGC AR699-700, or seek an answer from NIGC *whether or how* it could enforce the EPHS Ordinance.

In fact, NIGC has already answered this question in an interpretative rule, which contradicts BIA's assumptions in the FEIS and ROD:

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

67 Fed. Reg. at 46,111 (emphasis added).[15] The rule clarifies that NIGC will enforce EPHS provisions only when "inaction results in a condition of imminent jeopardy to the environment, public health and safety." *Id.* at 46,112. "Imminent jeopardy" exists when there are conditions "that pose a real and immediate threat: (1) to the environment, which, if uncorrected, would result in actual harm to life or destruction of property; or (2) to human health and well-being,

[15] Section 2710(b)(2)(E) requires NIGC to "approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that . . . the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety."

which, if uncorrected, could result in serious illness or death." *Id*. Failure to make payments to the County, NIGC AR780, or to improve road performance, NIGC AR782, or to provide sewage conveyance, NIGC AR783, or take many other actions required by the EPHS Ordinance obviously will not constitute imminent jeopardy. In fact, nothing in the EPHS Ordinance is likely to do so. BIA provided no explanation for its conclusion that NIGC would enforce the EPHS Ordinance or why NIGC's contrary authority is not applicable in this case.[16]

3. BIA Arbitrarily and Capriciously Relied on EPHS Ordinance for NEPA and Trust Acquisition Purposes

BIA's NEPA and trust decision documents rely heavily on the EPHS Ordinance throughout. Thus, BIA's arbitrary and capricious treatment of this issue is not a minor matter. BIA concluded that compliance with the EPHS Ordinance "is sufficient to reduce environmental effects of the Proposed Action." AR140412 [ROD 31]. But because the EPHS Ordinance is revocable and because NIGC will not enforce it, BIA's conclusion that the impacts of the proposed action will be mitigated is erroneous.[17]

[16] Relying on NIGC to enforce the EPHS Ordinance is problematic from another perspective--the question of prosecutorial discretion. Aside from NIGC's guidance, which disclaims the very responsibility BIA assigns it, there is no reason to expect that NIGC *would* exercise is prosecutorial discretion in a manner that a local government would have under a validly executed mitigation agreement. Local governmental officials are directly accountable to the public through democratic elections; NIGC is not. The Supreme Court did not find the Federal government's assurances that United States would enforce IGRA against tribes persuasive when it granted certiorari over the objections of the Office of the Solicitor General. *See Michigan v. Bay Mills Indian Cmty*., 133 S.Ct. 2850 (2013) (No. 12-515), 2013 WL 2010075 (Br. For United States as *Amicus Curiae*), The Court should not be persuaded here.

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

BIA is required to consider the effects of the proposed action on land use. 40 C.F.R. § 1512.16. "[M]ore careful scrutiny" is required when, as in the case of a trust land acquisition, the federal government "exercises its sovereignty so as to override local zoning protections." *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1037 (D.C. Cir. 1973). *See Isle of Hope Historical Ass'n. v. United States Army Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981) (closer scrutiny necessary when measures conflict with local interests). "To take the required 'hard look' at a proposed project's effects, *an agency may not rely on incorrect assumptions or data in an EIS*." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005)(emphasis added).

BIA, however, relied on the EPHS Ordinance for mitigation throughout the EIS *because* it incorrectly assumed—without exploring the issue—that the mitigation was guaranteed. *See* AR140390 [ROD 9 n.4] ("The Final EIS considered the Tribal Ordinances as an alternative mechanism to enforce mitigation of environmental impacts equivalent to that provided in the MOU.") But the mitigation is not guaranteed; it can be revoked, and it will not be enforced by NIGC. BIA's failure to address this issue undermines the entire EIS, because BIA relied on the EPHS Ordinance for mitigation throughout the document. In particular, critical issues including: 1) water supply, (AR140390-91) [ROD 9-10]; 2) site drainage, *id.*; 3) law enforcement, *id.*; 4) fire protection services, *id.* [ROD 9-10]; 5) development standards to address seismic issues, AR140420 [ROD 39]; 6) storm water runoff, AR140396 [ROD 15]; wetland protection, AR140398 [ROD 17]; transportation impacts, AR140400 [ROD 19]; and 8) socioeconomic impacts, AR140399 [ROD 18], were all treated as mitigated in the ROD. Not only did BIA rely on the EPHS Ordinance to assess impacts in the EIS, it incorporated its errors in its analysis of the criteria under the trust regulations. BIA assumes that the Tribe will compensate the State and County for property tax revenues lost. AR140488-89 [ROD 107-108] (evaluating the fee-to-trust request under 25 C.F.R. § 151.10). Likewise, BIA concludes that the EPHS Ordinance will "address all major jurisdictional issues," including development and processing fees, building requirements, law enforcement and other matters. AR140490 [ROD 109]. By failing to deal

with the questions that the parties raised about the EPHS Ordinance, and by incorrectly concluding that it could invoke the EPHS as a cure-all form of mitigation, BIA failed to satisfy NEPA and the trust regulations. The ROD must be vacated.

B. BIA's Purpose and Need Statement and Alternatives Analysis Fails to Consider Reasonable Alternatives

BIA also impermissibly narrowed the range of alternatives through: 1) unreasonable screening criteria; and 2) an unsubstantiated, post-DEIS report that overstates the Tribe's economic need and relies on the Tribe's uncertified expanded enrollment. These mechanisms resulted in the improper exclusion of reasonable alternatives located in the Tribe's historic lands.

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R.§ 1502.14. The range of alternatives an agency must consider is based on its statement of purpose and need statement. Because the purpose and need statement defines "[t]he goals of an action delimit the universe of the action's reasonable alternatives," *id.*§ 1502.13, an agency cannot "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." *Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

BIA's statement of purpose and need is broad—i.e., "to create a Tribal land base for its members and establish a Tribal Headquarters from which its Tribal Government can operate to provide housing, health care and other governmental services, and from which it can conduct economic development necessary to fund these Tribal Government services."[18] AR75837 [FEIS 1-6]. Obviously, a very wide range of alternatives would satisfy this purpose.

[18] The Tribe already has a Tribal Headquarters from which it can and does provide services in Longview, 22 miles north of the Site. AR64738 [ROD 116]. Nonetheless, BIA did not factor this into its analysis of need.

BIA, however, employed restrictive screening criteria to limit the range of alternatives that impermissibly reduce the scope of the purpose and need statement, including: 1) in close proximity to the I-5 highway; 2) contiguous properties forming 20 acres or more; 3) with contiguous ownership; 4) available for purchase; 5) without any environmental constraints; 6) with public services available; and 7) favorable zoning designation. AR106673 [DEIS 2-34]. Using these criteria, BIA "screened" 19 parcels, AR75882 [FEIS 2-36], and narrowed the list to 11 properties, which then included five properties within the Tribe's historic territory, AR75882-886 [FEIS 2-36-40]. BIA then eliminated all five of the historic properties from detailed consideration, ostensibly because of environmental constraints or because they were not for sale. AR106673 [DEIS 2-34]. BIA ultimately considered only one location as an alternative. AR140393 [ROD 12].

There were two keys problems with this approach: 1) the criteria were too restrictive; and 2) BIA applied the criteria unreasonably. As to the latter point, even the Site itself does not meet the screening criteria BIA established. The Site is zoned agricultural, not commercial/industrial, and the City and County cannot provide public services because doing so would violate the Growth Management Act. *See* AR74115-22; AR092271-73; AR100033-54. BIA does not explain why it is permissible to exclude all five sites in the Tribe's historic territory for failing to meet certain criteria when the Site fails to meet some of the same criteria. Moreover, BIA does not explain why requiring alternatives to consist of contiguous properties forming 20 acres or more *with contiguous ownership* is reasonable, AR106633 [DEIS 1-6], when the record demonstrates that the Site itself was originally made up of nine separate properties, including one parcel a little more than an acre in size, with multiple owners, AR66046-130; NIGC AR 3263. In fact, BIA also claimed that there were no available properties in the Tribe's historic lands that met the screening criteria, when the record shows that conclusion to be untrue.

In response to concerns raised during the comment period on the DEIS regarding BIA's improper exclusion of all of the alternatives in the Tribe's historic territory from detailed consideration, *se e.g.,* AR009596-98, AR102781-83, the Tribe provided a business plan setting

forth the Tribe's unmet needs (Unmet Needs Report), AR081569-95, as justification for the decision BIA already made—i.e., to exclude from detailed consideration reasonable alternatives. BIA used the Unmet Needs report as the new "predominant" basis for screening alternatives, AR078614 [FEIS C-131 (Response #434-10)], and excluded the alternatives in the Tribe's historic lands because "none of the . . . northern sites could adequately meet the Tribe's economic objectives and needs." AR075886; AR078455 [FEIS B-8]. The Tribe quantified its economic need as requiring an annual budget of $114 million per year to fund governmental services to provide for its 3,544 members—i.e., $32,000/member/per year or twice the amount the State of Washington spends on its citizens annually (including Cowlitz Tribal members who live in the State). *See* AR081569-95 [FEIS App. Vol. VII.E, Exhibit A]; AR078453-54 [FEIS B-7]. On this basis, the Tribe argued, and BIA agreed, that alternatives within the historic territory of the Tribe would provide insufficient revenue.

It is difficult to conceive of a more restrictive alternatives screening process than what BIA ultimately created through its original criteria and Unmet Needs Report. Using such unreasonably narrow criteria to eliminate otherwise reasonable alternatives renders an EIS inadequate. *See Theodore Roosevelt Conservation P'ship (TRCP) v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (citation omitted). "The existence of a viable but unexamined alternative renders an [EIS] inadequate." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (citations omitted).

An August 4, 2006, memorandum between the Tribe and the environmental contractor preparing the EIS – Analytical Environmental Services (AES) provides:

> Several separate issues regarding the alternatives considered in the EIS were raised…. Several other parties including CARS suggested that an alternative near Toledo should/must be analyzed. CARS also indicated that Alternative D should not have been analyzed because it is economically infeasible.
>
> Introduction of a new alternative which could be selected and implemented would require issuance of a supplemental draft EIS. New alternatives can be interjected into the process is [sic] they are not subjected to detailed analysis, so they could

> not be selected. Alternatives may only be rejected if they do not meet purpose and need.
>
> So far we propose interjecting 3 new site locations and demonstrating that they do not meet purpose and need. These locations are in Cowlitz and Lewis County. However, Grand Ronde has presented a number of alternative locations in Cowlitz and Lewis County they feel should have been analyzed. Grand Ronde's comments even include an Innovations market study of the site.

See AR58651. By October 4, 2006, AES and the Tribe identified as an agenda item "Rewrite of Purpose and Need – AES (started, pending receipt of Economic Development Plan from the Tribe)," which BIA ultimately incorporated. *See* AR78614 [FEIS Vol. IV.C, at C-131 (Response #434-10)]. With a new economic cut-off of $114 million to use, BIA claimed that it could exclude alternatives in Cowlitz and Lewis Counties. *See* AR075832-846 [FEIS 1-1 - 1-15]; AR075882 [FEIS 2-36]; AR075882-886 [FEIS 2-37-40]; AR078614 [FEIS Vol. IV.C, at C-131 (Response #434-10)]; AR075886 [FEIS 2-40]; AR078455 [FEIS B-8].

BIA had an obligation to confirm the accuracy or reasonableness of the Unmet Needs Report, if it intended to use it as a screening criteria that would affect alternatives, which are the "heart" of the EIS process. 40 C.F.R. § 1502.1. An agency must "independently evaluate the information submitted" by an applicant, and the agency is held "responsible for its accuracy." 40 C.F.R. § 1506.5(a); *Native Ecosystems Council v. U.S. Forest Service, an agency of U.S. Dep't of Agriculture*, 418 F.3d 953, 965 (9th Cir. 2005) (*citing* 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.")). The purpose and need statement, and the manipulation of the post-DEIS alternatives analysis, compromised both the process and the substance of the FEIS. BIA's actions are unlawful.

C. BIA Erred in Evaluating Adverse Impacts on Water Quality

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

evaluation of impacts. 40 C.F.R. §§ 1502.16, 1502.24. Moreover, the EIS does not address the new changes in the law regarding storm water, which requires BIA to prepare a supplemental EIS.

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

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

Neither the FEIS nor the ROD explain how the casino will address these significant regulatory hurdles. The FEIS does not address the process for obtaining a NPDES permit given that no TMDLs are in place. AR076082 [FEIS 4.3-4]. The ROD devotes even less attention to these issues, merely assuming that a NPDES permit will be issued. AR140417 [ROD 36]. Neither the FEIS nor the ROD address what happens if a NPDES permit is not issued, and that is

the result currently required by the CWA.[19] Instead, the FEIS inaccurately represents and assumes that the treatment system used to mitigate the fecal coliform and temperature impacts will be sufficient to address these deficiencies. With respect to temperature, the FEIS acknowledges that, if untreated, the temperature of the wastewater discharge will be too high to comply with the applicable water quality standard of 16 degrees C. AR076085 [FEIS 4.3-7]. The ROD only indicates that wastewater will be treated so that its anticipated average temperature is 16 degrees C. AR140442 [ROD 61]. However, the water quality standard does not include an "averaging" component. The FEIS also is misleading in its statements that treatment of fecal coliform will be adequate. See AR075916; AR076083 [FEIS 3.3-12; 4.3-5]. The receiving waters remain impaired for fecal coliform. Even if the proposed treatment system is effective in removing much of the fecal coliform from the casino's wastewater discharge, the fact remains that the casino's discharge will contain this pollutant, resulting in a net increase in the receiving water, in violation of the CWA. AR076083 [FEIS 4.3-5].

Moreover, there have been highly significant changes to the standards applicable to water resources since the EIS was finalized in 2008. BIA's certificate of NEPA adequacy alludes to some of those changes, but fails to address how the new storm water runoff regulations will be managed or whether the existing mitigation is sufficient to satisfy current standards. *See* AR138745-47 (discussing 2011 water quality standards for wastewater). Under the NPDES program, Clark County was required to reduce storm water runoff from new development to the historical level at the site. The County instead decided to try to adopt an alternate method to mitigate water runoff. On March 21, 2011, several citizen and environmental organizations filed a citizen enforcement action in federal court under the CWA claiming that Clark County violated

[19] As a potential alternative to the NPDES permit, the Tribe entered into an agreement with the City of La Center to pay for an extension of the municipality's sewer system. Due to violations of state law, the City rescinded the sewer agreement on June 4, 2012, in response to a legal challenge by some of the Plaintiffs in this case. *Alexanderson v, City of La Center*, WWGMHB No. 12-2-0041 Order on Dispositive Motion (May 4, 2012), *available at* http://www.gmhb.wa.gov/LoadDocument.aspx?did=2853. BIA was put on notice of the demise of the sewer agreement by letters submitted by the County on April 15, 2013 (AR138879) and plaintiffs Dragonslayer, Inc. and Michels Development, LLC on April 23. *See* Baur Declaration.

its NPDES permit by failing to enforce flow control requirements of its permit in accordance with its terms. *Rosemere Neighborhood Ass'n v. Clark County*, No. 3:11-cv-05213-RBL (W.D. Wash. filed Mar. 21, 2011). The County's plan was also reviewed by the Washington State Pollution Control Hearings Board and state appellate courts, which invalidated the County's prior regulations for using water runoff standards that afforded less water quality protection than its NPDES permit required. *Rosemere Neighborhood Ass'n v. Clark County*, 170 Wn. App. 859, 290 P.3d 142 (2012), *review denied*, 176 Wn.2d 1021, 297 P.3d 708 (2013).

Addressing matters raised in these cases, the County recently adopted stronger storm water management and erosion control standards that apply to all new development, redevelopment, and drainage projects consistent with the Stormwater Management Manual for Western Washington, as modified by Clark County's specific standards and manual. *See* Clark County Code 40.385.010. These regulations generally require that newly developed sites drain as slowly as what would have occurred on historic, forested land cover unless reasonable historic information is provided that indicates the site was prairie prior to settlement.

These standards set a much higher bar for storm water management than what was reviewed in the FEIS. BIA's Certificate of NEPA Adequacy also fails to address this issue, even though the County's new stormwater management regime came into effect before the 2013 ROD. Accordingly, BIA issued the 2103 ROD without analyzing these critically important water quality impacts, and a remand for additional NEPA compliance (i.e., preparation of a supplemental EIS) is necessary to address these significant new circumstances.

This error on a critically important issue requires remand of the EIS.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court vacate BIA's 2013 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 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** and **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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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