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 U.S. Department of the Interior, *et al.*, Defendants, and COWLITZ INDIAN TRIBE, Intervenor-Defendant.	Case No. 13-cv-00849-BJR

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

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INTRODUCTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants, the United States Department of the Interior ("DOI"), et al., hereby respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion in Support of Summary Judgment. For the reasons described below, and based upon the Administrative Record ("AR")[1] supporting DOI's determination to accept land into trust for the benefit of the Cowlitz Indian Tribe ("Cowlitz" or "Cowlitz Tribe"), and the AR supporting the National Indian Gaming Commission's ("NIGC's") approval of the Cowlitz Tribe's gaming ordinance and the amendment to that ordinance, the Court should grant the United States' Motion for Summary Judgment on all of Plaintiffs' claims.[2]

BACKGROUND

Plaintiffs challenge two federal agency actions, one by the NIGC Chair and one by the Secretary of the Interior, that relate to the potential acquisition into trust of property for the Cowlitz Tribe's benefit. Clark Cnty. Compl. at 3, 14-15 (ECF No. 1 in Case No. 13-cv-00850); Grand Ronde Compl. at 2 (ECF No. 1 in Case No. 13-cv-00849). The land is comprised of nine contiguous parcels totaling approximately 151.87 acres located in Clark County, Washington ("Cowlitz Property" or "Property") on which the Cowlitz plans to construct and operate a gaming facility under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721.[3] First, Plaintiffs challenge the Secretary's decision to take the Cowlitz Property into trust on

[1] The NIGC record will be cited as "NIGC ARXXXX"; the DOI record as "BIA ARXXXXXX".

[2] Grand Ronde (Case No. 13-cv-00849) and Clark County Plaintiffs (Case No. 13-cv-00850) filed suit on June 6, 2013. The lawsuits were consolidated on July 18, 2013. The Grand Ronde does not challenge the NIGC's action, but for ease of reference both Plaintiffs will be referred to collectively, except in relation to the separate claims in each case, if necessary.

[3] For a description of the parcels, see BIA AR000010-15; Land Acquisitions; Cowlitz Indian Tribe,78 Fed. Reg. 26802 (May 8, 2013).

behalf of the Tribe pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. Grand Ronde Compl. at 16-18; Clark Cnty. Compl. at 23-24. The Clark County Plaintiffs also challenge the Secretary's application of the IRA's regulatory factors as part of that decision and they allege that the Secretary ignored DOI's regulations for establishing that an American Indian group exists as an Indian tribe ("Federal acknowledgment regulations") codified at 25 C.F.R. Part 83. Clark Cnty. Compl. at 24-25. Second, Plaintiffs challenge the Secretary's determination that if the Property is taken into trust and declared a reservation, it will be eligible for gaming pursuant to IGRA. Grande Ronde Compl. at 18-20; Clark Cnty. Compl. at 25-26. Third, Plaintiffs challenge the Secretary's compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370. Grand Ronde Compl. at 20-24; Clark Cnty. Compl. at 28-30. Fourth, the Clark County Plaintiffs challenge the NIGC Chair's approval under IGRA of the Cowlitz Tribe's 2008 amendment to the Tribe's gaming ordinance relating to the Cowlitz Property. Clark Cnty. Compl. at 27-28.[4]

The Cowlitz Tribe was acknowledged as a federally recognized tribe in 2000 through DOI's administrative acknowledgment process ("FAP"). BIA AR140377; Final Determination To Acknowledge the Cowlitz Indian Tribe ("Final Determination"), 65 Fed. Reg. 8,436 (Feb. 18, 2000). The Cowlitz Property will be the first parcels of land held in trust by the United States for the Cowlitz and once it is declared a reservation pursuant to Section 7 of the IRA, 25 U.S.C. § 467, it will be eligible for gaming under the "initial reservation" exception in IGRA. 25 U.S.C. § 2719(b)(1)(B)(ii); BIA AR140494-518. As part of the ordinance approval, the NIGC also determined that the Cowlitz Property would be eligible for gaming under the "restored lands" exception in IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). NIGC AR001622.

[4] While Clark County asserts various claims regarding NIGC's 2005 approval of the Cowlitz gaming ordinance in their complaint, aside from the mention of this approval as controversial in a footnote, there are no arguments related to this approval in their summary judgment brief.

I. Statutory and Regulatory Background

A. Indian Reorganization Act

Section 5: Acquisition of Land Into Trust. In deciding to accept the Property into trust, the Secretary acted pursuant to the IRA. In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973). This "sweeping" legislation, Morton v. Mancari, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." United States v. Celestine, 215 U.S. 278, 290 (1909). The IRA thus repudiated the previous land policies of the General Allotment Act, which sought to end tribal organization and communal land ownership. See e.g. 25 U.S.C. § 461 (prohibiting further allotment of land); 25 U.S.C. § 462 (extended indefinitely the periods of trust or restrictions on alienation of Indian lands); 25 U.S.C. § 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary).

The "overriding purpose" of the IRA, however, was broader and more prospective than remedying the negative effects of the General Allotment Act. Morton, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Id. Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477.[5]

[5] Congress also authorized or required the Secretary to take specified steps to improve the economic and social conditions of Indians, including: 25 U.S.C. § 466 (regulations for forestry and livestock grazing);

> Of particular relevance here, Section 5 of the IRA provides in pertinent part that:
>
> [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> …
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

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

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id. § 469 (creation of federal Indian-chartered corporations); id. § 470; id. § 472 (preferences to Indians for employment in positions relating to Indian affairs).

NEPA. See id. § 151.10(b)-(d), (f)-(h). Here, the Secretary made the required notifications and considered the appropriate factors. See BIA AR140458-493 (summary).

Section 19: The Definition of Indian. Section 19 defines those who are eligible for the IRA's benefits. The first definition of "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.[6]

In February 2009, the Supreme Court issued its decision in Carcieri v. Salazar, 555 U.S. 379. Carcieri involved a challenge to DOI's decision to accept land into trust for the benefit of the Narragansett Tribe. Id. at 384. The Court interpreted the word "now," in the phrase "recognized Indian tribe now under Federal jurisdiction" in the first definition of Indian in Section 19 to mean "under federal jurisdiction in 1934," when the IRA was enacted. Finding that the Narragansett Tribe was not under federal jurisdiction in 1934, the Court concluded that the Secretary lacked authority under the IRA to take the parcel at issue into trust. The majority did not elaborate on how a tribe might demonstrate that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in effect had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934. Id. at 395-96. Nor did the majority address the term, "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

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

[6] The IRA also includes within its definition of "Indian" "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

In short, Carcieri requires that for any "recognized Indian tribe" that applies for land to be taken into trust under the first definition of "Indian" in Section 19 of the IRA, the Secretary must determine that the tribe was "under Federal jurisdiction" at the time of the passage of the IRA in 1934. Because the term "now" in the IRA does not modify the term "recognized Indian tribe," however, there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not" recognize it "at the time." Id. at 397 (Breyer, J.).

Section 7: Reservation Proclamation. In addition to authorizing the Secretary to accept land into trust, the IRA also authorizes the Secretary to consider such lands as part of a tribe's reservation. Specifically, "[t]he Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations." 25 U.S.C. § 467. DOI has guidelines implementing the provision. See BIA AR140494-497.

B. The Indian Gaming Regulatory Act

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

IGRA provides that gaming regulated under the statute shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions in Section 20 apply. See 25 U.S.C. § 2719(a)-(b). These exceptions apply

when "lands are taken into trust as part of—(i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." Id. § 2719(b)(1)(B).[7] These exceptions "ensur[e] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones," City of Roseville v. Norton, 348 F.3d 1020, 1030 (D.C. Cir. 2003), and provide "some sense of parity between tribes that had been disbanded and those that had not." City of Roseville v. Norton, 219 F. Supp. 2d 130, 161 (D.D.C. 2002). The pertinent exceptions apply to land taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition," id. § 2719(b)(1)(B)(iii), and "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." Id. § 2719(b)(1)(B)(ii).

Among other requirements, the governing body of a tribe must also adopt a gaming ordinance and the NIGC Chair must approve it before Class II or Class III gaming activities may occur on Indian lands. 25 U.S.C. § 2710(b)(1)(B) (Class II); 25 U.S.C. § 2710(d)(2)(A) (Class III).[8] Pursuant to Sections 2710(b)(2) and (d)(2) of IGRA, a tribe desiring to conduct Class II or Class III gaming must also adopt and enact a gaming ordinance and submit that gaming ordinance to the Chair of the NIGC for approval. Unless the Chair determines that the ordinance

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

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

does not meet the requirements of IGRA and the NIGC's implementing regulations, the Chair approves such ordinance within 90 days of its submission. 25 U.S.C. § 2710(e).

C. The National Environmental Policy Act

Congress passed NEPA to focus governmental and public attention on the potential environmental effects of any proposed "major Federal action." See 42 U.S.C. § 4332(2)(C); Marsh v. Or. Natural Res. Def. Council, 490 U.S. 360, 371 (1989). Council on Environmental Quality ("CEQ") regulations, 40 C.F.R. §§ 1500–1508, provide guidance to agencies in applying NEPA. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–53 (1989). NEPA is "essentially procedural." Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978). The statute does not mandate particular results, but instead prescribes a process to ensure that federal decision-makers consider, and that the public is informed about, a proposed action's potential environmental consequences. Robertson, 490 U.S. at 350; Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). To achieve those aims, NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS is a statement regarding "the environmental impacts of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action." Id. § 4332(2)(C)(i)–(iii).

II. Statement of Undisputed Material Facts[9]

A. Brief History of the Cowlitz Indian Tribe

The Cowlitz Tribe is the successor in interest of the Lower Cowlitz and the Upper Cowlitz Bands of Southwestern Washington. 62 Fed. Reg. 8,983-01 (Feb. 27, 1997). The

[9] Pursuant to LCvR 7(h)(2), a separate statement of material facts will not be filed.

Lower Cowlitz Bands participated in the 1855 Chehalis River Treaty negotiations held between several Indian tribes in Southwest Washington and the United States. Id. Although the Lower Cowlitz Band refused to sign the Chehalis River Treaty, DOI's Branch of Acknowledgment and Research found in its initial proposed findings that the Lower Cowlitz Band's participation in the treaty negotiations constituted unambiguous federal acknowledgment as of the date of the treaty negotiations. Id. Following the initial negotiations, DOI continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because they recognized that Indian title to the land had never been properly ceded, BIA AR140479, (citing Cowlitz Tribe of Indians v. United States, 25 Ind. Cl. Comm. 442, 454-56 (June 23, 1971)), and throughout the 1860s, DOI's Office of Indian Affairs made several attempts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation. Id.

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

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

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

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

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

Id.[11] None of the Plaintiffs in this case filed a challenge to DOI's determination to acknowledge the Cowlitz Tribe.

B. The Cowlitz Property and Administrative Proceedings[12]

The Cowlitz Tribe submitted its application to have the Cowlitz Property acquired in trust on January 4, 2002. BIA AR140382. The Cowlitz Property is located on the western side of Interstate 5 near the City of La Center,[13] about sixteen miles north of Vancouver, Washington. BIA AR140383; BIA AR075920; BIA AR076441–43 (maps). The Cowlitz Tribe proposes to use the Cowlitz Property to develop "tribal government facilities, tribal elder housing, a tribal cultural center, a casino, a hotel, a convention facility, an RV park, park facilities and a wastewater treatment plant." BIA AR140382-383; BIA AR076444. The purpose is to "establish and operate a tribal government headquarters to provide housing, health care, education and other governmental services to its members, and engage in the economic development necessary

[11]The final acknowledgment was issued in February 2000. Final Determination, 65 Fed. Reg. 8,436 (Feb. 18, 2000). That decision was affirmed after a reconsideration request by the Quinault Indian Nation before the Interior Board of Indian Appeals, though three issues were referred back to the Assistant Secretary-Indian Affairs. In re Federal Acknowledgment of the Cowlitz Indian Tribe, 36 IBIA 140 (May 29, 2001). In December 2001, the Assistant Secretary-Indian Affairs issued the Reconsidered Determination reaffirming the initial ruling, which supplemented and superseded the original determination. Reconsidered Determination, 67 Fed. Reg. 607 (Jan. 4, 2002).

[12] DOI originally signed its ROD for the Cowlitz application on December 17, 2010, deciding to implement the preferred alternative. See BIA AR000024–146, 140385-86; 76 Fed. Reg. 377–01 (Jan. 4, 2011). That decision was challenged in this Court. On October 1, 2012, after the Court denied DOI's request for a voluntary remand regarding the initial reservation determination, DOI filed a supplemental ROD revising the initial reservation decision, which supplemented the 2010 ROD. BIA AR140386. However, on March 13, 2013, this Court remanded that decision in *Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar*, No. 11-cv-285-BJR (D.D.C.), with instructions to rescind the 2010 ROD and issue a new decision within sixty days.

[13] La Center is currently home to four "card rooms" gaming establishments. See BIA AR076347.

to fund these tribal government programs, provide employment opportunities for its members, and allow the tribe to become economically self-sufficient" and achieve self-determination. BIA AR140386; BIA AR075785; BIA AR075837.

NEPA also applied to DOI's review of the Cowlitz application. After requesting public comment on the scope of the EIS and hosting a public scoping meeting in Vancouver, Washington, in November 2004, BIA AR123662–63, DOI issued a Draft EIS ("DEIS") for public comment on April 12, 2006. See 71 Fed. Reg. 18,767, 18,767–68 (April 12, 2006); 106546–48; BIA AR106588–627 (DEIS executive summary). Public meetings on the DEIS were held in Vancouver, Washington, on June 14 and June 15, 2006. BIA AR140385. After two years of additional review and responding to public comments, DOI issued the Final EIS ("FEIS") for public comment on May 30, 2008. See BIA AR074228–29 (73 Fed. Reg. 31,143–44 (May 30, 2008)); BIA AR075769–831 (FEIS executive summary).

In addition to NEPA, DOI considered, as part of its review of the Cowlitz Tribe's application, the other factors listed in 25 C.F.R. Part 151, including the purpose of the land acquisition, the impact on Washington and its political subdivisions of removing the Cowlitz Property from the tax rolls, jurisdictional problems and potential conflicts of land use, and whether BIA is equipped to discharge the additional responsibilities resulting from the acquisition. BIA AR140487-493. DOI also considered the impact of the Supreme Court's recent decision in Carcieri v. Salazar, 555 U.S. 379 (2009), on the Secretary's authority to acquire the Clark County Parcels. BIA AR140459-487.

Because the Cowlitz Tribe initially intends to conduct Class II gaming on the Cowlitz Property,[14] the Secretary also determined whether the Cowlitz Property would be eligible for gaming if the land is taken into trust. Relying upon a legal opinion issued by the DOI Office of

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

the Solicitor, the Secretary concluded that the Property qualifies as the Cowlitz Tribe's "initial reservation" under Section 2719(b)(1)(B)(ii) if it is declared a reservation under 25 U.S.C. § 467, and would be eligible for gaming. BIA AR140494-518; 25 U.S.C. § 2719(b)(1)(B)(ii).

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

After further review pursuant to NEPA, and evaluation of the factors listed in 25 C.F.R. Part 151, the statutory authority delegated pursuant to the IRA, and whether the Cowlitz Property is eligible for gaming, DOI signed its Record of Decision ("ROD") for the Cowlitz Tribe's application on April 22, 2013, deciding to implement the preferred alternative. See BIA AR140376-519; 78 Fed. Reg. at 26,802. With respect to NEPA, the ROD summarized the alternatives considered, potential environmental effects and possible mitigation, and responded to public comments. AR140395-437. The ROD discussed the reasoning for DOI's decision to select the preferred alternative. AR140437-439. The ROD discusses the 25 C.F.R. Part 151 factors, BIA AR140458; BIA AR140487-140493, the Secretary's statutory authority, BIA AR140459-487, and whether the Property is eligible for the conduct of gaming. BIA AR140494-140518.

C. The Challenged Decisions

Plaintiffs brought suit challenging the DOI ROD and NIGC determination under the Administrative Procedure Act. Clark County, the City of Vancouver, a non-profit organization, three individuals, and corporations owning the La Center card rooms (collectively, "Clark County" or "Clark County Plaintiffs") allege that DOI's decision to accept the Cowlitz Property in trust violated the IRA and NEPA, and that DOI's determination that the Parcel is eligible for gaming was contrary to IGRA. See Clark Cnty. Compl. at 23-26, 28-30. The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), which owns and operates a casino eighty-five miles south of the Cowlitz Property, makes similar allegations in a separate suit. See Grand Ronde Compl. at 4, 16-24. The Clark County Plaintiffs, but not Grand Ronde, also allege that the NIGC's determination that the Cowlitz Property is eligible for gaming was contrary to IGRA. See Clark Cnty. Compl. at 26-28. Clark County and Grand Ronde both seek declaratory relief, vacatur of DOI's land-into-trust decision, and an injunction enjoining gaming on the Cowlitz Property. See Clark Cnty. Compl. Prayer for Relief; Grand Ronde Compl. Prayer for Relief. Clark County and Grand Ronde filed their motions for summary judgment on September 23, 2013. See Pls.' Mot. & Memo. of Points & Authorities in Supp. for Summ. J. ("Clark Cnty. Br.") (ECF No. 24); Mem. of Points & Authorities in Support of Pl.s' Mot. for Summ. J. ("Grand Ronde Br.") (ECF No. 23).

D. Taking the Cowlitz Property Into Trust

The United States has not yet taken the Cowlitz Property into trust. To allow for an orderly, yet expedited, resolution of Plaintiffs' claims, the United States stipulated that it would not take the land into trust until March 31, 2014, or a decision from this Court on the parties' cross-motions for summary judgment, whichever comes first. ECF No. 5 at 2. That stipulation

was conditioned upon the general briefing deadlines that the parties agreed upon, which were later amended in light of the lapse in federal appropriations in October 2013.

III. Standard of Review

Plaintiffs in both cases bring their claims under the APA, 5 U.S.C. § 706. Section 706(2)(A) provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard encompasses a presumption in favor of the validity of agency action. "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Small Refiner Lead Phase-Down v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416. In making this determination, the Court's review is limited to the administrative record. See TOMAC v. Norton, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing Overton Park, 401 U.S. at 420). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted).

ARGUMENT

The Court should grant the United States summary judgment on Plaintiffs' claims. Plaintiffs challenge DOI's trust decision in a number of respects. First, Plaintiffs allege that the IRA does not apply to the Cowlitz because the Tribe was neither under Federal jurisdiction nor recognized at the time of the statute's enactment. Summary judgment should be granted in DOI's favor on that claim because the Cowlitz have been under Federal jurisdiction since at least

1855, when the United States undertook treaty negotiations with the Tribe for cession of their lands and removal to a reservation and the IRA only requires a tribe to be federally recognized at the time of the Secretary's trust acquisition decision, not in 1934. Second, Plaintiffs allege that the Secretary's decision that the Property meets the requirements of IGRA's Section 20 initial reservation exception is in error because the Cowlitz Tribe lacks a significant historical connection to the Cowlitz Property. However, IGRA only requires a tribe to have a strong presence in the *vicinity* of the parcel to establish a significant historical connection to the property. Therefore, summary judgment should be granted in DOI's favor on that claim because the administrative record supports the Secretary's conclusion that the Cowlitz Tribe maintained a strong presence in the vicinity of the Cowlitz Property, more than sufficient to establish a significant historical connection. Third, Plaintiffs' NEPA claims also must fail. Grand Ronde lacks standing to even bring NEPA claims and regardless, the EIS adequately assessed the proposed action's alternative and potential environmental effects.

The Clark County Plaintiffs assert two additional counts. They raise a number of claims challenging DOI's compliance with its land-into-trust regulations and underlying policies; these claims lack merit. DOI's consideration of the factors required by its regulations is adequately documented in the ROD, which presents a lengthy and careful analysis of how acquiring land into trust may impact local government tax rolls, may result in potential jurisdictional problems and land-use conflicts, and whether DOI has capacity to shoulder the new administrative responsibilities that will arise with the trust acquisition. The Clark County also alleges the NIGC violated IGRA because it lacked the authority to approve the 2008 amendment to the Cowlitz gaming ordinance. To the contrary, however, NIGC holds that authority and summary judgment should therefore be granted in favor of NIGC.

I. The Secretary's Legal Interpretation of the First Definition of "Indian" in Section 19 of the IRA is Consistent with the Supreme Court's Decision in Carcieri v. Salazar and is Entitled to Chevron Deference

In count one of both complaints, the Plaintiffs challenge the Secretary's authority under the IRA to acquire land into trust for the Cowlitz Tribe. Plaintiffs in effect make two general legal arguments as to why the Secretary's interpretation of the IRA is incorrect: (1) that "now" in the phrase "recognized Indian tribe now under Federal jurisdiction" modifies "recognized Indian tribe," as well as "under Federal jurisdiction"; and (2) in 1934, the term "recognized tribe" was interpreted as the political concept of a government-to-government relationship. Therefore, Plaintiffs argue, the IRA requires that a tribe be both "recognized" and "under Federal jurisdiction" in 1934 and that the Cowlitz Tribe was neither "recognized" nor "under Federal jurisdiction." Grand Ronde Compl. at 16-18; Clark Cnty. Compl. at 23-24. But Carcieri and the text of the IRA do not support Plaintiffs' interpretation. The Secretary determined that the IRA only requires that a tribe be "under Federal jurisdiction" in 1934, not "recognized" in 1934. The Secretary then determined that the phrase "under Federal jurisdiction" requires a two-part inquiry and the Cowlitz meet the requirements of that inquiry. The Secretary's reasonable interpretation of the IRA is consistent with the Carcieri decision and the statutory text and is entitled to Chevron deference. As discussed infra, Part II, the Secretary's legal interpretation and application of the IRA's first definition of "Indian" to the Cowlitz Tribe is factually and legally correct and summary judgment should be granted in favor of Federal Defendants.

A. The Secretary's Interpretation of the Phrase "under Federal jurisdiction" is Reasonable and Entitled to Chevron Deference

1. The Chevron Standard Applies to the Secretary's Determination

As discussed above, in Carcieri the Supreme Court interpreted the word "now" in the phrase "now under Federal jurisdiction" to mean under federal jurisdiction in 1934. The

majority did not elaborate on how a tribe might show that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in effect had conceded that the Narragansett was under state, not federal, jurisdiction in 1934. Id. at 395-96.[15]

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction," BIA AR140465, nor does the legislative history clarify the meaning of the phrase. BIA AR140465-468; BIA AR140475-76. Indeed, in a 1934 memorandum drafted by Assistant Solicitor of the Interior Felix Cohen that compared the Senate and the House versions of the bill, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' whatever that may mean," and recommended removal of the phrase because it would likely provoke too many questions regarding interpretation. BIA AR140467-68 (emphasis added).

Because the phrase "under Federal jurisdiction" is ambiguous and the statute does not define its meaning, the Secretary appropriately applied the Chevron rules of statutory construction and interpreted the phrase "under federal jurisdiction." Under Chevron, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." Chevron, 467 U. S., at 842.[16] First, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. But "if the statute is silent or ambiguous with

[15] As discussed infra, the majority also does not address the term, "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

[16] The Chevron analysis is frequently described as a two-step inquiry. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'").

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

As the Supreme Court recently confirmed, courts must give Chevron deference to an agency's interpretation of a statutory ambiguity concerning the scope of the agency's statutory authority. City of Arlington v. FCC, 133 S. Ct. 1863, 1866 (2013). The Court noted that "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." Id. at 1868. The Court stressed that there is no difference between the question of whether an agency exceeded the authorized application of authority and the exercise of that authority. Id. at 1870-71. Therefore, the Court reaffirmed that it has "consistently held 'that Chevron applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'" Id. at 1871 (citation omitted). Under the longstanding principles of Chevron deference, this Court should defer to the Secretary's determination of her jurisdiction and her interpretation of an ambiguous statutory provision.[17]

[17]This Court should apply Chevron deference to the Secretary's interpretation, rather than the deference standard in Skidmore v. Swift & Co., 323 U.S. 134 (1944). Chevron provides "the appropriate legal lens through which to view the legality of the Agency interpretation," Barnhart v. Walton, 535 U.S. 212, 222 (2002), because of the "interstitial nature of the legal question" and the "related expertise of the Agency," id. See also Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262, 1266 (D.C. Cir. 2008). In any event, Skidmore deference is more than sufficient to uphold the Secretary's interpretation and determination in this case. Further, ambiguous statutes and statutory provisions enacted for the benefit of Indians are to be construed liberally in their favor. See Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 158-59 (D.D.C. 2000). The IRA and Section 20 of IGRA were enacted for the benefit of Indian tribes. This Court has concluded that Section 20 of IGRA is ambiguous, requiring its provisions to be interpreted in the tribe's favor. See Coos, 116 F. Supp. 2d at 162.

2. The Secretary's Interpretation of the Ambiguous Phrase "under federal jurisdiction" under Chevron Step Two is Entitled to Deference

In exercising the Secretary's delegated authority to interpret and implement the IRA, and having closely considered the text of the IRA, its remedial purposes, legislative history, the Carcieri decision, and DOI's early practices, as well as the Indian canons of construction, the Secretary construed the phrase "now under federal jurisdiction" as entailing a two-part inquiry: 1) whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, and 2) whether the tribe's jurisdictional status remained intact in 1934. BIA AR140475-76.

In articulating the two-part test, DOI carefully construed an ambiguous statutory phrase in a manner that relied on the Agency's regulatory expertise and was consistent with its past practices and policies. Accordingly, its interpretation and the application of the test to the Cowlitz Tribe are entitled to a high degree of deference from this Court.[18] In any event, the Secretary's determination was neither arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, nor was it in excess of her statutory authority.

The first inquiry in the two-part test is whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.,* whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions, through a course of dealings or other relevant acts, for or on behalf of the tribe that are sufficient to establish, or that reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. BIA AR140476. The Secretary explained that some federal actions may in and of themselves demonstrate that a tribe was at some identifiable point

[18] DOI took significant care in drafting its interpretation, reviewed extensive comments submitted by Plaintiffs, other tribes, and tribal representative groups, and considered several potential alternative constructions of the statutory language. BIA AR140475-78.

or period in its history under federal jurisdiction. In other cases, an array of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction. Id. Once having established that the tribe was historically under federal jurisdiction, the second question is to ascertain whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact in 1934. BIA AR140476.

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

As discussed supra., in the Carcieri decision, the majority did not elaborate on how a tribe might demonstrate that it "was under federal jurisdiction" in 1934. Carcieri at 395-96. While the majority did not address the term, "any recognized Indian tribe," that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian," Justice Breyer addressed the relationship between these two terms in his concurrence; he explained that the word "now" modifies "under federal jurisdiction," but does not modify "recognized," and concluded that the IRA therefore "imposes no time limit on recognition." Id. at 397-98. Because the term "now" does not modify the term "recognized Indian tribe," there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, as Justice Breyer noted, "a tribe may have been 'under federal jurisdiction'" in 1934 even though the Federal Government did not" realize it "at the time." Id. at 397 (explaining that the Stillaguamish Tribe, as a signatory to an 1855 Treaty had fishing rights even though recognition status was not confirmed until 1976). Plaintiffs' assumption that the term "recognized Indian tribe" also carries with it a temporal component dating back to 1934, such that the tribe must have been federally acknowledged (in today's terms) in 1934, is therefore incorrect and contrary to the language of the statute.[19]

[19] Grand Ronde challenges the Secretary's interpretation on grammatical grounds by comparing the text of the IRA to fictional statutes that regulate the practice of medicine or the regulation of automobiles. Grand Ronde Br. at 10. This argument rests on the false premise that the ambiguous, highly complex,

Following Justice Breyer's interpretation of the phrase "recognized," the Secretary concluded that, in the first definition of "Indian" in the IRA, the word "now" modifies the phrase "under Federal jurisdiction," and not the phrase "recognized Indian tribe." If Congress had intended a different interpretation, it would have done so by referencing a particular date or time frame. Pursuant to this interpretation, the Secretary properly determined that she had authority to acquire land in trust for the Cowlitz Tribe based on the acknowledgment of the Cowlitz Tribe in 2002 and the determination that the Tribe was under Federal jurisdiction in 1934. For the same reasons that the Secretary's interpretation of the phrase "under Federal jurisdiction" is entitled to deference, the Secretary's determination that there is no temporal limitation on recognition in the definition of Indian in the IRA is also entitled to Chevron deference.

C. The Clark County Plaintiffs' Argument is Contrary to the Position They Advocated Before the Secretary

The Clark County Plaintiffs' argue that the Secretary's interpretation of the IRA is contrary to the plain language and legislative history of the Act, as well as the majority opinion in Carcieri. Clark Cnty. Br. at 13-21. This assertion is not only without merit, but undermined by their submissions during the administrative process,[20] in which they conceded that "under Federal jurisdiction" was left undefined by the Court. BIA AR023071. During the

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and evolving concept of a "recognized Indian tribe," discussed infra, operates in the same manner as fixed terms such as "state resident" and "automobiles." The concept of tribal recognition has evolved over the years based on the shifting policy views of how the Federal government should deal with Indian tribes, as evidenced by the IRA itself, which broadly defines "tribe" as either "any Indian tribe . . . *or* the Indians living on one reservation," 25 U.S.C. § 479 (emphasis added). This broad definition reflects the fact that the term encompassed more than those entities who had established a political, government-to-government relationship with the Federal government at that time. See Stand Up for California! v. Dep't of the Interior, 919 F. Supp. 2d 51, 68 (D.D.C. 2013) ("[T]he broad definition of 'tribe' in § 479 indicates that a formal tribal government is not necessary to be considered a 'tribe' for purposes of the IRA."). Even if Grand Ronde's grammatical model were sound, the Cowlitz Tribe was both a recognized tribe (in an anthropological sense if not also political) and under Federal jurisdiction in 1934.

[20] It is settled law that "claims not presented to the agency may not be made for the first time to a reviewing court," United Transp. Union v. STB, 114 F.3d 1242, 1244 (D.C. Cir. 1997) (citation omitted).

administrative process Clark County argued that, "[t]he Court's decision admittedly left uncertain precisely which post-1934 federally recognized tribes qualify for trust acquisition pursuant to section 5 of the IRA, 25 U.S.C. § 465, because it did not define the phrase, 'under federal jurisdiction' in section 19 of the IRA, 25 U.S.C. § 479." BIA AR023071. Moreover, in attempting to refute the Cowlitz Tribe's assertion that DOI should use the dictionary definition of "jurisdiction," Clark County argued that:

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

BIA AR023074 (emphasis added).[21] The Clark County Plaintiffs now argue that both issues were clearly addressed in Carcieri and that the Secretary's interpretation of the statute is contrary to the plain language of the IRA and the Carcieri decision. Compare BIA AR023071; BIA AR023076 and Clark Cnty. Br. at 13-21. That is simply not the case. "[T]hree of the nine Justices took the position that federal recognition is not synonymous with being under federal jurisdiction . . . [and] the majority opinion took no position on the matter whatever . . . . Thus, the decision does not resolve the question of whether 'under federal jurisdiction' and recognition *are coextensive*." BIA AR023076-77 (Perkins Coie submission to Assistant Secretary-Indian Affairs and Solicitor) (internal citations omitted). The arguments in their brief are directly contrary to the Clark County Plaintiffs' position during the administrative process. The fact that the phrase "under Federal jurisdiction" is susceptible to two competing interpretations by the same party in the same litigation, surely qualifies it as ambiguous.

[21] The Secretary did not adopt the Cowlitz Tribe's interpretation of the statute. Compare BIA AR140475-78 and BIA AR059496-97.

D. The IRA's Voting Requirement Applied to Reservations, Not Tribes

Grand Ronde's assertion that the IRA's voting requirement provides clear evidence that a tribe had to be recognized in 1934 and that the list of tribes that voted constitutes the entire universe of tribes that were eligible for benefits under the IRA, Grand Ronde Br. at 10, 24-25, is also without basis in the statutory text. For example, Grand Ronde's argument completely ignores the language of the voting provision of the statute, which states, "[t]his Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478 (emphasis added). Nowhere in this section is there a mention of a "recognized tribe" voting on the IRA because the votes were conducted by reservation. In fact, tribes that did not vote on the IRA [e.g. St. Croix Chippewa Indians of Wisconsin] appear in Table B of the Haas Report, which Grand Ronde cites, as organizing under the IRA.[22] See BIA AR134256 (Haas Report).[23] If Grand Ronde's assertion were true, it would not be possible for a tribe that did not vote to accept or reject the IRA to organize under its provisions.[24] Therefore, that tribe would not

[22] Cowlitz members residing on the Quinault reservation were eligible to vote on the application of the IRA to the Quinault reservation in 1935 as, "descendants of such members [of a recognized Indian tribe] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479 (the second definition of "Indian"); BIA AR140483.

[23] DOI completed the voting and the results of most elections are reflected in the Haas Report. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). BIA AR134256. The Haas Report listed reservations where the Indian residents voted to accept or reject the IRA, *id*. at 13 (table A), tribes that reorganized under the IRA, *id*. at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, *id*. at 31 (table C), and tribes not under the IRA with constitutions, *id*. at 33 (table D). Table A lists most of the tribes that voted to accept or reject the IRA. Table A is frequently cited for the mistaken proposition that tribes that voted on the IRA were the only ones recognized as eligible to organize under the IRA's provisions. Table B lists the tribes that have IRA constitutions and charters. If only those that voted were eligible to organize, every tribe in Table B should be listed in Table A, but that is not the case. Groups that fit within the definition of Indian in Section 19 were still eligible to organize under the IRA, despite not being eligible to vote to accept or reject the Act.

[24] Nor is there any suggestion that a tribe had to have land to be subject to Section 465 of the IRA. Such a reading would in effect penalize those tribes that lost all their land to allotment.

appear in Table B. Because the voting was conducted by reservation and not by tribe, the lists of reservations that voted to accept or reject the IRA's provisions are not definitive.[25]

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

Plaintiffs claim that every court to address the issue has held that the IRA authorizes the Secretary to take land into trust only for tribes that were recognized in 1934. Grand Ronde Br. at 11; Clark Cnty. Br. at 12 n.4. This argument is erroneous. The cases upon which Plaintiffs rely either do not pertain to the definition at issue in this case or were superseded by the Supreme Court's decision in Carcieri. Plaintiffs quote United States v. John, 437 U.S. 634 (1978), for example, which addressed whether the United States had criminal jurisdiction over the defendant, a member of the Mississippi Band of Choctaw Indians. In John, Mississippi argued that the IRA, 25 U.S.C. §§ 460-479, could not apply to the Mississippi Choctaw because the Act was not meant to apply to Indians that were "fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." John, 437 U.S. at 652. The Court disagreed:

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

Id. at 650. However, the Supreme Court did not address what it meant to be "recognized" or "under Federal jurisdiction" in 1934. Indeed, if it had addressed the issue, there would have

[25] Furthermore, some tribes that were permitted to vote on the IRA's application were years later denied the opportunity to reorganize their tribal government under the IRA due to an erroneous determination by DOI, as in the case of the Nooksack Tribe. BIA AR134278 (Haas Report); M-35013 (Organization of the Nooksack Indians Under the Indian Reorganization Act) (Dec. 9, 1947). This opinion was later superseded by Solicitor's Opinion M-36833 (Aug. 13, 1971), which confirmed the status of the Nooksack Tribe for IRA purposes. See Cohen's Handbook of Fed. Indian Law at 148 n. 108 (2012).

been no reason for Carcieri to be litigated because John would have been binding precedent. In John, the Supreme Court simply did not address the temporal requirement. Instead, the Supreme Court concluded that:

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

Id. at 653.

Plaintiffs also rely on Maynor v. Morton, 510 F.2d 1254 (D.C. Cir. 1975), which likewise has nothing to do with interpreting what "under Federal jurisdiction" or "recognized" meant in 1934. Grand Ronde Br. at 12. In Maynor, plaintiff was one of 22 individuals who in 1938 received one-half blood Indian status certification from the BIA and therefore, was eligible for benefits under the IRA. Maynor needed such certification because he was Lumbee, which did not have "any tribal designation, organization, or reservation at the time." Maynor, 510 F.2d at 1256. Thereafter, Congress in 1956 officially designated the Indians living in Robeson and adjoining counties, North Carolina, as the "Lumbee Indians," but expressly precluded them from receiving federal services. Lumbee Act of 7 June 1956, Pub. L .no. 570, 70 Stat. 254, 255 (June 7, 1956). The court concluded that Maynor's designation as an Indian under the IRA was not abrogated by the 1956 Act, specifically finding that "no implication of a repeal of the certified Indian status of Maynor arises by such legislation conferring a tribal name on a group of North Carolina Indians, even if the group included [Maynor]." Maynor, 510 F.2d at 1259. Thus, unlike the situation in Maynor, in the present matter the Federal Government was well aware of

and directly involved with the Cowlitz Tribe in 1934. The Federal Government, in fact, entered into treaty negotiations with the Cowlitz and listed Cowlitz Indians on official agency census rolls well before 1934. BIA AR140478; BIA AR140481-82. Plaintiffs would like this Court to believe that the Lumbee's lack of a tribal designation or reservation in 1934 is the same as the Federal Government ignoring its obligations to the Cowlitz Tribe, but the circumstances of the Lumbee simply are not relevant to the present matter. More importantly, as discussed in the ROD, the Federal Government did have involvement with the Cowlitz Tribe in 1934.

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

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

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

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

City of Sault Ste. Marie at 161 (concluding that the later recognition of the Sault Ste Marie Band did not preclude the Secretary from subsequently applying the IRA to the Band).[26]

[26] Grand Ronde also claims that the court in New York v. Salazar, 2012 U.S. Dist. LEXIS 136086 (N.D.N.Y. Sept. 24, 2012), held that a tribe has to be both recognized and under Federal jurisdiction in 1934 in order to qualify under the first definition of Indian in Section 19 of the IRA. Grand Ronde Br. at 12 n.4. But the sentence Grand Ronde cites is dicta. The court later recognized, "[v]iewed through the

For all the foregoing reasons, the Secretary's interpretation of the phrase "under Federal jurisdiction" and her determination that there is no temporal limitation on recognition are reasonable constructions of ambiguous statutory terms that are entitled to Chevron deference. Furthermore, as will be discussed, the Secretary's application of these terms to the Cowlitz should be upheld under the APA's deferential standard because the Secretary employed the specialized agency expertise in Indian affairs delegated to her by the IRA. See New York v. Salazar, 2012 U.S. Dist. LEXIS 136086, *54-56 (N.D.N.Y. Sept. 24, 2012).

II. The Secretary's Determination that the Cowlitz Indian Tribe was "under Federal jurisdiction" in 1934 is Consistent with the Supreme Court's Decision in Carcieri v. Salazar and Should Be Upheld

The Secretary carefully and properly reviewed all documents submitted by the Cowlitz Tribe and the documents submitted by interested parties, including arguments and materials submitted by Plaintiffs, as well as the factual and historical evidence pertinent to types of actions that could constitute evidence of a tribe being under federal jurisdiction. BIA AR140476-78. Applying the correct legal standard for "under Federal jurisdiction" (discussed in Part I.A., supra), the Secretary concluded that the record reflects a course of dealings between the United States and the Cowlitz Tribe beginning in the 1850s and that there is sufficient subsequent evidence that the Tribe remained under federal jurisdiction through the passage of the IRA in 1934. BIA AR140478-84.

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lens of Carcieri, the instant matter presents the Court with an ostensibly straightforward syllogism . . . (2) in order for DOI to have authority under the IRA to place land into trust for a given tribe, that tribe must have been under federal jurisdiction in 1934; therefore (3) in order for DOI to have placed the land into trust for the OIN lawfully, the OIN must have been under federal jurisdiction in 1934." New York v. Salazar, 2012 U.S. Dist. LEXIS at *50. The court, in fact, did not address the merits of the Carcieri claim because the ROD was issued before the Carcieri decision. As a result, it failed to address the threshold jurisdictional question of IRA authority. Therefore, the court remanded the ROD because "[t]here is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous peoples of the United States. This institution is not the Court. It is the Bureau of Indian Affairs." Id. at *57. In the instant case the agency has already made its decision and the Court should defer to the agency's expertise on these matters.

A. The Federal Government First Asserted Jurisdiction Over the Cowlitz Tribe in the 1850s

In accordance with step one of the two-part "under Federal jurisdiction" inquiry, DOI reasonably concluded that the first clear expression that the Cowlitz Tribe (or its predecessors) was under federal jurisdiction is reflected by the United States' treaty negotiations with the Lower Band of Cowlitz Indians.[27] While the negotiations did not result in a treaty, DOI determined that these events reflected the existence of a relationship with the Cowlitz Tribe (or its predecessors) and that the Federal Government had demonstrated responsibility for and obligations to the Tribe (or its predecessors). BIA AR140478.[28]

As discussed supra, the Final Determination to acknowledge the Cowlitz Tribe extended the date of previous unambiguous federal acknowledgment to 1878-1880:

> When Federal Indian agents appointed Atwin Stockum chief in 1878 and included both the Lower Cowlitz and Upper Cowlitz bands in Office of Indian Affairs censuses taken in 1878 and 1880. The proposed finding found that the government administratively joined the Lower Cowlitz . . . and the Upper Cowlitz.

65 Fed. Reg. 8,436-01 (Feb. 18, 2000); BIA AR140479. Therefore, DOI reasonably and permissibly found, as the starting point in its analysis, that the Cowlitz Tribe was unambiguously under federal jurisdiction at least as of 1880.

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[27] In 1855, Governor Stevens engaged in a week of negotiations with the Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians at a location on the Chehalis River just east of Grays Harbor. BIA AR140478. When the Indian negotiators from the inland tribes rejected the proposed treaty, Governor Stevens ended the negotiations. Id. (citing Cowlitz Tribe of Indians v. United States, 21 Ind. Cl. Comm. 143, 167-69 (June 25, 1969)).

[28] Notwithstanding the lack of reservation for the Cowlitz, the Federal Government continued a course of dealings with both the Tribe and its members. BIA AR140479-80. During the rest of the 1850s and into the 1860s, DOI continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because Indian title to the land had never been properly ceded. BIA AR140479. For example, an 1862 report requested that treaties be entered into with the Chehalis, Cowlitz and other tribes. Additionally, during the 1860s, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation. Id.

B. The Federal Government's Course of Dealing with the Cowlitz Indian Tribe Continues Up to and Beyond 1934

DOI further concluded that through the rest of the 19th Century, the federal government continued to identify the Cowlitz Indians as under its jurisdiction to provide services to them. BIA AR140479-80. For example, in 1894 the local Superintendent stated that the Federal Government continued to provide for non-reservation Indians via schools and the provision of medical services. BIA AR140480.

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

Indeed, some representatives even spoke in terms of a Cowlitz "reservation" although none was ever established for the Tribe. Id. For example, in April 1923, the Superintendent wrote to the Commissioner of Indian Affairs regarding traveling expenses to describe "the reservations under this jurisdiction, also the country inhabited by the detached Indian homesteaders." Id. Included among the reservations is a reference to "the Cowlitz Reservation located in the Cowlitz River Valley." BIA AR140481.

In 1904, the Cowlitz began a prolonged effort to obtain legislation to bring a claim against the United States for the taking of their land. Id. Evidence supporting this claim was presented to DOI, and in 1910, DOI requested that Special Indian Agent Charles McChesney prepare a report on their claim. Id. McChesney's report concluded that the claim of Cowlitz Indians was a just one, and that they should receive compensation for land they had occupied and never ceded. Id. The local Superintendent supported this report. Id. Ultimately, the Tribe was not successful in obtaining special legislation, but was awarded a judgment for its land from the Indian Claims Commission ("ICC"). Id. [29]

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

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

demonstrates evidence that those Indians were accounted for in official federal records, and that while they lacked a land base, they were still subject to federal oversight. BIA AR140481-82.

In addition to membership rolls or censuses, BIA also kept separate census counts by reservation that would include all individuals who obtained rights to that reservation's land through allotments. BIA AR140482. This is further evidence of federal superintendence. For the roll associated with the Quinault Reservation, individuals, including Cowlitz, were identified as being members of their own tribes and not members of the Quinault Tribe. Id. The distinction is explained in a March 16, 1934, instruction to the Taholah Superintendent from Commissioner Collier. Id. Collier explains that receipt of an allotment on the Quinault Reservation by a Chinook, Chehalis or Cowlitz Indian did not mean that such Indian should be included on the tribal roll for Quinault, only that he or she should be included on the census roll for the Quinault Reservation. Id. He continued by stating that "they should be enrolled, if under your jurisdiction, as Chinook, Chehalis, and Cowlitz Indians." Id.

Other evidence of federal jurisdiction and a continuing course of dealings relates to allotments issued to Cowlitz Indians. BIA AR140482-83. The first allotment issued to a Cowlitz Indian occurred in 1888, pursuant to the amended Indian Homestead Act, Act of July 4, 1884, Ch. 180 23 Stat. 76, 96. According to information gathered for the acknowledgment decision, approximately 20-30 other off-reservation allotments were issued to Cowlitz Indians, some of which were granted as homesteads under the Homestead Act and some as Section 4 (public domain) allotments under the General Allotment Act. Id. DOI's view at the time of acknowledgment was that "the law establishing the public domain allotments appears to treat non-reservation groups whose members got such allotments as having the same status as clearly recognized, reservation tribes . . . . There is supporting evidence that the allotment was based on

a [f]ederal relationship." BIA AR140483 (allotments issued as trust allotments and the Indian Service took action in support). Furthermore, at the time the IRA was passed, Indians possessing homestead allotments on the public domain were still eligible to organize. BIA AR140483 n.134, citing Solicitor's Opinion, March 6, 1937, 1 Op. Sol. on Indian Affairs 732 (U.S.D.I. 1979) ("these Indians are not denied the benefit of organization or land purchase [under the IRA] because of the fact that they are not reservation Indians but possess homestead allotments.").

Some Cowlitz Indians also received allotments on the Quinault Reservation if they had not received one on another reservation or the public domain. BIA AR140483. The basis for such allotments is found in the Executive Order creating the Quinault Reservation and a 1911 Act. The November 4, 1873, Executive Order established the Reservation for "the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast;" and the Act of March 4, 1911, confirmed pre-existing allotment activity by directing the Secretary to make allotments on the Quinault Reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Id. Because Cowlitz members believed they were entitled to allotments on the Quinault Reservation as one of the tribes referenced in the phrase "these tribes," they filed suit against the United States. This lawsuit, Halbert v. United States, 283 U.S. 753 (1931), provides further evidence that the Tribe was under Federal jurisdiction. The Court held that "the Chehalis, Chinook and Cowlitz Tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." Id. at 760; BIA AR140483.

Based on the reference to the "Cowlitz Tribe" in the 1931 Halbert decision, the action by Congress to provide allotments for "other tribes of Indians in Washington" in the 1911 Act and its implementation as to Cowlitz Indians, and the virtually consistent position taken by the DOI to grant allotments to eligible Cowlitz Indians during the period from 1905 to 1930, the Secretary concluded the Cowlitz was under federal jurisdiction during this time. BIA AR140483-4.

Finally, DOI's approval of an attorney contract for the Tribe in 1932 is a key indicator that DOI regulated the affairs of the Cowlitz Tribe, and therefore the Tribe was under Federal jurisdiction. BIA AR140484. The Act of May 21, 1872, Revised Statutes § 2103, required contracts between Indian tribes and attorneys to be approved by both the Commissioner of Indian Affairs and the Secretary of the Interior in order to be valid. Id. This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to this statutory requirement, and thus "under federal jurisdiction." Id.

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

C. Plaintiffs' Assertions that the Cowlitz Indian Tribe is Ineligible for the Benefits of the IRA are Based on an Incorrect Reading of the Statute and Carcieri

1. Plaintiffs' Assertions that the Cowlitz Indian Tribe Cannot Meet the Requirements of the Secretary's Two-Part Inquiry for "Under Federal Jurisdiction" are Incorrect

The Clark County Plaintiffs devote several pages to the argument that federal recognition is necessary for a tribe to be "under Federal jurisdiction." Clark Cnty. Br. at 14-19. However, as discussed supra, because the term "now" in the IRA does not modify the term "recognized Indian tribe," there is no requirement that the tribe prove that it was viewed by the federal government as a "recognized" tribe in 1934.[30] The Clark County Plaintiffs also argue that the Secretary's evidence is insufficient because a failed treaty negotiation cannot provide evidence that a tribe was under Federal jurisdiction. Clark Cnty. Br. at 21-23. However, through the FAP process, DOI previously determined that the failed treaty negotiation initiated the federal relationship with the Cowlitz Tribe and was an unambiguous federal acknowledgment of the Tribe. 62 Fed. Reg. 8,983 (Feb. 27, 1997) ("Although the Lower Cowlitz refused to sign the Chehalis River Treaty, their treaty participation in the negotiations constitute unambiguous

[30] The Clark County Plaintiffs argue that the Cowlitz membership has been inappropriately expanded and, therefore, the Secretary cannot take land into trust on behalf of the Tribe. Clark Cnty. Compl. at 2-3, 24-28. Although they allege that this issue was raised before the agency during the process, the comments submitted by Plaintiffs were general in nature and do not reference the FAP regulations or the agency's authority to act pursuant to the IRA. Therefore, this argument is waived. Plaintiffs also lack standing to challenge the Cowlitz Tribe's implementation of its constitutional enrollment requirements. Regardless, the argument misconstrues the FAP regulations. First, Indian tribes retain their inherent power to determine tribal membership. Montana v. United States, 450 U.S. 544, 564 (1981). Second, Section 83.12(b) is designed to clearly define tribal membership prior to acknowledgment by defining the base roll. It does not impact a tribe's enrollment of additional members pursuant to their tribal constitution after the tribe is acknowledged and there is no requirement that the Secretary certify membership enrollments that are made pursuant to a tribe's constitution. Furthermore, there is no requirement in either the IRA or Part 151 regulations that requires the Secretary to examine the tribal membership roll before approving a land into trust application, nor is she prohibited from moving forward if there has been some expansion of tribal membership. If the Clark County Plaintiffs disagreed with the Secretary's acknowledgment decision because they believed the base roll to be over inclusive, they should have challenged that decision in 2000.

Federal acknowledgment of the tribe's sovereignty."). The regulations likewise specifically provide that "evidence that a group has had treaty relations with the United States" can demonstrate previous acknowledgment. 25 C.F.R. § 83.8(c)(1). As discussed supra, the date of unambiguous federal acknowledgment was later extended to 1880 during the acknowledgment process. 65 Fed. Reg. 8,436-01 (Feb. 18, 2000). Plaintiffs failed to challenge either determination during the FAP and are precluded by the statute of limitations from challenging that decision now. In any event, federal treaty negotiations demonstrate that the United States thought that the Cowlitz constituted a tribal entity with which a treaty was feasible, see Worcester v. Georgia, 31 U.S. 515, 559-60 (1832), and "reflect the existence of a relationship with the Tribe . . . and acknowledged responsibility for the Tribe." BIA AR140478.[31]

Plaintiffs also argue that DOI's determination conflicts with NIGC's earlier finding in its restored lands opinion that the Cowlitz had been terminated. Clark Cnty. Br. at 19-20, 24-26. This argument fails because a determination made by NIGC under IGRA does not affect the Secretary's exercise of authority under the IRA. BIA AR140485. The NIGC is not charged with administering the IRA and the NIGC has no special expertise in determining the legal status of tribes because its only delegated authority is limited to IGRA. Furthermore, the definitions of "terminated" and "restored" were judicially expanded to include a notion of "administrative" termination for the purpose of evaluating whether a tribe met IGRA's restored lands exception. See Grand Traverse Band of Ottawa and Chippewa Indians v. United States, 46 F. Supp. 2d 689, 697 (W.D. Mich. 1999), aff'd 369 F.3d 960 (6th Cir. 2004). Prior to these cases, the United States had argued that the "restored lands" exception in IGRA only applied to tribes for whom

[31] Plaintiffs' arguments to the contrary, which analogize to treaties with other countries, ignore the unique inherently federal power to manage Indian affairs, the preemptive effect of the treaty-making process, and the reality that Congress envisioned treaty-making with tribes as a means of preventing state encroachment on the exclusively federal power to regulate affairs with Indian tribes. United States v. Kagama, 118 U.S. 375, 383-84 (1886); Cohen § 1.02[3], at 24.

Congress had terminated the federal-tribal relationship and that the term "restored" was a term of art that applied "only to a process of restoration by way of Congressional action or by order of the court, not by agency acknowledgment." Id. Therefore, the United States argued, the restoration of lands could only be by Congressional action or court order. Id. However, the courts disagreed that "restoration" or "restored" were terms of art that only applied to congressionally restored tribes, so those definitions in IGRA were judicially expanded to include tribes that were administratively ignored, as well as tribes that were congressionally terminated. See id.; TOMAC, 433 F.3d at 866; Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 163–65 (D.D.C. 2000).[32] Thus, courts have held that, for IGRA purposes, the terms "restored" and "restoration"—and the inverse of restoration, "termination"—have a broader meaning when used to determine whether the restored lands exception in IGRA is applicable to a particular tribe. As a result, "termination" has a unique, judicially-constructed meaning in the context of IGRA. NIGC was applying IGRA's unique use of "termination" in its Indian lands opinion.[33]

Furthermore, only Congress can lawfully terminate the relationship with, and thus its obligations to, the Cowlitz. United States v. Celestine, 215 U.S. 278, 290 (1909). DOI's actions or inaction concerning the Tribe, discussed at length by Plaintiffs, are not tantamount to a lawful termination. Accordingly, while DOI's action or inaction concerning the Cowlitz Tribe may constitute "termination" under IGRA, this action or inaction does not otherwise terminate the

[32] Under this interpretation of IGRA, a tribe recognized through FAP could never fit in the restored lands exception because that tribe's ability to be recognized through the FAP is premised on it never being terminated. A tribe may only be acknowledged through the FAP if "[n]either the petitioner [tribe] nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." 25 C.F.R. § 83.7(g). Instead, a tribe recognized through FAP could acquire lands through the initial reservation exception.

[33] DOI has since narrowed the ability of a tribe to avail itself of both the restored lands and initial reservation exception. See 25 C.F.R. § 292.6.

relationship between the Tribe and the Federal government or otherwise alter whether a tribe was under federal jurisdiction.

The Secretary employed the agency's specialized expertise in Indian affairs and the authority delegated to her through the IRA to determine that the Cowlitz Tribe factually met the requirements of her legal interpretation of the phrase "under Federal jurisdiction." Plaintiffs misconstrue the Carcieri decision and the text of the IRA. Neither Carcieri nor the IRA requires a tribe to be recognized in 1934 and the Secretary's interpretation of the ambiguous phrase "under Federal jurisdiction" is entitled to Chevron deference and is correct as a matter of law. For all the foregoing reasons, the Court should grant summary judgment on behalf of the Federal defendants on the first claim in Plaintiffs' complaints.

2. In the Alternative, Even if the IRA is Interpreted to Require Recognition in 1934, the Cowlitz Tribe Would Qualify Under a Proper Understanding of the term "Recognized"

As explained above, the language of the IRA does not impose a temporal requirement on the term "recognized Indian tribe." Therefore, there is no need for this Court to consider or decide the issues in the alternative arguments set forth below. If, however, this Court interprets the IRA to the contrary, as both Plaintiffs now argue, Clark Cnty. Br. at 14-16; Grand Ronde Br. at 9-13, it should nonetheless find, as DOI alternatively concluded, that the Cowlitz in addition to being "under Federal jurisdiction" also constituted a "recognized" Indian tribe in 1934.

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

The concept of formal federal recognition was not developed or established in 1934. As the Secretary observed:

> The members of the Senate Committee on Indian Affairs debating the IRA appeared to use, the term 'recognized Indian tribe' in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term 'recognized Indian tribe,' even though '[t]he Government

> has not found out that they live yet, apparently. In fact, the Senate Committee's concern about the breadth of the term 'recognized Indian tribe' arguably led it to adopt the phrase 'under federal jurisdiction' in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as 'under federal jurisdiction,' if the IRA had incorporated the rigorous, modern definition of federally recognized Indian tribe.

BIA AR140469.[34]

Only in the years subsequent to the enactment of the IRA did DOI actively begin to engage in defining tribal recognition, making determinations that were largely conducted on a case-by-case basis for a large number of Indian groups. For example, in the 1930s alone, DOI's Solicitor's Office was called upon repeatedly to determine the status of groups seeking to organize under the IRA. Memo from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, BIA AR064398 (discussion of the case by case determinations for tribes seeking to organize under the IRA).[35]

Plaintiffs argue that the term "recognized Indian Tribe" refers to political entities having a government-to-government relationship with the United States. Grand Ronde Br. at 13-17; Clark Cnty. Br. at 16-19.[36] While Plaintiffs' understanding may be the current view of the

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[34] Based on this discussion, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits" in reference to the Stillaguamish Tribe. See Memo from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, BIA AR064398; BIA AR140463 n.31; BIA AR140469 n.60; BIA AR140471.

[35] This memorandum concluded that the Stillaguamish Tribe was both a "recognized tribe" and "under Federal jurisdiction" for IRA purposes due to the Tribe's fishing rights, guaranteed by the Treaty of Point Elliott. This treaty right confirmed the Tribe's recognized and under Federal jurisdiction status in 1934, regardless of whether DOI believed so at the time.

[36] Grand Ronde also claims that the recent decision in Stand Up For California! v. Dep't of the Interior, 919 F. Supp. 2d 51 (D.D.C. 2013), while adopting Justice Breyer's interpretation of "under Federal jurisdiction," supports their argument that Cowlitz cannot meet the requirements of the Secretary's two-part inquiry. Grand Ronde Br. at 24-25. However, the court agreed with the Secretary's interpretation and held that, "based on the Secretary's interpretive discussion and the Court's own reading of the statutory language, the Court concludes that the phrase 'recognized Indian tribe' in the IRA refers to

federal relationship with federally recognized Indian tribes, the contours of that relationship were not well-defined in the 1930s. In fact, formal regulatory parameters for recognition were not established until well after the IRA's enactment.[37] Felix Cohen, former Solicitor at DOI and the author of the original Cohen's Handbook on Federal Indian Law, developed the "Cohen criteria"[38] which lists the type of evidence the BIA considered when determining tribal status in the years following the IRA's enactment. Felix Cohen, Handbook of Fed. Indian Law 271 (1941); see also Statement of Hazel Elbert, Deputy to the Assistant Secretary – Indian Affairs [Indian Services], Department of the Interior, Hearing Before the Senate Select Committee on Indian Affairs, United States Senate, Oversight Hearing on Federal Acknowledgment Process ("FAP"), S. Hrg 100-823, pages 2-10, 61-62 (May 26, 1988) (discussing various factors BIA

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recognition in the cognitive or quasi-anthropological sense." Stand Up for California!, 919 F. Supp. 2d at 70. Furthermore, while it is true that the tribe in Stand Up voted on the application of the IRA to its reservation in 1935, as the Secretary explained in the Cowlitz ROD, "[f]or some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to accept or reject the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934." Thus, while voting on the IRA and the establishment of a reservation for the benefit of a tribe are clear indicators of Federal jurisdiction, nothing in the Stand Up decision stands for the proposition that those are the only relevant indicia.

[37] The Supreme Court decision Morton v. Mancari, 417 U.S. 535 (1974) demonstrates this point. In Mancari, the Court did not address the meaning of the phrase "recognized tribe" in the IRA, and the decision was issued prior to the adoption of the Federal acknowledgment regulations. Nevertheless, by 1974, the Court was using the then-current term "federally recognized Indian tribe" to refer to those tribes with whom the Federal government had established a government-to-government relationship. This reflects the evolving concept of "recognition" after 1934, as the IRA's use of "tribe" is broader than what the Court in 1974 or what we today consider "federal recognition."

[38] Those factors are: (1) "treaty relations with the United States;" (2) whether "the group has been denominated a tribe by act of Congress or Executive order;" (3) whether "the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;" (4) whether "the group has been treated as a tribe or band by other Indian tribes;" (5) whether "the group has exercised political authority over its members, through a tribal council or other governmental forms." Cohen, Handbook of Fed. Indian Law at 271. Cohen states that these factors were considered singly or jointly in making the determination. Plaintiffs assert, Grand Ronde Br. at 17, Clark Cnty. Br. at 14-15, that the Secretary inappropriately relied on the article by William Quinn discussing recognition. However, Plaintiffs read far more into the selective quotations than is appropriate. Rather than denying the existence of recognition on or before 1934 in the cognitive sense, Quinn noted that in the years prior to the IRA recognition had both a formal jurisdictional sense and a cognitive one. In any event, the Secretary did not rely on the substance of the article in support of her interpretation, but rather cited it for the undeniable proposition that there were different forms of recognition.

considered prior to the FAP); see also Allen v. United States, 871 F. Supp. 2d 982, 989–92 (N.D. Cal. 2012). The BIA also relied on a mixture of court opinions, limited statutory guidance, treaty law, and evolving departmental policy and practices, but lacked a clear and consistent system to apply these factors and recognize a tribe until the FAP. Id. In fact, DOI's considerations lacked precision and "led to inconsistencies in the BIA's final determinations of tribal status." Id. at 990.

The reality is that there was no formal process or method for recognizing a tribe until the establishment of the FAP in 1978.[39] Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978). However, tribes acknowledged through the FAP must prove their continuous existence not just as Indians, but as a tribal entity as well. The Cowlitz Tribe met that exacting burden and by doing so, necessarily met the criteria of the Cohen factors developed in the 1930's. 65 Fed. Reg. at 8,436-37. None of the Plaintiffs in this case challenged the Secretary's FAP findings.

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

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

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

> The evidence also indicated that throughout the period since 1855, the named leaders were identified by knowledgeable external authorities, primarily Federal officials, as exercising a sufficient amount of political influence or authority within the overall membership to meet criterion 83.7(c), which is intended to establish continuous tribal political existence. Evidence from BIA documentation was ample for this purpose for the period through the late 1930's, and there was also sufficient evidence for the more recent period.

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

For the foregoing reasons, even if the IRA required a tribe to be recognized in 1934, the FAP requires that a tribe show its continuous existence as a tribal political entity and through that process the Cowlitz established, and the Secretary found, that the Cowlitz have existed as a continuous tribal political entity since 1880 (including in 1934).

III. The Secretary's Gaming Determination Is Entitled to Deference

Both Plaintiffs also challenge the Secretary's determination that the Cowlitz Property is eligible for gaming under IGRA, Clark Cnty. Compl. at 25-26; Grand Ronde Compl. at 18-20. However, as DOI concluded in the ROD, the Cowlitz Property clearly meets the statutory and regulatory requirements to be eligible for the conduct of gaming. See BIA AR140504.

Because the Cowlitz Property would be acquired in trust after October 17, 1988, gaming would be lawful only if the Tribe's request meets one or more of IGRA's exceptions to the general prohibition against gaming on newly acquired lands. The Cowlitz Tribe's application requested that DOI accept the Property into trust as part of its initial reservation, making the parcel eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(B)(ii) (the "initial reservation

exception"). The initial reservation exception of IGRA provides that the general prohibition on gaming on lands acquired after October 17, 1988, does not apply when: "lands are taken into trust as part of the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." Id. The regulations implementing Section 2719 of IGRA require two inquiries for analyzing whether a tribe's request meets the requirements of the initial reservation exception: "(1) was the Tribe acknowledged through the Federal acknowledgement process?; and (2) is the subject land eligible to be taken into trust as part of the Tribe's initial reservation?" BIA AR140497. In the ROD's initial reservation determination, DOI concluded that the answer to the first inquiry is undoubtedly yes, and therefore, focused on the second.

Pursuant to DOI's regulations implementing Section 2719 of IGRA, 25 C.F.R. Part 292, the initial reservation exception allows for gaming on newly acquired lands if the following conditions are met. See 25 C.F.R. § 292.6. Because the Cowlitz Tribe had no proclaimed reservation on the effective date of the Part 292 regulations, DOI applied 25 C.F.R. § 292.6(d), which states:[40]

> If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has *significant historical connections* and one or more of the following modern connections to the land:
>
> (1) The land is near where a significant number of tribal members reside; or
>
> (2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

[40] As discussed above, the Cowlitz Tribe was acknowledged through the FAP and currently has no trust land and does not operate a gaming facility. BIA AR140496, 140501, 140504-505. Therefore, DOI concluded, and Plaintiffs have not disputed, that the Tribe meets the first three requirements of 25 C.F.R. § 292.6(a)-(c), because it would be the first reservation proclaimed for the Tribe. BIA AR140504-505.

> (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

Id. (emphasis added).

The key issue in subsection 292.6(d) is whether the land at issue is "within an area where the tribe has significant historical connections." The term "significant historical connections" is defined in IGRA's implementing regulations to mean, "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in *the vicinity of the land*." 25 C.F.R. § 292.2 (emphasis added). DOI concluded that there is sufficient evidence of historic use and occupancy *in the vicinity* of the Cowlitz Property to conclude that the Tribe has significant historical connections to the parcel pursuant to the regulations. BIA AR140507. DOI based its conclusion on evidence such as: the Indian Claims Commission findings that the Cowlitz Tribe's exclusive aboriginal territory is located only fourteen miles from the Cowlitz Property, BIA AR140507; the Cowlitz Tribe's historical presence at Warrior's Point located only three miles northeast of the Cowlitz Property, BIA AR140509-10; the Cowlitz Tribe's historical presence at Bellevue Point located only ten miles south of the Cowlitz Property, BIA AR140510-12; and the location of a significant battle between the Cowlitz and the Chinook Tribes only three miles away from the Cowlitz Property, BIA AR140514-15. DOI reached its conclusion based on its review of the FAP findings and ICC proceedings, as well as the material submitted by Plaintiffs, and concluded that the Cowlitz Tribe has significant historical connections to the area in which the Property is located to meet the requirements of the initial reservation exception. BIA AR140517-18. DOI also concluded that the Cowlitz Tribe has a modern connection to the Property because it maintains its governmental headquarters in Longview, Washington, only 22 miles away, satisfying the

requirements of 25 C.F.R. § 292.6(d)(2), and because a significant number of tribal members reside near the Property (104 members living in Clark County), BIA AR140518.

Plaintiffs argue that the Cowlitz Tribe lacks a significant historical connection to the Cowlitz Property because the Tribe's connections are too attenuated and too geographically distant from the Cowlitz Property. Clark Cnty. Compl. at 26; Clark Cnty. Br. at 28-32; Grand Ronde Compl. at 18-20, Grand Ronde Br. at 30-43. In making their arguments, Plaintiffs would like this Court to believe that DOI has departed dramatically from its prior application and interpretation of the term "significant historical connection" in finding that the Cowlitz Property is eligible for the "initial reservation exception." This is not true. Plaintiffs cite to several Indian land opinions in their brief, Grand Ronde Br. at 37-39, quoting selectively from these opinions in attempt to argue their case. However, Plaintiffs leave out several important factors in those decisions, namely the distances that those parcels were from each tribe's territory.[41] For example, Grand Ronde cites the NIGC's Bear River opinion, Grande Ronde Br. at 37, but fails to point out that the parcel was six miles from the boundary of the Bear River Band's Rancheria and outside the boundary of a negotiated but unratified treaty with the tribe. Bear River Band Rohnerville Rancheria Approval at 8-9 (Aug. 5, 2002), available at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx. The NIGC also found that it was three to six miles away from several other important sites for the tribe, concluding that the tribe nonetheless had a significant historical connection because it was in the vicinity.[42]

[41] Grand Ronde also misstates the Secretary's conclusion in the Scotts Valley Indian Land opinion. Grand Ronde Br. at 38-39. The Secretary determined that the nature of Scott Valley's use and occupancy in the vicinity of the parcel would not lead to the natural inference that the tribe used and occupied the parcel. AR140560-63. Despite Plaintiffs' insistence to the contrary, the Secretary's determination here is consistent with the Scotts Valley, Guidiville, and prior opinions.

[42] More examples: the approval for the Poarch Band of Creek Indians at 23-24 (the land was 12 miles from the Poarch Reservation); approval for Mooretown Rancheria Restored Lands Opinion at 10 (15 miles); The St. Ignace Parcel Does Not Qualify As The Restoration of Lands for An Indian Tribe

In finding the Cowlitz Property eligible for gaming, DOI similarly concluded that the Cowlitz were historically in the vicinity of the Cowlitz Property based on information that shows their presence three miles away at Warrior's Point, BIA AR140509-10, at Bellevue Point, which is ten miles south of the Cowlitz Property, BIA AR140511, on the Cowlitz trade route three miles from the Cowlitz Property, id., and the ICC's finding that the aboriginal title area of the Cowlitz Tribe is only 14 miles north of the Cowlitz Property, BIA AR140507; see figure 1, which maps these points in relation to the Cowlitz Property. BIA AR140545. All of this evidence, considered together, led DOI to appropriately conclude that the Cowlitz Tribe established that it was in the vicinity of the Cowlitz Property and that decision and DOI's interpretation of its regulations implementing IGRA are entitled to deference.

Grand Ronde claims that the ICC findings bar DOI from concluding that Cowlitz maintained a presence anywhere outside of the ICC adjudicated area. Grand Ronde Br. at 31, 33-34, 36. However, Grand Ronde misunderstands the standards used by the ICC in adjudicating claims. The ICC interpreted the ICCA provision allowing claims for taking of lands "owned or occupied" by a tribe to authorize recovery of damages only where the tribe could show that it had "aboriginal title" to lands. BIA AR140501-02. "The ICC adopted the strict standard for establishing aboriginal title announced by the Supreme Court in 1941 in United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941)." BIA AR140501. As a result, a tribe was required to show actual, *exclusive*, and continuous use and occupancy prior to loss of the land in order to be compensated for a taking. Id. There is no dispute that the Cowlitz could not establish exclusive use and occupancy of the Property because the Cowlitz shared that area with

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Restored to Federal Recognition (Sault Ste. Marie Tribe of Chippewa Indians) at 11-12 (50 miles); Legality of Gaming Under the IGRA on the Shriner Tract owned by Wyandotte Tribe at 21 (175 miles was too far to qualify); Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria at 9 (approval; 10 miles). All of these opinions are available at the NIGC website: http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

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

DOI's determination that the Cowlitz Property would qualify under the "initial reservation exception" is consistent with prior Indian land opinions addressing whether a tribe has "significant historical connections" to the area in which a parcel is located to justify their ability to operate a gaming facility on that land. Moreover, Plaintiffs' arguments completely ignore the standard of review of agency actions such as DOI's determination. Courts may not overturn an agency's decision simply because there may be conflicting evidence, and "in the absence of clear evidence to the contrary, courts presume that [agencies] have properly discharged their official duties." Nat'l Archives & Record Admin. v. Favish, 541 U.S. 157, 174 (2004). Moreover, an agency decision must be upheld so long as the agency examines the relevant data and sets out a satisfactory explanation including a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). That is all that is required, and the only question before the Court at present is a legal one: whether DOI's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Demonstrating this is Plaintiffs' burden. See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 37 (D.C. Cir. 1986) ("the party

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

IV. The Department of the Interior Fully Complied with NEPA

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

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

Initially, the Court need not reach any of the NEPA arguments brought by Grand Ronde Community because it lacks standing to make such claims. "[S]tanding is an essential and unchanging part of [Article III's] case-or-controversy requirement." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A plaintiff has standing to enforce procedural rights, such as those that NEPA affords, only if the applicable procedural requirement was "designed to protect some threatened concrete interest" of the plaintiff. Id. at 573 n.8; see Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc). "NEPA, of course, is a statute aimed at the protection of the environment." ANR Pipeline Co. v. FERC, 205 F.3d 403, 408 (D.C. Cir. 2000). A plaintiff challenging an agency's alleged failure to follow one of NEPA's procedural requirements must therefore show harm to a "particularized environmental interest." Fla.

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

Grand Ronde lacks standing for its NEPA claims because it does not raise a particularized environmental interest. Nor likely could it. The Spirit Mountain Casino, which provides the basis for Grand Ronde's alleged harm, is *eighty-five miles* from the Cowlitz Property. See BIA AR082244. The injury that Grand Ronde does allege is purely economic: lost revenue from increased competition to its own casino. See Grand Ronde Br. at 47; BIA AR102778 (letter from Grand Ronde stating that it "has an important economic interest at stake"). The United States Court of Appeals for the District of Columbia Circuit has squarely held that such economic harm, when not interrelated with environmental effects, is insufficient for purposes of standing under NEPA. See Town of Stratford, 285 F.3d at 89; ANR Pipeline, 205 F.3d at 408. This Court has followed suit, recognizing in the context of a DOI decision to accept land in trust for a tribe, that, to fall within NEPA's zone of interests, any economic interest must stem from the federal action's environmental impacts. See City of Roseville v. Norton, 219 F. Supp. 2d 130, 165 (D.D.C. 2002) (citing City of Olmstead Falls v. FAA, 292 F.3d

261, 267–68 (D.C. Cir. 2002)).[43] Grand Ronde's alleged harm does not fall into that category, and it therefore lacks standing to pursue its NEPA claims.

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

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

1. Interior Reasonably Defined the Purpose and Need

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

The FEIS specifies the proposed action's purpose as creating a Tribal land base for the currently-landless Cowlitz Indian Tribe. BIA AR075837. The Tribe will use the land to

[43] For similar holdings see Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005); Lower Ark. Valley Water Conservancy Dist. v. United States, 578 F. Supp. 2d 1315, 1338 (D. Colo. 2008); Hurd Urban Dev., L.C. v. Fed. Highway Admin., 33 F. Supp. 2d 570, 572–74 (S.D. Tex. 1998).

"establish a Tribal Headquarters from which its Tribal Government can operate to provide housing, health care and other government services, and from which it can conduct the economic development necessary to fund these Tribal Government services and provide employment opportunities for its members." Id. The FEIS makes clear that the need for the project derives from the Cowlitz's current lack of "meaningful opportunities for economic development and self-sufficiency of the Tribe and its members." Id. More importantly, see Busey, 938 F.2d at 196, the stated purpose and need is in accord with the statutory authority under which DOI would be acting here. See BIA AR140384 (ROD at 3). The IRA "provides the Secretary of the Interior with general authority to acquire land in trust status for Indian tribes in furtherance of the statute's broad goals of promoting Indian self-government and economic self-sufficiency." BIA AR140384 (ROD at 3); see 25 U.S.C. § 465.

Contrary to Plaintiffs' arguments, the purpose and need statement did not inappropriately limit the agency's choice of alternatives. Indeed, after an initial feasibility screening, the FEIS looked into a total of thirteen different possible locations for the Cowlitz's proposed project (BIA AR075847–80, BIA AR075882–86), analyzing in detail two site location alternatives and several on-site alternatives (BIA AR075847–80).[44] Thus, Grand Ronde's citation to Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997), is off-point. Grand Ronde Br. at 44, 45. In Simmons, the Seventh Circuit found that the agency had misstated the applicant's purpose. 120 F.3d at 669. The applicant had sought a permit to supply water to a town and a

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

water district, but the agency had narrowed that purpose to one that supplied water from a single source, thus effectively leaving only one alternative. See id. That was not the outcome here.[45]

Clark County is also incorrect in arguing that DOI's use of feasibility criteria impermissibly narrowed the purpose and need statement. See Clark Cnty. Br. at 40. The FEIS did not use the feasibility criteria to define the purpose and need; rather, as discussed further below, it used them to determine which, if any, of nineteen additional potential project locations were "reasonable" alternatives.[46] See BIA AR075882. Determining whether a given alternative is reasonable is a separate inquiry from identifying the purpose and need for the action. Agencies need not consider alternatives that are "too remote, speculative, or impractical or ineffective," regardless of whether those alternatives could possibly meet the action's purpose and need. Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1039 (10th Cir. 2001) (citation omitted); see Vt. Yankee, 435 U.S. at 551 (in order for an EIS to be "more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility").

Plaintiffs offer two additional reasons why they believe the purpose and need statement to be faulty: (1) a claim that DOI inappropriately relied upon the Cowlitz Indian Tribe's statement of unmet needs; and (2) a claim that DOI acted contrary to NEPA by modifying the purpose and need statement in the FEIS from that which had appeared in the DEIS. See Grand Ronde Br. at 43–45; Clark Cnty. Br. at 40–42. Neither has merit.

First, Plaintiffs misunderstand the purpose of the Cowlitz's Unmet Needs Report. The Cowlitz developed the Report to meet a requirement under DOI's land-into-trust regulations.

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[45] Grand Ronde's citation to Sierra Club v. Van Antwerp, 709 F. Supp. 2d 1254, 1267–68 (S.D. Fla. 2009), is also misplaced. Grand Ronde Br. at 45. The portion of the opinion to which Grand Ronde cites addresses requirements under the Clean Water Act, not NEPA. See id.

[46] Eleven of those nineteen locations were considered in further detail. See BIA AR075882–86. Those eleven were in addition to the Cowlitz's proposed location and the Ridgefield Interchange, for a total of thirteen different locations.

See 25 C.F.R. §§ 151.10(b), 151.11(a), (c); BIA AR092977 (Mar. 12, 2007 cover letter submitting Report); BIA AR091908. The information from the Report was incorporated into the NEPA purpose and need statement only because of public comments that had requested the information, and, as a result, disclosing tribal plans that are normally not disclosed at all. See BIA AR102780–83, BIA AR102789; BIA AR075837–38 (general response to comment); AR078614 (itemized responses to Grand Ronde comments). Thus, Clark County is simply wrong that the Unmet Needs Report was developed for the NEPA process, let alone to narrow the purpose and need statement. See Clark Cnty. Br. at 40–42. The August 2006 memorandum from which Clark County quotes (Br. at 41–42) does not even mention revising the purpose and need statement. See BIA AR058651 (summarizing discussions between BIA and its contractor).

Regardless, it is entirely appropriate for agencies to consider the applicant's needs and objectives in defining project purpose. City of Grapevine v. U.S. Dep't. of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994); Busey, 938 F.2d at 196–98. "When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application" and "cannot redefine the goals of the proposal that arouses the call for action." Id. at 196, 199 (citation omitted). Agencies are "precluded from completely ignoring a private applicant's objectives." Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999). The fact that the applicant here is a sovereign tribal nation only buttresses the point. Federal government adjustments to a tribe's internal economic budgetary planning and needs would be inappropriate and contrary to federal Indian policies encouraging tribal sovereignty and self-determination. See BIA AR140406.

Plaintiffs' disagreement with the Cowlitz's estimation of the Tribe's needs does not trump DOI's ability to take the Cowlitz's stated needs into account. See Grand Ronde Br.at 44–

45; Clark Cnty. Br. at 41. "[Courts] [are to] 'uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable.'" Theodore Roosevelt Conservation P'ship, 744 F. Supp. 2d at 161 (quoting Busey, 938 F.2d at 196). It is hardly unreasonable to believe that a landless, and, thus, largely incomeless tribe with over 3,500 members needs an annual revenue of $113 million to provide its growing (and aging) membership with health care, government and social services, and housing assistance. See BIA AR140413; BIA AR081569–95; BIA AR083808–15 (Cowlitz response). Cowlitz is forced to develop these programs from a budgetary baseline of nearly zero.[47]

Second, the FEIS's reference on the Cowlitz Unmet Need Report did not undercut the public's ability to meaningfully participate in the NEPA process. Notably, Plaintiffs ignore the vast public involvement that occurred here. DOI hosted three public meetings (BIA AR123662–63, BIA AR140385); publicly circulated an initial EA for comment (BIA AR131351–52); publicly released the DEIS for 145 days of public comment (BIA AR106546–48, BIA AR102715, BIA AR140385); and publicly released the FEIS for seventy-one days of public comment (BIA AR140385, BIA AR074012). All told, DOI granted the public more than twice the review time envisioned by CEQ regulations. Compare 40 C.F.R. § 1506.10(b). DOI also dedicated three FEIS appendices (covering 260 pages) to public comments, see BIA AR078415–477; logged and disclosed the public comments to the DEIS, see BIA AR078419–47 (FEIS Appendix A); provided responses to general and over-arching comments, see BIA AR078448–83

[47] Grand Ronde's issue with the Cowlitz's estimated annual health care costs is particularly inappropriate. See Grand Ronde Br. at 45. An annual health insurance rate of $11,000 per person is nowhere near unreasonable. And Grand Ronde's objection to upfront costs for the Cowlitz to establish government programs and a health care clinic is simply irrelevant. See Grand Ronde Br. at 44–45. Rather than upfront costs, the FEIS purpose and need statement focused on the need for a sustained revenue stream to meet annual budgetary requirements—a needed revenue stream for which the Cowlitz currently have nothing. See BIA AR075837.

(FEIS Appendix B); and provided detailed responses to thirty-nine substantive comment letters broken down by topic, see BIA AR078484–677 (FEIS Appendix C).[48] This included public comment and agency response on the purpose and need statement. See BIA AR078453–54. The public had more than sufficient opportunity to meaningfully participate.

Plaintiffs similarly ignore the limited manner in which DOI modified the purpose and need statement to reference the Unmet Needs Report. The modification was not the wholesale change that Plaintiffs make it out to be. Instead, in response to public comments—including comments by these Plaintiffs—DOI focused one paragraph of the statement on the Unmet Needs Report's monetary quantification of need, rather than the DEIS's narrative comparison of the Cowlitz's socioeconomic conditions with those of the surrounding community. Compare BIA AR075837 (FEIS) with BIA AR106633 (DEIS); see also BIA AR122871–73 (purpose and need as stated in Feb. 2005 NEPA scoping report). The remainder of the statement and the basis of the Tribe's need—and, thus, the purpose and need that informed public comment and agency decision-making—did not change. Courts have upheld agency modification of purpose and need statements in similar circumstances. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155–56 (9th Cir. 1997); City of Grapevine, 17 F.3d at 1506–07.

The public also had the opportunity to comment directly on the Unmet Needs Report during the public review period for the FEIS. See BIA AR074228–29 (73 Fed. Reg. 31,143–44 (May 30, 2008)). Plaintiffs themselves took advantage of that opportunity. See BIA AR071480–12; BIA AR000287–92. DOI considered and responded to those comments in reaching its final decision. See BIA AR140412–13 (ROD at 31–32). Contrary to what Plaintiffs seem to expect, NEPA regulations do not require circulation of a never-ending parade of draft

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

EISs in response to comments. See 40 C.F.R. § 1503.4. "The very purpose of a DEIS is to elicit suggestions for change." City of Grapevine, 17 F.3d at 1507. To that end, CEQ regulations require that an FEIS respond to comments received on the DEIS. See 40 C.F.R. § 1502.9(b). That is precisely what DOI did here.

Thus, Grand Ronde's demand for a supplemental or new EIS is particularly unwarranted. See Grand Ronde Br. at 51. CEQ regulations require agencies to supplement existing NEPA documentation where some major federal action remains and there are "substantial changes in the proposed action that are relevant to environmental concerns," or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). The FEIS's modification of the purpose and need in response to public comment does not fall into either of those categories. BIA AR140406. "[R]equiring agencies to repeat the public comment process when only minor modifications are made promises to prolong endlessly the NEPA review process." California v. Block, 690 F.2d 753, 771 (9th Cir. 1982). NEPA's purpose is to inform, rather than prevent, agency decision-making. The public involvement here fulfilled that purpose.

2. Interior Considered a Reasonable Range of Alternatives

Under the stated purpose and need, DOI properly considered a reasonable range of alternatives. NEPA requires agencies to "objectively evaluate all *reasonable* alternatives," and briefly discuss those that were eliminated from detailed study. 40 C.F.R. § 1502.14(a) (emphasis added). A "rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'" Busey, 938 F.2d at 195 (citation omitted) (emphasis in original). An agency need not consider alternatives which do not meet the proposed action's purpose and need, *or* which can be rejected as "too remote, speculative, or . . . impractical or

ineffective." Custer Cnty., 256 F.3d at 1039; Busey, 938 F.2d at 195–96. "[T]he Court will 'uphold an agency's . . . discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail.'" Theodore Roosevelt Conservation P'ship, 744 F. Supp. 2d at 161 (citation omitted).

Here, DOI expansively discussed potential alternatives. BIA AR075847–87. The FEIS analyzed in detail the potential effects of six alternatives, including: the Cowlitz's proposed project (Alternative A); an alternative location at the Ridgefield Interchange two miles to the south (Alternative E); non-casino and no-action alternatives (Alternatives D and F); and alternative development configurations (Alternatives B and C). BIA AR075847–82; BIA AR076068–387. In addition, DOI looked at a total of nineteen other potential alternative sites. BIA AR075882. The FEIS used seven feasibility criteria to narrow the nineteen other potential sites to eleven.[49] As NEPA requires, DOI briefly discussed why those eleven alternative sites were eliminated from detailed study. See 40 C.F.R. § 1502.14(a). Six of those eleven sites, which had also been identified in the DEIS, were not available for sale. See BIA AR106673–74; BIA AR075882–86. The remaining five sites were assessed in response to public comments stating that sites farther to the North—and, thus, farther from the Vancouver, Washington, and Portland, Oregon, market—should be considered. See BIA AR075883–86; BIA AR078454–56 (response to comments). DOI assessed these sites and, using three different market analyses, determined the sites would not meet the Cowlitz's identified need for sustained revenue. BIA AR000035; BIA AR000061–62; BIA AR075886; BIA AR082328–52.

Plaintiffs do not take issue with the FEIS's selection of the six alternatives considered in detail. Instead, they argue that DOI should have further explored one or more of the five

[49] The criteria included: 1) proximity to the I-5 freeway; 2) contiguous properties forming twenty acres or more; 3) contiguous ownership; 4) availability for purchase; 5) environmental constraints; 6) availability of public services; and 7) underlying zoning designation. BIA AR075882.

Northern sites. See Grand Ronde Br. at 46–47; Clark Cnty. Br. at 41. But DOI reasonably selected the six alternatives to discuss in detail, a discussion that fully-informed the decision-maker and the public as to the potential alternatives to the Cowlitz's proposal. See BIA AR075886 (noting that five Northern sites are not so distinguishable from those considered that they would offer additional information that would assist the decision-maker). Clark County argues that DOI failed to explain why it did not further analyze the five Northern sites. Clark Cnty. Br. at 40. To the contrary, however, DOI explained in the FEIS and the ROD that the sites "were found to be inconvenient to both the Seattle and Portland/Vancouver markets," and because the sites are located "in more rural, less developed, areas, the potential for adverse impacts would likely be more significant." BIA AR140388 (ROD); BIA AR075883–86 (FEIS). DOI considered the sites in response to public requests that it do so even though Cowlitz does not have the resources to purchase or otherwise obtain title. See BIA AR140387.

Grand Ronde and the Clark County Plaintiffs are clearly displeased with the Cowlitz's chosen location for its project. But DOI's role is not to compel a site location upon the Cowlitz. Nor is NEPA an outcome-determinative statute. Robertson, 490 U.S. at 350. Instead, NEPA is aimed at informing decision-makers and the public about the potential environmental effects of a proposed action and that action's reasonable alternatives. Balt. Gas, 462 U.S. at 97. That is exactly what occurred here.

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

"NEPA requires that an agency take a 'hard look' at the environmental consequences of the proposed course of action." Theodore Roosevelt Conservation P'ship, 744 F. Supp. at 159 (citations omitted); see 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. The Court's role is to ensure the agency takes that look, "'not to interject its own judgment as to the course of action to be

taken.'" Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52, 59 (D.D.C. 2009) (quoting Hammond v. Norton, 370 F. Supp. 2d 226, 240 (D.D.C. 2005)).

DOI's FEIS took the requisite "hard look." The FEIS discussed potential impacts of everything from soils to cultural resources, see BIA AR076071–222, as well as any cumulative effects associated with those impacts (BIA AR076344–84). The FEIS summarized for the public and agency decision-makers the unavoidable adverse effects that would result from the proposed action. BIA AR076385–87; see BIA AR140395–403 (summary in ROD).

Of the more than 300 pages of impacts analyses in the FEIS, Plaintiffs take issue with only three specific items: (1) potential economic effects on Grand Ronde (Grand Ronde Br. at 47–51); (2) effects on water quality (Clark Cnty. Br. at 42–45); and (3) effects on land use (Clark Cnty. Br. at 37 n.18, 38). None of Plaintiffs' arguments demonstrate a violation of NEPA.

1. Interior Appropriately Addressed Economic Effects

"Only when socioeconomic effects somehow result from a project's environmental impact must they be considered. Whether an impact on the 'human environment' must be addressed depends on 'the closeness of the relationship between the change in the environment and the "effect" at issue.'" Hammond, 370 F. Supp. 2d at 243 (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 771–72 (1983)). As the United States Supreme Court has articulated:

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

Metro. Edison Co., 460 U.S. at 772; see Ass'n of Pub. Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1186 (9th Cir.1997).

Here, the potential for revenue reduction at the Grand Ronde's Spirit Mountain Casino is a purely economic effect with no close link to the environment. Grand Ronde admitted as much during the administrative process. BIA AR102778. NEPA therefore did not require DOI to consider those economic effects. Grand Ronde's effort to now articulate a competition-based loss in casino revenue as a "socioeconomic impact" does not change the fact that its revenues have no link whatsoever to any environmental effect at or near the Cowlitz Property. Grand Ronde Br. at 47–48. DOI recognized as early as February 2005 that the potential for revenue-related effects on the Spirit Mountain Casino was not a NEPA issue; but the agency nonetheless provided the information to "encourag[e] informed comment by the public and consideration of decision makers." See BIA AR122864 (portions of Feb. 2005 NEPA scoping report).

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

would continue to grow even after the Cowlitz development.[50] See BIA AR140429 (ROD at 48). Thus, as NEPA would have required, the FEIS assessed the potential impact and informed the public and the decision-maker of the potential outcome.[51]

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

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

Clark County's main point with respect to water quality is that DOI did not discuss what would happen if a National Pollutant Discharge Elimination System ("NPDES") permit does not issue for the Cowlitz development. See Clark Cnty. Br. at 42–44. But, with respect to permits, NEPA requires that agencies "list all Federal permits . . . which must be obtained in implementing the proposal." 40 C.F.R. § 1502.25(b). DOI complied with that requirement here. See BIA AR076082; BIA AR140390–91. In addition, the FEIS's appendices include extensive reports on wastewater treatment. See BIA AR077191–233; BIA AR081597–726. These, in addition to discussions in the FEIS (BIA AR76079–92), were more than sufficient to inform

[50] Grand Ronde cites to a non-record website to support its arguments. See Grand Ronde Br. at 49–50 (citing N.J. Division of Gaming Enforcement, Historical Operating Statistics, available at http://www.nj.gov/oag/ge/historicalstatistics.html). But the citation does not indicate from where or how Grand Ronde derived its purported statistics. Regardless, the information was not before DOI decision-makers and is therefore outside this Court's scope of review under the APA. See Franks v. Salazar, 751 F. Supp. 2d 62, 67 (D.D.C. 2010). Similarly, the website to which Grand Ronde cites to purportedly substantiate its income numbers does not appear to be a functioning website. See Grand Ronde Br. at 50 n.35 (citing "http://censtats.gov").

[51] Grand Ronde is also incorrect that DOI's allegedly inadequate consideration of financial impacts to the casino violated DOI's trust responsibilities. See Grand Ronde Br. at 50–51. "The federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources. The elements of this type of common law trust are a trustee (the United States), a beneficiary . . . and a trust corpus (the regulated Indian property, lands or funds)." Inter Tribal Council of Ariz., Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (citations and quotations omitted). Even if Grand Ronde's casino revenues were trust assets (which they are not, AR140405), *future* revenues would not yet be held in trust. There is no "control or supervision over tribal monies" from which "the fiduciary relationship [would] normally exist[ ] with respect to such monies." Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (citation omitted). The essential trust corpus is missing. See Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297–98 (D.N.M. 1996), aff'd 104 F.3d 1546 (10th Cir. 1997).

agency decision-makers and the public about potential impacts from wastewater. See also BIA AR140417–18 (ROD at 36–37). The U.S. Environmental Protection Agency, after reviewing the FEIS, stated: "[t]he measures taken to obtain additional baseline data, and address water temperature, fecal coliform and wetland issues should assure that water and air quality standards will be met and biological resources will be protected." BIA AR074071.

After this Court remanded DOI's decision in March 2013, DOI again assessed the environmental picture, this time to determine whether that picture had changed since the 2010 ROD. See BIA AR 138742–878 (April 2013 Final EIS Evaluation of Adequacy). This included updated information on potential impacts to water resources. See BIA AR138745–48; Clark Cnty. Br. at 44–45. DOI concluded that there would be "[n]o additional impacts to water resources beyond those identified within the 2008 FEIS . . . ." BIA AR138748. That conclusion is entitled to deference. See Nat'l Parks Conservation Ass'n v. Jewell, ___ F. Supp. 2d ___, No. 12-cv-1690-RWR, 2013 WL 4616972 at *7 (D.D.C. Aug. 30, 2013) (the "decision whether to prepare a supplemental EIS is entitled to deference under the arbitrary and capricious standard." (citations omitted)).

Clark County's concern with the proposed site's land use designation, which the County primarily relegates to a footnote earlier in its brief, is even further misplaced. See Clark Cnty. Br. at 37 n.18, 38. Prior to the FEIS, a decision by the Western Washington Growth Management Hearings Board remanded to Clark County the County's growth management plan. See BIA AR140409-10 (ROD at 29-30). The remand resulted in the plan's "Light Industrial with an Urban Holding" designation for the Cowlitz Property being reverted back to the previous "Agricultural with an Industrial Urban Reserve" designation. See id.; see also BIA AR138753. Regardless of the designation, however, the FEIS stated the current land uses at the site and in

the surrounding area (BIA AR076012–13) and described how Cowlitz's proposal would affect those uses (BIA AR076211–14; see BIA AR140400 (ROD at 19)). The potential change in land use designation therefore did not present any significant new information bearing on the proposed action's impacts. See BIA AR140410; BIA AR140433–34; BIA AR138753.

3. Interior's Reference to the Cowlitz Environment, Public Health, and Safety Ordinance was Appropriate and Fully Complied with NEPA

The FEIS's reference to the Cowlitz Indian Tribe's Environment, Public Health, and Safety Ordinance as a source of mitigation also does not violate NEPA. The Ordinance contains several commitments that the Cowlitz will undertake to mitigate potential local impacts. See BIA AR082804–11; BIA AR075842–45; BIA AR083093 (Cowlitz letter to Clark County); BIA AR083095–96 (Clark County letter to DOI). It also waives the Cowlitz Indian Tribe's sovereign immunity to allow Clark County to sue the Tribe for specific performance of the Ordinance's obligations. See BIA AR082805. Clark County argues that the Ordinance will not provide for effective mitigation because it can be revoked and is not enforceable. See Clark Cnty. Br. at 37–39. As detailed below, Clark County is incorrect in those assertions. Regardless, however, NEPA does not require that mitigation discussed in an EIS be enforceable and incapable of revocation. Instead, an EIS must contain "a reasonably complete discussion of possible mitigation measures." Robertson, 490 U.S. at 352; Defenders of Wildlife v. Salazar, 698 F. Supp. 2d 141, 149–50 (D.D.C. 2010); see 40 C.F.R. §§ 1502.14(f), 1502.16(h). DOI complied with that requirement here, discussing possible mitigation in the FEIS (AR076388–411) and the ROD (AR140439–54), and considering a mitigation plan in its decision-making (AR066017–45). Those discussions "'permit[ted] a decisionmaker to fully consider and balance the environmental factors.'" Defenders of Wildlife, 698 F. Supp. 2d at 149 (citation omitted).

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

In the Fourth Claim of their Complaint, the Clark County Plaintiffs allege that the NIGC's approval of the 2008 EPHS amendment to the Cowlitz Tribe's gaming ordinance was arbitrary and capricious because NIGC lacked approval and enforcement authority.[52] Clark Cnty. Compl. at 26-28. As discussed below, because the Chairman of the NIGC had the authority to approve the 2008 amendment, the Federal Defendants should be granted summary judgment on the fourth claim of their complaint.[53]

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

Contrary to Plaintiffs' assertions, Clark County Br. at 33-35, the NIGC did not ignore the issues that the EPHS Amendment presented. In approving the EPHS Amendment, the Chairman explained that his "approval under IGRA does not implicate any other state or federal statute. Specifically, my decision does not affect the status of the Tribe-County memorandum of understanding under state law or the public's right to participate in the analyses being conducted by the federal government under NEPA." NIGC AR000002. Furthermore, because the Cowlitz

[52] In their Complaint, the Clark County Plaintiffs allege that the NIGC was not authorized to approve a gaming ordinance before the land is acquired into trust, Clark Cnty. Compl. at 27, but in their brief, this argument is only mentioned in a footnote. Clark Cnty. Br. at 33 n.14. Any challenge to the 2005 approval is barred by the statute of limitations. 28 U.S.C. § 2401(a). Regardless, there is nothing remarkable about the NIGC's later change in position on site-specific gaming ordinances for land that is not yet in trust. Tohono O'odham Nation Class III site-specific, conditional gaming ordinance amendment (Aug. 24, 2011) ("TON Denial"), available at www.nigc.gov/Reading_Room/Freedom_of_Information_Act.aspx. Though NIGC's present interpretation differs from the prior, "an agency with authority to interpret a statue has the authority to change its interpretation, and a reinterpretation of a statute is 'entitled to no less deference . . . simply because it has changed over time.'" Id. (citing Nat'l Home Equity Mort. Ass'n v. Office of Thrift, 373 F.3d 1355, 1360 (D.C. Cir. 2004)). It is axiomatic that an agency can change its policy choices or statutory interpretations. EME Homer City Generation, L.P. v. E.P.A., 2012 WL 3570721 (D.C. Cir. 2012). Like EPA in EME Homer City, NIGC acknowledged its approaches and the reasons for those approaches in both the Cowlitz and the Tohono O'odham ordinance approvals. NIGC AR000001-2; NIGC AR001622-23; TON Denial at 8.

[53] The Clark County Plaintiffs also fail to make specific allegations regarding the substance of the Indian lands opinion issued as part of the 2005 ordinance approval by the Chairman of the NIGC as part of that claim.

Tribe, "provid[ed] more with regard to EPHS enforcement than is minimally required under IGRA" the Chairman was obligated to approve the EPHS Amendment, "even if there are legal or practical impediments regarding such extra measures[.]" Id. The Chairman goes on to state that, "[w]hether the Tribe's approved ordinance amendment also will serve a purpose under NEPA is a separate issue that should be addressed in the NEPA process." Id.

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

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

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

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

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

Plaintiffs' statement that the Cowlitz Tribe has no intention of keeping its commitment or to refer to the commitments of the Cowlitz Tribal government as "fanciful" is purely speculative. Clark Cnty. Br. at 37. Furthermore, it is misleading, particularly for Clark County, which would have the ability to enforce the waiver of sovereign immunity, to state that it is not enforceable. Because the EPHS Amendment is enforceable, BIA's decision to rely on it for the mitigation measures is entitled to deference and is not arbitrary or capricious.

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

CONCLUSION

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

Dated: November 6, 2013

Respectfully submitted,

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s/ Kristofor R. Swanson

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2013, I filed the above pleading with the Court's CM/ECF system, which will send notice of such filing to all parties.

s/ Kristofor R. Swanson
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