IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, *Plaintiff,* v. **SALLY JEWELL, et al.,** *Defendants*.	Case No. 1:13-cv-00849 Judge Barbara J. Rothstein

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Cowlitz Indians have lived in what is now southwestern Washington State since time immemorial. AR140460, AR018924, and National Indian Gaming Commission AR002042-23. Yet for more than a century and a half, the Cowlitz Indian Tribe has had to hold its people, its traditions, and its government together without the benefit of a single acre of inalienable trust land. Without a reservation, the Tribe has no territory over which it can exercise its sovereign governmental authority, no central location to provide services to its people, and no land to engage in tribal economic activity free from state and local taxation. Without a reservation, the Cowlitz Tribe will forever remain a poor, disadvantaged second-class citizen among its federally recognized sister tribes.

The members of the Grand Ronde Tribe of Oregon live on a reservation that encompasses 10,300 acres of land, on which the Tribe furnishes a range of services and benefits from a substantial tribal casino operation (located about 85 miles from the Cowlitz Parcel). In its zeal to foreclose competition in a huge gaming market that stretches into Washington State, Grand Ronde advocates for a particularly constrained interpretation of the Secretary of the Interior's Indian Reorganization Act authority, one which would prevent the Secretary not just from acquiring this particular 151 acres for the Cowlitz Tribe, but which in fact would prevent the Secretary from acquiring *any* reservation land for the Cowlitz *anywhere, ever*. Piling on, Clark County and four local privately-owned Card Rooms seek to do the same.

In their two separate briefs, Plaintiffs essentially advance three major arguments. First, Plaintiffs argue that the Secretary does not have authority to acquire land in trust for the Cowlitz Tribe because (i) Cowlitz does not meet the standard set out by the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009); and, (ii) Interior's federal acknowledgment regulations in 25 C.F.R. § 83 require BIA to review the Cowlitz Tribe's post-acknowledgment tribal enrollment

and BIA failed to do so. Second, Plaintiffs argue that the Tribe does not have "significant historical connections" to the area in which the Cowlitz Parcel is located, such that, even if taken into trust, the land would not meet the Indian Gaming Regulatory Act's requirements for an "initial reservation" (meaning that Cowlitz would not be allowed to use the land for gaming). Finally, Plaintiffs argue that Interior's compliance with NEPA is flawed because the Department failed to take a hard look at the environmental consequences of the Tribe's proposed project, and improperly relied on the Tribe's environmental ordinance for mitigation.

For the reasons set forth in this Memorandum, all of these arguments are entirely without merit -- neither supported by the law nor the facts in the Administrative Record -- and are designed for no other purpose than to prevent the Cowlitz Indian Tribe from benefiting from the same status, the same right to a federally-protected land base, and the same economic development opportunities that are enjoyed by every other federally recognized tribe in the states of Oregon and Washington. The Cowlitz Indian Tribe respectfully requests that this Court reject Plaintiffs' arguments and affirm the Secretary's decision.

STATEMENT OF FACTS

I. STATUTORY AND LEGAL FRAMEWORK

A. The Indian Reorganization Act of 1934

During the entirety of the United States' history prior to enactment of the Indian Reorganization Act (IRA), federal policy toward Indian tribes was dedicated to forced assimilation, wholesale removal, and even extinction. As non-Indian migration west accelerated, so too did the United States' efforts to open up Indian lands to non-Indians. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 78 (1942 ed.). The General Allotment Act of 1887, 24 Stat. 388, authorized the allotment of portions of tribal lands to individuals, and included a mechanism by which those lands could pass out of Indian ownership. The effect was both to

break up reservations and to weaken or disestablish tribal governments. Cohen, § 1.04 (2005 ed.).

It was within this historical context that the Indian Reorganization Act (IRA) of 1934 was crafted to effect a sea change in federal Indian policy. The IRA explicitly rejected long-standing federal policies that had undermined the political and even physical existence of tribes, and instead provided support for tribal governments, tribal economic development, and most important here, an administrative mechanism to expedite reacquisition of land for Indians. Cohen, § 1.05 (2005 ed.). Between 1887, when the General Allotment Act was passed, and 1934, when the IRA was enacted, more than 90 million acres of tribal land passed out of trust. 64 Fed. Reg. 17,576 (Apr. 12, 1999). Commissioner of Indian Affairs John Collier, one of the principal architects of the IRA, was particularly focused on the goal of providing federally protected lands to "homeless" Indians. AR059506.

The IRA delegated to the Secretary of the Interior the authority to acquire and hold in trust new land for Indians (Section 5), 25 U.S.C. § 465, and to proclaim new reservations encompassing those trust lands (Section 7), 25 U.S.C. § 467. The Secretary has issued regulations governing his Section 5 authority to acquire land in trust at 25 C.F.R. § 151. There are no regulations implementing Section 7, although there are related regulations that govern whether a tribe's "initial reservation" can be used for gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. *See* 25 C.F.R. § 292.6.

B. The Federal Acknowledgment Regulations

The Office of Federal Acknowledgment (OFA) (formerly known as the Branch of Acknowledgment Research, or BAR) implements 25 C.F.R. § 83, which establishes the criteria "for acknowledging that certain American Indian groups exists as tribes." Although the phrases "federally acknowledged" and "federally recognized" often are used interchangeably, OFA uses

the phrase "federally acknowledged" only for tribes that have been through its administrative process.

Tribes that have been acknowledged (or had their recognition restored) are, by the Department's own definition, Indian groups which *continuously* have maintained their tribal identities since the time of first sustained white contact or since previous federal acknowledgment. *See* 25 C.F.R. § 83.3. The Department's final determination to acknowledge the Cowlitz Tribe specifically noted the continuous existence of the Cowlitz as a tribe from 1855 (when it engaged in treaty negotiations with the United States) to the present. *See* 65 Fed. Reg. 8436 (Feb. 18, 2000).

C. The Indian Gaming Regulatory Act of 1988

In 1987, the United States Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987), confirmed Indian tribes' inherent sovereign right to conduct gaming on tribal lands and that "[s]tate regulation [of tribal gaming] would impermissibly infringe on tribal government[s]." Congress reacted to *Cabazon* by enacting the Indian Gaming Regulatory Act (IGRA) in 1988. Pub. L. No. 100-497 § 5, (codified at 25 U.S.C. §§ 2701 *et seq*). IGRA makes clear that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." *Id*. § 2701(4).

IGRA also established the National Indian Gaming Commission (NIGC), a semi-independent agency within the Department of the Interior charged with implementing IGRA and promulgating necessary regulations for that purpose. *Id*. §§ 2704, 2706. NIGC's authority includes approval of tribal gaming ordinances, a prerequisite to Indian gaming. *Id*. § 2710.

IGRA generally allows gaming only on reservations or other trust lands in existence when the statute was enacted on October 17, 1988. *Id*. § 2719. Section 20 of IGRA, however, provides certain narrow exceptions to this rule to assist tribes that did not have reservations or

other trust lands when IGRA was enacted. The two exceptions relevant here are the "restored lands exception" and the "initial reservation exception." *Id.* § 2719 (b)(1)(B)(ii)-(iii). These exceptions "ensure 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). Regulations implementing Section 20's initial reservation and restored lands exceptions require the applicant tribe to have, *inter alia*, a "significant historical connection" to the land in question.

D. The National Environmental Policy Act of 1969 (NEPA)

NEPA is a "procedural statute that mandates no substantive results." *Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C. 1991) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)). NEPA requires an agency to take a hard look at the environmental consequences of actions before taking or approving them, *Robertson v. Methow Valley Council*, 490 U.S. 332, 350 (1989), but as long as the agency has taken a hard look and followed NEPA's procedures, its substantive decision will not be overturned by a court unless it is arbitrary, capricious, or an abuse of discretion." *Sierra Club*, 808 F. Supp. at 859 (citing *Marsh*, 490 U.S. at 377).

NEPA provides that an agency must prepare an EIS for federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3 An EIS must "briefly specify the underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. Based on the purpose and need, the agency must evaluate a "reasonable range of alternatives" to the proposed action. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011), *see also* 40 C.F.R. § 1502.4. An EIS also must provide "a reasonably complete discussion of possible mitigation measures," but imposes no substantive duty to mitigate adverse environmental effects. *Robertson*, 490 U.S. at 352-53.

E. Indian Canons of Construction

It is well established that the "basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians." Cohen, § 2.02[1], p. 119. If there are any doubtful expressions or ambiguities within the statute, they are to be resolved in favor of the Indian parties. *See McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Okla.*, 397 U.S. 620, 631 (1970).

II. THE FACTS RELEVANT TO THE DISPUTE

A. Historical Facts

In 1854, federal officials considered establishing a reservation for the Cowlitz Indian Tribe at Chalatchie Prairie in Clark County, about six miles east of the land at issue in this case ("the Cowlitz Parcel"). AR016603-11. But by 1855, the United States changed its position, and commenced treaty negotiations with the Cowlitz Tribe to try to persuade the Tribe to abandon its traditional territory and relocate to the Olympic Peninsula to share a reservation with the Quinault (a traditional enemy of the Cowlitz). AR140478. The Cowlitz Tribe refused to leave its home territory, and declined to sign the treaty proffered by the United States. *Id*.

Only Congress has the power to extinguish "Indian title" to land.[1] Nevertheless, without congressional authorization, an Executive Order opened Cowlitz lands to non-Indian settlement in 1863. AR012028. Soon Cowlitz lands were lost to non-Indian homesteaders and the Cowlitz people were scattered throughout southwestern Washington and northern Oregon. *Id*. Despite the Tribe's repeated pleas for a reservation within its traditional territory, no land was ever set aside for the Cowlitz. *See generally Simon Plamondon, on Relation of the Cowlitz Tribe of*

[1] *See United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941) (power of Congress to extinguish Indian title is plenary and non-justiciable; but Congress presumed not to have done so absent a clear and express intention). *See also* Cohen § 15.09[1][b] (2005 ed.).

Indians v. United States, 21 Ind. Cl. Comm. 143-72 (1969). AR012028.

In the early 1900s, after the death of the last chief appointed by federal Indian agents, the Tribe took steps to reorganize and elect its own governing body. *See generally* BAR Historical Technical Report at 114, AR015534. In 1908, the Tribe initiated land claims against the United States relating to certain lands on Cowlitz Prairie; in 1909 it filed an expanded petition for its aboriginal lands. AR015527-29. This 1909 petition was the impetus for the 1910 McChesney Report, in which Special Indian Agent Charles McChesney reported to the Commissioner of Indian Affairs: "As the result of my investigation, I am of the opinion that the claim of the Cowlitz Indians is a just one, and that they should receive compensation for the land they occupied, and recommend that the necessary action be taken with such end in view." AR059542. By 1917, the Cowlitz Tribe of Indians formally organized and elected a President, Vice-President, Secretary, and Treasurer. AR015548.

The Cowlitz continuously pursued federal legislation to enable the Tribe to present its claims in the federal courts and begin restoring its land base. From 1915 through 1929, twelve bills were introduced in Congress to provide the Court of Claims with jurisdiction over the Cowlitz claim. AR015547, AR 059541-43. In 1928, Congress enacted such legislation; unfortunately, it was vetoed by President Coolidge. AR015548. Congress finally enacted legislation in 1946 establishing the Indian Claims Commission (ICC), which allowed the Cowlitz Tribe to pursue its claims. AR059542.

In 1973, the ICC entered a judgment in favor of the Cowlitz Tribe entitling it to receive compensation for its aboriginal lands. AR059542. In 2004, two years after the Tribe's federal recognition was formally restored, AR140382, and a full century after the Tribe began its campaign, Congress enacted the Cowlitz Indian Tribe Distribution of Judgment Funds Act, Pub.

L. 108-222; 118 Stat. 623 (April 30, 2004), to implement the ICC judgment.

Despite the Tribe's tenacity, Cowlitz has been landless for a century-and-a-half, no doubt contributing to the federal government's occasional confusion about the Tribe's status.[2] Eventually the Tribe was forced to submit to the lengthy, expensive, and extremely burdensome process of reestablishing its federal recognition through the Department's federal acknowledgment process. On February 18, 2000, a quarter century after the Tribe filed its petition, the Assistant Secretary-Indian Affairs issued his determination to acknowledge the *Cowlitz Indian Tribe*. 65 Fed. Reg. 8436 (Feb. 18, 2000). Although the Quinault Indian Nation challenged the finding, the Secretary upheld the initial determination in a Reconsidered Final Determination in favor of the Tribe on January 4, 2002. 67 Fed. Reg. 607 (Jan 4, 2002).

In the nearly 150 years since the Cowlitz Indian Tribe's lands were taken by the federal government, the Tribe has had no reservation from which it could exercise sovereignty over its people. Through no fault of its own, the Tribe has remained ineligible for the reservation-based federal funding that is available to other federally recognized Indian tribes,[3] and without the federally-protected land base necessary for meaningful self-determination. AR102554.

B. The Administrative Process

Initial Trust Acquisition. On the same day that the Secretary finally re-confirmed the Cowlitz Tribe's federal recognition, January 4, 2002, the Tribe submitted its application requesting that the Department take into trust 151.87 acres of land (the "Cowlitz Parcel") in Clark County, Washington. AR140382.

[2] A discussion of BIA's relationship with the Cowlitz Tribe is provided in the Cowlitz Request for a Restored Lands Opinion, AR008227-31, the NIGC *Cowlitz* Opinion, AR008199-202, the Cowlitz Tribe's 2009 and 2010 *Carcieri* supplemental submissions to the Department, AR059479-60061, 023185-207, and in Section I, *infra*.

[3] A list of these programs may be found at AR008282.

In March 2004 the Tribe submitted an amended fee-to-trust application, stating that the parcel would be used for gaming, other economic development and governmental purposes, and requesting that Interior proclaim the Parcel as the Tribe's "initial reservation" pursuant to the IRA, 25 U.S.C. § 467 and IGRA, 25 U.S.C. § 2719(b)(1)(B)(ii). AR102548. At the same time, the Tribe completed negotiation of a Memorandum of Understanding (MOU) with Clark County to provide for mitigation of potential impacts from the Tribe's proposed development. AR140389. The MOU was challenged by some of the Plaintiffs in this case. AR062475.

In June 2006, the Tribe submitted an updated fee-to-trust application to reorganize and provide additional information. AR012025. The Tribe submitted an amended reservation proclamation request in August 2006. AR102544. In March 2007, the Tribe submitted its business plan, including an Unmet Needs report, to identify the anticipated economic benefits from its proposed trust acquisition, in compliance with 25 C.F.R. § 151.11(c). AR092977.

NEPA Compliance. On November 12, 2004, BIA issued a notice of intent to prepare an EIS for the Tribe's fee-to-trust and gaming proposal, specifying that the site would be used for "development of gaming and related entertainment facilities, tribal government facilities and tribal housing." AR123659.

On April 12, 2006, BIA prepared a comprehensive Draft EIS (DEIS), AR106587, 113493, which evaluated the Tribe's proposed project (development of a Tribal government headquarters, elder housing and cultural center, and a casino-resort on the Cowlitz Parcel) and five other alternatives, and provided extensive opportunity for public comment and participation. AR113493-502, 112568-787. BIA consulted with local governments and several state and federal agencies as cooperating agencies on the EIS. AR113493, 107176-87. BIA fully considered and addressed the voluminous written comments submitted on the DEIS and

Preliminary Final EIS (which typically is confidential) in preparing the Final EIS, including thousands of pages of comments submitted by the Plaintiffs. AR078415-81543.

BIA released the Final EIS (FEIS) on May 20, 2008. AR074228, 075768. The FEIS included a purpose and need statement that BIA revised in response to comments on the DEIS and review of the Cowlitz Tribe's business plan and Unmet Needs report. BIA properly considered and eliminated additional alternatives, analyzed the ways in which development of the proposed project could impact the surrounding environment, and considered appropriate mitigation. AR075768-6441. Plaintiffs and other members of the public submitted further comments on the FEIS, which were addressed in significant detail in the Department's Record of Decision. AR067161-8398, 140403-37; *see also* AR140373-75, 138742-878 (Final EIS Evaluation of Adequacy).

Tribal Gaming Ordinances. On March 15, 2005, the Tribe submitted to NIGC a request for approval of a site-specific Class II gaming ordinance in an effort to expedite the lengthy federal approval processes and confirm that the Cowlitz Parcel would be eligible for gaming before spending the enormous amount of resources needed to complete the NEPA, fee-to-trust and reservation proclamation processes. NIGC AR005613; *see also* Supplemental Submission, NIGC AR003313.[4] On November 23, 2005, NIGC approved the Tribe's gaming ordinance, based in part on its determination that the Cowlitz Parcel would be eligible for gaming under IGRA's restored lands exception if and when it is acquired in trust. NIGC AR001622-64.

In October 2007, the Tribe submitted to NIGC an amendment to its gaming ordinance,

[4] Typically, tribes must complete the very lengthy and expensive fee-to-trust and NEPA processes before the Department will determine whether their land is eligible for gaming. If the Department determines that the land is not gaming-eligible, the tribe will have wasted many years and thousands of dollars and will have no way to recover those losses since its economic development project cannot proceed.

which revised a portion of the Tribe's previously approved ordinance and incorporated the Tribe's Environment, Public Health and Safety (EPHS) Ordinance. NIGC AR000770-86. The EPHS Ordinance establishes the Tribe's public health and safety program for its proposed gaming facility, requires the Tribe to perform all the mitigation measures originally included in the 2004 MOU with Clark County, and contains an irrevocable waiver of sovereign immunity allowing Clark County to enforce it.[5] *Id*. NIGC approved the Tribe's ordinance amendment on January 8, 2008. NIGC AR000001, 000006-11.

C. *Carcieri* Decision, Prior Litigation and Instant Action

On February 24, 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, holding that only tribes "under federal jurisdiction" in 1934 are eligible to receive trust land pursuant to the IRA. On December 17, 2010, the Department issued its decision to accept the Cowlitz Parcel in trust for the Tribe and proclaim it the Tribe's reservation. 2010 ROD, AR000024-146. On January 31 and February 1, 2011, respectively, the Plaintiffs filed complaints challenging the Department's decision.[6] After Plaintiffs filed summary judgment motions, the Department requested a voluntary remand to examine certain documents submitted by Plaintiffs regarding the Department's initial reservation determination. The Court denied the Department's motion, but allowed the Department time to review and reconsider its decision. In response, the Department filed a Notice of Supplemental ROD incorporating a Revised Initial Reservation Opinion. On March 13, 2013, the Court found that Interior lacked authority to

[5] The Card Room/Alexanderson Plaintiffs' legal challenge continued in 2007 (and eventually invalidated the MOU on procedural grounds). In light of this legal challenge, the Tribe adopted its EPHS Ordinance and amended its Gaming Ordinance to provide an alternative mechanism to ensure that potential impacts on the environment caused by its proposed development would be mitigated in the same manner as under the MOU. Ultimately the County and the Tribe entered an agreement to rescind the MOU and instead rely on the mitigation and irrevocable waiver of sovereign immunity in the Tribe's EPHS Ordinance. AR067055-057.

[6] *Clark County. v. Salazar*, 11-cv-00278-RWR (D.D.C. Jan 31, 2011) and *Confederated Tribes of Grand Ronde Cmty. v. U.S. Dep't. of the Interior*, 11-cv-00284-RWR (D.D.C. Feb. 1, 2011).

supplement its 2010 ROD with the Revised Opinion, dismissed the litigation as moot and remanded the matter to the Department, ordering the Department to issue a new ROD within sixty days. On April 22, 2013, the Department issued a new decision to accept the Cowlitz Parcel in trust for the Tribe and proclaim it the Tribe's reservation. 2013 ROD (hereinafter "ROD"), AR 140376-519. That ROD is the subject of this litigation.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under the Administrative Procedure Act ("APA") a court must uphold an agency's decision so long as that decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (2)(A). The party challenging the agency action bears the burden of proof. *City of Olmstead Falls, Ohio v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002). Judicial review is highly deferential, presumes the agency action to be valid and is limited to the Administrative Record before the agency at the time the decision was made. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

ARGUMENT

I. THE SECRETARY HAS AUTHORITY TO ACQUIRE LAND IN TRUST FOR THE COWLITZ INDIAN TRIBE

A. The *Carcieri v. Salazar* Requirement

Congress delegated to the Secretary of the Interior authority to acquire land in trust for Indian tribes in Section 5 of the IRA:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians …. Title to any lands acquired . . . 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.

25 U.S.C. § 465 (emphasis added). In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Court found

that because the word "tribe" in Section 5 is modified by the word "Indian," Section 5 must be read in concert with Section 19 of the Act. Section 19, in turn, defines "Indian" to include:

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

25 U.S.C. § 479 (emphasis and bracketed numbering added). *Carcieri* concerned the Narragansett Indian Tribe, which did not have an "Indian reservation", and which was not presented to the Court as a Tribe composed of individuals with "one-half or more Indian blood". In deciding whether the Secretary had authority to acquire land for that tribe, the Court applied the remaining Section 19 definition to determine whether the tribe was "a recognized Indian tribe now under federal jurisdiction."

It was undisputed by the parties to *Carcieri* that in 1934 the Narragansett Indian Tribe did not enjoy the legal status of what today we refer to as "federal recognition."[7] The State of Rhode Island argued broadly that "federal recognition" in 1934 was a prerequisite to the Secretary's authority. Had the Court agreed, no further analysis would have been necessary. Instead, to determine whether the Secretary had land acquisition authority for the Narragansett, the Court focused on Section 19's requirement that the tribe be "now under federal jurisdiction." The Court found that "now" means that a tribe must have been under federal jurisdiction when the statute was enacted in 1934. *Carcieri*, 555 U.S. at 388-90. Both the Secretary and the Tribe itself had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934. *Id.* As a result, the Court held that the Secretary did not have authority to acquire land in trust for the

[7] *Carcieri*, 555 U.S. at 395. ("Moreover, the petition for writ of certiorari filed in this case specifically represented that '[i]n 1934, the Narragansett Indian Tribe … was neither federally recognized nor under the jurisdiction of the federal government.' Pet. for Cert. 6. The respondents' brief in opposition declined to contest this assertion. *See* Brief in Opposition 2-7.")

Narragansett Tribe because that tribe was not under federal jurisdiction in 1934. *Id.* at 395.

In stark contrast, the Secretary forcefully asserts that the Cowlitz Tribe *was* under federal jurisdiction in 1934. Relying on a wealth of factual evidence in the Administrative Record, which confirms both the existence and the exercise of federal jurisdiction over Cowlitz prior to 1934, and which further confirms that the Tribe's "jurisdictional status" remained intact in 1934, the Secretary correctly concluded that the Secretary has authority under Section 5 to acquire land in trust for this Tribe and authority under Section 7 (25 U.S.C. § 467) to proclaim a reservation for it. AR140382-86.

B. The Cowlitz Tribe Was Under Federal Jurisdiction in 1934

1. The Secretary's Two-Prong Test for "Under Federal Jurisdiction"

To implement *Carcieri*, the Secretary employs a two-part inquiry to determine whether a tribe was under federal jurisdiction in 1934. First, the Secretary considers whether there is evidence that, in or before 1934, the federal government confirmed jurisdiction over the tribe in some way by taking "an action or series of actions" sufficient to "establish . . . or generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." AR140475. Second, the Secretary considers "whether the tribe's jurisdictional status remained intact in 1934". AR140476.

The Secretary's two-part inquiry is entitled to *Chevron* deference. *See Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Her interpretation not only is a "permissible construction of the statute", *id.*, it also is consistent with the intent and statutory scheme of the IRA, and is informed by her extensive expertise in Indian affairs. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[p]ractical agency expertise is one of the principal justifications behind *Chevron* deference").

While the Secretary's test is entitled to *Chevron* deference, her construction of the phrase

"under federal jurisdiction" is narrower than the IRA requires. By its terms, the statute invites a more straightforward test based on the plain meaning of the word "jurisdiction." The United States Constitution gives Congress plenary jurisdiction over Indian tribes,[8] and that authority exists even if the United States has taken no particular action to "establish" it.[9] Hence, the first prong of the Secretary's test creates a more difficult standard than what may be necessary.

The Secretary's second prong -- a determination of whether the tribe's jurisdictional status remains intact -- recognizes that the Secretary may no longer have authority to take administrative action for a tribe if Congress legislatively has altered a tribe's "jurisdictional status" by terminating or limiting its status as a tribe eligible to access the federal laws and services which generally benefit Indian tribes. In such cases, while Congress continues to have constitutionally-derived plenary authority over the terminated tribe, the agencies no longer have delegated authority to provide services.[10] As discussed below, Congress has *never* withdrawn its delegation of authority to the Secretary to provide services to Cowlitz, and so Cowlitz's "jurisdictional status" has remained intact and uninterrupted.

2. Federal Jurisdiction Over the Cowlitz Tribe Was Well Established Prior to 1934

The first prong of the Secretary's test requires that the Secretary determine:

> 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

[8] *See Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979); *see also* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 5.01[1] at 392-93, § 5.02 (2005 ed.).

[9] *See generally*, Cohen's Handbook of Federal Indian Law § 3.02[6][d] (2012 ed); *see also Stand Up For California!*, 919 F. Supp. 2d 51,67 (D.D.C. 2013).

[10] *See, e.g.*, Western Oregon Indians: Termination of Federal Supervision (Aug. 13, 1954), 25 U.S.C. §§ 691–708, by which Congress legislatively terminated the Grand Ronde Tribe's jurisdictional status ("The purpose of this subchapter is to provide for … the termination of federal services furnished such Indians because of their status as Indians"); Grand Ronde's jurisdictional status was restored by Congress in 1983, *see* 25 U.S.C.§ 713(b) (Confederated Tribes of the Grand Ronde Reservation Restoration Act (Nov. 22, 1983)).

> 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 or in some instance tribal members - that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.

AR140475. The United States entered into treaty negotiations with the Tribe in 1855. AR012085-88. The United States' effort to negotiate a treaty aimed at removing the Tribe to a federally-protected Indian reservation is conclusive proof that the United States had jurisdiction over the Tribe. Plaintiffs argue that Cowlitz effectively rejected federal jurisdiction when it broke off treaty negotiations. But Plaintiff confuses the Tribe's rejection of the government's proposed terms with a rejection of jurisdiction. What followed makes this distinction tragically apparent: when the Cowlitz Tribe refused to be removed to a distant reservation, the United States exercised its ultimate jurisdiction by simply dissolving the Tribe's aboriginal title through an Executive Order.[11] While this Order was plainly unlawful,[12] it would be impossible to argue that it was not an exercise of "jurisdiction."

Although now landless, the federal government continued to exercise federal jurisdiction over the Cowlitz through the era in which the IRA was enacted. The Record includes 22 documents from 1917 to 1953 in which BIA officials *explicitly state* that BIA had jurisdiction over the Cowlitz Tribe.[13] Fifteen of these date from 1934 or before, and leave no doubt that the

[11] Executive Proclamation No. 693 (Mar. 20, 1863); *see also* NIGC AR005401.

[12] These lands to which the Tribe held aboriginal title were protected by the federal Trade and Intercourse Act (25 U.S.C. § 177). Because there was no Congressional authorization for the alienation of Cowlitz's lands (as no treaty with the Tribe was ever completed), the 1863 Executive Order opening Cowlitz lands to non-Indian homesteading was *ultra vires* and a violation of the Act. The fact the Cowlitz lands were protected by that Act is yet another indication of federal jurisdiction. *See United States v. John*, 437 U.S. 634 (1978).

[13] *See, e.g.*, September 7, 1927 Letter from Superintendent, BIA Taholah Indian Agency to Superintendent, Salem Indian School, Chemawa, Oregon "The Cowlitz Tribe is under this jurisdiction." (AR059585); May 23, 1929 from Superintendent, Taholah Indian Agency to Commissioner of Indian Affairs dated: "the following Indian tribes . . . are under this jurisdiction: Cowlitz Tribe, estimated about 800." (AR059586); Letter from Deputy Disbursing Agent, Taholah Indian Agency to E.G. Potter, Puyallup, Washington: "the Cowlitz Tribe of Indians are within my jurisdiction . . . ." AR059587 (emphasis added). *See* generally Tribe's June 18, 2009 Supplemental Submission on Carcieri (AR059479-6801).

first prong of the Secretary's test has been satisfied.

Plaintiffs nevertheless urge the Court to ignore the overwhelming weight of evidence from the local BIA field officials in favor of a 1933 letter from the Commissioner of Indian Affairs indicating his understanding that that the Cowlitz Tribe no longer existed. GR Mem. 18; Clark Mem. 22; AR008200-201. Yet a year later -- *in 1934*-- the Commissioner corrected his error when he explicitly instructed the Superintendent of BIA's Taholah, Washington Agency Office to enroll Cowlitz Indians (AR060019). Plaintiffs admit that enrollment is an indicator both of being "under federal jurisdiction" and of "federal recognition." GR Mem. 21-22.

In addition to BIA's explicit, contemporaneous statements that it possessed jurisdiction over the Tribe, the Record also includes substantial evidence that in the years leading up to, including, and immediately after the IRA was enacted,[14] the federal government actively exercised that jurisdiction. While Cowlitz strongly agrees with the Secretary that a continuous exercise of jurisdiction is not (and cannot be[15]) a requirement to demonstrate that a tribe is "under federal jurisdiction,"[16] the fact that there is so much evidence of it relating to Cowlitz is conclusive proof that jurisdiction existed. The Administrative Record contains:

- 26 documents dated from 1911 to 1965 in which the BIA exercised its authority

[14] Plaintiffs Clark County/Card Rooms (Mem. 16) argue that there must be evidence literally generated in *June* 1934. But Plaintiffs' argument, if taken to its logical conclusion, would require that every tribe be able to produce conclusive evidence that jurisdiction existed literally on the day - June 18 - on which the IRA was enacted. There is no evidence whatsoever that Congress (or the *Carcieri* Court) intended such a ridiculous standard.

[15] It is well established that that jurisdiction is continuous and uninterruptible; its existence is not dependent on how, or how often, or even whether, the federal government exercises that jurisdiction. *United States v. Nice*, 241 U.S. 591, 600 (1916) (Congress' constitutional authority over tribes is "a continuing power of which Congress . . . [can] not divest itself. It [can] be exerted at any time and in various forms during the continuance of the tribal relation. . .").

[16] *See* AR140470-72 (Discussing Department's errors in implementing IRA, United States unaware that certain tribes existed but still "under federal jurisdiction" within the meaning of the IRA).

under 25 U.S.C. § 81 to review and approve tribal attorney contracts,[17]

- 13 of which are dated from 1926 to 1932; AR059523-29.

- 37 documents dated from 1888 to 1976 which demonstrate BIA's continued supervision over lands held in trust by the federal government for members of the Cowlitz Indian Tribe (33 of which are dated from 1923 to 1935); AR059531-35.

- 49 documents dated from 1913 to 1945 in which the Bureau exercised its authority to make heirship determinations and conduct probate proceedings on behalf of members of the Cowlitz Indian Tribe, 43 of which are dated from 1922 to 1939; AR059536-41.

- 27 documents dated from 1880 to 1975 demonstrating BIA's exercise of its authority to supervise the education of Cowlitz children at BIA and other schools, 20 of which are dated from 1924 to 1928; AR059543-46.

- 27 BIA documents dated from 1924 to 1928 evidencing the local BIA Superintendent's exercise of supervisory authority over Cowlitz tribal members' financial matters (*e.g.*, payment of hospital and funeral expenses, management of funds for minors to pay for clothes, medical expenses and the like); AR059547-50.

- 23 BIA documents dated from 1910 to 1967 demonstrating that BIA officials attended and supervised Cowlitz tribal meetings, 6 of which are dated 1925 to 1932; AR059550-55.

- 7 documents dated from 1926 to 1934 in which BIA interceded with state and local officials regarding Cowlitz federally-based fishing rights; AR059555-57.

- 34 documents from 1919 to 1966 documenting that BIA conducted census, enrollment and other vital statistic record keeping for the Cowlitz, 29 of which are dated 1919 to 1938; AR059557-63.

[17] A federal statute enacted on March 3, 1871 and amended on May 21, 1872. R.S. § 2103 (Acts Mar. 3, 1871, ch. 120 § 3, 16 Stat. 570; May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136) (the most recent version today is codified at 25 U.S.C. § 81) required tribal attorney contracts to be reviewed and approved by the Secretary. The statute as it existed in 1934 provided that "no contract or agreement of any kind shall be made by any person *with any tribe of Indians* . . . for the payment or delivery of any money or other thing of value, . . . or the granting or procuring any privilege to him . . . unless such contract or agreement be in writing, and executed and approved in the manner hereinafter directed." The statute also required that contracts "be executed before a judge of a court of record and approved in writing thereon by the Secretary of the Interior and commissioner of Indian affairs." BIA's regulations implementing R.S. § 2103 established two sets of approval procedures, one for tribes organized under the IRA, and a second, more extensive set of regulations for tribes "not organized under the [IRA]." *See* 25 C.F.R.§§ 15.7-15.25 (1939) (governing approval of attorney contracts with tribes not organized under the IRA). This clearly demonstrates that whether or not a tribe was organized under the IRA is not dispositive of whether a tribe was under federal jurisdiction, notwithstanding Plaintiffs' arguments to the contrary. *See* GR Mem. 24-27.

Plaintiffs urge the Court to ignore BIA's exercise of jurisdiction relating to *tribal* activity (*e.g.*, monitoring tribal meetings, reviewing and approving tribal attorney contracts, and working to protect federally-based fishing rights). They argue that BIA's involvement was only with *individual* Indians and so not relevant to whether the *Tribe* was under federal jurisdiction. GR Mem. 22, 28; Clark Mem. 18-19. But that rather glib argument is not only wrong as a matter of fact, it ignores the statutory underpinnings of what plaintiffs disingenuously dismiss as interactions with individual Indians. BIA possesses jurisdiction to exercise authority over an individual if that person is an "Indian." The Cowlitz Tribe had no reservation on June 1, 1934; further, the Record does not suggest (and Plaintiffs have not argued) that BIA provided services to Cowlitz members based on blood quantum. Thus, the *only* statutory basis for the services BIA furnished to individual Cowlitz Indians up to and through 1934 was as "members of any recognized Indian tribe now under Federal jurisdiction." That BIA was providing services to individuals based on their membership in the Cowlitz Tribe confirms that, at the time the IRA was enacted, the Tribe was "a recognized Indian tribe now under federal jurisdiction."[18]

Further, Plaintiffs ignore or gloss over extensive evidence of federal jurisdiction over the Tribe exercised by both Congress and the federal courts. The Record contains documentation of Congress' repeated efforts from 1915 to 1929 to enact legislation that would have allowed the Tribe to bring claims against the United States for Cowlitz lands that were taken pursuant to the 1863 Executive Order without Congressional authorization and without compensation. *See* S. 2458, 64th Cong. (1915), H.R. 6862, 64th Cong. (1916), H.R. 224 (1917), S. 3663, 65th Cong. (1918), H.R. 9611, 65th Cong. (1918), H.R. 15480, 94th Cong. (1976), S. 1521, 65th Cong.

[18] *See Stand Up For California!*, 919 F.Supp.2d at 67-69 (that individual members of the North Fork tribe were allowed to vote on an IRA constitution is evidence that they were "members of [a]recognized Indian tribe now under Federal jurisdiction"; also dispositive was that BIA had acquired trust land for individual members).

(1919), H.R. 2424, 67th Cong. (1921), H.R. 71, 70th Cong. (1923), S. 2557, 68th Cong. (1924), H.R. 2694, 69th Cong. (1925), H.R. 167, 70th Cong. (1927), and related Congressional reports and correspondence.[19] AR140481, 059542, 059751-831. These efforts culminated in 1928, when Congress passed H.R. 167 "a Cowlitz claims authorization bill." NIGC AR002198; *see also* H.R. Exec. Doc. No. 319, 70th Cong., 1st Sess. (1928). Although President Coolidge vetoed that legislation because he disagreed with the basis of the Tribe's land claims, AR002196, passage of the bill leaves no room for doubt that Congress had jurisdiction over the Cowlitz Tribe.

Congress also exercised its jurisdiction over the Tribe when it enacted the Act of March 4, 1911, 36 Stat. 1345 authorizing the Secretary to allot land on the Quinault reservation to members of Washington tribes that were "affiliated with the Quinaielt and Quileute tribes" in the Treaty of Olympia of 1855, 12 Stat. 971. AR059660-61. In *United States v. Halbert*, 283 U.S. 753 (1931), the Supreme Court confirmed that Cowlitz was an intended beneficiary of the 1911 Act, in accord with an earlier Interior Solicitor's Opinion which also found that Cowlitz was an intended beneficiary. *Id.* at 759-60. The Court relied in part on the Department's response to proposed federal legislation introduced in 1913 to clarify that Cowlitz was an intended beneficiary (H.R. 22,868), which response stated that legislation was not necessary because the Department already agreed that Cowlitz members were entitled to allotment under the Act. *Id.* Significantly, *Halbert* made clear that an individual tribal member's right to an allotment on the Quinault reservation was not based on the fact that the person was an "Indian", but rather on the fact that the person specifically was a member of the Cowlitz Tribe. *Id*. at 760-63.

[19] Plaintiffs assert that the Department of the Interior's opposition to some of these bills (Clark Mem. 22) is evidence that the Cowlitz Indian Tribe was not under federal jurisdiction. Given that Congress' authority is primary, and the Secretary only has authority to the extent it is delegated to it by Congress, it is difficult to understand why the Secretary's objections should carry more weight than Congress' repeated efforts to assist the Tribe.

3. Cowlitz Tribe's Jurisdictional Status Remained Intact In 1934

There is no evidence in the Record that Congress enacted federal legislation altering Cowlitz's jurisdictional status before (or, for that matter, after) 1934. There is no termination legislation, no federal statute withdrawing from the federal agencies the authority to implement federal laws in relation to the Cowlitz Tribe. To the contrary, throughout the 1920's Congress in fact worked to pass legislation that would give the Tribe the right to bring its land claims to federal court. These Congressional activities on the Tribe's behalf are the antithesis of termination legislation. And, obviously, the Department of the Interior clearly understood itself to have continuing administrative authority to extend services and benefits to the Tribe during the time period in which the IRA was enacted, because it was so frequently doing so.

Plaintiffs nevertheless argue that the Tribe's jurisdictional status was terminated based on a National Indian Gaming Commission (NIGC) opinion in which NIGC agreed with the Tribe that for the purposes of the "restoration of lands for an Indian tribe that is restored to Federal recognition" provision of the Indian Gaming Regulatory Act (25 U.S.C. § 2719(b)(1)(iii)), the Tribe had at one time been *administratively* "terminated." Plaintiffs fundamentally misunderstand the legal difference between *legislative termination* which involves an express statutory termination of status, and what loosely has come to be called "*administrative termination,*" which occurs when the Department has made a mistake about the Tribe's jurisdictional status and therefore ceased providing the federal services to which the tribe was otherwise entitled. There is no general statutory authority whatsoever for Interior to alter the jurisdictional status of an Indian Tribe, and there certainly has never been any statutory authority

specific to the Cowlitz Tribe granted to Interior.[20]

Because IGRA prohibits Indian gaming on land acquired in trust after its date of enactment in 1988, Congress provided for certain very limited remedial exceptions to that general prohibition in order to provide for tribes that were landless in 1988, but might acquire land in the future. Chief among the tribes Congress intended to benefit were tribes whose status had been legislatively terminated (but later restored) by federal statute, and those whose continued jurisdictional status was mistaken by Interior resulting in the Department's termination of benefits -- *i.e.*, those tribes which had been "administratively terminated." To qualify for this particular exception, Interior requires a tribe to demonstrate that it was once federally recognized, that it was at some time either legislatively or administratively terminated, and that its recognition is now restored. While "administrative termination" is relevant to whether the Tribe should benefit from the remedial provisions of IGRA Section 20, it cannot, as a matter of constitutional law, equate to congressional termination of status.

In sum, there is no question but that the Tribe's "jurisdictional status remained intact" in 1934, satisfying the second prong of the Secretary's Test.

C. Neither the IRA Nor *Carcieri* Require That Tribes Be "Federally Recognized" in 1934

Plaintiffs insist that the IRA also requires a tribe to have been "*federally* recognized"-- as that term has come to be used in the modern era -- in 1934. GR Mem. 11-20; Clark Mem. 10-15. This argument fails for two reasons. First, however "recognition" is defined for the purposes of the IRA, the Supreme Court rejected the proposition that recognition has to have been in place in 1934. Second, even if there were such a requirement, the Secretary's determination that the

[20] *See, e.g., McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 173 n.12 (1973) (limitation on federal power over tribe can only be accomplished through congressional action).

Cowlitz Indian Tribe was "recognized" in 1934 is entitled to deference, and further is consistent with the applicable standards of the day.

1. The *Carcieri* Court Rejected the Contention That Tribes Had to be Recognized in 1934

The *Carcieri* Court certainly viewed "recognition" and "under federal jurisdiction" as two different legal concepts. The State of Rhode Island repeatedly framed the question as "[w]hether the Indian Reorganization Act of 1934 authorizes the Secretary to take land into trust on behalf of an Indian tribe that was neither federally recognized *nor* under federal jurisdiction at the time of the statute's enactment," and it repeatedly argued that the Secretary's authority under the IRA was restricted to tribes that were both "federally recognized *and* under federal jurisdiction in 1934." *See, e.g.*, Brief for Petitioner Donald Carcieri, Governor of Rhode Island at 13-15, 17-20, 23, 26, 31-32, 34. In concluding that the Secretary did not have authority to take land in trust for the Narragansett Tribe, the majority never once cited lack of "federal recognition" in 1934 as a reason for that lack of authority. Rather, the majority focused exclusively on the "under federal jurisdiction" requirement, finding that "§ 479 limits the definition of 'Indian,' and therefore limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." *Carcieri*, 555 U.S. at 391.

The concurring opinions consider the question of the timing of recognition directly and at great length.[21] Justice Breyer specifically found that Indian tribes not recognized until after 1934

[21] Concurring opinions routinely and properly are relied upon for guidance in applying a majority opinion. *See Rodriguez v. Bennett*, 303 F.3d 435, 438-39 (2d Cir. 2002) (Justice Stevens' concurring opinion made "explicitly clear" the "'Court's narrow holding'"); *Flores v. Demskie*, 215 F.3d 293, 304 (2d Cir. 2000) (rejecting broader application of Supreme Court case based on Justice O'Connor's concurring opinion identifying the narrow application of majority holding)*; In re Possible Violations of 18 U.S.C. §§ 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977) (Justice Powell's concurrence "emphasized" and "elaborated" the majority opinion); Igor Kirman, *Standing Apart To Be A Part: the Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev.

nonetheless may still have been "under federal jurisdiction" in 1934. He identified instances in which the Department has made mistakes about whether a tribe continued to exist, or in which a tribe enjoyed continuing rights under a federal statute or treaty even though the tribe was not "recognized" in 1934. *Carcieri*, 555 U.S. at 396-400 (Breyer, J., concurring). Justice Breyer wrote:

> [A]n interpretation [of "under federal jurisdiction"] that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. *That is because a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time.* We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off that list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22-24; Quinn, Federal Acknowledgment of American Indian Tribes: The Historical development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356-359 (1990). The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. *And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934 – even though the Department did not know it at the time.*
>
> *The statute, after all, imposes no time limit upon recognition.* See § 479 ("The term 'Indian' . . . shall include all persons of Indian descent who are members of *any recognized* Indian tribe now under federal jurisdiction …" (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855 ….

Id. at 398-99 (Breyer, J., concurring) (emphasis added). In a separate concurring opinion, Justices Souter and Ginsburg agreed that "under federal jurisdiction" and "recognition" are separate concepts, and that recognition can follow after 1934. *Id*. at 400-01 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part):

> The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, "any recognized Indian tribe now under Federal jurisdiction."

2083 (1995) (identifying numerous Supreme Court concurring opinions treated as authoritative in part because they clarify majority opinions).

> *Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.* As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that *the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at the time.* See Memorandum from Associate Solicitor, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. *And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.*

Id. at 400 (Souter, J. and Ginsburg, J., concurring in part and dissenting in part) (emphasis added). The majority never disagreed with Justices Breyer's, Souter's and Ginsburg's conclusions that "recognition" and "under federal jurisdiction" are separate concepts or that recognition may follow at a date after 1934.[22] To the contrary, acceptance of this distinction is implicit in both the majority's reasoning and result.

The concurring Justices' conclusion is supported by earlier case law in which the courts have confirmed that federal laws intended to protect or benefit Indians are applicable to tribes that are not recognized.[23] *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (even though the Passamaquoddy Tribe was not recognized at the time it brought its lawsuit, Congress nevertheless intended that the tribe's lands be protected by the

[22] As Justice Breyer observed in his explanation of how later recognition could reflect the fact that a tribe was under federal jurisdiction in 1934 even if the federal government did not appear to be aware of it at the time. "[I]n 1934, the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for Western District of Michigan*, 369 F.3d 960, 961, and n.2 (6th Cir. 2004). But later the Department recognized the Tribe, *considering it to have existed continuously since 1675*. 45 Fed. Reg. 19,321 (Mar. 25, 1980)." *Carcieri*, 555 U.S. at 398, (Breyer, J., concurring).

[23] *See, e.g.*, the federal statute, discussed *supra* at n.17, which governs the approval of tribal attorney contracts R.S. § 2103 (Acts Mar. 3, *1871*, ch. 120 § 3, 16 Stat. 570; May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136). The original version of the statute had different requirements for tribes that had, or had not, reorganized under the IRA. The modern version of the statute (codified at 25 U.S.C. § 81) has been amended so that now it applies only to those tribes "recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450(b)(e).

federal Indian Trade and Intercourse Act (25 U.S.C. § 177);[24] *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) (unrecognized tribes signatory to a federal treaty reserving fishing rights maintained those rights despite the lack of recognition by the Department of the Interior); *United States v. John*, 437 U.S. 634, 652-53 (1978) (Court rejected argument that lapse in recognition equated to lack of federal jurisdiction over the tribe).

In a 1994 amendment to the IRA, Congress specifically spoke to the question of whether the Department of the Interior may, in its application of the IRA, discriminate between tribes based on the manner or timing of a tribe's recognition. The Federally Recognized Indian Tribe List Act dictates that:

> [The] Departments or agencies of the United States shall not . . . make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) [the IRA] . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. § 476(f), 108 Stat. 4791. In other words, Congress made clear in the 1994 IRA amendments that all federally recognized tribes are to have equal access to the IRA's benefits regardless of the manner or timing of recognition -- the Secretary may not implement the IRA in a way that creates unequal classes of recognized tribes.[25] So, while the IRA requires a distinction between tribes that were or were not "under federal jurisdiction" in 1934, based on the 1994 amendments Congress expressly does not allow the Secretary to make a distinction in how she implements the IRA based on when or how federal recognition was extended to a tribe.

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[24] "We emphasize what is obvious, that the 'trust relationship' [between federal government and Passamaquoddy] we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act . . . *Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities….*" 528 F.2d at 379 (emphasis added).

[25] *See also* H.R. 103-781, at 3-4 (1994) (federal agencies may not "differentiate between federally recognized tribes as being 'created' or 'historic'").

Congress also has spoken to the question of whether the land acquisition authority of the IRA's Section 5, and the reservation proclamation authority of the IRA's Section 7, are available to tribes whose federal recognition is confirmed or restored through the Part 83 Federal acknowledgment process. In IGRA, Congress expressly allows a tribe that has been through the Federal acknowledgement process to conduct gaming on its first ("initial") reservation:

> (a) [E]xcept as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 unless -- . . .
>
> (b)(1)(B) *lands are taken into trust* as part of -- . . .
>
> (ii) the initial reservation of an *Indian tribe acknowledged by the Secretary under the Federal acknowledgement process.*...

25 U.S.C. §§ 2719(a), (b)(1)(B)(ii) (emphasis added). This provision of IGRA would be nonsensical without the Secretary's authority to acquire land in trust under Section 5, and to issue a reservation proclamation under Section 7,[26] as these provide the only general land acquisition/reservation proclamation authority for tribes whose recognition has been confirmed or restored through the Part 83 Process.[27]

When read together -- the *Carcieri* majority opinion which implicitly rejected Rhode

[26] *See* 25 C.F.R. § 292.6(c), which governs the Secretary's implementation of IGRA's "initial reservation exception", and which requires that the land be "proclaimed to be a reservation under 25 U.S.C. 467[ ]".

[27] Plaintiffs point out that the Narragansett Tribe was recognized through the federal acknowledgement process and that nevertheless the Supreme Court determined that Narragansett was not under federal jurisdiction in 1934. But in *Carcieri*, how the phrase "now under Federal jurisdiction" should be defined was never briefed -- or even raised -- by either side. Rather, the Court relied on Rhode Island's representation in its petition for *writ of certiorari* – and the fact that it was uncontested by either the Tribe or the United States -- that the Narragansett Tribe was not under federal jurisdiction in 1934. (*"None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934." Carcieri*, 555 U.S. at 395 (emphasis added)). Thus, the fact that the Narragansett Tribe obtained federal recognition through the Part 83 Federal acknowledgement process has no bearing on whether Cowlitz was under federal jurisdiction in 1934. *See also* Letter to the Hon. Earl Barbry, Sr., Chairman Tunica-Biloxi Tribe of Louisiana (the Secretary found that the Tunica-Biloxi Tribe, which also was recognized through the federal acknowledgment process, was under federal jurisdiction in 1934).

Island's argument that a tribe also had to be "federally recognized" in 1934, the three *Carcieri* concurring opinions which explicitly reject this argument, the relevant case law, the 1994 amendments to the IRA, and the statutory framework constructed by Congress in IGRA -- it is clear that Congress intends the benefits of the IRA to be available to tribes that were "recognized" after 1934 as well as before 1934.

2. The Cowlitz Indian Tribe Was "Recognized" by the Standards of the Day and Meets the Modern Definition of Federally Recognized

Plaintiffs' arguments also fail because regardless of whether the IRA requires recognition in 1934, and regardless of whether the test is tied to a 1934 understanding of "recognition" or to the modern concept of "federal recognition," the Cowlitz Tribe meets the requirement that it be a "recognized Indian tribe now under Federal jurisdiction."

Section 19 defines "Indian" as including "members of a recognized tribe now under Federal jurisdiction." Plaintiffs assert that "recognition" as the word was used in 1934 means the same thing that the phrase "federally recognized" has come to mean today. In other words, Plaintiffs insist that Section 19 should be read as if it said "members of any *Federally* recognized tribe now under Federal jurisdiction." But that is not what the statute says, and the Secretary is correct to point out that that is not what Congress meant.

The distinction is an important one because the term "federal recognition" is a term of art with a technical meaning that has developed in the modern era. Today, "federal recognition" speaks not to whether the tribe still exists or whether Congress has authority over it, but rather to whether the United States affirmatively has established a "government-to-government relationship" with it. In 1934, the extension of formal relationships with Indian tribes was not a well-developed concept. This is highlighted in William Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist.,

331 358 (1990) (an article cited in the *Carcieri* decision and the ROD):

> [O]ne might logically expect to find a specific, early date upon which the United States sought to establish or even came to realize that American Indian tribes, like foreign sovereignties, ought to be formally acknowledged, and that such acknowledgement should form the basis upon which the two entities--the governments of the United States and a particular Indian tribe, respectively--would interact. The historical record, however, does not support any such expectation. In fact, the historical record reveals a consistent uncertainty and even confusion on the part of the several branches of government of the United States about its relations with and legal responsibilities toward certain Indian tribes throughout the nineteenth and early twentieth centuries.

Id. at 332 (emphasis added).

It was not until relatively recently that federal statutes intended to benefit Indians explicitly began to limit their application to "federally recognized tribes." These statutes generally include a definition of "federally recognized tribe" that almost invariably is tied to an official list of tribes BIA began keeping in 1979, and which in 1994, Congress forced BIA finally to start making public by publishing in the Federal Register. Pub. L. 103-454. Quinn explains:

> Possibly the most curious aspect of the particular history of the concept and application of federal acknowledgement relative to Indian tribes, specifically, and of the entire history of U.S.-Indian relations, generally, is the fact that not until 1979, fully 157 years after the establishment of the BIA in 1822, was there a comprehensive list of exactly which Indian tribes are federally acknowledged and, by exclusion from that list, which Indian groups are not. Though it may be argued that other earlier lists[[28]] produced by the political branches of the federal government served as constructive lists of 'federally acknowledged' tribes, the fact remains that the 1979 list was the first conscious, explicit delineation of federally acknowledged Indian tribes as such.

Id. at 334-35. Congress did not use the term "federally recognized" in the phrase "members of any recognized tribe now under Federal jurisdiction," because it was a term of art which did not

[28] Plaintiffs insist that a list published in 1947 colloquially known as the "Haas List" must serve as the one and only indicator of which tribes are considered recognized in order to access the benefits of the IRA. GR Mem. 25. But in fact that list was only a list of tribes that BIA considered eligible to organize new governments under the IRA because they already had reservation land -- it was *not* a list of "federally recognized tribe".

then exist. Nor did Congress provide a definition of the word "recognized." Accordingly there is no evidence and no particular reason to believe that Congress intended the word "recognized" to have some special significance beyond its ordinary meaning, and the Secretary correctly points this out. AR140468-70.

Because the concurring opinions in the *Carcieri* case make so clear that recognition is not required in 1934, the Secretary correctly concluded that "[f]or purposes of our decision here, I need not reach the question of the precise meaning of 'recognized Indian tribe' as used in the IRA, nor need I ascertain whether the Cowlitz Tribe was recognized by the Federal Government in the formal sense in 1934, in order to determine whether land may be acquired in trust for the Cowlitz Tribe." AR140469. Nevertheless, the Secretary found that:

> As the historical record produced during the FAP process [Part 83 Federal Acknowledgment Process] demonstrates, the Cowlitz Tribe was a recognized Indian tribe in the cognitive or quasi-anthropological sense of that term in 1934, and it remains so today. Moreover, the Cowlitz Tribe was recognized by the Federal Government in the formal sense of that term at multiple stages in its history, including the late 19th Century, as well as, in conjunction with the FAP determination in 2002.

Id. Accordingly, even if this Court determines that "recognition" in 1934 is a requirement of the phrase "recognized tribe now under federal jurisdiction," the Secretary's interpretation of the term and her application of it to the Cowlitz Tribe is entitled to *Chevron* deference; it also is properly guided by the Indian canon of construction resolving ambiguities in favor of tribes, and accordingly it must stand.

Further, Cowlitz clearly met the 1942 definition of "recognized" that would have been applied, as explained by Felix Cohen, preeminent Indian law practitioner, and author of Cohen's Handbook of Federal Indian Law. Cohen set forth the five criteria by which the Department at that time was using to determine whether a tribe should be "entitled to be considered as a tribe, within the meaning of the [IRA]." Cohen, *supra* at 270-71. The facts in the Record make clear

that the Cowlitz Tribe comfortably met each of these five criteria. *See also* Quinn, 34 Am. J. Legal Hist. at 358.

First, Cowlitz met Cohen's criterion that looked to whether the group had treaty relations with the United States. Cohen, at 270-71 (1942 ed.).[29] Second, Cohen looked to whether the group had been denominated a tribe by act of Congress or Executive Order, *id.* -- as discussed above, Cowlitz clearly met this standard as well.[30] Third, Cohen inquired whether the group had been treated as having collective rights in tribal lands or funds, even if not expressly designated a tribe. *Id.* Again, Cowlitz easily meets this test -- Congress considered twelve pieces of legislation to allow the Cowlitz Tribe to pursue its collective rights against the United States for the unlawful taking of its lands. AR059542; AR059751-831.[31] Fourth, Cohen looked to whether the group had been treated as a tribe or band by other Indian tribes. Cohen, at 270-71

[29] In 1854, the Acting Commissioner of Indian Affairs instructed Washington's first territorial governor, Isaac Stevens, to commence treaty negotiations with the Washington tribes. *Simon Plamondon*, 21 Ind. Cl. Comm. 143, 166. In February of 1855, Governor Stevens convened treaty negotiations with the "Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault, and Queets Indians." *Id*. at 167; *see also* AR012085-88. While Cowlitz refused to sign the treaty because it required the Tribe to cede its historical lands and be removed to a reservation outside its historical territory, *Simon Plamondon*, 21 Ind. Cl. Comm. at 169, the fact that the United States entered treaty negotiations with Cowlitz means that the United States recognized the Tribe as a political entity. The federal acknowledgment regulations provide that: "[e]vidence that a group has had treaty relations with the United States" can demonstrate previous Federal acknowledgement. 25 C.F.R. § 83.8(c)(1). In the Department's Final Acknowledgment Determination for Cowlitz, it determined that "substantial evidence demonstrated that the Federal Government recognized the Lower Cowlitz Tribe during 1855 treaty negotiations." 67 Fed. Reg. 607 (Jan. 4, 2002). The Reconsidered Final Determination for Federal Acknowledgement explained that "[t]he Lower Cowlitz did not sign a treaty; they, however, participated in treaty negotiations, activity which indicated that the Federal Government recognized the negotiating entity as a tribe." NIGC AR006013.

[30] Congress introduced no fewer than twelve pieces of legislation, dated from 1915 through 1929, intended to assist the Tribe in its quest to be compensated for the lands taken from it through an Executive Order in 1863. AR059542; AR059751-831. One of these bills was passed by the House and Senate, and only failed to become law because it was vetoed by President Coolidge. NIGC AR002198*; see also* AR140481. *See* discussion *supra* at 20.

[31] BIA also interceded several times to protect the federally-based fishing rights of Cowlitz Indians. AR059555-57. Additionally, Congress passed legislation in 1911 to provide land allotment rights to members of certain tribes, including Cowlitz tribal members, based on the fact that Cowlitz was an intended beneficiary of the Treaty of 1855 because it was a tribe "affiliated with the Quinaielt and Quileute tribes." AR059660-61. In 1931 the Supreme Court confirmed that the Cowlitz Indian Tribe was one of the tribes whose members Congress intended to enjoy rights to allotments in the 1911 Act. *Halbert*, 283 U.S. at 759-60. The Tribe also availed itself of the Indian Claims Commission Act of 1946, which allowed the Tribe to bring a claim for unjust compensation for the lands taken from it by Executive Order. It is therefore quite clear that the Cowlitz Tribe had collective rights, and that its members had rights by virtue of being members of this particular tribe.

(1942 ed.). The Record demonstrates that the Cowlitz Tribe was recognized by other tribes as both a trading partner and military rival. AR015441.[32] Fifth, Cohen looked to whether the group exercised political authority over its members, through a tribal council or other governmental forms. *Id*. As is clear from the Record, the Tribe had an active tribal government, with BIA supervising tribal meetings. *See* AR140484; NIGC AR002182-83; NIGC AR002199; AR059550-55.[33] In sum, there is no question that even under the administrative acknowledgment standards of the day, the Tribe was federally recognized.

Finally, even if the modern term "federal recognition" is to be grafted onto the 1934 statute, Cowlitz also meets this test. The United States entered into a government-to-government relationship with the Tribe when it entered into treaty negotiations with it. Congress has never acted to terminate that relationship, and as discussed at length above, Interior has never had authority to terminate that relationship. Accordingly, while Interior occasionally lapsed in its responsibility to provide services to the Tribe (and for a time failed to properly include the Tribe on its modern list of federally recognized tribes), in fact the Tribe's formal relationship with the federal government was never terminated. NIGC's finding of administrative termination for the purposes of IGRA's restored lands exception has no bearing whatsoever on the fact that a government-to-government relationship was established through treaty negotiations and never

[32] In addition, Cowlitz and neighboring tribes engaged in warfare. AR015440; *Simon Plamondon*, 21 Ind. Cl. Comm. 143, 155; NIGC AR005672; and during the treaty negotiations of 1855 with Governor Stevens, Yoannus, head chief of the Upper Chehalis stated that "we have finally settled on a place for these five bands, the Cowlitz, Upper Cowlitz, Upper Chehalis, Satsop, and Mountain Indians." *Simon Plamondon*, 21 Ind. Cl. Comm. 143, 168; NIGC AR005685

[33] During the 1920's and 1930's the Cowlitz Tribe's government was especially active in pursuing its land claims as well as assisting its tribal members on a variety of issues. AR012057. Further, BIA explicitly found that the Cowlitz Tribe met the Federal acknowledgement criterion of maintaining tribal political influence or authority over its members without interruption (25 C.F.R. § 83.8) since at least the time of the 1855 treaty negotiations. AR012055-57. In fact, BIA's Historical Technical Report found that tribal member attendance at governmental meetings "was comparatively high during the 1920's and 1930's." *Id.*

terminated by Congress. Accordingly, the status of the Tribe's government-to-government relationship has remained intact since 1855.

By any reasonable standard, the Cowlitz Indian Tribe was both "recognized" and "federally recognized," when the Secretary exercised her IRA authority and in 1934 when the IRA was enacted. While recognition is not required in 1934, the facts make clear that even if it were, the Tribe would meet that standard.

D. The Cowlitz Tribe Has the Right to Control its Tribal Membership; The Acknowledgment Regulations Do Not Affect The Secretary's IRA Authority

Clark County claims that the federal acknowledgment regulations impose an ongoing duty on BIA to police any post-acknowledgment expansion of tribal enrollment to ensure that it meets the criteria in 25 C.F.R. § 83.7(e), and further argues that BIA's failure to do so prevents BIA from taking administrative action on behalf of the Tribe. *See* Clark Mem. 24-28. The County failed to raise this argument during the course of BIA's administrative proceedings, and so this claim should be dismissed under the APA. *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) ("A party must first raise an issue with an agency before seeking judicial review."). In addition, Clark County is challenging tribal enrollments that occurred more than six years ago, Clark Mem. 24, so this claim also is barred by the APA's six year statute of limitations.[34] But even if timely raised, this mangled reading of the regulations would not withstand scrutiny.

First, a long and unbroken line of federal case law makes clear that a federally recognized tribe has the sovereign right to define its own membership. *See United States v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978) ("unless limited by treaty or statute, a tribe has the power to

[34] *See* 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of Title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

determine tribal membership"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). A tribe's "ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribes' membership determinations." *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995). Courts have long recognized that tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323 (1978). Thus, absent Congressional action, the Cowlitz Tribe retains complete control of its membership decisions and its criteria for tribal enrollment, and BIA has no jurisdiction to interfere with the Tribe's membership decisions.[35] *See Smith*, 875 F. Supp. at 1361; *see also Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977) (Congress does have the power to define a tribe's membership differently from the tribe).

Second, Clark County's proffered reading of Part 83 also would create an impermissible classification of tribes: those with full sovereign authority to determine their membership decisions and those with a more limited sovereignty because they were acknowledged through the Part 83 process. This type of classification was expressly made illegal by the 1994 amendments to the IRA Pub. L. No. 103-263 108 Stat. 707, codified as 25 U.S.C. § 476 (f)-(g). The 1994 amendments provide that "[a]ny regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and

[35] Congress has on occasion acted to impose restrictions on certain federally recognized tribes' rights to define and control their membership. *See, e.g.*, Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300g (7) (1987). The Ysleta del Sur Restoration Act restricted tribal membership to descendants of members listed on the original base roll with at least 1/8 degree or more of Tigua-Ysleta del Sur Pueblo Indian blood. The 112th Congress amended the Act to remove this restriction on tribal enrollment and grant the Pueblo full control over its enrollment decisions. *See* Pub. L. 112-157. Congress has never taken any such action acted to restrict the Cowlitz Tribe's inherent right define its membership.

that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect."[36] *Id.* at (g). The amendments were necessary because the Department had developed an "in-house" classification system between "historic tribes" and "created tribes" which assigned the two classes of tribes differing levels of tribal sovereignty. *See* K. Gover, *Genealogy as Continuity: Explaining the Growing Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian. L. Rev. 243, 277-78 (2008). Senator John McCain, vice-chair of the Senate Committee on Indian Affairs and co-sponsor of the 1994 IRA amendments explained in his floor statement introducing the bill that:

> Our amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law… our amendment to section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.

140 Cong. Rec. 11050 (1994). Senator McCain expressly addressed the sort of impermissible classification scheme for which Clark County advocates here: "[R]egardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States *and exercise the same inherent authority." Id.* (emphasis added).

To support its arguments Clark County points to three circumstances in which the Department tried to impose membership restrictions on Part 83 tribes. Clark Mem. 26, Exhibits

[36] The Part 83 regulations were promulgated on February 25, 1994, several months before the 1994 amendments to the IRA were enacted. The amendments also prospectively prohibit agencies from promulgating any regulation or issuing any decisions/determinations that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes. 25 U.S.C. § 476 (f).

1-3,[37] but these cases all predate the 1994 amendments. Accordingly the cited examples only highlight the precise type of improper classification that Congress ordered the Department to stop when it enacted the 1994 amendments to the IRA.

Finally, even if the Department were free to impose membership restraints on the Tribe, in fact the federal acknowledgment regulations themselves do not support Clark County's argument. The regulations apply "*only to those American Indian groups … which are not currently acknowledged as Indian* tribes by the Department." 25 C.F.R. § 83.3(a) (emphasis added), and "Indian tribes…which *are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations*." 25 C.F.R. § 83.3(b) (emphasis added). Because the Cowlitz Tribe was acknowledged by and has been receiving services from BIA since 2002, the Part 83 regulations, by their own terms, do not apply to the Tribe.

Clark County nevertheless insists that § 83.12(b) effectively imposes a continuing obligation on the Secretary to ensure that "any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e)."[38] *Id.* Yet the preamble to the regulations makes clear that § 83.12(b) allows "for the addition to the base roll of . . . individuals who are politically and socially part of the tribe and who meet its membership requirements." 59 Fed. Reg. 9292 (Feb. 25, 1994). Even under its tortured interpretation of the regulations, Clark

[37] Clark County submits three exhibits containing documents outside the Administrative Record (because this issue was never raised prior to its 2013 complaint). Interestingly, the exhibits include at least one document that would normally be protected as attorney-client privileged from FOIA disclosure, and includes letters from DOI officials to tribal officials that do not appear to be available to the public. Apart from the questions raised about the source of these documents, they are outside the Administrative Record and therefore not properly before the Court.

[38] 25 C.F.R. §83.7(e) requires that a "petitioner's membership consist[] of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."

County does not, and has no basis to allege, that the Cowlitz Tribe has enrolled members that do not meet the requirements of § 87.3(e) or that they are not politically and socially part of the Tribe / do not meet the Tribe's membership criteria.[39]

In sum, the Part 83 regulations simply do not require that BIA certify any increase in the Cowlitz Tribe's base membership roll before BIA can take administrative action on the Tribe's behalf. The Court should reject this argument.

II. COWLITZ MEETS THE "SIGNIFICANT HISTORICAL CONNECTION" REQUIREMENT FOR AN "INITIAL RESERVATION"

A. Statutory and Regulatory Requirements

The Secretary's authority to proclaim a reservation is derived from Section 7 of the Indian Reorganization Act. 25 U.S.C. § 467. Section 7 imposes no limitation on where a reservation may be located. The Secretary has not adopted regulations to implement that authority; it is implemented through unpublished internal guidelines, which also do not contain any geographical limitations. *See* AR140494-07; AR140404. Section 20 of IGRA governs whether gaming may occur on the "initial" reservation acquired for a tribe acknowledged under the federal acknowledgment process; it also does not impose a geographic limitation on the location of the "initial" reservation. 25 U.S.C. § 2719(b)(1)(B)(ii).

Although there is no geographic limitation in either the IRA or IGRA, the Department's regulations implementing IGRA Section 20's "initial reservation" provision require that the land be located "within an area where the tribe has significant historical connections…" 25 C.F.R. §

[39] All that Clark County has alleged is that Cowlitz enrollment has increased since acknowledgment. This by itself is neither a nefarious nor an uncommon occurrence, as more tribal members often enroll after recognition or restoration. In fact, *Grand Ronde has increased its tribal membership by more than 472 percent* since it was restored to federal recognition. *See* 49 Fed. Reg. 25,688 (June 22, 1984) (Grand Ronde base roll published pursuant to the Grand Ronde Restoration Act, 25 U.S.C. § 691 *et. seq*); *see also* http://bluebook.state.or.us/national/tribal/grandronde.htm (current tribal population) (site last visited Nov. 2, 2013).

292.6(d). "Significant historical connections" can be established by "historical documentation [of] 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.

Prior to adoption of the Part 292 regulations the concept of "historical connections" was almost exclusively invoked in the context of a different provision of Section 20, the one allowing tribes restored to federal recognition to game on "restored lands."[40] A significant body of administrative and federal case law interpreted the restored lands provision, and this served as basis for the "significant historical connections" regulatory requirement. *See Butte County v. Hogen*, 613 F.3d 190, 192 (D.C. Cir. 2010) (test for "historical connections" in pre-existing case law codified in Part 292 regulations).

The Secretary's regulatory standard reflects the holdings in the foundational cases of *City of Roseville v. Norton*, 348 F.2d at 1027-30 (IGRA's Section 20(b) should be "interpreted consistent with the broad purposes it serves including restitution for historical wrongs;" Section 20(b) "ensur(es) that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones");[41] and *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for West. Dist. Mich.*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) (even if there are other locations which "were of historical significance

[40] IGRA's general prohibition against gaming on land acquired after October 17, 1988 does not apply if land is taken in trust as "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

[41] *See also Interior Coos Op.* (Dec. 5, 2001) (finding that lands qualify as restored lands applying Indian canons of construction, which provide that statutes are to be construed liberally in favor of the Indians); *Citizens Exposing Truth About Casinos v. Norton*, Civ. A 02-1754 TPJ, 2004 WL 5238116 (D.D.C. Apr. 23, 2004), *aff'd* 492 F.3d 460 (D.C. Cir. 2007) (upholding Secretary's initial reservation determination; confirming that exception intended to ensure parity for newly recognized and restored tribes that lacked a reservation in 1988); *see also City of Roseville v. Norton*, 348 F.2d at1027-30 (interpretation consistent with broad purposes of remedial exception); 73 Fed. Reg. 29354, 29360 (May 20, 2008) ("purpose of the exception is to assist newly recognized tribes in economic development") .

and arguably were more important" to the tribe, the parcel of lesser historical importance nevertheless met the historical connections test for "restored lands"). Interior and NIGC continue to rely heavily on these earlier federal court opinions. *See Butte County*, 613 F.3d at 192; *see also NIGC Fort Sill Op.* at 24 (May 19, 2008); *Interior Upper Lake Op*. at 6 (Nov. 21, 2007); *NIGC Mechoopda Op.* at 6 (March 14, 2003); *NIGC Wyandotte Op.* at 8 (Sept. 10, 2004); *NIGC Rohnerville Op.* at 1 (Aug. 5, 2002); *NIGC Karuk Op.* at 8 (Apr. 9 2012).

B. The Secretary's Application of The Historical Connection Standard to the Cowlitz Tribe Was Appropriate

The Secretary's conclusion that the Cowlitz Parcel meets the requirements for an initial reservation proclamation (including the significant historical connection requirement) is amply supported by the evidence in the Administrative Record. *See* ROD at 123-24, AR140504-05, 140518 (25 C.F.R. § 292.6 requirements other than significant historical connections); ROD at 120-21, 126-27, AR140501-02, 140507-08 and AR cites therein (ICC finding of use and occupancy); ROD at 127-28, AR140508-09 and AR cites therein (Cowlitz use of Columbia River), ROD at 128-30, AR140509-11 and AR cites therein (evidence of occupancy including large Cowlitz lodges three miles from the site); ROD at 130-33, AR140511-14 and AR cites therein (Cowlitz trade presence); ROD at 133-34, AR140514-15 and AR cites therein (Cowlitz battles); ROD 134-136, AR140515-17 and AR cites therein (treaty negotiations and tribal membership roll with geographic location of members); *see also* AR 140545, 014789-95 (maps showing Cowlitz historical connections).

Importantly, the Secretary's determination that the Tribe has significant historical connections with the Parcel relies on facts already adjudicated in two prior federal proceedings:

> (1) The Cowlitz Tribe's ICC proceedings, *Simon Plamondon*, 21 Ind. Cl. Comm. 143, which involved ICC review of detailed historical information

> as well as factual and legal arguments from both the United States and the Tribe, *see* AR140501-02.[42] The United States is bound by the findings of the ICC and the admissions made by the United States therein.
>
> (2) The Tribe's administrative federal acknowledgment proceedings, which involved extensive independent research into the Tribe's history conducted by BAR (now known as the Office of Federal Acknowledgment), including several technical reports supporting the final acknowledgment determination (Historical Technical Report, Anthropological Technical Report, Genealogical Technical Report), *see* AR140502-03.[43] The factual findings in BAR's Cowlitz technical reports are entitled to deference. *See James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

There can be little question that the Secretary's reliance on these federally-adjudicated facts establishes a rational connection between the facts and the choice made, as required by the APA. *See Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001).

In addition, the Secretary considered that the Tribe's aboriginal title (exclusive use and occupancy) area as determined by the Indian Claims Commission (ICC)[44] is only about 14 miles north of the Parcel. Applying the regulatory standard in 25 CFR § 292.2 consistent with prior agency opinions and relevant case law, the Secretary determined that Cowlitz's ICC "exclusive

[42] Although Plaintiffs incorrectly claim that the ICC determined that the area surrounding the Cowlitz Parcel is wholly outside of the Tribe's historical territory, GR Mem. 33; Clark Mem. 30, as the Secretary explains, AR 140502, 140508, the ICC did *not* find that the Cowlitz had no historical connection there. In fact, the ICC record actually establishes that the Tribe historically occupied and used the area in and around the Cowlitz Parcel. *See, e.g.*, AR 140507, 014786, 014821, 014836-37, 078862 (Cowlitz exclusive use area was 14 miles north of Cowlitz Parcel; Tribe directly used and occupied lands within one mile); AR140510 n. 238, 131976, 014821 (noting Townsend's 1834 account of Cowlitz encampments near the mouth of the Lewis River).

[43] Plaintiffs cite to portions of the record from the Tribe's federal acknowledgment proceedings which they claim establish that the Tribe did not historically use or occupy the Cowlitz Parcel, GR Mem. 34-35, but as the Secretary's decision makes clear, there is substantial evidence in the BAR Technical Reports that shows Cowlitz use and occupancy of the Columbia near the mouth of the Lewis River, AR140508-11 140515; Cowlitz participation in the fur trade near the Cowlitz Parcel, AR140511-13; Cowlitz involvement in battles and skirmishes within a few miles of the Cowlitz Parcel, AR140514-15; and Cowlitz members included in the federal census in the area and later in the 1919 Roblin Roll; AR140516-17.

[44] Congress created the ICC to provide a forum in which tribes could sue the United States for damages for, *inter alia*, the United States' taking of lands to which the tribes had "aboriginal title." The ICC awarded such compensation for aboriginal title lands only if the claimant could demonstrate exclusive and continuous use and occupancy for a long time prior to the loss of the land. *See Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 905 (Ct. Cl. 1963). The ICC did not compensate tribes for lands they used in common with other tribes. *Id*.

use and occupancy" area is within the "vicinity" of the Cowlitz Parcel and therefore indicates significant historical connections with the Parcel. *See* ROD at 126-27, AR 140507-08, (citing *NIGC Karuk Op.* at 10-12) (parcel 38 miles from tribal headquarters and not in area of exclusive use by tribe warrants a finding of historical connection); *see also* ROD at 127, n. 229, AR 140508 (citing additional Indian lands opinions supporting analysis).[45]

Ignoring that far greater distances have been found to support significant historical connections in numerous other cases, *see* AR140508 n. 229,[46] Plaintiffs contend that the 14-mile distance between the Parcel and the Cowlitz Tribe's ICC territory shows that Cowlitz had no connection to the Parcel. But evidence of use or occupancy of the particular parcel is not required, *see, e.g.*, *Interior Scotts Valley Op*. at 15, n. 57 (May 17, 2012) (unduly burdensome, unrealistic to require a tribe to produce direct evidence of actual use or occupancy), 73 Fed. Reg. at 29,368 (May 5, 2008) (actual inhabitance not required), and since the Cowlitz were not only expert boatmen (AR140516) but also had "abundant" horses (AR140513), it is not unreasonable to infer that Cowlitz covered the distance and historically used or occupied the Parcel, given "the

[45] *NIGC Poarch Band Op.* (May 19, 2008); *NIGC Mooretown Rancheria Op.* (Oct. 25, 2007); *NIGC Sault St. Marie Op.* (July 31, 2006); *NIGC Wyandotte Op*; *NIGC Mechoopda Op.*; *NIGC Rohnerville Op.* (Aug. 5, 2002). Plaintiff Grand Ronde argues that the ROD "conflates" the distance from a tribe's former reservation and the distance from a tribe's historical territory (GR Mem. 38, n. 28) -- but in fact, Plaintiff conflates a tribe's ICC "exclusive use and occupancy area" with its historical territory. Because Cowlitz never had a reservation, it was entirely appropriate for the Secretary to evaluate the 14-mile distance between the parcel and the Tribe's ICC exclusive use and occupancy area -- this area certainly is comparable to former reservations or tribal headquarters. *See, e.g., City of Roseville v. Norton*, 348 F.3d at 1023, 1033 (land 40 miles from the tribe's former reservation qualifies as "restored lands"); *NIGC St. Ignace Op.* (July 31, 2006) at 12 (tribe had significant historical connection to a parcel 50 miles from the tribe's center).

[46] This argument flows from Plaintiffs' overly restrictive view that the Cowlitz Tribe's historical territory is limited to its exclusive use and occupancy area as defined by the ICC. GR Mem. 32-33; Clark Mem. 30. No case interpreting significant historical connections has ever concluded that tribes cannot have overlapping claims to an area; to the contrary, the case law (and the regulation) is clear that IGRA does not require a tribe "to demonstrate that it was the only tribe with historical connections to the area, or that the subject area was the only place where [the tribe] has historical connections." *NIGC Karuk Op*. at 12 (emphasis added). Indeed, Interior explicitly rejected such a strict standard when it promulgated the Part 292 Section 20 implementation regulations. *See* 73 Fed. Reg. 29354, 29360 (May 5, 2008) (in rejecting suggestion to limit gaming to "ancestral homelands" or to require "historically exclusive use" to show significant historical connections, both suggestions found to be inconsistent with IGRA).

nature of the Cowlitz Tribe's historic use and occupancy" and the totality of the evidence showing Cowlitz presence in the vicinity of the Parcel. *Interior Scotts Valley Op*. at 15; *see* ROD at 126-36, AR 140507-17 and AR cites therein.

Plaintiffs argue that the Parcel must be "at the center of" the Tribe's historic activities, or within ceded, settled, or aboriginally controlled territory in order to show "significant historical connections." GR Mem. 33-35, 37; Clark Mem. 29-30. Yet neither of the two federal agencies charged with implementing IGRA have ever required a showing that land be "at the center of" a tribe's historic territory to find significant historical connections.[47] Rather, the agencies have engaged in fact-specific, case-by-case analyses, finding that a number of factors may demonstrate that a parcel was of significant historical importance to a tribe including, but not limited to, evidence that:

- The tribe historically used the parcel for subsistence purposes,[48] including hunting, fishing and gathering (*Ft. Sill Op*. at 24; *NIGC St. Ignace Op*. at 12-13; *NIGC Mechoopda Op*. at 11);
- Tribal members lived and worked *in the general area* of the parcel for much of the tribe's recorded history (*NIGC Grand Traverse Op*. at 18 (Aug. 31, 2001);
- The parcel contains or is near areas of cultural significance for the tribe, such as historic village sites (*NIGC Mechoopda Op.* at 10-11; *Interior Upper Lake Op*. at 7; *NIGC Poarch Band Op.* at 25; *NIGC Rohnerville Op.* at 12; *Interior Coos Op*. at 11.

The Secretary's reasoning in her explanation of why Cowlitz has a historical connection to the Parcel is fully in accord with these earlier agency decisions.

[47] *See, e.g., Interior Upper Lake Op*. at 7 (Dec. 5, 2001); *Interior Elk Valley Op.* at 7 (July 13, 2007) ; *NIGC Poarch Band Op.* at 25; *NIGC Karuk Op.* at 10; *NIGC Mechoopda Op*. at 9; *NIGC Wyandotte Op.* at 11; *NIGC St. Ignace Op.* at 13.

[48] Although Plaintiffs claim that "subsistence use" for purposes of the "initial reservation" exception requires "long-term and regular interaction with the land," they fail to cite to a single opinion requiring as much, and instead rely on regulations governing the subsistence management of public lands in Alaska, which are altogether inapplicable here. GR Mem. 31, n.19.

Plaintiffs also contend that two recent Interior opinions finding insufficient historical connections reveal that the Cowlitz decision is inconsistent with agency precedent, *see Interior Scotts Valley Op.*; *Interior Guidiville Op.* (Sept. 1, 2011). The ROD in fact relies on the legal standard used in the *Scotts Valley* and *Guidiville* opinions, *see* ROD at 126, 133, AR140507, 140514; but the Secretary reached a different conclusion because Cowlitz has very different factual circumstances.

In the *Guidiville* opinion, Interior found that the Band's evidence of general presence of Pomo Indians in the Bay Area was insufficient to show use or occupancy by the specific Guidiville Band of Pomo of the parcel or of lands in its vicinity. Similarly, in the *Scotts Valley* case, the Department found that lands some 78 miles south of the Band's former reservation were not restored lands because the Band did not demonstrate that the Pomo bands inhabiting the area were its ancestors; further, the Department found that even if they were the Band's ancestors, the Band failed to show that the "nature of the tribe's historic use and occupancy" would lead to the natural inference that the Band also historically used or occupied the subject parcel. *Interior Scotts Valley Op*. at 15. By contrast, federally-adjudicated facts demonstrate that the Cowlitz Tribe descends from the historic Cowlitz Indians, and that there are multiple instances of Cowlitz historic presence in and around the Parcel from which the requisite inference of use or occupancy can be drawn.

Plaintiffs devote some eight pages to trying to show why the numerous pieces of evidence cited in the ROD to support the finding of significant historical connections are inadequate, despite the fact that the ROD fully and thoroughly addressed the numerous historical submissions made by the Plaintiffs and other opponents of the Tribe's trust acquisition. *See* AR140498, 140506, 140508-16. Plaintiffs' speculative fly-specking of each piece of evidence,

however, only serves to highlight that there are multiple pieces of federally-adjudicated historical evidence that, taken together, show Cowlitz occupancy or use in the vicinity of the Parcel. *See, e.g.*, AR140508-11 (evidence of Cowlitz use and occupancy of Columbia River in vicinity of parcel); AR140516-17 (evidence of Cowlitz occupancy in Clark County from treaty negotiations, census records and 1919 Roblin Roll); AR140511-14 (evidence of extensive, intensive nature of Cowlitz trade in immediate area of parcel); AR140514-15 (Cowlitz warriors and battles within 3 miles of parcel); and AR140509-10 (large Cowlitz lodges about three miles from parcel).

In sum, the Secretary's interpretation of the "significant historical connection" requirement in this case is consistent with more than a decade of precedent from Interior, NIGC, and the courts, and therefore is entitled to deference, particularly since the Secretary is interpreting regulations established by her own agency that implement a statute she is charged with administering. *See Fontana v. Caldera*, 160 F. Supp. 2d 122, 129 (D.D.C. 2001) (internal citations omitted) (reviewing courts "should accord even more deference" to an agency's interpretation of its own regulations, and "defer to that interpretation unless it is plainly wrong."). Deference is especially warranted where, as here, the record reflects a factual dispute that clearly implicates the Secretary's special area of expertise. *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 114 (D.D.C. 2006), *citing James v. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987). The Court need not find that the Secretary's decision is "the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings;" *Enter. Nat'l Bank v. Johanns*, 539 F. Supp. 2d 343, 345 (D.D.C. 2008), *citing Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983); the Court must only determine that the Secretary's decision was based on "reasonable expert evidence" that established "a rational connection

between the facts and the choices made." *Wis. Valley Improvement Co. v. FERC*, 236 F.3d at 747 (internal citation omitted). Having relied on an extensive number of federally-adjudicated facts and having duly considered contrary evidence, the Secretary's determination that the Tribe has a significant historical connection to the Cowlitz Parcel must be upheld as reasonable and lawful under the APA. *Marsh*, 490 U.S. at 378.

III. THE SECRETARY FULLY COMPLIED WITH NEPA

In compliance with NEPA, the BIA prepared a comprehensive Environmental Impact Statement (EIS) defining the purpose and need for the proposed Cowlitz trust acquisition (Project), identifying a reasonable range of Project alternatives, thoroughly evaluating potential environmental consequences, and describing mitigation measures that will minimize those consequences. Throughout the 6-year EIS process, the agency held multiple hearings and carefully reviewed and responded to thousands of pages of public comments. Plaintiffs nonetheless contend that BIA failed to take a hard look at environmental issues and did not provide adequate opportunity for comment. Clark Mem. 32-45, GR Mem. 43-51. But the Administrative Record demonstrates quite the opposite.

A. BIA Properly Identified And Evaluated The Purpose And Need For The Project

An EIS must "briefly specify the underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. Where, as here, an agency is asked to sanction a plan of development, the purpose and need statement "should take into account the needs and goals of the parties involved in the application" as well as "the views of Congress expressed ... in the agency's statutory authority to act." *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.).

Agency statements of purpose and need are reviewed using a deferential "rule of reason."

Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73 (D.C. Cir. 2011); *Citizens Against Burlington*, 938 F.2d at 196. A reviewing court must "uphold an agency's definition of objectives so long as the objectives the agency chooses are reasonable." *Citizens Against Burlington*, 938 F.2d at 196; *see also Rivers Unlimited v. Dep't of Transp.*, 533 F. Supp. 2d 1, 3 (D.D.C. 2008) (statement of purpose and need "is reviewed with considerable deference").

Here, BIA properly identified and stated the purpose and need for the Project as follows:

> to create a federally-protected Tribal land base on which the Cowlitz Indian Tribe can establish and operate a Tribal Government Headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these Tribal Government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient.

AR140383, 075837. This statement appropriately "take[s] into account the needs and goals of the part[y] involved in the application" for approval (namely, the Cowlitz Tribe). *See Citizens Against Burlington*, 938 F.2d at 196 (directing agencies to take into account applicant's goals). The statement also accounts for "the views of Congress expressed ... in the agency's statutory authority to act" to acquire and protect Tribal trust land and promote Tribal sovereignty and economic opportunities. See AR140383-84 (discussing Congressional authorization); *Citizens Against Burlington*, 938 F.2d at 196 (directing agencies to consider views of Congress). It was fundamentally reasonable for BIA to consider the establishment of a sovereign land base and tribal self-sufficiency for a landless Indian tribe recently restored to federal recognition. *See Citizens Against Burlington*, 938 F.2d at 196; *City of Alexandria v. Slater*, 198 F.3d 862, 867-68 (D.C. Cir. 1999) (upholding "rather obvious" purpose and need). For these reasons, BIA's statement of purpose and need satisfies the deferential "rule of reason" and must be upheld.

Plaintiffs nonetheless allege that BIA's statement of purpose and need violates NEPA, taking exception to BIA's consideration of an economic report submitted by the Tribe. Clark

Mem. 39-42; GR Mem. 43-46. But it was perfectly permissible for the agency to consider information from the Tribe's economic analysis.[49] *City of Grapevine v. Dep't of Transp*., 17 F.3d 1502, 1506 (D.C. Cir. 1994) (upholding agency consideration of applicant's economic goals); Citizens Against Burlington, 938 F.2d at 197-98 (upholding agency consideration of applicant's economic analysis); *see also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 166 (D.D.C. 2002) (upholding BIA reliance on technical reports submitted by tribal applicant). Indeed, it would have been improper to do otherwise. *Citizens Against Burlington*, 938 F.2d at 196; *see also Louisiana Wildlife Fed'n v. Yor*k, 761 F.2d 1044, 1048 (5th Cir. 1985) (agency cannot gloss over applicant's objectives); *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) (improper to ignore applicant's economic goals).

Plaintiffs also allege that BIA's statement of purpose and need failed independently to evaluate allegedly inaccurate information in the Tribe's economic report. Clark Mem. 42; GR Mem. 44-46. The administrative record demonstrates that BIA independently evaluated the economic reports, appropriately and reasonably balanced the Tribe's objectives with the agency's Congressionally-defined authority over tribal self-governance and economic development, and appropriately exercised its discretion throughout the NEPA process. *See, e.g.*, AR140383-84 078453-54 (discussing Congressional authorization); AR140383-84, 140406, 140412-13 (discussing BIA consideration of Tribal business plan and economic report); AR140409, 066844-985, 074236-5765, 086652-59, 098347-9240, 099502-23, 092943, 117785 (exercise of

[49] The economic analysis at issue is the Tribe's "Unmet Needs Report" and Business Plan. Plaintiffs question the legitimacy of the Unmet Needs Report, but the Cowlitz Tribe, not Plaintiffs, is uniquely qualified to determine the needs of its tribal government and members and what economic and other programs the Tribe should pursue to meet these needs. In preparing the Unmet Needs Report, the Tribe relied on information collected by its limited staff and data from public and tribal sources to generate its estimates of Tribal need, which take into account, *inter alia*, the significantly disadvantaged position of the Cowlitz Tribe in comparison to the State or other established tribes with a land base (like Grand Ronde). *See* AR083808-15.

independent discretion).[50]

Grand Ronde further alleges that BIA violated NEPA by adding the Tribe's economic report and business plan to the EIS at the "last minute," thereby precluding comment. GR Mem. 43. That is a gross misrepresentation of the record. In their comments on the DEIS, Plaintiffs asked BIA to add the Tribe's economic report and business plan to the document.[51] Although not required to do so, BIA consented.[52] The agency then provided Plaintiffs with multiple opportunities to comment on the added material, and it carefully considered those comments before making a final decision on the Project.[53] Contrary to Plaintiffs' suggestion, this is not evidence of a NEPA violation; rather, it is evidence that the NEPA process worked properly. *See City of Grapevine*, 17 F.3d at 1507 ("The very purpose of a DEIS is to elicit suggestions for

[50] It is also worth noting that BIA would not have violated NEPA ***even if*** it had simply adopted the Tribe's goals as the agency's own. *See Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 668, 672-73 (D.C. Cir. 2011). (agency "adopted [the applicant's] goals as the purpose and need of the [project]"; court held that agency "did all that NEPA required of it" and "found no errors that compromised the objectivity and integrity of the NEPA process").

[51] The DEIS described the Tribe's economic needs and expected revenues. *See* AR106757-59, 106905-906. Plaintiffs' comments on the DEIS requested that BIA consider and provide additional information about the Tribe's business plan, objectives, and projected revenues. AR101853-87, 101900-2511, 102775-3150, 103229-5015, 105016-51, 105077- 192, 105226-71, 105294-353.

[52] The Tribe submitted its business plan to BIA pursuant to the agency's fee-to-trust regulations, 25 C.F.R. § 151.11(c); submission is not required by NEPA. Tribes typically designate much of the financial information in their business plans as confidential business information protected from disclosure under the Freedom of Information Act (FOIA), but in this case BIA included the information in its NEPA document, allowing public comment.

[53] In response to those comments, BIA revised the DEIS and included the Tribe's business plan in a preliminary draft of the FEIS. AR093437-7274, AR097286- 328. Both groups of Plaintiffs reviewed and provided comments on the preliminary draft FEIS containing the Tribe's business plan. AR083444-69, 092189-266, 092759-72; 092883-920. The BIA carefully considered Plaintiffs' comments, made revisions to the preliminary draft FEIS, and released the final version of the FEIS for public review. AR074228-29, 086624-25, 086694-91886 092000-188, 092814-40. Both groups of Plaintiffs submitted additional comments on the FEIS. AR071321-39, 071390-2970, 072971-3288, 073294- 99, 073661-66, 073773-948, 074054-69, 074107-110, 074115-22. BIA considered Plaintiffs' comments on the FEIS prior to issuing the 2010 ROD, and included responses to those comments in the 2010 ROD, AR000054, 000060-61, 064778-6015, and in the 2

013 ROD, AR140406, 140412-13.

change").[54]

B. BIA Properly Considered A Range Of Reasonable Alternatives

Plaintiffs also allege that BIA's statement of purpose and need violated NEPA by precluding consideration of a full range of alternatives to the Project. Clark Mem. 39-42; GR Mem. 46-47. Judicial review of the alternatives considered by an agency is subject to the deferential "rule of reason." *Citizens Against Burlington*, 938 F.2d at 197-98. Under the "rule of reason," alternatives that are infeasible, unreasonable, or inconsistent with project purposes need not be addressed in detail in an EIS, so long as the document "briefly discuss[es] the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a); *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140-41 (D.C. Cir. 1991); *Citizens Against Burlington*, 938 F.2d at 197-98.

Here, the FEIS contains a detailed evaluation of six different alternatives. AR075847-87 (describing alternatives), 076068-387 (evaluation of environmental consequences). Those alternatives included multiple sites, multiple types of development (including a non-gaming development option), multiple development intensities, and the alternative of taking no action at all. *Id*. In addition, BIA carefully considered 13 other options (including multiple non-gaming options), which ultimately proved infeasible. *See* AR140386-94 140413-15, 075882-86 (BIA discussion of alternatives selection process).

Circuit precedent dictates that BIA's alternatives analysis was more than sufficient to satisfy NEPA's "rule of reason." For example, *Citizens Against Burlington* held that the rule of

[54] Indeed, "[t]his is how decision by notice and comment works: statements that respond to comments by laying out the basis for the decision at issue are both precisely what the agency is supposed to supply and precisely what is entitled to judicial deference." *Rivers Unlimited*, 533 F. Supp. 2d at 4; *see also City of Carmel-by-the-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1157 (9th Cir. 1997) (upholding EIS where federal agency refined statement of purpose and need in response to public comments).

reason was satisfied where an agency initially considered five alternatives, eliminated three from detailed consideration due to their infeasibility, and prepared an EIS addressing only the proposed project and a "no action" alternative. *Id*., 938 F.2d at 196-98. Similarly, *Theodore Roosevelt* upheld as reasonable a range of alternatives consisting of a proposed project, three modifications to the project, and "no action." *Id*., 661 F.3d at 74-76. Like the alternatives considered in those two cases, the alternatives evaluated in BIA's EIS provided a logical set of options: approve the Project as proposed, approve the Project with modifications (either by modifying the development or modifying its location), or deny the Project altogether. *See id*.; AR75847-87 (describing BIA's range of alternatives).

Plaintiffs nonetheless contend that BIA violated NEPA by failing to consider the possibility of developing a casino north of the Project site. Clark Mem. 40; GR Mem. 46-47. They are mistaken. The BIA carefully considered 19 different sites, including 5 located north of the Project site. AR75882-86, 140413-15. The "northern sites" were subject to multiple technical studies to determine their feasibility and, after reviewing all of the evidence, the BIA determined that (i) the northern sites could not feasibly accomplish the objectives of the Project, (ii) the northern sites would likely result in greater environmental consequences, and (iii) additional analysis of the northern sites would not offer information necessary for informed decision-making. AR140415. These well-supported findings are more than enough to satisfy NEPA's "rule of reason." Although Plaintiffs may have preferred that BIA approve a different alternative, such preferences are "simply not grounds for finding that the agency failed to meet its obligations...or that the agency's decision was arbitrary and capricious." *City of Roseville*, 219 F. Supp. 2d at 170 (citing *Citizens Against Burlington*, 938 F.2d at 194).

C. BIA Took A "Hard Look" At The Potential Environmental Impacts Of The Project

Plaintiffs also contend that BIA's evaluation of the environmental impacts violated NEPA. Clark Mem. 42-45; GR Mem. 46-50. Judicial review of such claims is narrow: "The only role for a court is to insure that the agency has taken a hard look at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *see also Tongass Conservation Soc'y*, 924 F.2d 1137 at 1140 (review limited to ensuring that EIS "contains sufficient discussion ... to enable the decisionmaker to take a hard look at environmental factors"); *Young v. General Serv. Admin.*, 99 F. Supp. 2d 59, 66 (D.D.C. 2000), *aff'd*, 11 Fed. App. 3 (D.C. Cir. 2000) ("hard look" standard is "highly deferential"). "It is well-settled that the court[s] will not flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006).

Ignoring the limited scope of "hard look" review,[55] Plaintiffs have raised narrow, hyper-technical objections to the EIS's discussion of water permitting and economic impacts. Clark Mem. 42-45; GR Mem. 47-51. As explained in detail below, Plaintiffs' contentions are both factually inaccurate and legally insufficient.

1. BIA Took A Hard Look At The Project's Potential Impacts On Water Quality

Plaintiffs claim that BIA erred by giving "almost no consideration" to the issue of wastewater. Clark Mem. 42. The Administrative Record demonstrates otherwise. The DEIS

[55] Remarkably, Plaintiffs fail to cite a single case from this Circuit regarding the "hard look" standard. Clark Mem. 42-45; GR Mem. 47-51. Instead, they rely on *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953 (9th Cir. 2005), a Ninth Circuit decision standing for the unremarkable proposition that the Forest Service cannot ignore its own regulations. *Id*. at 960, 964-65 (forest plan considered a regulatory requirement; agency methodology violated forest plan). That proposition is not relevant here.

evaluated existing water resources and the potential impacts of the Project on those resources. *See* AR106693-706 (existing resources), AR106855-63 (potential impacts of Project). The FEIS reviewed and responded to public comments on the DEIS analysis and added a supplemental water study. *See* AR076079-92 (evaluation of potential impacts), 078457-60 (describing process and summarizing comments/responses), 081596-726 (supplemental analysis). Plaintiffs had an opportunity to review and provide comments on the water quality analysis in the FEIS. *See* AR140416-18 (describing comments). BIA considered those comments and addressed them in the 2010 ROD. AR000043-44 (summarizing findings), AR000063-68 (responses to comments on FEIS). The agency then re-evaluated its analysis of water issues before issuing the 2013 ROD. Cowlitz Final EIS Evaluation of Adequacy (Evaluation of Adequacy), AR 138745-48. This thorough and transparent process was more than enough to satisfy NEPA's "hard look" requirement.

Plaintiffs further allege that the EIS should be invalidated because it fails to demonstrate that the Tribe will obtain a National Pollutant Discharge Elimination System (NPDES) permit pursuant to the Clean Water Act (CWA). Clark Mem. 53-54. That argument is flawed in numerous respects:

- No CWA permit has been issued or denied; therefore, Plaintiffs' claims are premature. See AR140441; 5 U.S.C. § 704 (judicial review under APA limited to final agency actions); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency actions not subject to judicial review until final).

- Plaintiffs have not alleged a CWA violation or named a CWA permitting agency[56] as a defendant in this action. *See, e.g.*, *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 273 (D.C. Cir. 2002) (rejecting attempt to use

[56] As discussed in the FEIS, U.S. EPA is charged with issuing CWA permits in Indian Country, while the Washington Department of Ecology has jurisdiction over CWA permits in the State of Washington. AR075913. It is worth noting that EPA was satisfied with the EIS' analysis of water quality issues, declaring that the analyses and mitigation measures undertaken by BIA will "assure that water and air quality standards will be met and biological resources will be protected." AR074071; *see also* AR140417-18(ROD addresses EPA feedback).

NEPA claims as a collateral attack on CWA permitting decision).

- Plaintiffs' request for a substantive ruling on the Tribe's entitlement to a CWA permit exceeds the strictly procedural scope of judicial review under NEPA. *See Kleppe*, 427 U.S. at 410 n.21.

- BIA did, in fact, take a "hard look" at CWA permitting issues. *See, e.g.*, AR140396-97 140440-42 (ROD); AR138745-48 (Evaluation of Adequacy); 075913-15, 076082-85, 076931-32 (FEIS); 078457-60, 078493-99, 078581-82 (responses to comments on DEIS); AR106700-04, 106857-58, 107132 (DEIS).

In short, Clark County's hybrid NEPA-CWA argument is an impermissible collateral challenge to a CWA permitting process that has not yet been undertaken. That challenge is not properly before this Court and, in any event, Plaintiffs' position is unsupported by the Administrative Record.

2. Although Not Required To Do So, BIA Took A Hard Look At Potential Economic Impacts To Grand Ronde's Casino

Plaintiff Grand Ronde claims that the EIS violates NEPA by improperly calculating the economic impact of the Project on Grand Ronde's existing casino. See GR Mem. 47-51. But Grand Ronde has not identified a connection between the economic harm it alleges and any particular *environmental* resources or issues. For that reason alone, its claims must be rejected. *See* 40 C.F.R. § 1508.14 (socioeconomic factors need not be addressed unless "interrelated" with the physical environment); *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) ("NEPA does not require the agency to assess every impact or effect …only the impact or effect on the environment"); *Hammond v. Norton*, 370 F. Supp. 2d 226, 242-43 (D.D.C. 2005) (EIS not required to address potential job losses); *see also Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-45 (9th Cir. 2005) (economic injuries are outside NEPA's zone of interests).

Though not required to do so, BIA nevertheless did take a "hard look" at the economic impacts of the Project. The EIS provided a detailed analysis of socioeconomic issues, including

the economic benefits of the Project (more than 7,000 jobs). *See* AR106905-26; *see also* Evaluation of Adequacy, AR138751-52. The EIS also addressed Grand Ronde's existing casino, which is located more than 80 miles from the Project site, and responded to Grand Ronde's comments on the document. *See* AR076140, 078474-75 (summaries); 080919-1294 (comments); 087613-27 (responses); 082238-72 (35-page study of potential economic impacts on Grand Ronde); AR082188-236, 082274-326, 082328-52 (additional economic studies). These analyses were more than sufficient to provide a "hard look" at economic issues.

Grand Ronde argues that its own economic analyses are more accurate than those prepared by the agency. GR Mem. 47-51. But the BIA is entitled to rely on the conclusions of its own economic experts. *Marsh*, 490 U.S. at 378. In the words of the Supreme Court "[n]either [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the…consequences of [agency] actions." *Kleppe*, 427 U.S. at 410, n. 21*; see also Citizens Against Burlington*, 938 F.2d at 194 (same).

D. BIA Provided A Reasonable Discussion Of Mitigation Measures

In a long-winded and circuitous series of allegations, Clark County argues that the EIS violates NEPA because the mitigation measures set forth in the Tribe's EPHS Ordinance cannot be enforced. Clark Mem. 32-39. The County's argument fails for two independent reasons: (1) the EPHS Ordinance is fully enforceable and (2) even if the EPHS Ordinance were not enforceable, it would not violate NEPA.

1. The Cowlitz EPHS Ordinance Is Fully Enforceable

In 2005, consistent with the requirements of IGRA, the NIGC approved the Tribe's Class II gaming ordinance. 25 U.S.C. § 2710(b)(2); NIGC AR001622-64. In 2008, NIGC approved the Tribe's amended gaming ordinance, which incorporated the requirements of Cowlitz Tribal Council Ordinance No. 07-02, "Environmental Public Health and Safety Protection for the

Construction and Operation of the Cowlitz Indian Tribe Gaming Facility" (EPHS Ordinance). NIGC AR000001-2, 000006-11, 000770-73, 000779-86.[57] The EPHS Ordinance (i) establishes a public health and safety program for the Tribe's proposed gaming facility,[58] and (ii) incorporates and requires[59] the Tribe to comply with the mitigation measures set forth in a 2004 MOU between the Tribe and Clark County.[60] As a result of the 2008 amendment, the Tribe's gaming ordinance provides even "more with regard to EPHS enforcement than is minimally required under IGRA." NIGC AR000002. NIGC acted properly and fully within its authority in approving the 2005 Ordinance and 2008 Amendment, consistent with its mandatory duty to approve tribal gaming ordinances that meet the requirements of IGRA, 25 U.S.C. § 2710(b)(2).[61]

In preparing the EIS, BIA evaluated and properly concluded that the Cowlitz EPHS ordinance would provide mitigation equivalent to those measures previously included in the rescinded 2004 Memorandum of Agreement (MOU) between Clark County and the Tribe, and relied upon it in the ROD. AR075841-43, 140389-90, 140411-12, 140437. BIA also acted

[57] NIGC more than adequately explained the basis for its approval of the 2008 amendment, *see* NIGC AR000001-02, particularly since NIGC was acting in accord with its statutory obligations and prior agency practice. *See, e.g., Frizzelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (reviewing court will uphold a decision if "agency's path may reasonably be discerned") (internal citations omitted).

[58] The EPHS Ordinance provides for, *inter alia*, fire protection and emergency response, public health, traffic and transportation, sewer and water, and compliance with County ordinances and codes. NIGC AR000779-86.

[59] The EPHS Ordinance includes a waiver of the Tribe's sovereign immunity and the Tribe's consent to allow Clark County to sue it in state court to demand specific performance of the EPHS requirements contained in the ordinance. NIGC AR000779-80.

[60] The 2004 MOU had earlier been invalidated on procedural grounds in state court litigation brought by some of the Plaintiffs here. AR075842.

[61] Clark County pled in its Complaint and argues in a footnote that NIGC did not have authority to approve the Tribe's 2005 gaming ordinance because the land is not yet in trust, Clark Mem. 33, n. 13, but these arguments fail for two reasons. First, this claim is barred by the 6-year statute of limitations in 28 U.S.C. § 2401(a). Second, these arguments are erroneous as a matter of law because (i) IGRA § 2710(b)(2) requires NIGC to approve ordinances that meet certain enumerated conditions, none of which require that the land be in trust; (ii) NIGC has approved multiple ordinances that will govern lands to be acquired in trust in the future, *see, e.g.*, Mashpee Ordinance Approval (June 5, 2012); (iii) the NIGC Tohono O'odham Opinion, on which the County relies, is inconsistent with the law and NIGC practice (and it explicitly reaffirms the Cowlitz decision).

properly and fully within its authority.

a. BIA Properly Concluded that NIGC Has Authority to Approve and Enforce the 2008 Cowlitz EPHS Ordinance/Tribal Gaming Ordinance Amendment

Plaintiffs argue that the EPHS Ordinance is not enforceable and that BIA erred in concluding otherwise. Clark Mem. 33-34, 36-38. The argument is without merit. IGRA and its implementing regulations clearly authorize NIGC to enforce the provisions of an approved tribal gaming ordinance:

> ... [T]he Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $ 25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, *or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712* of this title.

25 U.S.C. § 2713(a)(1) (emphasis added); *see also* 25 C.F.R. § 573.1 (authorizing enforcement of "tribal ordinances and resolutions approved by the Chairman") (emphasis added).[62] Because the Cowlitz EPHS Ordinance has been incorporated into an approved tribal gaming ordinance, it is enforceable by NIGC.[63]

Plaintiffs mistakenly assert that an NIGC interpretive rule bars the agency from enforcing the EPHS Ordinance. Clark Mem. 36-37. Contrary to Plaintiffs' assertion, the interpretive rule does not address whether NIGC has authority to enforce Tribal EPHS standards incorporated

[62] Specifically, the NIGC regulations provide that "[t]he Chairman may issue a notice of violation to any person for violations ... *of any tribal ordinance or resolution* approved by the Chairman...." 25 C.F.R. § 573.3. NIGC also is authorized to assess fines of up to $25,000 per violation. 25 C.F.R. Part 575. NIGC has exercised this authority on numerous occasions. *See, e.g.*, SA-07-CTI, Crow Tribe of Montana Settlement Agreement re: EPHS issues (Oct. 27, 2007*); see also* NOVs issued to address violations of minimum internal control standards (NOV-07-06, Puyallup Tribe of Indians); failure to submit audit annual audits reports (NOV-06-12, Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation); employee background and licensing violations (NOV-06-15 Santa Rosa Rancheria Tachi-Yoket Tribe); failure to submit agreed upon auditing procedures (NOV-06-17 Kaw Nation of Oklahoma) and casino licensing irregularities (NOV-06-10 Crow Tribe of Montana).

[63] Enforcement of the EPHS Ordinance also is consistent with NIGC's statutory obligation to ensure that construction, maintenance and operation of tribal gaming facilities are "conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. § 2710(b)(2)(E).

into a tribal gaming ordinance; instead, it merely explains that NIGC will not directly impose EPHS standards on tribal facilities. 67 Fed. Reg. 46,109 (July 12 , 2002). The interpretive rule, therefore, does not preclude NIGC enforcement of a tribal EPHS ordinance where, as here, the EPHS standards are incorporated into a tribal gaming ordinance approved by NIGC. *Id*.

b. BIA Properly Concluded that the Tribe's EPHS Ordinance and Waiver of Sovereign Immunity are Irrevocable

The EPHS Ordinance (i) explicitly provides that the County may enforce the Tribe's mitigation obligations, (ii) waives the Tribe's sovereign immunity from suit for purposes of any such enforcement action, and (iii) prohibits the Tribe from revoking the Ordinance or the waiver of immunity. NIGC AR000779-80. This gives Clark County (like NIGC) authority to enforce the Tribe's mitigation commitments. Indeed, the County has confirmed in writing that it is relying on the Tribe's promise that neither the waiver nor the EPHS mitigation standards would ever be revoked or amended. AR083179-80, AR083172, AR067055-57. Having negotiated and extracted these concessions, and contradicting its earlier position, the County now alleges that BIA erred in relying on the Tribe's waiver of immunity. Clark Mem. 34-36. The argument is without merit.

First, the Tribe's waiver of immunity and the EPHS Ordinance are, by their explicit terms, "irrevocable." NIGC AR000780. Federal courts have long recognized that a tribal government may enact an ordinance waiving its sovereign immunity and consenting to suit. *See, e.g., Marceau, et al. v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006) (a tribe may voluntarily subject itself to suit by issuing a "clear" waiver) (*citing C & L Enters., Inc., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)); *see also Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) (en banc), *aff'd*, 455 U.S. 130 (1982). Not surprisingly, federal courts also have recognized that the word "irrevocable" when incorporated

into a legal instrument in fact means just that. *See, e.g., Timeline, Inc. v. Proclarity Corp.*, No. C05-1013 J2, 2007 U.S. Dist. LEXIS 38669 at *13 (W.D. Wash. May 29, 2007) (under "general principles of Washington state law," irrevocable lease upon breach could not be deemed null and void precisely because, by its own terms, it was "irrevocable").[64]

Second, the County's stated reliance on the EPHS Ordinance, confirmed by exchange of letters, see AR083179-80, 083172, constitutes an acceptance of those commitments and creates a valid unilateral contract between the Tribe and the County. *See, e.g., Multicare Med. Ctr. v. Dep't of Social & Health Serv.*, 790 P.2d 124 (Wash. 1990) (unilateral contract is the exchange of one party's promise for the other party's action or forbearance which becomes binding and enforceable when other party performs action or forbearance; consideration found when additional obligation not previously imposed by law is taken). Such a contract is enforceable in the same manner as the 2004 MOU between the Tribe and the County.[65]

Plaintiffs contend that the Tribe could revoke its waiver of sovereign immunity by unilaterally amending its Gaming Ordinance without NIGC approval, citing 25 C.F.R. § 522.12. But that regulation addresses revocation of tribal gaming authority, not amendment of tribal gaming ordinances. *See* 25 C.F.R. § 522.12. In other words, the cited regulation permits a tribe to revoke its authority to conduct gaming without NIGC approval; it does not allow the Cowlitz Tribe to unilaterally amend a waiver of sovereign immunity granted irrevocably to (and relied on

[64] *See also United States v. State of Oregon*, 657 F.2d 1009, 1016 (9th Cir. 1981) (where tribe argued that earlier waiver was not effective, court held that "the Tribe may not at this stage renege on its earlier agreement."

[65] In addition, even if the Ordinance and letters discussed above are not found to create a contract, Clark County would be able to enforce the Tribe's promises in equity under the doctrine of promissory estoppel. If a promisee (the County) can show that it relied on the promisor's (Tribe's) promise, changed its behavior because of that promise, and suffered because of it (relied on the Ordinance to its detriment), the promise can be enforced by application of promissory estoppel. *See, e.g., Havens v. C&D Plastics, Inc.*, 876 P.2d 935 (Wash. 1994). Promissory estoppel is traditionally limited to enforcement of otherwise unenforceable promises which are not supported by consideration, so a promise unenforceable under traditional contract analysis can still be enforced in equity. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 616 P.2d 644 (Wash. 1980).

by) a third party, that is incorporated in an approved gaming ordinance.[66]

In sum, the record is more than adequate to support the Secretary's decision to rely on the EPHS Ordinance, the mitigation measures set forth therein, and the Tribe's waiver of immunity allowing enforcement of those measures. AR140411-12, 140437; *see also Frizzelle*, 111 F.3d at 176 (reviewing court will uphold a decision if "agency's path may reasonably be discerned"). Accordingly, the decision must be upheld.[67]

2. Even If The EPHS Ordinance Were Not Enforceable, BIA Complied With NEPA

Clark County's entire mitigation argument is premised on the notion that NEPA requires BIA to impose enforceable, irrevocable mitigation measures. That premise is inaccurate. The Supreme Court has made quite clear that NEPA does not impose a substantive duty to mitigate adverse environmental effects. *Robertson*, 490 U.S. at 352-53; *see also Citizens Against Burlington*, 938 F.2d at 206. And it is equally well-settled that an EIS need not contain a fully developed mitigation plan. *Id*. Consistent with NEPA's procedural focus, an EIS need only provide "a reasonably complete discussion of possible mitigation measures." *Robertson*, 490 U.S. at 352; *see also Citizens Against Burlington*, 938 F.2d at 206.[68]

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[66] In contrast, the regulatory provision that actually governs amendment of a gaming ordinance clearly provides that a tribe must submit any such amendment to the NIGC. *See* 25 C.F.R. § 522.3.

[67] Even if Plaintiffs are right and NIGC lacks authority to enforce the EPHS Ordinance, the Ordinance is a valid exercise of the Tribe's sovereign authority that remains valid and in full force, and is enforceable by the County based on the Tribe's waiver of sovereign immunity -- Plaintiffs do not (and cannot) dispute this. And because the EPHS Ordinance and the Tribe's waiver of sovereign immunity are irrevocable for the life of the Tribe's gaming operation, the County can sue to enforce the EPHS provisions as long as the gaming facility operates. Therefore, even without the extra layer of federal enforcement by NIGC, the Tribal EPHS Ordinance constitutes enforceable mitigation equivalent to those measures originally provided in the Tribe's 2004 MOU with the County, and the Secretary's reliance on the Tribal EPHS Ordinance is entirely appropriate.

[68] In fact, "it would be inconsistent with NEPA's reliance on procedural mechanisms — as opposed to substantive, result-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm." *Robertson*, 490 U.S. at 352-53; *see also Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp*., 222 F.3d 677, 681 n. 4 (9th Cir. 2000) (mitigation "need not be legally enforceable, funded, or even in final form to comply with NEPA's procedural requirements").

Here, BIA went well beyond NEPA's procedural requirements for mitigation. The EIS identified and discussed potential mitigation measures for each and every potentially-significant environmental issue related to the Project. *See* AR0076072, 76081, 76084-85, 76100-101, 76112-17, 76131, 76141, 76180, 76183, 76212-14, 76224-27, 76231, 76233-36, 76268, 76275, 76388-411. Then, in its ROD, BIA formally adopted each of the mitigation measures proposed in the EIS. AR140439-54. Therefore, even if the EPHS Ordinance were not enforceable, the analysis in BIA's EIS and ROD would be more than enough to provide the "reasonably complete discussion of possible mitigation measures" that NEPA requires. *See Robertson*, 490 U.S. at 352; *Citizens Against Burlington*, 938 F.2d at 206.

CONCLUSION

The Tribe respectfully requests that this Court reject Plaintiffs' myriad manufactured objections and instruct the Secretary of the Interior to complete the fee-to-trust and reservation proclamation processes with all due speed.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2013, I electronically filed the foregoing Memorandum of Points and Authorities in Support of Intervenor's Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment using the CM/ECF system which will send notification of such filing to all counsel of record.

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