IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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We showed in our opening brief that the Secretary lacks authority under the Indian Reorganization Act (IRA) to take trust title to the Cowlitz Parcel; that the Parcel is not eligible for gaming under the Indian Gaming Regulatory Act (IGRA); and that the agency failed to comply with the National Environmental Policy Act (NEPA). Defendants do not grapple seriously with any of those fatal weaknesses in the Record of Decision (ROD).

First, the Secretary lacks authority to take title to the Parcel because the Cowlitz were neither "recognized" nor "under Federal jurisdiction" in 1934. With respect to the "recognized" requirement, Defendants barely defend the Secretary's assertion that the IRA applies to tribes—like the Cowlitz—that were not recognized *in 1934*. And that's not surprising, since the text, history, and case law dispositively show that the IRA requires recognition in 1934. As to the "under Federal jurisdiction" requirement, Defendants downplay the fact that the Cowlitz, by their own admission, were *terminated* as of 1934 and lacked a government-to-government relationship with the United States at that time. Put simply, a tribe that was terminated—whether administratively or congressionally—cannot have been "under Federal jurisdiction" within the meaning of the IRA.

Second, we showed in our opening brief that the Cowlitz Parcel is not eligible for gaming under the IGRA's initial-reservation exception because the Cowlitz lack "significant historical connections" to the land. The government fails to refute one central proposition: No prior agency opinion—none—has ever found a significant historical connection when the proposed gaming site was, as here, outside the territory historically occupied or controlled by the tribe.

Finally, Defendants fail to counter our NEPA contentions. Their threshold standing argument misapprehends the nature of Grand Ronde's challenge. On the merits, neither

defendant justifies the agency's rubber stamp of the Cowlitz's financial need projections or its failure to conduct transparent decision-making.

I. THE SECRETARY LACKS STATUTORY AUTHORITY UNDER THE IRA TO TAKE TRUST TITLE TO THE COWLITZ PARCEL

The Secretary can take land in trust only for tribes that are both (1) "recognized" *and* (2) "under Federal jurisdiction" within the meaning of the IRA. 25 U.S.C. § 479. As we showed in our opening brief, the Cowlitz satisfy neither requirement. That conclusion is compelled by the text of the statute, its legislative history, and binding case law. Accordingly, the Secretary's interpretation is entitled to no deference under *Chevron*.[1]

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

If this Court agrees with every other court to address the issue—and holds that a tribe must have been "recognized" *in 1934*—then the ROD cannot stand. That is because the Secretary concluded that the IRA covers even tribes that were recognized for the first time only in 2002. She expressly declined to address the meaning of "recognized" as used in the IRA or determine whether the Cowlitz satisfied that definition in 1934. AR140469-70 (ROD at 88-89).

Defendants offer almost no defense of the Secretary's judgment. The fact is, the IRA unambiguously requires recognition in 1934, and the Cowlitz were not "recognized" in 1934 within meaning of the IRA.

1. The IRA Unambiguously Bars The Secretary From Taking Land In Trust For Tribes That Were Not Recognized In 1934

The question whether the IRA requires recognition in 1934 is dispositive here. What little the government says on this falls wide of the mark.

[1] The Indian canon of construction is of no help to the Secretary here because it "has force only where a statute is ambiguous." *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011). No such ambiguity exists here.

(a) The Text Of The IRA And The Legislative History Require Recognition In 1934

The government's entire affirmative argument on the temporal component of "recognized" amounts to little more than a single sentence: "the Secretary concluded that in the definition of 'Indian' in the IRA, the word 'now' modifies the phrase 'under Federal jurisdiction,' and not the phrase 'recognized Indian tribe.'" U.S. Br. 21. But Grand Ronde has never argued that "now" modifies "recognized Indian tribe." Rather, we contend that "the *phrase* 'now under Federal jurisdiction' modifies the term 'recognized Indian tribe.'" GR Opening Br. 9 (emphasis added). Defendants cannot dispute that point; the Secretary herself acknowledged as much. See AR140475 (ROD at 94). It is also undisputed that, under *Carcieri v. Salazar*, 555 U.S. 379 (2009), the IRA applies only to tribes that were "under Federal jurisdiction" in 1934. The question, then, is whether a tribe can be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934. As we showed in our opening brief (at 9-13), the answer to that question is no.

We used as an illustration (at 10) a statute that provides benefits to any "state resident now practicing medicine." To take another example, consider a statute that provides health benefits to "any veteran who is now wounded." If that statute required veterans to be wounded *in 1934*, would it provide health benefits to persons who did not serve in the military (and therefore were not veterans) until 2002? No, because you cannot be a "veteran who is wounded in 1934" if you were not a "veteran in 1934." The same analysis applies here.

The government states in a footnote that our analysis is flawed because it "rests on the false premise that the ambiguous, highly complex, and evolving concept of a 'recognized Indian tribe' . . . operates in the same manner as readily defined terms such as 'state resident.'" U.S. Br. 20-21 n.19. But that argument confuses two different questions. Whether or not "recognized" is

a "complex" or "evolving" concept has nothing to do with the sole question at issue here, which is *when* a tribe must be "recognized" under the IRA. To take the veteran example, imagine the statute provides benefits to "any *heroic* veteran now wounded." "Heroic veteran" is more "complex" than "veteran." But the grammatical structure of the statute remains the same: You cannot get benefits unless you were a heroic veteran *in 1934*, regardless of what the statute means by the term "heroic." So too here: *Whatever* "recognized" means, the IRA requires the tribe to have satisfied that requirement as of 1934.[2]

As we noted in our opening brief (at 10), moreover, the Senate colloquy on the "recognized Indian tribe" requirement shows that the term "recognized" applies only to tribes that were recognized "at the present time"—not those first recognized 70 years later. AR135299 (S. 2755 Hrg. at 264). The government does not address that legislative history. Nor does the government address the statutory context; as we noted in our opening brief (at 10-11), the IRA's voting requirement and its second definition of "Indian" support the inference that "the IRA was intended to benefit only those Indians federally recognized *at the time of passage*." *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 160 n.6 (D.D.C. 1980) (emphasis added).[3]

[2] *Amici* the United South and Eastern Tribes, Inc., and Jamestown S'Klallam Tribe, rely (at 18-19) on cases dealing with statutes that have nothing in common with the IRA's text or grammatical structure. The statute at issue in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), for example, imposed an increased penalty on any person who "knowingly uses a means of identification of another person." The question in the case was how far the "knowingly" requirement extended in the statute. That is a completely different question from the one presented here—and *amici* neglect to mention that the court in *Villanueva-Sotelo* held that the "knowingly" requirement applied to *both* phrases in the statute. *United States v. Yermian*, 468 U.S. 63 (1984), is likewise inapposite. There, the Court held that 18 U.S.C. § 1001's *mens rea* requirement applies only to the making of a false statement, and not to whether the matter was within the jurisdiction of the United States. But that was because the phrase "knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement" plainly does not modify the jurisdictional requirement in section 1001. Here, in contrast, "now under Federal jurisdiction" indisputedly modifies the term "recognized Indian tribe," as the ROD acknowledges.

[3] *Amici* the United South and Eastern Tribes, Inc., and Jamestown S'Klallam Tribe cite (at 22) a 1934 Solicitor's opinion that states that the inherent powers of Indian tribes apply to "all Indian tribes recognized now or hereafter by the legislative or the executive branch of the Federal Government." But that opinion doesn't say that the IRA's definition of "Indian" includes tribes that were not recognized in 1934; it just clarifies that all recognized tribes maintain certain inherent powers regardless of when they are recognized.

At *Chevron* step 1, courts "employ[] traditional tools of statutory construction" without any deference to the agency. *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation marks omitted); see *Wash. Hosp. Ctr. v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986). Here, the text of the statute, together with its legislative history, shows that the IRA applies only to tribes that were recognized in 1934—squarely foreclosing the Secretary's contrary interpretation.[4]

(b) The Government Fails To Distinguish Any Of The Cases Stating That The IRA Requires Recognition In 1934

Every court to address the issue has determined that the IRA authorizes the Secretary to take land only for tribes that were recognized in 1934. Defendants utterly fail to distinguish those cases.

In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court expressly stated that the IRA's first definition of "Indian" applies only to persons "who are members of any recognized [in 1934] tribe now under Federal jurisdiction." *Id.* at 650 (brackets in original). The government notes that in *John* "the Supreme Court did not address what it meant to be 'recognized' or 'under Federal jurisdiction' in 1934." U.S. Br. 24. True enough. But the question here is *when* a tribe must be recognized to qualify as an Indian tribe under the Act, not *what* the IRA "meant" by "recognized." And the Supreme Court could scarcely have been clearer: "Recognized" requires recognition "*in 1934*." 437 U.S. at 650 (emphasis added).[5]

[4] The Secretary's interpretation would also fail at *Chevron* step 2 (though this Court need not get that far). That is because her interpretation "is inconsistent with [the agency's] prior analysis in similar situations without any acknowledgement of the fact, or cogent explanation as to why." *King Broad. Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988). As we explained in our opening brief (at 19), the Department previously took the position that the IRA requires recognition "on June 18, 1934 (the date of enactment of section 19)." *Brown v. Comm'r of Indian Affairs*, 8 IBIA 183, 188 (1980). The Secretary provided no explanation for her about-face on the issue.

[5] The government contends that "the Supreme Court simply did not address the temporal requirement" in *John*. U.S. Br. 25. That contention is unfathomable: The Court expressly stated that the IRA's first definition of Indian requires recognition "in 1934." How could that statement be any clearer? Nor does it matter whether that clear statement was the Court's *holding* in *John*. The D.C. Circuit has made clear that even "dicta of the United States Supreme

The government likewise dismisses *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975), on the ground that it "has nothing to do with interpreting what 'under Federal jurisdiction' or 'recognized' meant in 1934." U.S. Br. 25. Again, however, the government takes aim at the wrong target: Regardless of whether *Maynor* explained the meaning of "recognized," it made clear that, to fall within the IRA's first definition of "Indian," a tribe must have been "a legally recognized group" in 1934. 510 F.2d at 1258. Indeed, the government concedes as much, noting (at 25) that the plaintiff in *Maynor* "needed" certification of his one-half-blood status (pursuant to the IRA's third definition of "Indian") because the tribe did not have "any tribal designation" in 1934—and therefore did not satisfy the IRA's first definition of "Indian."

The court in *United States v. State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974), similarly held that the IRA "positively *dictates* that tribal status is to be determined as of June, 1934." *Id.* at 642 (emphasis added). The government dodges that unequivocal holding, too, contending that *State Tax Comm'n* was "superseded" by the Supreme Court's decision in *John*. U.S. Br. 26. But the Court in *John agreed* with the *pertinent* portion of the Fifth Circuit's decision—that under the IRA's first definition of "Indian" the Secretary has authority to take land only for tribes that were "recognized [in 1934]." *John*, 437 U.S. at 650. The Court just went on to explain that the IRA's third definition of Indian (which is not at issue in this case) allowed the Secretary to take land for Indians of "one-half or more Indian blood," even if such Indians were *not* members of a recognized tribe in 1934. *Ibid.*

Finally, in *City of Sault Ste. Marie*, 532 F. Supp. 157 (D.D.C. 1980), the court stated that "the IRA was intended to benefit only those Indians federally recognized *at the time of passage*."

Court should be very persuasive," *Gabbs Exploration Co. v. Udall*, 315 F.2d 37, 39 (D.C. Cir. 1963) (internal quotation marks omitted)—and that "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as *authoritative*," *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (internal quotation marks omitted) (emphasis added).

Id. at 160 n.6 (emphasis added). The government elides that language completely, focusing instead on the court's suggestion that the Secretary can determine "'that a given tribe *deserved* recognition in 1934.'" U.S. Br. 26. But the passage quoted by the government squarely fixes the date of recognition "in 1934." *Ibid.* Thus, while *City of Sault Ste. Marie* contemplates the possibility that it might have been "unclear" whether a tribe was recognized in 1934, it—like every other case—directly contradicts the Secretary's determination that the IRA applies to tribes that were *not* recognized in 1934. *City of Sault Ste. Marie*, 532 F. Supp. at 161.

(c)* Carcieri *Does Not Support The Secretary's Atextual Interpretation Of The Statute

The Cowlitz assert, inexplicably, that in *Carcieri* "the *Supreme Court* rejected the proposition that recognition has to have been in place in 1934." Cowlitz. Br. 22 (emphasis added). They even repeat that audacious claim: "The *Carcieri Court* rejected the contention that tribes had to be recognized in 1934." *Id.* at 23 (emphasis added). Of course, "the Supreme Court" did nothing of the sort. As the Cowlitz elsewhere acknowledge, the *Carcieri* "majority focused *exclusively* on the 'under Federal jurisdiction' requirement" and did not even address the recognized requirement. *Ibid.* (emphasis added).

What the Cowlitz actually rely on is the interpretation of "recognized" set forth by Justice Breyer in his concurrence in *Carcieri*. But Justice Breyer's concurrence is just that: a concurring opinion. The *majority* opinion in *Carcieri* provides no support for the Secretary's interpretation. And, as noted above, the Supreme Court spoke directly to the issue in *John*, expressly stating that the IRA applies only to tribes recognized "in 1934." Because that determination was not disturbed by *Carcieri*, *John* remains binding precedent. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[6]

The Cowlitz suggest (at 25) that their reading of the concurring opinion in *Carcieri* 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." But as the Cowlitz conceded in their prior briefing before this Court, whether *other* laws may be applicable to tribes that are not recognized is simply irrelevant where "*the federal statute is explicitly made applicable only to recognized tribes*." Case No. 11-cv-284, Dkt. No. 63, at 33 (emphasis added). The IRA *is* a statute "explicitly made applicable only to recognized tribes." *Ibid.* The cases cited by the Cowlitz therefore do not support the Secretary's determination that recognition in 2002—70 years *after* the IRA was enacted—satisfies the IRA's "recognized Indian tribe" requirement.

(d) The Cowlitz Misinterpret Related Indian Statutes

The Cowlitz advance two additional arguments in support of the Secretary's interpretation. First, the Cowlitz point to IGRA's initial-reservation exception, which permits gaming on certain lands taken into trust as part of the initial reservation of an Indian tribe acknowledged through the federal acknowledgment process. Cowlitz Br. 27. The Cowlitz appear to argue that the exception would be "nonsensical" unless the Secretary has authority to take land in trust for "tribes whose recognition is confirmed or restored through the Part 83

[6] Nor is Justice Breyer's concurring opinion crystal clear on the issue. Although the concurring opinion states that the statute "imposes no time limit upon recognition," 555 U.S. at 398, it further explains: "[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time," and "[t]he Department later recognized some of those tribes on grounds that show that it should have recognized them in 1934 even though it did not." *Id.* at 397-98. Justice Breyer's concurrence therefore allows for the possibility that a tribe might, in fact, have been recognized in 1934, even though the government realized that fact only later. But Justice Breyer's concurrence does not contemplate the situation here, where the tribe itself has repeatedly *conceded* that it was not recognized in 1934.

process." *Ibid.* But we don't dispute that the Secretary has authority to take land in trust for *some* tribes that are acknowledged under Part 83. For example, a tribe that was recognized in 1934, terminated in the 1950s (as many were), and then had its recognition "restored" in 2000 would qualify as "Indian" under the IRA (assuming it was also under Federal jurisdiction in 1934). Our only point is that the Secretary lacks authority to take land in trust for tribes that were not recognized in 1934, and the mere fact that an acknowledged tribe can game on land acquired as part of its initial reservation sheds absolutely no light on that issue.

Second, the Cowlitz point to a 1994 provision of the Federally Recognized Tribe List Act, which states that the "[d]epartments or agencies of the United States shall not . . . make any decision or determination pursuant to [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). The Cowlitz argue (at 26) that distinguishing between tribes that were recognized in 1934 and those that were not violates section 476(f) as an impermissible classification of tribes based on "their status as Indian tribes."

But the parties in *Carcieri* made that same argument, and the Supreme Court rejected it. In *Carcieri*, the government argued that, because of section 476(f), the IRA must extend to "*all* federally recognized tribes, without regard to whether they were 'under Federal jurisdiction'" in 1934. Br. for Resp'ts at 37, *Carcieri v. Kempthorne*, No. 07-526, 2008 WL 3883433 (Aug. 18, 2008). The Supreme Court disagreed, holding that the IRA expressly distinguishes between tribes that were under federal jurisdiction in 1934 and those that were not. Section 476(f) presented no obstacle to that conclusion—and it presents no obstacle here.[7]

[7] The legislative history shows that section 476(f) simply clarified that all recognized tribes have the same sovereign powers, regardless of whether they were "historic" or "created" tribes. 140 Cong. Rec. S4334, S4338, 1994 WL

2. The ROD Cannot Be Rescued On The Alternative Theory That The Cowlitz Actually *Were* Recognized In 1934

(a) Chenery *Precludes This Court From Upholding The ROD On A Ground That Was Not Invoked By The Secretary*

Although the government barely addresses the decisive question whether the IRA requires recognition in 1934, it spills considerable ink arguing that the Cowlitz were in fact recognized in 1934. U.S. Br. 37-41; see also Cowlitz Br. 28-33. But Defendants ignore the elephant in the room: *The Secretary did not decide that the Cowlitz were recognized in 1934.* Because the Secretary wrongly thought that "[t]he Cowlitz Tribe's federal acknowledgment in 2002 . . . satisfies the IRA's requirement that the tribe be 'recognized'" (AR14070 (ROD at 89)), she expressly declined to "ascertain whether the Cowlitz Tribe was recognized by the Federal Government" in 1934 (AR140469 (ROD at 88)).

As we noted in our opening brief (at 13), courts must determine the propriety of an agency action "solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); see *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (an agency order "must stand or fall on the grounds articulated by the agency in that order") (internal quotation marks omitted). The D.C. Circuit has made clear that "that proposition applies to statutory interpretations"—such as the Secretary's interpretation that the IRA applies to tribes that were not recognized in 1934. *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012).

Defendants fail to acknowledge the *Chenery* issue identified in our opening brief. Instead, after a half-hearted defense of the Secretary's determination that the IRA does not

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130063 (Apr. 14 1994) (statement of Sen. McCain). Section 476(f) has nothing to do with whether the Secretary has authority to take land in trust for tribes that were not recognized or under federal jurisdiction in 1934—as *Carcieri* itself makes abundantly clear.

require recognition in 1934, they argue at length that, "[e]ven if the IRA is interpreted to require recognition in 1934, the Cowlitz Tribe would qualify." U.S. Br. 37. That is simply impermissible "*post hoc* explanation of counsel." *N. Air Cargo*, 674 F.3d at 860. The agency decided this case on the sole ground that the IRA did *not* require recognition in 1934. If this Court concludes that the IRA *does* require recognition in 1934, it must at a minimum vacate the Secretary's decision. But as we explain below, it need not give the Secretary such a second bite at the apple. That is because the record makes clear that the Cowlitz were not a "recognized Indian tribe" in 1934 within the plain meaning of the IRA.

(b) The Cowlitz Were Not A "Recognized Indian Tribe" In 1934 Because, As Of 1934, They Were Not A Political Entity With A Government-To-Government Relationship With The United States

We showed in our opening brief that the IRA uses the term "recognized" to refer to tribes that were distinct political entities and enjoyed a government-to-government relationship with the United States. GR Opening Br. 13-17. Defendants do not show that the Cowlitz were "recognized" in that sense in 1934. And Defendants fail to cite a single authority supporting the Secretary's hypothesis that the IRA uses the term "recognized" in the "cognitive" or "quasi-anthropological" sense.[8]

(i) The IRA Uses The Term "Recognized" In The Political Sense

Though the Secretary expressly declined to "reach the question of the precise meaning of 'recognized Indian tribe' as used in the IRA," she invoked the concept of "cognitive" (as opposed to "political") recognition in surveying the scholarly literature on the point. AR140468-69 (ROD at 87-88). But tellingly, the government does not urge the Court to adopt the

[8] The Secretary's passing reference to the concept of "cognitive" recognition is not entitled to any deference from this Court. As noted, the Secretary expressly declined to decide whether the IRA uses "recognized" in the cognitive or political sense. AR140469-70 (ROD at 88-89). She therefore did not promulgate *any* interpretation of the term—much less one carrying "the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

"cognitive recognition" concept, which it barely even mentions in its brief. The government's primary argument now is that "[t]he concept of *formal* federal recognition was not developed or established in 1934" and that there "was no *formal* process or method for recognizing a tribe until the establishment of the FAP in 1978." U.S. Br. 37, 40 (emphasis added). But that misses the point. The question is not whether recognition was a formal or informal act in 1934. Rather, the question, in light of the ROD, is whether the IRA used the term "recognized" in the *political* sense or in the *cognitive* sense espoused by the Secretary.[9]

Although the government does not seriously advocate the "cognitive" recognition theory, it suggests that the political recognition concept is an entirely modern one that did not exist when the IRA was enacted in 1934. U.S. Br. 38-39. But the government ignores the statutes, case law, and agency opinions we cited in our opening brief—all of which make clear that the IRA uses the term "recognized" in the political sense. See GR Opening Br. 13-17. In *Morton v. Mancari*, 417 U.S. 535 (1974), for example, the Supreme Court held that the IRA's reference to "recognized" Indian tribes is "*political* rather than racial in nature." *Id.* at 553 n.24 (emphasis added). And in *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008), the D.C. Circuit similarly made clear that the IRA uses the term "recognized" in the political sense.

The government attempts to diminish *California Valley* on the ground that the "passage Grand Ronde cites is very general." U.S. Br. 40 n.39. But here is what the D.C Circuit said in *California Valley*:

[9] In any event, the government's current position that "formal" recognition did not exist in 1934 is impossible to square with the ROD itself. There, the Secretary stated that "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." AR140469 (ROD at 88) (emphasis added). Thus, the Secretary conceded that formal recognition existed before 1934—and that the Cowlitz were not so recognized at that time.

> recognition . . . is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government. The federal government has historically recognized tribes through treaties, statutes, and executive orders, but it does so today primarily by a standardized application process administered by the Secretary.

515 F.3d at 1263 (internal quotation marks and citation omitted). It is difficult to see anything "general" about that definition. *California Valley* makes abundantly clear that recognition requires a "government-to-government relationship"—a relationship that the Secretary concedes the Cowlitz lacked in 1934. See AR140487 (ROD at 106). And it also makes clear how that relationship has been manifested "historically," namely through treaties, statutes, and executive orders.[10]

Other cases make equally clear that "recognized" was used in the political sense long before the IRA was enacted in 1934. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), for example, the Court stated that through treaties and Congressional acts the United States "recogniz[ed] the national character of the Cherokees" and "consider[ed] the several Indian nations as *distinct political communities*." *Id.* at 556-57 (emphasis added). And in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court similarly explained that "[t]he acts of our government plainly recognize the Cherokee nation as a state" and as a "*distinct political society*." *Id.* at 16 (emphasis added).[11]

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[10] The government suggests (at 39 n.37) that the Supreme Court's statement in *Mancari*, 417 U.S. at 553 n.24—that recognition is "political rather than racial in nature"—applies only to "federally recognized" tribes (and not "recognized" tribes). But the government just begs the question: It provides no reason why "federally recognized" means something entirely different from "recognized"—or why the Supreme Court would treat the constitutional implications of those terms differently. Nor does the government address the fact that the hiring preference at issue in *Mancari* was established by the IRA.

[11] More recently, in *Allen v. United States*, 871 F. Supp. 2d 982, 992 & n.3 (N.D. Cal. 2012) (emphasis added), the court explained:

> So when is an Indian tribe an Indian tribe for purposes of the IRA? . . . In answering this question it must be pointed out that "[t]he term 'Indian tribe' has distinct and different meanings for native people and for federal law." Cohen's Handbook of Federal Indian Law, 3.02(2) (2005 ed.). This order does not presume to understand the shared language, rituals, narratives or other relationships that may, for native individuals, comprise an understanding of what constitutes a "tribe." Nevertheless, this question must at least be answered within the

As we also explained in our opening brief (at 15-16), the agency itself has consistently held that the IRA requires political recognition. For example, the IBIA has declared that if "a group is *not* a political entity with whom the Federal Government has a government-to-government relationship, that group cannot be considered a 'tribe' within the meaning of the IRA." *Estate of Elmer Wilson, Jr.*, 47 IBIA 1, 11 (2008).[12] The Secretary failed to explain her 180-degree departure from precedent, and the government does not attempt to do so here.[13] Nor has the government acknowledged that the IRA's legislative history also shows that Congress used the term "recognized" to refer to tribes that were "registered" and "enrolled" with the Indian Office—*i.e.*, to refer to tribes that were politically recognized.[14] AR135298-99 (S. 2755 Hrg. at 263-64).

The Cowlitz sow further confusion by distinguishing between "recognized" and "federally recognized." Cowlitz Br. 36-37. They contend that "federally recognized" is a term that came into existence only *after* the IRA's enactment, and that only "federal recognition"

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context of the IRA and with the understanding that "federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of *political relationship*."

[12] Contemporaneous opinions from the Solicitor state that a "recognized Indian tribe" is one that is "recognized *politically*" rather than "ethnologically" or cognitively. Solicitor's Op., Ft. Belknap Land Purchase—Reorganization Act (March 20, 1936), at 613 (emphasis added); see GR Opening Br. 15-16.

[13] Indeed, the sole authority for the "cognitive" concept cited by the Secretary below—the Quinn article—unambiguously shows that the IRA uses the term recognized in the "political" rather than "cognitive" sense. See GR Opening Br. 16-17. The Cowlitz (at 28-29) continue to rely on that article, yet fail to quote the portion of the article that is actually relevant here (and which completely eviscerates their theory): With the IRA's passage, "[r]ecognition had become, at last, a declaration, and its usage had shifted from a cognitive sense to a *wholly jurisdictional sense.*" Quinn, *Federal Acknowledgment Of American Indian Tribes: The Historical Development Of A Legal Concept*, 34 AM. J. LEGAL HIST. 331, 356 (1990) (emphasis added). In any event, a misquoted law review article cannot trump binding case law, which makes clear that the IRA uses the term "recognized" in the political sense.

[14] The government also misinterprets a portion of the Senate colloquy addressing the status of the Catawba Indians. U.S. Br. 37-38. The point of the colloquy on the Catawba was that even though they "certainly are an Indian tribe," they were not under the supervision and control of the federal government. AR135301. Commissioner Collier therefore suggested adding the phrase "under Federal jurisdiction" to exclude tribes such as the Catawba—*i.e.*, tribes that were not under Federal jurisdiction—from qualifying as Indian under the Act. *Ibid.* But nothing in the legislative history suggests that Congress believed the Catawba were recognized in the "cognitive" rather than political sense.

requires a government-to-government relationship. But in *Carcieri* itself, the Supreme Court used the term "federally recognized" to describe the IRA's requirement, explaining that in 1934 the Narragansett Tribe "was neither *federally recognized* nor under the jurisdiction of the federal government." 555 U.S. at 395-96 (emphasis added). In *Sault Ste. Marie*, this Court similarly stated that "the IRA was intended to benefit only those Indians *federally recognized* at the time of passage." 532 F. Supp. at 160 n.6 (emphasis added). Most tellingly, the Cowlitz themselves repeatedly argued in the proceedings below that "the IRA "limit[s] the Secretary's authority under the IRA only to those tribes that are *federally recognized*." AR002781 (Cowlitz *Carcieri* Submission at 27) (emphasis added). In the wake of those concessions, the Cowlitz's current position that "recognition" is different from "federal recognition" rings hollow.

(ii) The Federal Acknowledgment Of The Cowlitz In 2002 Does Not Prove That The Tribe Was Recognized In 1934

The government suggests that the fact that the Cowlitz were acknowledged through the FAP in 2002 proves that the tribe was "federally recognized in 1934." U.S. Br. 40-41. But numerous authorities confirm that FAP acknowledgment does not mean that a tribe was "recognized" at some earlier point in time. In *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), for example, the D.C. Circuit made clear that "[a]cknowledged tribes . . . may or may not have been formally recognized by the federal government at some point in the past." And in *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F. Supp. 2d 689 (W.D. Mich. 1999), the court stated that "[i]t is readily apparent that a tribe may be acknowledged which had never previously been recognized." *Id.* at 699.

The government's contrary view also proves too much. After all, the Narragansett Tribe at issue in *Carcieri* was likewise acknowledged through the FAP—in 1983 in their case. Under the government's theory, the Narragansett would have been both recognized and under federal

jurisdiction in 1934. That conclusion is difficult to reconcile with the fact that it was undisputed that the Narragansett were neither recognized nor under Federal jurisdiction at that time.

It is therefore beside the point that "[n]one of the Plaintiffs in this case challenged the Secretary's FAP findings." U.S. Br. 40. The Secretary's 2002 FAP determination has no bearing on the sole issue here—*i.e.*, whether the Cowlitz were "recognized" or "under Federal jurisdiction" within the meaning of the IRA.[15]

(iii) The Cowlitz's Newfound Reliance On Cohen's 1942 Treatise Is Misplaced

The Cowlitz argue that the tribe "met the 1942 definition of 'recognized'" because it satisfied factors identified by Felix Cohen in his 1942 Indian Law treatise. Cowlitz Br. 30-32. But the Secretary's decision below rested solely on her conclusion that the IRA does not require recognition in 1934. *Chenery* therefore bars this Court from upholding the ROD on the ground that the Cowlitz satisfied some *other* definition of "recognized" that the Secretary did not even mention—much less rely on—in the ROD.

In any event, Cohen's 1942 treatise only underscores that the IRA requires "political" rather than "cognitive" recognition. It states that "[t]he question of tribal existence, in the *legal or political sense*, has generally arisen in determining when some legislative, administrative, or judicial power with respect to Indian 'tribes' extended to a particular group of Indians." Cohen's Handbook of Federal Indian Law, 268 (1942 ed.) (emphasis added); see *id.* at 5 (noting that "Indians" were political groups toward which "the Federal government has assumed special responsibilities"). Cohen therefore *confirms* that recognition requires a government-to-government relationship—and belies Defendants' unfounded assertion that the political

[15] The government also argues that tribes that voted on the IRA are not the only tribes that were recognized as eligible to do so. U.S. Br. 23. But that response misses the point. As we explained in our opening brief (at 25), the government expressly *denied* the Cowlitz the right to vote on the IRA because it concluded that the tribe was not a "recognized tribe now under Federal jurisdiction." That is irrefutable evidence that the government believed that the Cowlitz failed to meet the IRA's statutory definition of Indian.

recognition concept did not exist prior to the 1970s.[16]

(iv) The Cowlitz Have Consistently Argued—And The Government Agreed—That The Tribe Was Not Recognized In 1934

The Cowlitz's suggestion that the tribe was in fact recognized in 1934 is particularly puzzling because they have consistently asserted just the opposite. In their request for a restored lands opinion, the Cowlitz argued that the tribe "no longer enjoyed federal recognition as a tribal entity" at the time of the IRA's enactment in 1934. AR014775 (Cowlitz Request for Restored Lands Op. at 11). The NIGC agreed, holding that "the United States did not recognize the Cowlitz Tribe as a governmental entity" in 1934. AR008199 (Restored Lands Op. at 5). Those concessions are dispositive here. Yet neither the Cowlitz nor the government even *addresses* those concessions.

Having successfully taken an opposite position, the Cowlitz are estopped from arguing that they were "recognized" in 1934. Judicial estoppel applies "where a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); see *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010). That is precisely what happened here. The Cowlitz assumed one position in the NIGC proceeding—that the tribe was not recognized in 1934. The Cowlitz succeeded based on that position; the

[16] Nor do the Cowlitz satisfy Cohen's factors. Cohen's first factor requires "[t]hat the group has had treaty relations with the United States." Cohen (1942) at 271. The Cowlitz suggest that the failed 1855 treaty negotiations satisfy that requirement. Cowlitz Br. 31 n.29. At most, a failed attempt to negotiate a treaty in 1855 is some evidence of recognition 80 years too early. And we know that the Cowlitz "no longer enjoyed federal recognition as a tribal entity" at the time of the IRA's enactment in 1934. AR014775 (Cowlitz Request for Restored Lands Op. at 11); see AR014777. Cohen's second factor requires that the tribe "has been denominated as a tribe by act of Congress or Executive order." Cohen (1942) at 271. The Cowlitz plainly had not been denominated a tribe by executive order or Congress in 1934, and the failed legislation cited by the Cowlitz (at 31 n.30) cannot change that fact. Cohen's third factor requires the tribe to have "been treated as having collective rights in tribal lands or funds." Cohen (1942) at 271. Again, however, the Cowlitz were never treated as having such collective rights, notwithstanding the failed legislation cited by the Cowlitz (at 30). The Cowlitz cannot save the Secretary's flawed decision through their *post hoc* appeal to Cohen's treatise.

NIGC issued a restored lands opinion after concluding that the Cowlitz were not recognized in 1934. Now that the Cowlitz's interests have shifted, they assume a directly contrary position—that they *were* recognized in 1934. That is exactly the type of gamesmanship barred by the judicial estoppel doctrine. See *Tr. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010) ("Judicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts.").

The government, too, now argues as a backup that the Cowlitz were recognized in the political or formal sense in 1934. See U.S. Br. 41. But the Secretary expressly stated in the ROD that "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." AR140469 (ROD at 88). Conspicuously missing was any suggestion that the Cowlitz were also recognized in the formal sense *in 1934*. The government cannot plausibly argue otherwise now.

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

The Cowlitz also flunk the IRA's second, independent, requirement: They were not "under Federal jurisdiction" in 1934. The Secretary applied a two-part inquiry to determine whether a tribe was "under Federal jurisdiction" in 1934. She asked (1) whether the tribe was "under Federal jurisdiction" prior to 1934, and (2) if so, did that jurisdiction remain intact in 1934. AR140475-76 (ROD at 94-95). But the Cowlitz's jurisdictional status was long since terminated as of 1934, and in any event the Secretary never established that the Tribe was under Federal jurisdiction in the first place.

1. Defendants Cannot Escape Their Repeated Concessions That The Cowlitz Were Terminated As Of 1934 And Lacked A Government-To-Government Relationship With The United States At That Time

In their request for a restored lands opinion, the Cowlitz argued that they were "administratively terminated in the early twentieth century" and "no longer enjoyed federal recognition as a tribal entity" as of 1934. AR014775, AR014777. The NIGC agreed, concluding that the United States "no longer had a government-to-government relationship with the Tribe" throughout the twentieth century. AR014773. And the Secretary, too, concluded that "the Tribe's government-to-government relationship with the United States had been terminated" when the IRA was enacted in 1934. AR140487 (ROD at 106).

Those concessions are fatal. As we showed in our opening brief (at 22-23), termination is the *antithesis* of federal jurisdiction. Defendants undoubtedly recognize as much: Their efforts to downplay the Cowlitz's termination are wholly without merit, and show just how desperate they are to avoid the commonsense conclusion that a tribe that was terminated in 1934 could not possibly have been "under Federal jurisdiction" within the meaning of the IRA.

The government argues first that "a determination made by NIGC under IGRA does not affect the Secretary's exercise of authority under the IRA. The NIGC is not charged with administering the IRA and the NIGC has no special expertise in determining the legal status of tribes." U.S. Br. 35. Accordingly, the government argues that it is not bound by the NIGC's determination that the Cowlitz "no longer had a government-to-government relationship with the Tribe" in 1934. AR014773. Bound or not, the Secretary is not free to depart without reason from agency precedent, and she has offered no good reason for doing so here. In any event, the NIGC is not alone in concluding that the Cowlitz were terminated as of 1934. As noted, the Cowlitz conceded the point, and the Secretary likewise stated that the Cowlitz's government-to-

government relationship with the United States "had been terminated" as of 1934. AR140487 (ROD at 106).[17]

Nor is there any basis for the government's assertion that the NIGC "has no special expertise in determining the legal status of tribes." U.S. Br. 35. By statute, a tribe may conduct gaming only if the NIGC has approved a tribal ordinance authorizing such gaming. 25 U.S.C. § 2710(b)(2), (d)(1). In making that decision, the NIGC determines whether the land would be eligible for gaming under one of IGRA's exceptions, including the initial-reservation and restored-lands exceptions. By definition, those inquiries require the NIGC to "determin[e] the legal status of tribes" (U.S. Br. 35)—as it did here when it concluded that the Cowlitz were terminated in 1934. The government cannot wave off that conclusion by impugning the NIGC's expertise.[18]

The Cowlitz, of course, cannot dispute that they were terminated in 1934—they vigorously argued before the NIGC that they were "administratively terminated in the early twentieth century." AR014777. Having prevailed on that argument, the Cowlitz are judicially estopped from contending otherwise. See *New Hampshire*, 532 U.S. at 749. That should be the end of the matter.[19]

[17] As we explained in our opening brief, a government-to-government relationship is the *sine qua non* of federal jurisdiction. GR Opening Br. 21, 24. The government does not directly contest that point. Indeed, it repeatedly defines the inquiry here as whether the Cowlitz had a "jurisdictional *relationship*" with the United States, U.S. Br. 33 (emphasis added), and it cites a variety of agency actions that, it argues, created such a "relationship." Yet it is undisputed that the Cowlitz lacked any government-to-government relationship with the United States in 1934. See AR140487 (ROD at 106).

[18] Indeed, in the 2010 ROD, the Secretary simply incorporated the NIGC's Restored Lands Opinion by reference. See AR000145 (2010 ROD, at 116). If the NIGC really lacked expertise, why would the Secretary have adopted its opinion without any independent analysis whatsoever?

[19] The Cowlitz made their concession of termination prior to the Supreme Court's decision in *Carcieri*—and therefore before it was clear that, by doing so, they were effectively conceding that the Secretary lacks authority to take land in trust on their behalf. But having made that concession, the Cowlitz must live with it.

But Defendants now try another tack. They argue that only Congress, not the agency, can terminate a tribe. U.S. Br. 36-37; Cowlitz Br. 21-22. In its prior briefing before this Court, however, the government expressly acknowledged that a tribe's "jurisdictional status" can be "*administratively or congressionally terminated*." Case No. 11-cv-284, Dkt. No. 61, at 31 (emphasis added). And, in a land-trust decision issued after the initial ROD in this case, the agency framed the second "prong" of the Secretary's test as whether "*the President* or Congress terminate[d] the under federal jurisdiction status of the tribe." Record of Decision for the Tunica-Biloxi Tribe of Louisiana at 12, Aug. 11, 2011 (emphasis added) (cited at Cowlitz Br. 27 n.27).[20]

It is easy to see why the government now backs away from that position: If, as it initially acknowledged, a tribe's jurisdictional status can be administratively terminated, then the Cowlitz plainly were not "under Federal jurisdiction" in 1934. But Defendants fail to cite a single case—not one—that supports their newfound position that administrative termination is insufficient to terminate a tribe's jurisdictional status. To the contrary, the cases they cite show, if anything, exactly the opposite.

The government's core argument is that "'termination' has a unique, judicially-constructed meaning in the context of IGRA" because the term "restored" also has a special meaning in the context of IGRA. U.S. Br. 36. Accordingly, it argues, the fact that a tribe was found to have been terminated for purposes of IGRA's restored-lands exception says nothing whatsoever about whether the tribe was terminated for IRA purposes. In support, it cites *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 163-65 (D.D.C. 2000). But the government gets that case exactly backwards. In *Coos*, the

[20] The Cowlitz, too, have suggested that administrative termination (like Congressional termination) eliminates "'all obligations on the part of the government to the Indian.'" AR014774 (quoting 1897 legal opinion).

government argued, just as it does here, that "restored" (and thus, by analogy, "terminated") had "a special meaning": namely, "restoration of lands by Congress contemporaneous with the restoration of federal recognition, or in some other way connected to the Congressional act of restoration." *Id.* at 163. And the court *rejected* that argument, holding that "restored" should instead be given the plain and ordinary meaning that it has elsewhere in the law: "restored," the court explained, "has no special meaning." *Ibid.* Neither does "termination."

The government (at 35-36) also misreads *Grand Traverse Band of Ottawa & Chippewa Indians v. United States*, 46 F. Supp. 2d 689, 697 (W.D. Mich. 1999). That case simply states that a terminated tribe can be restored (for purposes of IGRA) by either Congressional action or administrative decision. It does not, as the government suggests, hold that administrative termination is relevant only to IGRA. Indeed, *Grand Traverse*—like *Coos*—expressly *rejected* the government's argument that "restored" has a "specific meaning" within the context of IGRA that is limited to restoration by Congress. *Id.* at 697. Rather, the court explained, the term should be given its ordinary "dictionary definition[]." *Id.* at 699. And that dictionary definition of "restored" plainly encompasses a tribe that was recognized, administratively terminated, and then later re-acknowledged by the Secretary. *Ibid.*

Believing that the third time's a charm, the government makes the same argument it lost in *Grand Traverse* and *Coos*. It argues that "termination," like "restored," has a "special meaning" in the context of IGRA—and that the Cowlitz's administrative termination, while sufficient for purposes of IGRA's restored-lands exception, is irrelevant to a tribe's status under any other statute. This Court should reject that baseless assertion, just as the courts did in *Grand Traverse* and *Coos*.[21]

[21] *United States v. Celestine*, 215 U.S. 278 (1909), is also unavailing. That case just holds that "[i]t is not within the power of the courts to overrule the judgment of Congress" to terminate a tribe. *Id.* at 290. Contrary to the

The government also relies (at 36) on *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006). But that case, too, only undermines the government's position. *TOMAC* addressed the status of a tribe that had been "administratively terminated" when its application for recognition was denied under the IRA, and then later restored when Congress passed a statute that reestablished the "Tribe's status as a federally recognized tribe." *Id.* at 854, 856. *TOMAC* therefore shows that Congress itself believed that administrative termination could terminate a tribe for more than just IGRA-specific purposes: It passed a free-standing statute that restored the tribe for *all* purposes, not just IGRA-specific purposes. But for that congressional restoration, the agency was bound by the tribe's administrative termination—just as the government is here.[22]

Defendants' position on termination is also impossible to square with their claim that the Cowlitz *were* under Federal jurisdiction in 1934. In trying to cobble together some basis for jurisdiction, Defendants point to a series of informal "dealings" between *administrative* officials and individual Cowlitz Indians—for example, payment of "funeral expenses" (Cowlitz Br. 18). But if the exercise of jurisdiction can be *created* by agency action, why can it only be terminated by Congressional action? Defendants provide no answer that question.[23]

The Cowlitz protest that "[t]here is no general statutory authority whatsoever for Interior to alter the jurisdictional status of an Indian Tribe." But 25 U.S.C. § 2 provides that "[t]he

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government's argument (at 36), *Celestine* does not even remotely suggest that only congressional termination can vitiate a tribe's jurisdictional status under the IRA.

[22] The Cowlitz, too, argue that, "[w]hile 'administrative termination' is relevant to whether the Tribe should benefit from the remedial provisions of IGRA," it is wholly irrelevant in any other statutory context. Cowlitz Br. 22. But the Cowlitz fail to cite any authority for that proclamation. The lone case they cite, in a footnote (at 22 n.20), is *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 173 n.12 (1973). But that case has nothing whatsoever do to with administrative termination; it simply stands for the proposition that a state's provision of services to Indians cannot destroy a tribe's sovereignty.

[23] We do not deny that federal jurisdiction can be created by some agency actions (though as we show below, we dispute that the United States took any steps to create jurisdiction over the Cowlitz in the first place). The point here is that "under Federal jurisdiction" is not a one-way ratchet; it can be created by agency action, and it can be vitiated by agency action.

Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, . . . have the management of all Indian affairs and of all matters arising out of Indian relations." The decision to exercise jurisdiction over a tribe—and the decision to terminate that exercise of jurisdiction—*is* a matter of "Indian affairs" delegated to the Secretary.

At bottom, the Cowlitz's argument is no more than an extension of their argument that "the United States Constitution gives Congress plenary jurisdiction over Indian tribes, and that authority exists even if the United States has taken no particular action to 'establish' it." Cowlitz Br. 15. Indeed, in its briefing before the agency the Cowlitz argued that "the exact date on which the federal government effectively *terminated its supervision of the Cowlitz Tribe* is not relevant to the *Carcieri* analysis" on the ground that Congress's plenary jurisdiction over the tribe persisted all the while. AR002787-88 (Cowlitz *Carcieri* Submission at 33-34 n.39) (emphasis added). The Cowlitz repeat that argument here, stating that a "continuous exercise of jurisdiction is not (and cannot be) a requirement to demonstrate that a tribe is 'under federal jurisdiction'" because "jurisdiction is continuous and uninterruptible." Cowlitz Br. 17 & n.15.

But the Secretary expressly rejected the Cowlitz's "plenary jurisdiction" argument, and for good reason: if all the IRA required was plenary jurisdiction over an Indian tribe, then every recognized tribe would be "under Federal jurisdiction." See AR140478 (ROD at 97). Under that view, the "under Federal jurisdiction" limitation would be no limitation at all. Indeed, the Cowlitz's interpretation is squarely "at odds with the Supreme Court's ruling in *Carcieri*"—and with the plain text of the IRA. *Ibid.* After all, the use of the word "now" in the phrase "now under Federal jurisdiction" expressly contemplates that jurisdiction over a tribe is *not* (as the Cowlitz assert here) "continuous and uninterruptible." Cowlitz Br. 17 n.14.

As noted, the Cowlitz argued before the NIGC that, as of 1934, they had no

"government-to-government relationship" with the United States and "no longer enjoyed federal recognition as a tribal entity." AR014774, AR014775 (Cowlitz Request for Restored Lands Op. at 10, 11). In pressing that argument, they relied on the agency's proclamation in 1933 that the Cowlitz were "no longer in existence as a communal entity" at that time. AR014775. And they further asserted that "the voluminous evidence of the United States' long-held and repeatedly stated position that the Cowlitz Tribe was unrecognized constitutes unequivocal evidence of *de facto* termination." AR014776-77. It simply beggars belief to assert that, at the same time that it repeatedly disclaimed any relationship with the Cowlitz whatsoever (and asserted that they didn't even *exist* as a tribal entity), the United State nevertheless "exercised" supervision and control over the tribe. Indeed, during the Cowlitz's federal acknowledgment proceedings in 2000, the Assistant Secretary – Indian Affairs expressly stated that "from 1880-1940, the Cowlitz Indians" were neither "a reservation tribe *under Federal jurisdiction*" nor "under *direct federal supervision*." AR015279 (emphasis added).

Defendants argue that this Court should nevertheless defer to the Secretary's decision because "under Federal jurisdiction" is "an ambiguous statutory phrase." U.S. Br. 19. But as courts have repeatedly explained, any phrase can be ambiguous in some contexts. See *Carcieri*, 555 U.S. at 391 ("the susceptibility of the word 'now' to alternative meanings does not render the word . . . whenever it is used, ambiguous") (internal quotation marks omitted). The question under *Chevron* step 1 is whether the Secretary's interpretation in *this* context is contrary to congressional intent, and courts make that determination "without showing the agency any special deference." *Village of Barrington*, 636 F.3d at 659-60. As we explained above and in our opening brief, the Secretary's interpretation here is squarely foreclosed by the statute: A tribe that was terminated in 1934—whether administratively or congressionally—could not possibly

have been "under Federal jurisdiction" within the meaning of the IRA. Indeed, Defendants have effectively *conceded* as much. Defendants' talismanic invocation of *Chevron* cannot save an interpretation that conflicts with the statute.[24] See *id.* at 660 (even if a statute is ambiguous, the agency cannot go beyond the "range of possibilities" contemplated by the statute).

2. Failed Treaty Negotiations Cannot Place A Tribe "Under Federal Jurisdiction"

As we explained in our opening brief (at 27), the Secretary also failed to establish, under step one of her inquiry, that the Cowlitz were *ever* "under Federal jurisdiction" prior to 1934. That is because she relied exclusively on the *failed* 1855 treaty negotiations as evidence that the government established jurisdiction over the Cowlitz.

The government does not dispute that the term "under Federal jurisdiction" requires the exercise of supervision and control over the tribe—and the concomitant submission of the tribe to the protection of the United States. But the government, like the Secretary, does not bother to explain how failed treaty negotiations could possibly constitute the "exercise" of jurisdiction over a tribe. A failure to enact a treaty is, by definition, a *failure* to place a tribe under Federal jurisdiction—particularly where, as here, the tribe *refused* to sign a treaty with the United States (and therefore refused to submit to its jurisdiction). See Cowlitz Br. 6. That failure is not enough to establish federal jurisdiction over the Cowlitz in 1855—and it certainly is not evidence that the Cowlitz were "under Federal jurisdiction" 80 years later.

[24] The Secretary's interpretation would also fail at *Chevron* step 2 (though again, we do not think this Court should get that far). As we explained in our opening brief, the agency has, until now, consistently taken the position that the Cowlitz were *not* "under Federal jurisdiction." GR Opening Br. 19 n.10, 25-26. The agency rejected the Cowlitz's request to vote on the IRA in 1934. In 1975, the agency explained to Congress that "the Secretary is not empowered to take . . . land in trust" [for the Cowlitz under the IRA]." AR015064. In 1980, the IBIA held that the Cowlitz were not "a federally recognized tribe" in 1934—much less a recognized tribe under Federal jurisdiction at that time. *Brown*, 8 IBIA at 188. The Secretary failed to provide any "cogent explanation" for her tacit rejection of those prior interpretations. *King Broadcasting*, 860 F.2d at 470.

The government obliquely suggests (at 35) that *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), supports the Secretary's interpretation. But nothing in that case suggests that a *failed* treaty is sufficient to place a tribe under Federal jurisdiction. In *Worcester*, the Supreme Court stated that "[t]his *treaty*…guarant[eed] their lands; assum[ed] the duty of protection, and of course pledg[ed] the faith of the United States for that protection." *Id.* at 556 (emphasis added). In *Heckman v. United States*, 224 U.S. 413 (1912), the Court likewise stated "[b]y this *treaty*, the Cherokees acknowledged that they were under the protection of the United States of America." *Id.* at 429 (emphasis added). And in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court stated that Indian Tribes "acknowledge themselves in their *treaties* to be under the protection of the United States." *Id.* at 17 (emphasis added). Those cases all undermine the Secretary's contention that failed treaty negotiations place a tribe under the active control and protection of the United States.[25]

Indeed, it is telling that, while the government's sole argument for its interpretation of "recognized" rests on Justice Breyer's concurring opinion in *Carcieri*, the government barely even acknowledges Justice Breyer's interpretation of the term "under Federal jurisdiction." As we noted in our opening brief (at 27), Justice Breyer stated that federal jurisdiction can be demonstrated by "a treaty with the United States (*in effect in 1934*)." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) (emphasis added). Failed treaty negotiations in 1855 plainly do not result in a "treaty" that is "in effect" in 1934.

Nor have Defendants shown that the Cowlitz satisfy any of Justice Breyer's other criteria for "under Federal jurisdiction." Justice Breyer stated that a tribe's "enrollment (as of 1934)

[25] The government again skirts the issue when it argues (at 35 n.31) that "Congress envisioned treaty-making with tribes as a means of preventing state encroachment on the exclusively federal power to regulate affairs with Indian tribes." Again, there was *no* treaty here. The government's repeated references to ratified treaties serve only to highlight the fact that the Cowlitz were *not* under Federal jurisdiction in 1934.

with the Indian Office" could suggest that the tribe was "under Federal jurisdiction." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring). But as we noted in our opening brief (at 25), the Cowlitz and the Secretary concede that the Cowlitz were *not* enrolled with the Indian Office in 1934—indeed, the "BIA *never* kept an 'official' census or roll for the Cowlitz tribe." AR002826 (Cowlitz *Carcieri* Submission at 72) (emphasis added); AR140481 (ROD at 100 n.125).[26] Justice Breyer also stated that a "(pre-1934) congressional appropriation" for a tribe could indicate a jurisdictional relationship. *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring). Again, it is undisputed that Congress did not enact any such appropriation for the Cowlitz.

And, of course, it is also undisputed that the Cowlitz lacked a "government-to-government relationship with the United States" in 1934. AR140487 (ROD at 106). The government's sole response is that the term "*recognized*" does not require such a relationship. U.S. Br. 38. We of course dispute that assertion; the D.C. Circuit has made clear that recognition institutionalizes "the government-to-government relationship between the tribe and the federal government." *California Valley*, 515 F.3d at 1263 (internal quotation marks and citation omitted). But, as the Court in *Stand Up For California! v. Dep't of the Interior*, 919 F. Supp. 2d 51, 66 (D.D.C. 2013), has made clear, "Justice Breyer's concurring opinion in *Carcieri* stated that 'under Federal jurisdiction'" *also* requires a "government-to-government relationship with a tribe." Yet the government does not even address that requirement—a requirement articulated by Justice Breyer and by the only court to interpret the term "under Federal jurisdiction."

[26] The Cowlitz now argue (at 17) that a BIA superintendent was instructed to enroll the Cowlitz Indians. But that is irrelevant in light of the Cowlitz's own concession that they were *never* in fact enrolled with the Indian Office. Indeed, in its briefing in the NIGC, Cowlitz expressly relied on the BIA's refusal to enroll the tribe as affirmative evidence that the tribe was not even recognized in 1934—much less under Federal jurisdiction at that time. NIGC Request at 11.

3. The Sporadic "Dealings" Cited By Defendants Do Not Establish That The Cowlitz Were "Under Federal Jurisdiction" As Of 1934

The government and the Cowlitz cite additional "dealings" with individual Cowlitz Indians as evidence that the Cowlitz "retained" their jurisdictional relationship up to 1934—"thereby fulfilling the second part of DOI's 'under Federal jurisdiction' inquiry." U.S. Br. 33. But as noted, the Cowlitz, the NIGC, and the Secretary all agree that the Cowlitz were terminated as a tribe in 1934—and therefore not under Federal jurisdiction at that time. The isolated dealings cited by Defendants cannot change that fact. Nor can they change the fact that the failed treaty negotiations never created jurisdiction over the Cowlitz in the first place.

In any event, the "dealings" cited by Defendants lend no support to the Secretary's determination that the tribe "retained" any jurisdictional relationship in 1934:

- The Cowlitz cite statements by BIA officials that the Cowlitz were within the "jurisdiction" of one agency or another. Cowlitz Br. 16-17. But the Cowlitz concede that those statements say nothing about whether the federal government *exercised* jurisdiction over the Cowlitz. *Id.* at 17. As we explained in our opening brief (at 28-29), moreover, the agency disavowed those isolated statements.
- The Cowlitz (at 18) and the government (at 30-31) cite various records naming individual Cowlitz Indians. But it is undisputed that the "BIA never kept an 'official' census or roll for the Cowlitz" (AR002826 (Cowlitz *Carcieri* Submission, at 72)) and that the Cowlitz were not listed as a tribe on the annual Indian censuses required by the 1884 Appropriations Act (AR000129 (ROD at 100 n.125)). That is conclusive proof that the Cowlitz were *not* under Federal jurisdiction in 1934. See *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring).
- The Cowlitz (at 17-18) and the government (at 33) rely on the DOI's approval of attorney contracts with Cowlitz Indians. But as the Cowlitz acknowledge (at 18 n.17), the Department approved attorney contracts pursuant to Revised Statutes § 2103 (1872), which required agency approval of contracts with any "tribe of Indians, *or individual Indian or Indians*" (Act of May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136, 136) (emphasis added)—not with "recognized Indian *tribes*" that were "under Federal jurisdiction. And, indeed, most of the contracts referred to in the record appear to be contracts with individual Indians. See, *e.g.*, AR059624 (attorney bill "for the defense of Peter Satanas, a Cowlitz Indian"); AR059627 (telegram referring to meeting to negotiate attorney contract with Seven Patten Cater"); AR059622 (letter referring to "clothing belonging to an Indian by the name of Joe Skahan"). The agency's approval of attorney contracts with Cowlitz Indians therefore says nothing about the question here, which is whether the United States exercised jurisdiction over the Cowlitz *as a tribe*.

- The Cowlitz (at 18) point to lands held in trust for individual Cowlitz. But as we showed in our opening brief (at 28 n.15), the Department has stated that such allotments do "not provide good evidence [of] an acknowledged government-to-government relationship with a tribe." AR015512. Indeed, the Department has held that Cowlitz allotments did not alter the fact that "the Cowlitz Indians were not then Federally recognized as a tribe." AR015267 (BIA Technical Report, at 59).[27]

- The Cowlitz (at 20) and the government (at 32) rely on the Supreme Court's decision in *Halbert v. United States*, 283 U.S. 753 (1931). But, as the Department's 2000 FAP report makes clear, "[t]he Supreme Court did not rule that there was a government-to-government relationship between the Cowlitz and the United States, nor did the Court rule that the Cowlitz were a tribe in 1911 or in 1931." AR015272. That position is consistent with case law explaining that *Halbert* "was concerned only with allotment and addressed the rights of individual Indians, not tribal rights." *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996).

- The Cowlitz (at 19-20) and the government (at 30) cite Congressional consideration of legislation that would have allowed the tribe to bring claims against the United States. But none of that proposed legislation ever became law. And it failed to become law because the Department repeatedly "opposed the proposed legislation" (AR015547 (BIA Historical Technical Report, at 126)) on the ground that "the Secretary is not empowered to take . . . land in trust" for the Cowlitz under the IRA (AR015064). The failed legislation therefore shows that the Cowlitz were *not* under Federal jurisdiction in 1934.[28]

- The government suggests that the Cowlitz's 2002 Federal Acknowledgment shows that "the Cowlitz Tribe was unambiguously under federal jurisdiction at least as of 1880." U.S. Br. 28. Once again the government confuses the question of federal acknowledgment under the FAP with the "under Federal jurisdiction" requirement. As we noted in our opening brief (at 29-30), *Carcieri* itself shows that subsequent acknowledgment through the FAP does not mean that a tribe was "under Federal jurisdiction" in 1934. Indeed, the report prepared by the agency during the Cowlitz's federal acknowledgment proceedings disavows the government's theory, stating that "from 1880-1940, the Cowlitz Indians were" neither "a reservation tribe *under Federal jurisdiction*" nor "under direct Federal supervision." AR015279 (emphasis added).

As the Cowlitz themselves recognize, moreover, most of the "dealings" cited by the Secretary show BIA involvement with "*individual* Cowlitz Indians" only. Cowlitz Br. 19 (emphasis added). But as we explained in our opening brief (at 21), the term "under Federal

[27] The Cowlitz also cite (at 18) heirship determinations made by the BIA. Because the ROD did not cite those determinations in the decision below, this Court cannot rely on them as evidence that the tribe was under Federal jurisdiction in 1934. In any event, the heirship determinations cited by the Cowlitz pertain to individual Cowlitz Indians and do not reflect any supervision and control over the Cowlitz as a tribal entity.

[28] The Cowlitz (at 18) state that BIA officials attended Cowlitz tribal meetings. Again, the Secretary did not rely on meeting attendance in her decision below. And mere attendance at meetings does not show that the government exercised supervision and control over the tribe.

jurisdiction" requires the exercise of jurisdiction over a tribe as a *group*.[29]

The Cowlitz respond that the "BIA possesses jurisdiction to exercise authority over an individual if that individual is an 'Indian'" under the three-part definition set forth in the IRA. Cowlitz Br. 19. Thus, the Cowlitz argue, "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.'" *Ibid.* That argument misses the mark completely.

The IRA's definition of "Indian" limits the Secretary's authority to take certain actions for Indians only *under that statute.* The Secretary has authority to act for individual Indians under *other* statutes, and the IRA does nothing to limit that authority. See, *e.g.*, 25 U.S.C. § 2. Indeed, the contacts cited by the Cowlitz and the government took place *before* the IRA was enacted. The IRA's definition of Indian obviously could not govern the Secretary's authority before the IRA even existed. There is simply no logic to the Cowlitz's argument that every service provided to an individual Indian shows that a tribe was "recognized" and "under Federal jurisdiction" within the meaning of the IRA.[30]

II. THE SECRETARY LACKS AUTHORITY UNDER IGRA TO DECLARE THE PARCEL ELIGIBLE FOR GAMING

IGRA prohibits gaming on lands acquired after October 17, 1988, unless the land meets one of a few statutory exceptions. The Secretary concluded that the Cowlitz Parcel meets the "initial reservation" exception, which requires that the Cowlitz have "significant historical

[29] The Cowlitz's argument (at 18) regarding fishing rights is therefore equally beside the point. The agency's efforts on behalf of "two Cowlitz Indians," AR002824 (Cowlitz *Carcieri* Submission, at 70), for example, says nothing about whether the government exercised jurisdiction over the Cowlitz as a group.

[30] The Cowlitz state that there is no evidence that BIA provided services to "individual Cowlitz Indians" on the basis that they met one of the IRA's other definitions of Indians (which do not require the tribe to be "recognized" and "under Federal jurisdiction"). The Cowlitz provide no support for that assertion. But as noted, the Cowlitz miss the larger point here: The IRA does not limit the Secretary's authority to provide services to Indians pursuant to *other* statutes. It is well recognized that scores of statutes include other definitions of "Indian tribe." "A study of the statutes requiring application of some definition of the term 'Indian tribe' reveals that tribes cannot be neatly divided into 'recognized' and 'nonrecognized' tribes for all purposes; rather, a tribe may be a legal entity for some federal purposes, but not for others." Cohen's Handbook of Federal Indian Law, 3.02(6)(a) at 145 (2005 ed.).

connections" to the land. 25 C.F.R. § 292.6(d). But the Secretary's "significant historical connections" finding is foreclosed by the plain language of the regulation, the purpose of IGRA, and the undisputed facts. The Secretary's decision, which departs from agency precedent that has otherwise been consistent since IGRA's enactment, is entitled to no deference and cannot stand.

A. The Text Of The Regulation And The Structure And Purpose Of IGRA Require A Narrow Reading Of The "Significant Historical Connections" Requirement

Defendants do not (and cannot) deny that section 292.6(d) requires long-standing, regular interactions with the land; anything less would read the word "significant" out of the regulation. GR Opening Br. 31-32. The types of activities that the regulation expressly contemplates—subsistence use, occupancy, burial grounds, or tribal villages—plainly do not embrace mere transient or sporadic connections to the land. See 25 C.F.R. § 292.2. Occupancy, for instance, is the "[a]ct of taking or holding *possession*." Webster's New Int'l Dictionary 1684 (2d ed., copyright 1934; 1941 printing) (emphasis added). Rather than suggesting an alternative to that straightforward reading of the regulation, the government's brief devotes not even a single sentence to interpreting its text.[31]

Moreover, as we explained in our opening brief, a narrow construction is dictated by the structure and purpose of IGRA itself. GR Opening Br. 32. IGRA generally prohibits gaming on lands acquired after its passage precisely so tribes cannot cherry-pick new reservations based

[31] The Cowlitz respond only to our definition of "subsistence use," which, as we pointed out, is defined in other federal land-use laws as "customary and traditional uses" (which, in turn, is defined as a "long-established, consistent pattern of use"). GR Opening Br. 31 n.19. The Cowlitz protest (at 42 n.48) that these definitions from elsewhere in federal law are "inapplicable" here. But statutes and regulations commonly adopt terms of art that appear elsewhere in federal law. And tellingly, the Cowlitz never offer any competing definition of the word. At any rate, even the Indian lands opinions cited by the Cowlitz support our proposed interpretation of the word. See Ft. Sill Op. at 24 ("Subsistence, and the constant search for water in a semi-arid land, required the Tribe to *control . . . great distances for its survival*."); St. Ignace Op. at 12-13 (gaming site was "within the core of the Tribe's territory, which center[ed] around [a] fishing site" where the tribe "gather[ed] . . . *every year* for the abundant fishing *which constituted an integral part of the members' diet*") (emphases added).

on market research, rather than historical connections. *Ibid*. But the ROD's broad reading of the "initial reservation" requirement would allow tribes to do just that, giving them an unintended advantage over tribes with pre-existing reservations. The limited scope of lands on which Congress intended to allow gaming is evident from subsection (a) of IGRA, which prohibits gaming on land acquired after October 17, 1988, unless that land is "*within or contiguous* to the boundaries of the reservation of the Indian tribe" on that date, or is "*within* the Indian tribe's last recognized reservation." 25 U.S.C. § 2719(a) (emphasis added). The ROD's expansive interpretation of section 292.2's "significant historical connections" and "vicinity" requirements would completely divorce the initial-reservation and restored-lands exceptions in subsection (b) from the "within or contiguous to the boundaries of the reservation" limitation Congress clearly articulated in subsection (a).

Relatedly, as we have shown (and as neither defendant attempts to rebut), the significant historical connection standard requires a claim to the gaming site that distinguishes the petitioning tribe from every other tribe that ever ventured near the land. See GR Opening Br. 32-33. That is because the regulations must permit the Secretary to distinguish between similarly situated tribes making claims to the same land; to do so, the regulations must ensure that tribes can game only on lands to which, at some point in history, they had a valid claim of ownership or possession. *Ibid.*

Defendants and *amicus* Warm Springs protest that a tribe need not show "exclusive use" of the land throughout history—the standard applied by the ICC in determining the extent of land aboriginally controlled by an Indian tribe. U.S. Br. 45-46; Cowlitz Br. 40-41 & n.46; Warm Springs Br. 13 n.5. But they are attacking a straw man: As we explained, we do not suggest that the section 292 regulation requires *exclusive* use or ownership; rather, we contend only that the

petitioning tribe must have had a long-term connection on or adjacent to the site, whether or not the tribe was able to completely exclude other tribes from the site. See GR Opening Br. 34, 35 n.22. Importantly, Defendants do not contend that the Cowlitz had any claim of ownership—under *any* standard—to the land. Indeed, they fail to posit their own interpretation of the regulation in response to the construction we have articulated. This conspicuous omission says, in essence, "We don't know what 'significant historical connections' means, but we know that the Cowlitz have it."

B. The Distance Between The Cowlitz's Historical Territory And The Parcel Forecloses "Significant Historical Connections"

Neither the government nor the Cowlitz disputes (nor could they) any of the extensive facts in the record showing that the Parcel is neither within nor adjacent to historical Cowlitz territory. GR Opening Br. 33-36. In fact, the Parcel is 50 miles from the heart of Cowlitz territory, 25 miles from the nearest historical Cowlitz village, and 14 miles south of the southern-most edge of the Cowlitz's ICC-adjudicated historical territory.[32] *Ibid.* Nor can the government challenge the BIA's multiple findings in its Technical Reports that the Cowlitz had no claim to the Parcel and were not related to the Indians who controlled and occupied the land closest to the Parcel. *Id.* at 34. Defendants simply cannot contend that the Cowlitz, as a tribe, ever lived, subsisted, or buried its dead on the Parcel—or even that they regularly used land in the same *county* as the Parcel.

And the record shows that it would have been difficult and time-consuming for the Cowlitz's ancestors to travel even the fourteen miles from the edge of its territory to the Parcel,

[32] The government and the Cowlitz also misstate the ICC's findings. Although the ICC found that the Lewis River area (the section of the Columbia River closest to the Parcel) was "used by various Indian groups throughout the first half of the nineteenth century," the ICC never found, as Defendants intimate (U.S. Br. at 45-46; Cowlitz Br. at 40 n.42), that one of those Indian groups was the Cowlitz. The ICC certainly did not conclude that the Cowlitz actually lived at Warrior's Point (several miles from the Parcel) or on the Parcel itself. See GR Opening Br. 42 & n.31.

much less the 50 miles from Cowlitz Prairie, which was historically the heart of Cowlitz territory. See, *e.g.*, AR006356-57, AR009971; see also GR Opening Br. 36. The government doesn't challenge that undisputed fact, and the Cowlitz profess only that their ancestors were "expert boatmen" with "'abundant' horses," Cowlitz Br. at 41, a speculation that is plainly too vague to connect the Cowlitz to the Parcel itself.

Disregarding the distance between the Cowlitz's territory and the Parcel would eviscerate the very purpose of IGRA. Under Defendants' approach, tribes that lacked land at the time IGRA was enacted would be able to build casinos far outside the area they historically inhabited—to the detriment of tribes that had reservations at the time of IGRA's passage and are limited to gaming on those lands. GR Opening Br. 32. And that unwarranted expansion of gaming land available to each tribe would, in turn, create conflicts among tribes holding equally weak claims to the same land. *Id*. at 32-33. As we explained in our opening brief (at 32), such an interpretation of the regulation greatly exceeds the limits of IGRA.

C. The Secretary's Decision Is an Unexplained Departure from Agency Precedent

The Secretary's decision not only strays from the language of the regulation and the intended scope of IGRA; it also sharply diverges from agency precedent. The ROD is one-of-a-kind in two ways: it is the only time the agency has ever found "significant historical connections" to land well outside the area the tribe historically controlled or occupied, and it constitutes a *sui generis* application of the term "vicinity," which the agency carefully defined only last year. The agency glosses over these departures without acknowledging or explaining them, and, as such, the ROD cannot stand. See *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an

inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation marks omitted).

1. Prior To The Cowlitz Decision, The Agency Had Never Found Significant Historical Connections To Land Outside The Petitioner's Historical Territory

As we explained in our opening brief, the ROD breaks with every one of the agency's past applications of the "significant historical connections" requirement. For decades, the agency consistently interpreted the requirement in a way that comports with our textual analysis of the regulation: petitioners were required to show a *long-term* link, typically a form of ownership or possession (*i.e.*, "significant" connections) to land *directly surrounding* (*i.e.*, in the "vicinity" of) the parcel. GR Opening Br. 37 & nn.25, 27 (listing cases). When there was no direct evidence that a tribe regularly used the site itself, the agency looked for a showing that it was not only within the petitioner's historical territory, but was also in the *center* of that territory. *Ibid.* See also, *e.g.*, Rohnerville Op. at 13.[33] In stark contrast to every other agency opinion finding significant historical connections, the ROD points to no evidence—and does not even assert—that the Cowlitz Parcel is within or adjacent to land that the tribe ceded to the United States, settled on, or aboriginally controlled.

Defendants nevertheless attempt to shoehorn the Cowlitz decision into the mold of agency precedent by insisting that the 14 miles between the Cowlitz's territory and the Parcel is comparable to distances in other agency opinions between the tribes' *reservations* and their proposed gaming sites. U.S. Br. 45-46 & n.42; Cowlitz Br. 40-41 & n.45.[34] The Cowlitz assert

[33] All Solicitor and NIGC gaming opinions cited in Section II were attached as Exhibit C to Grand Ronde's opening brief or are attached here as Exhibit A.

[34] The government (at 44) misleadingly refers to "the distances that [other tribes'] parcels were from each tribe's *territory*," but cites distances from reservations, despite our explanation of the difference between the two. See GR Opening Br. 38 n.28.

(at 41 n.45) that, for tribes like the Cowlitz, which never had a reservation, the tribe's ICC-adjudicated territory is "comparable to former reservations or tribal headquarters." That absurd contention ignores the obvious difference between an ICC-adjudicated territory (the large area of land found to have been a tribe's aboriginal homeland) and a reservation (the relatively small piece of land set aside for a tribe in exchange for ceding the vast majority of its aboriginal territory). See GR Opening Br. 38 n.28. A tribe's ICC-adjudicated territory is therefore generally orders of magnitude larger than its reservation. See, *e.g.*, *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 183 (Ct. Cl. 1980) (tribe's ICC territory was 11.6 million acres and its reservation was 435,000 acres); *Spokane Tribe of Indians v. US*, 163 Ct. Cl. 58, 62 (Fed. Cl. 1963) (tribe's ICC territory was 1.85 million acres; its reservation was 155,000 acres). See also AR014739 (Cowlitz's ICC territory is 1.66 million acres). Comparing the two for the purposes of identifying where a tribe may conduct gaming would correspondingly magnify each tribe's available gaming area well beyond the agency's consistently held interpretation of section 292.

It is not surprising, then, that the Cowlitz cannot point to another instance in which the Secretary, the NIGC, or a court relied on a gaming site's distance from the tribe's ICC or aboriginal territory to establish the existence of significant historical connections.[35] There is simply no support for the Cowlitz's proposition that that distance (if it is greater than zero) can ever support a "significant historical connections" finding.[36]

[35] Indeed, in prior initial reservation opinions (that is, in cases like the Cowlitz's where the tribe did not have a pre-existing or former reservation), the DOI consistently relied upon the site's distance from the *center* of the tribe's historical territory, not the edge. See DOI Op., Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, June 25, 2003 (finding a significant historical connection because the parcel was in the same Township as the settlement around which the Tribe has been "centered" since the 1830s); DOI Op., Huron Potawatomi, Dec. 13, 2000 (finding that the Tribe's "social core" and its "historical and cultural center" were in the same county as the gaming parcel, and the parcel was part of lands ceded to the United States in an 1821 treaty).

[36] The sources cited by the Cowlitz for this proposition, Cowlitz Br. at 41 n.45, are inapposite. *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), does not even address the question; it asks only whether "restored lands" can ever include land outside a tribe's former reservation. Likewise, in the NIGC's *St. Ignace* opinion, the parcel

2. The ROD Departs Without Explanation From The Agency's Own Definition Of "Vicinity"

The finding of significant historical connections to land outside a tribe's historical territory is not the only "first" achieved by the agency in the Cowlitz decision. The ROD, as we showed in our opening brief, also applies an unprecedented and overbroad definition of the word "vicinity." The agency has previously made clear that "vicinity" is not a catch-all for all land within a certain number of miles of a tribe's historical location. Scotts Op. at 14-15; GR Opening Br. 38-39. Rather, the term has been applied to cover those circumstances—and *only* those circumstances—in which it is reasonable to infer that a tribe regularly used the proposed gaming site itself. Scotts Op. at 15. Put another way, "vicinity" is not just about *quantity* (the number of miles from historical use), but also about the *quality* of that use—a quality that shows that the tribe actually used the parcel on which it seeks gaming rights.

No one seriously contends that the Cowlitz meet that standard. They plainly don't. Nor do the Cowlitz succeed when they deny that the standard exists in the first place. Cowlitz Br. 41. According to the Cowlitz, the Scotts opinion supposedly held that "evidence of use or occupancy of the particular parcel is not required." *Ibid.* Nonsense. What the Secretary actually held in Scotts was that "*direct* evidence of actual use or occupancy on every parcel *within a tribe's historic use and occupancy area*" was not required. Scotts Op. at 15 (emphasis added). Instead, the Secretary held, the regulation's use of the word "vicinity" was intended to permit a finding of significant historical connections to land *within the tribe's historic territory* "where the particular location and circumstances . . . cause a natural inference that the tribe historically used or

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was within the tribe's undisputed former territory—land the tribe ceded pursuant to an 1836 treaty. *St. Ignace Op.* at 11.

occupied *the subject parcel as well.*" *Ibid.* (emphasis added).[37]

As we have explained, the Secretary utterly fails to make a connection between the way the Cowlitz used its aboriginal territory 14 miles to the north, or its sporadic and transient presence elsewhere in the Columbia River region, and any inference that the Cowlitz used the Parcel itself. GR Opening Br. at 40-43. Defendants fare no better in their briefing before this Court—nor could they, because the necessary facts simply aren't in the record. Neither Defendant explains how the facts on which the ROD relies, whether considered individually or in the aggregate, give rise to the necessary inference. See *ibid.* The ROD's failure to draw a "rational connection between the facts found and the choice made" deprive it of any claim to deference. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

Under the agency's long-held interpretation of the regulation, the manner of the Cowlitz's use of land elsewhere in the Columbia River area plainly does not give rise to a "natural inference" that the Cowlitz used the Parcel. Unlike other tribes whose land use was found to be in the "vicinity" of their gaming parcels, or who were otherwise sufficiently historically connected to their gaming land, the Cowlitz did not have to regularly cross the Parcel to get from one tribal settlement to another, Mechoopda Op. at 11, nor was the Parcel "part of a tightly circumscribed area that formed the core of [Cowlitz] territory," Grand Traverse Op. at 17, to name only two examples. Even worse, the ROD and both Defendants actually cite opinions like Grand Traverse and Mechoopda *in support of* their position that the Cowlitz decision is in

[37] The Cowlitz also cite the agency's response to a comment during the promulgation of the section 292 regulations for the proposition that "actual inhabitance [is] not required." Cowlitz Br. at 41. But the cited comment was not directed toward the initial reservation exception's "significant historical connections" requirement at all. Instead, it was a suggestion to *add* a "significant historical connections" requirement to an entirely different process for gaming rights on newly acquired lands (which applies *only* when the tribe cannot meet the initial reservation or any other exception to the general rule against gaming on such land). 73 Fed. Reg. 29,354, 29,368 (May 20, 2008).

line with agency precedent. See AR140508 (ROD at 127, n.229); U.S. Br. 44, n.42; Cowlitz Br. 42. Despite insisting that the inquiry is a "fact-specific, case-by-case analysis," Cowlitz Br. 42, Defendants obscure the very facts of the agency's prior opinions that place the Cowlitz ROD so far outside the range of past agency practice, as demonstrated in Table 1 below:

Table 1: "Significant Historical Connections" Agency Precedent

Decision (year)	Sufficient historical connection?	Within territory formerly occupied or controlled by tribe?	Other connections
Poarch (2008)*	Yes	**Yes**; in the center of land that exclusively belonged to tribe's ancestors and was ceded to U.S. by tribe's ancestors	• Site of historic town that was central to ancestral tribe • Two burial mounds at parcel site
Mooretown (2007)*	Yes	**Yes**; within aboriginal territory	• Within area used for subsistence by tribal ancestors
Sault Ste. Marie (2006)*	Yes	**Yes**; ceded to U.S. by tribe	• Approximately 4 miles from historical reservation
Mechoopda (2003)*	Yes	**Yes**; previously occupied by Tribe's ancestors, "squarely within the boundaries" of 23 historical villages, and promised to the tribe in unratified treaty	• One mile from three buttes with strong cultural significance to the Tribe • Historical trail passing through the parcel linked tribal villages

Bear River Band (2002)*	Yes	**Yes**; parcel is "in the middle of" 25 different sites known to be inhabited and used by the tribe	• One mile from two aboriginal villages • One mile from two major trails used by the tribe • One mile from pond with cultural significance to tribe • Three miles from five aboriginal villages and one historical town • Three to four miles from bluff with cultural significance to tribe • Six miles from a historical town, eleven aboriginal villages, and the tribe's original Rancheria
Karuk Tribe (2012)*	Yes	**Yes**; Parcel is either "ancestral territory or a neighboring area"	• Tribe's village located in the same town as the Parcel • Evidence of tribal connections to the county in which parcel is located
Coos (2001)	Yes	**Yes**; within reservation on which tribe lived, and land was continuously owned by tribal members since 1800s	• Site of former tribal village • Adjacent to tribal burial ground
Grand Traverse (2001)*	Yes	**Yes**; within tribal territory and land ceded to the U.S.	• Continuously occupied by tribe • At the "core" of tribe's territory • Near several trails and villages • In "immediate vicinity" of two tribal villages • Land used for natural resources necessary to tribal existence
Karuk Tribe (2004)	No	**Yes**; Parcel is either "ancestral territory or a neighboring area"	• Tribe's villages were located on the same river as the parcel • Ethnology literature stated it was "likely" tribe lived on portion of the river where parcel was located • No evidence that "parcel remained important to the tribe throughout history"

Wyandotte (2004)*	No	**Yes**; Tribe owned and occupied the land for 11 years and then ceded it to the U.S.	• Tribe was transient, but "significant roots were put down" during the 11 years it lived on the parcel
Guidiville (2011)*	No	**Maybe**; not within land set aside for tribe under unratified treaty, but evidence that parcel "might" have been located in territory of tribal ancestors	• Evidence that tribe lived in counties near the parcel and in "Bay Area," which includes the parcel • Some evidence of aboriginal trade route near parcel • Tribe could not demonstrate a village or burial ground in the city or county in which the parcel was located
Scotts (2012)*	No	**No**	• Possibility, based on an extrapolation from historical report, that members of tribe lived on the parcel • Some evidence that tribe descended from Indians living on parcel; evidence "not conclusive" • Tribe used land within 25 miles (across a bay) from parcel • Individual tribal members migrated to the parcel area beginning in 1920s

*Cited by Federal or Intervenor Defendants.

Even assuming that every fact relied upon by the agency is true (a dubious assumption, as we explained, see GR Opening Br. 41, 42 n.31), those facts still place the Cowlitz well beyond the scope of agency precedent. As Table 1 above throws into sharp relief, prior agency opinions finding significant historical connections consistently cited claims of ownership and other connections to the land that are completely absent from the Cowlitz record. In fact, as Table 1 also shows, even tribes that were found *not* to have sufficient historical connections to the gaming site were able to document claims to the land at least as strong as, or stronger, than those the Cowlitz have asserted. See GR Opening Br. at 40-41. The agency's lack of reasoned

explanation for this departure from its own precedent—indeed, its failure to even acknowledge the change—makes the ROD a quintessentially arbitrary and capricious agency action. See *Comau, Inc.* v. *NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012); *Friedman v. Sebelius*, 686 F.3d 813, 827 (D.C. Cir. 2012) (merely citing to prior cases with similar results "does not stand as a reasoned explanation if . . . those cases are materially different" from the case at hand).

III. THE SECRETARY'S DECISION-MAKING PROCESS VIOLATED NEPA

A. Grand Ronde Has Standing To Pursue Its NEPA Claims

The government contends that Grand Ronde lacks standing to pursue its NEPA claims because it has only a "purely economic" interest at stake. U.S. Br. 47. The government is mistaken. To be sure, several (though not all) of our NEPA arguments highlight deficiencies in the agency's economic analyses; and one of those arguments does challenge the Secretary's assessment of the economic harm Grand Ronde would suffer if the Cowlitz project went forward. But the government ignores the fact that the FEIS itself recognized that Grand Ronde *also* has significant cultural and historic interests in the parcel. AR075977-78. Indeed, under Section 106 of the National Historic Preservation Act, the agency was required to consult with Grand Ronde on how the proposed project might impact the Tribe's cultural resources. See 16 U.S.C. § 470f; 36 C.F.R. §§ 800.4, 800.5(a), 800.6(a).

And as we explained in both our Complaint (at ¶ 56) and opening brief (at 34 n.23), allowing the parcel to be taken into trust for the Cowlitz, and permitting the tribe to construct a casino on site, would harm Grand Ronde's longstanding interests in the land itself. For generations, Grand Ronde has had deep cultural and historic connections to the land on the north shore of the Columbia River, including Clark County. Grand Ronde ancestral tribal members are buried in that area, and Grand Ronde considers Clark County to be part of its Non-Treaty Homelands and Cultural Interest Lands. AR008616. One of Grand Ronde's principal treaties,

the Willamette Valley Treaty of 1855, also expressly recognized that Grand Ronde bands had legitimate claims to land on the north shore of the Columbia River. AR008616, AR008558-59. Grand Ronde therefore also has important aesthetic and recreational interests in maintaining its historic ties to this land—and in having the land unaltered.

Allowing the Cowlitz to establish a reservation and build a casino on this site would unquestionably injure those interests. And the D.C. Circuit has recognized that such injury falls squarely within the zone of interests NEPA was intended to protect. See, *e.g.*, *TOMAC v. Norton*, 193 F. Supp. 2d 182, 190 (D.D.C. 2002) *aff'd sub nom. TOMAC*, 433 F.3d 852, 860 (D.C. Cir. 2006) (injury to aesthetic and recreational interests of those "who enjoy recreation on land slated for changes in physical development fall well within the zone of interests protected by NEPA"); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996); see also, *e.g.*, *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27-29 (1st Cir. 2007) (Indian tribe had standing to challenge BIA's NEPA errors, where the tribe lived near the land slated for development and used it and the surrounding area "for a variety of ceremonial and community purposes").

It is true that the proposed action would harm Grand Ronde's economic interests, as well. As we have explained, construction of a Cowlitz casino on the parcel would devastate Grand Ronde's economy and ability to provide essential services for its members. GR Opening Br. 47-51. The BIA also recognized the project's potential adverse effects, devoting dozens of pages in its FEIS to analyzing the socioeconomic environment and impact of its decision.[38]

Contrary to the government's suggestion, however, the fact that Grand Ronde has alleged economic injury does not place its claims outside of NEPA's zone of interests. Rather,

[38] *E.g.*, AR075980-992, AR076136-62, AR076287-89, AR076297-98, AR076303, AR076306-07, AR076312, AR076316, AR076320, AR076323, AR076327, AR076329, AR076332, AR076333. AR076335, AR076337-38, AR076339, AR076341, AR076356, AR076368, AR076380, AR076386-87.

controlling case law instructs that even where plaintiffs may be motivated in part—even in large part—by economic interests, they still routinely satisfy NEPA's zone of interests test when they have other, cognizable, interests at stake, as well. See *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977) ("[A] party is not 'disqualified' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic."). "[A] plaintiff's economic interests do not blight his qualifying ones, such as aesthetic and environmental interests" in his use of the land. *Mountain States Legal Found*, 92 F.3d at 1236. Because the BIA's proposed action would injure Grand Ronde's aesthetic, recreational, *and* economic interests, the Tribe has standing to challenge the Secretary's flawed NEPA analysis.

B. The BIA Failed Independently To Evaluate The Cowlitz Unmet Needs Data

Both the government and the Cowlitz contend that it was entirely appropriate for the BIA to adopt and incorporate into the FEIS's statement of purpose and need the Cowlitz's unmet needs assertion. U.S. Br. 51-52; Cowlitz Br. 46-47 & n.49. Perhaps so, if the agency had assessed the figures supplied by the Cowlitz, as required by 40 C.F.R. § 1506.5(a). But the agency failed to do that. And neither defendant successfully defends that critical defect in the agency's analysis.

The government reiterates the Secretary's claim in the ROD that, because the Cowlitz are a sovereign nation, it would have somehow undermined tribal sovereignty and self-determination for the agency to have challenged the tribe's financial projections. U.S. Br. 52. That argument is puzzling, to say the least. This is a *federal* decision whether to take land into trust for the Cowlitz; it has nothing to do with tribal sovereignty. Just as the Cowlitz were required to submit their business plan to the BIA with their fee-to-trust application (AR075837), the agency was required to evaluate that information when it factored into its NEPA analysis (40 C.F.R. § 1506.5(a)).

What is more, even if it were a relevant consideration, tribal sovereignty cannot justify wholesale abdication of responsibility—and here, the agency conducted absolutely *no* assessment of the data to verify its validity. 40 C.F.R. § 1506.5(a) expressly prohibits agencies from relying upon an applicant's submissions without "independent[] evaluation." Yet that is precisely what occurred here, and the government offers no evidence to the contrary.[39]

The Cowlitz fare no better. They assert (at 47) that an agency may permissibly "consider" information submitted by the tribe. But the problem is that the agency didn't just "consider" the Cowlitz's economic analysis; it blindly accepted it without conducting the independent analysis required by NEPA. We don't doubt that the Secretary could give *some* weight to the Cowlitz data when drafting the project's purpose and need statement. Nevertheless, the agency may not shirk its duty to assess information submitted by the project applicant. See 40 C.F.R. § 1506.5(a). Indeed, any determination regarding how *much* weight to accord such information should take into account the agency's assessment of its strength and veracity.

The government and the Cowlitz next contend that the late addition of the Cowlitz data to the FEIS—and the FEIS's reliance on those data—did not impede the public's ability to meaningfully participate in the decision-making process. They note the opportunities for public comment throughout the NEPA process, including after the FEIS was issued, before the Secretary issued her final decision. U.S. Br. 53-54; Cowlitz Br. 48. Again, this misses the point: While the public doubtless participated in *parts* of the review process, the fact remains that the agency added critical new information to the statement of purpose and need at the very end of

[39] It is also no defense for the government to assert at this juncture that the Cowlitz projections look "reasonable." U.S. Br. 53. The responsibility to assess the applicant's submissions falls to the *agency* during the NEPA process, not to Justice Department lawyers in subsequent litigation. See 40 C.F.R. § 1506.5(a) ("The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.").

the NEPA process, foreclosing meaningful public scrutiny of that information and the effect it had on the agency's overall analysis.

Finally, Defendants contend that, in any event, the agency's consideration of alternatives was reasonable. Their argument is, in effect, that because the agency considered *some* alternatives, its analysis was inherently reasonable. U.S. Br. 55-57; Cowlitz Br. 49-50. That is meritless. The reasonableness of the agency's decision-making depends on its having considered an appropriate *range* of alternatives, not just *some* alternatives. See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991). And here, the agency's rigged deliberative process ensured that it gave serious consideration only to those options that would "adequately meet" the "economic objectives and needs" *stated by the Cowlitz*. AR075886; AR078455.[40] Remand is warranted so that the agency can properly evaluate *all* of the reasonable development alternatives, taking into account the tribe's legitimate unmet needs.

C. The BIA Did Not Take A Sufficiently Hard Look At The Impact Of The Proposed Casino On The Grand Ronde

NEPA and its implementing regulations are clear that the statute is concerned with the economic effects of federal actions. See 40 C.F.R. § 1502.16 (the agency must consider the direct and indirect effects of the proposed action); *id.* § 1508.8 ("Effects includes ecological . . . , aesthetic, historic, cultural, *economic*, social, or health, whether direct, indirect, or cumulative." (emphasis added)). The BIA thus appropriately recognized the need to consider the economic impact of the Cowlitz proposal and did so. See *supra* at 41 (citing the economic and socioeconomic analysis in the FEIS). As explained in our opening brief, however, the BIA's

[40] What is more, as we have explained (GR Opening Br. 46-47), in its rush to identify lands that would satisfy the Cowlitz's stated economic needs, the agency failed appropriately to weigh the importance of locating the proposed casino on the Cowlitz's *actual* historical lands and to recognize that locating a casino at any of the proposed northern sites would have more than satisfied legitimate tribal needs. Neither defendant attempts to defend those critical oversights.

analysis in that regard was plainly deficient. Both the FEIS and the ROD erroneously calculated the project's adverse effect on the Grand Ronde, significantly underestimating the extent to which it would devastate revenues used to fund vital tribal services. See GR Opening Br. 47-51. That error alone requires remanding the case to the agency to remedy its analysis. See, *e.g.*, *County of L.A. v. Shalala*, 192 F.3d 1005, 1020-23 (D.C. Cir. 1999).

It is no defense to say that the agency need not have conducted any economic analysis in the first place. U.S. Br. 58-59; Cowlitz Br. 53-54. This discussion *was* included in the FEIS, and agencies have a responsibility to present accurate data to the public and decision-makers; presentation of incomplete or misleading information defeats NEPA's objective of promoting transparent decision-making. See 40 C.F.R. § 1500.1(b); *id.* § 1502.24. Here, because the BIA failed to take proper account of the extent to which the Grand Ronde community would be affected by the development of a Cowlitz casino, it did not fully and fairly address all of the project's adverse effects. The agency's analysis therefore failed to provide for an informed comparison of alternatives, as required by NEPA, and remand is necessary for the agency to issue a new EIS that corrects the errors in its initial decision.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the Court should vacate the Secretary's Record of Decision.

Dated: December 11, 2013

Respectfully Submitted,

/s/ Lawrence S. Robbins

Lawrence S. Robbins (DC Bar No. 420260)
Gary A. Orseck (DC Bar No. 433788)
Sarah R. Prins (DC Bar No. 999960)
Daniel N. Lerman (DC Bar No. 1000936)
(admitted *pro hac vice*)
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411L
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

Counsel for Plaintiff The Confederated Tribes of the Grand Ronde Community of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2013, I have caused service of **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: December 11, 2013
Washington, D.C.

/s/ Lawrence S. Robbins
Lawrence S. Robbins (DC Bar No. 420260)