IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, *ET AL.*, PLAINTIFFS, VS. SALLY JEWELL, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*, DEFENDANTS, AND COWLITZ INDIAN TRIBE, INTERVENOR-DEFENDANT.	CASE NO. 13-CV-00849 BJR

PROPOSED AMENDED BRIEF OF AMICUS CURIAE CHINOOK NATION IN SUPPORT OF PLAINTIFFS[1]

INTRODUCTION

The rich and true history of the homelands of the indigenous peoples who built its villages, buried its ancestors, gathered foods and medicines, and hunted on and in the vicinity of the 151.87 acre parcel of land at issue in this case, has been ignored by the United States.[2] *Amici* CHINOOK NATION is a not-for-profit corporation organized under the laws of the State of Washington that seeks to protect this history and the status of its traditional

[1] Chinook Nation has not reviewed any potential motions that may be coming from the Plaintiffs simultaneously with the filing of this proposed *amicus curiae* brief and therefore cannot declare that it is in support of any particular motion. However, Chinook Nation's proposed brief is supportive of certain arguments made by Plaintiff Confederated Tribes of the Grand Ronde Community of Oregon in the history of these proceedings, as delineated in this proposed brief.

[2] See the "Map of the Tchinook Nation", which is attached hereto and marked as "Exhibit A".

homelands. The purpose and foundation of CHINOOK NATION's incorporation are to preserve and revive the Chinook language, protect their past cultural resources and sacred places, support the present art, lifeways and subsistence, and grow the future education, and political and legal status of the Tchinook people.

CHINOOK NATION consists of the descendants of the indigenous Tchinook Nation (hereinafter the "Tchinook"), including elders and others who work together in furtherance of promoting the fundamental goals of the corporation. The Tchinook consist of nineteen different tribes, including the Chinook Tribe, the Clatsop Tribe, the Willopah Tribe, the Nucquecluhwenuck Tribe, the Kathlamette Tribe, the Wahkiakum Tribe, the Skilloot Tribe, the Kalamah Tribe, the Wakamass Tribe, the Kathlapouthl Tribe, the Multnomah Tribe, the Shoto Tribe, the Shahala Cascade Tribe, Chilluckittequaw Tribe, the Wasco Tribe, the Wishham Tribe, the Wahlala Tribe, the Clackamas Tribe and the Clowwewalla Tribe. The rich history, culture, language, and homelands of the Tchinook have gone repressed in United States history. In fact, too many are unaware that the most renowned species of salmon, a wind that warms the slopes of the Rocky Mountains, and a United States Army helicopter are named in honor of these great peoples.

CHINOOK NATION, in line with its corporate purposes, seeks to bring attention to the factual history of the Tchinook peoples and their significant connections to the 151.87 acre parcel of land at issue in this case (hereinafter the "Parcel"). Moreover, the original allodial[3] title to the Tchinook lands surrounding and including the Parcel has never been

[3] The term "allodial" title means title to lands that confer absolute property rights to their owners and are not subject to any superior authority other than the authority of the allodial title holder."

extinguished by an express Congressional act, provision of compensation, or other agreement that had the consent of the Tchinook or any of the Tchinook Tribes.

Simply, the Tchinook are still a viable Indigenous People that have continuously remained connected to their culture, lifeways, their waters and their lands. Even though the Tchinook were hit hard and reduced by European diseases, inundated by interloper trespassing United States' citizens seeking land, and told by United States authorities to leave their homelands and go to distant reservations established for other tribes, most Tchinook just held on and stayed put. The United States' approval of the Parcel as the COWLITZ INDIAN TRIBE's "initial reservation" for which it purportedly has "significant historical connections" flies in the face of the United States' trust responsibility to adjudicate original title based on objective evidence that takes into account all Indigenous interests concerned with the adjudication of that title. Therefore, the Secretary of Interior's final agency determinations to acquire the Parcel in trust for the COWLITZ INDIAN TRIBE, and to allow the COWLITZ INDIAN TRIBE to build a casino on the Parcel, are therefore "arbitrary and capricious."

CHINOOK NATION supports the briefing and legal arguments of the plaintiff, the CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, and the other plaintiffs, as to the legal and factual arguments relevant to the "significant historical connection" determination required to allow the COWLITZ INDIAN TRIBE to develop gaming on the Parcel. The current parties, plaintiffs and defendants, have not addressed how the failure to extinguish the Tchinook peoples' original title to the Parcel and the surrounding area impacts the Secretary's determinations.

BACKGROUND REGARDING THE HISTORICAL RECORD

The relationship between the CHINOOK NATION and the United States of America is a long and complicated history. Since time immemorial and for thousands of years, the Tchinook have lived with God's gift to the Tchinook, our holy waters "Yakaitl Wimakl", the "Great River of the West" from Celilo Falls and the Falls of the Willamette to the Sea.

As Yakama/Chinook Tribal Elder Homer Settler wrote prior to his death:

THE NATURAL WORLD AND UNWRITTEN NATURAL LAWS

> Whereas, both the Earth and the earth's Humanity were created, in their natural states, and
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> Whereas, both this Earth and this earth's Humanity were created, in their natural states, by the same Supreme Being. Both were created as original, natural objects with both being in their original states of nature as they come from the hands of the Supreme Maker, and
>
> Whereas, as the Supreme Maker and creator of this Earth, the Supreme Being was its original, exclusive, and natural sovereign and divine owner of the earth, and his title and ownership were the full, complete estate in the Earth with the ultimate fee therein, and
>
> Whereas, as the original primary holder and owner of first and supreme title to all of the earth, with the full estate and fee therein, the Supreme Being could give the Earth and its title to whomever he chose to give it, and
>
> Whereas, He chose to give it mankind and this ownership and title to the Earth that he gave to mankind is the original, full, and complete human title to the whole earth, and it is Supreme, sovereign, full, complete, and exclusive, and
>
> Whereas, the Supreme Being consummated this aforesaid title and ownership of the Earth in Humanity who, as a continuously existing perpetual body, by virtue of its title and ownership of the Earth with it passing from and vesting in one original generation to each of the succeeding generations

making up the continuous and unbroken, perpetual existence of mankind, and

Whereas, man was created and placed on the Earth to people it, it was in its created and natural state, and natural, not man-made, laws governed it and the natural earth was not disturbed by civilized man, and

Whereas, man was created in his natural state and in a state of nature and under natural, unwritten laws and he was placed on this natural Earth as its original and first human occupant, owner, elder, and ruler, and

Whereas, his title to this natural Earth, under the rule of the laws of nature, was title by natural use and by natural occupancy, and it was the first and original human title and ownership to the entire natural Earth and thus it constituted man's first estate on this earth and was his original state of being, and

Whereas, all of these things, persons, and events occurred before a written alphabet and language were developed, before written calendars and time-telling systems were made, before written records, private documents, and governing documents were made, and before written laws existed when the entire Earth was in a state of nature and was a complete natural world, and

Whereas, the aforesaid natural title and ownership of the whole natural Earth under the natural laws of the entire natural world was the supreme, primary, original, sovereign, and exclusive title to the natural Earth and was the natural heritage of the individual members of mankind individually and of mankind as a whole, and passed on and vested in each successive generation of humanity in perpetuity and by using mankind as a never dying, perpetually existing body using the continuous existence of its successive generations, and

Whereas, no one nation or government has ever ruled the entire Earth, but only a part of it, and where the ownership of part of the Earth only gave the holder part ownership of the earth, then this part title was inferior to the aforesaid natural title, and such inferior title could only derive and descend from the said original title, and

Whereas, derived secondary titles to property do not come into existence until the original title has been extinguished and this must be done by conquest in a just war or by the free and informed consent of the prior, rightful holder and owner, and

THE CIVIL/LEGAL WORLD AND WRITTEN LAWS

Whereas, during the course of the passage of time in the natural world some of its natural cultures of its natural societies progressed farther and faster than the others, and in so doing they developed written alphabets, written number systems, written languages, written calendars, written time-telling systems, written private documents, written governing documents, written land titles, written public records, and written laws, and

Whereas, by reason of the foregoing devices these natural societies passed from a state of nature and a natural culture and society into a civil or legal state with civil and legal cultures and societies. By means of the previously shown devices, they developed themselves into an organized, directed, and written recorded system of legal force which could be directed at any object they chose, used at will, and used as they pleased, and

Whereas, said civil cultures developed into civil or legal nations which by dint of superior organized legal force, began to conquer and take over the persons and property of their natural neighbor nations, and

Whereas, they used the aforesaid devices to make artificial systems to supersede the natural systems. Some such devises were to make legal human beings which they made by law. They also made legal rights instead of natural rights, again they made legal land, legal objects, legal rivers, and legal written systems, and legal countries, etc., and

Whereas, these legal things superseded the natural things, and

Whereas, all of the legal countries had a case made for themselves, and their laws and legal systems were developed to

a point where they were concurrent with any point in time and one could fight a law case by starting with the current time, and

Whereas, the aboriginal natural countries had no written records and no case made for themselves and to pursue a law case in said natural countries one must try to record the entire unrecorded existence of said country and bring it up to the present time and date – this was a prohibitive difficulty, too difficult for the natural individual or the natural country, and

Whereas, the civilized countries began to make treaties with their aboriginal neighbor countries, and these treaties were both a law and a contract in the legal system of the civilized nations, and

Whereas, these civilized countries gave the aboriginal race the status of legal men by providing such a status by law, but this legal status given by this law still kept a natural man, who was disabled by that law from legally protecting his person and property, and by renaming the previously named aboriginal rivers and territory with legal names, they used these devices to take away his natural rights in place locations previously held by natural aboriginal names, and

Whereas, in said treaties there was a provision which provided that the natural rights and the natural names were to be retained in the unceded reserve areas of Indian Country which was to be used for their homes and homeland, and

Whereas, the aborigines had no writing and did not keep maps and records in their aboriginal language and let their original rights pass away by default, and

Whereas, as said contract, the treaty had two contracting parties and these two parties were identified in that contract, and

Whereas, the spelling of the name of the aboriginal contract party was changed and he legally ceased to exist as that contract party identity, and

Whereas, in any contract when one of the contracting parties ceases to exist, the surviving contract party takes all of the rights of both parties o that contract, and

Whereas, this is continually being done to aboriginal parties to a treaty contract, and

THE TCHINOOK AND UNITED STATES

Whereas, the two continents presently known as North and South Americas were aboriginal natural continents, and

Whereas, they later became known as the New World and were exclusively peopled by a natural aboriginal race which was named Indian by the white man, and

Whereas, the European nations made treaties with said Indian nations which included political cessions, land cessions, and cessions of rights in lands, with various reservations therein, and

Whereas, among the said Indian nations who were located on what is now known as the North American continent and within the presently shown boundaries of the United States who were located in an area known as Oregon Country was a nation of Indians known as the Tsinuks, and

Whereas, this nation occupied the mouth of Yakaitl Wimakl (the "Great River"), later known as the Columbia River, from its mouth a certain distance up river to Celilo Falls and Willamette Falls, and it held land on both sides of said river in the presently known states of Oregon and Washington, and

Whereas, the United States proposed treaties with seven (7) tribes of this nation as the very first action undertaken in compliance with the Act of June 5, 1850, U.S. Statutes at Large, 9:437, but these treaties were never ratified by the United States Senate, and

Whereas, these seven (7) tribes: Willopah, Chinook, Nukwecluwenck, Clatsop, Kathlamette, Waikakum, and Skilloot, have never ceded title to their aboriginal tribal homelands, never sold title in a government to government sale, nor fortified title as the spoils of a just war, and

Whereas, the United States made treaties with five (5) of the nineteen tribes of the Tsinuk People and tribal aboriginal

title was ceded for these tribal homelands: Wishham, Wasco, Wahlala, Clackamas, and Clowwewalla, and

Whereas, fourteen (14) of the nineteen (19) tribes of the Tsinuk People, also known as the Tchinook Nation, have no treaty with the United States and have never ceded their contiguously connected homeland: the Chituckittequaw Tribe, Shahala Cascade Tribe, Shoto Tribe, Multnomah Tribe, Kathlapouthl Tribe, Wakamass Tribe, Kalamah Tribe, Skilloot Tribe, Wahkiakum Tribe, Kathlamette Tribe, Nucquecluhwenuck Tribe, Clatsop Tribe, Chinook Tribe, and Willopah Tribe, and

Whereas, the original title, and rights of this nation's aboriginal Indian Country remaining was never extinguished in any degree, manor, or form, this Nation now hold their original, full, and complete title to their contiguous Aboriginal Indian Country lands in its entirety, and

Whereas, the right of continued past and present ownership rests on the Tchinook Nation's right of possession, and

Whereas, the United States government is in trespass and unlawful occupation of this said indigenous Nation's Original and Aboriginal Indian Country by the fact of its unlawful occupation and unlawful possession, and

Whereas, the existence of this Nation of People has never been extinguished and they still survive, and

Now, therefore, as the rightful existing owners of the aforesaid Aboriginal Indian Country come the aforesaid descendants of the Tchinook People, as heirs; legal and political successors in interest to the waters and the lands of their Aboriginal National Estate, the original and current homeland of the indigenous Tchinook Nation.

The waters of Yakaitl Wimakl have always been Tchinook waters and since time immemorial, the Tchinook have lived on the banks of our rivers, on the lands that are drained by our waters. At no time between 1700 and 2013, or before, has the United States held lawful title or owned the land of the Parcel.

On August 16, 1775, Captain Bruno Hecieta sailed the Spanish ship "Santiago" into the mouth of Yakaitl Wimakl and drew a map of its entrance.

During negotiations between Spain and the United States over Florida, Spain dropped their Northwest Maritime Claim to the Right of Discovery; i.e., the "Treaty of Friendship, concluded on February 22, 1819, between the United States of America and his Catholic Majesty of Spain."

Rights of Discovery are not transferable.

A later sojourn visits to Yakaitl Wimakl in 1792 by a vessel of the United States and a vessel of Great Britain led to a Treaty of Joint Occupancy of Tchinook Aboriginal Indian Country: "Convention Respecting Fisheries, . . . conducted October 20, 1818, between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland."

The "Treaty of 1846, concluded June 15, 1846, between the United States and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland", resulted in the United States as the sole occupier of the Tchinook homelands.

On June 5, 1850, Congress passed an Act, U.S. Statutes at Large, 9:437, which authorized the United States to negotiate with the aboriginal Indian nations located in what was then known as Oregon Territory, including the Tchinook homelands.

In 1851, the United States' treaty negotiator, ANSON DART, was sent to Oregon Territory. The first tribes that Mr. DART counselled with was the Chinookan Tribes.

In 1852, the United States Senate took action to table indefinitely consideration of the thirteen Indian treaties negotiated by Mr. DART.

In 1855, the newly appointed Washington Territorial Governor, ISAAC I. STEVENS, invited the Chinook Tribe and to try once again to negotiate a treaty.

Negotiations between Mr. STEVENS and the Chinook Tribe broke down after Mr. STEVENS insisted that the Chinook

cede 100% of their lands to the United States and relocate to the homeland of their traditional enemies, the Quinaielt Tribe. The Chinook rejected this demand, and returned home to Chinook Indian Country.

President ABRAHAM LINCOLN authorized an Act of War with his Executive Order of 1861 directing that Tchinook unceded lands in Area 458 be sold. Again, an Act of War occurred when he directed his Secretary of the Interior, JOHN P. USHER, to seize lands of the Chehalis Tribe and the Willopah Tribe located in Washington Territory without a treaty. When the United States broke away and declared its independence from Great Britain, it promised the world that it would honor and obey the Law of Nations. The aforesaid Acts of War were a violation of international law, as well as the laws of the United States. The Act of June 5, 1850, Statutes at Large, 9:437.

There is no statute of limitations to international land fraud.

Theft is not a valid means to establish or secure title.

The acts of theft resulting from the fraudulent Presidential Land Patents issued by President ULYSSES S. GRANT on July 20, 1869; September 1, 1869; and July 30, 1874; as well as the one issued by President RUTHERFORD B. HAYES on March 20, 1877[4], were unlawful and invalid.

A president may issue land patents, but only after there is a consensual transfer of aboriginal title to the United States, followed by ratification of that transfer agreement by the United States Senate and the President's proclamation of the transfer.

Presidents GRANT and HAYES tried to give away or sell parcels of the Tchinook National Estate, all within the tribal homelands of the Kathlapouthl Tribe of the TCHINOOK NATION, lands that the United States did not own.

The President of the United States cannot give away or sell land that the United States does not own.

The President of the United States is not above the law.

[4] Copies of the six referenced Presidential Land Patents are attached hereto, marked as "Exhibit H".

Neither man nor country can steal their way to ownership.

By his acts of issuing unlawful patents, President GRANT was committing acts of war against the Tchinook People.

The six patents described above were unlawful patents and did not transfer good title to the parcels of land in question.

These unlawful presidential land patents are proof of the act of theft and show the method for the acts of land fraud, as subsequent fraudulent deeds issued from these unlawful patents.

These unlawful patents and acts of the United States continue to this day, as the United States tries once again to steal Tchinook lands, this time to give to our neighbors to the north, the COWLITZ INDIAN TRIBE.

Since time immemorial, the Tchinook have held the original ultimate fee in title to the land of the parcel in question. This title has never been ceded by the Tchinook or by the Kathlapouthl Tribe of the TCHINOOK NATION. There has never been a government to government sale. The Tchinook have never forfeited title as the spoils of a just war.

Since time immemorial the Tchinook have held original title to their aboriginal waters and the lands that drain them.

THE ROLE OF WATERSHEDS IN DETERMINING ABORIGINAL BOUNDARIES

The Tchinook People are the oldest established Nation of the Pacific Northwest. Since the Salish People and the COWLITZ INDIAN TRIBE of the Salish Nation have arrived from the north, the tribal boundaries have been set by the Tchinook principle of watersheds.

The homeland boundaries of the various tribes of the TCHINOOK NATION are generally the ridges dividing the different watersheds. Just as the watershed of the Clackamas River defines the waters and the lands of the Clackamas Tribe of the TCHINOOK NATION, and the Cathlapootle and Yahkotl Rivers are the waters and the lands of the Kathlapouthl Tribe,

the watershed of the Cowlitz River is the basin for the COWLITZ INDIAN TRIBE's homeland.

Because the watershed and the waters of Yakaitl Wimakl (the Columbia River) are Tchinook waters, the boundary between the Skilloot Tribe of the TCHINOOK NATION and the COWLITZ INDIAN TRIBE of the Salish Nation has always been the reach of tidewater up into the Cowlitz River where the two watersheds meet and the Cowlitz River has flowed into Yakaitl Wimakl. For thousands of years, the Salish People and the COWLITZ INDIAN TRIBE have always honored the boundary until the coming of the white man.

The aboriginal homeland of the COWLITZ INDIAN TRIBE is three watersheds away from the parcel in question, which is located in the watershed of the Yahkotl and Cathlapootle Rivers (a/k/a the Lewis River), the waters and the homeland of the Kathlapouthl Tribe of the TCHINOOK NATION. To travel from the Cowlitz homeland to the parcel in question, one must pass through the homelands of the Skilloot Tribe of the TCHINOOK NATION, the Kalamah Tribe of the TCHINOOK NATION, and the Kathlapouthl Tribe of the TCHINOOK NATION in order to reach it. This goes against the spirit and intent of the D.O.I.'s regulations for the citing of new Indian reservations.

Nowhere in the record of human history is there a record of a transfer of title from any tribe of the TCHINOOK NATION to the COWLITZ INDIAN TRIBE.

The COWLITZ INDIAN TRIBE, a federally recognized Indian tribe starting in 20000, maintains offices and provides services to its members in Cowlitz and Lewis Counties in Washington state, within their aboriginal lands. Their housing, elders' program, and seniors' nutrition center are twenty miles away from the Parcel in the watershed of the Cowlitz River and in the Cowlitz's aboriginal territory.

The COWLITZ INDIAN TRIBE's administrative offices, located twenty-five miles away, are in an area that is not Cowlitz, but rather the aboriginal homelands of the Skilloot Tribe of the TCHINOOK NATION.

ARGUMENT

I.
TCHINOOK HISTORY IS CONTRARY TO A FINDING THAT THE COWLITZ INDIAN TRIBE HAS A "SIGNIFICANT HISTORICAL CONNECTION" TO THE PARCEL

For one to show that the Secretary of the Interior has failed to consider relevant and known facts, it must be clear that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" according to the Administrative Procedure Act, 5 U.S.C. § 706(2), Motor Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983) ("failed to consider an important aspect of the problem"). A significant aspect of whether the Secretary made a proper determination to place the Parcel into trust for the purpose of gaming concerns her failure to objectively review the known and relevant facts that support or deny the COWLITZ TRIBE's "significant historical connection" to that Parcel. The Secretary has only considered historical facts as advocated by the COWLITZ INDIAN TRIBE and has improperly ignored the body of relevant and known historical facts that present conflicting information to that of the COWLITZ INDIAN TRIBE. "Tales of the hunt shall always glorify the hunter."[5]

CHINOOK NATION, during the public proceedings for federal acknowledgement of the COWLITZ INDIAN TRIBE for its fee-into-trust application and the E.I.S. development,

[5] There is an African proverb that says: Tales of the hunt shall always glorify the hunter. The lion in the fable from which the proverb arises argues with the man as to which was the braver and stronger of the two. The latter exultingly points to a marble statue of a man strangling a lion, in proof of the superiority of his kind. "That," answered the lion, "is your version of the story; let us be the sculptors, and we will reverse the positions; the lion will then stand over the man" If the whole story is told, the other parties are allowed to tell their story, then the record can provide a full picture of interests, instead of the perspective of the one storyteller wielding the power.

has consistently provided written comments to the Secretary that Tchinook history, land tenure, and current interests were being ignored throughout these proceedings and in the Secretary's reviews. It is well settled that Indian affairs are within the authority of the Secretary of the Interior, and as such the Secretary also possesses a particular expertise in Indian affairs, especially as to how indigenous peoples were unwillingly and illegally taken from their homelands. *See* 25 U.S.C. § 2; *see also*, Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA."). As evinced thoroughly below, it is evident that even though facts were available concerning the rich history of the Tchinook People's significant connection to the land, those known facts have been ignored in the Secretary's decision-making.

Since time immemorial, the Tchinook People have owned and inhabited the lands drained by the *Yakaitl-Wimakl* (Chinookan phrase meaning "the Great River"), also known as the Columbia River, from the mouth of the *Yakaitl-Wimakl* and along the Pacific Ocean, upriver to Celilo Falls now inundated by a federal dam near present day The Dalles, Oregon, and north and south of the Columbia River corridor up various tributaries including the *Cathlapootle* and *Yahkotl* Rivers that together are different branches of the river (now known as the Lewis River), near present day La Center. This particular area of *Yakaitl-Wimakl*, and the *Cathlapootle* and *Yahkotl* Rivers includes the Parcel. The Kathlapouthl Tribe, the Tchinook Nation, and their descendants who are the current Tchinook legal successors in interest to the title, are the indigenous peoples that are the original and current owners of the Parcel.

The Tchinook have been described by anthropologists and others as groups that are linguistically and geographically unique from each other, namely "lower" and "upper" Chinookan dialects. Jon Darin Daehnke, Cathlapootle . . . Catching Time's Secrets, 15-16 (U.S. Fish & Wildlife Service, Cultural Resources Team, Region 1 2005), annexed hereto as "Exhibit B".[6] These supple dialects among the Tchinook Tribes are important because they demarcate how the nineteen Tchinook Tribes have been treated by the United States. The maritime Tchinook consist of the Chinook, Clatsop, Willopah, and Nucquecluhwenuck Tribes, who originally held lands along *Yakaitl-Wimakl* from its mouth to Gray's Bay and expanding north and south along the shore of the Pacific Ocean, spoke the Lower Chinookan dialect. *Id.* These Tchinook Tribes along with the Kathlamette Tribe, Wahkiakum Tribe, and the Koonnaack Band of the Skilloot Tribe who spoke Upper Chinookan dialects, have historically negotiated with the United States government for the proposed cessation of most of their lands. *See*, Complaint, The Chinook Tribe and Bands of Indians v. United States, 6 ICC 208, 211 (Docket No. 234, 1958) (covering the homelands of the Chinook and Clatsop Tribes); *See also*, Upper Chehalis Tribe, et al., v. United States, 4 ICC 301 (Docket No. 237, 1956) (discussing the lands occupied by certain Tchinook and their relation to the Chehalis).

Tchinook Tribes, who spoke Upper Chinookan dialects, include the Skilloot, Kalama, Wakamass, Kathlapouthl, Multnomah, Shoto, Shahala Cascade, and the Chilluckitequaw Tribes who originally held lands at the Parcel and along *Yakaitl-Wimakl* from Oak Point to the Klickitak River area, including the shores of the Willamette River upstream to the Lake

[6] Note that this publication was developed, in conjunction with Tchinook descendants, by the U.S. Fish & Wildlife Service, one of the bureaus and offices of the Secretary of the Interior.

Oswego area. The Upper Chinookan dialects for the Tchinook Tribes here included Kathlamet, Multnomah, and Kilsht. Daehnke, at 15-16. The Kathlapouthl Tribe spoke the Multnomah dialect. *Id.* These Tchinook Tribes did not negotiate with the United States for cession of their lands.

Further, published evidence establishes that the Kathlapouthl Tribe continuously occupied the Parcel and its surrounding area to the exclusion of the Cowlitz Indian Tribe. The area including the parcel and encompassing the mouth of the *Cathlapootle* river (as referenced on Pacific Railroad Survey Map of 1853) and upriver into the watershed was, both pre- and post-contact, owned, occupied, and used exclusively by the "Upper Chinookan" speaking Kathlapouthl Tribe.

One of the largest Tchinook towns on the *Yakaitl-Wimakl* (Columbia) river was the Kathlapouthl village of Cathlapotle only two miles southeast from the Parcel, and North of Ridgefield. *Id.* At 1-4. Lewis and Clark estimated that it was home to as many as 900 Kathlapouthl people; archaeologists estimate this town had a larger population. *Id.* (In fact, archaeologists estimate that the "Portland Basin, where the Willamette River flows into the Columbia River [near Vancouver Lake], was an especially attractive area for Chinookan peoples, containing perhaps the highest population density in North America at the time." *Id.*, at 4.) The area including the Parcel is an area of higher elevation and would have been used for hunting deer and elk, and berry picking and other gathering, to provide other nutritional requirements for the Tchinook at the Kathlapouthl village, as well as items for trade.

The Kathlapouthl village was a strategically located large trading center between the Pacific coast and the interior plateau. *Id.*, at 2 and 8. The Tchinook traded goods with other Native American groups throughout the Northwest and with Europeans as early as 1792. *Id.*, at 2. The Columbia River trade to Kathlapouthl also brought new diseases. *Id.*, at 34. In 1835, the Kathlapouthl village was one of the few Tchinook villages that escaped the smallpox epidemics. *Id.* Further epidemics brought more devastation, but the Tchinook and Kathlapouthl never became "extinct" or abandoned their lands. *Id.*, at 37-40.

In addition to these new facts, the Indian Claims Commission and other historic sources have consistently found that the Tchinook are the original and continuous owners of the area and that the COWLITZ INDIAN TRIBe is not.

> Virtually all of the contemporary as well as the historical and anthropological reports have identified the aborigines on the Lewis River **as belonging to other tribal groups and not the Cowlitz]** – specifically the Chinook and the Klickitat.

Simon Plamondon, On relation of the Cowlitz Tribe of Indians v United States, 21 Indian Cl. Comm. 143, 146 (Docket No. 218, 1969)(emphasis added).

> Near the mouth of the Lewis River the Chinook Indians were often observed. Dr. Ray **concedes the area along the Columbia River and at least 5 miles from the mouth the Lewis River to have been held, prior to the 1830's, by Chinookan-speaking peoples.**

Id. at 147 (emphasis added).

John R. Swanton in The Indian Tribes of North America, published by the Smithsonian Institute, Bureau of American Ethnology, wrote that the Hullooetell reported by Lewis and Clark on the Cowlitz and Lewis River may have been a subdivision of the Skilloot Indians (speaking an "Upper Chinookan" dialect of the Tchinook linguistic family).

Id., at 147 (emphasis added), citing John R. Swanton, The Indian Tribes of North America (U.S. Government Printing Office, 1952).

The Indian Claims Commission rulings, which arise out of the COWLITZ INDIAN TRIBE's improper assertion of ownership of Tchinook lands, found that the COWLITZ TRIBE was not an occupant, exclusive or otherwise, of the area. Somehow, the Secretary's determinations failed to note these findings of fact by the Indian Claims Commission. Moreover, the Secretary's decision completely fails to explain how the COWLITZ INDIAN TRIBE can have a significant historical connection to the Parcel and have as its initial reservation lands that have always been known by the United States to belong to the Tchinook. Instead, the Secretary only brings forward facts that are supportive, however minimally, of the COWLITZ INDIAN TRIBE.

In fact, even the U.S. Bureau of Indian Affairs has ruled that the Tchinook were the inhabitants of the Parcel and the surrounding area.

> During the course of the Cowlitz's federal acknowledgment proceedings, the BIA likewise rejected the Cowlitz's claims to the Parcel area. The BIA concluded in its Technical Reports that the **Cowlitz had no relationship to the Indians who had historically lived on the Lewis River.** ARO15422 (finding that the Lewis River Band – which the Cowlitz claimed to have been Cowlitz Indians – "was consistently identified as Klickitat"); *Id.*, at AR015471; AR015740 ("Most of the original documents indicated that the Lewis River band was probably **Klickitat, or … 'Cathlapoodle' [Kathlapouth] Chinook.**"). The BIA identified five anthropological groups representing all members of the modern-day Cowlitz and concluded that *none* of them had roots near the Lewis River.

Plaintiff's Motion for Summary Judgment, at 47-48, Grande Ronde v. U.S., No. 1:11-cv-00284 (D.D.C. filed June 20, 2012). (Emphasis added).

Historically both sides of the Columbia River, including its tributaries from Celilo Falls and Willamette Falls to the Pacific Ocean, were owned by Tchinook. Handbook of

American Indians, Part I, 493, 591 (The Smithsonian Institution, 4th ed. 1912) ("a Chinookan tribe living at the mouth of Cowlitz (River) ... undoubtedly a band of the Skilloot" and Skilloot, "A Chinookan tribe...above and below the entrance of the Cowlitz [River]."). In 1905, the Smithsonian Institution's Bureau of American Ethnology issued its Bulletin 30 defining the Kathlapouthl as a "Chinookan tribe formerly living on the lower part of Lewis {river}." *Id.* at 217.

Plaintiff CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON correctly notes that the COWLITZ INDIAN TRIBE fails to meet the "significant historical connection" requirement because its occupation was not within the "vicinity" of the Parcel, in part, because the "the ICC found that the southernmost edge of the land to which the Cowlitz had an interest in was approximately 14 miles north of the Parcel," and that the Indian Claims Commission "explicitly rejected" the Cowlitz claim that their ancestors lived near the (Lewis River), being the *Cathlapootle* River and the *Yahkotl* River which flows within two miles of the Parcel. In the context of the times, the Parcel's distance of 14 miles away from Cowlitz territory, as determined by the Indian Claims Commission, could not be considered within the "vicinity."[7] Because of salmon runs, indigenous peoples west of the Cascade mountain ranges were often defined by the watershed that they inhabited. Thus, one tribe could occupy a watershed just over the mountains from another only just a few miles apart, or one tribe would occupy the lower end of a watershed while another tribe might occupy the upper end of the watershed.

[7] *"Vicinity"*: "The state, character, or quality of being near in space, propinquity, proximity," and "in the vicinity (of), in the neighborhood (of), near or close (to)." The Oxford English Dictionary, Vol. XIX, Clarendon Press, Oxford (2nd ed. 1989).

In addition, these geographic territorial dividing lines were driven by different habitats and subsistence methods. For example, tribes at the mouths of larger rivers tended to be rather sedentary due to an abundance of salmon, while the tribes in the upper watersheds tended to be more nomadic, hunting game rather than fishing, and due to lack of concentrated abundance in more mountainous terrain. *See, Id.*, at 273 (Tchinook "villages were thus fairly permanent"). Such tribes, sometimes very distinctly different in language, culture and subsistence methods, were within just a few miles of each other. However, in this context of occupancy, subsistence and culture, fourteen miles historically is very far away, three watersheds away – certainly not "in the neighborhood" – and cannot meet the definition of "vicinity" within the "significant historical connection" requirement. 25 C.F.R. § 292.2 (2008).

The Tchinook's continuous ownership and occupation of these lands, including the Parcel, is not only historic, but continues to the present date. The Tchinook peoples' descendants today, and over the last 5,000 years, have lived within the area around the Parcel and in their larger surrounding homeland where their ancestors are buried. They continue to use the area in furtherance of their traditional cultural, spiritual, gathering, fishing and hunting activities, sometimes violating local laws to do so. Descendants continue to check on their sacred places and burial grounds in order to protect them from development and discovery.

The "Cathlapotle Plankhouse" located at the archaeological village site and a plankhouse of the Kathlapouthl people within the Ridgefield national Wildlife Refuge – operated by U.S. Fish and Wildlife within the Department of the Interior (hereinafter

"DOI") – is less than three miles away from the Parcel. The Cathlapotle Plankhouse was built by Greg Robinson of the neighboring Kalamah Tribe of the Tchinook, and is a place where current descendants of the Tchinook gather for cultural events. Opening the Door to the Cathlapotle Plankhouse: A Lewis and Clark Bicentennial Legacy for the Tribes and Public, last visited September 19, 2013, annexed hereto as "Exhibit C". *See also*, "Exhibit B".

Historically, the Kathlapouthl have always, and continuously, occupied this area until after the 1850s when settlers overtook the area without consent, and the influx of disease weakened the Tchinook. The Tchinook that occupied this area did not abandon their lands; rather, they simply could no longer struggle against the citizens of the United States laying claim to their homelands, and holding them with improper deeds.

Under the two part definition of "significant historical connection"[8], the Tchinook have been able to document the existence of its villages, burial grounds, and occupancy or subsistence use in the vicinity of the Parcel. The government's own documents exclude the COWLITZ INDIAN TRIBE as having any significant historical connection to the Parcel, and instead do name the Tchinook as the original owners. See: Exhibit B and C, Bureau of Indian Affairs (hereinafter "BIA") Federal Acknowledgment Proceedings for the Cowlitz Indian Tribe, and Cowlitz Tribe of Indians, 21 Indian Cl. Comm. 143, for example. Furthermore, the Secretary breaches her trust responsibilities when she ignores the history of the Tchinook People to favor the COWLITZ INDIAN TRIBE, even if the Tchinook are not

[8] *"Significant historical connection* means [1] the land is located within the boundaries of the tribe's last reservation under a ratified or ungratified treaty, or [2] a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. §292.2 9 (2008).

federally recognized in this instance[9] - because the government has failed to resolve the title to the land in question.

II.
NIGC APPROVAL

On November 23, 2005, the National Indian Gaming Commission (hereinafter the "NIGC") approved the Cowlitz Indian Tribe's gaming ordinance, based in part on its determination that the parcel in question would be eligible for gaming under the Indian Gaming Regulation Act's (hereinafter "IGRA") "restored lands" exception, if and when the parcel in question was placed in trust.[10]

The Tchinook developed their own calendar to keep track of time. Under their calendar, the year 2013 is an even year (9668). Since time "memorial", the Tchinook people have owned and occupied the valley of Yakaitl Wimakl (Columbia River) from Celilo Falls to the Pacific Ocean, and the parcel in question has always been within the aboriginal tribal homeland of the Kathlapouthl Tribe of the TCHINOOK NATION.

Approximately five thousand years ago, the COWLITZ INDIAN TRIBE of the Salish Nation arrived to find the ancient Tchinook dominion within the valley of the "Great River". The Tchinook allowed the Cowlitz to settle in the valley of a tributary to the Yakaitl Wimakl, and it came to be known as the Cowlitz River.

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[9] *See*, Cohen's Handbook of Federal Indian Law, § 3.02, (Nell Jessup Newton ed., 2012). "Occasionally Congress has afforded health care and other benefits to members of non-federally recognized tribes, especially in California, where there is a special history of ungratified treaties with native groups. Nonetheless, non-federally recognized tribes suffer from lack of federal respect for their sovereignty and land bases, lack of protection from state jurisdiction, lack of access to repatriation rights and other forms of cultural protection under federal law and denial of most benefits available to tribes that enjoy a government-to-government relationship with the United States. This legal status cannot, of course, deny historical or cultural evidence about tribal existence." (Emphasis added.) *Id.*

[10] NIGC AR001623-24.

For the past five thousand years, the Cowlitz have always known and respected the boundary with their neighbors, the Skilloot Tribe of the Tchinook Nation: the reach of tidewater on the tributary Cowlitz River. This exact boundary point is clearly shown in the DOI's map of 1878.[11]

At no time during the last five thousand years and up until the April 22, 2013 decision reached by the DOI can the COWLITZ INDIAN TRIBE name a date that the Tchinook 's title was transferred to the Cowlitz. At no time in the last 300 years and up until the April 22, 2013 decision reached by the DOI, can the United States name a date when the Tchinook's title was transferred to the United States of America.

The definition of "restore" is "to put or bring back into a former or original state."[12] Each day of every year for the past 9,000 years, the Kathlapouthl Tribe of the TCHINOOK NATION has owned and held the original ultimate absolute fee in title to the land to the parcel in question, which is located in the heart of their aboriginal tribal homeland. At no time during the past 9,000 years has the Cowlitz Indian Tribe ever owned or held the aboriginal title to the land of the parcel in question.

Thus, this parcel of land cannot be restored to the Cowlitz. The NIGC committed error on November 23, 2005, when they approved the COWLITZ INDIAN TRIBE's gaming ordinance. This parcel of land has **never** belonged to the COWLITZ INDIAN TRIBE.

[11] A copy of this map is attached hereto, marked as "Exhibit D".

[12] Merriam Webster's Dictionary, 1976 (Springfield, MA).

III.
INVALID PRESIDENTIAL LAND PATENTS

A. ORIGINAL TITLE TO THE PARCEL HAS NEVER BEEN EXTINGUISHED BY AN ACT OF CONGRESS

The Secretary has failed to consider the status of Tchinook title when making her determinations. The Parcel is part of the central area of lands of the Kathlapouthl and other Tchinook Tribes that was never taken by the United States as required by law through: (1) intent or agreement on the part of the Tribe to cede their lands, and (2) express and unambiguous congressional authorization. "Extinguishment of Indian title based on aboriginal possession . . . The power of congress in that regard is supreme." United States v. Santa Fe R.R. Company, 314 U.S. 339, 347 and 354 (1941) (finding that Congress has the power to extinguish aboriginal title, "extinguishment cannot be lightly implied", and there must be shown an intent or agreement on the part of the tribe to abandon their ancestral lands; forcible removal is not evidence of abandonment by the tribe).

In 1851, a series of thirteen treaties were negotiated with various tribes and bands, including certain tribes of the Tchinook as authorized by the act of June 5, 1850, 9 Stat. 437. The Superintendent for Indian Affairs of the Oregon Territory, ANSON DART, negotiated the proposed treaties at Tansy Point, on the South shore near the mouth of the Columbia River with only certain Tchinook tribes from the Western lands of the Tchinook, including the Chinook, Clatsop, Willopah, Nucquecluhwenuck, Kathlamette, and Wahkiakum Tribes along with the Konnaak Band of the Skilloot Tribe. In these proposed treaties these Tchinook Tribes negotiated for cession of most of their land in return for recognized and reserved treaty rights. *See*, C.F. Coan, The First Stage of the Federal Indian Policy in the

Pacific Northwest, 1849-1852, 87-89, (The Quarterly of the Oregon Historical Society, Vol. 22, No. 1, 1921). *See also*: http:www.jstor.org/stable/20610175 (last visited September19, 2013), annexed hereto as "Exhibit C". The lands to be ceded by the Clatsop, Kathlemette, the Wahkiakum, Willopah, and the Chinook Tribe proper, of the Tchinook Indians are described in Chinook Tribe and Bands of Indians v. United States, 6 Ind. Cl. Comm. 177, 192 (Docket no. 234, 1958) and in "Exhibit C". These proposed treaties, though executed by ANSON DART, were never ratified by the Senate.

These treaty negotiations, as well as the Indian Claims Commission decision, did not include the area upriver on the Columbia River that encompasses the Parcel, which is demarcated in "Exhibit C" as the unmarked parcel East of "B" and North of "D". These treaty negotiations did not include the specific tribes of Tchinook living in this area, including the Kathlapouthl. It is not known why these Tchinook Tribes in the area of the Kathlapouthl village and the Parcel were not included in the treaty negotiations, though the Kathlapouthl Tribe still occupied the area as their traditional homeland. *See* "Exhibit B", at 34. Other treaty negotiations took place with further eastern Tchinook Tribes in 1855 which included the Wasco, Wisham, Wahlala, Clackamas, and Clowwewalla Tribes who spoke upper Chinookan dialects, but the interior or central Tchinook lands, including the area where the Parcel is located, were never enveloped in a ratified or unratified treaty, the United State never sought to negotiate with these Tchinook Tribes and obtained their consent for cession as the law [9 Stat. 437] requires.

On February 20, 1855, Territorial Governor ISAAC I. STEVENS commenced treaty negotiations at a Kisehman on the south bank of the Chehalis River with Upper and Lower

Chehalis, the Satsop, the Cowlitz, the Chinook Tribe, Quinaielt Tribe, and the Queets Indians. Chehalis ICC, at 30. On July 8, 1864, Secretary of the Interior JOHN P. USHER wrote an order taking certain Tchinook lands without consent of the Tchinook or the Willopah Tribe, within whose homeland one of the camps was located. In Indian Land Cessions in the United States, 1784-1894, the author cites to the July 8, 1864 Order of Secretary USHER as the authority for taking of two parcels within the area demarcated as Area Number 458 on the "Washington 1" Map. At pages 832-33, and "Washington 1" Map, in J.W. POWELL, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896-1897, Part II (Washington, Government Printing Office 1899), annexed hereto as "Exhibit F". The author states "These tribes original claimed this territory. The U.S. took possession of it without any treaty, assigning to the Indians first only one small reserve (Chehalis) and afterward another (Shoalwater Bay). The territory thus acquired by the U.S., is here shown."

However, the 1864 Secretarial Order only established the Chehalis and Shoalwater Bay concentration camps. The Secretary does not have authority to extinguish original title. Any unilateral Secretarial Order to usurp Tchinook title, without the express intention of congress to unambiguously extinguish title, is unenforceable as a matter of law. "Any actions taken by the executive to extinguish Indian title depend for their efficacy upon congress's acquiescence." U.S. v. Dann, 706 F. 2d 919, 928 (9th Cir. 1983)(*rev'd* on other grounds U.S. V. Dann, 470 U.S. 39 (1984)), citing United States v. Southern Pacific Transp. Co., 543 F.2d 676, 689 (9th Cir. 1976). It was from this improper Secretarial Order upon which Presidential land patents were issued between 1864 and 1877 for the Parcel. Then

and since, the United States has behaved as if the Tchinook are irrelevant or superfluous and that Tchinook title to the interior Tchinook land need not be respected.

If Congress has not expressly and unambiguously extinguished aboriginal title, federal law holds that the United States can extinguish Indian title after it has encroached upon Indian land through an act of compensation or other legislative means. United States v. Dann, 470 U.S. 39, 45 (1985) (citing to the Indian Claims commission Act that payment of any claim through the Indian claims Commission "shall be a full discharge of the United State of all claims and demand touching any of the matters involved in the controversy.") A Walla Walla Indian masquerading as the Sovereign of the Chinook Tribe and also as representing the Clatsop Tribe, filed a claim before the Indian Claims Commission, which included land claims from the 1851 ANSON DART unratified treaties. *See*, Complaint, The Chinook Tribe and Bands of Indians v. United States, 6 ICC 208, 211 (Docket No. 234, 1958); *see also*, Upper Chehalis Tribe, et al., v. United States, 4 ICC 301 (Docket No. 237, 1956) (discussing the lands owned by the Tchinook in the west and their relation to the Chehalis). But again, the Tchinook Tribes, including the Kathlapouthl, in the inland or central part of the Tchinook National Estate were never included in any of the Indian Claims Commission Act claims. There is no other instance in which the title to these central Tchinook lands was expressly and unambiguously extinguished by an act of Congress and with the consent of these Tchinook Tribes.

Original title has been recognized and reaffirmed by the U.S. Supreme Court: Indian tribes have an "unquestioned right" to the exclusive possession of their land, Cherokee Nation v. Georgia, 5 Pet. 1, 17 (1831), and an Indian tribe's right of occupancy is "as sacred

as the fee simple of the whites." Mitchel v. United States, 9 Pet. 711, 746 (1835). This basic principle has been reaffirmed and never overturned. *See also* Fletcher v. Peck, 16 Cranch 87, 142-143 (1810); Johnston v. McIntosh, 8 wheat. 543 (1823); Clark v. Smith, 13 Pet. 195, 201 (1839); Lattimer v. Poteet, 14 pet. 4 (1840); Chouteau v. Molony, 16 How. 203 (1854); Holden v. Joy, 17 Wall. 211 (1872); *see also*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (U.S. 1985), *rvsd.* on other grounds. The fact that there can still be original title that has not been extinguished according to federal law is a unique situation as most original title has been accounted for through treaty, legislation, or pursuant to the Indian Claims Commission Act, or other congressional activity.

Original title may also be extinguished through abandonment by the Indian nation or tribe. United States v. Santa Fe R.R. Company, 314 U.S. 339, 354 (1941). However, the Tchinook including the Kathlapouthl living in the area at issue did not abandon their lands and since 1840 were slowly overwhelmed by the interlopers and trespassers that were citizens of the U.S.A. or members of the Cowlitz tribe.

Most certainly the United States cannot now attempt to allow another Tribe unaffiliated with the Tchinook People to take over the Parcel as an "initial reservation" with "significant historical connections" unless it first makes a determination that Tchinook title and all rights associated therewith have been extinguished pursuant to federal law. Relevant case law specifically addressing these facts in the context of a fee-into-trust application has not been found. However, it is uncontroverted that the United States maintains a trust responsibility to recognize or extinguish the homelands of the original indigenous peoples and with the consent of the indigenous peoples, and it must do so expressly and

unambiguously – not impliedly by executive agency action as a part of another Tribe's fee-into-trust process. *See, Id.* It is also uncontroverted that the law is "well established that the government in its dealing with Indian tribal property acts in a fiduciary capacity." Lincoln v. Vigil, 508 U.S. 182 (1993), citing United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987). Principles and guidance contained in the United Nations Declaration of the Rights of Indigenous Peoples[13] ("Declaration") should guide this Court and the Secretary to include the Tchinook People, their history and land tenure, in a proper determination that is not arbitrary or capricious. Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983) (an agency is arbitrary and capricious if it has "failed to consider an important aspect of the problem"). The status of Tchinook title to the Parcel is morally and legally a "significant aspect" for the Secretary's determination to allow land to be placed into trust for the benefit of the COWLITZ INDIAN TRIBE, especially considering that the COWLITZ INDIAN TRIBE's "significant historical connection" to the Parcel is tenuous at best. The Secretary has an "overriding duty…to deal fairly with Indians." Morton v. Ruiz, 415 U.S. 199, 236 (1974).

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[13] U.N. GAOR, G.A. Res. 61/295 (October 2, 2007). The "United Nations Declaration on the Rights of Indigenous Peoples" specifically Articles 10 and 27 are significant to this question. Article 10 provides that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Article 27 states that the country "shall establish and implement, in conjunction with indigenous peoples concerned, a fair independent, impartial open and transparent process, giving due recognition to indigenous peoples' laws, traditions customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands territories and resources, including those which were traditionally owned or otherwise occupied or used, Indigenous peoples shall have the right to participate in this process." *Id.* As the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, confirmed, the Declaration embodies long existing international norms and represents "an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples" which: "does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to specific historical, cultural and social circumstances of indigenous peoples". Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, U.N. Human Rights Council, U.N. doc. A/HRC/9/9 GAOR (Aug. 1, 2008). These rights enumerated in the Declaration are understood as an "authoritative common understanding, at the global level." *Id.*

B. ILLEGAL PRESIDENTIAL LAND PATENTS

In order to consider the status of the Presidential Patents for the parcel in question, one should look at other Presidential Patents involving lands of the TCHINOOK NATION. For example, in Oregon Territory and that portion of Oregon Territory that later became a part of Washington Territory, one can find the proper procedures for the transition of indigenous Indian lands to become public lands of the United States.

Specifically, with regard to the Tchinook lands in the Clackamas River Valley, the first step involved the passage of an Act of Congress on June 5, 1850, i.e., "an Act authorizing the Negotiation of Treaties with Indian Tribes in the Territory of Oregon for the establishment of Their Claims to Lands lying West of the Cascade Mountains and for Other Purposes." On January 22, 1855, JOEL PALMER, for the United States, negotiated the Treaty with the Kalapuya, Etc., with various tribes, including the Clackamas Tribe. The treaty was signed and concluded, and then ratified by the United States Senate on March 3, 1855, as well as proclaimed by the President of the United States on April10, 1855. With that proclamation, the Tchinook indigenous title held by the Clackamas Tribe of the TCHINOOK NATION was transferred to the United States, and thereafter, they became public lands of the United States.

Later, Presidents GRANT and HAYES issued patents for parcels of these public lands owned by the United States in the Clackamas Valley. Thereafter, these patents were given or sold to U.S. citizens, and then deeds were promulgated as the patent parcels were divided and transferred from one party to another. Due to the application of proper procedures and

due process protections, an abstract of title will show that the deeds flowing from these patents of Tchinook lands in the Clackamas River Valley are lawful.

Turning to the Tchinook lands located in the Kathlapouthl River Valley where the current parcel at issue is located, it is clear that these procedures and due process were not followed. The same Act of 1850 authorizing the treaty negotiations should have been applied to all Tchinook lands. Unfortunately, this did not occur. As noted by the Washington Territorial Governor ISAAC I. STEVENS during his negotiations at Kisehman on the south bank of the Chehalis River between February 20 and March 2, 1855, with the Upper and Lower Chehalis, the Satsop, the Cowlitz Tribe, the Chinook Tribe, the Quinaielt Tribe, and the Queets, he acknowledged that he should have invited tribes from the Upper Chinook of the Columbia River Valley to attend and participate in the council.[14] Despite the explicit authorization from the Act of 1850, this oversight was never addressed.

Between 1869 and 1877, Presidents GRANT and HAYES issued six patents covering the approximately 152 acres of the instant parcel.[15] Thereafter, deeds were promulgated, and the land was eventually purchased by the COWLITZ INDIAN TRIBE. However, as is clear from the historical record, the proper procedures and the necessary due process of law were not followed with respect to these Kathlapouthl lands of the Tchinook Nation. Presidents Grand and Hayes issued patents for lands that were not owned by the United States. The "seizure" of these lands was contrary to law, and the subsequent abstract of title and deeds,

[14] National Archives, Records of the Washington Superintendency of Indian Affairs, Treaty Proceedings, 1854-1855, p. 50.

[15] See: Exhibit H.

as presented by the COWLITZ INDIAN TRIBE to the DOI were fraudulent and defective as a matter of law, and in direct violation of the applicable rules for fee-to-trust land transactions.

IV.
BREACH OF FIDUCIARY DUTY BY THE DOI'S BUREAU OF INDIAN AFFAIRS

The personnel and employees of the Northwest Area Offices of the Bureau of Indian Affairs (hereinafter the "BIA") are generally well-educated individuals who know the history of what is commonly referred to as "Oregon Country". They know that the Tchinook people have occupied and lived in the Yakaitl Wimakl ("Columbia River") valley from Celilo Falls to the shores of the Pacific Ocean since time immemorial. Most have seen the map of linguistic locations drafted by JOHN WESLEY POWELL, founder of the Bureau of American Ethnology, which confirms that assertion. (See: "Exhibit B").

The BIA and its employees have a fiduciary duty to all of the indigenous people living within the boundaries of what is now called the United States of America, whether affiliated with federally-recognized tribes or not, to acknowledge and respect the existence of their traditional tribal lands. On December 16 2010, the President of the United States signed the United Nations' Declaration on the Rights of Indigenous Peoples, a copy of which is attached hereto, marked as "Exhibit G', and fully incorporated herein by this reference.

However, on December 17, 2010, the Secretary of the Interior decided to ignore this commitment to the fundamental rights of this country's indigenous people when he decided to seize the traditional lands of the Kathlapouthl Tribe of the TCHINOOK NATION and place them into trust for the benefit of the COWLITZ INDIAN TRIBE.

Following judicial review, the DOI was told to reconsider their decision on this land transfer. On April 22, 2013, the Secretary for the DOI reaffirmed this decision. In doing so, the Secretary ignored the historical record affirming that the parcel in question is traditional lands of the Tchinook people, as well as the United States' responsibilities to the Tchinook people under the United Nations' Declaration on the Rights of Indigenous Peoples ("Exhibit G"), in direct violation of its moral obligations to the United Nations and its fiduciary duties to the TCHINOOK NATION.

Under the laws of the United States, the necessary steps to complete an accurate Abstract of Title are clear. (See: "The Treatise on the Examination of Titles to Real Estate and the Preparation of Abstracts" by W.B. Martindale, which is attached hereto, marked as "Exhibit I"). As part of the DOI's preparations to process the instant fee-to-trust land transfer, it is required to prepare a valid Abstract of Title. The necessary steps and procedures for such an abstract have been developed and promulgated by the United States' Department of Justice. While the Department of Justice's standards and procedures only require the DOI to go back forty years, this "cap" would seem to be less than prudent for lands located in the western half of the country, particularly when one factors in the provisions of the United Nations' Declaration on the Rights of Indigenous Peoples ("Exhibit G").

The DOI had a clear duty and a fiduciary responsibility to acknowledge the illegality of the fraudulent President Patents that purported to transfer ownership of the Tchinook's original title to their traditional lands over to United States' citizens. As reflected in the historical record, these approximately 152 acres are not Cowlitz lands, they are Tchinook

lands. More importantly, ownership of these approximately 152 acres does not lie with the United States, it rests with the Tchinook Nation. The decision of the Secretary of the DOI must be reversed.

V.
TITLE BY ULTIMATE DOMINATION

The model chosen by the United States Congress for the acquisition of title to the lands of the Oregon Country is embodied in the Act of June 5, 1850. The negotiation for transference of title was implemented in general, but not for every square mile of the land. There are a few presidents, senators, representatives, and others that have declared the Indian Treaties are fine but not altogether necessary for the acquisition of title to North America. Their thinking is supported by reliance on the principles enumerated in the U.S. Supreme Court's ruling in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), which addressed the issues of divine right and ultimate dominion in land acquisitions. Two of the essential elements of Chief Justice Marshall's ruling were the European Christian Right of Discovery, and " . . . converting the discovery of an inhabited country into conquest."

The "Right of Discovery" may be argued for the East Coast of North America, but with regard to the West Coast where flows the great river of the West, "Yakaitl Wimakl", the United States did not possess any "Right of Discovery". Here in the West, the "Right of Discovery" was accomplished by Spain when the ship "Santiago" sailed in the mouth of Yakaitl Wimakl, and Captain HECIETA named the river "Rio de San Rogue".

An essential element of conquest is seizure by force. President THOMAS JEFFERSON detailed a military reconnaissance mission out to the West Coast under the command of MERRIWEATHER LEWIS and WILLIAM CLARK. It must be noted that this "mission" was not

a "conquest by force" action, but rather one of exploration and peace. The LEWIS and CLARK mission passed out "peace" medals, and the Tchinook Nation still has a few of the medals that were personally handed to them by LEWIS and CLARK. There were no hostilities between the Tchinook people and the United States of America's mission force. In fact, in the Pacific Northwest, the Chinook Tribe is the only tribe to fight on a war footing to defend the United States from a military foe.[16]

During the War of 1812, the British sent a gunship to the mouth of Yakaitl Wimakl to seize the United States' commercial outpost, Fort Astoria. The indigenous West Coast communications "network" sent word to Chinook Chief COMCOMLY from California that a British warship was headed to Fort Astoria. Because of the friendship between the Chinook and the Astoria community, Chief COMCOMLY deployed Chinook warriors to several vantage positions at the entrance, with instructions to stop the British from entering the river by shooting flaming arrows into its sails to block its maneuvering across the bar.

Chief Comcomly then paddled to Astoria to inform the men of JOHN JACOB ASTOR's Fur Company that they need not be afraid because the Chinook would stop the British warship from capturing Fort Astoria. The traders in charge at Astoria told Chief COMCOMLY that he could call down his warriors because they had made a deal to sell out their boss, JOHN JACOB ASTOR, and become partners with the British enterprise, the Northwest Fur Company. Thereafter, the British warship did indeed seize Fort Astoria, raise the British flag at the post, and renamed the post Fort George in honor of King GEORGE.

[16] Against Great Britain during the War of 1812.

The United States does not have the right to seize the Tchinook's original aboriginal title for themselves via their presidents by ultimate dominion. The United Nation's Declaration requires that the United States follow the "Rule of Law".

CONCLUSION

The Tchinook People continue to exist struggling to obtain the means and strength to assert their nation building efforts proclaimed December 22, 2001, and their history must be recognized and included in the documents and decision-making of the United States, in the hope that they can again return to a place of prominence and honor.

The DOI was arbitrary and capricious in finding that the Cowlitz Indian Tribe possesses a "Significant historical connection" to the Parcel as its "initial reservation." *Amicus Curiae* CHINOOK NATION respectfully requests that this Court declare that the Parcel cannot be put into trust as the COWLITZ INDIAN TRIBE's "initial reservation" for gaming purposes or otherwise, enjoining the Secretary. Furthermore, there remains the question of Congress' failure to extinguish original title to the area including the Parcel, and how that impacts the Secretary's determinations in these proceedings. Certainly, it would be arbitrary and capricious for the Secretary to continue without a full understanding of the status of the Tchinook title to the Parcel.

RESPECTFULLY SUBMITTED this 27th day of November, 2013.

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