UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARK COUNTY, WASHINGTON,
1300 Franklin Street,
Vancouver, WA 98666,

CITY OF VANCOUVER, WASHINGTON,
210 E. 13th St.,
Vancouver, WA 98668,

CITIZENS AGAINST RESERVATION SHOPPING (CARS),
703 Broadway, Suite 610
Vancouver, WA, 98660,

AL ALEXANDERSON,
4219 NW 328th Street, Ridgefield
Washington, 98642,

GREG AND SUSAN GILBERT,
2600 NW 329th Street, Ridgefield,
Washington, 98642,

DRAGONSLAYER, INC.,
225 W. 4th Street
La Center, WA 98629, and

MICHELS DEVELOPMENT, LLC
8200 Tacoma Mall Blvd.
Lakewood, WA 98499,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, 1849 C Street, N.W. Washington, DC 20240,

SALLY JEWELL, *in her official capacity as* Secretary, U.S. Department of the Interior, 1849 C Street, N.W. Washington, DC 20240,

BUREAU OF INDIAN AFFAIRS, U.S.

Civ. No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Department of the Interior, 1849 C Street, N.W., Washington, DC 20240,

KEVIN WASHBURN, *in his official capacity as* Assistant Secretary Bureau of Indian Affairs U.S. Department of the Interior, 1849 C Street, N.W., Washington, DC 20240,

NATIONAL INDIAN GAMING COMMISSION, 1441 L Street NW, Suite 9100, Washington, DC 20005,

TRACIE STEVENS, *in her official capacity as* Chairwoman, National Indian Gaming Commission, 1441 L Street NW, Suite 9100 Washington, DC 20005,

Defendants

INTRODUCTION

1. The acquisition of land in trust on behalf of a tribe, and its corresponding removal from state and local jurisdiction, must be carried out in compliance with certain standards that afford local governments and other affected parties some measure of consideration. As an initial matter, the Secretary of the United States of the Department of the Interior (the "Secretary" of "DOI") may acquire land in trust only for tribes that meet specific statutory requirements. Second, the regulations implementing the Secretary's authority require measured consideration of the jurisdictional and revenue impacts of the acquisition on state and local government. When gaming is involved, Congress has sought to balance the sovereign interests of the federal government, state governments, and Indian tribes and, in doing so, has established clear limitations on where tribes may operate casinos. Finally, agencies must take a "hard look" at the environmental consequences of a proposed trust acquisition and are required to prepare a supplemental environmental impact statement ("EIS") when substantial and significant changed circumstances render the prior EIS inadequate. Defendants failed on every count in this case.

2. This case involves a dispute over DOI's decision to acquire approximately 152 acres of land ("Casino Parcel") in trust on behalf of the Cowlitz Tribe ("Tribe") so that the Tribe can develop a casino-resort. Since 2002, the Tribe has been urging DOI to acquire the Casino Parcel, which is outside the Tribe's historic territory, at first for no apparent purpose, then for the professed purpose of building a small-scale casino, and ultimately for a casino boasting a 134,150 square-foot gaming floor with 3,000 slot machines; 135 gaming tables and 20 poker tables; a 250 room hotel; 165,000 square feet of retail space; 10 restaurants, a convention center, an entertainment venue, 7,250 parking spaces, an RV park, and a wastewater treatment plant.

3. In approving the Tribe's proposed fee-to-trust request ("2004 FTT"), the Secretary exceeded his authority under the Indian Reorganization Act ("IRA"), the scope of which the Supreme Court recently clarified in *Carcieri v. Salazar*, 555 U.S. 329 (2009). DOI ignored or discounted the jurisdictional and revenue impacts the land transfer and casino project would have on local governments and surrounding community, and ignored that the Tribe's enrollment has ballooned since acknowledgment, making no effort to determine whether it retained authority to act on behalf of this tribe that had redefined and enlarged itself since it received federal acknowledgment in 2002. DOI erroneously determined that the Indian Gaming Regulatory Act's ("IGRA") limits on gaming do not apply to the 152-acre parcel, and relied on the National Indian Gaming Commission's ("NIGC") improper approval of a site-specific gaming ordinance that included elements far outside of NIGC's purview. DOI failed to take the "hard look" at impacts NEPA requires, and ignored reasonable alternatives available in the Tribe's historic territory. Finally, despite receiving evidence demonstrating that substantial and significant circumstances rendered its original EIS inadequate, DOI failed to prepare a supplemental EIS, as required under NEPA. Defendants have violated all of these laws in the

course of conducting a review process that does not meet basic Administrative Procedure Act ("APA") requirements, a process that they themselves have testified before Congress was anomalous and undesirable.

4. The environmental, social, economic, and quality-of-life impacts of the development will substantially injure Plaintiffs Clark County, Washington ("County"); City of Vancouver, Washington ("City"); Citizens Against Reservation Shopping ("CARS"); Al Alexanderson, Greg and Susan Gilbert ("Gilberts"); Dragonslayer, Inc. and Michels Development, LLC (together, "Card Rooms").

5. DOI first set forth the reasoning for its unlawful decision to acquire the Casino Parcel in trust on behalf of the Tribe in a Record of Decision issued on December 17, 2010 ("2010 ROD"). Plaintiffs challenged the 2010 ROD in a complaint filed in this Court on January 31, 2011 in *Clark County, Wash. v. U.S. Dep't of the Interior*, Case No. 1:11-CV-00278-BJR (D.D.C.). That action concluded in March 2013 with the Court's remand of the matter to DOI, with instructions that the agency issue a new ROD within sixty days, unless good cause is shown why it cannot do so.

6. On April 22, 2013, DOI issued a new ROD (the "2013 ROD"). With minor exceptions, the 2013 ROD simply repeats the same flawed rationale for DOI's decision-making as asserted in the 2010 ROD. Plaintiffs therefore bring this action to rectify DOI's unlawful decision, now set forth in the 2013 ROD, to acquire land in trust on behalf of a tribe that Congress did not intend to benefit through the IRA, and Defendants' failure to comply with federal laws and regulations.

JURISDICTION

7. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-02, and 5 U.S.C. § 706.

8. Venue lies in this district under 28 U.S.C. § 1391(b) and (e)(2). A substantial portion of the events or omissions giving rise to the claims stated herein occurred in this district.

PARTIES

9. Plaintiff Clark County, Washington, a political subdivision of the State of Washington, is governed by its Board of County Commissioners. The County has jurisdiction over the proposed Casino Parcel. The County is harmed if the land is acquired in trust because it will lose jurisdiction over the land, experience a reduction in revenues and be unable to collect taxes on the site as developed. Further, the citizens of the County will be harmed by the environmental, social and economic impacts of the casino project.

10. Plaintiff the City of Vancouver is a municipal corporation and a City of the First Class operating under a home rule charter as provided for under Article XI, Section 4 of the Constitution of the State of Washington. The City has a population of approximately 165,000 people and is the nearest large city to the Casino Parcel, which is approximately 10 miles away. The proposed casino will adversely impact the City's housing, transportation, and law enforcement resources.

11. Plaintiff CARS is a non-profit organization formed in June 2005 to protect the Clark County community and environment from the Tribe's proposal to build a casino-resort at

the La Center junction of I-5. Scores of business and community leaders, educators, and elected officials joined CARS because of a shared concern that the casino, and Defendants' faulty review process, would harm their environmental, economic, and social interests. CARS' members rely on and enjoy the economic, social and environmental resources of the area, all of which are highly likely to be harmed by the casino development. As a result of the procedural irregularities and final decision, CARS' interests were not properly considered and their members are highly likely to experience a serious diminishment in their overall quality of life, aesthetic enjoyment, business development, and safety if the land is transferred into trust and used for casino development.

12. Plaintiff Al Alexanderson is an individual whose home is located on a five-acre parcel of rural land within sight of the proposed casino. Primary access from I-5 to Mr. Alexanderson's home runs through the proposed casino site, as does a tributary to the East Fork of the Lewis River where Mr. Alexanderson, an avid angler, often fishes. Mr. Alexanderson made a substantial investment when he acquired his home, relying heavily on the aesthetic and recreational values of living in rural Clark County. Mr. Alexanderson is concerned that the casino will increase crime, noise, and light pollution, and will pollute the East Fork of the Lewis River, harming his ability to enjoy his property, decreasing his property values, and in general diminishing his quality of life.

13. Plaintiffs Greg and Susan Gilbert are individuals who have lived for over 20 years in a home located on 36 acres of land, overlooking the East Fork of the Lewis River, on the east side of I-5. A seasonal stream flows through the proposed casino site, under I-5, then through the Gilbert's property, through Paradise Point State Park, and eventually empties into the East Fork of the Lewis River. The Gilberts enjoy the deer, blue heron, bald eagles, and many other

forms of wildlife that come to their property because of the habitat the stream provides. The Gilberts are deeply concerned that the proposed casino development will result in an irreversible change in the rural character of the area; the loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the proposed casino site; increased traffic; increased light, noise, air, and storm water pollution; increased crime; and decreased property values. The Gilberts are most gravely concerned, however, about preserving the integrity of the stream and the East Fork of the Lewis River, which they believe will be substantially harmed by the proposed 500,000 daily gallons of treated sewage and an unknown amount of storm water runoff from the proposed casino site. The Gilberts have been injured by Defendants' procedural failures and are likely to be injured by the casino project, which will substantially impact their property and the environment they enjoy.

14. Plaintiff Dragonslayer Inc., a Washington state corporation, owns two clubs in downtown La Center, which employ approximately 352 people, with pay-roll and benefits well over $12,000,000 per year (with Michels Development, LLC, the "Card Rooms"). Dragonslayer generates approximately $1,400,000 in tax revenue for La Center, and together with Michels Development LLC, the businesses account for approximately 75% of La Center's operations budget. Together, Dragonslayer and Michels Development LLC paid over $3,000,000 in local taxes to La Center in 2012. An active participant in the La Center community, Dragonslayer started the North County Chamber of Commerce; serves as a member of several other chambers; and contributes time, money and man-power to a variety of other charities, little leagues, founding day celebrations and other community activities. Dragonslayer and Michels Development LLC both support the La Center Casino Charitable Fund, which donates $72,000 to worthy causes in and around La Center per year. It is likely that development of the proposed

casino will result in the loss of approximately 60% of Dragonslayer's business, directly affecting La Center's revenues and the City's ability to provide services to its businesses and residents and undermine Dragonslayer's role in the community.

15. Plaintiff Michels Development LLC, a privately-held limited liability company, owns and operates two clubs in La Center, Washington – Chips Casino, which opened in October 1998 and the Palace Casino, which opened in June 1999. Michels Development, a leader in the community, participates extensively in charitable and community events and provides substantial support for various organizations that benefit Clark County businesses and the community. As with Dragonslayer, the Tribe's proposed casino will cause Michels Development to lose approximately 60% of its business. Not only will Michels Development's investment in the clubs be severely harmed, the substantial reduction in the clubs' revenue will directly affect La Center's revenues and the City's ability to provide services, as well as undermine Michels Development's ability to contribute to the community it has done much to benefit. Michels Development has a strong interest in maintaining and improving the quality and vitality of La Center, both to support its business and to ensure a safe and healthy environment for its employees.

16. Defendant DOI is an administrative agency of the United States.

17. Defendant Sally Jewell is the Secretary of DOI and is sued in her official capacity.

18. Defendant Bureau of Indian Affairs ("BIA") is an administrative agency within DOI and is charged with overseeing Indian Affairs.

19. Defendant Kevin Washburn is Assistant Secretary of DOI and administers the BIA, and is sued in his official capacity.

20. Defendant NIGC is an independent regulatory agency of the United States charged with overseeing gaming on Indian lands.

21. Defendant Tracie Stevens is the appointed Chairwoman of the NIGC, and is sued in her official capacity.

FACTS

The Tribe's 2002 FTT

22. On January 4, 2002, DOI published their Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe. That same day, the Tribe filed a fee-to-trust application to have the Casino Parcel acquired in trust on its behalf ("2002 FTT"), pursuant to 25 U.S.C. § 465 and 25 C.F.R. Part 151. Once land is acquired in trust, tribes, as sovereign entities, are exempt from taxes and state and local law.

23. Although the Tribe's fee lands and tribal offices are located 24 miles north of the casino site within the Tribe's historic territory (and most tribal property is even further away), *see Simon Plamondon, on Relation of the Cowlitz Indians v. United States,* 21 Ind. Cl. Comm. (June 25, 1969), the son of the Tribe's Chairman at the time – real estate developer David Barnett – purchased or optioned the Casino Parcel, which is located west of Interstate 5 ("I-5") at the NW 319th Street Interchange, during a two-year period before the Tribe was recognized. In contrast to the Tribe's fee land, the Casino Parcel is a short 16-mile drive from Portland, Oregon providing easy access to the Portland gaming market.

24. The Tribe did not identify its intended use of the Casino Parcel in the 2002 FTT, although it was required to do so under the trust regulations. 25 C.F.R. § 151.10(c). The Tribe argued that because it had no plans to develop the Casino Parcel, environmental review of the 2002 FTT was unnecessary.

25. The County objected to the 2002 FTT on April 23, 2002, arguing that the trust acquisition would negatively impact the County's comprehensive plan, public facilities, and schools. The Card Rooms also objected, arguing that federal law required the Tribe to identify its intended use of the land, which the Card Rooms believed was gaming.

26. The central office of BIA directed the BIA Northwest Regional Office to require the Tribe to state a specific land use and to declare whether the land will be used for gaming. Rather than do so, the Tribe withdrew its 2002 FTT during the summer of 2003.

The County's Efforts to Negotiate an MOU to Protect Its Interests

27. Soon after it filed its April 23, 2002 comments, the County initiated efforts to negotiate a Memorandum of Understanding ("MOU") with the Tribe to address impacts of the proposed trust acquisition. Although the County opposed the 2002 FTT, it negotiated the MOU with the Tribe in good faith out of concern that DOI would acquire the land regardless of the impacts on the County and that DOI would not require sufficient mitigation.

28. On March 2, 2004, the County and the Tribe executed an MOU requiring the Tribe to compensate the County for property and sales taxes the County would otherwise lose if the land were acquired in trust. The MOU also required the Tribe to maintain consistency with the local development code, Clark County Resolution 2004-03-02. The MOU included a

disclaimer stating that, "Nothing in this Memorandum of Understanding should be construed as evidencing County support for or endorsement of the Tribe's trust application."

The Tribe's 2004 FTT

29. The same day the County and Tribe executed the MOU, the Tribe filed its second fee-to-trust application for the same site (the "2004 FTT").

30. DOI sent notice of the 2004 FTT to the County soon after. At the same time, DOI also sent notice to the County that the Tribe had filed a request asking the Secretary to proclaim the Casino Parcel the Tribe's initial reservation, pursuant to 25 U.S.C. § 467.

31. An initial reservation proclamation is significant for newly-recognized tribes like the Cowlitz Tribe because IGRA prohibits gaming on lands acquired in trust after October 17, 1988, unless one of three exceptions applies: 1) the land is taken into trust as a part of a settlement of a land claim; 2) the land qualifies as the initial reservation of an Indian tribe acknowledged; or 3) the land qualifies as the restoration of lands for an Indian tribe that is restored to Federal recognition. 25 U.S.C. § 2719(b)(1)(B)(i-iii). If one of these three exceptions does not apply, the only available route for gaming is through the "two-part determination," which requires a finding by the Secretary that gaming will not be detrimental to the surrounding community and concurrence from the Governor, among other things. *Id.* § 2719(b)(1)(A).

32. The Tribe did not inform the County at any point during the negotiations for the MOU that it intended to seek an initial reservation proclamation or that it intended to conduct

gaming on the site. The County, therefore, did not address gaming in the MOU, and believed that, if gaming became an option, the two-part determination would apply.

The 2003 Environmental Assessment

33. During October 2003, the Tribe prepared an environmental assessment ("EA") under NEPA to support the 2004 FTT. The EA described a 41,800-square-foot casino, with 12,500 square-feet of gaming floor, plus a restaurant, a gift shop, and parking for 350 cars. The introduction of the EA stated that the impacts of a small casino were being evaluated only because "the Tribe did not wish to exclude any potentially lawful use of the subject lands."

34. DOI released the EA for public comment in March 2004, soon after the Tribe filed its 2004 FTT. The Card Rooms and other parties argued that the EA did not reflect the Tribe's true plans because economic studies demonstrated that the market would support a far larger casino than the Tribe described in the EA.

35. Several months later, David Barnett announced a partnership with the Mohegan Tribe of Connecticut to develop a far larger casino than described in the EA. DOI published a notice of intent to prepare an environmental impact statement ("EIS"), describing the significant increase in the size of the new project. The new project increased the amount of gaming floor space from 12,500 to 160,000 square feet and parking from 350 to 6,500 spaces. The revised project would also include a 210,000 square feet of restaurant and retail facilities, 150,000 square feet of convention and entertainment facilities, and an approximately 250 room hotel.

The Draft EIS Process

36. The City and the County participated as cooperating agencies in the preparation of the EIS. DOI issued the draft EIS on April 14, 2006. Prior to its release, both the City and the County objected to the draft EIS, citing the poor quality of the analysis and its failure to meet "reasonable standards as an objective and thorough analysis of the socioeconomic and transportation impacts." The City warned DOI that, "[i]f the quality of analysis in these sections is not significantly improved from this draft, it is likely that the City will challenge the adequacy of the EIS." Neither the City's nor the County's comments were addressed in the draft EIS.

37. On June 6, in the midst of the comment period on the draft EIS, the Tribe filed a revised 2004 FTT. After originally closing the comment period on the draft EIS on July 14, DOI announced that it would "extend" the comment period until August 25, 2006, to allow time for comments on the Tribe's revised 2004 FTT. Yet again, in the middle of the extended comment period, the Tribe filed another new document with DOI, this time a revised application for its initial reservation designation.

38. In addition to objecting to the Tribe's submission of new documents during the comment period, commentators, including Plaintiffs, objected to: 1) DOI's exclusion of reasonable alternative sites, including one located in the Tribe's historic territory; 2) DOI's reliance on the MOU to support the conclusion that impacts would be mitigated; 3) DOI's inadequate analyses of economic, traffic, water, pollution and other impacts; and, 4) DOI's failure to adequately assess impacts on local governments and the surrounding community.

NIGC's Approval of the Site-Specific Ordinance

39. On March 15, 2005, while BIA was preparing the draft EIS, the Tribe submitted a request to NIGC seeking approval for a Class II gaming ordinance, which specifically identified the Casino Parcel (the "2005 Ordinance").

40. NIGC approved the site-specific 2005 Ordinance on November 23, 2005, despite the fact that the Casino Parcel had not yet been taken into trust. In every other case before and since its approval of the 2005 Ordinance, NIGC has required a tribe to have land in trust before it would approve a site-specific gaming ordinance.

41. After receiving multiple objections to the NIGC's opinion, BIA announced that it would conduct an independent review of the decision. It never did so.

Substitution of the MOU with the Environment, Health and Safety Ordinance

42. The draft EIS relied heavily on the 2004 MOU between the Tribe and the County to support the conclusion that the impacts of the 2004 FTT and casino project would be mitigated.

43. Although DOI was informed that the Western Washington Growth Management Hearing Board determined that the MOU violated the State's Growth Management Act (Chapter 36.70 RCW) and was void ab initio in 2007, DOI did not revise the draft EIS to reflect the fact that some impacts were no longer mitigated.

44. Instead, on October 6, 2007, the Tribe unilaterally adopted an amended gaming ordinance which appended two additional ordinances called the Environment and Public Health

and Safety Ordinance ("EPHS Ordinance") and the Tribal Enforcement and Compliance Officer ("TECO"). The EPHS included provisions addressing fire protection, public health, sewer, landscaping, street standards, and other requirements, mirroring the obligations the Tribe committed to in the invalidated MOU.

45. In October 2007, the Tribe then returned to NIGC, and requested that NIGC approve an amendment to the site-specific 2005 Ordinance, which incorporated by reference the EPHS Ordinance.

46. NIGC regulations relating to ordinances do not provide for the review, approval or enforcement of the EPHS or TECO. 25 C.F.R. Part 522. NIGC regulations permit a tribe to revoke or amend a tribal ordinance at any time. 25 C.F.R. §§ 522.3, 522.12.

47. Nevertheless, NIGC approved the 2008 Amendment to the site-specific 2005 Ordinance on January 8, 2008.

48. DOI relied on the EPHS and TECO ordinances to substitute for the invalidated MOU in the final EIS and in the 2010 and 2013 RODs as evidence of mitigation.

The Final EIS Review

49. On March 2007, the Regional BIA released the preliminary final EIS to cooperating agencies. That document included two new reports submitted by the Tribe after the close of the draft EIS comment period—the Tribe's Business Plan and Unmet Needs Report.

50. When the Tribe was first acknowledged on January 4, 2002, its enrollment was 1,482 members. As of 2007, that enrollment had more than doubled to approximately 3,600

members. The Unmet Needs Report, based on the dramatically expanded enrollment numbers, asserted that the Tribe required $113.6 million annually to meet the Tribe's "unmet needs" at that time.

51. On the basis of the Unmet Needs Report, the final EIS and 2010 ROD concluded that DOI did not need to consider in detail an alternative located in the Tribe's historic territory, because it would not generate sufficient revenue for the greatly expanded tribal membership and therefore would not satisfy the purpose and need for the proposed trust acquisition. The draft EIS did not consider a northern alternative in detail, despite the lack of the Unmet Needs Report, which DOI used to justify its exclusion.

52. Further, the final EIS does not cure the problems commentators identified in the draft EIS relating to, among other things, water, traffic, pollution, social and economic impacts, insufficient mitigation, exclusion of reasonable alternatives, and other issues.

53. In addition to the Plaintiffs, the City of La Center, the City of Woodland, the Port of Woodland, and the Woodland School District objected to the proposed land transfer and casino project, as did other prominent community organizations, including the Greater Vancouver Chamber of Commerce; the La Center North Clark County Chamber of Commerce; the Woodland Chamber of Commerce; the Battle Ground Chamber of Commerce; the American Land Rights Association; Identity Clark County; Friends of Clark County; Enterprise/Paradise Point Neighborhood Association; Fish First; the Chinook Indian Tribe and Stand Up for Clark County Citizens.

DOI's Lack of Oversight Over EIS Process

54. The Council on Environmental Quality's Regulations implementing NEPA, 40 C.F.R. Part 1500, require the action agency to oversee the NEPA process and to assume responsibility for the document. 40 C.F.R. § 1506.5. For an EIS, an agency often hires a third party contractor, and charges the applicant for the cost. The contractor must be selected by the federal action agency after the consideration of candidates and must assert that it has no interest in the outcome of the project and is objective. DOI selected Analytical Environmental Services ("AES") at the recommendation of the Tribe.

55. DOI entered into an MOU on October 29, 2004 with AES, and the Tribe. Consistent with NEPA regulations, the MOU requires BIA to "direct and control all of the work of AES. The BIA will provide AES direction, technical review and quality control for the preparation of the Scoping Report, EIS, technical studies, and other NEPA-related documents. AES agrees to act as the project manager on behalf of and at the direction of the BIA."

56. Documents obtained by the Card Rooms through Freedom of Information Act litigation against DOI (*Dragonslayer, Inc., et al. v. U.S. Dep't of the Interior, et al.*, No. 3:09-cv-00135 (D.C. Ore., terminated May 17, 2010)) demonstrate that BIA did not direct and control all of the work of AES.

57. DOI agreed during an April 19, 2010 meeting with the Card Rooms to review the FOIA documents and determine whether BIA met its NEPA obligations. DOI did not address the materials submitted by the Card Rooms in either the 2010 or 2013 RODs, or the "Final EIS Evaluation of Adequacy" that it issued in April 2013.

Review of the Tribe's Status under Carcieri

58. The Indian Reorganization Act ("IRA") authorizes the Secretary to acquire land and hold it in trust "for the purpose of providing land for Indians." Ch. 576, §5, 48 Stat. 985, 25 U.S.C. § 465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*." 25 U.S.C. § 479 (emphasis added).

59. In 2009, the Supreme Court held that "now," as used in 25 U.S.C. § 479, unambiguously refers to the year when the IRA was first enacted – 1934. *Carcieri v. Salazar*, 555 U.S. 329 (2009). The *Carcieri* decision thus clarifies that the Secretary's authority is limited to acquiring land in trust only for recognized tribes that were under federal jurisdiction in 1934.

60. In 2005, NIGC issued a determination finding that "the historical evidence establishes that the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." NIGC cited as support for this finding, among other things, a statement made in 1933 by John Collier, Commissioner of BIA and architect of the IRA, explaining that "the Cowlitz tribe . . . is no longer in existence as a communal entity" and that "they live scattered about from place to place, and have no reservation under Governmental control."

61. The available evidence, including NIGC's 2005 finding, demonstrates that the Cowlitz tribe was not under federal jurisdiction in 1934.

62. DOI also concluded that the Casino Parcel qualified for a reservation proclamation pursuant to 25 U.S.C. § 467 and as the Tribe's initial reservation under IGRA, 25

U.S.C. § 2719(b)(1)(B)(ii), which requires a finding that the tribe has "significant historical connections" to the land, 25 C.F.R. § 292.6, relying in part on NIGC's Restored Lands Opinion.

The 2010 ROD and Original Litigation

63. DOI first set forth the reasoning for its unlawful decision to acquire the Casino Parcel in trust on behalf of the Tribe in the 2010 ROD, which Plaintiffs challenged in this Court in *Clark County, Wash. v. U.S. Dep't of the Interior*, Case No. 1:11-CV-00278-BJR. In that action, Plaintiffs alleged that the Secretary's decision to acquire the Casino Parcel into trust violates: (1) Section 5 and 19 of the IRA, because the Tribe was not federally recognized or under federal jurisdiction in 1934, as required by the Supreme Court's decision in *Carcieri*; (2) NEPA; and (3) IGRA. Plaintiffs also filed claims against the NIGC, challenging the NIGC's 2005 approval of a gaming ordinance for the Tribe, as well as the 2008 approval of an amendment to that ordinance, and the NIGC's ultra vires determination that the Casino Parcel was eligible for gaming under IGRA's "restored lands" exception, 25 U.S.C. § 2719(b)(1)(B)(iii).

64. The Federal Defendants lodged two separate administrative records in response to the challenge to the 2010 ROD. The first was filed by NIGC in January 2012, the second by BIA in mid-February 2012. Upon review of those records, Plaintiffs discovered that BIA had failed to include several documents that Plaintiffs had provided BIA during the decision process that refuted the existence of a historical connection between the Tribe and the Casino Parcel, a legal requirement for the land to qualify for IGRA's restored lands exception and for the Tribe to be permitted to conduct gaming there.

65. Plaintiffs' counsel advised BIA of this omission and, several weeks later, counsel for BIA reported that it had been unable to locate these materials. At BIA's request, Plaintiffs provided these materials to BIA for a second time, and BIA agreed to include them in the administrative record. They were part of a supplement to the BIA's administrative record that was lodged with the Court on May 2, 2012. In supplementing the administrative record with these materials, the BIA certified that they were "before the Secretary at the time of his 2010 ROD."

66. On June 20, 2012, Plaintiffs filed a motion for summary judgment. Among other grounds for relief asserted, Plaintiffs argued that the 2010 ROD must be vacated because of BIA's failure to consider evidence submitted by Plaintiffs during the decision process refuting the Tribe's claim to IGRA's restored lands exception. Not only did BIA not consider this evidence in the 2010 ROD, it admittedly lost materials submitted by Plaintiffs for its review on this very subject. Plaintiffs argued that BIA's clear failure to consider this contrary evidence was, by definition, arbitrary and capricious under the APA, and rendered the 2010 ROD invalid.

67. Recognizing that its failure to consider Plaintiffs' restored land materials in the first instance rendered its decision vulnerable, DOI filed a motion with the Court requesting that the litigation be stayed to give DOI an opportunity to review those materials (apparently for the first time) on "voluntary remand." The Court denied that motion on August 29, 2012, but granted the Defendants extra time to file oppositions to summary judgment. The Court's Order concluded, "[s]hould the federal defendants decide in the interim to rescind or otherwise alter their determination, they shall file promptly a notice of such action."

68. The Defendants declined to proceed by one of the options presented by the Court. Instead, they attempted to "supplement" the 2010 ROD with a brand new, unpublished legal memorandum in "explanation" of DOI's 2010 decision that the Casino Parcel qualifies as the Tribe's initial reservation. Then, the Defendants filed their opposition to summary judgment, relying on that post-hoc supplemental ROD to support its brief.

69. Plaintiffs argued that the supplemental ROD was improper on the grounds that it undermines the Court's jurisdiction and defeats APA review, which evaluates whether an agency conducted reasoned decision-making at the time it issued its decision by evaluating the record on which that decision was based.

70. In an order dated March 13, 2013, the Court agreed that the APA does not permit an agency to amend a final decision once a case has been filed in federal court. Furthermore, because the Defendants submitted that the "supplemental" ROD superseded DOI's 2010 initial reservation decision, the Court found that it would be "fruitless" to litigate the propriety of that decision. Accordingly, the Court remanded the matter to DOI and directed it to issue a new ROD within sixty days, unless good cause is shown why it cannot do so.

Need for a Supplemental EIS and Examination of the Tribe's Enrollment

71. After the Court issued its order on March 13, 2013 requiring DOI to rescind the 2010 ROD, the Card Rooms submitted several documents to the DOI for its review, all of which demonstrate that substantial and significant changed circumstances require DOI's consideration and preparation of a supplemental draft EIS pursuant to 40 C.F.R. § 1502.9(c)(1)(i), (ii), before it can take action on the Tribe's existing trust land application. Among these materials were:

a. A new economic analysis of the Tribe's unmet needs and proposed casino resort, demonstrating that the economic assumptions that the Tribe relied upon when it submitted its unmet needs report and business plan in 2006 – and upon which the DOI relied in the final FEIS and 2010 ROD to reject a wide range of alternatives – are no longer valid;

b. New information about the transportation issues that will arise as a result of the proposed casino resort, including plans by the Tribe and the City of La Center for a major highway interchange reconstruction and expansion project that will be required to handle the resulting greatly increased volume of traffic;

c. New information that makes clear the Tribe's inability to meet basic water quality requirements, whether through negotiation of a valid sewer agreement with the City of La Center or by obtaining a discharge permit under the Clean Water Act. The new information described the failure of an attempt by the City of LaCenter and the Tribe to enter into a sewer agreement due to its inconsistency with the County's comprehensive land use plan. As demonstrated by the materials submitted to DOI, neither the sewer agreement or discharge permit is a viable option for the Tribe at the Casino Parcel.

72. The Card Rooms also submitted materials regarding the Tribe's dramatic increase in enrollment since its acknowledgment, including evidence that in the ensuing years the Tribe may not have limited membership to those having significant social and political ties with the Tribe, as required by 25 C.F.R. § 83.12(b) (the "Part 83 Regulations"). As explained in the 1994 rulemaking that resulted in these Part 83 Regulations, the base roll at the time of

acknowledgment "cannot be so greatly expanded that the petitioner becomes, in effect, a different group than the one acknowledged." 59 Fed. Reg. 9,280, 2,292 (Feb. 25, 1994). Taking land into trust is an "administrative act" within the Part 83 Regulations. As the Card Rooms' comments explained, the Secretary lacks authority to take land into trust for the Tribe, unless and until the Tribe provides "acceptable" evidence that the new members descend from the historical tribe and have maintained significant social and political ties with the Tribe. 25 C.F.R. § 83.7(e)(i).

The 2013 ROD

73. Following the Court's remand, DOI issued the 2013 ROD on April 22, 2013. With minor exceptions, this new ROD simply repeats the same flawed rationale for DOI's decision-making asserted in the 2010 ROD. As did the 2010 ROD, the 2013 ROD authorizes acquisition of the Casino Parcel in trust on behalf of the Tribe and proclaims that the Casino Parcel is the Tribe's "initial reservation" for purposes of the IGRA. 76 Fed. Reg. 377-01 (Jan. 4, 2011). This decision is a final agency action pursuant to 25 C.F.R. § 2.6 and 5 U.S.C. § 704. The 2013 ROD largely ignores the new evidence submitted by Plaintiffs following the remand.

FIRST CLAIM

DOI Violated the Indian Reorganization Act of 1934 and the Administrative Procedure Act

74. The paragraphs set forth above are realleged and incorporated herein by reference.

75. Under the IRA, DOI's power to take land into trust and proclaim reservations for the benefit of Indian tribes is limited to only those tribes that were federally recognized and under federal jurisdiction in June 1934, when the IRA was enacted. 25 U.S.C. §§ 465, 467, and 479.

76. The Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934. The Secretary therefore has no authority under 25 U.S.C. § 465 to acquire land in trust on behalf of the Tribe. Because the Secretary has no authority to acquire land in trust for the Tribe under the IRA, the Secretary has no authority to proclaim such land the Tribe's reservation.

77. Accordingly, DOI's decision to acquire land in trust and declare it the Tribe's reservation is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. §706(2).

SECOND CLAIM

DOI Violated the Indian Reorganization Act of 1934, the Part 151 Regulations Implementing that Act, the Part 83 Regulations, and the Administrative Procedure Act

78. The paragraphs set forth above are realleged and incorporated herein by reference.

79. Under the regulations implementing 25 U.S.C. § 465, the Secretary must consider, among other things, the impacts of the proposed acquisition on the State and its political subdivisions resulting from the removal of the land from the tax rolls and the jurisdictional problems and potential conflicts of land use which may arise. 25 C.F.R. § 151.10(e), (f). In addition, the Secretary is required to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and give greater weight to the concerns raised by the State and local governments. 25 C.F.R. § 151.11.

80. DOI failed to adequately consider the impacts of the trust acquisition and casino project on the County and did not properly account for the jurisdictional problems and potential

conflicts of land use which may arise, because it improperly relied on NIGC's approval of tribal ordinances that NIGC lacked the authority to approve or enforce.

81. DOI failed to address the concerns of local government in the 2013 ROD and failed to scrutinize properly the Tribe's anticipated benefits, which were set forth in the Tribe's Business Plan and inflated Unmet Needs Report.

82. DOI's trust decision further violated 25 C.F.R. § 83.12(b), which restricts the Secretary's authority to perform administrative acts on behalf of the tribe's "base" membership roll submitted as part of their petition for acknowledgement, descendants of those on the roll who meet the tribe's membership criteria, and others who meet the requirements of 25 C.F.R. § 87(e) and maintain significant and social political ties with the tribe. DOI ignored evidence that the Tribe's membership has dramatically expanded since acknowledgement to effectively create a different tribe than the one acknowledged by DOI in 2002, to include members who were not confirmed to meet those criteria.

83. Accordingly, DOI's decision to acquire land in trust failed to adhere to the procedural and substantive requirements set forth in 25 CFR Part 151 and 25 CFR Part 83 and is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. §706(2).

THIRD CLAIM

DOI Violated the Indian Gaming Regulatory Act and the Administrative Procedure Act

84. The paragraphs set forth above are realleged and incorporated herein by reference.

85. Section 20 of IGRA creates a broad prohibition against gambling on land taken into trust after October 17, 1988, 25 U.S.C. § 2719(a), unless one of three exceptions apply. An initial reservation is one of the three exceptions to the gaming prohibition. *Id.* § 2719(b)(1)(B)(ii).

86. To meet the initial reservation exception, the tribe must demonstrate, among other things, that "the land is located within . . . an area where the tribe has significant historical connections . . ." 25 C.F.R. § 292.6.

87. DOI erroneously determined that the Tribe has a significant historical connection to the Casino Parcel required for the initial reservation exception.

88. Accordingly, DOI's decision is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. §706 (2).

FOURTH CLAIM

NIGC Violated the Indian Gaming Regulatory Act and the Administrative Procedure Act

89. The paragraphs set forth above are realleged and incorporated herein by reference.

90. IGRA requires the approval of a gaming ordinance before gaming can be conducted on Indian lands. The regulations provide that a gaming ordinance shall meet certain requirements for approval, including: that the tribe shall have sole proprietary interest in the gaming operation; how revenues shall be used; that the tribe shall have gaming operations audited annually; that certain contracts shall be included within the audit; that background

investigation shall be conducted; that the tribe shall issue separate licenses to each facility operating class II gaming; and that the tribe shall construct, maintain and operate a gaming facility in a safe manner. 25 U.S.C. § 2710; 25 C.F.R. §§ 522.4, 522.6. In other words, an ordinance must comply with requirements related to ensuring the integrity of the gaming operation.

91. Furthermore, IGRA does not authorize NIGC to approve a gaming ordinance under 25 C.F.R. part 522 or to make a determination that specific land is eligible for gaming under Section 20 before the Secretary has acquired the land in trust. *See* 25 U.S.C. §§ 2703(4), 2710(b)(2). With the sole exception of NIGC's approval of the site-specific 2005 Ordinance for the Cowlitz Tribe, NIGC's practice has reflected this restriction: never before or since has NIGC approved a site-specific ordinance for land not yet taken into trust.

92. This practice has since been codified by DOI, which promulgated regulations in 2008 implementing Section 20 of IGRA, which require a tribe to submit a request for a gaming eligibility determination to the Office of Indian Gaming within BIA, not the NIGC, "[i]f the tribe seeks to game on newly acquired lands that require a land-into-trust application." 25 C.F.R. § 292.3(b). Only when the "newly acquired lands" are already in trust, can a tribe submit a request for a gaming eligibility determination directly to NIGC. Id. § 292.3(a). *See* 73 Fed. Reg. 29354 (May 20, 2008).

93. NIGC has also expressly recognized that this restriction is dictated by the plain language of Section 20 of the IGRA. *See Tohono O'Odam Nation Class III site-specific, conditional gaming ordinance amendent* at 11 (NIGC, Aug. 24, 2011).

94. NIGC's approval of the Tribe's site-specific 2005 Ordinance was legally and factually erroneous. Further, the EPHS attached to the Tribe's 2007 amended ordinance falls outside NIGC's authority. NIGC lacks authority to review, approve, or enforce the provisions in the EPHS.

95. Accordingly, NIGC's decision is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. §706(2).

FIFTH CLAIM

DOI Violated the National Environmental Policy Act and the Administrative Procedure Act

96. The paragraphs set forth above are realleged and incorporated herein by reference.

97. DOI's actions in approving the 2004 FTT and certifying the EIS constitute violations of NEPA, 42 U.S.C. § 4321 et seq., and its implementing regulations, 40 C.F.R. 1500 *et seq.* Without limitation, DOI's actions violate NEPA and are therefore unlawful in the respects alleged below.

98. The EIS fails to adequately assess the impacts the FTT will have on the County, the City, local communities, the Card Rooms and nearby residents, as required by 40 C.F.R. § 1502.16(c), 25 C.F.R. § 151.10(e) and NEPA.

99. BIA's failure to oversee the NEPA review, as required by 40 C.F.R. § 1506.5, has compromised the process and final EIS, in violation of NEPA. The Tribe's extensive involvement in the preparation of the EIS, as evidenced in correspondence between AES and the

Tribe, presented a conflict of interest and violated NEPA regulations, as well as the MOU between BIA, AES and the Tribe.

100. DOI improperly accepted the Tribe's statement of need, financial data, and revenue projections without critical consideration, in violation of 40 C.F.R. §1502.13 and the APA, and as a consequence, eliminated from detailed analysis feasible alternatives, in violation of 40 C.F.R. §1502.14 and the APA.

101. DOI has unlawfully relied on NIGC's ultra vires approval of the Tribe's revocable Environment and Public Health and Safety ordinance as evidence of mitigation in the FTT, in violation of the APA.

102. DOI's assessment of indirect and growth-inducing effects and cumulative effects is inadequate, in violation of 40 C.F.R. § 1502.16 and the APA.

103. DOI failed to take a "hard look" at the environmental impacts of proposed major actions raised by Plaintiffs required by 40 C.F.R. § 1502. This includes and is not limited to the following areas:

- DOI failed to adequately assess and consider the social, economic, employment, and housing impacts of the proposed casino on the communities within Clark County including La Center, Woodland, Ridgefield, Battleground, Vancouver and Camas, as well as the effects on social services;
- DOI's traffic analysis is inadequate, either omitting necessary data or relying on out-of-date information. The impacts in regard to transportation and level of service are not adequately analyzed including potential road improvements and the replacement of the Interstate 5 bridge coinciding with the development and opening of a casino/resort.
- DOI's air emissions analysis is inadequate.

- DOI's assessment of impacts on water resources, the sole source aquifer, streams, and wetlands from runoff, turbidity, sewage, and other effects is inadequate.

104. DOI violated NEPA by issuing an EIS that makes conclusions about the FTT without obtaining, considering and evaluating sufficient data.

105. DOI ignored substantial material submitted to it prior to its issuance of the 2013 ROD, which demonstrates that substantial and significant changed circumstances relating to the economic analysis of the Tribe's unmet needs and proposed casino resort alternatives, transportation issues that will arise as a result of the proposed casino resort, and the Tribe's inability to meet basic water quality requirements all require DOI's consideration and preparation of a supplemental draft EIS pursuant to 40 C.F.R. § 1502.9(c)(1)(i), (ii).

106. Accordingly, DOI's decision to acquire land and proclaim it the Tribe's reservation available for gaming on the basis of the EIS is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. §706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. That the Court declare that the Secretary's decision to acquire the Casino Parcel in trust on behalf of the Cowlitz Tribe violates the IRA, the Part 151 Regulations, and the Part 83 Regulations, and ordering the Secretary to set aside her decision approving the trust acquisition;

B. That the Court declare that the Casino Parcel does not qualify as an initial reservation for the Tribe pursuant to 25 U.S.C. § 2719(b)(1)(B)(ii) and enjoin the Secretary from allowing the land to be used for gaming purposes;

C. That the Court declare that NIGC's approval of the Tribe's ordinance under 25 C.F.R. Part 522 was ultra vires, arbitrary and capricious and otherwise not in accordance with law;

D. That the Court declare that DOI acted in an arbitrary and capricious manner by certifying the EIS for the casino project and approving the 2004 FTT because the final EIS is legally inadequate under NEPA and the APA and require the Secretary to comply with NEPA by preparing a new or supplemental EIS consistent with NEPA's requirements;

E. That the Court award such other relief as it deems proper to effectuate the purposes of this action.

Respectfully Submitted,

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