IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON
9615 Grand Ronde Road
Grand Ronde, OR 97347

Plaintiff,

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

KEVIN WASHBURN
in his official capacity as
Assistant Secretary – Indian Affairs
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

STANLEY M. SPEAKS
in his official capacity as
Regional Director
Northwest Region
Bureau of Indian Affairs
911 Northeast 11th Avenue
Portland, Oregon 97232

UNITED STATES DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

Civ. No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTORY STATEMENT

1. The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde") challenges an April 22, 2013, Record of Decision ("ROD") issued by the Secretary of the U.S. Department of the Interior through her designee the Assistant Secretary – Indian Affairs. The challenged decision approved the acquisition of a parcel of land in Clark County, Washington ("the Parcel"), to be held in trust for the Cowlitz Indians; proclaimed the land a reservation for the Cowlitz; and declared the land to be eligible for gaming. The Secretary's decision permits the Cowlitz to build a mega-casino and resort facility on the Parcel—despite the fact that the land is not located within the Cowlitz Tribe's aboriginal territory, is not historically or culturally significant to the Cowlitz, and would be taken in trust for a tribe that was neither "recognized" nor "under federal jurisdiction" at the time prescribed by law. The decision below is thus unauthorized under the Indian Reorganization Act, 25 U.S.C. § 465, and violates the Indian Gaming Regulatory Act, 25 U.S.C. § 2719; it also fails in multiple respects to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. Moreover, the resulting casino—whose location was chosen for its proximity to the same gaming markets served by Grand Ronde's casino, Spirit Mountain—will dramatically impair Grand Ronde's ability to support itself, its members, and its future cultural integrity as a tribe. Grand Ronde therefore seeks declaratory and injunctive relief from the Secretary's order.

NATURE OF THE ACTION

2. Plaintiff seeks declaratory and injunctive relief pursuant to the Constitution and laws of the United States, including but not limited to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706. This action arises under federal law, including but not limited to the Indian

Reorganization Act, 25 U.S.C. § 465, the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

4. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because a substantial part of the events giving rise to the claims asserted occurred in this district and because Defendants may be found here.

5. Grand Ronde has a right to bring this action under 5 U.S.C. §§ 701-706 because Defendants have engaged in final agency action presenting an actual case or controversy for which Grand Ronde is entitled to relief and because the United States has consented to suit.

THE PARTIES

6. Plaintiff Grand Ronde is a federally recognized Indian tribe with a reservation located in western Oregon.

7. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior ("DOI"). She acts through her designee the Assistant Secretary – Indian Affairs, and is sued in her official capacity.

8. Defendant Kevin K. Washburn is the Assistant Secretary – Indian Affairs of the U.S. Department of the Interior. Assistant Secretary Washburn has responsibility for management of the Bureau of Indian Affairs ("BIA") and is sued in his official capacity.

9. Defendant Stanley M. Speaks is the Regional Director for the BIA's Northwest Region. If the ROD is implemented, he will be authorized to approve the conveyance document accepting the Parcel in trust for the Cowlitz. He is sued in his official capacity.

10. Defendant the U.S. Department of the Interior is an executive department of the United States and is headquartered at 1849 C Street NW, Washington, DC 20240.

FACTUAL BACKGROUND

I. The Present Dispute

11. Grand Ronde, which has more than 5000 members, comprises twenty-seven tribes and bands that have lived in their ancestral homelands in western Oregon, northern California, and southern Washington for more than 12,000 years. Although Grand Ronde's federal recognition was terminated by the Federal Government in 1954, Grand Ronde has remained a cohesive community since then and has worked to recover its lands and rebuild its government. In 1983 Grand Ronde's federal recognition was legislatively restored, and in 1988, 9,811 acres of Grand Ronde's original reservation, which was approximately 60,000 acres, were returned to the Tribe. Grand Ronde is still working to regain its original reservation lands and has recovered approximately 12,000 acres of that land.

12. Grand Ronde currently has a health clinic, an education and cultural facility, social services offices, a governance building, an adult foster care facility, an elder activity center, elder housing, and family housing located on its reservation. Grand Ronde's present-day reservation is located in the heart of the original Grand Ronde reservation.

13. Grand Ronde owns and operates Spirit Mountain Casino on its reservation, approximately 65 miles southwest of Portland, Oregon. The casino is the Tribe's primary source of revenue.

14. Grand Ronde uses Spirit Mountain's revenues to fund tribal services and programs, such as health care, education, housing, per capita, pension, and disability payments, and cultural programs.

15. The Cowlitz Indians live in western Washington. They maintain governmental offices and services in Cowlitz and Lewis Counties, within their aboriginal lands.

16. The Cowlitz were first federally acknowledged by the Secretary pursuant to 25 C.F.R. Part 83 in 2000. 65 Fed. Reg. 8436-01 (Feb. 18, 2000). That determination was challenged by the Quinault Indian Nation, and the acknowledgment was affirmed in 2002. 67 Fed. Reg. 607-01 (Jan. 4, 2002).

17. After their federal acknowledgment, the Cowlitz began seeking to have the Parcel acquired by the federal government and held in trust for the Cowlitz for the purposes of building a casino-resort complex and other facilities on the land.

18. The Parcel is a 151.87-acre plot in Clark County, Washington, near the city of La Center, Washington, west of Interstate 5 (I-5) at the NW 319th Street Interchange.

19. The Cowlitz chose the Parcel's location because it is a prime location for a casino-resort facility, based on its proximity to I-5 and the Portland-Vancouver metropolitan area.

20. The Parcel is approximately 25 miles from the Cowlitz administrative offices, located in Longview, Washington, and 50 miles away from tribal Housing and the Cowlitz Elders Program and Senior Nutrition Center, located in Toledo, Washington.

21. The Cowlitz's planned casino-resort complex on the Parcel includes: 134,150 square feet of gaming floor (3,000 video lottery terminals, 135 gaming tables, 20 poker tables); 355,355 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multi-purpose space; an 8-story, 250-room hotel; and 7,250 parking spaces. The building footprint of the casino-resort facility would be almost 800,000 square feet.

22. The Cowlitz's plans for the Parcel also include a 20,000 square foot Tribal government office building, a 12,000 square foot cultural center, and approximately 16 elder housing units.

23. In January 2002, the Cowlitz submitted an application to the Secretary to have the Parcel taken into trust for the Cowlitz. A second amended application was submitted in June 2006.

24. In 2005, the Cowlitz submitted a site-specific Class II tribal gaming ordinance, along with a request for a "restored lands" opinion, to the National Indian Gaming Commission ("NIGC"). (A trust acquisition that constitutes a "restoration of lands" to a tribe restored to federal recognition qualifies for one of the limited exceptions to IGRA's prohibition of gaming on Indian lands acquired after 1988.) In order to meet the prerequisites for a restored lands opinion, the Cowlitz asserted in substance that they were unrecognized and not under federal jurisdiction from the early 1900s through 2002. See 25 C.F.R. § 292.7 (tribe must have lost its government-to-government relationship to qualify for the restored lands exception).

25. In 2005, NIGC issued the requested restored lands opinion, which—accepting the Cowlitz's assertions—found in substance that the Cowlitz were neither recognized nor under federal jurisdiction throughout the Twentieth Century (including in 1934). The opinion concluded that the Cowlitz were therefore eligible for gaming under the restored lands exception of IGRA. That opinion formed the basis for NIGC's approval of the Cowlitz's gaming ordinance.

26. As required by the National Environmental Policy Act, the Secretary published a Notice of Intent in the Federal Register in November 2004, announcing the BIA's intent to prepare an Environmental Impact Statement ("EIS") evaluating the Cowlitz's proposed fee-to-trust transfer and inviting public comments. 69 Fed. Reg. 65,477 (Nov. 12, 2004). The draft EIS was distributed to federal, tribal, state, and local agencies, and made available to other interested parties in April 2006. See 71 Fed. Reg. 18767 (Apr. 12, 2006). The BIA then held public

hearings and received comments on the draft. After reviewing these comments, the agency revised its draft and published a Final EIS on May 30, 2008, which identified development of the proposed Cowlitz casino as the report's "Preferred Alternative." See 73 Fed. Reg. 31143 (May 30, 2008).

II. Prior Proceedings In This Case

27. On December 17, 2010, the Secretary, acting through the Assistant Secretary – Indian Affairs, issued its first ROD ("the 2010 ROD") on the Cowlitz's fee-to-trust application. The 2010 ROD announced the Secretary's decision to take trust title to the Cowlitz Parcel, proclaim the land a reservation for the Cowlitz, and declare the land to be eligible for gaming.

28. On February 1, 2011, Grand Ronde filed a Complaint in this Court challenging the 2010 ROD and seeking declaratory and injunctive relief. Civ. No. 11-00284 (Dkt. No. 1).

29. On June 20, 2012, Grand Ronde filed a motion for summary judgment. Dkt. No. 45.

30. On July 19, 2012, the government filed a motion seeking voluntary remand for the agency to consider documents that it had failed to review when it issued the 2010 ROD. Dkt. No. 48.

31. This Court denied the government's remand motion. Dkt. No. 56. Instead, it extended the deadline for Defendants' summary-judgment motions, stating that, "[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." *Id.* at 3.

32. On October 1, 2012, the government submitted to the Court a "Notice of Filing Supplemental ROD" (Dkt. No. 57) along with a "Revised Initial Reservation Opinion for the Cowlitz Indian Tribe"—a 24-page memorandum from the Associate Solicitor outlining the

Associate Solicitor's belief that the Cowlitz parcel would qualify for IGRA's "initial reservation" exception. Dkt. No. 57-2.

33. On October 5, 2010, the Federal Defendants filed their cross-motions for summary judgment. Dkt. Nos. 61-62. With respect to the initial-reservation issue, Defendants' briefs focused exclusively on the new justifications set forth in the agency's 2012 Revised Initial Reservation Opinion.

34. On October 16, 2012, Grand Ronde filed a Motion to Strike Federal Defendants' Supplemental Record of Decision and Revised Initial Reservation Opinion. Dkt. No. 67. Grand Ronde argued that the agency's *ex post* supplementation of the administrative record violated the Administrative Procedure Act.

35. On March 13, 2013, this Court issued an Order remanding the action to the agency. Dkt. No. 83. The Court stated that "[i]t is black letter law that the record to be considered by this Court consists of the administrative record compiled by the agency *in advance of litigation*, not any record thereafter constructed in the reviewing court." *Id.* at 11 (internal quotation marks omitted). The Court therefore held that "the Federal Defendants did not have the authority to supplement the 2010 ROD with the 2012 Revised Initial Reservation Decision." *Id.* at 10. The Court remanded the action to the agency "with instructions to rescind the 2010 ROD," and ordered the agency "to issue a new decision of record within sixty" days of its Order. *Id.* at 12.

III. The Decision Below

36. On April 22, 2013, the Secretary, acting through the Assistant Secretary – Indian Affairs, issued a new ROD—the agency action challenged in this Complaint. The ROD

announced the Secretary's decision to take trust title to the Cowlitz Parcel, proclaim the land a reservation for the Cowlitz, and declare the land to be eligible for gaming.

37. The Secretary explained that her authority to take trust title to the Parcel arises from Section 5 of the Indian Reorganization Act ("IRA"), which provides that the Secretary may take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465; see also 25 C.F.R. Part 151 (regulations governing the Secretary's authority pursuant to the IRA). The term "Indian" is defined by the IRA as "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction." 25 U.S.C. § 479. As the Secretary acknowledged, the United States Supreme Court held in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), that the phrase "now under federal jurisdiction" means that the Secretary may take land in trust only for those Indian tribes that were under federal jurisdiction when the IRA was enacted in 1934.

38. Relying on a concurring opinion in *Carcieri*, the Secretary construed "recognized" and "under federal jurisdiction" as "necessitating separate inquiries." ROD at 81 n.16. With respect to the "recognized" requirement, the Secretary stated that "the date of federal recognition did not affect the Secretary's authority under the IRA" because the term "now" modifies the phrase "under federal jurisdiction" but not the phrase "recognized Indian tribe." *Id.* at 89. Applying that interpretation, the Secretary concluded that the federal acknowledgment of the Cowlitz *in January 2002* constitutes "recognition" of the Cowlitz within the meaning of the IRA. *Ibid.* In light of her determination that a recognition as recent as 2002 suffices under the IRA, the Secretary declined to "reach the precise meaning of 'recognized Indian tribe' as used in the IRA" or to "ascertain whether the Cowlitz Tribe was recognized by the Federal Government in the formal sense in 1934." *Id.* at 88. The Secretary nevertheless stated that, in her view, the

word "recognized" in the IRA connotes "cognitive" or "quasi-anthropological" recognition and did not require recognition in any political or jurisdictional sense. *Id.* at 87, 88.

39. With respect to the "under federal jurisdiction" requirement, the Secretary stated, first, that treaty negotiations between the United States and the Lower Cowlitz in 1855 constituted "sufficient evidence of federal jurisdiction as of at least 1855," notwithstanding the fact that those negotiations failed to culminate in any treaty. ROD at 97. The Secretary then addressed whether the Cowlitz *remained* under federal jurisdiction in 1934, concluding that there was "no clear evidence" that the Cowlitz's jurisdictional status was "terminated" or lost after the failed treaty negotiations. *Id* at 98. The Secretary pointed to disparate federal government contacts with individual Cowlitz Indians as additional evidence that the Cowlitz remained "under federal jurisdiction" in 1934. For example, the Secretary noted that the Federal Government provided for certain "medical needs" of individual Cowlitz Indians, authorized expenditures for "goods at a local store" on behalf of individual Cowlitz Indians, and allotted land to individual Cowlitz Indians in the late nineteenth and early twentieth centuries. ROD at 99, 101.

40. The Secretary acknowledged that a DOI official stated in 1910 that the Cowlitz "have never had any recognition at the hands of the Government"; that the Secretary of the Interior and other DOI officials stated in 1924 that the Cowlitz were "scattered" and "without any tribal organization"; and that the BIA commissioner stated in 1933 that the Cowlitz were "no longer in existence." ROD at 100, 101 n.128. The Secretary dismissed those contemporaneous statements, however, on the ground that they were inconsistent with the DOI's 2002 finding that the Cowlitz were "identified" as an American Indian "entity" for purposes of federal acknowledgment under 25 C.F.R. Part 83. ROD at 99 n.115, 100, 101 n.128. Although the Secretary also acknowledged the Cowlitz's assertion (in seeking a restored lands opinion) that

there in fact existed no "government-to-government relationship" between the Cowlitz and the federal government in 1934 (and throughout the Twentieth Century), she stated that the lack of such a relationship had no bearing on the question whether the Cowlitz were "under federal jurisdiction" in 1934 or whether the Cowlitz were "recognized" in the "cognitive" sense. *Id.* at 104, 106.

41. Addressing the other requirements set forth in 25 C.F.R. Part 151—the regulations governing the Secretary's authority to take land in trust under the IRA—the Secretary reiterated that the Cowlitz needed the Parcel because their "government-to-government relationship with the United States had been terminated." ROD at 106. She also stated that satisfying the Cowlitz's unmet needs "hinge[s]" on the development of a resort and casino on the land, and observed that the Parcel was "not too distant" from the Cowlitz's current headquarters or from a site the Federal Government briefly considered reserving for the Cowlitz in 1854. *Id.* at 107, 111.

42. The Secretary next explained her decision to issue a reservation proclamation pursuant to the requirements set forth in the BIA Guidelines for Proclamations. Although the Guidelines state that a proclamation request "cannot be initiated" until the BIA has granted trust status to the land in question and has received a copy of the document transferring trust title, the Secretary acceded to the Cowlitz's request to render a decision on the reservation proclamation "concurrently with the decision on the trust acquisition." ROD at 113. Next, in response to the Guidelines' requirement that the Secretary consider whether the trust land is "within the tribe's aboriginal territory, as defined by the Indian Claims Commission," the Secretary noted that the Parcel is "a short distance" from the land for which the Indian Claims Commission ("ICC")

awarded compensation to the Cowlitz, and stated that the Cowlitz historically had a "significant historical presence . . . in the area in which the Cowlitz Parcel is located." *Id.* at 115.

43. The Secretary then turned to the Cowlitz's request that she authorize gaming on the Parcel. As the Secretary explained, IGRA generally prohibits gaming on lands acquired in trust after 1988. The Secretary concluded, however, that the Parcel—which would be acquired well after 1988—was eligible for gaming under IGRA's "initial reservation" exception. See 20 U.S.C. § 2719 (b)(1)(B)(ii). The implementing regulations of IGRA, 25 C.F.R. § 292.6, provide that, to qualify for the "initial reservation" exception, a tribe must have "significant historical connections" to the land on which gaming will take place. In support of her determination that the Cowlitz satisfied that requirement, the Secretary cited largely conjectural evidence that Cowlitz Indians historically passed within miles of the Parcel on their way to other places, that Cowlitz Indians had been sighted in three isolated instances within several miles of the Parcel, and that individual Cowlitz members lived in the same county as the Parcel in the late 1800s and early 1900s. ROD at 127-135.

44. Last, the Secretary addressed the Final Environmental Impact Statement ("FEIS") prepared by the BIA to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* Environmental Impact Statements must "provide [a] full and fair discussion of significant impacts" associated with a federal decision, 40 C.F.R. § 1502.1, including its potential socioeconomic effects, *id.* §§ 1508.8, 1508.14; consider "the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment," *id.* § 1502.1; and discuss "appropriate mitigation measures" that would ameliorate the adverse effects of the proposed action, *id.* §§ 1502.14(f); 1502.16(h). The Secretary

concluded that acquiring trust title to the Parcel and authorizing its development into a resort and casino complex is the Preferred Alternative.

45. In reaching that conclusion, the Secretary acknowledged that the BIA erred in its estimate of the economic effect that development of a casino on the Cowlitz Parcel would have on Grand Ronde's Spirit Mountain Casino, but dismissed the significance of the negative impact on the Grand Ronde on the ground that it is unlikely that "Spirit Mountain will experience a long-term revenue decrease due to the introduction of a new Portland market casino." ROD at 48. The Secretary further concluded, based on an assumption that Grand Ronde allocates 33% of net income from Spirit Mountain as per-capita payments to tribal members, that a reduction in revenue at Spirit Mountain would "not affect the ability of [Grand Ronde] to operate essential programs." *Ibid*.

46. In support of the FEIS's determination that the proposed casino is necessary to meet the Cowlitz's needs, the Secretary stated that the BIA "relies" on the Cowlitz's Business Plan and Unmet Needs Report and "believes that the Cowlitz Tribe accurately has reported the cost of and need for Tribal programs." ROD at 32.

47. After the Court's decision remanding the action to the agency, the BIA "undertook a review of the Final EIS and completed a Final EIS Evaluation of Adequacy on April 11, 2013, to determine if a supplemental EIS was required pursuant to NEPA." ROD at 5. The Department concluded that "the conclusions and mitigation measures set forth in the Final EIS remain applicable to the Tribe's proposed project and that no supplement is required." *Ibid.*

48. The DOI published its Notice of Final Agency Determination in the Federal Register on May 8, 2013. 78 Fed. Reg. 26802-01 (May 8, 2013).

IV. Taking the Cowlitz Parcel In Trust, Proclaiming A Reservation, And Authorizing Gaming Would Significantly Harm Grand Ronde

49. The ROD constitutes a final agency determination to acquire approximately 151.87 acres of land into trust for the Cowlitz and to proclaim a reservation for the Cowlitz. The ROD also constitutes final agency authorization for the Cowlitz to build a casino on the Parcel pursuant to IGRA. Because the Department of the Interior published its Notice of Final Agency Determination in the Federal Register on May 8, 2013, see 78 Fed. Reg. 26802-01 (May 8, 2013), the ROD authorizes the Secretary to take trust title to the land on or after June 7, 2013, see 25 CFR part 151.12(b).

50. There is no dispute that, if the Secretary's decision is allowed to stand, the Cowlitz will build and operate a casino on the Parcel. The Cowlitz's gaming ordinance was approved by NIGC, and the Secretary has declared that the Cowlitz Parcel falls within the "initial reservation" exception to IGRA. As the Notice of Final Agency Determination unequivocally states, the Parcel "*will* be used for gaming." 78 Fed. Reg. 26802-01 (emphasis added).

51. The Secretary's decision will cause significant harm to Grand Ronde. Grand Ronde is a tribal government responsible for providing its members essential services such as public safety, public works projects, health care, education, employment, and housing. It relies on revenues from Spirit Mountain to provide all those services. Revenues from Spirit Mountain also support Grand Ronde's monitoring and protection of its tribal cultural resources and its wildlife protection and conservation efforts on tribal lands. In addition, Grand Ronde provides tribal members per capita, pension, disability, and supplemental social security payments, all of which similarly depend on Spirit Mountain revenue. Those payments themselves constitute an essential government service, particularly for those tribal members who lack access to government services that are provided only on Grand Ronde's reservation.

52. All of those crucial government services would be directly, immediately, and significantly impaired by the certain and substantial loss of revenue that would result from establishing a casino on the Cowlitz Parcel. Nearly half of Spirit Mountain's revenues comes from visitors from the Portland metropolitan area, a market that the Cowlitz casino would also serve. Economic analyses show that the establishment of a casino on the Cowlitz Parcel would reduce revenues at Spirit Mountain by more than $100 million in 2011 alone—a decrease of more than 41% from current yearly revenues. By authorizing gaming on the Cowlitz parcel, the Secretary's decision will substantially eviscerate the revenues generated by Grand Ronde's Spirit Mountain Casino.

53. U.S. Census and other data show that Grand Ronde tribal members have a relatively low median household income, a high percentage of families in poverty, and a high unemployment rate. Indeed, by each of those measures, Grand Ronde tribal members are worse off than the Cowlitz at present. Establishing a casino on the Cowlitz Parcel will only exacerbate that disparity.

54. Grand Ronde is one of the largest employers in Polk and Yamhill Counties, Oregon, providing much-needed jobs for tribal members as well as nonmembers from the local community. In addition to providing such jobs, Spirit Mountain and its employees support numerous local businesses. Establishment of a casino on the Parcel would cause a significant loss of jobs at Spirit Mountain and be detrimental to the surrounding community.

55. Spirit Mountain has been crucial to Grand Ronde's efforts to reverse the devastating impacts of the Allotment era and Grand Ronde's termination. For example, jobs at Spirit Mountain and services provided by Spirit Mountain revenue have helped to buy back reservation land, draw displaced tribal members back to their aboriginal homeland, reduce

reliance by those members on state and federal assistance, and enable the tribal government to provide crucial services to its members. Contrary to the purposes of the IRA and IGRA, the Secretary's decision therefore threatens the tribal self-sufficiency, self-governance, and self-determination of Grand Ronde.

56. Grand Ronde has cultural and historical connections to the north shore of the Columbia River, including Clark County. Indeed, that historical connection has been expressly recognized by treaty since 1855. Grand Ronde also considers Clark County, Washington, part of its Non-Treaty Homelands and Cultural Interest Lands, and Grand Ronde tribal members are buried on the north side of the Columbia River. Establishment of a reservation for the Cowlitz outside their aboriginal lands—and on lands to which Grand Ronde, by contrast, *has* a significant connection—would cause further injury to Grand Ronde.

COUNT I

(Declaratory and Injunctive Relief – Acquisition of Land in Violation of the Indian Reorganization Act)

57. Each of the foregoing allegations is incorporated herein by reference.

58. The Secretary lacked authority under the IRA to take trust title to the Cowlitz Parcel. Because the Cowlitz are not a "recognized Indian tribe now under Federal jurisdiction," within the meaning of 25 U.S.C. § 479, the Secretary's decision to take trust title to the Parcel was arbitrary, capricious, contrary to law, and in excess of her statutory authority under 5 U.S.C. § 706(2).

59. By defining "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction," 25 U.S.C. § 479, the IRA sets a crucial limitation on the Secretary's authority to take land in trust for Indians. As the Supreme Court held in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), the Secretary may take land in trust only for

those Indian tribes that were "under federal jurisdiction" when the IRA was enacted in 1934. By parity of reasoning, the IRA likewise requires that the Indian tribe was "recognized" in 1934.

60. None of the evidence relied upon by the Secretary in the ROD demonstrates that the Cowlitz were either "recognized" or "under federal jurisdiction" in 1934 as required by the IRA. There was no ongoing government-to-government relationship between the United States and the Cowlitz as a group or tribe or any assertion of authority by the United States over the Cowlitz. Any intermittent contact that might have occurred between the Federal Government and individual Indians of Cowlitz descent is insufficient to constitute recognition of the Cowlitz as an Indian tribe or demonstrate that the Cowlitz were under federal jurisdiction in 1934.

61. The United States did not recognize the Cowlitz from at least the late Nineteenth Century until 2002, when the Cowlitz first obtained recognition through the federal acknowledgment procedure set forth in 25 C.F.R. Part 83. Accordingly, the Cowlitz fail to meet the "recognized" requirement of the IRA.

62. The Cowlitz likewise fail to meet the "under federal jurisdiction" requirement of the statute. Although the United States attempted to negotiate a treaty with the Cowlitz in 1855, those negotiations ultimately failed. As of 1934, neither of the Cowlitz bands was granted a reservation, and no treaty was ever formed between either band and the Federal Government.

63. Indeed, to the extent that the Cowlitz were recognized or under federal jurisdiction at all, the Cowlitz plainly lost any such recognition or jurisdictional status prior to 1934. As the Secretary of the Interior himself noted in 1924, the Cowlitz were geographically dispersed and lacked any tribal organization whatsoever as of that date. The BIA has also concluded that as of 1933—the year before the IRA was enacted—the Cowlitz had no existence as a communal entity and were not under Federal Government control. Those determinations—

which the BIA has reiterated on multiple occasions—demonstrate that the Cowlitz were not recognized or under federal jurisdiction when the IRA was enacted in 1934.

64. What is more, the Cowlitz themselves have repeatedly asserted in filings with multiple governmental agencies that the United States lacked any government-to-government relationship with the Cowlitz and that the Cowlitz were administratively terminated by the U.S. government prior to 1934. Indeed, precisely by advancing that position, the Cowlitz secured approval of their gaming ordinance from NIGC. In particular, in its 2005 Restored Lands Opinion, NIGC expressly concluded that the Cowlitz were unrecognized in 1934. NIGC Op. at 7-8.

65. In addition, the Secretary's decision to take trust title to the Cowlitz Parcel and declare a reservation is arbitrary and capricious and contrary to law because it fails to adhere to the procedural and substantive requirements set forth in 25 CFR Part 151 and in the BIA's Guidelines for Proclamations. The Secretary did not properly analyze the Cowlitz's need for the acquisition or the distance of the Parcel from the Cowlitz's historical lands—both of which are required considerations under 25 CFR Part 151. Further, the Secretary violated the Guidelines for Proclamations by proclaiming a reservation on land that had not been transferred into trust status, and by disregarding the fact that the Parcel is not located within the Cowlitz's aboriginal territory.

COUNT II

(Declaratory and Injunctive Relief – Approval of Gaming in Violation of the Indian Gaming Regulatory Act)

66. Each of the foregoing allegations is incorporated herein by reference.

67. IGRA and its implementing regulations place strict limits on use of Indian lands for gaming, especially on land acquired by the Secretary in trust for an Indian tribe after the

enactment of the statute in 1988. Recently acquired land cannot qualify for gaming under IGRA's "initial reservation" exception unless a tribe demonstrates "significant historical connections" to the land in question. 25 C.F.R. § 292.6.

68. The Secretary erroneously concluded that the Cowlitz have significant historical connections to the Parcel sufficient to satisfy the "initial reservation" exception.

69. The evidence on which the Secretary relied for her conclusion that the Cowlitz have significant historical connections to the Parcel does not demonstrate that the Cowlitz ever had or maintained significant historical connections to the Parcel.

70. In fact, as determined by the ICC, the southernmost area of the Cowlitz's aboriginal land is at least 14 miles north of the Parcel. The ICC concluded that the Cowlitz did *not* have a valid claim to the land along the Lewis River, including the land on which the Parcel sits. See *Plamondon v. United States*, 21 Ind. Cl. Comm. 143 (1969).

71. Historically, the land on which the Parcel sits was exclusively occupied by other Indian tribes. The ICC concluded that "virtually all of the contemporary as well as the historical and anthropological reports have identified the aborigines on the Lewis River [the river closest to the Parcel] as belonging to other tribal groups." *Plamondon*, 21 Ind. Cl. Comm. at 146.

72. The Secretary relied heavily on the location of the Cowlitz's "exclusive use and occupancy" land, as adjudicated by the ICC, despite the fact that the southern boundary of that land is *fourteen miles away* from the Parcel. In the relevant historical time periods, and in the relevant geographical area, such distances would have been difficult to travel. Use of land so removed from the Parcel cannot support the Secretary's finding.

73. The 2005 NIGC Restored Lands Opinion, which concluded that the Cowlitz maintained a sufficient historical connection to the Parcel land to satisfy the "restored lands"

exception, expressly acknowledged that the Parcel itself was not "historically important" to the Cowlitz. NIGC Op. at 10, 11.

74. Furthermore, many of the facts relied upon by the Secretary are inaccurate and based upon misreadings of the historical evidence or on unreliable documentation. Nonetheless, even if those facts were accurate, they would not establish a "significant historical connection" to the Parcel. At most, they would establish transient and intermittent contact with the Parcel.

75. The ROD does not show that the Cowlitz ever lived on, subsisted on, or otherwise occupied the Cowlitz Parcel.

76. Nor does the evidence in the record "lead to the natural inference" that the Cowlitz ever used the Parcel, as required by the prior agency authority on which the Secretary purports to rely.

77. The ROD fails to explain the agency's departure from recent agency decisions that are directly contrary to the agency's decision in this case.

78. In short, the evidence relied on in the ROD, taken as a whole, does not show that the Cowlitz have "significant historical connections" to the Parcel. To the contrary, the evidence of record conclusively proves just the opposite.

79. The Secretary's decision that the Cowlitz Parcel qualifies for IGRA's "initial reservation" exception is arbitrary and capricious and contrary to law.

COUNT III

(Declaratory and Injunctive Relief – Approval of Fee-To-Trust Application in Violation of the National Environmental Policy Act)

80. Each of the foregoing allegations is incorporated herein by reference.

81. The FEIS on which the Secretary relies violates NEPA's substantive and procedural requirements governing consideration of the environmental effects of a major federal

action. The FEIS fails to accurately assess the impacts of the proposed action, including socio-economic impacts, meaningfully consider alternative actions, and properly evaluate mitigation measures, as required by NEPA and its implementing regulations. See, *e.g.*, 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500.1(b), 1502.1, 1502.14(f), 1502.16(h).

82. The FEIS relies on untimely and prejudicial modifications of its "Purpose and Need" section, which were used to justify the Preferred Alternative and eliminate viable alternatives. The elimination of viable alternatives was prejudicial to the interests of Grand Ronde, because development of a Cowlitz casino at the alternative locations would cause Grand Ronde far fewer adverse effects than will development of a casino on the selected Parcel.

83. In response to public concern that the draft EIS's "Purpose and Need" section failed to adequately describe the Cowlitz's need for the proposed project in its final report, the BIA added to that section a statement that the Cowlitz had unmet financial needs of over $113 million. FEIS 1-6. That figure was derived directly from the Cowlitz Tribal Business Plan, which the BIA appended to the FEIS. FEIS App. Vol. VII.E. The BIA also made the ability to satisfy that supposed need "the predominant criterion of the Proposed Action." FEIS Vol. IV.C-131 (Response #434-10).

84. The BIA's last-minute inclusion of the Cowlitz's unmet-needs assertion in the FEIS denied interested agencies and the public the opportunity to comment on either the suitability of tying the proposed project's purpose and need to a specific dollar amount or the reasonableness of that amount. Having failed to make such commentary possible, the BIA therefore was unable to respond to comments in the FEIS, see 40 C.F.R. § 1503.4, or discuss "any opposing view which was not adequately discussed in the draft statement," see *id.* § 1503.9(b).

85. Those errors are especially problematic because the unmet-needs estimate significantly overstates the costs of many or all of the Cowlitz's desired programs and services, and the FEIS utterly fails to present any independent or objective analysis of that inflated figure. Addition of this figure also had the effect of removing several alternative development locations from serious consideration by the BIA, because the BIA determined that the alternatives would not "adequately meet the economic objectives and needs of the Tribal government." FEIS 2-36 to 2-40. Each of the eliminated alternatives, if selected, would have had substantially less adverse effect on Grand Ronde.

86. As the Secretary has acknowledged, ROD at 48, the FEIS also erred in its vast underestimation of the adverse impact of the proposed Cowlitz casino on the Grand Ronde. That error caused the BIA to fail to address measures necessary to mitigate the adverse effects of the Cowlitz casino project, as required by NEPA. See 40 C.F.R. §§ 1502.14(f), 1502.16(h).

87. Relying on inaccurate and non-representative market data, rather than *actual* Spirit Mountain revenue, the FEIS estimated Spirit Mountain's 2005 revenue to be $130,689,375, an amount nearly 30 percent lower than Spirit Mountain's actual 2005 revenue of $184,595,967. FEIS App. Vol. VII.L 19. The FEIS then compared that erroneous 2005 estimate to a projection of Spirit Mountain's 2011 revenue ($113,504,847), which, the FEIS asserted, accounted for losses due to the opening of the Cowlitz casino. FEIS App. Vol. VII.L 24. From this comparison, the FEIS concluded that opening of the Cowlitz casino would cause only a $17,184,528, or 13.15 percent, decrease in 2011 Spirit Mountain revenue. FEIS App. Vol. VII.L 24; FEIS 4.7-5.

88. That analysis failed to incorporate the FEIS's own conclusion that Spirit Mountain revenue will grow 5 percent annually, reaching $166,900,000 in 2011. FEIS App.

Vol. VII.L 20. It also inexplicably compared Spirit Mountain's projected *2011* revenue to the facility's estimated *2005* revenue. Had the FEIS instead compared Spirit Mountain's projected 2011 revenue to an amount that incorporated the casino's anticipated annual revenue growth, it would have forecasted a much larger—$53,395,153, or nearly 32 percent—decline in Spirit Mountain's revenue as a result of the proposed Cowlitz development.

89. After receiving comments from the Grand Ronde explaining that the FEIS's analysis was severely flawed, the BIA made several corrections to its initial figures—and yet still grossly underestimated the negative impact the proposed Cowlitz casino would have on the Grand Ronde. For example, rather than accepting Grand Ronde's financial projections, the Secretary parsed Grand Ronde's revenue data, insisting that Spirit Mountain would suffer only a 25.9 percent reduction in gross revenue in 2011. ROD at 48. The Secretary then concluded that this loss would not impair essential tribal programs, because it could be offset by reductions in per-capita payments to tribe members. *Ibid.*

90. Aside from the incorrect calculation, that conclusion completely ignores the fact that per-capita payments *are* essential tribal services, especially for a restored tribe like Grand Ronde whose membership is widely dispersed outside of Grand Ronde. Without them, demand for social service programs on and off the reservation would skyrocket, and the Tribe easily could be rendered unable, for example, to provide the level of health care services that the Secretary himself recognized as a "priority" when justifying her decision to accept, without question, the Cowlitz's unmet-needs estimate. ROD at 32.

91. The agency also failed to adequately take into account various economic, social, political, and environmental changes that have occurred since the Cowlitz's unmet-needs

estimate was submitted in 2006 and the FEIS was published in 2008. At a minimum, those significant changes require the agency to prepare a revised or supplemental EIS.

92. The agency's "Final EIS Evaluation of Adequacy" is no substitute for a new EIS and rests on speculative and unsupported assertions regarding the economic, social, political, and environmental changes that have occurred since the original FEIS was published in 2008. For example, although the "Evaluation of Adequacy" suggests that Spirit Mountain Casino has seen strong revenue growth since 2008, total revenues at the casino have actually decreased since that time.

93. The FEIS is fundamentally flawed and does not comply with NEPA or its implementing regulations. The Secretary's reliance on that report, and her own erroneous analysis of the impact of the proposed action on Grand Ronde, render her final decision arbitrary and capricious and contrary to law. The Secretary's decision not to prepare a revised or supplemental EIS is also arbitrary and capricious. The Secretary's decision, moreover, reflects an inadequate effort to balance the BIA's trust responsibility to the Cowlitz with its trust responsibility to Grand Ronde. See, *e.g.*, *United States v. Mitchell*, 463 U.S. 206, 226 (1983).

REQUESTED RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment as follows:

94. Declaring that the Secretary's decision to take trust title to the Cowlitz Parcel and to proclaim a reservation for the Cowlitz violates the IRA and associated regulations, and ordering the Secretary to set aside her approval of the Cowlitz's fee-to-trust application and her reservation proclamation.

95. Declaring that the Cowlitz Parcel cannot be used to conduct gaming operations and issuing an order enjoining the Secretary from approving gaming on the Cowlitz Parcel.

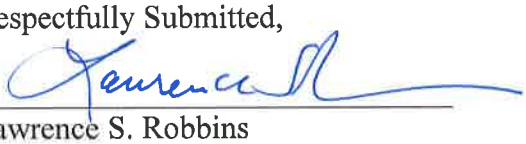
96. Declaring that the BIA failed to comply with NEPA's requirements and that the Secretary's reliance on the FEIS was arbitrary and capricious and contrary to law, and ordering the Secretary to comply with NEPA by preparing a new or supplemental EIS consistent with NEPA's requirements.

97. Awarding Plaintiff costs, attorneys' fees, and other expenses of this litigation.

98. Providing any such other relief that the Court may deem proper.

Dated: June 6, 2013

Respectfully Submitted,



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