Record of Decision

Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe

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Action: Record of Decision for the Trust Acquisition of, and Reservation Proclamation for the 151.87-acre La Center Interchange Site in Clark County, Washington, for the Cowlitz Indian Tribe

Summary: On January 4, 2002, the Cowlitz Indian Tribe (Tribe) was federally recognized through the BIA's administrative acknowledgment process. On that same date, the Tribe, which is landless, submitted a fee-to-trust application to the Bureau of Indian Affairs (BIA), requesting that the Department of the Interior accept trust title to land totaling 151.87 acres in Clark County, Washington (the "Cowlitz Parcel"). The Tribe requested that the Cowlitz Parcel be proclaimed its "initial reservation", and plans to construct Tribal government buildings, Tribal elder housing, a Tribal cultural center, a casino-resort complex, parking facilities, a recreational vehicle park, and a wastewater treatment plant. The Proposed Action (the Tribe's proposed trust acquisition and reservation proclamation) was analyzed as Alternative A in an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act (NEPA), under the direction and supervision of the BIA Northwest Regional Office. The Draft EIS was issued for public review and comment on April 12, 2006. After an extended comment period, two public hearings, and consideration and incorporation of comments received on the Draft EIS, BIA issued the final EIS on May 30, 2008. The Draft and Final EIS considered a reasonable range of alternatives that would meet the purpose and need for the proposal, and analyzed the potential effects of those alternatives, as well as feasible mitigation measures.

With the issuance of this Record of Decision (ROD), the Department announces that the action to be implemented is the Preferred Alternative (Alternative A in the FEIS), which includes acquisition in trust of the 151.87-acre Cowlitz Parcel, proclamation of the parcel as the Cowlitz Indian Tribe's reservation, and construction of Tribal government headquarters, Tribal elder housing, a Tribal cultural center and a gaming-resort complex including a 134,150 square foot casino, 250-room hotel, recreational vehicle park, parking facilities, and a wastewater treatment plant. The Department has determined that this Preferred Alternative will best meet the purpose and need for the Proposed Action, in promoting the long-term economic self-sufficiency, self-determination and self-governance of the Cowlitz Tribe. Implementing this action will provide the Tribe with a long-deferred reservation land base and the best opportunity for attracting and maintaining a significant, stable, long-term source of governmental revenue, and accordingly, the best prospects for maintaining and expanding tribal governmental programs to provide a wide range of health, education, housing, social, cultural, environmental and other programs, as well as employment and career development opportunities for its

members. The Department has considered potential effects to the environment, including potential impacts to local governments and other tribes, has adopted all practicable means to avoid or minimize environmental harm, and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD. The Department also has determined that the Cowlitz Parcel is eligible for gaming because it qualifies as the Tribe's "initial reservation" under Section 20 of the Indian Gaming Regulatory Act.

The decision is based on thorough review and consideration of the Tribe's fee-to-trust application, the Tribe's request for a reservation proclamation, and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of trust title to land, issuance of reservation proclamations, and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public; federal, state and local governmental agencies; and potentially affected Indian tribes.

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1.0 INTRODUCTION

1.1 SUMMARY

On January 4, 2002, the Cowlitz Indian Tribe (Tribe) was federally recognized through the BIA's administrative acknowledgement process. On that same date, the Tribe, which is landless, submitted a fee-to-trust application to the Bureau of Indian Affairs (BIA), requesting that the Department of the Interior accept trust title to land totaling 151.87 acres in Clark County, Washington (the "Cowlitz Parcel"). The tribe requested that this parcel be proclaimed its "initial reservation", and plans to construct Tribal government buildings, Tribal elder housing, a Tribal cultural center, a casino-resort complex, parking facilities, a recreational vehicle park, and a wastewater treatment plant[1].

The proposed trust acquisition and reservation proclamation for the 151.87-acre Cowlitz Parcel was analyzed in an Environmental Impact Statement (EIS) prepared by the BIA. The Draft EIS, issued for public review on April 12, 2006 and the Final EIS, issued May 30, 2008, considered various alternatives to meet the stated purpose and need and analyzed in detail potential effects of various reasonable alternatives. With the issuance of this Record Of Decision (ROD), the Department has determined that Alternative A, consisting of the acquisition of trust title to the 151.87-acre site, construction of Tribal Governmental facilities, Tribal housing, Tribal cultural center, an approximately 134,150 square foot casino, a 250-room hotel, a 85,000 square foot convention facility, and ancillary infrastructure, is the Preferred Alternative to be implemented. The Department has determined that the Preferred Alternative would best fit the purpose and need for the Proposed Action. The Department also has determined that under Section 20 of IGRA, the Tribe may game on the Cowlitz Parcel, once held in trust, because it will qualify as the Tribe's "initial reservation" when the requested reservation proclamation has been issued by the Department. The Department's decision to acquire trust title to the Cowlitz Parcel and to proclaim it as the Tribe's reservation, and the Department's determination that the Parcel is eligible for gaming is based on thorough review and consideration of the Tribe's fee-to-trust application and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of trust title to land, reservation proclamations, and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public; federal, state and local governmental agencies; and potentially affected Indian tribes.

1.2 DESCRIPTION OF THE PROPOSED ACTION

Under the Proposed Action, the BIA would accept into trust the 151.87-acre Cowlitz parcel for the Cowlitz Indian Tribe, and proclaim it to be the Tribe's reservation[2]. On the parcel, the Tribe proposes to develop Tribal governmental facilities, Tribal elder housing, a Tribal

[1] Amended fee-to-trust applications were later submitted by the Tribe on March 2, 2004 and again on June 6, 2006 with re-organized information to parallel the organizational structure of the BIA's fee-to-trust regulations in 25 C.F.R. Part 151. The amended applications also requested that the secretary exercise his authority to proclaim the land as the Tribe's "initial reservation" pursuant to the authority in Section 7 of the IRA 25 U.S.C. Section 467 and consistent with Section 20(b)(1)(B)(ii) of IGRA. The Tribe also submitted an amended and reorganized request for a reservation proclamation on August 11, 2006.

[2] A legal description of the Cowlitz Parcel is incorporated by reference from Tab 19 of the Tribe's June 6, 2006 amended fee-to-trust application.

cultural center, a casino, a hotel, a convention facility, an RV park, parking facilities and a wastewater treatment plant.

The Cowlitz Parcel is located west of Interstate 5 (I-5) at the NW 319th Street Interchange. Tribal facilities would include a 20,000 square foot Tribal government office building, a 12,000 square foot Tribal cultural center, and approximately 16 Tribal elder housing units. The casino-resort complex would include Class III gaming conducted in accordance with the Indian Gaming Regulatory Act ("IGRA") and Tribal-State Compact requirements and would consist of 134,150 square feet of gaming floor (including 3,000 video lottery terminals [VLTs], 135 gaming tables, and 20 poker tables); 355,225 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multi-purpose space (with seating for up to 5,000); and an eight story, 250-room hotel. Approximately 7,250 parking spaces would be provided for the project in surface parking lots and a subterranean parking structure located adjacent to the proposed casino complex.

Under the Proposed Action, NW 319th Street would be rerouted (with the agreement of Clark County) to a more southerly location across the project site to allow for construction of the casino and hotel facilities on the northern portion of the property with minimal impacts on wetlands or wetland buffer areas, thus requiring limited mitigation.

1.3 PURPOSE AND NEED

The purpose of the Proposed Action is to create a federally-protected Tribal land base on which the Cowlitz Indian Tribe can establish and operate a Tribal Government Headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these Tribal Government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient. As a newly recognized, landless Tribe, the Tribe's need for a reservation and land base over which it can exert civil jurisdiction and government powers, as well as a headquarters facility from which it can develop and operate Tribal Government programs, is particularly acute. The Proposed Action would create a reservation base that is centrally located for a significant number of the Tribe's widely dispersed membership, and that is fundamental to the Tribe's ability to establish a stable Tribal Government, perform essential government functions, preserve Tribal culture, and generate Tribal Government revenues that will be used to provide members with housing, health and other social services.

In particular, the Tribe's purpose and needs include providing employment opportunities for Tribal members, creating a long-term, sustainable revenue base and a diversified stable economy that will fund government operations and a variety of Tribal programs that will decrease members' dependence on Federal and State funding, and providing elder members (who are typically those most in need of assistance) with housing near Tribal offices on which they will rely for services. Creation of a reservation for the Tribe is essential to promoting tribal sovereignty because it ensures that the Tribe will have a protected land base within which the Tribe is entitled to exercise its governmental authority. Further, issuance of a reservation proclamation will allow the Tribe and its members to be eligible for a number of federal programs that are limited to Indians living "on or near Indian reservations."

The Proposed Action is consistent with the BIA's mission, as well as the policies underlying the federal statutory authorities in the Indian Reorganization Act and IGRA, and BIA's implementing regulations, of promoting meaningful opportunities for economic development and self-sufficiency of the Tribe and its members, and furthering tribal self-governance and self-determination.

1.4 AUTHORITIES

Section 5 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465, provides the Secretary of the Interior with general authority to acquire land in trust status for Indian tribes in furtherance of the statute's broad goals of promoting Indian self-government and economic self-sufficiency. If a tribe is seeking to acquire landing trust, it must apply to the BIA and comply with the regulations in 25 C.F.R. Part 151, which implement the Secretary's trust acquisition authority in Section of the IRA. Section 7 of the IRA, 25 U.S.C. § 467, authorizes the Secretary to proclaim lands as an Indian reservation, and is implemented pursuant to the BIA's reservation proclamation guidelines. This ROD records the decision by the Department to acquire in trust the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe and to proclaim it a reservation.

IGRA was enacted in 1988 to regulate the conduct of Indian gaming and to promote tribal economic development, self–sufficiency and strong tribal governments. IGRA generally prohibits gaming on lands acquired in trust after 1988, unless certain exceptions found in Section 20, 25 U.S.C. § 2719, are met. Here the relevant exceptions are the "initial reservation" exception in Section 20 (b)(1)(B)(ii), which allows gaming on after-acquired lands if the lands are taken in trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process, 25 U.S.C. 2719 (b)(1)(B)(ii)." The Section 20 exceptions are implemented through regulations found in 25 C.F.R. Part 292. Therefore, Section 20 of IGRA does not provide the Secretary of the Interior with the authority to acquire land in trust; rather, it authorizes gaming on certain after-acquired lands once those lands are acquired into trust. Because the Cowlitz Tribe has requested that the Clark County Parcel be taken in trust for gaming, the Tribe must satisfy one of the IGRA Section 20 exceptions before it may game on the parcel. This ROD records the Department's determination that the Cowlitz Parcel is eligible for gaming under the "initial reservation" exception in IGRA Section 20, 25 U.S.C. § 2719(b)(1)(B)(ii), such that the Tribe may game on the Cowlitz Parcel once it is acquired in trust.

1.5 PROCEDURAL BACKGROUND

The regulations at 25 C.F.R. Part 151 require compliance with the National Environmental Policy Act (NEPA). Accordingly, the BIA published a Notice of Intent ("NOI") in the *Federal Register* on November 12, 2004 (Volume 69 page 65477) describing the Proposed Action, announcing the BIA's intent to prepare an EIS for the Proposed Action, and inviting public and agency comments. The comment period was open until December 13, 2004, and a scoping meeting was held in the City of Vancouver on December 1, 2004. A report outlining the results of scoping was issued in February 2005. The scoping report summarized the major issues and concerns from the comments received during the scoping process. Scoping comments were considered by the BIA in developing the project alternatives and analytical methodologies presented in the EIS. During the NOI comment period the BIA

identified 14 Cooperating Agencies: the National Indian Gaming Commission (NIGC), the Federal Highway Administration (FHA), the U.S. Army Corps of Engineers (USACE), the Washington Department of Transportation (WsDOT), the Cowlitz Indian Tribe, Clark County, the Clark County Sheriff's Office, Cowlitz County, the City of La Center, the City of Vancouver, the City of Ridgefield, the Port of Ridgefield, the City of Woodland, and the City of Battle Ground.

An administrative version of the Draft EIS was circulated to cooperating agencies in October 2005 for review and comment. Comments were taken into consideration and revisions were completed as appropriate prior to public release. In April 2006, the Draft EIS was made available to federal, Tribal, state, and local agencies and other interested parties for review and comment. The Notice of Availability ("NOA") for the Draft EIS (EIS No. 200600122) was published in the *Federal Register* on April 12, 2006 (Volume 71, page 18767), initiating a 90-day public review period. The NOA was additionally published in *The Columbian* which circulated in Clark County on April 14, 2006, and in *The Oregonian,* which circulated in the Portland Metropolitan area on April 17, 2006. The NOA provided information concerning the proposed project, public comment period, and the time and location of public hearings to receive comments from the public concerning the DEIS. Public hearings were held at the Skyview High School Auditorium in Vancouver City, Washington on June 14 and June 15, 2006. In response to public requests, the comment period on the Draft EIS was re-opened on August 4 (*Federal Register* Volume 71, page 44281) and then closed again on August 25, 2006. The total comment period for the Draft EIS lasted the duration of 145 days.

Public and agency comments on the Draft EIS received during the comment period, including those submitted or recorded at the public hearing, were considered in the preparation of the Final EIS. Responses to the comments received were provided in Appendices B and C of the Final EIS and relevant information was revised in the Final EIS as appropriate to address those comments. An administrative version of the Final EIS was circulated to cooperating agencies in March of 2007 for review. All comments received as a result of cooperating agency review were considered, and changes to the Final EIS were made as appropriate. The NOA for the Final EIS (EIS No. 200600122) was published in the *Federal Register* on May 30, 2008 (Volume 73, page 31143). Consistent with the BIA NEPA Handbook, the NOA for the Final EIS was also published in local and regional newspapers, including the *The Columbian* (Clark County) on May 30, 2008 and *The Oregonian* (Portland Metropolitan Area) on May 30, 2008. The 30-day waiting period was formally extended through a publication of a notice in the *Federal Register* on May 30, 2008 (Volume 73, page 39715) and ended on August 11, 2008. A summary of the substantive comments received during this period that were not previously raised and responded to in the EIS process, and BIA's responses to them are included in **Section 3.2** of this ROD. Responses to each agency comment letter (10) and 25 comment letters which BIA considers representative of the majority of comments received on the Final EIS are provided in the Supplemental Response to Comments document, included as Section 2.0 of the BIA's Decision Package for the Proposed Action.

2.0 ANALYSIS OF ALTERNATIVES

2.1 ALTERNATIVE SCREENING PROCESS

Consistent with the relevant BIA authorities and policies that promote Indian self-government, self-determination, economic self-sufficiency, and Tribal economic development, a range of possible alternatives to meet the purpose and need were considered in the EIS, including non-casino alternatives, alternative sites, and alternative development configurations. As described above, the purpose and need for the project is to create a federally protected land base for the Cowlitz Tribe on which it can establish and operate a tribal governmental headquarters to provide housing, health care, education and other governmental services to its members, and engage in the economic development necessary to fund these tribal government programs, provide employment opportunities for its members, and allow the tribe to become economically self sufficient and achieve self determination. Alternatives, other than the No Action alternative, were first screened to see if they met the purpose and need of the BIA and the Tribe. Remaining alternatives were selected for the EIS largely based on three criteria: 1) providing an adequate and reasonable range of alternatives, 2) feasibility, and 3) ability to reduce environmental impacts.

2.1.1 Non-Casino Alternatives

The EIS evaluated the following non-gaming alternatives: (1) a business park with proposed uses such as office, industrial flex space and accessory commercial uses, and (2) the No-Action Alternative. The proposed business park with office, industrial flex space and associated commercial uses was analyzed in detail as Alternative D in the EIS. A No-Action Alternative was analyzed in detail as Alternative F in the EIS. Similarly, other non-gaming alternatives were briefly considered but not fully analyzed within the EIS. These uses include a shopping center complex anchored by a "Big Box" store and a technology center. These uses are sufficiently similar to Alternative D that their analysis would offer little additional information.

2.1.2 Alternative Casino Sites

Cowlitz Parcel Site: The Cowlitz Parcel consists of eight parcels totaling approximately 151.87 acres located adjacent to the west side of Interstate 5 (I-5) at the NW 319th Street Interchange in unincorporated Clark County, Washington. The project site is located between NW 41st Avenue and NW 31st Avenue, and is bisected by NW 319th Street. The parcel was selected for its economic viability and historical connection to the Tribe. There are currently no residences on the project site. The southern portion of the site was previously used for some cattle grazing activities. No agricultural uses currently occur on the site. Development of the Cowlitz Parcel was analyzed in Alternatives A, B, C, and D of the EIS.

Ridgefield Interchange Site: The Ridgefield Interchange Site consists of 19 parcels totaling approximately 163.02 acres two miles south of the La Center Interchange Site. The Ridgefield Interchange Site was recently annexed into the Ridgefield city limits on July 12, 2007 as a result of the City Council's adoption of the Ordinance No. 958. The City of Ridgefield is located in the northwestern portion of Clark County. A private residence is located in the central portion of the site and several single-family homes are located towards

the eastern property boundary. The Ridgefield Interchange Site was historically used for cattle grazing. Land surrounding the Ridgefield Interchange Site is used predominantly for agricultural production with rural residential uses interspersed. Development of the Ridgefield Interchange site was analyzed in Alternatives E of the EIS. The Tribe has no ownership interest in, or legal connection to the Ridgefield Site.

Northern Sites: Some commenters responding to the Draft EIS and Final EIS advocated that a northern alternative site should be investigated and chosen as the location for a Cowlitz resort casino facility. The northern area advocated by these commenters was subjected to three different market analyses. One study by EcoNorthwest and one by the Innovations Group, both submitted as comments on the Draft EIS, and a third study by E.D. Hovee Company commissioned as part of the EIS (Appendix N of the Final EIS). These studies were utilized by the BIA to determine whether the sites could meet the needs of the Cowlitz Tribal government as outlined in the Tribal Business Plan (Appendix E of the FEIS) submitted as part of the fee-to-trust application under 25 C.F.R. 151, although the Cowlitz Tribe has no ownership or other interest in developing these sites, nor does it have resources to purchase or otherwise obtain an interest in them, assuming their availability. In brief, these alternatives were found to suffer from being inconvenient to both the Seattle and Portland/Vancouver markets, and therefore were not adequately situated to be able to meet the needs of the Tribal government. Additionally, because these alternative sites are located in more rural, less developed areas, the potential for adverse impacts would likely be more significant. Finally, these alternative sites are not sufficiently distinguishable from those considered that their analysis would offer additional information to assist the BIA in its consideration of impacts under NEPA. Thus, northern site alternatives were eliminated through the screening process from detailed consideration within the EIS.

2.2 Reasonable Alternatives Considered in Detail

The Draft EIS and Final EIS evaluate the following reasonable alternatives and the mandatory No-Action Alternative in detail.

2.2.1 Alternative A – Preferred Casino-Resort Project (Proposed Action)

Alternative A, the Proposed Action, consists of the following components: (1) placing approximately 151.87 acres into Federal trust status; (2) issuance of a reservation proclamation by the Department of the Interior; (3) development of Tribal headquarters, Tribal elder housing and a Tribal cultural center; (4) approval of a gaming development and management contract; and (5) development of a casino-resort, including ancillary components such as parking and a wastewater treatment plant. Under Alternative A, NW 319th Street would be re-routed, with Clark County approval, through the southern portion of the La Center Interchange Site in order to preserve on-site wetlands. This alternative, which constitutes the Preferred Alternative and the Tribe's and the BIA's Proposed Action, most suitably meets all aspects of the purpose and needs of the Proposed Action by promoting the Tribe's self-governance capability and long-term economic development, while preserving key natural resources of the project site. Components of Alternative A are described below.

Trust Title Acquisition and Reservation Proclamation: Alternative A consists of the conveyance of a 151.87-acre area of land into Federal trust status, and the issuance of a reservation proclamation designating the land as the Tribe's reservation.

The land transfer would be made in accordance with the procedures set forth in 25 C.F.R. Part 151, which implement the Secretary's trust acquisition authority under Section 5 of the IRA, 25 U.S.C. §465. The reservation proclamation would be issued in accordance with the BIA's *Guidelines for Proclamations,* which implement the Secretary's authority to issue reservation proclamations under Section 7 of the IRA, 25 U.S.C. §467. The reservation proclamation would establish the land as the Tribe's first reservation since its federal acknowledgment in 2002. Accordingly, the reservation proclamation would serve as the basis for a BIA determination that the land is eligible for gaming as the "initial reservation" of a tribe recognized through the federal acknowledgment process, in accord with IGRA Section 20(b)(1)(B)(ii), 25 U.S.C. §2719(b)(1)(B)(ii).

Gaming Development and Management Contract: Congress enacted IGRA with the stated purpose of providing a statutory basis for the operation and regulation of gaming by Native American tribal governments. The NIGC, which was established by IGRA, has the authority to approve management contracts between tribal governments and outside management groups. Implementation of Class III gaming operations under Alternative A would require NIGC approval of the management contract between the Tribe and its management group.

Proposed Facilities: Alternative A would result in the development of a 20,000 square-foot Tribal government office building, a 12,000 square-foot Tribal cultural center, and approximately 16 Tribal elder housing units. The project also calls for the development of gaming facilities including a casino and hotel facilities, parking facilities, an RV park, and wastewater treatment plant. The proposed facilities would occupy most of the project site. The project plans call for 134,150 square feet of gaming floor (including 3,000 VLTs, 135 gaming tables, and 20 poker tables); 355,225 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multi-purpose space (with seating for up to 5,000); and a 250 room hotel.

The casino facility would be housed in a two-story structure with a subterranean level built into the sloped site. The main entry level would house the gaming floor and associated public spaces, including food and beverage, retail, and entertainment. The hotel would consist of eight floors, with each floor having an area of approximately 18,810 square feet for a total hotel square footage of 150,480 square feet. Similar to the casino, the hotel would be of a contemporary nature but would incorporate many of the natural materials of the general region including stone and wood. The main hotel entrance would be on the west side, adjacent to the hotel porte cochere. The Tribal facilities would be grouped in the southeastern portion of the project site west of I-5 and NW 31st Avenue. The Tribal government offices would include 20,000 square feet of office space and Tribal Council chambers with adequate surface parking for staff and visitors. The cultural center would consist of 12,000 square feet of museum and office space. The elder housing would consist of approximately 16 residences grouped together around a common area and accessed by a loop-road from NW 31st Avenue.

Alternative A includes two self-park garages, each containing 2,750 parking spaces for a total of 5,500 spaces. In addition, there would be 1,750 Valet Parking spaces in the subterranean level for a total of 7,250 spaces. The RV park would consist of a large paved parking area with spaces for 200 RVs and would be located at the southwestern portion of the project site.

MOU and Tribal Ordinances: In 2004, the Tribe entered into a Memorandum of Understanding (MOU) with Clark County. Under the MOU, the County agreed to provide services to the proposed facility that would include, but not be limited to, law enforcement, fire protection and emergency medical services. In return, the Tribe agreed to ensure that the development and operation of the facility would be consistent with certain specified County codes and ordinances and to provide payments to the County to offset County expenditures and impacts to County revenues.

Subsequent litigation resulted in uncertainty regarding the legal status of the MOU and the mitigation measures contained in the MOU, so in October 2007 the Tribe enacted two ordinances to serve as an enforceable legal mechanism that would ensure the same mitigation of impacts as was provided in the MOU. The Tribe first enacted an Environment, Public Health and Safety (EPHS) Ordinance (Appendix U of the FEIS) which: (i) obligates the Tribe to perform mitigation measures equivalent to those in the MOU, (ii) grants an irrevocable limited waiver of the Tribe's sovereign immunity to Clark County to allow an enforcement action by the County in state court; (iii) provides that the Tribe will not revoke or modify either the waiver of sovereign immunity or the environment, health and safety mitigation provisions of the Ordinance, and (iv) creates a Tribal Enforcement and Compliance Officer (TECO), whose duty is to ensure implementation of and compliance with the EPHS Ordinance. The Tribe also passed a Gaming Ordinance Amendment that amended the Tribe's existing gaming ordinance and incorporated the entire Tribal EPHS Ordinance. The Gaming Ordinance Amendment therefore includes mitigation measures equivalent to those in the MOU as part of the Tribe's gaming ordinance, giving the federal government enforcement authority to ensure that the mitigation measures are implemented. As required by IGRA, the Tribe submitted the Gaming Ordinance Amendment to the NIGC for approval. On January 8, 2008, the Tribe's Gaming Ordinance Amendment was approved by the NIGC.[3]

In April 2009, the Tribe and Clark County entered into a new agreement to rescind the 2004 MOU and to rely instead on the Tribe's EPHS Ordinance and Gaming Ordinance Amendment to provide the same mitigation of impacts as was provided in the MOU. The rescission agreement confirms the Tribe's limited waiver of sovereign immunity which allows Clark County to enforce the Tribe's obligations. As a result, the MOU is no longer in effect, the lawsuit challenging the MOU has been dismissed, and mitigation of impacts is provided for in the Tribal Ordinances.[4]

Water Supply: Alternative A contemplates that Clark Public Utilities (CPU) will provide water to the project and CPU has agreed to provide water as provided in Section 3(F) of the

[3] Litigation challenging the NIGC approval of the Tribe's amended Gaming Ordinance was dismissed in August 2010 by the U.S. Court of Appeals for the Ninth Circuit in City of Vancouver v. George Skibine, et al., D.C. No. 3:08-cv-05192-BHS (Aug. 31, 2010).

[4] The Final EIS considered the Tribal Ordinances as an alternative mechanism to enforce mitigation of environmental impacts equivalent to that provided in the MOU. Final EIS at Section 1.5.

Tribe's EPHS Ordinance. Proposed facilities would connect to the CPU water main and the Tribe has agreed to pay for the expenses associated with the delivery of service to the project site. CPU has consented through service agreement letters to enter into negotiations and to contract with the Tribe. Major components of the water supply system within the property would include a pipeline connection at the property line; a 750,000 gallon reservoir; a booster pump station; and an emergency diesel generator for back-up power supply. On-site irrigation would utilize a recycled water system that would not put an increased demand on CPU.

Wastewater Treatment and Disposal: The Tribe has committed in Section 3(F) of the EPHS Ordinance to provide wastewater conveyance, treatment, reuse, and disposal through development of a new, independent sewage treatment plant, which would meet or exceed federal and State standards. On-site collection of wastewater would consist of gravity lines that would transfer wastewater from buildings to a sanitary pump station. From there, wastewater would be pumped via pipelines beneath the roads to a treatment plant located in the southeast of the project site between I-5 and NW 31st Avenue. Due to area constraints and requirements for surface discharge, the recommended treatment plant is a membrane bioreactor plant (MBR) with ultraviolet (UV) light disinfection of the effluent. From the treatment plant, treated wastewater effluent would be pumped to the 750,000-gallon closed-tank reservoir for reuse. Treated effluent would meet water quality guidelines as discussed further in Section 4.3 of the FEIS, Water Resources. A National Pollutant Discharge Elimination System (NPDES) permit from the U.S. Environmental Protection Agency (USEPA) would be required for the discharge of treated wastewater to the unnamed stream.

Site Drainage: Four stormwater treatment facilities would be located around the project site to take advantage of topography and natural resources to provide optimum site drainage while ensuring impacts to natural resources are minimal. These facilities would be designed to comply with Clark County Code 40.380 (Stormwater and Erosion Control) in accordance with the Tribe's EPHS Ordinance. Stormwater would be collected from impervious surfaces throughout the development and treated within one of the four stormwater treatment facilities prior to discharge to either a holding wetland or detention basin. Stormwater facilities have been designed to ensure stormwater runoff generated from the impervious surfaces associated with the development are contained and treated prior to surface discharge to the unnamed stream.

Natural Gas Supply: Natural gas would be utilized for a number of purposes including heating, water heating (including swimming pool water), and kitchen operations. Natural gas service would be provided by NW Natural Gas and would require the extension of a natural gas line to the site.

Law Enforcement: Law enforcement services, prosecution, and court and jail services would be provided by the Clark County Sheriff's Office pursuant to Section 3(A) and 3(B) of the Tribe's EPHS Ordinance.

Fire Protection Services: Fire protection services would be provided by the Clark County Fire District (CCFD) 12 pursuant to Section 3(C) of the Tribe's EPHS Ordinance.

2.2.2 Alternative B – Preferred Project Without Rerouting NW 319th Street

Alternative B is similar to Alternative A in most aspects, such as the request for the placement of the Cowlitz Parcel into trust, issuance of a reservation proclamation, and approval of a gaming management contract. Like Alternative A, Alternative B also includes the development of Tribal elder housing, Tribal government offices, and a cultural center. Operation of the casino-resort, project construction, water supply, wastewater treatment and disposal, and site drainage would also be similar to Alternative A. Differences in project components are described below.

Alternative B Facilities: Under Alternative B, NW 319th Street would not be rerouted, thereby requiring the casino and hotel facilities north of NW 319th Street to be placed within 8.41 acres of wetlands and wetland buffer areas. The right-of-way for NW 319th Street would remain in its current location and the street would continue to provide access to local housing to the west of the site and the casino-resort complex.

The casino-resort complex under Alternative B is similar to what is described under Alternative A with several exceptions as follows:

1. The right-of-way for NW 319th Street would remain in its current location as described above;
2. The cultural center is not directly accessed from NW 319th Street;
3. The cultural center and the Tribal offices have switched locations relative to NW 31st Avenue (i.e. the cultural center is now to the east and the Tribal offices are moved to the west of NW 31st Avenue);
4. The overall building footprint for the casino-hotel facility would be 878,000 square feet (1,000 square feet larger than Alternative A);
5. There would be two porte cocheres;
6. 100 surface parking spaces would be added adjacent to the casino/hotel (south) porte cochere.

Infrastructure and Public Health and Safety Services: Under Alternative B, the infrastructure components related to water supply, wastewater treatment, natural gas, law enforcement, and fire protection are similar to those described under Alternative A. Refer to the description of each component under Alternative A (**Section 2.2.1** of this ROD) for more detail.

2.2.3 Alternative C - Reduced Intensity

Alternative C, the Reduced Intensity Alternative, consists of development of a reduced size casino-resort complex on the Cowlitz Parcel. Alternative C is similar to Alternatives A and B in most aspects, entailing the placement of the property into trust, issuance of a reservation proclamation, and approval of a gaming management contract. Alternative C also includes the following elements of Alternatives A and B: Tribal elder housing, Tribal government offices, and a cultural center. Operation of the casino-resort, project construction, water supply, wastewater treatment and disposal, and site drainage would be similar to Alternatives A and B, but due to the reduced intensity of these components, there would be some differences as described below.

Alternative C Facilities: This alternative entails a smaller, reduced intensity casino-resort complex, parking facilities, RV park, wastewater treatment plant, and Tribal facilities. Alternative C would occupy most of the project site, but less than Alternative A and B. The project plans call for 78,880 square feet of gaming floor (including 2,000 VLTs, 79 gaming tables, and 12 poker tables); 193,765 square feet of restaurant and retail facilities and public space; 125,900 square feet of convention and multi-purpose space (with seating for up to 5,000); a 200-room hotel; as well as the same Tribal offices, a Tribal cultural center, and approximately 16 Tribal elder housing units as contemplated in Alternative A and B.

Infrastructure and Public Services: The necessary infrastructure that would be incorporated into the project and public service providers are the same as those discussed for Alternatives A and B.

2.2.4 Alternative D – Business Park

Alternative D is a non-gaming alternative that would replace the proposed casino-resort complex with a business park on the Cowlitz Parcel. Under this alternative, land would still be placed into trust by the BIA and a reservation proclamation would be issued. However, as there would be no gaming under this alternative, there would be no approval of a gaming development and management contract by the NIGC. Additionally, there would be no Tribal Headquarters, cultural center, or Tribal elder housing under Alternative D. As part of the business park, Alternative D would include office, industrial flex-space and accessory commercial uses. No on-site wastewater treatment plant is proposed for this Alternative. Components of Alternative D are described below.

Alternative D Facilities: The Business Park Alternative would consist of a technical office park on each side of NW 319th Street. This alternative contains one Class A three-story office building consisting of 450,000 square feet that can be leased to a single major tenant or subdivided as required. The majority of the buildings would be single story office/minor warehousing buildings grouped throughout the site. These buildings cumulatively total 960,300 square feet and are designed to have office space in the front portion with potential warehousing space behind. Each unit would have roll-up doors for receiving. A main warehousing type facility would be located in the southwestern portion of the project site. This facility would consist of 168,000 square feet of high density warehousing with 12,500 square feet of office space within the same building. Under this alternative, surface parking for 3,742 vehicles would be provided throughout the office park.

Infrastructure and Public Services: Water supply distribution under Alternative D is similar to that described under Alternative A. Wastewater service for Alternative D would be provided by connection to the City of La Center municipal system, as the site is included within the Urban Growth Area (UGA) for the City of La Center.[5] The Tribe would obtain a services agreement with the City of La Center to provide for off-site disposal of wastewater. Alternative D would use natural gas, principally for space and water heating. Natural gas service to the site would be provided by NW Natural Gas. Law enforcement services,

[5] Although it is currently unclear whether the site will remain within the La Center UGA, (see Section 3.2.3.1 of this ROD) it is assumed that wastewater service for Alternative D will be provided by connection to the City of La Center municipal system.

prosecution, court and jail services, and fire protection services would be provided pursuant to Section 3(A), 3(B), and 3(C) of the Tribe's EPHS Ordinance as described under Alternative A.

2.2.5 Alternative E – Ridgefield Interchange Site

Alternative E consists of the development of a tribal government and casino-resort complex on the Ridgefield Interchange Site, 2 miles south of the Cowlitz Parcel identified in Alternative A. Alternative E includes the conveyance of 19 parcels totaling approximately 163.02 acres into Federal trust status on behalf of the Tribal Government and issuance of a reservation proclamation.

Alternative E Facilities: Alternative E would include Tribal government offices, Tribal elder housing, a Tribal cultural center, a casino-hotel facility, parking facilities, and an RV park similar to Alternatives A through C. The proposed facilities would occupy most of the Ridgefield Interchange Site. The project plans call for Tribal government offices with 20,000 square feet of office space, a 12,000-foot Tribal cultural center, and approximately 16 Tribal elder housing units, including surface parking for visitors and staff. The project plan also calls for 141,275 square feet of gaming floor (including 3,000 VLTs, 135 gaming tables, and 20 poker tables); 300,225 square feet of restaurant and retail facilities, and public space; 147,500 square feet of convention and multi-purpose space (with seating for up to 5,000); and a 300-room hotel. Alternative E contains two self-park garages, each containing 2,500 parking spaces for a total of 5,000 spaces. In addition, there will be 1,000 surface parking spaces and 1,750 valet parking spaces in the subterranean level for a total of 7,750 spaces.

Water Supply: Alternative E is located within the CPU service area. The Tribe would obtain a Service Agreement letter from CPU to provide service under Alternative E. The Agreement for water supply would be similar in intent and scope to that described in Section 3(F) of the Tribe's EPHS Ordinance (Appendix U of the FEIS) for the preferred site as described under Alternative A. A 16-inch diameter pipeline runs along the east side of the property and has the capacity and pressure to serve Alternative E, including fire suppression needs. On-site distribution lines would be constructed to connect buildings and fire hydrants to the existing system. No on-site water storage is proposed for this Alternative.

Wastewater Treatment and Disposal: For wastewater service, Alternative E would utilize the City of Ridgefield municipal wastewater system, including the treatment plant. The Tribe would enter into a service agreement with the City of Ridgefield and pay user and development fees for service. To service Alternative E, the City of Ridgefield would need to speed up planned improvements, including constructing a planned outfall to the Columbia River, and the Tribe would need to fund improvements for discharge quality to allow for more discharge to the Lake River.

Law Enforcement: The Tribe would obtain a Service Agreement letter from Clark County Sheriff's Office to provide law enforcement, prosecution, and court and jail services under Alternative E. The Agreement would be similar in intent and scope to the Agreement established under the Tribe's EPHS Ordinance for the preferred site described under Alternative A.

Fire Protection Services: The Tribe would obtain a Service Agreement letter from CCFD 12 to provide fire protection services under Alternative E. The Agreement would be similar in intent and scope to the Agreement established under the Tribe's EPHS Ordinance for the preferred site described under Alternative A.

2.2.6 Alternative F - No-Action Alternative

Under the No-Action Alternative, neither the Cowlitz Parcel nor the Ridgefield Interchange Site would be placed into Federal trust for the benefit of the Tribe, no reservation proclamation would be issued, and neither site would be developed as described under the development alternatives. Land use jurisdiction of the Cowlitz Parcel would remain with Clark County and the site has been identified as an area for growth in the 2007 update of the Clark County Comprehensive Growth Management Plan. The Ridgefield Interchange Site would remain within the jurisdiction of the City of Ridgefield and has been identified by the City of Ridgefield Comprehensive Land Use Plan as Master Planned Business Park, and zoned by the Ridgefield Development Code, Title 18 of the Ridgefield Municipal Code, as Master Planned Business Park.

3.0 ENVIRONMENT IMPACTS AND PUBLIC COMMENTS

3.1 ENVIRONMENTAL IMPACTS IDENTIFIED IN FINAL EIS

A number of specific issues were raised during the EIS scoping process and public and agency comments on the Draft EIS. Each of the alternatives considered in the Final EIS was evaluated relative to these and other issues. The categories of the most substantive issues listed in the scoping document include:

- Geology and Soils
- Water Resources
- Air Quality
- Biological Resources
- Cultural and Paleontological Resources
- Socioeconomic Conditions
- Transportation/Circulation
- Land Use
- Public Services
- Noise
- Hazardous Materials
- Aesthetics
- Indirect and Growth Inducing Effects
- Cumulative Effects

The evaluation of project-related impacts included consultations with entities that have jurisdiction or special expertise to ensure that the impact assessments for the Final EIS were accomplished using accepted industry standard practice, procedures and the most currently available data and models for each of the issues evaluated in the Final EIS. Alternative

courses of action and mitigation measures were developed in response to environmental concerns and issues. Section 4 of the Final EIS described effects of the Alternatives A through E as follows:

3.1.1 Geology and Soils

Topography – All alternatives would involve clearing and grading. While some cut-and-fill slopes would be noticeable on the Cowlitz Parcel, the project design of Alternatives A through C ensures that the major topographic features (i.e., hills and slopes) would be preserved. Significant impacts to topography would result from development of Alternatives D and E as key topographic features of the site would be substantially altered or eliminated by the cutting and filling of topographic features. Due to the necessity for grading for building pads and parking areas, and to provide adequate drainage to the facilities proposed under these Alternatives, the significant impacts identified to topography would be unavoidable under Alternatives D and E.

Soils/Geology – All development alternatives could potentially impact soils due to erosion during construction, operation, and maintenance activities, including clearing, grading, trenching, and backfilling. The majority of the soils on the Cowlitz Parcel and Ridgefield Interchange Site have a moderate erosion potential based on soil type and slope gradients. An Erosion Control Plan would be implemented during project construction and operation to minimize adverse effects resulting from erosion. Additionally, the Tribe has committed to develop the Cowlitz Parcel consistent with Clark County building codes and stormwater and erosion control requirements. Mitigation measures include obtaining a NPDES permit from the USEPA for sediment control and erosion prevention into navigable (surface) waters of the U.S. As part of the General Construction NPDES permit, a Storm Water Pollution Prevention Plan (SWPPP) would be developed and include provisions for (1) erosion prevention and sediment control; and (2) control of other potential pollutants. Mitigation would reduce impacts to less than significant.

Seismicity – There are no known fault traces that intersect the Cowlitz Parcel and Ridgefield Interchange site boundaries, therefore; the potential for surface rupturing along an on-site fault trace is considered low and should not be considered a constraint for Alternatives A through E. Additionally, the Tribe has committed in the EPHS Ordinance to develop the property consistent with CCC Chapter 40.430, Geologic Hazard Areas and Chapter 14.04, Building Code.

Mineral Resources – None of the development alternatives would result in the loss of mineral resources, thus, this impact is less than significant.

3.1.2 Water Resources

Flooding – The Cowlitz Parcel and Ridgefield Interchange Site are located outside the 100-year and 500-year floodplains. Thus, no impacts from flooding would occur as a result of the development alternatives.

Surface Water Quality/Construction Effects – During construction, each of the development alternatives could result in potential discharge of sediment and construction-related materials into surface waters. Mitigation requires the preparation of a SWPPP, implementation of Best Management Practices (BMPs) to prevent erosion and minimize sediment transport, and implementation of a sampling and monitoring program to assess the quality of surface water entering and leaving the project site. After implementation of required mitigation, impacts would be reduced to less than significant.

Surface Water Quality/Stormwater – The development alternatives would increase impervious surfaces through the conversion of undeveloped land into building and parking lots, resulting in increased stormwater runoff during rain events and the potential for trash, debris, oil, sediments, grease, and fertilizer from stormwater runoff to impact water quality. Stormwater control facilities included in the project design would reduce peak stormwater flows and provide filtering of runoff to improve water quality. Mitigation requires the preparation of a SWPPP, implementation of BMPs to prevent erosion and minimize sediment transport, and implementation of a sampling and monitoring program to assess the quality of surface water entering and leaving the project site. After implementation of required mitigation, impacts would be reduced to less than significant.

Wastewater – Under Alternatives A through C, wastewater would be treated at an on-site wastewater treatment plant (WWTP) and recycled for irrigation, toilet flushing, fire suppression, and use in the cooling system. Discharge of treated wastewater into the seasonal stream on site would improve water quality by reducing fecal coliform levels in the stream through dilution. However, if the WWTP is not properly sized, it will not meet denitrification requirements in accordance with the Washington Administrative Code (WAC) criteria for ammonia. Further, higher temperature treated wastewater could adversely impact receiving waters. In addition to compliance with the Clean Water Act and NPDES permitting process, mitigation would require that the Tribe construct an underground pipe field to transfer heat from treated wastewater to the cooler soil, thereby reducing treated wastewater temperatures prior to discharge. Mitigation further requires that anoxic basin of the WWTP be sized in accordance with the calculated ammonia criteria of the WAC as determined through the NPDES permitting process. After mitigation, impacts resulting from Alternative A through C would be reduced to less than significant.

Alternatives D and E would not result in the development of an on-site WWTP and therefore no associated adverse effects would occur.

Groundwater – None of the development alternatives would result in groundwater withdrawals. Under Alternatives A through C, reclaimed water treated and used on site would be comparable to or higher in quality than the existing groundwater quality. Stormwater control facilities would provide filtering of runoff to improve water quality prior to percolation into the groundwater table. There would be no adverse impacts to groundwater resources from development of the project alternatives.

3.1.3 Air Quality

Construction Emissions – All development alternatives would generate air pollutants through construction although they would not exceed regulatory emissions threshold levels. Mitigation measures including construction BMPs have been recommended to reduce impacts associated with construction emissions to a less than significant level.

Operational Emissions – Direct and indirect vehicle emissions generated from development of Alternatives A through E would be considered significant. Mitigation measures for operational emissions include the use of shuttles to population centers, transit stations, and multi-modal centers; the use of clean fuel vehicles in vehicle fleet where practicable; encouraging the use of van and car-pools; and providing adequate ingress and egress at facility entrances to minimize vehicle idling and traffic congestion. This mitigation would reduce the effects of indirect and direct emissions from Alternatives A through E, but not to less than significant. This is an unavoidable adverse effect.

Additionally, direct and indirect vehicle trips generated by development of Alternatives A through E would contribute to greenhouse gas (GHG) emissions that could result in cumulative effects associated with global warming. Mitigation would ensure project consistency with applicable greenhouse gas emission reduction strategies recommended by the Washington State Department of Ecology Climate Action Team (WCAT). These strategies are intended to result in a reduction of statewide emissions to levels below current background levels. Because the project alternatives would be in compliance with the WCAT's GHG emission reduction strategies, this impact would be less than significant.

3.1.4 Biological Resources

Wildlife and Habitats – Implementation of the development alternatives would result in habitat disturbance within the Cowlitz Parcel or the Ridgefield Interchange Site. Ruderal/developed, pasture, and mixed woodland habitat types on the Cowlitz Parcel and Ridgefield Interchange Site are currently subject to disturbance from existing roads, residential development, and grazing activities, thus decreasing the likelihood of supporting persistent wildlife populations. Under Alternatives A through D, the removal of large grazing animals could improve the habitat quality of the unnamed stream on the Cowlitz Parcel. However, discharge of treated stormwater and treated wastewater to the unnamed stream could result in potential impacts to riparian habitat. Mitigation requires the installation of temporary fencing around wetlands and riparian areas during construction, obtaining a U.S. Army Corps of Engineers (USACE) permit prior to any discharge of dredged or fill material into waters of the U.S., incorporation of BMPs for stormwater runoff, and prevention of noxious weeds on the property. Additionally, through its EPHS Ordinance, the Tribe has committed to compliance with measures contained in the Clark County Wetland Protection Ordinance (CCWPO). After mitigation, impacts to wildlife and habitats under each of the development alternatives would be reduced to less than significant.

Waters of the U.S – Alternative A and C would affect approximately 0.038 acres of jurisdictional waters of the U.S. The impacted waters of the U.S. include a roadside ditch adjacent to and south of NW 319th Street that would be removed with the construction of the casino-resort complex and the rerouting of NW 319th Street. Additionally, discharge of

treated effluent and stormwater run-off would change the unnamed stream from a seasonal stream to a perennial stream. Mitigation requires the installation of temporary fencing around wetlands and riparian areas during construction, obtaining a USACE permit prior to any discharge of dredged or fill material into waters of the U.S., and incorporation of BMPs for stormwater runoff. Additionally, through its EPHS Ordinance the Tribe has committed to compliance with measures contained in the Clark County Wetland Protection Ordinance (CCWPO). After mitigation, impacts to waters of the U.S. would be reduced to less than significant levels.

Alternative B would significantly affect approximately 8.41 acres of jurisdictional waters of the U.S and change the Type 5 on-site stream from a seasonal stream to a perennial stream. Similar to Alternative A, implementation of mitigation, compliance with a USACE permit, and commitments made in the EPHS Ordinance would reduce impacts to less than significant levels.

Alternative D would significantly affect approximately 0.44 acres of jurisdictional roadside ditches and 0.03 acres of Category 4 Wetlands. Similar to Alternative A, implementation of mitigation, compliance with a USACE permit, and commitments made in the EPHS Ordinance would reduce impacts to less than significant levels.

Development of Alternative E would significantly affect approximately 24.56 acres of jurisdictional waters of the U.S. If Alternative E would be selected, USACE verification of the wetland delineation would have to be obtained. Similar to Alternative A, implementation of mitigation, compliance with a USACE permit, and commitments made in the EPHS Ordinance would reduce impacts to less than significant levels.

Federally Listed Species – Three special status bat species have the potential to occur in the vicinity of the Cowlitz Parcel. Six special status fish species may be affected by Alternatives A through E due to an increase in effluent discharge and stormwater runoff into the unnamed seasonal stream on site, a tributary to the East Fork Lewis River. Two special status bird species, including olive-sided flycatchers, and slender-billed white-breasted nuthatches, have the potential to be adversely affected by Alternatives A through E due to potential vegetation removal during the nesting season. Two federally listed plant species, tall bugbane and water howellia, have the potential to be adversely effected by Alternatives A through E. Mitigation listed in the EIS would reduce potential impacts to federally listed species to less than significant levels. In accordance with Section 7 of the Endangered Species Act (ESA), the BIA submitted a Biological Assessment (BA) for the Cowlitz Parcel to the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for consultation purposes. Both the USFWS and the NMFS submitted letters concurring with the BIA's finding that the proposed alternative would be not likely to adversely affect federally listed species.

Migratory Birds – Under Alternatives A through D migratory bird nests could be affected by vegetation removal associated with project construction during the nesting season. Development of Alternative E would result in the loss of a small amount of stopover/foraging habitat for migrating Canada geese; however, this impact would be less than significant. Permanent features associated with proposed facilities under the development alternatives,

such as night lighting, may potentially impact migratory bird species. Mitigation listed in the EIS would reduce potential impacts to migratory birds to less than significant levels.

3.1.5 Cultural Resources

No known historic properties or paleontological resources have been identified within the area of potential effects on the Cowlitz Parcel and the Ridgefield Interchange site. The State Historic Preservation Officer has concurred with the BIA's determination that project development at the Cowlitz Parcel under Alternatives A through D would not adversely affect historic properties. Further reconnaissance-level surveys at the Ridgefield Interchange Site would be required for Section 106 compliance should Alternative E be chosen. Under each alternative, the potential exists for previously unknown archaeological or paleontological resources to be encountered during construction activities. With implementation of mitigation identified in the Final EIS, impacts to cultural resources would be less than significant.

3.1.6 Socioeconomic Conditions and Environmental Justice

Socioeconomics Conditions – All development alternatives would result in potential economic benefits for Clark County and the Tribe. Potential benefits to the County would include the creation of jobs and payments in lieu of taxes (specified in the Tribe's EPHS Ordinance). Increased school enrollment would be funded by incoming worker's property taxes and in-lieu payments required by the EPHS Ordinance. The greatest economic benefit for the Tribe and the greatest number of jobs would be created by the development alternatives that involve gaming, including Alternatives A, B, C, and E. The Tribe has agreed to contribute no less than $50,000 per year to compensate problem gambling service programs. This contribution would reduce potential effects to problem gambling services to less than significant. Gaming alternatives would result in a decline in local cardroom business. The resulting decline in gaming tax revenue for the City of La Center could impact the City's discretionary funding of capital improvement projects for public facilities.

Environmental Justice – None of the development alternatives would result in significant disproportionate effects to low-income or minority populations.

3.1.7 Transportation/Circulation

Alternatives A through E would add significant vehicle trips to the circulation network, resulting in decreased levels of service (LOS) for certain transportation facilities during the AM, PM, and Saturday peak hours. The Washington Department of Transportation (WSDOT) has determined that the La Center and Ridgefield interchanges are part of a High Accident Corridor due to traffic backups onto the I-5 mainline. The Tribe has committed in its EPHS Ordinance to implement various intersection improvements to Interstate 5 and County roads. The mitigation improvements ensure that the LOS of transportation facilities does not operate below LOS D for intersection delay (defined as more than 35 seconds for un-signalized intersections, and more than 55 seconds for signalized intersections) during the peak traffic hours. Additionally, mitigation requires that the Tribe will encourage carpooling and bus use to the project site on events nights. Shuttles running from points in west and east Vancouver, and potentially a site or two in Portland, Oregon, will help to reduce traffic

impacts, including impacts to key segments of I-5 and I-205. While implementation of shuttle bus service may be expected to result in reduced transportation impacts to I-5 and I-205 segments on events nights, three segments may still experience reduced levels of service. It should be noted that the improvements currently proposed for I-205 between SR-500 and the Glenn Jackson Bridge and the under the Columbia River Crossing DEIS should independently ameliorate these impacts.

3.1.8 Land Use

Alternatives A through D are generally inconsistent with adopted and proposed Clark County land use plans for the Cowlitz Parcel. As has been pointed out by commenting parties, the May 14, 2008 decision of the Western Washington Growth Management Hearings Board may result in the subject parcels not being included within the La Center Urban Growth Area and being returned to agricultural zoning. Similarly, Alternative E generally is inconsistent with adopted City of Ridgefield land use plans for the Ridgefield Interchange Site. Environmental effects resulting from the inconsistency would be avoided through implementation of mitigation measures identified for public services, traffic, air quality, noise, and aesthetics. Additionally, the proposed alternatives would be developed in a manner consistent with specific Clark County codes and ordinances as outlined in Section 3(G) of the Tribe's EPHS Ordinance. In the long term, Alternatives A, B, C, and D would generally be compatible with surrounding land uses, as parcels in the project area such as the parcels immediately east of I-5, have been planned for increased urbanization with light industrial development. Alternative E generally would be compatible with surrounding land uses as the project area has been planned for increased urbanization as a Master Planned Business Park.

3.1.9 Public Services

All development alternatives (A through E) would increase public service demands for water supply, wastewater, solid waste, gas and electric, telecommunications, law enforcement, fire protection, and emergency medical services. Alternatives A through E would not result in significant impacts to public services for the most part, but through mitigation and provisions identified in the Tribe's EPHS Ordinance, any significant impacts to public services from Alternatives A - E would be reduced to a less than significant level. After mitigation, there would be sufficient capacity from local service providers to provide public services to both the Cowlitz Parcel and the Ridgefield Site without significant impacts. It should also be noted that the May 14, 2008 decision of the Western Washington Growth Management Hearings Board will not affect the ability of Clark County or other parties to provide public services.

3.1.10 Noise

For all development alternatives (A through E), nighttime construction activities would exceed the WAC Noise Abatement Criteria (NAC) level of 47 dBA. Proposed mitigation would reduce potential impacts from construction to a less than significant level. On-site operational noise levels would be in compliance with all State limits for all development alternatives.

3.1.11 Hazardous Materials

The development alternatives are not located in areas with hazardous materials contamination. Alternatives A, B, C, and E would not store or use significant quantities of hazardous materials. A provision is included in the project description for all development alternatives regarding potential unknown contamination encountered during construction. The use, generation, and storage of hazardous materials during the operation of the office/industrial/commercial facilities under Alternative D is likely. While the impacts would be similar to those of other light industrial operations of this size, there could be a potentially significant impact to the environment and public. The impact from the development of Alternatives A, B, C, and E is less than significant.

3.1.12 Aesthetics

To reduce visual impacts from the proposed development for Alternatives A through E, screening features shall be integrated into the landscaping design to screen the view of the facilities from existing residences and to integrate natural elements into the design. This includes screening views for residents north and west of the site. In Alternatives A through E, the use of glass panels and reflective detailing would increase off-site glare. Impacts as a result of glare would be considered significant and unavoidable and are discussed further under **Section 3.1.15** of this ROD.

3.1.13 Indirect and Growth-Inducing Effects

Indirect Effects from Socioeconomic Conditions – As described in detail in the FEIS, Alternatives A through E would not result in significant indirect effects (effects caused by the action but occurring later in time or removed in distance). Indirect socioeconomic effects on the local and regional economy would result in beneficial effects to surrounding communities including the City of La Center and the City of Ridgefield, although La Center is expected to experience a reduction in gaming tax revenues (which is discussed further in **Section 3.2.12.2** of this ROD).

Indirect Effects from Off-Site Traffic Mitigation - With implementation of mitigation measures, including those in the Tribe's EPHS Ordinance, and compliance with regulatory permits there would be no significant indirect impacts resulting from implementation of off-site traffic mitigation.

Growth Inducing Effects of Natural Gas Supply & Use - Provision of natural gas service to the La Center Interchange area may be expected to induce further growth in the I-5 corridor. Providing natural gas service, much like providing other public services by the proposed extension of the La Center UGA, may be expected to remove some impediments to growth and further accelerate the expansion of La Center's economic center closer to the I-5 corridor. However, growth inducing effects would be less than significant.

3.1.14 Cumulative Effects

The development alternatives when added to past, present, and reasonably foreseeable future actions would not result in significant cumulative impacts. In the Tribe's EPHS Ordinance,

the Tribe has agreed to payments in lieu of taxes and implementation of road improvements that would address potential cumulative impacts associated with traffic and public services. Implementation of interchange improvements recommended in the Draft Interchange Justification Report (IJR) prepared in coordination with WSDOT and the FHWA would further reduce potential cumulative traffic impacts to less than significant. Water quality, biological resources, and cultural resources are afforded substantial protection under federal, state and local regulations that would avoid potential cumulative effects associated with these resources. Through compliance with applicable strategies developed by the WCAT to meet emission reduction targets, the project's contribution to cumulative emissions of green house gases would be reduced to less than significant thereby supporting the state's efforts to significantly reduce its cumulative contribution to global climate change (to levels recommended by the United Nations Intergovernmental Panel on Climate Change). Potential cumulative effects associated with land use and aesthetics would be avoided as future developments would be required to comply with local land use regulations developed by the applicable local agency. Therefore, it was determined that with incorporation of mitigation measures, the development alternatives would not result in cumulatively considerable environmental effects.

3.1.15 Unavoidable Adverse Effects

Due to the necessity for substantial grading for building pads and parking areas proposed under Alternative D, and to provide adequate drainage to the casino-resort complex and Tribal facilities proposed on the Ridgefield Interchange Site under Alternative E, significant impacts to topography would result under Alternative D and E.

The use of glass panels and reflective detailing for Alternatives A, B, C, D, and E could increase off-site glare and result in immitigable glare impacts to travelers on Interstate 5 (I-5) and/or to local residents.

After mitigation, "indirect" air emissions resulting from Alterative A, B, C, D, and E would still exceed conformity thresholds and therefore would have a significant adverse effect. However, the "indirect" emissions, which are responsible for the exceedance of the conformity standards, are mainly emitted from outside the immediate project area and therefore an analysis of the project region was performed to better understand the true regional significance to air quality. CO emissions resulting from Alternatives A and B would only comprise 0.6% of the total regional emissions, while NO_x emissions would comprise 0.4%, and VOCs emissions would comprise 0.3%. Using the criteria of the general conformity regulations, if an area has equal or greater than 10% of the regions emissions inventory, the project is considered to have a significant impact. As shown above the percentage of regional emissions that the Proposed Action/Preferred Alternative will emit is far less than 10%. Since the "indirect" emissions will be emitted outside the project area, from a regional standpoint the project emissions would be less than significant.

3.2 COMMENTS ON THE FINAL EIS AND RESPONSES

During the 30-day waiting period following issuance of the Final EIS on May 30, 2008, the BIA received 114 comment letters from agencies and interested parties, as well as 1,061 form letters submitted by a third party. At the Department's discretion, the 30-day waiting period

on the Final EIS was extended in response to requests from interested parties. During the decision making process for the Proposed Action, all comment letters on the Final EIS were reviewed and considered by the BIA and are included within the administrative record for this project. A substantial number of these comment letters were survey forms or "vote" letters that did not provide substantive comments on the Final EIS. A list of each comment letter and a copy of each comment letter received from agencies (10) as well as 15 from interested parties considered representative of the substantive comments received on the Final EIS is included within Section 3.0 of the BIA's Decision Package. Specific responses to these representative comments letters are included in the Supplemental Response to Comments document, which is included as Section 2.0 of the BIA's Decision Package. A summary and general discussion of the key issue areas raised in comments on the Final EIS is provided below.

3.2.1 Non-NEPA Matters

3.2.1.1 Expressions of Opinion

Comment: Letters were received that were expressions of opinion either for or against the project. The majority of these letters were form letters against the project submitted through a third party company based in Seattle.

Response: These comments are noted and were considered in the BIA decision process, but require no further response.

3.2.1.2 Comments on Specific Factors for Consideration in the Fee-to-Trust Application or Reservation Proclamation

Comment: Some comments were directed specifically to the Tribe's Application for Fee-to-Trust following 25 CFR 151 and addressed specific issues that must be considered under the regulations. Other comments were directed specifically towards the question of the initial reservation proclamation and what factors should be considered. These comments centered on aboriginal territory issues.

Response: Factors to be addressed regarding compliance with 25 CFR 151 are discussed within **Section 8.0** of this ROD. The BIA's *Guidelines for Proclamations,* which outline procedures for issuing reservation proclamations, do not require that land be in a Tribe's aboriginal territory to qualify as part of the Tribe's reservation. Regardless, the BIA, utilizing data submitted and approved in the Tribe's administration recognition process, the proceedings before the Indian Claims Commission regarding the Tribe's claim for compensation for lands taken by the United States, and the Indian Lands Determination of the NIGC, has determined that the Cowlitz Parcel is within the area in which the Tribe has significant historical connections relating to trading, hunting, fishing, lodging and other traditional purposes. These historical connections to the area are considered as part of the reservation proclamation decision, as discussed in **Section 9.0** of this ROD. The issues of aboriginal territory are addressed further in the Cultural Resources discussion of the Final EIS and in **Section 3.2.11** of this ROD.

3.2.1.3 Matters beyond the Scope of the EIS

Comment: Comments were received concerning the NIGC restored lands decision, questioning either the decision itself or NIGC procedures utilized in making the decision. Other comments were received that advocated that the impact of additional trust acquisitions should be analyzed on the premise that the Tribe's expanding economy and establishment of an initial reservation would make such acquisitions inevitable. The City of La Center demanded that as a condition of approval the ROD preclude the Cowlitz Tribe from any additional trust acquisitions.

Response: The question of whether certain lands meet the requirements of IGRA Section 20's "restored land for a restored tribe" exception is a legal determination that is not subject to NEPA review. Therefore, any restored lands decision lies outside the scope of the EIS process. Similarly, the Cowlitz Tribe has not proposed additional trust acquisitions and accordingly, such acquisitions lie outside the scope of the EIS. Further, the Secretary of the Interior has no legal authority to prevent the Tribe from considering or applying for additional trust acquisitions. If the Tribe applies to have additional lands acquired in trust, such future applications will have to be considered on their individual merits including the requisite compliance with NEPA.

3.2.1.4 Other Factors Relevant to the BIA Decision

Comment: Comments from the Grand Ronde Tribe focused on the BIA's need to balance satisfying the needs of the Cowlitz Tribe with the potential harm that would accrue to Grand Ronde through loss of market share in western Oregon.

Response: Impacts to Grand Ronde's Spirit Mountain Casino are discussed within **Section 3.2.12.3** of this ROD, as well as in Section 4.7 of the Final EIS. Factors considered in the BIA's decision are discussed in **Section 8.0** and **Section 9.0** of this ROD. When presented with competing interests among tribes, the BIA must weigh these interests based on the policies and goals of the agency, as set out in relevant statutes, regulations and other authorities. In this case, the Grand Ronde Tribe benefits from possession of a 10,000-acre reservation land base, on which it has been able to generate tribal revenue from various tribal businesses, including its Spirit Mountain Casino. Grand Ronde essentially is asking for protection from additional business competition for its Spirit Mountain Casino, which may result from implementation of the Cowlitz Preferred Alternative. Revenue generated by tribal casinos is a non-trust asset, and Spirit Mountain's revenues, even taking into account potential competitive effects, well exceed the costs of tribal government operations. Moreover, the BIA policies of promoting tribal self-determination, self-governance, and economic self-sufficiency, do not require that BIA ensure the competitive advantage of one tribe to the exclusion of providing another tribe with similar opportunities for economic development and self-determination. Rather, BIA's policies support the expansion of economic opportunities for all tribes, and these same policies weigh in favor of a decision that will provide the Cowlitz Tribe, which has no reservation or trust land, with a federally-protected land base that will allow the Tribe to pursue economic development opportunities similar to those enjoyed by other, more established tribes with an existing land base. Therefore, the BIA finds that the policy goal of providing a landless tribe with a reservation land base within an area in which it

has reasonable historical and modern connections outweighs any potential competitive effects on Grand Ronde's gaming facility.

3.2.2. NEPA Procedural Comments

3.2.2.1 NOA on Final EIS and Comment Period

Comment: Numerous comments were received that the waiting or "comment period", following issuance of the Notice of Availability (NOA) of the Final EIS in the Federal Register on May 30, 2008 was inadequate and a new notice was required announcing an extended waiting or commenting period. The City of La Center stated that even with the additional 41 days of review authorized by the BIA, the allotted amount of time was too limited to allow meaningful review of the Final EIS from the public and agencies given the length of the document.

Response: The required 30-day waiting period or comment period following the publication of the NOA for the Final EIS was extended with a Federal Register notice on July 1, 2008 which extended the period through August 11, 2008 for a total of 71 days. Accordingly the public was afforded more than twice the review time required by federal law. The public has been afforded an extended opportunity to comment on the environmental effects of this project. In addition, cooperating agencies, including the City of La Center and Clark County, were provided additional opportunities to comment on administrative drafts prior to public release of the Draft EIS and Final EIS. In its discretion, the BIA provided an extension of the comment period on the Draft EIS, as well as an extension of the waiting period following issuance of the NOA for the Final EIS. A large number of public comments on both the Draft EIS and Final EIS were submitted and considered by the BIA. The BIA has determined that the opportunity for public comment on the Final EIS was sufficient to allow meaningful input and comments from the public and agencies for consideration of the BIA in making its decision on the proposed action. The public and agency input provided during the EIS process has allowed the BIA to make meaningful revisions in response to comments.

3.2.2.2 Supplemental EIS or Re-circulation of the EIS Required

Comments: A number of commenters stated that preparation of a Supplemental EIS or Re-circulation of a revised Draft EIS is necessary for the BIA to fulfill NEPA procedural requirements. Generally, comments cited the following reasons for the need: 1) the public should be provided an opportunity to comment on the Tribal Business Plan, Unmet Needs Report and/or modifications to the purpose and need statement, 2) the Final EIS did not reflect the May 14, 2008 decision of the Western Washington Growth Management Hearings Board (GMHB) decision concerning the expansion of La Center's Urban Growth Area, 3) the May 14, 2008 Growth Management Board Decision would prevent Clark County Public Utilities from providing water supplies to the site and therefore an expanded discussion of impacts to groundwater and wells was required, 4) the EIS did not consider Appendix X2 of the State of Washington gaming compacts and the resulting increase in revenue that could be generated by the proposed casino facility, and 5) analysis and information presented in the Final EIS was inaccurate and therefore required correction and subsequent public review.

Response: The Department has determined that preparation of a supplemental EIS and/or re-circulation of the EIS is not necessary to fulfill NEPA procedural requirements as discussed below.

Inclusion of Tribe's Business Plan

Providing the Tribal Business Plan for public review was specifically requested in comments on the DEIS. Accordingly, it was provided in the Final EIS. Federal agencies routinely modify alternatives including the proposed action and supplement, improve, or modify analyses in the Final EIS in response to comments on the Draft EIS. Inclusion of the Business Plan, and the elaboration of the project Purpose and Need within the Final EIS, do not constitute significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Furthermore, submission of the Business Plan is required by federal fee-to-trust regulations and is not required as part of the NEPA process. While the BIA chose in its discretion to append the Tribe's Business Plan to the Final EIS to elaborate on the purpose and need for the Proposed Action as requested in comments on the Draft EIS, public and agency review and comment on the Tribe's internal economic planning strategy document would be inappropriate and contrary to federal Indian policies encouraging tribal sovereignty, self determination and self governance. Nevertheless, the public and agencies did in fact comment on the Tribe's Business Plan during the extended waiting/comment period provided after release of the FEIS. Accordingly, a Supplemental DEIS or re-circulation of the EIS to allow the public opportunity to comment on the Tribe's Business Plan and Unmet Needs Report is not required.

GMHB Decision

Similarly, the decision of the GMHB does not require that the BIA issue a Supplemental DEIS or modify and reissue the Final EIS. As an initial matter, the GMHB decision was reversed by the Clark County Superior Court on appeal by the County; that decision was then appealed and a decision is pending (see **Section 3.2.3.1** of this ROD). Even if the final disposition of the appeal affirms the GMHB decision and results in some modifications to the existing land use setting as described in the Final EIS, these changes do not result in significant new information that would alter the BIA's analysis, impact conclusions, or mitigation requirements (see **Section 3.2.3.1** and **Section 3.2.14.1** of this ROD). Local land use jurisdictional consequences of the GMHB decision or a decision in the related appeal do not constitute significant new information or facts that demonstrate the Proposed Action would result in significant environmental effects not already considered within the EIS. The BIA is not making substantial changes in the proposed action that are relevant to environmental concerns; and the decision does not constitute significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Discussion of Appendix X2 of State of Washington Gaming Compacts

The Cowlitz Tribe does not have a tribal gaming compact. A report prepared by ECO Northwest, and submitted as comments on the Final EIS estimates revenues for a northern gaming facility in Vader, Washington at $322 million and ascribes this substantial increase in potential income to the more liberal Appendix X2 provisions. The BIA has had this report and its conclusions analyzed. The differences in predicted revenue between the Final EIS

analysis and the ECO Northwest report result from a number of different basic assumptions as well as utilization of a different model rather than from consideration of provisions of Appendix X2. Major differences derive from utilization of differing penetration rates for tertiary markets (Seattle and Spokane), and importantly, an assumed much higher annual number of gaming trips and a much higher length of stay in the ECO Northwest report. As discussed further in **Section 3.2.5.1** of this ROD, the analysis concluded that methodology used within the Final EIS provided an accurate prediction of gaming revenues in light of Appendix X2 of the Washington Gaming compacts. Accordingly, a Supplemental DEIS or re-circulation of the EIS is not required.

Inadequate Analysis

As described in the responses to technical issues raised in comments on the Final EIS (**Section 3.2.3** through **Section 3.2.19** of this ROD and the Supplemental Response to Comments document), the BIA has determined that analysis and conclusions within the EIS are adequate and thoroughly supported by evidence in the record.

3.2.2.3 Programmatic EIS Required

Comment: Comments were received on the Final EIS that a programmatic EIS addressing the Cowlitz, Warm Springs, and Klamath trust acquisition and casino proposals should be prepared prior to preparation of an EIS for any individual proposal.

Response: This concern is addressed in Appendix B of the Final EIS. A programmatic EIS is not appropriate because the BIA does not have a proposal to implement any specific policy, adopt a plan for a group of related actions, or implement a specific statutory program in which any of the approvals for the Proposed Project would be subsumed. Multiple projects that are not inter-related or dependant on each other do not constitute a "program".

3.2.2.4 Failure to Respond to Comments on the DEIS

Comment: Some parties indicated either that the Final EIS did not respond to their comments on the DEIS or failed to respond adequately.

Response: The BIA considered all comments submitted on the Draft EIS. Appendix B of the Final EIS includes a summary of comments received on the Draft EIS and responses to significant issues that were raised. Individual responses to bracketed comment letters considered representative of the majority of comments received on the Draft EIS are included within Appendix C of the Final EIS. Revisions and modifications to the analysis within the Final EIS are referenced and summarized within responses to comments on the DEIS included as Appendix B and C of the Final EIS. It should be noted that Appendix Volume VII of the Final EIS consists primarily of technical studies and correspondence completed in response to public and agency comments on the Draft EIS. In some instances the BIA noted that "no response was required" to a comment – this response was most often applied to non-substantive comments expressing a statement of opinion that was not relevant to environmental concerns or analysis within the EIS.

3.2.2.5 Failure to Respond to Cooperating Agency Comments on the Preliminary FEIS

Comment: Some parties indicated that the Final EIS did not respond to cooperating agency comments on the Preliminary Final EIS.

Response: Comments of cooperating agencies on the Preliminary Final EIS are not numbered, bracketed, and responded to in the same manner as comments on the DEIS. Similar to comments submitted on the agency review version of the Draft EIS, these comments were submitted on a preliminary administrative draft of the Final EIS and thus inclusion within the appendices of the final public review document would be inappropriate and is not necessary to comply with NEPA procedural requirements. However, as demonstrated in the BIA's administrative record for the Proposed Action, all comments from cooperating agencies were thoroughly considered, and in many instances changes were made to the Final EIS as a result of these comments before its release. Specifically, comments submitted on the Preliminary Final EIS were addressed through the addition of an addendum to the supplemental socioeconomic memo titled *Cowlitz Casino, Updated Growth Management Allocations* included within Appendix K of the Final EIS, revisions to the traffic study included as Appendix O of the Final EIS, revisions to the responses to DEIS comments in Appendix B and Appendix C of the Final EIS, and revisions to Sections 1.0-5.0 in the Final EIS. In some instances, the BIA determined that suggestions or opinions of cooperating agencies did not warrant changes to the analysis within the Final EIS; accordingly, not all comments were addressed through revisions.

3.2.2.6 BIA's Alleged Pro-tribal bias, Participation of the Cowlitz Tribe as the Applicant and Cooperating Agency, and Selection of AES as Environmental Contractor

Comment: Comments were received that BIA was biased in favor of the Tribe and that accordingly the EIS should be prepared under the lead of another Federal agency or as a joint lead EIS with multiple Federal agencies (such as EPA, or FHWA). Other comments indicated that participation of the Cowlitz Tribe in the EIS process, particularly as a cooperating agency, was inappropriate. Other comments stated that Analytical Environmental Services, BIA's environmental contractor, had a bias in favor of the Tribe and project as demonstrated by having worked on other Tribal fee-to-trust and casino projects and that BIA had not followed appropriate procedures in the selection of AES.

Response: The EIS was prepared by the BIA in accordance with NEPA, and presents an unbiased assessment of the environmental impacts of the Proposed Action.

A joint lead EIS may be appropriate in instances where it avoids duplication of effort by Federal agencies making major decisions and preparing separate Environmental Impact Statements. A joint lead EIS is not prepared as a means for a Federal agency to avoid carrying out its mission or completing its responsibilities. In this case, other Federal agencies, including EPA, FHWA, and NIGC, have actively participated in development of the EIS as cooperating agencies, preventing the duplication of effort.

The Cowlitz Tribe is not precluded from participating as a cooperating agency because of the Tribe's status as an applicant. Indian Tribes are specifically noted as potential cooperating agencies in NEPA regulations (40 CFR 1508.5), and are routinely included as such in BIA

and Department NEPA review consistent with the BIA NEPA Handbook, the Departmental Manual, and recent CEQ Guidance on Cooperating Agencies. The Cowlitz Tribe was included as a cooperating agency under the same rationale as Clark County, the City of La Center, City of Ridgefield, City of Vancouver, and the City of Woodland; that the proposed action may have jurisdictional and other effects on the Cowlitz Tribal Government.

The BIA followed procedures consistent with 40 CFR 1506.5 (c) in the selection of AES as the environmental consultant. AES was selected from a field of three candidates provided by the Cowlitz Tribe at the request of the BIA. The BIA selected AES in part because AES' participation in other similar projects provided AES with a superior level of experience and qualifications to conduct the required work. The BIA preferred to utilize a contractor that had past experience with the production of Environmental Impact Statements in accordance with the BIA's NEPA implementation guidelines, had worked on other fee-to-trust projects, and was familiar with the concerns and impacts normally associated with proposed casino projects. All AES work was performed under BIA direction as required by 40 CFR 1506.5.

3.2.3 Local Jurisdictional Issues

3.2.3.1 Growth Management Board Decision on Expansion of the City of La Center's Urban Growth Area

Comment: The May 14, 2008, decision of the Western Washington Growth Management Hearings Board (GMHB) is cited in comments as inducing jurisdictional conflicts. First, comments state the belief that the decision of the Board will preclude Clark County and other parties such as the Sheriff's Office and Clark Public Utilities from providing essential services to the project. Secondly, it is assumed that the decision of the Board removes the parcel from light industrial zoning and returns it to agricultural zoning, creating jurisdictional and land use conflicts not properly addressed in the EIS.

Response: As discussed in Section 3.9 of the Final EIS, Clark County approved an update of the Comprehensive Growth Management Plan (GMP) in September 2007 that resulted in the expansion of the City of La Center's Urban Growth Area (UGA) boundary to include the entirety of the Cowlitz Parcel. Under Washington State law, the County is allowed to provide "urban level" service to lands located within UGAs, but not to land located outside of these areas. The update of the GMP, which went into effect on January 1, 2008, amended the County's land use designation of the project site from Agricultural with an Industrial Urban Reserve overlay, to Light Industrial with an Urban Holding – 40 overlay. The May 14, 2008 GMHB decision found that the County's update to the GMP and expansion of the urban growth areas was not completed in accordance with Washington State Growth Management Act (GMA). Since the GMHB lacks the authority to reinstate agricultural zoning, (it can only make a decision concerning compliance with the GMA in adopting the amendment), the decision effectively remanded the matter to the County, which appealed the decision (see County's comment letter included as Log A2 of Section 3.0 of the BIA's Decision Package). The Superior Court in Clark County subsequently reversed the GMHB, effectively returning the land to the UGA. An appeal of the Superior Court decision is pending. Accordingly, it currently is undecided whether the project site will remain or be removed from the designated UGA for the City of La Center. Regardless of the outcome of this situation, implementation of the proposed trust acquisition would remove the property from

jurisdiction of the GMHB and land use authority of Clark County, effectively removing any jurisdictional questions or conflicts. As discussed below and in **Sections 3.2.14** and **3.2.15** of this ROD, the GMHB decision and possible removal of the Site from La Center's UGA do not warrant further analysis of the Proposed Action in the context of land use impacts, public services, or other issue areas.

Land Use Conflicts and Inconsistencies

Conclusions regarding the significance of land use impacts would not be affected in the event that the subject property is removed from La Center's UGA and returned to its previous land use designation of Agriculture with Industrial Urban Reserve overlay. Although the analysis in the Final EIS reflected the 2008 update to the Clark County GMP and associated Industrial Urban Holding land use designation for the project site, the analysis of land use impacts within the DEIS, circulated to the public on April 2006, was completed under the assumption that the project site was designated for agricultural purposes. The BIA determined in both the DEIS and the Final EIS that the Proposed Action would *not* be consistent with local land designations and intended uses for the Cowlitz Parcel, but that environmental impacts associated with this inconsistency would be reduced through the implementation of specific mitigation measures identified for traffic, noise, aesthetics, air quality, and public services. Thus, impacts have been evaluated and disclosed under both scenarios and the significance conclusions of the EIS are not affected. Mitigation measures identified for the Proposed Action in **Section 6.0** of this ROD will reduce the potential for adverse environmental effects resulting from land use inconsistencies regardless if the subject property remains within or is removed from the la Center UGA.

Provision of Public Utilities and Services to the Project Site

Special purpose districts (including Clark Public Utilities, which has agreed to provide water and power services to the site, and Clark County Fire District, which will provide fire protection and emergency services) are not subject to the requirements of the Growth Management Act, and thus would not be affected by the GMHB decision or any decision in the pending appeal and possible removal of the project site from the La CenterUGA. Additionally, sewer services would be provided through the development of an on-site wastewater treatment plant, and similarly would be unaffected by the GMHB decision or related appeals. While it is expected that law enforcement, prosecution, court and jail services will be provided by the County or its political sub-divisions as stated in the Tribe's EPHS Ordinance, once the land is in trust, these services could be provided through other mechanisms should the County be prohibited from extending services to the project site as a consequence of the GMHB decision and related appeals. If the Tribe decided to agree to Public Law 280 jurisdiction, the State would be required to provide law enforcement, prosecution, and related services. Additionally, the Tribe's EPHS ordinance provides that law enforcement, fire protection, and emergency services would be provided by the Tribe if agreements with relevant local governments cannot be reached.

Aside from the fact that there are alternatives for the provision of services to the project site under existing law and the Tribe's EPHS ordinance, it is anticipated that any decision in the appeal from the GMHB decision would not prevent local land use governments, including Clark County, from providing services to the project site once it is taken into trust because

local land use requirements do not apply to tribal trust lands. The subject property would not be designated as "agricultural" and would not have a "rural" character once the land is brought into trust; thus extension of urban level services to the project site would not violate the GMA. Local governments would be capable of providing services to the subject property regardless of the final determination concerning La Center's designated UGA boundary. It should also be noted that counties may extend urban levels of service to areas not managed under the GMA across areas that are "rural" in character as long as "urban" services are not provided to the intervening ineligible rural area.

Urbanization and Growth Assumptions

Urbanization of the I-5 Interchange area is expected to occur regardless of whether or not the project site is included within the La Center UGA as only a portion of the lands located at the interchange are affected by the GMHB decision (which was subsequently reversed and remains on appeal). The Final EIS is correct in the assumption that the I-5 Interchange area will likely be subject to urbanization under future cumulative conditions.

3.2.3.2 MOU between the Tribe and Clark County and Tribal EPHS Ordinance

Comment: Some comments were received noting that the MOU was relied on in the DEIS as an enforcement mechanism for much of the mitigation as well as a means of assuring that Clark County provided essential services to the project. These comments pointed out that the MOU was ruled to be invalid by the Growth Management Board, and accordingly could not be relied on. These same comments indicated that the Environmental, Public Health and Safety (EPHS) Ordinance, enacted by the Tribe and approved by the NIGC as a portion of the Tribal gaming ordinance was not an effective substitute for the MOU. Parties were concerned that the ordinance was revocable at the discretion of the Tribe. Another concern was that the ordinance did not provide relief to Clark County in State Court. Additional concerns include the ability of NIGC to enforce the ordinance and the question of whether ordinances enacted by Clark County subsequent to the MOU completed in 2004 would require compliance under the Tribal EPHS ordinance.

Response: The legal status of the MOU and the applicability of the Tribal EPHS ordinance are discussed in Section 1.5 of the Final EIS. The Final EIS recognizes that should the MOU become invalid as a result of litigation, the implementation of mitigation measures included as provisions of the 2004 MOU to avoid environmental effects would be ensured through the Tribe's EPHS Ordinance, which incorporates equivalent mitigation measures. After the Final EIS was issued, in April 2009, the Tribe and Clark County entered into a new agreement to rescind the 2004 MOU and to rely instead on the Tribe's EPHS Ordinance and Gaming Ordinance Amendment. As a result, the MOU is no longer in effect, the lawsuit challenging the MOU has been dismissed, and mitigation of impacts is provided for in the Tribal Ordinances.

The Tribe's EPHS Ordinance is enforceable through two mechanisms: 1) the Tribe's grant of an irrevocable limited waiver of sovereign immunity which allows Clark County to seek relief in State Court (neither the MOU nor the Ordinance empower other parties, such as the City of Vancouver, to seek relief or force compliance in State Court); and 2) as the Ordinance is part of the Tribal gaming regulations, the NIGC has the authority and ability to enforce the

provisions with powers that include closure of the gaming operation. The April 2009 rescission agreement between the Tribe and the County confirms the Tribe's limited waiver of sovereign immunity which allows Clark County to enforce the Tribe's obligations. It also should be noted that specific provisions of the EPHS Ordinance, including the Tribe's grant of a limited waiver of sovereign immunity, may not be revoked without approval of NIGC.

Consistent with the provisions of the now-rescinded 2004 MOU, the Tribal EPHS ordinance does not require the Tribe to comply with new County ordinances or updates to the County's 2004 ordinances in Exhibit 1 to the EPHS Ordinance (and originally appended to the MOU). Therefore, the analysis of impacts within the EIS was based on the Tribe's commitment to comply with specified 2004 Clark County Ordinances and not the currently adopted ordinances of the local jurisdiction. Strict compliance with local policies and regulations is not a NEPA threshold for determination of the significance of environmental impacts. As discussed further in **Section 8.6** of this ROD, trust lands are only required to comply with Federal and tribal standards. As described within specific sections of this ROD related to water quality (**Section 3.2.6**), groundwater and water supply (**Section 3.2.7**), biological resources (**Section 3.2.10**), and traffic (**Section 3.2.13**), the BIA has determined that compliance with federal regulations and provisions of the Tribal EPHS Ordinance are sufficient to reduce the environmental effects of the Proposed Action, and failure to comply with updates to the County's 2004 ordinances would not alter the impact conclusions or mitigation requirements within the EIS.

3.2.4 Purpose and Need

Comment: Comments were received that the Tribe's Business Plan and Unmet Needs Report presented inflated needs and that the information contained within them should not have been used to modify the purpose and need statement in the Final EIS. More specifically, it was claimed that utilization of the corrected purpose and need statement to eliminate some alternatives from detailed study was improper and contrary to NEPA procedures.

Response: The BIA relies on the Tribal Business Plan and Unmet Needs Report for decisions on the proposed fee-to-trust application, as it did in developing the Final EIS, and believes that the Cowlitz Tribe accurately has reported the cost of and need for Tribal programs.

Under NEPA, the BIA is entitled to give substantial weight to the needs and goals of the applicant, the BIA also is entitled to define criteria for generating a reasonable range of alternatives, and those criteria are properly based on the BIA's statutory authorities and policy direction, as well as on the purpose and need for the project. The Cowlitz Tribe is recently recognized, has no reservation or trust land, and needs to develop and fully staff its Tribal government and governmental programs. The Tribe has the sovereign right to determine the needs of its tribal government and its own members and to determine how to finance those needs. The Tribal Business Plan is a reflection of those governmental decisions and priorities. BIA intervention into such tribal governmental decisions would be contrary to federal Indian policy to encourage tribal sovereignty, self determination and self governance.

A discussion of the incorporation of elements of the Tribal Business Plan into project purpose and need is provided in Chapter 1.0 and Appendix B of the Final EIS. However, the Plan is

not usually presented in its entirety to the public as part of the fee-to-trust application, as much of the financial information contained in the Plan usually is considered confidential and redacted, nor is the Plan subjected to public review under NEPA. A number of comments from parties in opposition to the project demanded that the Plan be provided to the public. The Cowlitz Tribe provided the Plan to the BIA and the BIA provided the Plan, in its entirety, as Appendix E, of the Final EIS. The BIA supplemented its analysis by providing the Plan in response to public comments and incorporated information from the plan in its analysis.

The BIA has reviewed the Business Plan, the Unmet Needs Report, and comments submitted on the two reports. Comments submitted in opposition focused on the alleged inflated needs of the Tribe with the most attention being paid to Tribal health care needs. Comments on health care needs indicated that costs on a per capita basis appeared unjustified and needs could be met by providing health insurance premiums, or that Tribal membership was not large enough to justify establishing and maintaining the Tribal Health Clinics, which constituted the majority of costs. The BIA notes that many Tribal health clinics serve patients from the local population in addition to Tribal members, and frequently these clinics serve an important purpose by providing health care to patients, the uninsured or the under-insured, and those who would otherwise be able to access care only through emergency rooms. Providing health care is a legitimate governmental function, and it is reasonable for the Cowlitz Tribal Government to make it a priority.

3.2.5 Alternatives Analysis

3.2.5.1 Consideration of Northern Alternatives

Comment: A repeatedly voiced concern was that a northern alternative, near the Cities of Toledo or Vader, was not considered in detail and selected as the proposed action. Comments on the Final EIS were directed to two areas: that information from the Tribal Business Plan should not have been used to supplement the purpose and need, leading to the conclusion that northern sites did not meet the purpose and need and should not be subjected to detailed analysis; and secondly that if the Tribe were to negotiate a compact with the State of Washington, having more favorable conditions than the old compacts (due to the addition of Appendix X2), that northern alternatives could meet their purpose and need.

Response: The issue of which alternatives were selected for detailed analysis is discussed in depth in Section 2.0 and Appendix B of the Final EIS, and in **Section 2.1** of this ROD. Section 2.9 of the Final EIS provides a discussion of five northern alternative sites, which were found not to meet the Tribe's needs. Detailed analysis of the northern alternatives would require that BIA ignore the needs of the Cowlitz Tribe. It also assumes that the Tribe would be able to acquire and develop one of the parcels proposed by project opponents.

Some commenters asserted that northern alternatives would sufficiently meet the Tribe's purpose and need if the Tribe were to negotiate a compact with the State of Washington, having more favorable conditions than the old compacts (due to the addition of Appendix X2). A report prepared by ECO Northwest and submitted as comments on the Final EIS estimates revenues for a casino in the town of Vader at $322 million while the analysis within the Final EIS estimates revenues at $77 million. The ECO Northwest report claims that the difference in predicted revenue was a result of a new and more liberal tribal gaming compact

in the State of Washington titled "Appendix X2", differences in market area population and spending ascribed to a Vader facility, and tribal employment opportunity associated with a casino located in Vader.

An analysis of the ECO Northwest report determined that differences in predicted revenue between the Final EIS analysis and the ECO Northwest report result from a number of different basic assumptions as well as utilization of a different model rather than from consideration of provisions of Appendix X2. Major differences derive from utilization of differing penetration rates for tertiary markets (Seattle and Spokane), and importantly, an assumed much higher annual number of gaming trips and a much higher length of stay in the ECO report. It was concluded that ECO Northwest's analysis assumes (without any verifiable documentation) much higher penetration of the Seattle-Tacoma market for a Vader facility (located approximately 100 miles south of Seattle) than appears reasonable for a market area characterized as highly competitive with lower resulting revenues per VLT than occurs in Oregon.

Economic modeling in the Final EIS uses revenue assumptions based on Oregon tribal casinos because trip distribution and other modeling indicate that the majority of the market for the Cowlitz Tribe casino would come from the Portland, Oregon and Southwest Washington region currently served primarily by Oregon based casinos. Oregon tribal casinos already operate with compacts containing provisions very similar to those contained in Appendix X2 for Washington casino properties. Market studies for Toledo/Vader applied the same modeling assumptions as those utilized for the Cowlitz Parcel to assure consistency of data and approach. Because economic modeling in the Final EIS was based on Oregon casinos that already have compact provisions similar to X2, revenue projections for the Toledo/Vader alternative (as well as the Cowlitz Parcel) essentially take into account provisions now contained within Washington Appendix X2 compacts. Accordingly, conclusions concerning the inability of northern alternative site to address the purpose and need for the Proposed Action would not be significantly affected by the potential Appendix X2 provisions of the Washington-State gaming compacts.

NEPA requires that the selection of alternatives should be governed by the "rule of reason" (see CEQ 40 FAQs 1b). Because NEPA review of the Proposed Action was triggered by the Tribe's fee-to-trust application, it is appropriate that substantial weight is given to the Tribe's articulated goals, needs and objectives in selecting reasonable alternatives to be considered within the Final EIS. With this objective in mind, the BIA undertook a thorough analysis of northern alternative sites following publication of the Draft EIS in response to comments as described in Section 2.9 of the Final EIS. Documentation of this analysis is included within the administrative record for the Proposed Action. The BIA determined that northern alternative sites would not meet the purpose and need for the Proposed Action, and in many cases had the potential to result in greater environmental effects due to the rural nature and remote location of the sites. The BIA determined that northern alternative sites are not sufficiently distinguishable from those considered within the Final EIS that their analysis would offer additional information necessary for informed decision making or to assist the BIA in its consideration of impacts under NEPA.

3.2.5.2 *Consideration of Non-gaming Alternatives*

Comment: The comments of Clark County state that none of the alternatives, including the no action alternative, meet the purpose and need or are acceptable, in part because, it argues, current participation of the Tribe's business partners will be contrary to Tribal self-governance. The County believes the proposed action should incorporate elements of the Business Park Alternative, and also other land uses such as retail and light industrial. The County believes that such an alternative is viable and that the NEPA process should be reinitiated with this new alternative as the proposed action.

Response: As discussed in Appendix B of the Final EIS, a "mixed use" alternative brings nothing new to the analysis and is subsumed within the discussion of Alternatives C and D. The Cowlitz Tribe has committed to using a portion of the monies received from the Indian Claims Commission (ICC) to purchase the property. However, outside financing is required for any significant development of the property.

The BIA has analyzed and presented a reasonable range of alternatives in the EIS. Detailed consideration of a new reduced intensity business park alternative recommended by the County is unnecessary because it is subsumed within the range of alternatives already analyzed within the Final EIS. The BIA is not recommending this alternative because, as the County notes, it fails to provide sufficient income to meet Tribal needs as disclosed in the Business Plan.

Furthermore, the BIA disagrees with the commenters' assertion that gaming alternatives fail to meet the purpose and need because participation in a gaming management contract would be contrary to Tribal self-governance. First, applicable federal law (IGRA) specifically identifies in its "Declaration of Policy" that the purpose of IGRA is "to provide a statutory basis for the regulation of Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. §2707(1). IGRA specifically allows tribes to enter into management contracts. 25 U.S.C. §2711. Second, the NIGC is the federal agency with the authority to approve management contracts between tribal governments and outside management groups. As discussed in Section 2.2.2 of the Final EIS, to approve a management contract, the NIGC must determine that the contract is consistent with IGRA in terms of contract period, management company payment, and protection of tribal authority. Although, it is anticipated that Salishan-Mohegan, LLC would manage day-to-day operations of the casino-resort complex, the Cowlitz Tribal Government would maintain the ultimate authority and responsibility for the development, operation and management of the casino pursuant to IGRA, NIGC regulations, the Tribal Gaming Ordinance and the Tribal/State Compact to be negotiated with the State of Washington. Thus, the BIA does not believe that such a partnership would diminish the goal of tribal self governance.

3.2.6 Water Quality

3.2.6.1 *Storm Water*

Comment: Several comments were received regarding whether the project should be required to comply with Clark County stormwater ordinances in place at the time of construction versus the ordinance that was in effect at the time the MOU agreement was made

between the Tribe and the County. Additionally, some comments asserted that the design and sizing of stormwater treatment facilities is not appropriate for the proposed use on the site, and that the flow quantities would negatively impact the water quality of the unnamed stream bordering the site.

Response: As described in **Section 3.2.3.2** of the ROD, the Tribal EPHS Ordinance does not require the Tribe to comply with new County ordinances or updates to the County's 2004 ordinances appended to the EPHS Ordinance. As discussed in Section 4.3 of the FEIS, stormwater control facilities would be designed to comply with federal regulations and the 2004 Clark County Code 40.380 (Stormwater and Erosion Control) as required by Section 3(G) of the Tribe's EPHS Ordinance. The proposed stormwater control facilities described in detail in the stormwater control plan included as Appendix F of the Draft EIS, have been designed to meet the water quality antidegradation provisions of the Washington Administrative Code (WAC).

The stormwater treatment facilities for the Proposed Action were designed to treat the "water quality design storm" for the site, accounting for the amount of impervious surface and the projected amount of stormwater that could be generated. Water quality design storms typically precede large storms and provide the first flush of surface contaminants such as automobile fluids and sediment. The best management practices (BMPs) proposed to provide treatment and filtration of sediments are biofiltration swales, below-grade cartridge filters, sedimentation manholes and oil/water separators where needed. These BMPs have been approved by both Clark County and Washington State Department of Ecology (DOE). Turbidity increases and flooding events releasing untreated water would be addressed by controlling flow with BMPs, including use of retention basins, detention basins, constructed wetlands, infiltration practices, grassland swales, and minimization of directly connected impervious surface areas. These measures would ensure that stormwater runoff would be appropriately managed and would not result in adverse impacts to water quality.

Runoff from construction activities would be managed through compliance with a National Pollution Discharge Elimination System (NPDES) construction general permit, which would require the preparation of a Stormwater Pollution Prevention Plan (SWPPP). Extensive BMPs would be used throughout the construction phase of the project to meet runoff discharge standards. As described in Mitigation Measure 5.2.1.B of the FEIS adopted within **Section 6.0** of this ROD, these not only include the normal erosion prevention BMPs, but also include the use of chemical treatment to remove sediment if needed.

3.2.6.2 Wastewater

Comment: A number of comments were received concerning the discharge of treated wastewater under the Proposed Action and the potential for adverse effects to water quality in the unnamed stream and East Fork of the Lewis River. Some comments stated that the USEPA would not grant an NPDES permit for the project. Some comments questioned the effectiveness of proposed cooling facilities to reduce effluent temperatures and were concerned that year-round discharge would disrupt the natural ephemeral nature of the

unnamed stream. Additional concern was expressed whether the project would be capable of using the City of La Center wastewater treatment facility.

Response: Wastewater would be treated according to Washington State Department of Health (DOH) and DOE standards for Class A Reclaimed Water for release to wetlands and potential human contact (fire suppression). The proposed facility would be capable of treating the projected wastewater flows at the site and would utilize a Membrane Bioreactor (MBR) Plant to treat effluents. Wastewater would be oxidized, coagulated, filtered, and disinfected prior to discharge to meet Title 22 standards and the Tribe would obtain and comply with a NPDES waste discharge permit from the USEPA prior to operation of the proposed facility.

The supplemental wastewater report (Appendix G of the FEIS) summarizes the anticipated levels of common constituents within treated wastewater. Temperature and metals levels were estimated from influent data obtained from the WWTPs at La Center and Woodland. Treated water quality estimates are based upon information reported at other WWTPs using MBR systems with denitrification and UV disinfection, similar to the treatment train for the Proposed Project. Discharge of treated wastewater effluent with the characteristics described in Table 2.1.6 of the Final EIS, would not adversely impact water quality.

As described in Section 4.3 of the Final EIS, the temperature of wastewater effluent increases over ambient conditions during transport and treatment. An underground heat transfer pipe field is proposed along the discharge line leading to the unnamed tributary and is included as mitigation in Section 5.2.2 of the Final EIS to reduce potential impacts from the increased temperature of treated wastewater. The cooling field would reduce treated wastewater temperatures to 16°C, avoiding potential adverse impacts. The effectiveness of the proposed cooling facilities has been verified in a technical memorandum included within **Exhibit 3** of the Supplemental Response to FEIS Comments (Section 2.0 of the Decision Package).

The effects of increased flows and year-round discharge to the unnamed stream was considered and discussed in Section 4.5 of the Final EIS. Impacts considered included increased streambank erosion, sedimentation, and loss of riparian vegetation. Erosion would be associated with the initial additional flows entering the unnamed stream but would not be a major long-term impact. Effluent discharge mitigation measures recommended within Section 5.0 of the Final EIS would ensure the effects of discharge to the unnamed stream are not significant. Compliance with the NPDES permit would include continued water monitoring to ensure that the unnamed stream would not be impaired by water that would be discharged on-site. The USEPA's comment letter of June 25, 2008 on the Final EIS indicated that its previous concerns regarding water quality were appropriately addressed, stating "The measures taken to obtain additional baseline data, and address water temperature, fecal Coliform and wetland issues should assure that water and air quality standards will be met and biological resources will be protected."

The Proposed Action does not require the City of La Center to provide sewage service. Whether the City is permanently precluded from doing so by the recent decision of the Western Washington Growth Management Hearings Board, which has been appealed by Clark County, is unlikely since the land in trust will not be subject to state and local

requirements. As discussed in Section 4.14 of the FEIS, in the unanticipated event that an agreement is reached between the Tribe and the City for the provision of sewage service, the City would upgrade its existing wastewater treatment facilities and be responsible for compliance with all applicable federal and state regulations, including the CWA and Washington State Environmental Protection Act. This process, although not reasonably foreseeable, would require the City to obtain a new NPDES permit from the EPA.

3.2.7 Groundwater / Water Supply

3.2.7.1 Operational Effects

Comment: A number of comments were received expressing concern that domestic wells would be affected by the development of on-site water supply wells to serve the proposed facilities. Comments indicated that CPU would be unable to provide water to the project due to the May 14, 2008 decision of the GMHB. Commenters noted that the Troutdale Aquifer has been reclassified as a sole source aquifer (SSA) and the FEIS is deficient because it fails to mention USEPA project review under the SSA Protection Program and does not describe measures to minimize or eliminate the project's adverse impacts to the aquifer. A number of comments claim the Final EIS is in error concerning the number of wells located within a one mile radius of the project site.

Response: Optional mitigation to develop on-site water wells as an alternative potable water supply source was not adopted by the BIA, and is not a component of the Proposed Action. Water supply for the proposed facilities would be provided through connection to the Clark Public Utilities (CPU) municipal water supply system. CPU's current Water System Plan and recent planning documents relating to new source development indicate that their system is capable of providing the water necessary to meet all service demands in the foreseeable future, including water demands for the Proposed Action. Clark Public Utilities (CPU) has signed an agreement to provide water supply to the project (Appendix BB of the DEIS). As discussed in detail in **Section 3.2.3.1** of this ROD, the GMHB decision does not prohibit CPU from providing water supplies to the project, nor would any subsequent appellate decision. The use of CPU water supply would not influence water availability or water quality for neighboring properties, and there would be no impacts to the quality of water in the Troutdale Aquifer and the water wells in the project vicinity. Although the development of on-site water supply wells is not a component of the project, the feasibility and potential water supply effects of developing on-site wells was discussed in the report entitled "Water Supply Source Evaluation" (Pacific Groundwater Group, May 24, 2005) provided as an attachment to the Water and Wastewater Report for the project (Appendix G of the DEIS).

As mentioned in comments, the Troutdale Aquifer has been classified as a sole source aquifer, and thus is protected through the sole source aquifer (SSA) protection program authorized by section 1424(e) of the Safe Drinking Water Act of 1974 (Public Law 93-523). Under the SSA Protection Program, designation of an aquifer as a sole source aquifer provides USEPA with the authority to review federal financially assisted projects planned for the area to determine their potential for contaminating the aquifer. Because the proposed project does not involve federal funding, impacts to the Troutdale aquifer from the project would not be subject to USEPA review under the SSA protection program. Nonetheless, the Tribe will consult with

the USEPA to obtain NPDES permits for general construction and wastewater discharge, which would allow USEPA to make a determination about the project's impacts to groundwater quality. As described in Section 4.3 of the Final EIS, and **Section 3.2.6** of this ROD, the Proposed Action will not adversely impact groundwater quality. The Final EIS includes stormwater controls and wastewater discharge measures that will ensure that there would be no impacts to the quality of groundwater in the Troutdale Aquifer and the water wells in the project vicinity. Additionally, the project would implement a groundwater monitoring program to ensure that the project does not result in adverse impacts to groundwater quality.

3.2.7.2 Construction Effects

Comment: Some comments expressed concerns over dewatering for building foundations or reduced infiltration and increased stormwater runoff. Comments asserted that the Final EIS states the incorrect groundwater depth at the site to be 75 feet below the surface, when in fact the groundwater table is relatively shallow on the project site. Commenters stated that the use of pile foundations could result in a breeched aquitard, which could result in potential negative environmental impacts such as groundwater contamination, or loss of surface water associated with wetlands on the site.

Response: Ground-disturbing activities would have the potential to negatively impact groundwater quality during construction activities. Dewatering may be required for portions of the below-grade excavations. The areas of dewatering and volumes of water would be a function of the time of year construction occurs and local soil conditions. The majority of the soils are silt and clay and exhibit low permeability. Sump pumps and low energy pumping systems are anticipated to be used within portions of the excavation. The fine-grain nature of the soil is such that dewatering volumes are expected to be minimal. As described in Section 5.0 of the Final EIS, the project would obtain and comply with an NPDES permit, which contains required provisions for dewatering activities that would avoid adverse effects.

Piles may be utilized to support the foundations of the proposed parking garage in the northern portion of the site. If steel piles are used, the cohesive nature of the site soil would result in adhesion of the soil along the sidewalls, which would seal off the soil interface and would not result in a breeched aquitard. Grout piles may be constructed by advancing a mandrel and boot into the soil while injecting grout under pressure. As the mandrel is advanced, soil is densified around the annulus of the pile by the mandrel. Densification of the soil from the mandrel results in lower soil permeability. Grout that is placed into the shaft of the pile forms a hydraulic seal along the annulus, which would prevent the flow of water along the pile. In either scenario the hydraulic conductivity would not be increased as a result of pile installation. Therefore, pile-driving into the soils would not result in a breach of the aquitard.

Section 3.3 of the FEIS and the Water & Wastewater Report (Appendix G of the Draft EIS), accurately describe the depth to the Upper Troutdale Aquifer at 75 feet below the ground surface. As discussed in the grading and drainage study conducted for the proposed project (Appendix F of the Draft EIS), shallow groundwater on the project site may occur at depths of 2 to 5 feet. The project area contains perched groundwater at varying depths throughout the

site. As described above, construction techniques and measures would be implemented to ensure that groundwater quality is protected.

3.2.8 Soils, Geology, and Seismicity

Comment: A comment was made that the analysis did not correctly identify potential mineral resources on the project site and in the project vicinity. A comment stated that the capacity of soils to remove contaminants from stormwater and wastewater was not described. Additionally, a commenter stated that the project would not include sufficient protection to address potential seismic issues, particularly resulting from liquefaction.

Response: As described in Section 3.2 of the Final EIS, no mining activities are currently taking place on or near the project site, and no identified mineral resources are known to exist within the project site. Because the project would not result in a loss of mineral resources, no significant impact would occur. The ability of soils to remove contaminants from stormwater and wastewater runoff is described in Section 4.3 of the FEIS.

The project would include seismic safety features in compliance with the International Building Codes which provide design criteria that protect against potential localized seismic impacts in accordance with the Tribal EPHS Ordinance. Seismic safety features would be implemented based on the results of a final geotechnical investigation.

As described in Section 3.2 of the FEIS, according to the Washington State Department of Natural Resources, Division of Geology and Earth Resources, the Cowlitz Parcel and surrounding vicinity have a low to very low susceptibility to liquefaction. The discussion of liquefaction and site seismicity hazards within the FEIS is based on a general literature review and review of subsurface information contained in a feasibility study for the site completed in April 2005 (Appendix 7 of Appendix F of the DEIS). Further, geotechnical analysis using additional subsurface data confirmed that there is a very low susceptibility of liquefaction or cyclic failure at the site (see Exhibit 3 of the Supplemental Response to Comments, Section 2.0 of the Decision Package). The Tribe has committed in the EPHS Ordinance to develop the property consistent with CCC Chapter 40.430, Geologic Hazard Areas and Chapter 14.04, Building Code. The building code includes standards that are sufficient to ensure that new buildings withstand potential localized seismic impacts.

3.2.9 Air Quality

Comment: Several comments stated that the Final EIS greenhouse gas mitigation is inadequate. The comments state that the Final EIS fails to inventory all emission sources and the analysis should be redone.

Response: Section 4.15 of the Final EIS quantifies greenhouse gas (GHG) emissions from the Proposed Project for both direct and indirect sources. The emission inventory that is provided in the Final EIS used the most up-to-date data available. GHG emission estimation is an evolving science; therefore the best available greenhouse gas emission factors were used. The mobile emission estimations take into account employee trips, patron trips, and deliveries to the facility, while area estimation takes into account maintenance work, kitchen,

and other stationary source on the property. The Final EIS provides an account of reasonably foreseeable emissions and recommends appropriate mitigation measures within Section 5.0.

3.2.10 Biological Resources

3.2.10.1 Wetlands

Comment: Many comments indicated that the Final EIS failed to use the updated Clark County Code (CCC 40.450) for wetland classification, rating system and buffer width calculations for site and mitigation planning. Some commenters also mentioned that many wetlands were incorrectly classified if the current County Code were to be applied.

Response: Wetlands on the site were delineated to U.S. Army Corp of Engineers (USACE) standards, as verified by the USACE in letters dated February 9, 2005 and May 31, 2005 (Appendix M of the DEIS). **Section 3.2.3.2** of this ROD clarifies that the Tribal EPHS Ordinance commits the Tribe to compliance with the County regulations in effect at the time the now-rescinded MOU was signed in 2004; thus the buffer requirements that were used to design the proposed site plan were the 2004 buffer requirements of the Clark County Wetland Protection Ordinance (CCWPO). The comments submitted on the Final EIS relating to wetlands are all tied to current County standards, which are different from those in place and applicable to the baseline for the Project. The Project goes beyond the Federal standards for wetland protection as neither EPA nor the USACOE regulations require the use of buffers to avoid impacts to wetlands. The Proposed Action includes buffers for all wetlands and water courses. The detailed discussion of how the buffers proposed by the Project fully conform to the applicable County standards for wetlands and buffers is contained in the Buffer Reduction and Mitigation Plan (Appendix 9 of Appendix F of the DEIS). These demonstrate that the project is in full compliance with the Clark County Code (CCC.40.450) wetland classification requirement that is applicable to the project through the EPHS Ordinance. All wetlands will be buffered by at least 25 feet, and many by 100 feet or more. Many of the buffers and some of the wetlands will be enhanced to ensure that the quality and beneficial functions of wetlands, such as filtration, will be increased as a result of the project. The project is in full compliance with the applicable wetland classifications in place at the time the now-rescinded MOU was executed, consistent with the Tribal EPHS Ordinance. Further, the project is in full compliance with the USACOE standards that are the controlling standards for all wetlands on trust lands. Nearly 99.5% of all wetlands will be avoided and preserved; while some, as noted above will also be enhanced. Two relatively small isolated non-jurisdictional wetlands are scheduled to be filled. Some roadside ditches that were classified as jurisdictional under the jurisdictional delineation approved by the USACOE will also be impacted; these will be fully mitigated on site as the new road alignment will have new road side ditches created to offset these jurisdictional wetlands on a 1:1 or greater basis.

3.2.10.2 Fisheries and Aquatics

Comment: Several comments stated there was a lack of impact analysis to fisheries and aquatic resources of the unnamed tributary as well as the East Fork Lewis River from direct wastewater and stormwater discharges. One comment specifically noted that the USEPA letter on the DEIS was never addressed as it pertained to changes of the biota of the unnamed

stream while another comment noted that the unnamed stream was recently reclassified as fish bearing.

Response: The detailed analysis and evaluation of potential impacts from wastewater and stormwater is thoroughly explained in Section 4.3.1 of the Final EIS. This analysis indicates that impacts to surface and ground waters will be less than significant, and in some cases would improve the water quality from the current site conditions, thus the impact to all aquatic resources would be less than significant. USEPA comments on the DEIS regarding wastewater and stormwater management plans and their affects on aquatic resources were fully addressed in the Final EIS to assure that all applicable water quality objectives would be met. Effluent and stormwater discharges to the unnamed tributary will likely increase habitat value, allowing a greater number of species that are dependent on perennial water sources to utilize the area; no special status species would be displaced due to the creation of a more perennial aquatic environment.

The most current information and data demonstrates that the unnamed stream is in fact not accessible as habitat for migration or spawning salmonids. Specifically, an existing 12 foot waterfall is a barrier to upstream migration from fish of the East Fork Lewis River to the unnamed stream. The Section 7 consultation letter from the USFWS letter dated July 12, 2007 describes the unnamed stream as such, "An unnamed, non-fish bearing seasonal stream flows through the project site and into the East Fork Lewis River approximately one mile northeast of the project area." Furthermore, the Section 7 consultation letter from the National Marine Fisheries Service (NMFS) dated January 7, 2008 states, "Because all potential adverse effects are discountable or insignificant (from wastewater and/or stormwater discharges), NMFS concurs with the COE effect determination of 'may affect, not likely to adversely affect' for chum salmon, Chinook salmon, and steelhead." The NMFS concurrence letter specifically states that the projects wastewater and stormwater management practices will be insignificant to and are not likely to adversely affect fisheries resources in the unnamed stream or the East Fork Lewis River (Final EIS Volume VII Appendix I). In its comment letter of June 25, 2008 on the Final EIS, the USEPA acknowledged that its comments on the Draft EIS have been appropriately addressed stating:

> it is clear that a significant amount of additional work was has been performed since the draft EIS was issued for public comment and that a genuine effort was put into addressing the environmental concerns raised in our comments. The measures taken to obtain additional baseline data, and address water temperature, fecal Coliform and wetland issues should assure that water and air quality standards will be met and biological resources will be protected.

3.2.10.3 Migratory Birds/Water Fowl

Comment: Some comments raised concerns regarding potential indirect impacts to locally occurring bald eagles, and migratory waterfowl such as trumpeter swans, sand hill cranes and Canadian geese that utilize the regional wetlands and Wildlife Refuges as a stopover in their pacific flyway migration.

Response: The bald eagle receives full protection from federal laws including the Bald Eagle Protection Act, and the Migratory Bird Treaty Act (MBTA). These statutes will remain in force after the land is taken into trust for the Tribe. The Biological Assessment (BA) for the Proposed Action discusses the potential for impacts to eagles and the mitigation that is proposed addresses both direct and indirect impacts as well as all other MTBA covered species. The Section 7 consultation letter from USFWS dated July 12, 2007 concurred with the BIA's determination, stating the following with regards to bald eagles, "The project site does not provide suitable nesting, roosting or foraging habitat for bald eagle," and that "Effects from the proposed action would be insignificant due to the proposed project site being in an area of existing high disturbance due to the proximity of commercial and residential developments as well as the interstate 5 freeway." Additionally, the comments noting that a wildlife refuge was in close proximity to the site and the project could have potential impacts to waterfowl in migratory stopover utilizing these regional wetlands was fully addressed in the response to comments on the DEIS (Appendix B of the Final EIS, Page B-19). It was determined that mitigation measures to reduce impacts to migratory birds would reduce potential effects to less than significant; therefore, the project would have no direct impact to these wildlife refuges.

3.2.11 Cultural and Paleontological Resources

3.2.11.1 Presentation of Ethnographic Resources

Comment: Several comments were received contending the source referenced in the Final EIS concerning the Tribe's "claim to the area" was inaccurate and discredited by the Indian Claims Commission (ICC).

Response: While historic and ethnographic records indicate that the Cowlitz Tribe was not the only Native American group to occupy the environs of the lower Lewis River in proximity to the Columbia River, the preponderance of evidence demonstrates that the Cowlitz Tribe used the area for a variety of purposes including trading expeditions, hunting, fishing, warfare, and seasonal settlement.

The Tribe's historic presence in the area surrounding the La Center site is thoroughly documented in a number of sources including, but not limited to: the technical reports prepared in conjunction with the Assistant Secretary-Indian Affairs' Final Determination acknowledging the Cowlitz Indian Tribe; in the decision documents, related exhibits, and testimony from the ICC litigation involving the Tribe's successful claim for compensation for Cowlitz lands taken by the United States; in the Cowlitz Amended Fee-to-Trust application; and in the Restored Lands Opinion from Penny Coleman, NIGC Acting General Counsel to Philip Hogen, NIGC (November 22, 2005).

3.2.11.2 Aboriginal Territory Questions and Concerns

Comment: Some comments indicated that the BIA should not have relied on the NIGC and the findings of the OFA in recognizing the Cowlitz Tribe in answering aboriginal territory questions. These comments also indicated that the ICC had stated that project site lands were occupied by Chinooks rather than Cowlitz. The comments stated that this was important

because BIA should not make an Initial Reservation Proclamation for lands outside of a Tribe's aboriginal territory.

Response: BIA *Guidelines for Proclamations* do not preclude proclamations for non-aboriginal territory, nor do the guidelines indicate how strongly aboriginal territory concerns should be ranked in a BIA decision. Nevertheless, the BIA has properly considered the Cowlitz Tribe's history and historical connections to the Cowlitz Parcel, as well as the need and justification for proclaiming that land as the Tribe's reservation, as set out in the BIA guidelines. Further, the ICC did not make any finding that the land was Chinook or that it was not Cowlitz territory, merely that the Cowlitz did not have "aboriginal title," meaning that the Cowlitz did not occupy the land to the exclusion of other Indian groups and therefore would not be entitled to payment for its loss. Indeed, the Cowlitz Indian Tribe believed it had aboriginal title to the land and applied to the ICC for compensation for the land surrounding La Center. In other words, the Tribe did not belatedly assert its connection to this area to justify its current land acquisition request, but rather, always has maintained its historical connection to these lands. Finally, the BIA is entitled to rely on findings of its own experts in the Branch of Acknowledgement, now known as the Office of Federal Acknowledgement, as well as findings made by a federal tribunal, the ICC, and the conclusions of the NIGC, rather than accepting the ethnographic interpretations of other groups.

3.2.12 Socioeconomic Impacts

3.2.12.1 Employment and Housing

Comment: Several comments were received that stated the number of local non-hires was underestimated in the Final EIS. One comment provided example mitigation measures to reduce impacts if the assumptions in the Final EIS were inaccurate. Several comments stated that the location of new in-migrating households generated by project related employment opportunities was incorrectly identified in the Final EIS. Several comments stated that predicted employee wages were too low and this would result in an increased need for services. Several commenters stated that the Final EIS underestimates the potential need for social services and housing for employees and underestimates the number of in-migrating households. One commenter stated that the Final EIS uses inaccurate growth rates and that this inaccuracy translates to inaccurate and artificially low estimates for socioeconomic analysis and thus violates NEPA (40 C.F.R. § 1500.1(b)). Several comments suggested that additional mitigation should be proposed to reduce impacts from the influx of non-English speaking project employees.

Response: Sections 4.7, 4.14, and 4.15 of the Final EIS discuss socioeconomic impacts and Section 5.0 provides mitigation to reduce impacts to less than significant levels. The Final EIS (Appendices B and C) includes extensive responses to comments received on the DEIS as well as Appendix K *Supplemental Socio-Economics Report, and Addendum* (Hovee, 2006c and 2007c) (Final EIS, Vol. VII).

The Final EIS provides an accurate and thorough discussion of socioeconomic impacts related to employee income and housing. The estimated median household income for all jobs under the Proposed Action is $39,500 (DEIS Appendix S). These households are generally above levels that would qualify for public assistance. The impacts of in-migrating workers are

addressed in Sections 4.7 and 4.14 of the Final EIS, Appendix B Section 2.15.2, and Appendix K of the Final EIS. It was determined that because projected Cowlitz casino wages are almost 60 percent higher than Clark County wages within comparable industry sectors, this wage level will attract workers from the existing labor pool of Clark and Cowlitz Counties who are currently unemployed, earning less money, or looking for employment. ECONorthwest has not provided any case study analysis that contradicts the January 2006 Socioeconomic Assessment (Appendix S of the DEIS) estimate that approximately 10% of hires will come from new residents relocating to the region (with a range of 5% -15%). The resulting demand is calculated at a net need for five new residences, which represents a very small addition to the existing housing inventory. The study area's relatively higher historical unemployment rate and observed resident willingness to commute are important to this labor market determination.

As identified in Appendix K of the Final EIS, the ECONorthwest analysis should not be directly compared to the socioeconomic analysis conducted for the EIS due to the following: the lack of transparency with the ECONorthwest model; a level of geographic specificity at odds with market experience; disregard of employment allocations; conclusion of higher in-migration but with no supporting rationale; and, the assumption of net new housing demand required from indirect/induced multiplier effects despite high level of existing construction activity in Clark and Cowlitz Counties. In response to the commenter's claim that the Final EIS uses inaccurate growth rates and subsequently identifies inaccurate and artificially low estimates of the significance of socioeconomic and cumulative impacts to the City of La Center and surrounding area, refer to Appendix S of the Draft EIS and Appendix K of the Final EIS. Growth rates utilized within the Final EIS were based on revised population growth projections identified for the Clark County Comprehensive Plan update, the City of La Center urban growth area (UGA) and the City of Ridgefield UGA (see Appendix K, E.D. Hovee 2007c). As discussed in the E.D. Hovee & Company Memorandum (Hovee 2007c), the socioeconomic impacts of the expanded UGAs (and subsequent revisions to the population growth rates) include the increased ability for the Primary Study Area (identified as the cities of La Center, Ridgefield, and Woodland) to accommodate more of the in-migrant population growth directly associated with the Proposed Project and increased potential for communities within the Primary Study Area to attract a larger share of casino workers over a longer period of time after the initial start-up of the Proposed Project. The BIA has determined that the growth rates identified in the Final EIS and related attachments are thorough, accurate and sufficient to assess project-related socioeconomic effects pursuant to 40 C.F.R. § 1500.1(b).

Impacts to local jurisdictions are discussed in Section 4.7 of the Final EIS and **Section 3.2.12.2** of this ROD.

3.2.12.2 Impacts to Local Jurisdictions

La Center

Comment: The City of La Center provided comments stating that the proposed action would result in a 66% loss in card room revenues, and that this was a significant impact, which needed to be fully mitigated for the life of the Tribe's casino project, rather than for the 10-year period proposed by the Tribe earlier. The City also indicated that closure of all four card

rooms was a probable effect of the proposed action and that this impact should be disclosed and mitigated. Additionally, the City indicated that economic benefits provided to La Center by the card rooms or their employees must be mitigated. Additionally, the City stated that there would be significant costs to the City for providing police services and that these costs would not be reimbursed, as no mutual aid agreement with Clark County exists.

Response: The City of La Center participated in the NEPA process as a cooperating agency. Mitigation to address impacts of lost gambling revenues for at least 10 years was discussed in Section 4.7.1 and Section 5.2.6 of the Final EIS. The Cowlitz Tribe made a second offer to mitigate the financial impacts to La Center when it adopted a tribal ordinance that specifically commits the Tribe to enter into a Memorandum of Understanding with the City that will provide for payments to help offset the potential reduction in the City's gambling tax revenue once the Tribe's gaming facility is operational (See Comment Log A4 included within Section 3.0 of the BIA's Decision Package). The mitigation offer made by the Tribe in its ordinance is tied to sewer and other infrastructure projects and provides a limited waiver of sovereign immunity to allow the City to bring suit to enforce the Tribe's commitment to provide at least the same level of sewer and infrastructure funding as was previously offered to the City by the Tribe in 2006. However, the Tribe's more recent offer expired on July 14, 2009, which allowed the City approximately one year after the tribal ordinance was adopted to accept the proposed mitigation. According to the Tribe, this contingency was necessary to ensure that the City does not unnecessarily delay decisions that the Tribe will need to make concerning the provision of sewer services to the site once the land is taken into trust.

It is important to note that neither the BIA nor the Cowlitz Tribe have the ability to make the City of La Center accept any mitigation or enter into any mitigation MOU, as borne out by the fact that La Center declined to accept the Tribe's most recent mitigation offer. Accordingly, BIA is presenting the impacts to La Center's gambling tax revenues as unmitigated.

NEPA does not require that all impacts be mitigated. In this case the impacts of lost card room revenue and financial contributions are indirect and entirely economic, and potential mitigation of such impacts is entirely within the control of the City (through negotiation of an agreement with the Tribe). Therefore, the BIA is not obligated to ensure that such impacts are mitigated before acting on the Tribe's proposal. Additionally, the BIA does not believe the potential impacts meet a significance threshold of interfering with the provision of governmental services. As discussed in Section 4.7 of the Final EIS, even with the projected 66% loss in card room revenues as a result of the Proposed Action, the remaining $1.6 million in gaming tax revenue would be more than sufficient to ensure that allocations to the City's general fund (which were $853,000 as of 2005) would not be reduced. Thus, the primary impact of the Proposed Action would be a reduced build-up of the City's discretionary fund for capital improvement projects, rather than on the general fund supporting City services. Under NEPA, the BIA has an obligation to disclose potential environmental impacts and identify feasible mitigation to reduce the impacts of proposed actions. The BIA also has an obligation to fairly review the Tribe's application, support Tribal sovereignty and the Tribe's efforts to exercise its legal rights. In this case, the BIA has disclosed the potential for effects and identified potential mitigation, and believes that the Tribe has made a good faith effort to negotiate with the City to provide said mitigation. The BIA has determined that it will not

require the Cowlitz Tribe to mitigate these potential economic impacts to the City of La Center, and it has not adopted the previously identified mitigation as a condition of approval.

With regard to the City's claim that all the card rooms will close, it is anticipated that predicted annual gaming revenues in excess of $12,000,000 would support the economic viability of at least two of the card rooms to remain in business.

Finally, with regard to provision of police services, the site is within the jurisdiction of Clark County, not the City of La Center, so the City is under no obligation to provide police services. The Tribe's EPHS Ordinance provides that the Clark County Sheriff's Office will provide law enforcement service to the site.

City of Woodland:

Comment: The City of Woodland provided a resolution of the town council in response to the Final EIS. This resolution indicates that in the event the land is taken into trust, the City intends to explore joining with other parties that may litigate against the trust acquisition, and that the Proposed Action would result in significant impacts to their jurisdiction requiring compensatory mitigation.

Response: The City of Woodland participated in the EIS process as a cooperating agency. The BIA has thoroughly evaluated the potential for impacts to the City of Woodland throughout preparation of the EIS. While no stand-alone studies were conducted, the City of Woodland was included within the primary study area for evaluation of socioeconomic impacts. Various socioeconomic parameters of Woodland are specifically broken out in Section 3.7 of the EIS. Additionally, analysis in the Final EIS indicated that the City's transportation facilities and public services and utilities would not be impacted. No significant impacts to this jurisdiction were identified in the analysis, thus no mitigation or compensation to the City is warranted.

City of Vancouver:

Comment: The City of Vancouver has made repeated assertions of procedural impropriety by the BIA, focusing on project need and alternative selection, but also indicating that the BIA did not respond to the City's comments on the Preliminary Final EIS (PFEIS). The City repeatedly asserted that it and its residents would be significantly impacted. The City asserts that traffic in general, and intersections within Vancouver in particular, will be affected; that there will be an increased demand for low cost or assisted housing; and that there will be a plethora of problems resulting from increased gaming addiction.

Response: The City of Vancouver participated in the NEPA process for this project as a cooperating agency. Accordingly, it was provided with the Preliminary Final EIS for review. Unlike the DEIS, cooperating agency comments on the Preliminary Final EIS are not bracketed; however, they are considered, changes as appropriate are made in the Final EIS, and of course all such comments are included in the administrative record.

The City's assertions of probable significant impact are not supported by the best scientific evidence. The Traffic Impact Study (TIS) (Appendix T of the Draft EIS), Supplemental TIS

(Appendix O of the Final EIS), Socioeconomics Report (Appendix S of the DEIS) and Supplemental Socioeconomics Report (Appendix K of the Final EIS) conducted for the Proposed Action consider the question of impacts to the City. Since the City of Vancouver is 12 miles from the project site, traffic will not be routed through Vancouver (other than on I-5), and since a comparatively minor portion of the Cowlitz project's market comes from within Vancouver, impacts to Vancouver intersections would not be significant. Similarly, repeated socioeconomic studies focusing on the amount of immigration resulting from casino employment, coupled with the consideration that offers of the higher paid positions are more likely to initiate the decision to move, indicate that there will be no significant increase in low cost housing demand. The BIA does note that with the expansion of gaming opportunities in general, whether on the internet, in convenience stores, or in card rooms or Indian casinos, a sociologically significant increase in the rate of addicted gamblers attributable to the project is improbable.

3.2.12.3 Impacts to Spirit Mountain Casino and Grand Ronde Tribe

Comment: Comments were received from the Grand Ronde Tribe which took issue with the estimation of economic impacts to the Grand Ronde Tribe. More specifically the comments stated that the Spirit Mountain Casino has greater income and would lose greater market share than estimated in the Final EIS. The EIS includes a market-based estimate of income from Spirit Mountain of $131 million (Appendix L of the FEIS). The Grand Ronde Tribe, through its consultants, provided an estimate of $185 million for 2005. The comments indicated that the BIA had underestimated Spirit Mountain's penetration of the Portland market, and that the BIA analysis and assessment of impacts was flawed. Grand Ronde indicates that the proposed action will result in a reduction of Spirit Mountain income of 31.5% while the Final EIS estimates the reduction at 13.1%. These comments implied that the greater economic effect upon Grand Ronde would result in a significant reduction in the ability of the Tribal government to fund governmental programs. Accordingly, Grand Ronde maintains that a significant unmitigated environmental impact will occur and that mitigation must be offered within the Final EIS and ROD. Additionally, Grand Ronde maintains that the BIA must, in the exercise of its trust responsibility, balance the positive effects to the Cowlitz Tribe against the negative economic effects to the Grand Ronde Tribe.

Response: The BIA initiated a reanalysis and response to the Grand Ronde comments (see September 2008 Hovee memorandum within **Exhibit 1** of the Supplemental Response to Comments document, Section 2.0 of the BIA's Decision Package). The re-analysis notes that Spirit Mountain appears to be gathering 37% of Oregon's tribal gaming revenues while having only 25% of the tribal video lottery terminals (VLTs). Grand Ronde's estimate of a 31.5% reduction in revenue assumes a base year of 2007 rather than the FEIS base year of 2005. After correcting for this base year difference, the comparative reduction in gross revenue would be 25.9% (rather than 31.5%) using Grand Ronde's stated income figures. No documentation reviewed to date indicates that Spirit Mountain will experience a long-term revenue decrease due to the introduction of a new Portland market casino. Based on the analysis of comparable situations such as the introduction of Mohegan Sun into the Foxwoods market, Spirit Mountain may experience a two year flattening of visitation followed by a period of added visitor growth.

For the BIA, the critical factor in determining significance is the question of whether the loss in market share will affect the ability of Grand Ronde to continue to provide governmental services. If BIA assumptions are correct, net income from Spirit Mountain will be reduced 13.1% from 2005 levels. If Grand Ronde's figures are correct, Spirit Mountain revenue will be reduced by 25.9% (in 2005 dollars). The Grand Ronde Tribe currently allocates 33% of net income from Spirit Mountain to per capita payments rather than governmental operations and programs. Accordingly, a 13% to 26% reduction in net income would not affect the ability of the Tribe to operate essential programs. Additionally, even if this effect were significant, no mitigation would be required. When effects are solely economic, and do not result in physical environmental effects, NEPA does not require their mitigation.

3.2.12.4 Impacts to Schools

Comment: Several comments stated that the Proposed Action would impact school enrollment and that impacts to schools were underestimated in the Final EIS. Some comments were concerned that the student per household rate used was inaccurate, leading to underestimated impacts. Other comments stated that an MOU with the La Center School District is required to mitigate impacts to schools. Comments stated that schools in the project area are at capacity and cannot absorb the increased population identified in the Final EIS. Several comments expressed that the errors in the methodology for assessing the impact on schools include statements that: the Final EIS ignores indirect and induced employment impact; the Final EIS supposes a lower in-migration rate than is realistic; it ignores the fact that new hires will be replacing families with no children; and the student per household ratio in the EIS analysis is less than should be used.

Response: Impacts to schools are discussed in detail in Section 4.7 of the Final EIS. Responses to comments submitted on the DEIS are included in Sections 2.14 and 2.15.4 of Appendix B and Appendix K of the Final EIS. Further discussion of the analysis of impacts to schools is provided in Exhibit 1 of the Supplemental Response to Comments document (Section 2.0 of the BIA's Decision Package). The net in-migration rate used to predict the increase in households resulting from indirect and induced employment was based both on analysis of the labor-shed for the proposed Cowlitz Casino and also review of comparable job commuting experience with other west coast casinos. Comments asserting that the increase in the ratio of children per household was underestimated because new households would replace existing households with no children contravene actual experience with the entire housing stock in the vicinity of La Center and other nearby school districts. Some comments suggested that census data would be a more appropriate basis for the student generation ratio than the information that was utilized for the FEIS. Analysis of school generation in prior studies for the affected school districts indicates that average generation rates associated with now outdated census data would inappropriately overestimate actual generation more recently experienced over the entire housing stock of single and multi-family units in Clark County. Furthermore, the generation rates used within the FEIS were specific to new housing within each district, while Census data would include both existing and new; therefore, overestimating the true impact of added residential development. The analysis used to predict the student generation rate assumed within the FEIS was prepared independently of the socioeconomic assessment for the Proposed Action on behalf of and accepted by participating school districts. The BIA has determined that the conclusions regarding impacts to schools

provided in the Final EIS and technical appendices are accurate and complete and further analysis is not warranted.

3.2.12.5 Gambling Addiction

Comment: Several comments refuted the analysis and conclusions in the EIS regarding problem and pathological gambling and proposed mitigation. Comments indicated that additional problem or pathological gamblers would not seek treatment but would still represent a societal problem.

Response: Problem gambling is discussed in Section 4.7 of the Final EIS. Mitigation proposed in the Final EIS and provisions of the Tribal EPHS Ordinance would sufficiently reduce impacts from problem gambling to a less than significant level. The Final EIS estimates the number of problem/pathological gamblers who would seek treatment would be approximately 52 people. As a result, the Final EIS estimates that the additional problem/pathological gamblers who would seek treatment would require one additional licensed counselor at approximately $47,500 per year. As such, the Tribe has committed to contribute no less than $50,000 per year to compensate problem/pathological gambling programs through the Tribe's EPHS Ordinance. Furthermore, as identified in Section 4.7 of the Final EIS, similar to crime rates, independent government research suggests that there is no relationship between casino gaming and increased bankruptcy rates[6]. There is an existing gaming environment for people living within the project area with the presence of four card clubs currently operating in La Center, internet gaming, and the presence of legal gambling opportunities in 48 of the 50 states. This would not support the assertion that the Proposed Action would significantly increase the prevalence of problem/pathological gambling in the project area. The BIA has determined that the analysis and conclusions regarding problem/pathological gambling is accurate and further analysis is not warranted.

3.2.12.6 Accuracy of Socioeconomic Data on the Cowlitz Tribal Membership

Comment: Several comments were directed towards the socioeconomic status of Cowlitz Tribal members. In particular, the comments stated that membership in general enjoyed a higher standard of living than members of most Indian Tribes, that this was not reflected in the Final EIS, and that members did not "need" economic advancement. Most of this criticism is based on the reliance on 2000 Census data.

Response: As the Cowlitz Tribe was not federally recognized until 2002, data from the 2000 census apparently consists of information from individuals who reported themselves as Cowlitz. There is no way to determine what proportion of individuals on the actual Tribal membership rolls established in 2002 reported themselves. Accordingly, the BIA cannot rely on 2000 census information for purposes of determining numbers of members or the income and employment status of members. The argument that the Tribe does not need economic advancement because Tribal members have income approaching that of the average Washington citizen implies that Tribal members should not be allowed to achieve a standard of living higher than the median, and does not consider the funding required for operations of

[6] U.S. Department of the Treasury, 1999. A Study of the Interaction of Gambling and Bankruptcy. Available online at: http://www.americangaming.org/assets/files/studies/treasury_bankruptcy.pdf.

tribal government. These governmental operations are described in detail in the Unmet Needs report submitted by the Tribe as part of the fee-to-trust application (see Appendix E of the Final EIS). The argument also ignores the need to fund tribal governmental functions not directly related to members' individual needs (e.g. language and cultural preservation, natural resource protection, environmental protection, enforcement of tribal laws, etc.).

3.2.13 Traffic

Comment: A number of comments stated that the Supplemental Traffic Impact Study (TIS) in the EIS was inaccurate and not prepared consistent with the methodologies required by the MOU. Commenters noted that the trip generation rate used to estimate project related traffic was inaccurate and unrealistically reduced. Several commenters noted that the trip distribution used to estimate project related traffic patterns was inaccurate, unrealistic, or inconsistent between the Final EIS, TIS, Supplemental TIS, or Interchange Justification Report. Several commenters noted that the traffic operation modeling provided in the TIS and supplemental TIS did not sufficiently and realistically model the Proposed Project. Several commenters noted that the mitigation measures provided in the Final EIS were not adequate to reduce traffic to an acceptable level of service, while some mitigation measures were not feasible. Several commenters submitted peer reviews of the Supplemental TIS outlining alleged "deficiencies" and errors in the analysis.

Response: At the direction of the BIA, technical issues related to traffic raised in comments submitted on the Final EIS have been analyzed and are responded to in the September 2008 memorandum entitled *Response to Cowlitz Indian Tribe Final EIS Comments, Transportation Impacts,* included as Exhibit 2 of the Supplemental Response to Comments document (Section 2.0 of the BIA's Decision Package). The report and its conclusions do not indicate errors in the traffic analysis for the Proposed Action that would alter the impact conclusions or mitigation requirements in the Final EIS. Key traffic issues raised in comments related to MOU consistency, trip generation, trip distribution, traffic modeling assumptions, and mitigation are briefly addressed below.

Consistency with MOU

The methodologies utilized within the TIS (Appendix T of the DEIS) and Supplemental TIS (Appendix O of the Final EIS) to estimate the traffic effects of the Proposed Action are consistent with requirements of the MOU between the Tribe and Clark County; however, as discussed in **Section 3.2.3.2** of this ROD, the MOU has been rescinded by the parties, and the implementation of mitigation measures included as provisions of the 2004 MOU to avoid environmental effects will be ensured through the Tribe's EPHS Ordinance. The Tribal EPHS Ordinance does not require the Tribe to comply with new County ordinances or updates to the County's 2004 ordinances in Exhibit 1 of the EPHS Ordinance.

Trip Generation

The trip generation rate used in the TIS was refined in the Supplemental TIS as a result of comments received from the City of La Center, Cowlitz County, other jurisdictions, and private parties. The trip generation rate use in the supplemental TIS was developed for the Final EIS using traffic counts from several Pacific Northwest casinos that would be similar in

nature, location, uses, and circumstances. A list of these casinos is provided in the supplemental TIS. Trip reduction, such as pass-by and internal use were estimated using established reduction methodology or were derived directly from the ITE Trip Generation Manual.

Trip Distribution

The trip distribution used in the TIS was refined in the supplemental TIS as a result of comments received from the City of La Center, Cowlitz County, other jurisdiction, and private parties. Research of other casino-visitor travel habits from around the country was used to determine the trip generation rate used in the supplemental TIS. The trip distribution that was indicated by the research is based on the population base of the region, with some contribution from employment centers (mostly midday and after-work) and proximity of large recreational areas or major hotel.

Although the supplemental TIS implies that over 92% of the total trips generated by the casino are assumed to cross the Columbia River, it is shown in the supplemental TIS on page 9 that 92% of project traffic arrives from south of Ridgefield/Battle Ground/Central Clark County, which includes not only Portland, but South Clark and Skamania Counties. It is estimated that only 68 percent of the trips would cross the Columbia River and 24 percent would come from South Clark and Skamania Counties. The Final EIS and Supplemental TIS are consistent regarding trip distribution.

Traffic Modeling Assumptions

The traffic model used in the analysis to determine potential impacts to local roadways was Synchro, which is the appropriate traffic model for commercial land use. Revisions to the Synchro model were made in response to comments received on the DEIS and Preliminary FEIS. Changes in the traffic model, consistency with industry standards, and use of site specific model inputs provided the basis for the final traffic model, which is accurate in it assumptions and results. Freeway sections and the merge/diverge sections were evaluated using Corridor Simulation (CORSIM) and measured using Highway Capacity Manual (HCM) techniques, consistent with the now-rescinded MOU and equivalent provisions of the Tribal EPHS Ordinance.

Traffic Mitigation Adequacy and Feasibility

Mitigation for highway facilities proposed in the Final EIS was developed through consultation with the Washington State Department of Transportation (WSDOT), who with the Federal Highway Administration has jurisdiction over major roadways in the study area. The mitigation measures provided in the Final EIS were found by WSDOT to mitigate potential traffic impacts.

Proposed traffic mitigation for local roadways in Clark County would adequately mitigate for the increase in traffic resulting from Proposed Actions. Enforcement of these measures is required by the Tribal EPHS Ordinance. The impacts of the traffic mitigation measures were properly evaluated in Section 4.14 of the Final EIS.

3.2.14 Land Use and Agriculture

3.2.14.1 Inconsistency with Local Policies and Designations

Comment: A number of commenters stated that the land use evaluation in the Final EIS was inaccurate given the May 14, 2008 decision of the GMHB. Commenters stated that the project would be inconsistent with local land use regulations and policies and would result in conflicts with adjacent rural and agricultural land uses. Commenters stated that development of the subject property would be inconsistent with the intent of the GMHB to preserve the land for agriculture.

Response: Inconsistencies with local land use plans in light of the GMHB decision and subsequent appeals are addressed in **Section 3.2.3.1** of this ROD. As stated therein, the GMHB decision has been reversed and remains on appeal, and the Proposed Action would not be consistent with local land designations and intended uses for the project site regardless of whether the subject property remains within or is removed from the La Center UGA. Implementation of the Proposed Action would result in the federal government taking the Cowlitz Parcel into trust for the benefit of the Tribe effectively removing the applicability of State and local government rules and regulations and ending jurisdictional questions or conflicts.

NEPA Section 1502.16(c) requires that an EIS evaluate potential conflicts between the Proposed Action and applicable land use plans, policies, and controls for the area affected. In the event that the project site is ultimately removed from La Center's UGA and returned to the previous land use designation of agricultural with an Urban-Industrial overlay, the proposed development on the project site would not be consistent with local land use policies and could result in land use conflicts with surrounding rural lands. The rapid urbanization of the Cowlitz Parcel would be incompatible with the existing adjacent residential uses to the west and north and has the potential to result in significant impacts to adjacent sensitive receptors as discussed in detail in specific sections of the Final EIS. Impacts may include, but are not limited to, air quality and noise effects from construction and operational activities, congestion on rural roads not sized to handle increased traffic and significant alterations of the visual resources and aesthetics of the surrounding neighborhood. Mitigation measures identified for the Proposed Action in **Section 6.0** of this ROD would reduce the potential for adverse environmental effects resulting from land use conflicts and inconsistencies regardless if the subject property remains within or is removed from the La Center UGA. However, the Final EIS is correct in the assumption that the I-5 interchange area will likely be subject to urbanization under future cumulative conditions as only a portion of the lands located at the interchange are affected by the GMHB decision.

The significance of potential conflicts with local land use plans resulting from the Proposed Project has been considered by the BIA. As outlined in Section 8.0 of this ROD, the BIA has made the decision to move forward with the proposal despite potential conflicts that could occur. The BIA has determined that the Tribe has made good faith attempts to negotiate mitigation measures with local governments, that mitigation measures to address potential land use conflicts have been identified within the EIS, and that those mitigation measures identified in **Section 6.0** of this ROD will reduce potential adverse effects of such conflicts.

3.2.14.2 FPPA Evaluation

Comment: A number of commenters stated that the Farmland Conversion Impacts Rating Form completed in compliance with the Farmland Protection Policy Act (FPPA) was inaccurate given that the agricultural designation of the land resulting from the GMHB decision would require a higher protection threshold.

Response: As discussed above in **Section 3.2.3.1** of this ROD, the GMHB lacks the authority to reinstate agricultural zoning. The County appealed the GMHB decision, and the Superior Court in Clark County subsequently reversed the decision, effectively returning the land to the UGA. An appeal of the Superior Court decision is pending. Because the ultimate outcome of this situation is unknown, completion of the FPPA evaluation assuming the land use designation of light industrial is appropriate. Regardless, in the event that the project site is returned to an agricultural designation, the overall land evaluation and site assessment score completed under the FPPA would be increased by 20 points to a total of 157 points, which is still below the recommended protection threshold for agricultural resources. Therefore, significance conclusions in the Final EIS regarding the conversion of agricultural land would not be affected.

3.2.15 Law Enforcement and Fire Protection

Comment: One comment stated that because the Proposed Action would be developed on lands designated for agricultural uses Clark County could not enter into an agreement to provide law enforcement services for the Proposed Action. Another comment stated that the lack of a mutual aid agreement between Clark County and the City of La Center would result in the City of La Center not being reimbursed for mutual aid calls for service.

Response: Law enforcement impacts are identified in Section 4.10 and mitigation is provided in Section 5.2.8 of the Final EIS. Appendix B, Section 2.13.1 of the Final EIS explains that the absence of a mechanism for reimbursement for mutual aid calls between the Clark County Sheriff's Office and the City of La Center Police Department would not preclude the reimbursement of the City of La Center for the provision of mutual aid services. Further, this would allow the City of La Center to establish a separate third-party agreement with the Tribe and Clark County to establish the reimbursement mechanism for the provision of mutual aid. As previously identified in Section 4.10 of the Final EIS and Response 2.13.1 of Appendix B of the Final EIS, after the implementation of mitigation provided in Section 5.2.8 of the Final EIS and provisions identified in the Tribe's EPHS Ordinance it is anticipated that very few calls for mutual aid services would result from the Proposed Action. This mitigation would eliminate impacts to the Clark County Sheriff's Department for the provision of law enforcement services.

As discussed in **Section 3.2.3.1** of this ROD, it is not expected that the GMHB decision or any decision in the related appeal would prevent the Clark County Sheriff's department from providing services to the project site once it is taken into trust because local land use requirements do not apply to tribal trust lands. The Tribe has committed, through the EPHS Ordinance, to ensure that the Proposed Action, if developed, would be consistent with County ordinances and would provide payments to the County to further offset project-related impacts.

3.2.16 Aesthetics

Comment: Two comments were directed at the adequacy of mitigation identified in the Final EIS to mitigate impacts to aesthetics from the project alternatives. One comment requested clarification of the term "medium range views," which was used in the Final EIS to describe screening mitigation requirements. Another comment stated that the Western Washington Growth Management Hearings Board May 18, 2008 decision to invalidate the revised Clark County Growth Management Plan would result in the project site significantly impacting the viewshed of the project site as the decision would not allow for urban growth on or near the project site. The comment stated that this decision would result in the Proposed Action having a significant impact to aesthetics. Further, the comment stated that with this decision, the proposed mitigation in Section 5.2.11 of the Final EIS would not sufficiently mitigate impacts to aesthetics.

Response: Impacts related to aesthetics are described in Section 4.13 of the Final EIS and mitigation is provided in Section 5.2.11 of the Final EIS. The implications of the Growth Management Hearings Board May 14, 2008 decision are discussed in **Section 3.2.3.1** of this ROD.

As required by the Tribal EPHS Ordinance, the proposed facilities would be developed consistent with various Clark County development ordinances including Title 40 of the Unified Development Code which includes Chapter 40.320.010, "Landscaping and Screening on Private Property". Prior to construction of the Proposed Action, the specific units of measurement for screening buffers would be established by Clark County during project design review. Regardless of whether or not the site remains within the City of La Center's UGA or is returned to an agricultural designation under local land use regulations, impacts to aesthetics would be less than significant with the implementation of mitigation proposed in Section 5.2.11 of the Final EIS, and provided for in the Tribe's EPHS Ordinance. Moreover, local land use plans and policies would no longer apply to the project site when the land is taken into federal trust on behalf of the Tribe.

3.2.17 Indirect and Growth Inducing

Comment: Some comments stated that all future activities proposed by the Tribe under the Business Plan were indirect effects of the proposed action and their environmental effects should be analyzed and presented. Some comments stated that the indirect growth attributed to the project was underestimated. Some comments stated that gaming facilities in the post development review report were not comparable to the proposed facility as they are located in small communities at a distance from metropolitan areas and are smaller than the proposed facility.

Response: NEPA does not require that the BIA analyze potential effects of future projects contemplated in the Tribe's Business Plan. The Unmet Needs report is a reference document intended for use in tribal development planning. Hypothetical tribal projects described in the business plan are subject to change based on evolving social and economic circumstances, as well as future tribal governmental decisions and the availability of funding. All these actions

are sufficiently removed in time and place from the proposed project as to make their analysis speculative at best. As the Business Plan does not envision the Tribe achieving a positive cash flow on the project until 7 years out, and as it can be anticipated that Tribal leadership and priorities may change in the interim, analysis of hypothetical projects which lack geographic and temporal specificity is not required for informed decision making. Although NEPA requires that an EIS consider indirect effects that are reasonably foreseeable, it does not require an analysis of effects that are highly speculative or indefinite.

To estimate the indirect growth induced as result of the Proposed Action, a study of developments that have occurred contiguous to five other gaming projects in the greater Portland area (Chinook Winds, Kah-Nee-Ta, Lucky Eagle, Spirit Mountain, and the four La Center card rooms) was undertaken and included as Appendix M of the Final EIS. The study was utilized as a means of verifying the analysis provided in the DEIS. It concluded that land use and development effects associated with the development of gaming projects in these areas have been minimal. Thus, the BIA has determined that growth inducement from the Proposed Action described within Section 4.14 of the Final EIS is a reasonable estimate, and associated effects from this growth have been appropriately analyzed and disclosed.

3.2.18 Cumulative Analysis

Comment: Some comments indicated that the cumulative analysis was insufficient and that in particular the cumulative effects of all Indian gaming in Washington and Oregon were not presented.

Response: The Final EIS contains a thorough and adequate evaluation of cumulative impacts in Section 4.15. In particular, guidance provided in considering cumulative effects under NEPA, issued by the CEQ, was followed. While the other existing and proposed Indian casinos proposed for inclusion in the analysis lie outside the geographic scope of the cumulative effects analysis, separate consideration of current conditions and future growth of Indian gaming in southwestern Washington and northwestern Oregon is provided in Appendix B of the Final EIS.

3.2.19 Mitigation Enforceability

Comment: Several comments were directed to the question of mitigation enforceability. Specifically, comments indicated that as the MOU is not in place, Clark County lacked the ability to enforce its terms and conditions under the EPHS Ordinance. Additionally, other comments indicated that neither the BIA nor the NIGC had the authority or ability to enforce the conditions of the ordinance. Some commenters stated recommended mitigation to enter into agreements with local agencies was not enforceable. Comments stated that all mitigation must be enforceable, and should be included within a mitigation monitoring plan.

Response: All mitigation adopted as part of the BIA's decision on the Proposed Action is specified in **Section 6.0** of this ROD, and included within the BIA's Mitigation Monitoring and Enforcement Plan (MMEP) (see Section 4.0 of the BIA's Decision Package). All adopted mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities. As

discussed in Section 3.2.3.2 of this ROD, the MOU with Clark County is no longer in effect, and the implementation of equivalent mitigation measures included as provisions of the 2004 MOU to avoid environmental effects will be ensured through the Tribe's EPHS Ordinance. The Tribe's EPHS Ordinance is enforceable through the Tribe's grant of a waiver of sovereign immunity which allows Clark County to seek relief in State Court to enforce both the mitigation provisions and the waiver of sovereign immunity. Further, the Tribe's waiver of sovereign immunity may not be revoked without approval of NIGC as the EPHS Ordinance is part of the Tribal gaming regulations. Finally, NIGC has the authority and ability to enforce the Tribe's gaming regulations with powers that include closure of the gaming operation.

As discussed in detail in **Section 3.2.12.2** of this ROD, the mitigation measure within the Final EIS recommending that the Tribe enters into an agreement with the City of La Center has not been adopted as a condition of approval of the Proposed Action, thus the issue concerning enforceability of this measure is not relevant.

4.0 ENVIRONMENTALLY PREFERRED ALTERNATIVE(S)

Either the Reduced Intensity Alternative (Alternative C) or the No-Action Alternative (Alternative F) would result in the fewest effects to the biological and physical environment. Because the Department cannot predict with certainty the exact type of development that would occur under the No-Action Alternative, it is difficult to assess whether it would result in similar, lesser, or greater impacts to the natural and human environment than the Proposed Action, although it is assumed to be less, and accordingly would be environmentally preferred. The No-Action Alternative would not meet the stated purpose and need. Specifically, it would not provide a land base for the Tribe (which has no reservation or trust land) and therefore does not provide the Tribe with an area in which the Tribe may engage in economic development to generate sustainable revenue to allow the Tribe to achieve self-sufficiency, self-determination, and a strong Tribal government. The No-Action alternative also would likely result in substantially less economic benefits to Clark County than the development alternatives.

Of the development alternatives, the Reduced Intensity Alternative would result in the fewest adverse effects on the human environment. The Reduced Intensity Alternative would have the fewest effects due to a lesser amount of new development than would occur with any of the other development alternatives. However, the Reduced Intensity Alternative would generate less revenue, and therefore reduce the number of programs and services the Tribal Government could offer Tribal members and neighboring communities. The Reduced Intensity Alternative is the Environmentally Preferred Alternative, but it would not fulfill the purpose and need for the Proposed Action stated in the EIS.

5.0 PREFERRED ALTERNATIVE

For the reasons discussed herein, the Department has determined that Alternative A is the agency's Preferred Alternative because it meets the purpose and need for the proposed actions. BIA's mission is to enhance the quality of life and to promote economic opportunity in balance with meeting the responsibility to protect and improve the trust resources of American Indians, Indian Tribes and Alaska Natives. This mission is reflected in the policies

underlying the statutory authorities governing this action, namely, the IRA, which was enacted to promote Indian self-government and economic self-sufficiency, and IGRA, which was enacted to govern Indian gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Of the alternatives evaluated within the EIS, Alternative A would best meet the purposes and needs of the BIA, consistent with its statutory mission and responsibilities to promote the long-term economic vitality, self-sufficiency, self-determination and self-governance of the Tribe. The Tribal government facilities and casino-resort complex described under Alternative A would provide the Cowlitz Indian Tribe, which has no reservation or trust land, with the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for the Tribal government. Under such conditions, the Tribal Government would be stable and better prepared to establish, fund and maintain governmental programs that offer a wide range of health, education and welfare services to Tribal members, as well as provide the Tribe, its members and local communities with greater opportunities for employment and economic growth. Alternative A would also allow the Tribe to implement the highest and best use of the property. Finally, while Alternative A would have slightly greater environmental impacts than either of the environmentally preferred alternatives, those alternatives do not meet the purpose and need for the Proposed Action, and the environmental impacts of the Preferred Alternative are adequately addressed by the mitigation measures adopted in this ROD.

Alternative B, while similar to Alternative A, would impact additional areas of wetlands, increasing impacts to the environment requiring additional mitigation and limiting to some degree the scale and effectiveness of potential development. Similarly, Alternative E, located at the Ridgefield Interchange Site would also impact large areas of wetlands that would require additional mitigation, and also would have unavoidable impacts to topographical features.

Alternative C also would provide economic development opportunities for the Cowlitz Indian Tribe; however, the economic returns would be smaller than under Alternative A and the more limited development is not the most effective use of either the land or the Tribe's capital resources.

The competitive market forces associated with commercial development, the amount of competitive commercial development within the greater Vancouver area, and the location of the project site, make Alternative D (business park development) less attractive than Alternative A from the standpoint of securing a long term, sustainable revenue stream. Alternative D also would likely have greater traffic impacts during peak hours than would Alternative A.

In short, Alternative A is the alternative that best meets the purposes and needs of the Tribe and the BIA while preserving the key natural resources of the project site. Therefore, Alternative A is the Department's Preferred Alternative.

6.0 MITIGATION MEASURES

All practicable means to avoid or minimize environmental harm from the Preferred Alternative have been identified and adopted. The following mitigation measures and related

enforcement and monitoring programs have been adopted as a part of this decision. Where applicable, mitigation measures will be monitored and enforced pursuant to federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision. Specific best management practices and mitigation measures adopted pursuant to this decision are set forth below and included within the Mitigation Monitoring and Enforcement Plan (MMEP) (see Section 4.0 of the BIA's Decision Package).

6.1 Geology and Soils

A. In general, fill slopes shall not be greater than 2H:1V (horizontal to vertical) and shall be benched in if an existing slope is greater than 4H:1V. Permanent cut slopes shall not be steeper than 3H:1V unless recommended by a licensed geologist. Temporary cut slopes shall not be steeper than 2H:1V unless shored or allowed by a licensed geologist.

B. A General Construction NPDES permit shall be obtained from the USEPA under the federal requirements of the Clean Water Act (CWA). As required by the NPDES permit, a SWPPP shall be prepared that addresses potential water quality impacts associated with construction and operation of the project alternatives. The SWPPP shall make provisions for erosion prevention and sediment control and control of other potential pollutants.

The SWPPP shall describe construction practices, stabilization techniques and structural Best Management Practices (BMPs) that are to be implemented to prevent erosion and minimize sediment transport. BMPs shall be inspected, maintained, and repaired to assure continued performance of their intended function. Reports summarizing the scope of these inspections, the personnel conducting the inspection, the dates of the inspections, major observations relating to the implementation of the SWPPP, and actions taken as a result of these inspections shall be prepared and retained as part of the SWPPP.

To minimize the potential for erosion to occur on the project site, the following items shall be addressed and implemented:

1. Prior to land-disturbing activities, the clearing and grading limits shall be marked clearly, both in the field and on the plans. This can be done using construction fences or by creating buffer zones.
2. Construction traffic shall be limited in its access to the site to a single entrance if possible. Haul roads and staging areas shall be developed to control impacts to on-site soil. All access points, haul roads and staging areas shall be stabilized with crushed rock. Any sediment shall be removed daily and the road structure maintained.
3. Downstream waterways and properties shall be protected during construction from increased flow rates due to the higher impervious nature of the site. During construction, detention ponds can be combined with sedimentation ponds as long as the detention volume is not impacted by a buildup of sediment.

4. Concentrated flows create high potential for erosion; therefore, any slopes shall be protected from concentration flow. This can be done by using gradient terraces, interceptor dikes, and swales, and by installing pipe slope drains or level spreaders. Inlets need to be protected to provide an initial filtering of stormwater runoff; however, any sediment buildup shall be removed so the inlet does not become blocked.
5. The SWPPP shall address maintenance and repair of heavy equipment on site to remove the potential for pollution from oil, fuel, hydraulic fluid, or any other potential pollutant.
6. Staging areas and haul roads shall be constructed to minimize future over-excavation of deteriorated sub-grade soil.
7. If construction occurs during wet periods, sub-grade stabilization shall be required. Mulching or netting may be needed for wet-weather construction.
8. Temporary erosion control measures (such as silt fence, gravel filter berms, straw wattles, sediment/grease traps, mulching of disturbed soil, construction stormwater chemical treatment, and construction stormwater filtration) shall be employed for disturbed areas. Due to the clay soils on the Cowlitz Parcel, it is possible that settlement basins may not remove the fine clay particles. If this is the case, then the use of chemical treatment and stormwater filtration shall be required.
9. Exposed and unworked soils shall be stabilized by the application of effective BMPs. These include, but are not limited to, temporary or permanent seeding, mulching, nets and blankets, plastic covering, sodding, and gradient terraces.
10. The SWPPP shall address the maintenance of both temporary and permanent erosion and sediment control BMPs as described in the Erosion Control Plan recommendations in Appendix 5 of the grading and drainage report (DEIS Vol. I, Appendix F).

6.2 WATER RESOURCES

Construction Impacts

A. As described under **Section 6.1**, Geology and Soils, Mitigation Measure B, prior to construction, an NPDES General Construction permit shall be obtained from the USEPA and a SWPPP shall be prepared and approved by the USEPA. The SWPPP shall describe construction practices, stabilization techniques and structural BMPs that are to be implemented to prevent erosion and minimize sediment transport as outlined above.

B. In accordance with the NPDES General Construction permit, a sampling and monitoring program shall be developed and implemented to assess the quality of surface water entering and leaving the project site. At a minimum, sampling sites shall include: a location above all proposed development and a location downstream of all development. Analyses shall include total suspended solids (TSS), oils and greases.

C. As described in detail under **Section 6.4**, Biological Resources, Mitigation Measure B, a 404 permit shall be obtained from the USACE prior to any discharge

of dredged or fill material into waters of the U.S, and a 401 Water Quality Certification shall be obtained from the EPA.

Operational Impacts

D. The Tribe shall comply with all provisions of the CWA including the NPDES program for wastewater and stormwater discharges. The Tribe shall prepare a SWPPP that addresses water quality impacts associated with construction and operation of the project alternatives. Water quality control measures identified in the SWPPP shall include but not be limited to those BMPs previously listed under **Section 6.1**, Geology and Soils, Mitigation Measure B.

E. Fertilizer use shall be limited to the minimum amount necessary and shall be adjusted for the nutrient levels in the water used for irrigation. Fertilizer shall not be applied immediately prior to anticipated rain.

F. The runoff from trash collection areas shall be directed to the sanitary sewer system for treatment at a wastewater treatment plant (WWTP) prior to discharge.

G. Landscape irrigation shall be adjusted based on weather conditions and shall be reduced or eliminated during the wet portion of the year in order to prevent excessive runoff.

H. Water conservation measures shall be implemented, including low flow fixtures and electronic dispensing devices in faucets.

I. In order to reduce the temperature of treated wastewater, an underground pipe field will be constructed along the discharge line leading to the unnamed tributary. The pipe field will cover an area of approximately 450 feet x 450 feet and be located below the RV park. The pipe field will transfer heat from treated wastewater to the cooler soil, reducing treated wastewater temperatures. Temperatures are anticipated to average 16°C following cooling.

J. To ensure that the discharge into the unnamed tributary does not increase erosion or sedimentation, all water being discharged into the unnamed tributary will first be converted to sheet flow.

K. In order to ensure compliance with the WAC criteria for ammonia, the anoxic basin of the WWTP will be sized in accordance with the calculated ammonia criteria as determined through the NPDES permitting process when commenced.

6.3 AIR QUALITY

Construction Impacts

A. The Tribe shall control fugitive dust emissions (PM10) during construction through the following actions, as applicable:

- Spray exposed soil with water or other suppressant.
- Minimize dust emissions during transport of fill material or soil by wetting down loads, ensuring adequate freeboard (space from the top of the material to the top of the truck bed) on trucks, and/or covering loads.
- Promptly clean up spills of transported material on public roads.
- Restrict traffic on site to reduce soil disturbance and the transport of material onto roadways.
- Locate construction equipment and truck staging areas away from sensitive receptors as practical and in consideration of potential effects on other resources.
- Provide wheel washers to remove particulate matter that would otherwise be carried off site by vehicles to decrease deposition of particulate matter on area roadways.
- Cover dirt, gravel, and debris piles as needed to reduce dust and wind-blown debris.

B. The Tribe shall control emissions of volatile organic compounds (VOC), nitrogen oxides (NO_x), sulfur oxides (SO_x), and carbon monoxide (CO) whenever reasonable and practicable by requiring all diesel-powered equipment be properly maintained and minimizing idling time to 5 minutes when construction equipment is not in use, unless per engine manufacturer's specifications or for safety reasons more time is required. Since these emissions would be generated primarily by construction equipment, machinery engines shall be kept in good mechanical condition to minimize exhaust emissions.

C. In the event of air quality complaints received by SWCAA about activities which occur on the reservation and affect citizens residing off the reservation, a representative of the Tribe shall meet with the SWCAA to determine the appropriate course of action.

Operational Impacts

D. The Tribe shall provide transportation (e.g., shuttles) to nearby population centers, major transit stations, and multi-modal centers.

E. The Tribe shall ensure the use of clean fuel vehicles in the vehicle fleet where practicable.

F. The Tribe shall provide a parking lot design that includes clearly marked and shaded pedestrian pathways between transit facilities and building entrances.

G. The Tribe shall provide preferential parking for vanpools and carpools.

H. The Tribe shall provide on-site pedestrian facility enhancements such as walkways, benches, proper lighting, and building access, which are physically separated from parking lot traffic.

I. The Tribe shall provide adequate ingress and egress at entrances to the casino to minimize vehicle idling and traffic congestion.

Climate Change

J. Implement Mitigation Measures B, C, D, E, J, K, L, and M identified in Section 6.8 of this ROD to ensure project consistency with applicable Washington Climate Advisory Team (WCAT) greenhouse gas emission reduction strategies as shown in Table 1 below.

TABLE 1
COMPLIANCE WITH STATE EMISSIONS REDUCTION STRATEGES

WCAT Number	WCAT Strategy	Project Consistency
RCI-10	More Stringent Appliance/Equipment/Lighting Efficiency Standards, and Appliance and Lighting Product Recycling and Design.	Project would be consistent after implementation of Mitigation Measures J, K, L, and M of Section 6.8 of this ROD.
RCI-11	Policies and/or Programs Specifically Targeting Non-energy GHG Emissions.	Project would be consistent after implementation of Mitigation Measures J, K, L, and M of Section 6.8 of this ROD.
AW-3	Significant Expansion of Source Reduction, Reuse, Recycling, and Composting.	Project would be consistent after implementation of Mitigation Measures B, C, D, and E of Section 6.8 of this ROD.
Source: State of Washington Climate Advisory Team, 2007. A Comprehensive Climate Approach for Washington, 2007. Available online at: http://www.ecy.wa.gov/climatechange/CATdocs/122107_1_recommendations.pdf. Viewed January 7, 2008.		

6.4 Biological Resources

A. If feasible, vegetation removal activities shall occur outside of the nesting season (approximately March through September) for migratory birds, olive-sided flycatcher, and slender-billed white-breasted nuthatch. If vegetation removal activities are to be conducted during the nesting season, a pre-construction survey for active nests within proposed disturbance areas shall be conducted by a qualified biologist within one week prior to vegetation removal. If vegetation removal activities are delayed or suspended for more than one month after the pre-construction survey, the site shall be resurveyed. If active migratory bird, olive-sided flycatcher, or slender-billed white-breasted nuthatch nests are identified, vegetation removal that would disturb these nests shall be postponed until after the nesting season, or a qualified biologist has determined the young have fledged and are independent of the nest site. No active nests shall be disturbed without a permit or other authorization from the USFWS.

B. A permit shall be obtained from the USACE prior to any discharge of dredged or fill material into waters of the U.S. The Tribe shall comply with all the terms and conditions of the permit and compensatory mitigation shall be in place prior to any

direct effects to waters of the U.S. Minimal mitigation measures would require the creation of wetlands at a 1:1 ratio for any wetlands impacted. If the jurisdictional road-side ditch is to be impacted, minimal mitigation shall require that an equivalent drainage be created along the realigned road. Any activity which will cause fill to "waters of the U.S." will require a 404 permit. The USEPA will require a 401 Water Quality Certification permit prior to the USACE issuance of a 404 permit. Development which will impact less than 0.5 acres or less than 300 feet may require a Nationwide 39 or Nationwide 18 permit. Full mitigation will be carried out in compliance with any permits.

C. The project shall incorporate BMPs for stormwater runoff, including sedimentation basins, vegetated swales, and runoff infiltration devices if necessary, to ensure that the water quality of the on-site unnamed seasonal stream does not degrade. Stormwater runoff from the project site shall be monitored according to BMPs to assess the quality of water leaving the project site.

D. Temporary fencing shall be installed around areas of wetland, intermittent drainage and riparian habitat as shown on the site plans (Figure 2-1 and Figures 2-6 through 2-9), unless a USACE Section 404 Permit is obtained for placement of fill. Fencing shall be placed in accordance with the Clark County Wetland Protection Ordinance (CCWPO) pursuant to the Tribe's EPHS Ordinance. Fencing shall be installed prior to any construction and shall remain in place until all construction activities on the site have been completed.

E. Construction staging areas shall be located away from the wetlands and intermittent drainages that are to be preserved. Temporary stockpiling of excavated or imported material shall occur only in approved construction staging areas. Excess excavated soil shall be used on site or disposed of at a regional landfill or other appropriate facility. Stockpiles that are to remain on the site through the wet season shall be protected (e.g. with silt fences or straw bales) to prevent erosion.

F. Lighting shall optimize the use of downward directed low-pressure sodium lighting. No strobe lights shall be utilized except as required by Federal Aviation Administration (FAA) regulation.

G. In order to avoid the introduction of noxious weeds to the project site, no plants designated as "noxious weeds" by the Washington State Noxious Weed Control Board shall be used for landscaping. Additionally, no mulch with the potential to contain viable seeds from a designated noxious weed shall be used on the project site.

H. Preconstruction surveys shall be conducted prior to construction to determine if bat species are roosting on the project site. If bat species are not found roosting on the project site, then no further mitigation will be necessary. If bat species are found roosting on the project site, USFWS will be contacted to discuss potential mitigation measures.

I. If construction is scheduled to occur between January 15 and August 1, a biologist shall conduct a survey for active bald eagle nests located within 0.5 miles of the project site. If active nests are located, the following mitigation measures shall apply:

1. Project construction within 0.5 miles of an active nest shall be prohibited during the bald eagle nesting season, from January 15 through August 1, unless there is evidence that nests are abandoned or the young have fledged.
2. The Tribe shall be responsible for educating contractors about sensitive biological resources, particularly nesting bald eagles. The Tribe shall inform the construction contractor about the biological constraints of the project site.
3. If bald eagles are observed in the immediate project area during the construction period, the Tribe shall contact the USFWS to determine whether further consultation is necessary.
4. Where possible, existing trees to be removed will be relocated and/or additional trees and screening vegetation shall be planted to increase the vegetated buffer between the site and nesting raptors and to help compensate for any habitat loss.

J. Wetland Cs is proposed as a natural stormwater detention basin. A wetland buffer will be maintained around this area, consistent with the CCWPO standards. A stormwater treatment facility will be constructed adjacent to this stormwater detention pond. Runoff from paved surfaces will be treated prior to entering the stormwater detention basin.

K. Construction of stormwater and effluent discharging structures in the vicinity of the unnamed seasonal stream on site will require an NPDES permit and SWPPP monitoring.

L. Preconstruction bloom-period surveys shall be done for water howellia and tall bugbane. The bloom-period for tall bugbane is May to August and the bloom period for water howellia is June to August. If the plants are present, the Tribe shall consult with the USFWS to determine appropriate mitigation measures, including relocation of the plants to a suitable location on-site or the purchase of mitigation credits, and implement the required mitigation. No activities that could potentially impact water howellia will be conducted without a Biological Opinion, Incidental Take Permit, or other authorization from USFWS. All terms and conditions of any USFWS authorization will be met.

M. Discharge of treated wastewater to the unnamed seasonal stream on site will require an NPDES permit. Continued water quality monitoring will be required to ensure the stream will not be impaired by water discharged on-site.

6.5 Cultural Resources

A. In the event of any inadvertent discovery of prehistoric or historic archaeological resources or paleontological resources during construction-related earth-moving activities, all such finds shall be subject to Section 106 of the National Historic Preservation Act as amended following procedures in 36 C.F.R. 800. Specifically, procedures for post-review discoveries without prior planning pursuant to 36 C.F.R. 800.13 shall be followed. All work within 50 feet of the find shall be halted until a professional archaeologist can assess the significance of the find. If any find is determined to be significant by the archaeologist, then representatives of the Tribe shall meet with the archaeologist to determine the appropriate course of action, including the development of a Treatment Plan, if necessary. All significant cultural materials recovered shall be subject to scientific analysis, professional curation, and a report prepared by the professional archaeologist according to current professional standards.

B. If human remains are discovered during ground-disturbing activities on Tribal lands, the Tribal Official and BIA representative shall be contacted immediately. No further disturbance shall occur until the Tribal Official and BIA representative have made the necessary findings as to the origin and disposition. If the remains are determined to be of Native American origin, the BIA representative shall notify a Most Likely Descendant (MLD). The MLD is responsible for recommending the appropriate disposition of the remains and any grave goods.

C. In the event of accidental discovery of paleontological materials during ground-disturbing activities, a qualified paleontologist shall be contacted to evaluate the significance of the find and collect the materials for curation as appropriate.

6.6 Socioeconomic Conditions and Environmental Justice

A. The Tribe shall contribute no less than $50,000 annually to a program that treats problem gamblers, as provided in the Tribe's EPHS Ordinance.

6.7 Transportation/Circulation

A. All work conducted within the Washington Department of Transportation (WsDOT) right-of-way will require the following:

- Proposed changes to State facilities must be designed to current WsDOT standards and specifications.
- Plans must be reviewed and approved by WsDOT and Federal Highway Administration (FHWA) prior to beginning work.
- Engineering calculations, plans and reports submitted for review and approval must bear the seal and original signature of a professional engineer.
- Construction must be done in accordance with the current WsDOT Standard Specifications for Road, Bridge, and Municipal construction manual.
- Construction inspection will be performed by WsDOT at the Tribe's expense.

B. For the Cowlitz Events Center, the Tribe will encourage carpooling and bus use to the project site on events nights. Shuttles running from points in west and east Vancouver, and potentially a site or two in Portland, Oregon, will help to reduce traffic impacts, including impacts to key segments of I-5 and I-205. Such shuttle service will be particularly important on those few weekday evenings where there are coincidental events at both the Cowlitz Events Center and the Clark County Amphitheatre.

C. The Tribal EPHS Ordinance (Appendix U of the FEIS) includes provisions for determining when mitigation measures are necessary to reduce impacts related to the addition of project traffic on the public roadway network. As described in the EPHS Ordinance, the Tribe shall make roadway and intersection improvements to maintain traffic level of service (LOS) at existing levels and shall also ensure that LOS does not operate below LOS D for intersection delay during the peak traffic hours. A credit shall be given to the Tribe for the number of vehicles that would be generated if the site were developed based on uses permitted in the Agriculture District for each phase of the development. Additionally, the Tribe and Clark County have agreed to work together to ensure that "late comer" provisions (Revised Code of Washington [RCW] Section 35.72.040) apply to any future developments in the vicinity of the project site. Such provisions shall ensure that the Tribe receives reimbursement or contribution for improvements as otherwise would be permitted under State law.

D. All work conducted within the WsDOT right-of-way for the Interstate 5 (I-5)/La Center Interchange, including overpass widening, shall be conducted in accordance with the WsDOT and FHWA approved Interchange Access Justification Report (IJR) (Parsons Brinckerhoff, 2003d). No work shall be conducted on the interchange until a Documented Categorical Exclusion (DCE) has been accepted by WsDOT.

E. To provide adequate sight distance and horizontal curvature for the proposed access points along NW 31st Avenue, the roadway, within a 20-foot setback from right-of-way lines, shall be kept obstacle-free, and if landscaping is placed in this area, it shall be limited to no more than 2 feet in height.

F. Realign NW 31st Avenue approximately 300-350 feet west of its current intersection with NW 319th Street in order to provide appropriate intersection spacing from the I-5 interchange. The intersection with NW 319th Street would be signalized and improved with left- and right-turn lanes.

G. I-5 and La Center Interchange:

1. Signalize the northbound and southbound ramp intersections with separate controllers, which are in coordination with one another;
2. Add an auxiliary lane to the northbound off-ramp of approximately 1,500 feet in length (consistent with WsDOT standards) and widen to accommodate a two-lane off-ramp.

3. Add a left-turn lane with a storage length of 450 feet for Alternatives A and B, or 300 feet for Alternative C, to the northbound ramp; this ramp will also require a 450-foot right-turn lane;

4. Widen the overpass between the I-5 northbound and southbound ramps to accommodate a second westbound traffic lane and a back-to-back left turn lane (a total of four lanes on the overpass); the overpass shall be constructed so as to accommodate a second eastbound travel lane in the long-term (2030) future.

5. Add an auxiliary lane to the southbound on-ramp of approximately 1,500 feet consistent with WsDOT standards;

6. The southbound ramp intersection shall have one exclusive right-turn lane and one through-lane in the eastbound direction; the westbound direction shall have one through-lane and one through- and right-turn lane; while westbound has two through lanes plus a left-turn lane.

7. Although no mitigation is needed for the NW La Center Road/Paradise Park Road intersection, minor improvements to shift the intersection as far east along the existing alignment as is possible will provide additional spacing between the frontage road intersection and the ramp intersection. Note: future interchange improvements conducted by WsDOT or another public agency with eminent domain authority shall realign this frontage road approximately 300 feet east of its current location to provide adequate intersection spacing.

8. Add a right-turn storage lane of 100 feet to the southbound I-5 off-ramp at NW 319th Street.

9. Realign NW 31st Avenue westward as shown on the project site plans.

H. To provide adequate site access at Parking Garage #1, the site access intersection will need to be signalized and shall be coordinated with the northbound and southbound I-5 ramp intersections with NW La Center Road.

6.8 PUBLIC SERVICES

Water Supply

A. The use of recycled water shall be maximized to the extent feasible. Potential uses include toilet flushing, landscape irrigation, emergency fire flow, and evaporative cooling. According to the wastewater engineering report (FEIS Vol. II, Appendix G), water usage could be reduced by up to 67 percent by maximizing recycled water use.

Construction-Related Solid Waste Service

B. Construction waste shall be recycled to the fullest extent practicable by diverting green waste and recyclable building materials from the solid waste stream.

C. Environmentally preferable materials shall be selected, to the extent practical, for construction of facilities.

Solid Waste Facility Operations

D. A solid waste management plan shall be adopted by the Tribe that addresses recycling and solid waste reduction on site. These measures shall include, but not be limited to, the installation of a trash compactor for cardboard and paper products, and annual waste stream analysis.

E. Recycling bins shall be installed throughout the facilities for glass, cans and paper products.

F. Decorative trash and recycling receptacles shall be placed strategically throughout the site to encourage people not to litter.

G. Security guards shall be trained to discourage littering on site.

Electricity, Natural Gas, and Telecommunication

Construction

H. At least three working days prior to construction, the Tribe shall contact the Utility Notification Center, which provides a free "Dig Alert" to all excavators (e.g., contractors, homeowners, and others) in Washington. This call shall automatically notify all utility service providers at the excavator's work site. In response, the utility service providers shall mark or stake the horizontal path of underground facilities, provide information about the facilities, and/or give clearance to dig.

Operation

I. The Tribe and CPU shall enter into negotiations to provide electrical service to the project site.

Energy Conservation

J. Buildings shall be thoroughly insulated and weatherized so as to minimize energy loss due to heating and cooling waste. Doors and windows shall be regularly inspected for air leaks, and shall be caulked or weather-stripped as appropriate where leaks are identified. Storm windows and double-paned glass shall be used to the extent practicable, shall be maintained in good repair, and shall be weatherized. New windows shall meet energy-saving criteria set forth by the National Fenestration Rating Council (NFRC). Caulk and seal shall be used as appropriate to prevent air leaks where plumbing, ducting, or electrical wiring penetrates through exterior walls, floors, ceilings, and soffits over cabinets. Rubber gaskets shall be installed as appropriate behind outlet and switch plates on exterior walls. Exterior walls shall be sealed with appropriate sealants.

K. For heating systems, filters on furnaces shall be cleaned or changed once a month or as needed. Energy-efficient equipment, such as appliances bearing the ENERGY STAR® logo, shall be selected for purchase and installation.

L. The selected heating, ventilation, and air conditioning (HVAC) system shall minimize the use of energy by means of using high efficiency variable speed

chillers, high efficiency low emission steam and/or hot water boilers, variable speed hot water and chilled water pumps, variable air volume air handling units, and air-to-air heat recovery where appropriate. Hotel rooms shall have four pipe fan coil units and individual exhaust vents. Pool area dehumidification shall include heat recovery systems. All systems shall be designed in accordance with American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 90. Complex ventilation shall be designed in accordance with ASHRAE Standard 62. A building automation system shall be integrated with all building support systems.

M. Energy efficient lighting shall be installed throughout the facilities. Dual-level light switching shall be installed in support areas to allow users of the buildings to reduce lighting energy usage when the task being performed does not require all lighting to be on. Day lighting controls shall be installed near windows to reduce the artificial lighting level when natural lighting is available. Controls shall be installed for exterior lighting so it is turned off during the day.

Water Heating and Conservation

N. Water systems shall be inspected regularly for leaks or degradation that could lead to leaks, and water heater tanks and pipes shall be insulated or lagged to the extent practicable.

O. Non-aerating, low-flow faucets and showerheads shall be installed in the hotel rooms.

P. New, energy-efficient water heaters shall be installed, and shall be evaluated for replacement every seven years.

Q. Water tanks shall be maintained and cleaned every three months to remove sediment in order to maintain the heat transfer efficiency of water heaters.

Public Health and Safety

Law Enforcement

R. The Tribe shall provide traffic control with appropriate signage and the presence of peak-hour traffic control staff. This shall aid in the prevention of off-site parking, which could create possible security issues.

S. The Tribe shall provide on-site security for casino operations to reduce and prevent criminal and civil incidents and shall coordinate response calls with the Clark County Sheriff's Office.

T. The Tribe shall adopt a Responsible Alcoholic Beverage Policy that shall include, but not be limited to, checking identification of patrons and refusing service to those who have had enough to drink.

U. In accordance with Section 3(A) of the Tribal EPHS Ordinance (Appendix U of the FEIS), the Tribe shall enter into an agreement to reimburse the Clark County

Sheriff's Office for reasonable direct and indirect costs incurred in conjunction with providing law enforcement services, of which some costs shall be re-evaluated on an annual basis, unless these services are otherwise reimbursed directly through an impact mitigation fund established in a State/Tribal gaming compact.

V. The Tribe shall enter into an agreement with Clark County to provide reimbursement for court and jail services, similar to Section 3(B) of the EPHS Ordinance, unless these services are otherwise paid for through an impact mitigation fund given directly to the County.

Fire Protection and Emergency Medical Service

W. During construction, any construction equipment that normally includes a spark arrester shall be equipped with an arrester in good working order. This includes, but is not limited to, vehicles, heavy equipment, and chainsaws. Staging areas, welding areas, or areas slated for development using spark-producing equipment shall be cleared of dried vegetation or other materials that could serve as fire fuel. To the extent feasible, the contractor shall keep these areas clear of combustible materials in order to maintain a firebreak.

X. The Tribe shall use fire-resistant construction materials for the larger buildings and equip enclosed buildings with automatic sprinkler systems as required by applicable building codes. The automatic sprinkler systems shall be designed to meet or exceed the National Fire Protection Association (NFPA) standards governing the different occupancies associated with the project structures. All fire protection water systems shall be in place before the introduction of combustible material to any of the facilities.

Y. Through the use of modern construction and fire engineering techniques, the Tribe shall build in automatic systems designed to contain any fire to the room of origin. All automatic systems will meet or exceed the NFPA standards.

Z. Through the use of modern fire engineering technology, the Tribe shall create and maintain a facility equipped with the latest early detection systems that insure an initial response to any fire alarm (automatic, local, or report). This would rely on automatic sprinkler systems in the occupied areas and smoke detection, along with automatic sprinkler systems, in the areas of the facility that are normally unoccupied, such as storerooms and mechanical areas. All early detection systems will meet or exceed the NFPA standards.

AA. In accordance with Section 3(C) of the Tribal EPHS Ordinance (Appendix U of the FEIS), the Tribe shall enter into an agreement to reimburse Clark County Fire District (CCFD) 12, taking into account payments received by the District, directly or indirectly, though any impact mitigation fund that would directly reimburse Clark County.

6.9 NOISE

Construction Noise

A. Construction using heavy equipment shall not be conducted between 10:00 p.m. and 7:00 a.m. Additionally, the following measures shall be used to minimize impacts from noise during work hours (7:00 a.m. to 10:00 p.m.):

1. All engine-powered equipment shall be equipped with adequate mufflers. Haul trucks shall be operated in accordance with posted speed limits. Truck engine exhaust brake (a.k.a. "Jake Brake") use shall be limited to emergencies.
2. Loud stationary construction equipment shall be located as far away from residential receptor areas as feasible.
3. All diesel engine generator sets shall be provided with enclosures.
4. All nighttime truck traffic activities, deliveries, and loading and unloading of equipment during the night shall be eliminated.

6.10 HAZARDOUS MATERIALS

A. In the event that contaminated soil and/or groundwater or other hazardous materials are encountered during construction-related earth-moving activities, all work shall be halted until a qualified individual can assess the extent of contamination. If contamination is determined to be significant, representatives of the Tribe shall consult with the USEPA to determine the appropriate course of action, including the development of a sampling plan and remediation plan if necessary.

B. All hazardous materials that would be necessary for the operation of the facilities shall be stored and handled according to State, federal, and manufacturer's guidelines. All flammable liquids shall be stored in a labeled secured container.

C. Personnel shall follow written standard operating procedures (SOP) for filling and servicing construction equipment and vehicles. The SOPs, which are designed to reduce the potential for incidents involving hazardous materials, shall include the following:

1. Refueling shall be conducted only with approved pumps, hoses, and nozzles.
2. Catch-pans shall be placed under equipment to catch potential spills during servicing.
3. All disconnected hoses shall be placed in containers to collect residual fuel from the hose.
4. Vehicle engines shall be shut down during refueling.
5. No smoking, open flames, or welding shall be allowed in refueling or service areas.
6. Refueling shall be performed away from bodies of water to prevent contamination of water in the event of a leak or spill.

7. Service trucks shall be provided with fire extinguishers and spill containment equipment, such as absorbents.
8. Should a spill contaminate soil, the soil shall be put into containers and disposed of in accordance with local, State, and federal regulations.
9. All containers used to store hazardous materials shall be inspected at least once per week for signs of leaking or failure. All maintenance and refueling areas shall be inspected monthly. Results of inspections shall be recorded in a logbook that shall be maintained on site.

D. As part of the proposed wastewater treatment design, sodium hypochlorite and citric acid shall be stored in the chemical room of the wastewater treatment plant building. The chemical room shall contain an emergency shower and eyewash. The storage and chemical metering facilities shall be located inside a chemical spill containment area, sized to contain 150 percent of the storage volume in case of an unintentional release. The sodium hypochlorite shall be stored in a 55-gallon drum and the citric acid shall be stored as dry material and then in a 50-gallon mixing tank when needed. Both chemicals shall be transferred to the dip tanks using pumps.

6.11 AESTHETICS

Screening features shall be integrated into the landscaping design of the alternatives to screen the view of the facilities from existing residences and to integrate natural elements into the design. For the Cowlitz Parcel this includes screening views for residents within a medium range north and west of the site. The following species are recommended for screening where appropriate, as they are native to the area and on average grow to approximately 100 feet or taller: Douglasfir, Western red cedar, Ponderosa pine, and Western white pine. Due to the slower rate of maturity, a row of a faster growing species such as Knobcone pine, which reaches approximately 80 feet in height, could be utilized as other species mature.

6.12 MITIGATION MEASURES THAT ARE NOT ADOPTED

CEQ NEPA regulations 40 C.F.R. § 1505.2(c) call for identification in the ROD of any mitigation measures specifically mentioned in the Final EIS that are not adopted. The following mitigation measures have not been adopted.

Socioeconomic Conditions and Environmental Justice

A. The Tribe shall establish a fund, through escrow account or other means, adequate to replace revenues lost by the City of La Center due to reduced taxes received from the existing card rooms and make this fund available to the City of La Center for at least 10 years.

This mitigation measure relating to socioeconomic impacts is not adopted for the reasons explained above in **Section 3.2.12.2.**

Water Supply

Optional Mitigation

D. As an optional source of potable water that would reduce impacts to CPU, the Tribe shall consider constructing on-site water wells for potable water supply. Based on the hydrogeology of the area, the development of wells within the Sand and Gravel Aquifer (SGA) under the Cowlitz Parcel, it is estimated that water yields could be between 500 gpm and 1,000 gpm, which would be more than adequate to serve the project alternatives.

E. As an optional source of potable water that would reduce impacts to CPU, water supply from the City of Ridgefield water system shall be considered. This system, however, has significant limitations for meeting the demands of a large project. For the City of Ridgefield to supply water for Alternatives A, B, C, or D, a pipeline connection of more than 2 miles would be required.

These mitigation measures were considered optional or alternative mitigation in the FEIS, and therefore are not necessary to avoid potential harm for the Preferred Alternative.

Wastewater Service

Optional Mitigation

H. As an alternative to on-site wastewater treatment and disposal, the Tribe should seek to obtain a services agreement with the City of La Center to provide municipal sewer service. The Cowlitz Parcel is within the City of La Center UGA. Proposed improvements needed to service the project and alternatives are discussed under the wastewater service discussion for Alternative D in Section 4.10 of the EIS, Public Services.

This mitigation measure was considered optional or alternative mitigation in the FEIS, and therefore is not necessary to avoid potential harm from the Preferred Alternative.

7.0 DECISION TO IMPLEMENT THE PREFERRED ALTERNATIVE

The Department has determined that it will implement the Preferred Alternative (Alternative A). This decision has been made based upon the environmental impacts identified in the EIS, a consideration of economic and technical factors, as well as the BIA's policy goals and objectives and the purpose and need for the project. Of the alternative evaluated in the EIS, Alternative A would best meet the purposes and needs of the BIA, consistent with its statutory mission and responsibilities, to promote the long-term economic vitality and self-sufficiency, self-determination and self-governance of the Tribe. The Tribal government facilities and casino-resort complex described under Alternative A would provide the Cowlitz Indian Tribe, which has no trust land or a reservation, with a long-deferred reservation land base and the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for its Tribal Government. This would enable the Tribal Government to establish, fund and maintain governmental programs that offer a wide range of health, education and welfare services to Tribal members, as well as provide the Tribe, its members and local communities with greater opportunities for employment and economic growth.

The Department is aware that completion of the project as detailed in Alternative A will require that approval or other actions of federal or local agencies. For Alternative A to be implemented, NIGC must approve the Gaming Management Contact, EPA must grant general construction and discharge NPDES permits, Clark County must agree to vacate the right-of-way for 319th Avenue and accept the proposed alternative road alignment (see **Section 7.2** below), and CPU must provide water and power to the project. While the No-Action Alternative (Alternative F) and Reduced Intensity Alternative (Alternative C) would result in lesser environmental impacts, these alternatives would limit the ability of the Tribe to facilitate and promote tribal economic development, self-determination and self-sufficiency. The No-Action Alternative would result in no net income or other economic benefits to the Tribe, and thus does not meet the stated purpose and need. Likewise, the Reduced Intensity Alternative, which has been identified in **Section 5.0** as the Environmentally Preferred Alternative, would substantially limit the beneficial effects that would otherwise be available to the Tribe and Clark County communities under the Preferred Alternative and would not substantially meet the purpose and need for the Proposed Action.

The Preferred Alternative results in substantially greater beneficial effects for the Tribe and Clark County communities than any of the other alternatives, with the exception of the Preferred Project Without Rerouting NW 319th Alternative (Alternative B) and the Ridgefield Interchange Site Alternative (Alternative E). However, Alternative B would have slightly greater environmental impacts to wetlands requiring additional mitigation, and Alternative E would result in greater significant adverse environmental effects for which mitigation would not reduce impacts to less than significant levels. With the exception of unavoidable impacts identified for each of the development alternatives as a result of glare and indirect vehicle emissions, any additional impacts from the Preferred Alternative would be reduced to less than significant after the implementation of mitigation measures. Accordingly, the Department will implement the Preferred Alternative subject to implementation of the mitigation measures discussed in **Section 6.0**.

7.1 THE PREFERRED ALTERNATIVE RESULTS IN SUBSTANTIAL BENEFICIAL IMPACTS

The Preferred Alternative reasonably is expected to result in beneficial effects for Clark County, the Tribe and its members. Key beneficial effects include:

- Establishment of a land base for the Cowlitz Tribe, from which it can operate its Tribal government and provide a variety of health, housing, education, social, cultural and other programs and services for its members, provide employment opportunities for its members, and promote a sense of community and political cohesion.

- Generation of needed government revenues for the Tribe that will allow the Tribe to fund the governmental operations and programs required to meet Tribal needs, will provide capital for other economic development opportunities, and will allow the Tribe to achieve Tribal self-sufficiency, self-determination, and a strong, stable Tribal government.

- Generation of approximately 4,011 jobs over the entire construction period with an average wage of $46,200 and a total payroll of $185,292,000.

- Generation at the onset of operations of employment of 3,151 employees with an average wage of $28,000 and a total annual payroll of $88,135,000. Approximately 90% of employees are anticipated currently to reside in Clark and Cowlitz counties.

- Increased off-site spending and economic opportunities benefiting local community members. Revenue from the sales tax on construction purchases is estimated to total $39,290,000.

- Generation of annual and one-time revenues to the State of Washington through the Tribal State Compact.

7.2 PREFERRED PROJECT WITHOUT REROUTING NW 319TH STREET MAY RESULT IN INCREASED ADVERSE ENVIRONMENTAL EFFECTS REQUIRING ADDITIONAL MITIGATION

The Preferred Project Without Rerouting NW 319th Street Alternative (Alternative B) would be located on the same site and would have essentially the same facility and operation as the Preferred Alternative; therefore, Alternative B is reasonably expected to result in similar beneficial economic and related effects for Clark County, the Tribe, and its members as the Preferred Alternative. However, unlike the Preferred Alternative, it does not include the rerouting of NW 319th Street, thus the wetlands located on the northern portion of the property would be impacted slightly more by development of Alternative B. Specifically, Alternative B would affect approximately 8.4 more acres of palustrine wetlands than the Preferred Alternative. While the impacts to wetlands from Alternative B could be reduced to less than significant with mitigation, there is added environmental value in minimizing disturbance to the natural environment as proposed with the Preferred Alternative. The Department believes that the added environmental value in minimizing disturbance and potential impacts to biological resources weighs in favor of selection of Alternative A over Alternative B as the Preferred Alternative. However, Alternative B remains preferable to the other development alternatives (Alternatives C, D, and E) because it most substantially meets the purpose and needs of the Tribe and the BIA and potential impacts can be adequately mitigated, such that it would be an acceptable approach if rerouting of NW 319th Street were not accomplished.

7.3 REDUCED INTENSITY ALTERNATIVE RESTRICTS BENEFICIAL EFFECTS

The Reduced Intensity Alternative (Alternative C) is the environmentally preferred development alternative but Alternative C would generate less gaming revenue than the Preferred Alternative. As a result, it would restrict the Tribe's ability to meet its needs and to foster Tribal economic development, self-determination, and self-sufficiency. Due to a lesser amount of new development, the effects on the natural and physical environment would be slightly less under Alternative C than those created by the Preferred Alternative. Both alternatives would result in a similar level of impacts after mitigation, including significant unavoidable impacts associated with glare and indirect vehicle emissions. The BIA believes the reduced economic and related benefits of Alternative C make it a less viable option that would fulfill the purpose and need of the Proposed Action to a lesser degree than the

Preferred Alternative. Accordingly, the BIA has selected the Preferred Alternative over Alternative C.

7.4 BUSINESS PARK ALTERNATIVE MAY RESULT IN INCREASED ADVERSE ENVIRONMENTAL EFFECTS AND RESTRICTS BENEFICIAL EFFECTS

The Business Park Alternative (Alternative D) would result in less employment and economic growth for both the Tribe and neighboring communities than from the Preferred Alternative. As a result, it would restrict the Tribe's ability to meet its needs and to foster Tribal economic development, self-determination, and self-sufficiency. The BIA believes the reduced economic and related benefits of Alternative D make it a less viable option that would fulfill the purpose and need of the Proposed Action less than the Preferred Alternative. Additionally, Alternative D would result in greater trip generation and a higher percentage of trip generation at peak hours, subsequently increasing the potential for adverse traffic impacts and associated air quality emissions. Therefore, selection of Alternative D over the Preferred Alternative is not warranted.

7.5 RIDGEFIELD INTERCHANGE SITE ALTERNATIVE MAY RESULT IN SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS

Because the Ridgefield Interchange Site Alternative (Alternative E) would be located near I-5 south of the Cowlitz Parcel, and would have similar facilities and operations as the Preferred Alternative, Alternative E would result in similar beneficial economic and related effects for Clark County, the Tribe and its members as the Preferred Alternative. The Ridgefield Interchange Site is diagonally bisected by jurisdictional wetlands that cannot be entirely avoided by development. Alternative E would affect approximately 24.2 more acres of palustrine wetlands than the Preferred Alternative. While the impacts to wetlands from Alternative E could be reduced to less than significant with mitigation, there is added environmental value in minimizing disturbance to the natural environment as proposed with the Preferred Alternative. Additionally, Alternative E would result in significant and unavoidable effects to topography due to the necessity for substantial grading to provide adequate drainage to the proposed casino-resort complex and Tribal facilities. Accordingly, because development of the Ridgefield Interchange Site would result in greater adverse environmental effects, the BIA has selected the Preferred Alternative over Alternative E.

7.6 NO-ACTION ALTERNATIVE FAILS TO MEET PURPOSE AND NEED OF PROJECT

The No-Action Alternative (Alternative F) would not meet the stated purpose and need. Specifically, it would not provide a land base for the Tribe and a source of net income to allow the Tribe to achieve self-sufficiency, self-determination, and a strong Tribal government. This alternative also would likely result in substantially less economic benefits to Clark County than the development alternatives.

8.0 DECISION TO ACQUIRE TRUST TITLE TO THE 151.87-ACRE COWLITZ PARCEL

The procedures and policies concerning the Secretary's exercise of discretion for acquiring lands in trust for Indian tribes and individuals are set forth in 25 U.S.C. § 465 and 25 C.F.R.

Part 151. The BIA's evaluation of the Tribe's fee-to-trust request based on the applicable criteria is provided in **Sections 8.1** through **8.11** of this ROD, below.

8.1 25 C.F.R. 151.3 LAND ACQUISITION POLICY.

The Tribe's fee-to-trust request meets the two threshold requirements of the Secretary's land acquisition policy in 25 C.F.R. § 151.3. First, land may be acquired in trust status for an Indian tribe or individual. A "tribe" includes any Indian tribe or nation "which is recognized by the Secretary as eligible to receive the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. § 151.2(b). The Cowlitz Indian Tribe is a federally recognized Indian tribe and is eligible to receive services from the BIA. See Department of the Interior, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007) (listing the Cowlitz Indian Tribe as an eligible entity).

Second, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
(2) When the tribe already owns an interest in the land [i.e., the tribe owns an interest in an off-reservation asset and seeks to consolidate that interest]; or
(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

As described in detail in the Tribe's amended fee-to-trust application and the Final EIS, the Tribe wishes to use the Cowlitz Parcel as its initial reservation for the development of Tribal governmental facilities, elder housing, a cultural center, a casino, a hotel and resort. The establishment of a land base and a source of revenue to fund tribal government infrastructure and programs, provide employment opportunities for Tribal members, and create other economic development opportunities that will facilitate tribal self-determination, economic development, and Indian housing, is particularly important given that the Cowlitz Tribe was restored to recognition in 2002 and is still without any trust land or a reservation. Therefore, the BIA has determined that the acquisition of the 151.87 acre area of land in trust is necessary to facilitate tribal self-determination, economic development, and Indian housing, and that the acquisition satisfies 25 C.F.R. § 151.3(a)(3).

8.2 25 C.F.R. 151.10(A). STATUTORY AUTHORITY FOR THE ACQUISITION

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority.

Section 5 of the IRA is the primary general statutory authority for the Secretary to acquire lands in trust for Indian tribes and individual Indians. It provides in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted

> allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians . . . .
>
> Title to any lands or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

As a result of the Supreme Court's February 2009 decision in *Carcieri v. Salazar,*[7] the application by the Cowlitz Tribe to have land taken into trust by the Secretary pursuant to the Indian Reorganization Act (IRA),[8] requires that the Secretary first determine whether the tribe was "under federal jurisdiction" at the time of the passage of the IRA. This analysis is highly fact specific. As a result, much of this decision is limited to evaluating the Secretary's authority with respect to the Cowlitz Tribe.

Background on the Tribe's Application

A Tribal member of the Cowlitz Tribe acquired certain parcels of the 151.87 acres in rural Clark County, Washington. The tribal member and other non-Indians sold their parcels to Salishan-Mohegan, a gaming development entity. Salishan-Mohegan has agreed to transfer ownership of the parcels to the Tribe or directly to the United States if the fee-to-trust application is approved. Purposes of the transfer into trust include re-establishing a tribal land base for this landless Tribe, and developing Tribal government buildings, Tribal elder housing, a Tribal cultural center, a wastewater treatment plant, and a casino-resort gaming facility. The land is located approximately 24 miles from the Tribe's headquarters in Longview, Washington in Cowlitz County. The land is about 30 minutes from Portland, Oregon and about 20 minutes from Vancouver, Washington. The closest town to the proposed gaming site is La Center, Washington.

In 2004, the Tribe submitted its fee to trust application, invoking the Secretary's authority under Section 5 of the IRA, 25 U.S.C. § 465, to take land into trust for tribes. The stated purposes for the trust land include gaming, other economic development, and governmental purposes. In February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar.*[9] The *Carcieri* decision requires that in order for the Secretary to exercise his authority under the IRA) to take land into trust for an Indian tribe,[10] the Secretary must first establish that the tribe was "under federal jurisdiction" at the time of the passage of the IRA. In June 2009, after the Supreme Court issued *Carcieri*, the Cowlitz Tribe submitted a supplement to its trust acquisition request that addressed the *Carcieri* decision. The June 2009 document included

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[7] 129 S. Ct. 1058 (2009).

[8] The *Carcieri* decision addresses the Secretary's authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the Secretary's authority to take land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

[9] 129 S. Ct. 1058 (2009).

[10] The *Carcieri* decision addresses the authority to take land into trust for "persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the authority to take land into trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

both an analysis of the decision and copies of documents that it asserted demonstrated that the Tribe was under federal jurisdiction in 1934. The Tribe submitted a supplement to that latter document on August 17, 2010.

Brief History of the Cowlitz Tribe

The Cowlitz Tribe is located in southwest Washington. The Tribe descends from the Lower Cowlitz and Upper Cowlitz bands, with its aboriginal territory along the Cowlitz River. As discussed in more detail below, the Lower Cowlitz Band participated in treaty negotiations with the United States in 1855 at the Chehalis River. Although the Band refused to sign the treaty and the treaty was never completed, these facts demonstrate that the Federal Government clearly regarded the Band as a sovereign entity capable of engaging in a formal treaty relationship with the United States. After 1855, the Upper and Lower Cowlitz Indians remained in the Cowlitz River valley, and over time, the two bands were amalgamated into one Tribe. By the early 1900's, the Office of Indian Affairs regarded the Cowlitz Indians as one Tribe. The Cowlitz Indians were regularly listed in the BIA's records, and identified as a tribal entity from the 1860s through the 1890s, from 1904 through the 1930s, and after 1950. The BIA regularly provided services to the Cowlitz Indians, including supervising allotments, adjudicating probate proceedings, providing education services, assistance in protecting fishing activities, investigating tribal claims to aboriginal lands, and approving attorney contracts.

The Tribe was administratively recognized under the federal acknowledgment process (FAP) (25 C.F.R. Part 83) in 2000.[11] The FAP process, among other things, required the Tribe to show – and the Department to find – that the Tribe had a continuous political and community existence which commenced from at least the time of the 1855 Chehalis River treaty negotiations. The extensive factual and historical record developed by the Department as part of the FAP process is incorporated by reference herein. The extensive record developed during the FAP process establishes significant factual underpinnings relevant to this determination that the Cowlitz Tribe was under federal jurisdiction in 1934.

Statutory Interpretation of the IRA

A. Supreme Court Decision in Carcieri v. Salazar, 129 S. Ct. 1058 (2009)

In 1983, the Narragansett Indian Tribe of Rhode Island (Narragansett) was acknowledged as a federally recognized tribe.[12] In 1978, the Narragansett filed two lawsuits to recover possession of approximately 3,200 acres of land comprising its aboriginal territory that were alienated by Rhode Island in 1880 in violation of the Indian Non-Intercourse Act. The parties

[11] The final determination to acknowledge the Cowlitz Indian Tribe was issued in February 2000. 62 Fed. Reg. 8436 (Feb. 18, 2000). The Quinault Indian Nation requested reconsideration of the decision before the Interior Board of Indian Appeals (IBIA). *See* 36 IBIA 140 (May 29, 2001). The IBIA affirmed the final determination but referred three issues back to the Secretary for further consideration. *Id.* In December 2001, the Assistant Secretary-Indian Affairs issued a Reconsidered Final Determination reaffirming the initial ruling and addressing the concerns outlined by the IBIA, which became effective on publication in the Federal Register, 67 Fed. Reg. 607 (Jan. 4, 2002). The reconsidered final determination supplements the final determination and supersedes it to the extent it is inconsistent.
[12] 48 Fed. Reg. 6177 (Feb. 10, 1983).

settled the lawsuit which was incorporated into federal implementing legislation known as the Rhode Island Indian Claims Settlement Act.[13] In exchange for relinquishing its aboriginal title claims, the Narragansett agreed to accept possession of 1,800 acres within the claim area.

In 1985, after the Narragansett had achieved federal recognition, the Rhode Island Legislature transferred the settlement lands to the Narragansett. Subsequently, the Narragansett requested that its settlement lands be taken into trust by the Federal Government pursuant to section 5 of the IRA. The Narragansett's application was approved by the BIA and upheld by the IBIA notwithstanding a challenge by the Town of Charlestown.[14] The settlement lands were taken into trust with the restriction contained in the Settlement Act that the lands were subject to state criminal and civil jurisdiction, 25 U.S.C. § 1708.

In 1998, the Bureau approved, pursuant to Section 5 of the IRA, the Narragansett's application to acquire approximately 32 acres into trust for low income housing for its elderly members.

The State and local town filed an action in district court claiming that the decision to acquire 32 acres into trust violated the Administrative Procedure Act; that the Rhode Island Indian Claims Settlement Act precludes the acquisition; and that the IRA is unconstitutional and does not apply to the Narragansett. In 2007, the First Circuit, *en banc*, rejected the State's argument that Section 5 did not authorize the BIA to acquire land for a tribe who first received federal recognition after the date the IRA was enacted. The State sought review in the Supreme Court.

1. Majority Opinion

The Supreme Court in a 6-3 ruling (J. Breyer concurring, J.J. Souter and Ginsburg concurring in part and dissenting in part, J. Stevens dissenting) reversed the First Circuit holding that the Secretary did not have authority to take land into trust for the Narragansett because the Narragansett was not under federal jurisdiction at the time the IRA was enacted in 1934. Justice Thomas, writing for the majority, determined that the Court's task was to interpret the term "now" in the statutory phrase "now under federal jurisdiction" in Section 19 of the IRA.[15]

Interpreting Section 19, in concert with Section 5, the Supreme Court applied a strict statutory construction analysis to determine whether the term "now" in the definition of Indian in Section 19 referred to 1998 when the Secretary made the decision to accept the parcel into trust or referred to 1934 when the IRA was enacted.[16] The Court analyzed the ordinary

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[13] 25 U.S.C. §§ 1701-1716.

[14] *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs,* 18 IBIA 67 (Dec. 5, 1989).

[15] *Carcieri*, 129 S. Ct. at 1061. Furthermore, while the definition of Indian includes members of "any recognized Indian tribe now under federal jurisdiction," the Supreme Court did not suggest that the term "recognized" is encompassed within the phrase "now under federal jurisdiction." Consistent with the grammatical structure of the sentence – in which "now" qualifies "under federal jurisdiction" and does not qualify "recognized" – and consistent with Justice Breyer's concurring opinion, I construe "recognized " and "under federal jurisdiction" as necessitating separate inquiries. *See* discussion Section IV(D)(2).

[16] *Carcieri*, at 1064.

meaning of the word "now" in 1934,[17] within the context of the IRA,[18] as well as contemporaneous departmental correspondence,[19] concluding that "the term 'now under the federal jurisdiction' in Section 19 unambiguously refers to those tribes that were under [f]ederal jurisdiction of the United States when the IRA was enacted in 1934."[20] The majority, however, did not address the meaning of the phrase "under federal jurisdiction" in Section 19, concluding that the parties had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934.[21]

2. *Justice Breyer's Concurring Opinion*

Justice Breyer wrote separately concurring in the majority opinion with a number of qualifications. One of these qualifications is significant for the Department's implementation of the Court's decision. He stated that an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it first appears. That is because a tribe may have been "under federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time.[22] [Justice Breyer cited to a list of tribes that was compiled as part of a report issued 13 years after the IRA (the so-called Haas Report)[23] and noted that some tribes were erroneously left off that list – because they were not recognized as tribes by federal officials at the time – but whose status was later recognized by the Federal Government. Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[24] Justice Breyer specifically cited to the Stillaguamish Tribe as an example in which the tribe had treaty fishing rights as of 1934, even though the tribe was not formally recognized by the United States until 1976. The concurring opinion of Justice Breyer also cited Interior's erroneous 1934 determination that the Grand Traverse Band of Ottawa and Chippewa Indians

[17] The Court examined dictionaries from 1934 and found that "now" meant "at the present time" and concluded that such an interpretation was consistent with the Court's decisions both before and after 1934. *Id.* at 1064.
[18] The Court also noted that in other sections of the IRA, Congress had used "now or hereafter" to refer to contemporaneous and future events and could have explicitly done so in Section 19 if that was Congress' intent in the definition.
[19] The Court noted that in a letter sent by Commissioner Collier to BIA Superintendents, he defined Indian as member of any recognized tribe "that was under [f]ederal jurisdiction at the date of the Act." *Id.* at 1065, quoting from *Letter from John Collier, Commissioner to Superintendents*, dated March 7, 1936.
[20] *Id.* at 1068.
[21] *Id.* at 1061, 1068. The issue of whether the Narragansett Tribe was "under federal jurisdiction in 1934" was not considered by the BIA in its decision, nor was evidence concerning that issue included in the administrative record. When the BIA issued its decision, the Department's position was that the IRA applied to all federally recognized tribes. Because the Narragansett Tribe was federally recognized, the administrative record assembled pertained solely to the Bureau's compliance with the Part 151 regulatory factors.
[22] *Id.* at 1069.
[23] *See infra* note 53 (discussing lists of federally recognized tribes).
[24] *Id.* at 1070. Justice Breyer concurred with Justices Souter and Ginsburg that "recognized" was a distinct concept from "now under federal jurisdiction." However, in his analysis he appears to use the term "recognition" in the sense of "federally recognized" as that term is currently used today in its formalized political sense (i.e., as the label given to Indian tribes that are in a political, government-to-government relationship with the United States), without discussing or explaining the meaning of the term in 1934. *See infra* discussion Section IV(D)(2).

had been "dissolved," a view that was later repudiated by Interior's 1980 correction concluding that the Band had "existed continuously since 1675."[25] Finally, Justice Breyer cited the Mole Lake Band as an example, where the Department had erroneously concluded the tribe did not exist, but later determined that the anthropological study upon which that decision had been based was erroneous and recognized the tribe.[26]

Thus, Justice Breyer concluded that, regardless of whether a tribe was formally recognized in 1934, a tribe could have been "under federal jurisdiction" in 1934 as a result, for example, of a treaty with the United States that was in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office. Justice Breyer, however, found no similar indicia that the Narragansett were "under federal jurisdiction" in 1934. Indeed, Justice Breyer joined the majority in concluding that the evidence in the record before the Supreme Court indicated that at no point in its history leading up to 1934 had the Narragansett *ever* been either federally recognized or under federal jurisdiction.[27] Justices Souter and Ginsburg, by contrast, would have reversed and remanded to allow the Department an opportunity to show that the Narragansett Tribe was under federal jurisdiction in 1934, contending that the issue was not addressed in the record before the Court.[28] Justice Stevens dissented finding that the IRA places no temporal limit on the definition of an Indian tribe,[29] and criticized the majority for adopting a cramped reading of the IRA.[30]

In sum, the Supreme Court's majority opinion instructs that in order for the Secretary to acquire land for a tribe under Section 5 of the IRA, a tribe must have been "under federal jurisdiction" in 1934. While the Court's review provides at least some indication of the type of evidence that would support a finding that a tribe was <u>not</u> under federal jurisdiction in 1934, the majority opinion did not identify what types of evidence would demonstrate that a tribe <u>was</u> under federal jurisdiction. Nor, in 1934, was there a definitive list of "tribes under federal jurisdiction."[31] Therefore, to interpret the phrase "now under federal jurisdiction" in accordance with the holding in *Carcieri*, I must interpret the phrase "under federal jurisdiction."

B. History of the IRA

The IRA was the culmination of many years of effort to change the Federal Government's Indian policy. The allotment and assimilation policies were dismal failures.[32] After the

[25] *Carcieri*, at 1069.
[26] *Id.*
[27] *But see supra* note 15.
[28] *Carcieri*, at 1071.
[29] *Id.* at 1072.
[30] *Id.*
[31] Memo. from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, at 7 (Stillaguamish Memorandum); *see also* note 53 (discussing lists of federally recognized tribes).

[32] The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) (Meriam Report) (detailing the deplorable status of health, id. 3-4, 189-345, poverty, 4-8, 430-60, 677-701, education, 346-48, and loss of land, 460-79).

allotment of tribal lands, tribes and individual Indians lost millions of acres. The IRA was enacted to help achieve a shift in policy away from allotment and assimilation.[33]

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-government. Congress authorized Indian tribes to adopt their own constitutions and bylaws (Section 16, 25 U.S.C. § 476), and to incorporate (Section 17, 25 U.S.C. § 477). It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application (Section 18, 25 U.S.C. § 478). In service of the broader goal of "recogn[izing] [] the separate cultural identity of Indians," the IRA encouraged Indian tribes to revitalize their self-government and to take control of their business and economic affairs.[34] Congress also sought to assure a solid territorial base by, among other things, "put[ting] a halt to the loss of tribal lands through allotment."[35] Of particular relevance here, Section 5 of the IRA authorizes the Secretary of the Interior "in his discretion," to "acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians."[36] The acquired lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian . . ."[37] The IRA thus repudiated the previous land policies of the General Allotment Act.

Section 19 of the IRA defines those who are eligible for its benefits. That section provides that the term "tribe" "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[38] Section 19 further provides as follows:

> The term "Indian" . . . shall include all persons of Indian descent who are [1] members of any recognized Indian tribe now under [f]ederal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.[39]

With a few amendments, the IRA has remained largely unchanged since 1934.

C. *Meaning of the Phrase "Under Federal Jurisdiction"*

In examining the statute, the first inquiry is to determine whether there is a plain meaning of the phrase "under federal jurisdiction." The IRA does not define the phrase, and as shown below, the apparent author of the phrase, John Collier, did not provide a definition either. In discerning the meaning of the phrase since Congress has not spoken directly on this issue, one option is to look to the dictionary definitions of the word "jurisdiction."[40] In 1933, Black's Law Dictionary defined the word "jurisdiction" as:

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[33] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).
[34] Graham Taylor, *The New Deal and American Indian Tribalism*, 39 (1980). *See also* 48 Stat. 984 ("An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses . . . .")
[35] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973).
[36] 25 U.S.C. § 465.
[37] *Id.*
[38] 48 Stat. 988; (codified at 25 U.S.C. § 479).
[39] *Id.*
[40] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (when a term is not defined in statute, the court's "task is to construe it in accord with its ordinary or natural

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[41]

The entry in Black's includes the following quotation: "The authority of a court as distinguished from the other departments; . . ."[42] Since the issue before us concerns an "other department" rather than a court, I turn to the contemporaneous Webster's Dictionary for assistance. Webster's definition of "jurisdiction" provides a broader illustration of this concept as it pertains to governmental authority:

> 2. Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.
> 3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.[43]

These definitions, however, while casting light on the broad scope of "jurisdiction," fall short of providing a clear and discrete meaning of the specific statutory phrase "under federal jurisdiction" that could be considered unambiguous. For example, these definitions do not establish whether in context of the IRA, "under federal jurisdiction" refers to the outer limits of the constitutional scope of federal authority over the tribe at issue or to whether the United States exercised jurisdiction in fact over that tribe. I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction."

D. *Legislative History of the IRA*

The Department of the Interior drafted the proposed legislation that subsequently was enacted as the IRA. The Interior Solicitor's Office took charge of the legislative drafting, with much of the work undertaken by the Assistant Solicitor, Felix S. Cohen.[44] In February 1934, the initial version of the bill was introduced in both the House of Representatives and the Senate. The Indian Affairs Committees in both bodies held hearings on the bill over the next several

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meaning"), *id.* at 275 (with a legal term the court "presume[s] Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment.").

[41] *Black's Law Dictionary* at 1038 (3d ed. 1933).

[42] *Id.*

[43] *Merriam-Webster's New International Dictionary* (2d ed. 1935). *See, e.g., Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000) (the plain meaning of a statutory term can sometimes be ascertained by looking to the word's ordinary dictionary definition).

[44] Elmer Rusco, *A Fateful Time*, 192-93 (2000); *Id.* at 207 ("In a memorandum to Collier on January 17, 1934, Felix Cohen reported that drafts of the proposed legislation . . . are now ready . . . . On January 22, Cohen sent the commissioner drafts of two bills . . . .") (internal quotations and citations omitted); John Collier, *From Every Zenith; A Memoir; And Some Essays on Life and Thought*, 229-30 (1964).

months, which led to significant amendments to the bills. These amendments included the addition of the phrase "now under federal jurisdiction" to the definition of the term "Indian."

1. The Hearings

In the initial version of the Senate bill, the term "Indian" was defined as follows:

> Section 13 (b) The term 'Indian' as used in this title to specify the person to whom charters may be issued, shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.[45]

Thus, the amended definition of "Indian" in Section 19 of the version of the bill that was before the Senate Committee during the Committee hearing on May 17, 1934 included "all persons of Indian descent who are members of any recognized tribe."[46] This definition was further amended following the Senate Committee hearings on May 17, 1934. At one point in that hearing Senators Thomas and Frazier raised questions regarding the bill's treatment of Indians who were not members of tribes and were not enrolled, supervised, or living on a reservation. : Senator Thomas then brought up the deplorable conditions of the Catawbas of South Carolina and the Seminoles of Florida, stating that they "should be taken care of."[47] Chairman Wheeler responded one concern with the definition of "Indian" in the IRA draft under consideration:

> I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done.[48]

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[45] Readjustment of Indian Affairs Part 1, H.R. 7902, 73rd Cong., 2d Sess. (Feb. 22, 1934), page 6, Title I–Indian Self-Government, Section 13.
[46] To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 234 (May 17, 1934) ("Senate Hearing).
[47] *Id.* at 263.
[48] *Id.* at 263-64

To address this concern, the Committee proposed amending the third definition of "Indian" in the IRA to include "all other persons of one-half or more Indian blood," rather than those of one-quarter blood. Thus, the Committee understood that Indians that were neither members of existing tribes or descendants of members living on reservations came within the IRA only if they satisfied the blood-quantum requirement.[49] In other words, the blood-quantum requirement was not imposed on the other two definitions of "Indian" included in the Act. In response to statements by Chairman Wheeler that the term "recognized Indian tribe" was over-inclusive in the first definition of "Indian" and included "Indians" who were essentially "white people," and Senators O'Mahoney's and Thomas' interest in including landless tribes such as the Catawba, Commissioner Collier at the close of the hearing on May 17, 1934, suggested that the language "now under federal jurisdiction" be added after "recognized Indian tribe."[50] Although there was significant confusion over the definition of "Indian" during the hearing,[51] which renders difficult a precise understanding of the colloquy, Commissioner Collier's suggested language arguably sought to strike a compromise that addressed both Senators O'Mahoney's and Thomas' desire to include tribes like the Catawba that maintained tribal identity and Chairman Wheeler's concern that groups of Indians who have abandoned tribal relations and connections be excluded.[52]

Almost immediately after Commissioner Collier offered this proposal, the hearing concluded without any explanation of the phrase's meaning. Nor did subsequent hearings take up the meaning of the phrase "under federal jurisdiction," which does not appear anywhere else in the statute or legislative history.[53]

Concerns about the ambiguity of the phrase "under federal jurisdiction" surfaced in an undated memorandum from Assistant Solicitor Felix Cohen, who was one of the primary drafters of the initial proposal for the legislation. In that memorandum, which compared the House and Senate bills, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' *whatever that may mean*."[54] Based on Cohen's analysis, the Solicitor's Office prepared a second memorandum recommending deletion of the phrase "under federal jurisdiction" because it was likely to "provoke interminable questions of interpretation."[55] The phrase, however, remained in the bill; and Cohen's prediction that the phrase would trigger "interminable questions of interpretation" is remarkably prescient.

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[49] *Id.*
[50] *Id.* at 265-66.
[51] During the crucial discussion in which "under federal jurisdiction" was proposed, Senate Hearing at 265-66, the Senators are not clear whether they are discussing the Catawba or the Miami Tribe; whether the first definition of "Indian" – members of recognized tribes – or the second definition – descendants of tribal members living on a reservation – is at issue; whether the Catawba were understood to have land; or the meaning of the term "member." In addition, Chairman Wheeler appears to have misunderstood the interplay between the three definitions of the term "Indian," seeming to believe (incorrectly) that the blood quantum limitation applied to all definitions.
[52] *Id.*
[53] The legislative history refers elsewhere to terms such as "federal supervision," "federal guardianship," and "federal tutelage." Yet Congress opted not to rely on one of those terms.
[54] *Differences Between House Bill and Senate Bill*, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, Memo of Felix Cohen (National Archives Records) (emphasis added).
[55] *Analysis of Differences Between House Bill and Senate Bill*. Box 11, Records Concerning the Wheeler-Howard Act, 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4).

On June 18, 1934, the IRA was enacted into law. Section 19 of the IRA requires that, in order to be eligible for the benefits of the Indian Reorganization Act, an individual must qualify as an Indian as defined in Section 19 of the Act, which reads in part as follows:

> Section 19. The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Using this definition, the Department immediately began the process of implementing the IRA and its provisions.

2. *"Recognition" versus "Under Federal Jurisdiction"*

The first portion of the IRA's definition of "Indian" includes the terms "recognized Indian tribe" and "under federal jurisdiction." Interpreting the phrase "under federal jurisdiction," is complicated by confusion over the meaning of the term "recognized Indian tribe" as used in the IRA. The term "recognized Indian tribe" has been used historically in at least two distinct senses. First, "recognized Indian tribe" has been used in what has been termed the "cognitive" or quasi-anthropological sense. Pursuant to this sense, "federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize.'"[56] Second, the term has sometimes been used in a more formal or "jurisdictional" sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States.[57]

The political or jurisdictional sense of the term "recognized Indian tribe" evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s. In 1978, the Department promulgated regulations establishing procedures pursuant to which tribal entities could demonstrate their status as Indian tribes.[58] These regulations, as amended in 1994, require that a petitioning entity satisfy seven mandatory requirements, including the following: that the entity "has been identified as an American Indian entity on a substantially continuous basis since 1900"; the "group comprises a distinct community and has existed as a community from historical times to the present"; and the entity "has maintained political influence or authority over its members as an autonomous entity from historic times to the present."[59]

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[56] W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 333 (1990).
[57] *Id. See also* Felix Cohen, *Handbook of Federal Indian Law* 268 (1942 ed.) ("The term 'tribe' is commonly used in two senses, "an ethnological sense and a political sense.").
[58] 25 C.F.R. pt. 83.
[59] 25 C.F.R. § 83.7(a), (b), (c). Moreover, in 1979, the Bureau of Indian Affairs for the first time published in the Federal Register a list of federally acknowledged Indian tribes. "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 44 Fed. Reg. 7235 (Feb. 6, 1979). Based on our research, the Department's first efforts to publish a comprehensive list of federally recognized tribes, such that entities that did not appear on the list (other than eligible Alaskan tribal entities) were regarded

The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term "recognized Indian tribe," even though"[t]he Government has not found out that they live yet, apparently."[60] In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably led it to adopt the phrase "under federal jurisdiction" in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as "under federal jurisdiction," if the IRA had incorporated the rigorous, modern definition of federally recognized Indian tribe.

As the historical record produced during the FAP process demonstrates, the Cowlitz Tribe was a recognized Indian tribe in the cognitive or quasi-anthropological sense of that term in 1934, and it remains so today.[61] Moreover, the Cowlitz Tribe was recognized by the Federal Government in the formal sense of that term at multiple stages in its history, including the late 19th Century, as well as, in conjunction with the FAP determination in 2002.

For purposes of our decision here, I need not reach the question of the precise meaning of "recognized Indian tribe" as used in the IRA, nor need I ascertain whether the Cowlitz Tribe was recognized by the Federal Government in the formal sense in 1934, in order to determine whether land may be acquired in trust for the Cowlitz Tribe. The Secretary has issued regulations governing the implementation of his authority to take land into trust.[62] Those regulations define "tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."[63] The Department, therefore, only takes land into trust for federally recognized Indian tribes.[64] If a tribe is

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as not constituting federally recognized tribes, did not occur until the 1970s. Although some commentators refer to a post-IRA list of tribes, *see* Quinn, 34 Am. J. Leg. Hist. at 334 n.10, this reference appears to be a report issued 10 years after the IRA and did not purport to list all recognized or federally recognized tribes. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). The Haas Report listed reservations where the Indian residents voted to accept or reject the IRA, *id.* at 13 (table A), tribes that reorganized under the IRA, *id.* at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, *id.* at 31 (table C), and tribes not under the IRA with constitutions, *id.* at 33 (table D). Prior to the list published in 1979, the Department made determinations of tribal status on an ad hoc basis. *See* Stillaguamish Memorandum at 7.

[60] *See* Senate Hearing at 266; *see also* Senate Hearing at 80 (Sen. Thomas). Based on this legislative history, the Associate Solicitor concluded that "formal acknowledgment in 1934 is [not] a prerequisite to IRA land benefits." Stillaguamish Memorandum at 1; *see also id.* at 3.

[61] Although Commissioner Collier posited in an October 1933 letter to an individual seeking enrollment with the Cowlitz Tribe that the Cowlitz Tribe no longer existed as a tribal entity, this statement appears to be discussing the existence of a tribal entity in the political sense – as Collier indicated that the Indian Service was not keeping enrollment information for the Cowlitz Tribe because it had no reservation and no tribal funds were on deposit under government control. *See* HTR at 131 (citing Collier 1933). Moreover, even if Collier were asserting that the Tribe has ceased to exist in a cognitive sense, this letter was specifically considered and rejected as part of the FAP, which concluded that the Cowlitz Tribe continuously existed and that despite Collier's letter, contact between the Indian Affairs Office and Cowlitz tribal members continued on a variety of topics. HTR at 131.

[62] 25 C.F.R. pt. 151.

[63] 25 C.F.R. § 151.2.

[64] In 1994, Congress enacted legislation requiring the Secretary to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454,

federally recognized, by definition it satisfies the IRA's term "recognized Indian tribe" in both the cognitive and jurisdictional senses of that term. That is because, whatever the precise meaning of the term "recognized Indian tribe," the date of federal recognition does not affect the Secretary's authority under the IRA. In Section 19 of the IRA, the word "now" modifies only the phrase "under federal jurisdiction"; it does not modify the phrase "recognized Indian tribe."[65] As a result, "[t]he IRA imposes no time limit upon recognition";[66] the tribe need only be "recognized" as of the time the Department acquires the land into trust, which clearly would be the case here, under any conception of "recognition." The Cowlitz Tribe's federal acknowledgment in 2002, therefore, satisfies the IRA's requirement that the tribe be "recognized."

3. The Interior Department's Interpretation and Implementation of the IRA

The IRA delegated substantial implementation authority to the Department. For example, under Section 18 of the IRA, the Department was responsible for conducting votes on all Indian reservations within two years of enactment. The Department completed the voting, and the results are reflected in the Haas Report.

If the Department was unsure of whether a particular group of Indians was eligible for IRA benefits—such as taking land into trust and reorganizing a tribal government—the Department sometimes sought the opinion of the Solicitor. Beginning in the first few years after the IRA was enacted, the Solicitor issued several such opinions.[67] These opinions are instructive because various tribes were determined to be tribes and/or under federal jurisdiction, and thus eligible for benefits of the IRA.[68] Moreover, the opinions were of critical importance in the 1930s because "it is very clear from the early administration of the Act that were was no established list of 'recognized tribes now under [f]ederal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."[69]

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108 Stat. 4791 (25 U.S.C. § 479a-1). The Cowlitz Tribe appears on the most recent list of tribes. 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010). Additionally, in 1994 Congress' amended the IRA, codified at 25 U.S.C. § 476(f), to prohibit the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes.

[65] *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring).

[66] *Id.*

[67] *See* Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes"). In the ultimate irony, the Solicitor issued an opinion that, contrary to Commissioner Collier's belief that "the Federal Government has not considered these Indians as Federal wards," the Catawba Tribe was eligible to reorganize under the IRA. Solicitor's Opinion, March 20, 1944, II Op. Sol. on Indian Affairs 1255 (U.S.D.I. 1979) ("Catawba Tribe – Recognition Under IRA").

[68] Stillaguamish Memorandum at 6, note 1.

[69] *Id.* at 7.

For example, beginning with the Mole Lake Band of Chippewas,[70] the Solicitor's Office looked at factors such as whether the group ever had a treaty relationship with the United States, whether it had been denominated as a tribe by an act of Congress or executive order, and whether the group had been treated by the United States as having collective rights in tribal lands or funds, even if the group was not expressly designated as a tribe. In the Mole Lake Band opinion, the Solicitor referenced federal actions such as the receipt of annuities from a treaty, education assistance, and other federal forms of support. Likewise, in a later opinion regarding and reassessing the status of the Burns Paiute Indians, the Associate Solicitor noted that "the United States has, over the years, treated the Burns Indians as a distinct entity, placed them under agency jurisdiction, provided them with some degree of economic assistance and school, health and community services and, for the specific purpose of a rehabilitation grant, has designated them as Burns Community, Paiute Tribe, a recognized but unorganized tribe."[71] The opinion also specifically cited an unratified treaty between the United States and predecessors of the Burns Pauite as "showing that they have had treaty relations with the government."[72] Similarly, in finding that the Wisconsin Winnebago could organize separately, the Solicitor pointed to factors such as legislation specific to the tribe and the approval of attorney contracts.[73]

A 1980 memorandum from the Associate Solicitor, Indian Affairs, to the Assistant Secretary, Indian Affairs, regarding a proposed trust acquisition for the Stillaguamish Tribe, also discusses Interior's prior interpretation of Section 19 of the IRA.[74] According to this memorandum, the phrase "'recognized tribe now under [f]ederal jurisdiction' . . . includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." The Associate Solicitor ultimately concluded that the Secretary could take land into trust for the Stillaguamish, noting that, "[t]he Solicitor's Office was called upon repeatedly in the 1930's to determine the status of groups seeking to organize. . . . None of these opinions expresses surprise that the status of an Indian group should be unclear, nor do they contain any suggestion that it is improper to determine the status of a tribe after 1934 . . . . Thus it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a 'recognized tribe now under [f]ederal jurisdiction' and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability."[75]

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[70] Memo. Solicitor of the Interior, Feb. 8, 1937.

[71] Memo. from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, Nov. 16, 1967 (M-36759).

[72] Felix Cohen, *Handbook of Federal Indian Law*, § 3.02[6][d] at 151 (2005 ed.).

[73] Memo. from Nathan R. Margold, Solicitor, to the Comm'r on Indian Affairs, Mar. 6, 1937.

[74] This memorandum was lodged with the Supreme Court as part of the *Carcieri* case and cited by Justice Breyer in his concurrence. *Carcieri*, 129 S. Ct. at 1070.

[75] Stillaguamish Memorandum at 7-8, citing Opinion of Associate Solicitor, April 8, 1935, on the Siouan Indians of North Carolina; Solicitor's Opinion, August 31, 1936, I Op. Sol. on Indian Affairs 668 (U.S.D.I. 1979) ("Purchases Under Wheeler-Howard Act"); Solicitor's Opinion, May 1, 1937, I Op. Sol. on Indian Affairs 747 (U.S.D.I. 1979) ("Status of Nahma and Beaver Indians"); Solicitor's Opinion, February 8, 1937, I Op. Sol. on Indian Affairs 724 (U.S.D.I. 1979) ("Status of St. Croix Chippewas"); Solicitor's Opinion, March 15, 1937, I Op. Sol. on Indian Affairs 735 (U.S.D.I. 1979) ("St Croix Indians – Enrollees of Dr. Wooster"); Solicitor's Opinion, January 4, 1937, I Op. Sol. on Indian Affairs 706 (U.S.D.I. 1979) ("IRA – Acquisition of Land"); Solicitor's Opinion, December 13, 1938, I Op. Sol. on Indian Affairs 864 (U.S.D.I. 1979) ("Oklahoma – Recognized Tribes").

Admittedly, the Department made errors in its implementation of the IRA. Several groups of Indians were determined not to be tribes—but later found to be tribes; some tribes were neglected in the implementation of the IRA; and some tribes simply chose not to organize despite their lack of reservation or trust lands.[76] As such, as Justice Breyer notes, the lack of action on the part of the Department in implementing the IRA for a particular tribe does not necessarily answer the question whether the tribe was "under federal jurisdiction in 1934."

a. Basic Principles

The discussion of "under federal jurisdiction" should also be understood against the backdrop of basic principles of Indian law, which define the Federal Government's unique and evolving relationship with Indian tribes. The Constitution confers upon the Federal Government broad powers to administer Indian affairs. The Indian Commerce Clause provides the Congress with the authority to regulate commerce "with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3, and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate. U.S. CONST., art. II, § 2, cl. 2. The Supreme Court has long held that "[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[77]

The Court has also recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'"[78] In addition, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation . . . ."[79] Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities . . . ."[80]

Lastly, the Supremacy Clause, U.S. CONST., art. VI, §1, cl. 2, ensures that laws regulating Indian Affairs and treaties with tribes supersede conflicting state laws. These constitutional

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[76] *See Indian Affairs and the Indian Reorganization Act: The Twenty Year Record* (W. Kelly ed. 1954).

[77] *United States v. Lara*, 541 U.S. 193, 200 (2004); *Hartford Fire Ins. Co.v. California*, 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction then the question is whether and to what extent, Congress has exercised that undoubted jurisdiction.); *Morton v. Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

[78] *Lara*, 541 U.S. at 201.

[79] *Morton v. Mancari*, 417 U.S. at 552 (citation omitted).

[80] *United States v. Sandoval*, 231 U.S. at 45-46; *see also United States v. Kagama*, 118 U.S. 375, 384-385 (1886) ("From [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government . . . and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else . . . .").

authorities serve as the continuing underlying legal authority for Congress, as well as the Executive Branch, to exercise jurisdiction over tribes, and thus serve as the backdrop of federal jurisdiction.[81]

Congress exercised its plenary power authority over tribes in a variety of ways from historical times up to 1934.

For example, between 1789 and 1871, over 365 treaties with tribes were negotiated by the President and ratified by the Senate under the Treaty Clause. Many more treaties were negotiated but never ratified. Many treaties established on-going legal obligations of the United States to the treaty tribe(s), including, but not limited to, annuity payments, provisions for teachers, blacksmiths, doctors, usufructury hunting, fishing and gathering rights, housing, and the reservation of land and water rights. Furthermore, treaties themselves implicitly established United States jurisdiction over tribes. Even if the treaty negotiations were unsuccessful, the act of the Executive Branch undertaking such negotiations constitutes, at a minimum, acknowledgment of jurisdiction over those particular tribes.[82]

As Indian policy changed over time — from treaty making to legislation to assimilation and allotment — the types of federal actions that evidenced a tribe was under federal jurisdiction changed as well. Legislative acts abound, the implementation of which demonstrate varying degrees of jurisdiction over Indian tribes. Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137 (1790), Congress first established the rules for conducting commerce with the Indian tribes. The Trade and Intercourse Act (sometimes referred to as the Non-Intercourse Act), last amended in 1834, 4 Stat. 729 (1834), regulated trading houses, liquor sales, land transactions, and other various commercial activities occurring in Indian Country. The Trade and Intercourse Acts also established both civil and criminal jurisdiction over non-Indians who violated the Act. Notably, these Acts did not assert such jurisdiction over the internal affairs of Indian tribes or over individual Indians, but over the interaction between tribes and tribal members and non-Indians.[83] The Indian Contracting Act required the Secretary of the Interior to approve all contracts between non-Indians and Indian tribes or individuals.[84] As a result, any contracts formed between Indian tribes and non-Indians without federal approval were automatically null and void. The Major Crimes Act gave the federal courts jurisdiction for the first time over crimes committed by Indians against Indians in Indian Country.[85] Bolstered by the Supreme Court decision in *United States v. Kagama*, 118 U.S. 375 (1886), which held that Congress has "plenary authority" over Indians, Congress continued passing legislation that reflected jurisdiction over Indians and Indian tribes. Both legislation and significant judicial decisions reflected the move to a more robust "guardian-ward" relationship between the Federal Government and Indian tribes.[86]

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[81] Because this authority lies in the Constitution, it cannot be divested except by Constitutional amendment.
[99] *Worcester v. Georgia,* 31 U.S. 515, 556, 569-60 (1832).
[83] The courts have held that the Non-Intercourse Act created a special relationship between the Federal Government and those Indians covered by the Act. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).
[84] Ch. 120, § 3, 16 Stat. 544, 570-71 (1871).
[85] Act of Mar. 3, 1885, § 9, 23 Stat. 362 (1885). The Major Crimes Act was passed in response to *Ex Parte Crow Dog*, where the Supreme Court held that the federal courts did not have jurisdiction over crimes committed by individual Indians against another Indian. *Ex Parte Crow Dog,* 109 U.S. 556 (1883).
[86] 70 Mich. L. Rev., at 956-60.

Additionally, annual appropriations bills listed appropriations for some individually named tribes and reservations.[87] However, in 1913 Congress passed the Snyder Act, 25 U.S.C. § 13, which granted the Secretary authority to direct congressional appropriations to provide for the general welfare, education, health, and other services for Indians.

In what some would consider the ultimate exercise of Congress' plenary authority, the General Allotment Act was enacted to break up tribally owned lands and allot those lands to individual Indians based on the Federal Government's policy during that time to assimilate Indians into mainstream society.[88] Congress subsequently enacted specific allotment acts for many tribes.[89] Pursuant to these acts, lands were conveyed to individual Indians and the Federal Government retained federal supervision over these lands for a certain period of time. Lands not allotted to individual Indians were held in trust for tribal or government purposes. The remaining lands were considered surplus, and sold to non-Indians. Eventually the Federal Government kept individual allotments in trust or otherwise restricted the alienability of the land. This left federal supervision over Indian lands firmly in place.

The IRA itself, intended to reverse the effects of the allotment acts and the allotment era, was also an exercise in Congress' plenary authority over tribes but which, as discussed above, was intended to have some limiting application to certain tribes and individual Indians.[90]

The Executive Branch has also regularly exercised such authority over tribes. The War Department initially had the responsibility for Indian affairs. In 1832, Congress established the Commissioner of Indian Affairs who was responsible, at the direction of the Secretary of War, for the "direction and management of all Indian affairs, and of all matters arising out of Indian relations . . . ."[91] The Office was thus charged with implementing and executing treaties and other legislation related to tribes and Indians. The Office of Indian Affairs was transferred to the Department of the Interior in 1849.[92] With the allotment and assimilation eras, and at the time the IRA was passed, the Office of Indian Affairs and the agents and

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[87] For example, the same legislation that contained the Indian Contracting Act also appropriated funds for over 100 named tribes and bands. *See* Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 547 550, 551 (for such purposes as assisting a band in operating its village school, paying a tribal chief's salary, and providing general support of a tribal government). *See also* Act of May 31, 1900, ch. 598, 31 Stat. 221, 224 (appropriating funds for a variety of tribal services, such as Indian police and Indian courts).

[88] The Dawes Act, 24 Stat. 388 (Feb. 8, 1887).

[89] *See e.g.,* Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 ("Five Civilized Tribes Act"); Five Civilized Tribes Act; Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act'); Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 ("Nelson Act of 1889").

[90] *See infra* discussion at Section IV(D)(3)(b). In addition, since the IRA, Congress has exercised its constitutional jurisdiction in various ways. For example in the 1940's and 1950's, as the termination era began, Congress reversed the policy of the IRA and terminated the federal supervision over several tribes. *See* Menonimee Indian Termination Act of 1954, 68 Stat. 250 (June 17, 1954), as amended, 25 U.S.C. §§ 891-902, California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (Aug. 18, 1958), Klamath Termination Act, 68 Stat. 718 (Aug. 13, 1954) (codified at 25 U.S.C. § 564 *et seq.*). Then, in the 1970's Congress reversed position again, and restored many of those tribes that had been terminated. And, in a policy consistent with the IRA, in 1975 Congress passed the hallmark Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*

[91] An Act to provide for the appointment of a commission of Indian Affairs, 4 Stat. 564 (codified at 25 U.S.C. § 1).

[92] 9 Stat. 395 (Mar. 3, 1849).

superintendents of the Indian reservations exercised virtually unfettered supervision over tribes and Indians.[93] The Office of Indian Affairs became responsible, for example, for the administration of Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their land. As part of the exercise of this administrative jurisdiction, the Office produced annual reports, surveys, and census reports on many of the tribes and Indians under its jurisdiction.

This summary of the exercise of action by the United States through treaty, legislation, the Executive Branch and the Office of Indian Affairs serves as a non-exclusive representation of the types of actions and jurisdiction that the United States has asserted over Indians over the course of its history.

b. Defining "Under Federal Jurisdiction"

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." Nor does the legislative history clarify the meaning of the phrase. The only information that can be gleaned from the Senate hearing of May 17, 1934, is that the Senators intended it as a means of attaching some degree of qualification to the term "recognized Indian tribe." The addition of the phrase was proposed at an ambiguous and confused colloquy at the conclusion of the Senate hearing, discussed above. Chairman Wheeler queried whether a "limitation after the description of the tribe" was needed.[94] He also noted that "several so-called 'tribes' . . . . They are no more Indians than you or I, perhaps."[95] Based on his reading of this portion of the Senate hearing, Justice Breyer concluded that the Senate Committee adopted this phrase to "resolve[] a specific underlying difficulty" in the first part of the definition of "Indian."[96]

Having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

[93] Meriam Report at 140-54 (recommending decentralization of control); Id. at 140-41("[W]hat strikes the careful observer in visiting Indian jurisdictions is not their uniformity, but their diversity . . . . Because of this diversity, it seems imperative to recommend that a distinctive program and policy be adopted for each jurisdiction, especially fitted to its needs.").
[94] Senate Hearing at 266 (Statement of Chairman Wheeler).
[95] *Id.*
[96] *Carcieri*, 129 S. Ct. at 1069.

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe.[97] Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of and/or entering into treaties, the approval of contracts between a tribe and non-Indians, enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may, of course, be other types of actions not referenced herein that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe.

Once having identified that the tribe was under federal jurisdiction, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934.[98] For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. It should be noted, however, that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status.[99] Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry outlined above, is consistent with the legislative history, which as discussed elsewhere in this memorandum shows that the phrase was meant to qualify the term "recognized Indian tribe," as well as with Interior's post-enactment practices in implementing the statute, as discussed above.

Below, is a further discussion of the two-part inquiry and a number of facts and federal actions specific to the Cowlitz Tribe that support the conclusion that the Tribe was under federal jurisdiction in 1934.

1. Legal Backdrop of "Under Federal Jurisdiction"

The Cowlitz Tribe and others have asserted that tribes are under federal jurisdiction as a matter of law pursuant to Congress' constitutional plenary authority over tribes. The Tribe

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[97] *See* Stilliguamish Memorandum at 2; *see also United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

[98] For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to reorganize under the IRA in the years following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry.

[99] *See* Stilliguamish Memorandum.

first argues that the phrase "under federal jurisdiction" has a plain meaning,[100] and that meaning is synonymous with Congress' plenary authority over tribes pursuant to the Indian Commerce Clause. For the reasons stated above, I disagree that the phrase has a plain meaning, but rather I conclude that the phrase is ambiguous and requires further inquiry. The Tribe has also posited that Congress's plenary authority—its bare constitutional jurisdiction—cannot be divested absent constitutional amendment and is sufficient to find that a tribe, once recognized, remains under federal jurisdiction until or unless Congress explicitly terminated its jurisdiction or the tribe ceased its tribal relations.

Proponents of the plain meaning interpretation rely on *United States v. Rodgers,* 466 U.S. 475, 479 (1984). There the Supreme Court interpreted the term "jurisdiction" as used in a federal criminal code amendment enacted the same day as the IRA.[101] Since the term "jurisdiction" was not defined in the statute, *Rodgers* relied on dictionary definitions to discern the term's "ordinary meaning":

> "Jurisdiction" is not defined in the statute. I therefore start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines jurisdiction as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.[102]

Based on this interpretation, when the IRA was enacted in 1934, "jurisdiction" meant the sphere of authority; and "under federal jurisdiction" in Section 19 meant that the recognized tribe was subject to the Indian Affairs' authority of the United States. As the Cowlitz Tribe states in its Supplemental Submission:

> Based on the plain meaning of the word "jurisdiction," as well as on a long line of cases that consider the matter, it is clear that Congress' well-established plenary authority is synonymous with plenary legal jurisdiction. . . . [C]ongress' jurisdiction over Indian tribes is, as a legal matter, continuous and uninterruptable unless the tribe itself ceases to exist . . . or unless the Constitution some day is amended to say otherwise. Accordingly, a group of Indians that reasonably can be understood to have existed as a "tribe" that had maintained tribal relations in 1934, was, as a legal matter, a tribe under federal jurisdiction in 1934.[103]

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[100] The Cowlitz Tribe argues that dictionary definitions of the term "jurisdiction" provide a plain meaning for the statutory phrase "under federal jurisdiction." As I discuss below, I disagree with this contention.
[101] 466 U.S. at 478.
[102] *Id.* at 479 (quotations and internal citations omitted).
[103] Cowliz Supplemental Submission at 13 (June 18, 2009).

This plenary authority interpretation in effect presumes that jurisdiction over a tribe is always synonymous with the full extent of Congress' constitutional authority over Indian Affairs. While I agree that Congress's constitutional plenary authority over Indian tribes cannot be divested; I further believe that the Supreme Court's ruling in *Carcieri* calls for us, in addition, to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Reliance solely on the plenary authority interpretation would allow the Secretary to acquire land in trust for "any recognized Indian tribe," which is at odds with the Supreme Court's ruling in *Carcieri*. Rather, after Carcieri, I believe that a tribe must make a further showing that the United States has exercised its jurisdiction, [104] while recognizing that this interpretation may prove somewhat less restrictive than it first appears because a tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time.[105]

Application of Two Part Inquiry to Cowlitz Tribe

Based on our analysis of the entire administrative record, I conclude that the record reflects a course of dealings between the United States and the Cowlitz Tribe during the 1850s and that there is sufficient subsequent evidence that the Tribe remained under federal jurisdiction in 1934.

A. Course of Dealings and Exercise of Jurisdiction

In accordance with step one of our two part inquiry I conclude that the first clear expression that the Cowlitz Tribe (or its predecessors) was under federal jurisdiction is reflected by the United States' treaty negotiations with the Lower Band of Cowlitz Indians. In particular, in February 1855, Governor Stevens engaged in a week of negotiations with the Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians at a location on the Chehalis River just east of Grays Harbor. The proposed treaty presented to the Indians during the negotiations called for them to cede all their claims to territory covering much of southwestern Washington in exchange for a single reservation to be provided later, most likely on the Pacific Ocean. When the Indian negotiators from the inland tribes rejected these provisions due to their location and the Government's insistence on locating all the tribes together, Governor Stevens ended the negotiations.[106] While the negotiations did not result in a treaty, these events, as well as those discussed below, clearly reflect the existence of a relationship with the Tribe (or its predecessors); at a minimum it demonstrates that the Federal Government acknowledged responsibility for the Tribe (or its predecessors). This relationship and responsibility constitutes sufficient evidence of federal jurisdiction as of at least 1855.

The historical record, which is summarized below, provides no clear evidence that the United States terminated the Tribe's jurisdictional status, or that the Tribe otherwise lost that status, at any point between the mid-1850s and 1934. Moreover, the historical record also evidences

[104] The Court's holding in *Carcieri* requires a further showing regardless of whether the tribe at issue is recognized in the cognitive or political sense *Carcieri*, 129 S. Ct. at 1068.
[105] *See supra* Section IV(A)(2) discussing Justice Breyer's concurring opinion in *Carcieri*.
[106] *Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 167-69 (June 25, 1969) ("Cowlitz").

a continuing jurisdictional relationship between the Tribe and the United States up to and including 1934. The second part of our two-part inquiry, therefore, is satisfied

Notwithstanding the lack of reservation for the Cowlitz and other non-treaty Indians, the Federal Government continued a course of dealings with both the Tribe and its members. During the rest of the 1850's and into the 1860's, officials of the Department continued to recommend that the United States enter into a treaty with the non-treaty Indians, including the Cowlitz, because they recognized that Indian title to the land had never been properly ceded.[107] For example, in his 1862 report, Superintendent C. H. Hale requested that treaties be entered into with the Chehalis, Cowlitz and other tribes. He included the sum of $7500.00 for the expenses of holding a treaty council with these tribes in his estimate of expenses for 1863.[108] Additionally, during the 1860's, Office of Indian Affairs officials in Washington Territory made several efforts to consolidate the Cowlitz Indians with the Chehalis Indians on a single reservation.[109]

In June of 1868, the local Superintendent attempted to distribute goods and provisions to the non-treaty Indians at a meeting on the Chehalis Reservation. He reported that the Cowlitz Indians obeyed the invitation to be at the distribution, but refused to accept either goods or provisions, believing, as they declared, that the acceptance of presents would be construed into a surrender of their title to lands on the Cowlitz River where they have always lived, and where they desire that the Government would give them a small reservation, which if it would do, they would accept presents, but never until then.[110]

As a result of requests by the non-Indians among whom the Cowlitz were living, in 1878 officials of the Federal Government deemed it necessary to formally acknowledge two individuals to be the "chiefs" of the Lower and Upper Bands of the Cowlitz.[111] Thereafter, until 1912, after both chiefs died, the Federal Government communicated with the Tribe through these individuals as the official representatives of their people.[112] In 1878 and 1880, the local Superintendent also enumerated the members of both bands and then listed them together in that year's statistical tabulation.[113] This action constitutes further unambiguous federal jurisdiction over the amalgamated bands as single entity.

Through the rest of the 19th century, consistent with the then prevailing policy of focusing on individual Indians while minimizing tribal governments, Cowlitz Indians continued to be identified as such by, and provided services from, the Federal Government. For example, although the 1893 annual report described how the Cowlitz Indians were absorbed into their surrounding settlement so that they hardly formed a distinct class, in 1894 the local Superintendent stated that the Federal Government continued to provide for non-reservation Indians via schools and medical needs.[114]

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[107] *Cowlitz*, 25 Ind. Cl. Comm. 442, 454-56 (June 23, 1971).
[108] *Cowlitz*, 25 Ind. Cl. Comm. at 456.
[109] *Cowlitz*, 25 Ind. Cl. Comm. at 454-56.
[110] HTR at 75-76.
[111] HTR at 79, 85.
[112] HTR at 133-39.
[113] HTR at 2.
[114] HTR at 95.

The provision of services to, and actions on behalf of, Cowlitz Indians by the Federal Government continued into the 20th century. Descriptions of these actions and documentary evidence of the actions is provided by the Cowlitz submissions and is found in the federal acknowledgment record. These services included attendance by Cowlitz children at BIA operated schools and authorization of the expenditure of money being held by the Department for health services, funeral expenses, or goods at a local store on behalf of Cowlitz Indians.[115]

The local Indian Agency representatives repeatedly included Cowlitz Indians as among those for whom they believed they had supervisory responsibilities. For example, during the 1920s the Superintendant in the Taholah Agency represented the interests of the Cowlitz Tribe vis a vis state parties for purposes of asserting fishing rights.[116] In January 1927, the Superintendent of the Taholah Agency responding to an inquiry about a possible claim against the Government by the Cowlitz noted that "[t]he Cowlitz band are under the Taholah Agency" not the Tulalip Agency.[117] Later that year, the same Superintendent wrote to the principal of a school on the Yakama Reservation to seek information about certain students who attended school there. He stated that "[m]y jurisdiction includes all those Indians belonging to the Quinaielt, Quileute, Chehalis, Nisqually, Skokomish, Cowlitz, and Squaxin Island Tribes."[118] A later example is the Annual Report for 1937 in which a figure of 500 "unattached Indians largely of Cowlitz tribe" are identified as "Indians under the supervision of the Office of Indian Affairs whose names do not appear on the census rolls at Indian agencies . . . ."[119]

Indeed, some representatives even spoke in terms of a Cowlitz "reservation" although none was ever established for the Tribe. For example, in April 1923, the Superintendent wrote to the Commissioner of Indian Affairs regarding traveling expenses to describe "the reservations under this jurisdiction, also the country inhabited by the detached Indian homesteaders." Included among the reservations is a reference to "the Cowlitz Reservation located in the Cowlitz River Valley." [120]

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[115] Certain statements made by government officials in 1924 does not alter this analysis or conclusion. For example, the record contains a government correspondence that describe the Cowlitz Indians as "scattered all over the northwest," Cowlitz Tribe Document at 000011 (included with Cowlitz Tribe's supplemental submission June 18, 2009), or as "liv[ing] very much as white people do." Cowlitz Tribe Document at 000012-13. Another example is a statement by Interior Secretary Work in 1924 commenting in opposition on proposed legislation that would have allowed the Cowlitz to file a claim against the United States. After describing how he understood the Cowlitz Indians were then living, he concluded that "the Cowlitz Indians are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic." HTR at 126. These statements, however, are not consistent with the wide range of federal actions and activities relating to the Cowlitz Tribe and its predecessors, nor are they consistent with the Tribe's later acknowledgment, which determined that the Cowlitz Tribe continuously existed since at least 1855. The FAP determination belies the notion that the Cowlitz Tribe lacked political integrity.

[116] HTR at 124. Regardless of whether Cowlitz Indians had any actual fishing rights, the Superintendent's actions demonstrate that BIA regarded the Cowlitz as under the protection and jurisdiction of the Agency.

[117] Cowlitz Tribe Document at 000016-17.

[118] Cowlitz Tribe Document at 000018.

[119] 1937 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 250 ("Annual Report").

[120] Cowlitz Tribe Documents at 000002-03 and 000008-09 (duplicates).

In 1904 the Cowlitz began a prolonged effort to obtain legislation to bring a claim against the United States for the taking of their land.[121] Evidence supporting this claim was presented to the Department and in 1910, the Department requested that Special Indian Agent Charles McChesney prepare a report on their claim. McChesney's report concluded that the claim of Cowlitz Indians was a just one, and that they should receive compensation for land they had occupied and never ceded. The local Superintendent supported this report and described Cowlitz as follows:

> These Indians, like the Clallams, have never had any recognition at the hands of the Government and were active allies of the United States during the Indian troubles of the early days. These Indians are industrious and should be accorded recognition. I estimate that there are about 100 members of this tribe. The Clallam and the Cowlitz Tribes are the only two tribes in Southwestern Washington who have preserved their tribal identity who have not had any recognition from the government.[122]

Ultimately, the Tribe was not successful in obtaining special legislation, but was awarded a judgment for its land from the Indian Claims Commission.[123]

As mentioned above, Cowlitz Indians were enumerated in the censuses taken in 1878 and 1880,[124] and during the early 20th century the annual Indian population reports often made mention of the Cowlitz Indians or Cowlitz Tribe, although they were not enumerated in the annual censuses required by the Appropriations Act of July 4, 1884.[125] For example, from 1914 through 1923, the population table at the end of the Annual Report included a figure for "unattached Indians" in southwest Washington State that set forth an estimated number of Cowlitz. From 1930 through 1938, the total population of unenumerated Indians was listed separately from those enumerated, and each year a population of approximately 500, identified as associated with the Taholah Agency, is described as either "scattered bands" or "unattached Indians largely of the Cowlitz Tribe."[126] Although not identified in the census as a "tribe," the inclusion of Cowlitz Indians demonstrates evidence that those Indians were accounted for in official federal records and that while they lacked a land base they were still subject to federal oversight.[127] As a matter of practice at the time, the Indian Service did not

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[121] HTR at 105-09.
[122] HTR at 109.
[123] *See* 25 Ind. Cl. Comm 442.
[124] Final Determination for Federal Acknowledgement decision, 62 Fed. Reg. 8463 (Feb. 18, 2000); Reconsidered Final Determination for Federal Acknowledgment, 67 Fed. Reg. 607 (Jan. 4, 2002).
[125] Although the Cowlitz Tribe was not listed on various annual population censuses for Tribes, individual Cowlitz Indians were listed on some census rolls. Moreover, Cowlitz was a landless tribe and thus it is logical and reasonable to assume that individuals would be listed on the rolls as they were located rather than listing the tribe as a whole.
[126] Indians listed on these annual census lists compiled by the responsible BIA agency establishes that those Indians were under that particular agency regardless of where they resided, which at the time was also referred to as the "jurisdiction" of the particular reporting agency. *See* Solicitor's Opinion, Status of the Ottawa Tribe of Oklahoma as "under federal jurisdiction" on June 18, 1934, at 5 (Oct. 7, 2010). Thus, being listed on such census populations can be sufficient to show that a tribe was "under federal jurisdiction" at the time of the census roll. *Id.* at 5-6.
[127] *See also* Cowlitz Tribe Document 000010: Letter from Superintendant, Taholah Indian Agency to Commissioner of Indian Affairs (July 24, 1904) (reporting that the Cowlitz Tribe "living on the public domain in

enumerate the Cowlitz Indians in the annual censuses because of BIA's administrative practice not to enumerate or compile a membership roll for tribes that lacked a reservation or other federal asset.[128] This practice is reflected in an October 1933 letter from Commissioner Collier to an individual seeking enrollment with the Cowlitz Tribe.

In addition to membership rolls or censuses, BIA also kept separate censuses by reservation that would include all individuals who obtained rights to that reservation's land through allotments. For the roll associated with the Quinault Reservation, individuals were identified as being members of their own tribes, including Cowlitz, not members of the Quinault Tribe. The distinction is explained in a March 16, 1934 instruction to the Taholah Superintendent from Commissioner Collier. Collier explains that receipt of an allotment on the Quinault Reservation by a Chinook, Chehalis or Cowlitz Indian did not mean that such Indian should be included on the tribal roll for Quinault, only that he/she should be included on the census roll for the Quinault Reservation. He continued by stating that "they should be enrolled, if under your jurisdiction, as Chinook, Chehalis, and Cowlitz Indians."[129]

Other evidence of federal jurisdiction and a continuing course of dealings relates to allotments issued to Cowlitz Indians.[130] The first allotment issued to a Cowlitz Indian occurred in 1888, pursuant to the amended Indian Homestead Act, Act of July 4, 1884, 23 Stat. 76, 96.[131] According to information gathered for the acknowledgment decision, approximately 20-30 other off-reservation allotments were ultimately issued to Cowlitz Indians, some of which were granted as homesteads under the Homestead Act and some as Section 4 (public domain) allotments under the General Allotment Act.[132] The Department's view at the time of acknowledgment was that "the law establishing the public domain allotments appears to treat non-reservation groups whose members got such allotments as having the same status as clearly recognized, reservation tribes . . . . There is supporting evidence that the allotment was

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the Cowlitz River Valley" were "under my jurisdiction"); Cowlitz Tribe Document 000022: Letter from Deputy Disbursing Agent, Taholah Indian Agency to Mr. E.G. Potter (June 5, 1929) ("I will state that the Cowlitz Tribe of Indians are within my jurisdiction . . . .").

[128] *But see supra* note 55 and accompanying text, in which Collier in 1933 letter indicated that the Indian Service was not keeping enrollment information for the Cowlitz Tribe because it had no reservation and no tribal funds were on deposit under government control. While Collier also stated that the Cowlitz Tribes was no longer in existence, this conclusion, of course, is not consistent with the Department's acknowledgement determination that the Cowlitz Tribe did exist throughout the 20th century as a continuous political entity. Collier's conclusory and unsupported statement should therefore carry less weight than the thorough analysis of the historical record performed for the acknowledgment decision.

[129] Interestingly, this treatment of Cowlitz Indians differs greatly from that of Collier's just a year earlier and minimizes any suggestion that Collier's characterization of the Tribe in the 1933 letter should have particular weight in a determination of whether the Cowlitz Tribe was under federal jurisdiction in 1934.

[130] *See also* HTR at 92-93 n.78, City of Vancouver AR 6375 ("No documentation has been found which explicitly declares that a public domain allottee's tribe had to have been under Federal jurisdiction at the time the allotment was made. However, the overall context of Indian Service directives and agency documents concerning public domain allotments very strongly indicates that the U.S. sought allotments for tribes for which it had an acknowledged responsibility.") (citing BAR 9/23/96, 51).

[131] HTR at 90. *See also* HTR at 93-94, AR 6376 ("[The public domain allotment] program itself is based on a recognition that there were substantial number of Indians, including entire tribes, for which no reservation had been established by 1887 and for whom the Federal [G]overnment had a responsibility.") (citing BAR 9/23/96, 53).

[132] Appendix III to the Genealogical Technical Report ("GTR") prepared in association with the Summary under the Criteria and Evidence for Proposed Finding, at 111-12 (Feb. 12, 1997).

based on a [f]ederal relationship."[133] Furthermore, at the time the IRA was passed, Indians possessing homestead allotments on the public domain were still eligible to organize.[134] These allotments were issued as trust allotments, and there is substantial evidence that the Indian Service took actions in support of these allotments. For example, the local Superintendent supervised a sale of an Indian allotment for James Satanas,[135] wrote a letter to Lewis County protesting a possible tax sale of an allotment still in trust status,[136] and dealt with probate activity associated with these lands.

Some Cowlitz Indians also received allotments on the Quinault Reservation if they had not received one on another reservation or the public domain. The basis for such allotments is found in the Executive Order creating the Quinault Reservation and a 1911 Act. The November 4, 1873, Executive Order established the Reservation for "the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast." The Act of March 4, 1911 confirmed pre-existing allotment activity by directing the Secretary to make allotments on the Quinault Reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes."

In *Halbert v. United States,*[137] a suit filed by members of various tribes who had been denied allotments, the Court held that "the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere."[138] As a part of the factual background for the lawsuit, the Court noted that since 1905 members of the affected tribes had been receiving allotments, and that "[t]he record contains a stipulation showing that the applications were rejected but not disclosing the grounds of that ruling." [139] The reference to the "Cowlitz Tribe" in the Halbert decision of 1931, the action by Congress to provide allotments for "other tribes of Indians in Washington" in the 1911 Act and its implementation as to Cowlitz Indians, and the virtually consistent position taken by the Department to grant allotments to eligible Cowlitz Indians during the period from 1905 to 1930 supports a conclusion that the Cowlitz Tribe was under federal jurisdiction during this period of time.[140]

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[133] *Id.*

[134] *See* Solicitor's Opinion, March 6, 1937, I Op. Sol. on Indian Affairs 732 (U.S.D.I. 1979) ("Status of Wisconsin Winnebago"):

> It is my further opinion that these Indians are not denied the benefit of organization or land purchase because of the fact that they are not reservation Indians but possess homestead allotments. Section 8 of the Reorganization act provides that nothing contained in the act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of any Indian reservation. This section applies to those provisions of the act which would affect the allotments and homesteads themselves and not to those provisions which extend privileges to persons who are Indians and who are members of a tribe.

[135] Cowlitz Tribe Document at # 000112.

[136] Cowlitz Tribe Document at # 000123.

[137] *Halbert v. United States*, 283 U.S. 753 (1931).

[138] *Halbert*, 283 U.S. at 760.

[139] *Id.*

[140] *See* 67 Fed. Reg. 607.

Finally, an important action by the Federal Government evidencing the Tribe was under federal jurisdiction in 1934 is the Department's approval of an attorney contract for the Tribe in 1932. In February of that year the local Superintendent from the Taholah Agency attended a meeting of the Cowlitz Tribe during which tribal delegates were chosen to work with attorneys who planned to bring claims on behalf of the Tribe against the United States. The Act of May 21, 1872, Revised Statutes § 2103, required that contracts between Indian tribes and attorneys had to be approved by both the Commissioner of Indian Affairs and the Secretary of the Interior in order to be valid. The Superintendent was present to observe the meeting and provided a report to the Commissioner describing how the tribal delegates were chosen. In April 1932, "in accordance with section 2103 of the United States Revised Statutes" the contract between "the Cowlitz Tribe or Band of Indians" and two attorneys was approved by the Commissioner and the First Assistant Secretary.[141] This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to the statutory requirement for Department supervision of its attorney contracts, and thus "under federal jurisdiction."[142]

All of this evidence, taken together, supports our conclusion that prior to and including 1934 the Cowlitz Tribe retained and did not lose its jurisdictional status as a tribe "under federal jurisdiction."[143]

B. Additional Considerations

1. Card Room Submissions

I have carefully reviewed the 2005 submissions to the NIGC arguing that the Cowlitz Tribe was not a restored tribe.[144] I have also reviewed the more recent, October 19, 2010 submission from Perkins Coie entitled: "The Cowlitz Tribe's Ineligibility to have Land Acquired in Trust under the Indian Reorganization Act of 1934." I find these submissions unpersuasive.

In the 2010 Perkins Coie submission on behalf of certain card rooms ("Card Rooms Submission"), they argue that the Cowlitz Tribe could never establish that it was under federal jurisdiction.[145] In this submission it is argued that:

[141] Cowlitz Tribe Documents at 000060-69.

[142] *See* Solicitor Op. M-35029 (Mar. 17, 1948) (Solicitor contrasted a "tribe" from an "identifiable group of Indians" and noted that only tribes must have their attorney contracts approved under section 2103 of the Revised Statutes).

[143] Although the Cowlitz Tribe did not vote on the IRA, and made no efforts expended to gain land for itself after the IRA, it is important to note that organizing or participating in opportunities under the IRA is not indicative of whether a tribe was under federal jurisdiction. Indeed, many tribes that were clearly under the jurisdiction of the federal government chose not to organize under the IRA. *See* Haas Report, Table D at 33-4; 70 Mich. L. Rev. 955.

[144] Response to the Request of the Cowlitz Indian Tribe For a Restored Lands Determination, Submitted by Perkins Coie (Nov. 15, 2005).

[145] "The Cowlitz Tribe's Ineligibility To Have Land Acquired in Trust Under the Indian Reorganization Act of 1934." Submitted by Perkins Coie on behalf of Dragonslayer, Inc. and Michels Development (Oct. 19, 2010).

> The evidence on which the Tribe relies, however, is not evidence of a federal relationship with the Tribe qua tribe, but rather evidence of interactions between the federal government and individuals of Cowlitz descent. As the Tribe accurately argued in 2005, the federal government held the explicit view that there was no "Cowlitz Tribe" during the 20th century. Consequently, there is no reasonable basis for finding that the Tribe was "under federal jurisdiction" in 1934.[146]

Significantly, the Card Submission is devoid of any factual basis or supporting documentation, that "[i]n the federal government's eyes, the Tribe ceased to exist in 1880, and was not acknowledged to exist again until 2002."[147] Similarly, the submission does not posit any factual basis as to why the Cowlitz Tribe was not under federal jurisdiction in 1934. Moreover, the Card Room's argument conflates modern, more formal, notion of federal recognition with the IRA's reliance on "recognized Indian tribe" and "under federal jurisdiction." And, as I have discussed previously, the concept of "federally recognized tribe" is distinct from the term "recognized Indian tribe" as used in the IRA. The legislative history indicates that Congress most likely used the term "recognized Indian tribe" in the ethnological and cognitive sense. The facts and the record show that the Cowlitz tribe was "recognized" in 1934 as that term was used in the IRA.[148] I note, however, that recognition is not the inquiry before us. Rather it is the concept of "under federal jurisdiction" in 1934 that I am addressing. And as discussed above, because being federally recognized in the political sense today is not synonymous with "under federal jurisdiction," in our view the Tribe's admission that there was no formal government to government relationship (formal federal recognition) in 1934 is not fatal to the conclusion that the Tribe was under federal jurisdiction in 1934. Furthermore, the requirements to satisfy the IGRA Section 20 exceptions are not necessarily in contravention with the jurisdictional analysis and thus the NIGC opinion that the Federal Government did not have a government to government relationship with the Tribe for a certain period of time[149] is also not fatal to the determination that the Tribe was under federal jurisdiction in 1934.

Lastly the Card Rooms argue that the Tribe does satisfy any of the three Breyer examples. But, contrary to this argument and as discussed above, the information provided by the Tribe and the larger record provide sufficient evidence that is consistent with Justice Breyer's reference to types of actions that could constitute evidence of a tribe being under federal jurisdiction, even if BIA officials did not know it at the time.

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[146] *Id.* at 2.

[147] *Id.* at 8.

[148] Even if Congress had used the term "recognized tribe" to mean "federally recognized tribe," Congress did not opt to modify that term with "now." As a result, Congress did not require that the tribe at issue be federally recognized in 1934. The Cowlitz Tribe's subsequent federal recognition, therefore, is sufficient.

[149] In 2005 the National Indian Gaming Commission issued a decision that concluded that the Cowlitz Tribe was restored to recognition such that these lands, if acquired in trust, would be subject to the restored lands exception of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii). This conclusion was based upon a finding that between at least the early 1900s and 2002 the Tribe was not formally recognized by the United States. *But see supra* note 109.

2. Grand Ronde Submission[150]

The Grand Ronde submission to the NIGC was in 2005, before the *Carcieri* decision, and was submitted as part of NIGC's evaluation of the Cowlitz Tribe's request for an Indian lands determination under IGRA. I have reviewed it as part of the record before us on the land into trust decision. In that submission, Grand Ronde argues that IGRA requires "federal recognition" which they argue is a "formal recognition of the tribe by Congress or Executive Order and evidence of a continual political relationship with that entity."[151] They then focus on the Bureau's findings that both the Upper and Lower Cowlitz bands were federally acknowledged. They dismiss these findings by arguing: "[t]hese events show federal officials generally acknowledged the existence of the Upper and Lower Cowlitz as tribal entities, but they do not provide evidence that the Cowlitz Tribe was formally recognized."[152]

Like the Card Room Submission, Grand Ronde is analyzing the concept of "federally recognized tribe," which is a modern concept of the late 20th Century. It is a different concept than "under federal jurisdiction" in 1934. Finally, Grande Ronde argues, and NIGC later relied on, an October 29, 1975, letter from the Commissioner of Indians Affairs to Senator Abourezk stating that there had been no "continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians." Again, this confuses the concept of recognition under the IRA in 1934 and federal recognition under the IGRA and its regulations. Further, this letter pre-dates the acknowledgment regulations of 1978. In any event, it does not shed light on the concept of "under federal jurisdiction" in 1934.

Conclusion

Based on this analysis of the Cowlitz Tribe's history, I conclude that (1) the Cowlitz was under federal jurisdiction from at least 1855; and (2) this jurisdiction continued and was in effect in 1934.

The Tribe argues that there is:

> voluminous evidence that the [F]ederal [G]overnment was exercising jurisdiction over the Cowlitz Indian Tribe during the 1934 time period, including explicit statements to that effect, (requiring approval of attorney contracts, administering of allotments and trust land, making heirship determinations and probate proceedings, providing education, health and other services, management of funds, protection of fishing rights against State interference, and the keeping of census and other vital records), . . . makes it difficult to understand how the Department could conclude that the Cowlitz Indian Tribe was not under federal jurisdiction for *Carcieri* purposes.[153]

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[150] Confederated Tribes of the Grand Ronde Community of Oregon's Response in Opposition to the Cowlitz Indian Tribe's Request for a Restored Lands Opinion (Nov. 8, 2005).
[151] *Id.* at 9.
[152] *Id.*
[153] Cowlitz Supplemental Submission at 7 (Aug. 17, 2010).

I agree with the conclusion it draws from the evidence in the record, although I interpret the implications of *Carcieri* differently. The historical record provides no clear evidence that the United States terminated the Tribe's jurisdictional status, or that the Tribe otherwise lost that status, at any point between the mid-1850s and 1934. In fact, the Cowlitz Tribe was federally recognized as a tribe in 2002 based on evidence of a continuous political existence since at least 1855. Moreover, the record as a whole shows that there was a continuous course of dealings that strongly reflects federal supervision of the Tribe and its members prior to, and including, 1934 and into the present day. This course of dealings with Cowlitz existed from at least 1855 in which a band of the Cowlitz Tribe entered Treaty negotiations with the United States. As the record further shows, these course of dealings continued past 1855 to include a diverse array of federal interactions with Cowlitz, including a continued interest in negotiating a treaty, federal appointment of tribal leaders, a Secretarial approved attorney contract for the Cowlitz Tribe in 1932, numerous Indian Service efforts focused on services and responsibilities to the Cowlitz Indians related to land allotments held in trust from the early 1900s and beyond, which included protecting allotted lands, holding income generated by the land, and probating the estates of Indians who had received the homesteads. Additionally, throughout the 20th Century efforts were made to assist with education, health care, and fishing activities of the Cowlitz Indians. Lastly, throughout this time there are regular references in government documents to Cowlitz Indians and the Cowlitz Tribe. The Tribe and its members are repeatedly mentioned in the annual reports of the Indian Service, and are identified in a Congressional act and confirmed by a Supreme Court decision to be a tribe whose members may be eligible for allotments on the Quinault Reservation. This evidence is sufficient to conclude that the jurisdiction relationship between the Tribe and the United States remained intact. Based on this evidence and the lack of clear evidence of termination of the jurisdictional relationship, I conclude that based on the evidence in the record as a whole, the Cowlitz Tribe was under federal jurisdiction in 1934 for purposes of taking land into trust under the IRA.

8.3 25 C.F.R. 151.10(B). THE NEED OF THE INDIVIDUAL INDIAN OR TRIBE FOR ADDITIONAL LAND.

Section 151.10(b) requires consideration of the "the need of the…tribe for additional land."

As a general matter, the Cowlitz Indian Tribe's need to acquire land is dire because the Tribe currently holds no trust land whatsoever. As a consequence of the United States' historical failure to enter into a treaty with the Cowlitz, and its subsequent opening of Cowlitz lands to non-Indian settlement without compensation, the Tribe lost its lands and became dispersed. Over the course of time, the Tribe's landless status caused the United States to determine that the Tribe's government-to-government relationship with the United States had been terminated. While the Tribe completed the administrative Federal Acknowledgement Process with the U.S. Department of the Interior in 2002, resulting in restoration as a federally-recognized tribe, the Tribe still is not the beneficial owner of any lands held in trust by the United States. Placement of the Cowlitz Parcel into trust will promote tribal self-determination, provide opportunities for economic development, and aid in the construction of Indian housing. The Tribe's Business Plan details the Tribe's unmet needs and its strategy for generating revenue to address those unmet needs, which hinge on the trust acquisition of the proposed property. The proposed trust acquisition will provide a land base from which the Tribe may exercise governmental powers and operate governmental programs to serve its

membership, and will allow the Tribe to operate an enterprise which will provide the revenue for these programs.

The BIA has considered the Tribe's need for lands in trust status and finds that the Tribe has a demonstrable need to acquire the Cowlitz Parcel in trust.

8.4 25 C.F.R. 151.10(C). THE PURPOSES FOR WHICH THE LAND WILL BE USED.

Section 151.10(c) requires consideration of the purposes for which the land will be used.

As detailed in the Final EIS, the Tribe proposes to construct –Tribal facilities including a 20,000 square foot Tribal government office building, a 12,000 square foot Tribal cultural center, and approximately 16 Tribal elder housing units. As detailed in the Tribal Business Plan, the Cowlitz Tribe proposes to operate the following programs from the trust land: Tribal Government and Administration, Health Care and Social Services, Hosing, Elder Services, Education, Cultural Preservation, Transportation, and Environment and Natural Resources. In addition, the Tribal plans to construct and operate a Class III gaming casino resort complex, parking facilities, an RV park, and a wastewater treatment plant on the Cowlitz Parcel. The project plans call for 134,150 square feet of gaming floor (including 3,000 VLTs, 135 gaming tables, and 20 poker tables); 355,225 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multi-purpose space (with seating for up to 5,000); and a 250 room hotel. The proposed facilities would occupy most of the project site. The BIA finds that the stated purposes for which the land will be used appropriately meet the purpose and need for acquiring the lands in to trust as described in **Section 8.3** of this ROD.

8.5 25 C.F.R. 151.10(E). IF THE LAND TO BE ACQUIRED IS IN UNRESTRICTED FEE STATUS, THE IMPACT ON THE STATE AND ITS POLITICAL SUBDIVISIONS RESULTING FROM THE REMOVAL OF LAND FROM THE TAX ROLLS.

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By letters dated March 9-10, 2004 and July 11, 2008, in accordance with 25 C.F.R. 151.10, the BIA notified the State of Washington and Clark County that they would have 30 days in which to provide written comments as to the Cowlitz trust acquisition's potential consequence on regulatory jurisdiction, real property taxes, and special assessments. The State and the County submitted comments in response, and the Tribe responded to the substantive comments received. Based on the comments and the responses thereto provided by the Tribe, the BIA has made the determinations below concerning impacts to state and local governments resulting from removal of land from the tax rolls:

> State and County Taxes: In the Tribe's EPHS Ordinance, the Tribe has agreed to compensate the County and local districts on a biannual basis in lieu of property taxes for revenues lost as a result of the removal of the Cowlitz Parcel from the tax rolls, consistent with the customary assessment procedures used by the County Assessor and State Constitution. Such compensation is to be paid to the extent not otherwise specifically provided for (a) elsewhere in the Tribal EPHS Ordinance, or (b) in any Class III Gaming Compact subsequently entered into between the Tribe and the State pursuant to the federal

Indian Gaming Regulatory Act (including payments from the local Impact Mitigation Fund). It is agreed by correspondence between the County and Tribe that payment in lieu of taxes includes all property taxes which would have been received for the real property, improvements and personal property located in Clark County had the Tribe been subject to property taxes (see Appendix W of the Final EIS).

In addition, in the EPHS Ordinance the Tribe agrees to collect sales tax as appropriate on all sales to non-Indians that take place on the proposed trust property in business enterprises owned and operated by the Tribe. The rate of collection shall be in conformance with the applicable State-County blended tax rate as provided by the Washington Department of Revenue and confined upon tribal request by the County. The Tribe agrees to remit such sales tax to the State of Washington consistent with state law requirements. Furthermore, the Tribe has agreed to make an annual payment that is the equivalent of the transient occupancy tax that it would otherwise be required to collect if it were a private employer pursuant to Clark County Code Chapter 3.16. Additionally, the Tribe's EPHS Ordinance requires the Tribe to participate in and make payments to the CCFD 12 Local Improvement District should one be established to secure funding for equipment and fire services (LID).

Financial Mitigation Required by the Washington State Compacts: Although the Tribe has not completed negotiations with the State for a Class III compact, all of the other Washington State tribal gaming compacts contain provisions establishing funds for community impacts and charitable contributions. It is unlikely that the Cowlitz compact will differ substantially from the others. By these provisions, the Washington tribes have agreed to set aside two percent of net win from Class III table games to be used to offset the impacts on law enforcement, emergency services, and other service agencies of local jurisdictions materially impacted by Class III gaming. In addition, the Washington tribes have agreed to set aside one percent of the net win from Class III machines for local impact mitigation and charitable contributions to the local community. It is anticipated similar provisions would be required of the Cowlitz Tribe.

The potential fiscal impacts of the Preferred Alternative were comprehensively evaluated in the Final EIS. The Department finds that the impacts of removing the subject property from the tax rolls are not significant because of the degree to which the Tribe's direct and indirect payments to the State and Clark County offset the loss of real property taxes that would occur. (Even if there were a tax loss however, the Department likely would find that the benefit of providing a reserved land base to a landless tribe outweighs the burdens imposed by a modest loss of tax income to local governments.) Potential impacts to regulatory jurisdiction are discussed below.

8.6 25 C.F.R. 151.10(F). Jurisdictional Problems and Potential Conflicts of Land Use Which May Arise.

Section 151.10(f) requires consideration of jurisdictional problems and potential conflicts of land use which may arise.

The Cowlitz Parcel is located in an unincorporated portion of Clark County. Accordingly, Clark County currently exercises land use jurisdiction over the Cowlitz Parcel. Through the

Tribe's EPHS Ordinance, the Tribe has agreed to address all major jurisdictional issues, including, but not limited to: making development consistent with specific County ordinances applicable in 2004 (at the time the now-rescinded MOU was executed); paying development and other processing fees; making development consistent with building and design standards set out in County ordinances; and compensating the County law enforcement, prosecuting attorney's office, courts, school and fire districts that will provide public services on the Tribe's trust lands.

In 2007, Clark County revised its Comprehensive Growth Management Plan to expand the boundary of the La Center urban growth area (UGA) in a way that would encompass the Cowlitz Parcel. The intent of the expansion was to allow the County to extend "urban level" service to these lands including the Cowlitz Parcel. On May 14, 2008, the Western Washington Growth Management Hearings Board (GMHB) issued a decision that effectively remanded the matter of expansion of the urban growth area back to Clark County. The County appealed and the GMHB decision was reversed, returning the land to the La Center UGA; an appeal from that decision is pending. Regardless of whether the litigation eventually results in the Cowlitz Parcel being within the La Center UGA or being removed from the UGA and returned to agricultural zoning, the Preferred Alternative will conflict with the County land use designation for the parcel since a gaming facility is inconsistent with both the light industrial designation imposed under the UGA expansion, as well as an agricultural zoning designation. The BIA has determined that the benefits to the Tribe of providing it with a reserved land base outweigh concerns related to the area's Growth Management Plan designation. Further, the BIA notes that the area in which the Cowlitz Parcel is located is expected to become more urbanized in the future, reducing the potential land use conflicts between the trust parcel and the surrounding area. Finally, the BIA notes that once the land is taken into trust it no longer will be subject to local zoning (except to the degree that the Tribe has agreed to comply with such in the EPHS Ordinance) and therefore future Hearing Board determinations will no longer be applicable to the Cowlitz Parcel.

A number of comments on the Tribe's fee-to-trust request application and the Final EIS indicated concern that placement of lands into trust could complicate state and local governance with regard to applying environmental laws uniformly and equitably over a geographic area, and concern that State and local jurisdictions are more stringent than their federal counterparts in the areas of environmental protection and public health and safety. Commenters stated that compliance with Clark County's 2004 ordinances as required through the Tribe's EPHS Ordinance would not provide a sufficient level of environmental protection as the County has since (or is in the process of) adopting amendments to its ordinances that would result in more stringent protection thresholds. Some comments received are, in part, arguments about which government should have jurisdiction over the Tribe's lands and are not grounded in significant actual deficiencies in the Tribe's ability to manage its lands.

The environmental and land use impacts of the Preferred Alternative were evaluated in the Final EIS. Potential land use conflicts in light of the Hearing Board decision (and subsequent appeals) regarding expansion of the La Center UGA are addressed in **Section 3.2.3.1** of the ROD. BIA is aware that there may be some conflicts between the proposed uses of the trust property and the existing County land use designations in the area, but these conflicts are not sufficiently great that they should be an impediment to acquiring the land in trust, and any

resulting adverse environmental impacts will be reduced through the mitigation measures described in **Section 6.0** of this ROD.

The IRA reflects a federal policy of encouraging tribal self-government and economic self-sufficiency, and one of the mechanisms to promote these policies is the acquisition of land in trust. For that reason Congress fully intended that trust lands would be free from state and local regulation. While this statutory scheme will undoubtedly result in some differences between the current jurisdictional requirements for the Cowlitz parcel (and surrounding areas) and those applicable to the parcel once in trust, the Cowlitz parcel will not be unregulated; it will be subject to federal and tribal law which include stringent environmental, health and safety requirements. The Tribe is obligated to comply with numerous mitigation measures in the Tribe's EPHS Ordinance, which are specifically designed to protect the local community from adverse impacts, and which in fact require that the Tribe develop the property in a manner that is consistent with specified County environmental and land use ordinances. These obligations may be enforced by both the County and the NIGC. While these obligations may not be identical in every respect to current County requirements or County requirements that are being developed, they adequately address the potential adverse environmental effects of land use conflicts resulting from the trust acquisition.

In sum, the BIA has determined that the combination of Federal and Tribal regulatory oversight, and the ongoing practice of consultation and coordination between the Tribe and Federal, State, and local agencies will avoid potential adverse consequences caused by the creation of tribal governmental jurisdiction over the Cowlitz Parcel.

8.7 25 C.F.R. 151.10(G). IF THE LAND TO BE ACQUIRED IS IN FEE STATUS WHETHER THE BIA IS EQUIPPED TO DISCHARGE THE ADDITIONAL RESPONSIBILITIES RESULTING FROM THE ACQUISITION OF THE LAND IN TRUST STATUS.

The subject property does not contain any resources requiring BIA management assistance. The Tribe will maintain all roadways and utilities. The Tribe will pay for any municipal services that may be required in connection with the trust property. To the contrary, this trust acquisition will facilitate tribal economic development, which in turn will result in increased tribal self-sufficiency and, ultimately, less dependence on the federal government and specifically the BIA. Accordingly, the BIA is able to administer any additional responsibilities that may result from this acquisition.

8.8 25 C.F.R. 151.10(H). THE EXTENT OF INFORMATION TO ALLOW THE SECRETARY TO COMPLY WITH 516 DM 6, APPENDIX 4, NATIONAL ENVIRONMENTAL POLICY ACT REVISED IMPLEMENTING PROCEDURES AND 602 DM 2, LAND ACQUISITIONS: HAZARDOUS SUBSTANCES DETERMINATIONS.

Section 151.10(h) requires consideration of the extent to which the applicant provided information that allows the Secretary to comply with 516 DM 6, Appendix 4 (NEPA Revised Implementing Procedures), and 602 DM 2 (Hazardous Substances Determinations).

The BIA's guidelines for NEPA compliance are set forth in the BIA NEPA Handbook, 59 IAM 3-H (May 5, 2005). This ROD documents the Department's compliance with NEPA

through the preparation of an EIS. Compliance with NEPA is described in detail in **Section 1.5** of this ROD.

In accordance with Department of the Interior Policy (602 DM 2, Land Acquisitions: Hazardous Substances Determination), the BIA is charged with the responsibility of conducting an environmental site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. The record includes a Level 1 Contaminant Survey dated October 14, 2008, reflecting that there were no hazardous materials or contaminants on the property at that time. As required by current BIA procedures and ASTM E 1527-05, if necessary, an update to the site assessment will be completed within the six month period prior to the Department acquiring title to the property.

Accordingly, the Department concludes that after review and independent evaluation, the proposed Federal action to approve the Tribe's request to accept into trust the above-described property for the purpose of operating a gaming facility, subject to the conditions and commitments contained in **Section 6.0**, Mitigation Measures, of this ROD is appropriate.

8.9 25 C.F.R § 151.11(B). The Location Of The Land Relative To State Boundaries And Its Distance From The Boundaries Of The Tribe's Reservation.

The Tribe does not currently have a reservation, although the Cowlitz Parcel is located in the same state and in the same general geographical area of a significant percentage of its members and not too distant (about 22 miles) from its current tribal offices. Importantly, the Cowlitz Parcel is located near a site originally recommended by a federal agent for a reservation for the Tribe during the time period in which the United States sought to enter into a land cession treaty with the Tribe. More specifically, in 1854 Indian sub-agent William H. Tappen wrote to Washington Territory Governor and Western Territory Superintendent Isaac I. Stevens concerning sub-agent Tappen's "views relative to the extinguishment of Indian Titles to Lands" in southwestern Washington and Oregon. Tappen recommended that land should be reserved for the Cowlitz on the Chalatachie prairie, which is located only about six miles to the east of the Cowlitz Parcel. In addition, as discussed in **Section 9.0** of this ROD, the Tribe has significant other historical and modern connections to the area in which the Cowlitz Parcel is located.

8.10 25 C.F.R. § 151.11(C). Where Land Is Being Acquired For Business Purposes, The Tribe Shall Provide A Plan Which Specifies The Anticipated Economic Benefits Associated With The Proposed Use.

The Tribal Business Plan, prepared as part of the Tribe's application under 25 CFR 151, was presented to the public as Appendix E to the Final EIS. The Plan presents the Tribal government's unmet needs, the anticipated economic benefits deriving from the proposed acquisition, and the proposed Tribal expenditures on governmental programs. In particular, the Plan provides an analysis of anticipated gaming revenues, and the use of the gaming revenues to fund Tribal government infrastructure, to develop and fund a variety of social, educational, environmental, health, housing, cultural and other programs and services for Tribal members, to provide Tribal members with meaningful employment opportunities, and to stabilize and diversify the Tribal economy, creating more career opportunities for members

and other economic development opportunities. Review of the Business Plan and the BIA's comprehensive analysis of the socioeconomic impacts of the acquisition in the Final EIS lead the Department to conclude that the Tribe's Business Plan accurately describes the projected economic benefits that are associated with the proposed use.

8.11 25 C.F.R. § 151.10 AND 25 C.F.R. § 151.11(D). CONSULTATION WITH THE STATE OF WASHINGTON AND LOCAL GOVERNMENTS HAVING REGULATORY JURISDICTION OVER THE LAND TO BE ACQUIRED REGARDING POTENTIAL IMPACTS ON REGULATORY JURISDICTION, REAL PROPERTY TAXES, AND SPECIAL ASSESSMENTS.

As discussed above, by letters dated March 9-10 2004, and July 11, 2008, in accordance with 25 C.F.R. 151.10 and 25 C.F.R. § 151.11(d), the BIA notified the State of Washington and Clark County that they would have 30 days in which to provide written comments as to the acquisition's potential consequence on regulatory jurisdiction, real property taxes, and special assessments. In a letter dated August 11, 2008, the State of Washington declined to comment on the proposed trust acquisition and initial reservation status prior to a federal determination on the proposed action. Clark County submitted two letters in response to the BIA's notification letters dated August 11, 2004 and July 31, 2008. In general, the comments submitted in the County's 2004 letter raised the same or similar concerns as the comments received on the Draft EIS and have been addressed in Appendix B and Appendix C of the Final EIS. The County's letter of 2008 provided information concerning tax assessments for the property, and did not raise any significant issues.

Pursuant to 25 C.F.R. § 151.10, the Tribe was provided a copy of the comments received from the State, and Clark County and given an opportunity to respond to them. The BIA has reviewed the Tribe's responses to the comments and other information submitted by the Tribe in support of its fee-to-trust request, and finds that the Tribe has adequately addressed the concerns of the State, and local governments, as well as the BIA, with respect to acquiring the Subject Property in trust. See discussion in **Section 8.6** of this ROD.

Consultations with Clark County have been ongoing. Effects upon Clark County are expected to be effectively mitigated under the Tribe's EPHS ordinance approved by NIGC as a provision of the Tribe's amended gaming ordinance, or through other mitigation specified in the Final EIS and this ROD.

9.0 DECISION TO ISSUE A RESERVATION PROCLAMATION AND ELIGIBILITY OF THE LAND FOR GAMING

A reservation proclamation is one of the proposed actions in the Draft and Final Environmental Impact Statements. The Cowlitz Tribe submitted an amended and reorganized request for a reservation proclamation for the 151.87 parcel in Clark County, Washington prepared in accordance with the BIA *Guidelines for Proclamations* on August 11, 2006. As described in both the EIS and the Cowlitz Tribe's 2004 amended fee-to-trust application, the Tribe has requested that the Secretary proclaim the Cowlitz Parcel to be the reservation of the Cowlitz Indian Tribe pursuant to the authority provided by Congress in Section 7 of the IRA. The Tribe further has requested that the decision on a reservation proclamation be made concurrently with the decision on the trust acquisition. The Assistant Secretary for Indian

Affairs has been delegated authority for both a reservation proclamation and the acquisition of trust title to the property. Accordingly, a consolidated set of decisions with respect to the Cowlitz Parcel simplifies the administrative record and leads to better decision making on the part of the BIA and the Department.

Each of the elements required by the BIA's reservation proclamation guidelines is addressed in the Tribal request and summarized below.

9.1 RESOLUTION ENACTED BY THE TRIBE

A copy of Tribal Council Resolution No. 2004-24, dated October 2, 2004, in which the Cowlitz Tribal Council requests that the Assistant Secretary for Indian Affairs proclaim the Cowlitz Parcel to be the Tribe's initial reservation has been submitted as part of the amended request submitted to the Bureau of Indian Affairs on August 11, 2006.

9.2 DOCUMENT WHICH TRANSFERS TITLE OF THE SUBJECT PROPERTY INTO TRUST FOR THE TRIBE

The deed, transferring title into trust status, will be signed by the appropriate Bureau of Indian Affairs official immediately prior to the Department acting on the reservation proclamation. Therefore, as contemplated by the reservation proclamation guidelines, the deed will be available, as part of the Tribal request, at the time of Departmental action. As noted above, the fee-to-trust and reservation proclamation requests have been administratively connected through the NEPA process and are logically connected as elements of the proposed action.

9.3 A PLAT, PLOT OR FORMAL SURVEY

The Tribe has provided a plat map, formal survey and detailed legal description of the land proposed as initial reservation in both the fee-to-trust application and request for a reservation proclamation.

9.4 30-DAY NOTICE OF THE PROPOSED RESERVATION PROCLAMATION PROVIDED BY THE BIA TO STATE COUNTY AND MUNICIPAL GOVERNMENTS WITH JURISDICTION OVER THE LAND

BIA provided notice to Clark County and the State of Washington that the Proposed Reservation parcel was being considered for reservation status pursuant to Section 7 of the IRA, initially by letter dated March 9, 2004, and again by letter dated July 11, 2008.

9.5 SUBMISSION OF ANY COMMENTS IN RESPONSE TO 30-DAY NOTICE

Clark County responded to the March 2004 letter with comments making two main points: (i) that a reservation proclamation could "hasten" and "accentuate" the impacts of taking land into trust and removing the land from local land use requirements, particularly with respect to traffic, and (ii) that considering the parcel as eligible for gaming under the initial reservation exception in IGRA would remove the requirement for gubernatorial concurrence in the Department's decision to allow gaming on the parcel. The Cowlitz Indian Tribe provided a response to these comments on May 4, 2004, which indicated that: (i) the Tribe had agreed to mitigate potential impacts to traffic and other services in its MOU with the County, and that the proposed reservation status of the land would not affect the ability of the County to

develop the rest of the area surrounding the Cowlitz Parcel as it chooses, and (ii) the Tribe had informed County staff that the Tribe is eligible for and would seek to qualify the parcel for gaming under either the initial reservation or restored land exceptions in IGRA Section 20, neither of which require gubernatorial concurrence.

The BIA believes that impacts to Clark County have been fully and adequately addressed through the NEPA process and are mitigated through the Tribal EPHS Ordinance the provisions of which have been incorporated into the amended gaming ordinance that was approved by the NIGC on January 8, 2008. Further, the property is eligible for gaming without gubernatorial concurrence, through a reservation proclamation as the Tribe's initial reservation and as restored lands, as discussed in **Section 9.13**.

9.6 BRIEF NARRATIVE SUMMARY OF THE TRIBE'S GOVERNMENTAL ORGANIZATION AND HISTORY

The Cowlitz Indian Tribe has submitted information which is responsive to this requirement, in both its fee-to-trust application and the amended request for a reservation proclamation. As outlined in the tribal governing document provided by the Tribe, the Tribe operates under a constitution that establishes a 22 member Tribal Council. Among the powers and duties of the Tribal Council is the ability to acquire land for the Tribe and to accept the ownership of land in trust, with final approval from the general membership.

The Tribe submitted a significant amount of information concerning its history, and that history has been analyzed by the BIA Regional Director in his recommendation memorandum. The Tribe's history has also been analyzed by the National Indian Gaming Commission in its November 22, 2005 Restored Lands Opinion, and tribal historical information was summarized in the Draft and Final EISs. Those summaries and analyses are incorporated by reference in this ROD. In sum, however, the Department concludes that the failure of the United States to set aside any lands for the Tribe before the Tribe's lands were opened to non-Indian settlement in the 19th century, the Tribe's refusal to be moved outside of its historical territory to a reservation set aside for multiple Indian groups on the coast of the Olympic Peninsula, the Tribe's demonstrated historical and modern connections to the Lewis River area in which the Cowlitz Parcel is located, and the Tribe's continued landlessness even after restoration to federal recognition, all support the issuance of a reservation proclamation for Cowlitz Parcel, to provide the Tribe with a federally-protected land base in an area of historical and modern significance to it.

9.7 BRIEF NARRATIVE DESCRIBING THE ORIGIN OF CURRENT RESERVATION

The Tribe currently does not have either trust land or a reservation.

9.8 BRIEF NARRATIVE SUMMARY OUTLINING THE ORIGIN OF THE SUBJECT LAND IN TRIBAL OWNERSHIP

The Cowlitz Parcel is composed of eight parcels totaling approximately 151.87 acres, and title is currently held by the Tribe's development partner, Salishan-Mohegan, LLC. Salishan-Mohegan has committed to transfer its interest to the Tribe at such time as the United States agrees to accept trust title to the parcels.

9.9 REQUEST FROM THE TRIBE DESCRIBING THE ADVANTAGES, NEED, RATIONALE, OR OTHER JUSTIFICATION FOR SECURING RESERVATION STATUS ON THE TRUST LAND

The Cowlitz Indian Tribe has submitted information describing its need and its justification for obtaining reservation land in its fee-to-trust application and its amended proclamation request. The need and justification are addressed in further detail in the Final EIS for the Cowlitz project. As described in these documents, the Cowlitz Indian Tribe has been without trust land or a reservation for over 100 years and has remained without a secure land base since its acknowledgement more than six years ago. Establishment of a federally protected land base is fundamental to the exercise of tribal sovereignty and self determination. Securing a reservation will provide the Tribe with a land base over which it can exert governmental jurisdiction, and on which it can base its governmental operations. Provision of a reservation also will ensure the eligibility of the Tribe and its members for federal programs tied to reservation lands. Importantly, it also will provide the Tribe with access to economic development crucial to generation of the revenue required to establish and maintain effective Tribal governmental programs for the benefit of Tribal members and others.

The Tribe wishes to develop the Cowlitz Parcel to establish 20,000 square feet of tribal government offices, sixteen elder housing units, a 12,000 square foot tribal cultural center, and a casino-resort complex including a 134,150 square foot gaming facility and a 250 room hotel, with related restaurant, retail and conference facilities.

The Tribe has no land consolidation plan because it has no trust lands.

The Cowlitz Tribe has an Indian Claims Commission adjudicated claim area, which lies a short distance from the Cowlitz Parcel. The ICC did not award compensation for the immediate area in which the Cowlitz Parcel is located because the ICC found that other tribes also had used this area. However, the Historical Technical Report prepared by the Office of Federal Acknowledgment demonstrates a significant historical presence of the Cowlitz in the area in which the Cowlitz Parcel is located. These findings were confirmed by the Restored Lands Opinion issued by the National Indian Gaming Commission.

9.10 AN ANALYSIS AND RECOMMENDATION BY AREA DIRECTOR OF THE REQUEST FOR RESERVATION STATUS

The Regional Director, Northwest Regional Office, has submitted analysis and recommendations on the proposed reservation proclamation. The Northwest Regional Office recommends that the Secretary exercise his authority under 25 U.S.C. § 467 and proclaim the Cowlitz Parcel as the Tribe's reservation, and determine that the parcel is eligible for gaming pursuant to Section 20 of IGRA.

9.11 PROOF OF COMPLIANCE WITH NEPA

The Bureau of Indian Affairs issued a Final Environmental Impact Statement on May 30, 2008. This Record of Decision completes the NEPA compliance process.

9.12 COPY OF PROCLAMATION

The Tribe submitted a proposed proclamation with its amended request for a reservation proclamation.

9.13 ELIGIBILITY OF THE LAND FOR GAMING UNDER IGRA SECTION 20

The Department has determined that after the Cowlitz Parcel is taken into trust, it will meet the IGRA Section 20 exception that allows gaming on land acquired in trust after October 18, 1988 as a tribe's initial reservation.

The Tribe's March 2004 updated fee-to-trust application included a February 7, 2004 Tribal Resolution requesting that the Department proclaim the Cowlitz Parcel to be the Tribe's initial reservation pursuant to the Secretary's authority under Section 7 of the IRA and consistent with Section 20(b)(1)(B)(ii) of IGRA. The Tribe subsequently submitted another resolution dated October 2, 2004, reiterating its request for a reservation proclamation and a determination that the proclaimed reservation constitutes the Tribe's initial reservation within the meaning of Section 20(b)(1)(B)(ii). In addition, the Tribe submitted an amended and reorganized request for a reservation proclamation on August 11, 2006,

The Cowlitz Parcel will be eligible for gaming under the initial reservation exception (IGRA Section 20(b)(1)(B)(ii)) once the land is taken into trust and the reservation proclamation issued because the Property satisfies the regulatory requirements for IGRA's "initial reservation" exception set out in 25 C.F.R. §292.6.

More specifically, as required by 25 C.F.R. §292.6(a), the Tribe was acknowledged through the BIA's administrative process under 25 C.F. R. Part 82 in January 2002. 65 Fed. Reg. 8436 (Feb. 18, 2000). In accordance with 25 C.F.R. §292.6(b), the Tribe has no gaming facility located on newly acquired lands under the restored lands exception, and in accordance with 25 C.F.R. §292.6(c), the land will be proclaimed the Tribe's reservation under 25 U.S.C. §467, and will be the first proclaimed reservation for the Tribe.

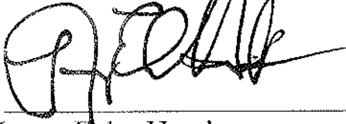
25 C.F.R. §292.6(d) requires that the Tribe demonstrate certain factors relating to the geographic location of the land, as well as the Tribe's historical and modern connection to the land. The Cowlitz Parcel meets the geographic location requirements because, as explained in the Tribe's amended fee-to-trust application and the Final EIS, the Cowlitz Parcel is located in the same state (Washington) where the Tribe is currently located. The Tribe's current location is demonstrated by the presence of the Tribe's headquarters in Longview, Washington, and the residence of a majority of its member population in Washington State. Further, the parcel is located within an area in which the Tribe has significant historical connections, as explained in detail in the Tribe's amended fee-to-trust application, the Tribe's request for a restored lands opinion, and the NIGC Restored Lands Opinion, which relies heavily on facts already adjudicated by the BIA in the Tribe's acknowledgment proceedings and by the ICC in the Tribe's land claim litigation. These facts demonstrate "significant historical connections" within the meaning of Sections 292.6(d) and 292.2 of the regulations governing IGRA's "initial reservation" exception.

Finally, the Cowlitz Parcel is located within area in which the Tribe has at least one or more modern connections. For example, the Parcel is near where a significant number of the Tribe's widely dispersed tribal members reside; the land is within a 25-mile radius of the Tribe's governmental facilities in Longview (which meet the regulatory requirement that the headquarters existed there for at least two years before the Tribe filed its fee-to-trust application); and the parcel is within the Tribe's HUD and IHS services areas. These factors, alone and together, constitute more than adequate modern connections for purposes of Section 292.6.

In sum, the Cowlitz Parcel, once acquired in trust, will be eligible for gaming under the restored lands exception in IGRA Section 20(b)(1)(B)(iii), and once the reservation proclamation is issued, also will be eligible under the initial reservation exception in IGRA Section 20(b)(1)(B)(ii).

10.0 SIGNATURE

By my signature, I indicate my decision to implement the Preferred Alternative, acquire the Cowlitz Parcel property in trust, and issue a Reservation Proclamation establishing an initial reservation for the Cowlitz Indian Tribe.



DEC 17 2010

Larry Echo Hawk
Assistant Secretary – Indian Affairs

Date