Cowlitz Indian Tribe

TESTIMONY OF THE HON. PHILIP HARJU
COWLITZ TRIBAL COUNCIL

ON BEHALF OF THE
THE COWLITZ INDIAN TRIBE OF WASHINGTON

SENATE COMMITTEE ON INDIAN AFFAIRS

OFF-RESERVATION GAMING:
THE PROCESS FOR CONSIDERING GAMING APPLICATIONS

FEBRUARY 1, 2006

Chairman McCain, Vice-Chairman Dorgan, and respected members of this Committee, I thank you for the opportunity to testify this morning. To Senator Maria Cantwell, I bring warm wishes from your Cowlitz constituents at home in Washington State.

My name is Philip Harju, and I serve as an elected member of the Cowlitz Tribal Council. Our Tribal Chairman John Barnett, who you know from his many appearances before your Committee over the years, very recently has suffered the death of one of his sons. I know you will understand why he cannot be here with you today. He has asked me to be here in his place to represent our Tribe at this hearing.

As I understand it, the purpose of today's hearing is to discuss two of the exceptions to the Indian Gaming Regulatory Act's (IGRA's) general prohibition on gaming on land acquired in trust after October 17, 1988: the "initial reservation" exception set forth in Section 20(b)(1)(B)(ii) and the "restored lands" exception set forth in Section 20(b)(1)(B)(iii). Both of these exceptions are relevant to the Cowlitz Indian Tribe, because we are both a "newly recognized" and a "newly restored" tribe. I wish to thank you for including language in S. 2078 which continues to protect newly recognized and newly restored tribes by reaffirming and further clarifying IGRA's initial reservation and restored lands exceptions. These exceptions ensure that tribes like mine will not be disadvantaged solely because, through no fault of our own, we were unrecognized and landless in 1988. In addition, I am eager to answer any questions you may have.

P.O. Box 2547 · Longview, WA 98632-8594 · (360) 577-8140 · Fax (360) 577-7432 · EMAIL cowlitztribe@tdn.com

In my testimony today, I would like to discuss: our understanding of the purpose of these two exceptions (Part I); how the exceptions have been mischaracterized by opponents of Indian gaming (Part II); the fee-to-trust process, with a focus on the important role of public consultation (Part III); how the initial reservation and restored lands exceptions are considered (Part IV); NIGC's restored lands opinion for Cowlitz (Part V); Interior's proposed Section 20 regulations (Part VII) and concluding thoughts (Part VII).

PART I
THE INITIAL RESERVATION AND RESTORED LANDS EXCEPTIONS: CONGRESSIONAL INTENT

Chairman McCain, I do not presume to tell you what Congress intended eighteen years ago when it enacted the Indian Gaming Regulatory Act (IGRA). No one knows or understands what the exact intent underlying the Section 20 exceptions was better than IGRA's original framers, and I know that you were an important force in passage of the Act in 1988. I think it would be useful, however, if I explain what *we* understand to be the purpose of the Section 20(b)(1)(B) exceptions, to explain our understanding of the law, and to explain how it has informed decisions that have been made by the Cowlitz Tribe.

We believe that, in 1988, Congress saw Indian gaming as an appropriate expression of tribal sovereignty and, accordingly, Congress enacted IGRA to protect and regulate that activity. It is clear, however, that, with certain exceptions, Congress intended to limit Indian gaming to Indian lands that existed on the date of enactment (October 17, 1988).

The problem was that not all tribes held tribal lands in 1988 and, in fact, not all tribes even enjoyed federal recognition in 1988. We believe that Congress very specifically intended to assist such disadvantaged tribes by providing that, when they finally obtained recognition and land, their land would be treated as if it effectively had been in trust since before October 17, 1988. In other the words, Congress provided the initial reservation and restored lands exceptions so that eligible tribes could be placed closer to the position they would have been in had they been recognized and held trust lands in 1988. By so doing, Congress provided a mechanism by which newly recognized/restored tribes would be on a more level playing field with the tribes that were lucky enough to have been recognized and to have had a land base on the date of IGRA's enactment. We believe that Congress knew that locking newly recognized and restored tribes out of the economic development opportunities made available by IGRA would do an incredible injustice to those tribes.

Our understanding of the purpose and intent of IGRA's restored lands and initial reservation provisions is informed by the opinions of the federal courts that have considered this issue. In 2003, in a case involving a California tribe, the D.C. Circuit (in an opinion joined in by now Chief Justice Roberts) explained that the restored lands and initial reservation exceptions "serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). In 2002, in an opinion involving a Michigan tribe that was later affirmed by the Sixth Circuit, the District Court said nearly the same thing, saying that the term "restoration may be read in numerous ways to place

belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the Western District of Michigan*, 198 F. Supp. 2d, 920, 935 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004) (referring to the factual circumstances, location, and temporal connection requirements that courts have imposed). The restored lands provision "compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim." *City of Roseville*, at 1029.

From a public policy standpoint, the need for special assistance for newly acknowledged/restored tribes is clear. Newly recognized and restored tribes have had to function without a land base and/or without federal recognition for very long periods of time. Almost by definition, these tribes – tribes like the Cowlitz – have been more disadvantaged and have suffered greater hardships than those which have had trust lands and access to federal assistance for many years.

Hence, we believe that Congress did not intend that a tribe newly emerged from the expense and rigors of the Federal Acknowledgment Process – or a tribe finally restored to federal recognition after having been terminated – should be automatically subjected to the "two-part determination process" which allows "off-reservation" gaming only where the Governor of the State concurs in the trust acquisition (*see* IGRA Section 20(b)(1)(A)). We believe that the two-part determination process was designed to govern the land acquisition activities of tribes that already have functional reservations, not the activities of newly recognized landless tribes. A blanket application of the two-part determination process will hold newly recognized and restored tribes hostage to the Governors of the states in which they are located, likely ensuring that most newly recognized and restored tribes will *never* gain access to the one economic development engine that has improved the livelihoods of so many other tribes.

PART II
RESERVATION SHOPPING

Given our understanding of what IGRA's initial reservation and restored land exceptions are supposed to accomplish, we hope this Committee understands how painful – how offensive – it is for us to hear our involvement with these IGRA exceptions characterized as "reservation shopping" and as mechanisms to "circumvent [ ] the law against gaming on newly acquired lands." Yet this is how our opponents have described the Cowlitz Tribe's request that the National Indian Gaming Commission (NIGC) review our eligibility for a restored lands determination. *See* Citizens Against Reservation Shopping press release, *Anti-Casino Groups Ask Interior to Vacate Cowlitz Opinion* (Jan. 15, 2006) at p. 3. The non-Indian card rooms and others who oppose our proposed trust acquisition characterize our efforts as somehow underhanded. We feel that these characterizations entirely ignore the "equal playing field" goals of the Section 20(b)(1)(B) exceptions.

Equally offensive, we feel that our opponents' characterizations ignore the Cowlitz Tribe's sincere and ongoing efforts to work through the established federal processes required to acquire land in trust for gaming. Those processes ensure that the public's thoughts, issues and concerns – even the card rooms' concerns – are carefully considered by

the Secretary of the Interior before she decides that she will, or that she will not, acquire trust title on our behalf. Following is a brief description of those established federal processes.

PART III
PETITIONING FOR TRUST LAND

There are two processes central to the fee-to-trust process: (1) compliance with Interior's fee-to-trust regulations, and (2) compliance with the National Environmental Policy Act (NEPA). *The Cowlitz Tribe adamantly supports these processes and their public consultation requirements.*

Interior's Fee-to-Trust Regulations

Only rarely does Congress provide the Secretary with special authority or direction to acquire trust land for a particular newly recognized or restored tribe. Therefore, newly recognized and restored tribes like the Cowlitz must rely on the general *discretionary* land acquisition authority given to the Secretary pursuant to Section 5 of the Indian Reorganization Act. (25 U.S.C. § 465) I emphasize the word "discretionary" because Section 5 does not require the Secretary to acquire land for Indian tribes; it merely gives her the authority to do so if she so wishes. As a consequence, newly recognized and restored tribes must submit to Interior's usual process for reviewing fee-to-trust applications, including complying with the requirements of Interior's fee-to-trust regulations (25 C.F.R. Part 151).

Interior's regulations for trust acquisitions distinguish between "on-reservation" and "off-reservation" fee-to-trust acquisitions. Off-reservation acquisitions are subject to significantly more process and significantly greater scrutiny than are on-reservation acquisitions. Because newly recognized/restored tribes like the Cowlitz have no reservation, *any* request for land we submit is deemed an "off-reservation" request and processed according to the more rigorous off-reservation standards.

Interior's regulations for off-reservation trust acquisitions specifically require that state and local governments (the elected officials who represent the local community) be consulted regarding their views on the proposed acquisition. The regulations require Interior to notify state and local governments that the tribe has made a fee-to-trust request. The regulations further require that Interior provide state and local governments with a minimum of 30 days in which to submit written comments regarding jurisdictional or land use issues and the impacts of removing the land from the local and state tax rolls, as well as other issues that the state or local government wishes to raise. Private citizens and local organizations are welcome to submit comments under this provision as well. In addition, where requested, Interior will make further efforts to assure that the public has an opportunity to comment on the proposed acquisition even though neither the Indian Reorganization Act nor the implementing fee-to-trust regulations require such additional opportunities. The Cowlitz Tribe's case provides a good example: the Department of the Interior, working with Congressman Baird, is hosting two public meetings (February 15th and

16th) in the local community. High-level officials from both Interior and NIGC have committed to participating in these hearings.

Public Participation Required During the NEPA Process

In addition to the public consultation and comment requirements built into the fee-to-trust process, there are a significant number of opportunities for public participation *required* by the National Environmental Policy Act (NEPA). Interior has made clear in its recently revised guidelines for gaming acquisitions that most tribal casino projects will require preparation of an environmental impact statement (EIS) to assess a wide range of potential impacts, including ecological, social, economic, cultural, historical, aesthetic and health impacts. The Cowlitz proposed project is no exception.

The enormous amount of public consultation wired into the NEPA EIS process is perhaps best demonstrated by walking through the process in which the Cowlitz has been engaged.

On November 12, 2004, the Bureau of Indian Affairs (BIA) published a notice of intent to prepare an EIS in the Federal Register describing the Cowlitz Tribe's proposed project, explaining the NEPA process, announcing a scoping meeting, and soliciting written comments on the scope and implementation of the proposed project. Public notices announcing the proposed project and the scoping meeting also were published in two local papers, The Reflector and The Columbian. As you know, the scoping process is intended to gather information regarding interested parties and the range of issues that will be addressed in the EIS. BIA held the public scoping meeting on December 1, 2004, in Vancouver, Washington, and received numerous comment letters during the scoping process.

In February 2005, BIA issued a scoping report describing the NEPA process, identifying cooperating agencies, explaining the proposed action and alternatives, and summarizing the issues identified during the scoping process. BIA then prepared a preliminary draft EIS, which was circulated to the cooperating agencies for comment late in 2005. Cooperating agencies for the Cowlitz project include NIGC, EPA, the Federal Highway Administration, the U.S. Army Corps of Engineers, the Cowlitz Tribe, Washington State Department of Transportation, *and a host of local government entities including: Clark County, Cowlitz County, Clark County Sheriff, City of La Center, City of Vancouver, City of Woodland, City of Ridgefield, and the City of Battle Ground.*

Based on the comments received from the cooperating agencies, BIA currently is preparing a draft environmental impact statement that is scheduled to be released for public comment some time later this month or in early March. BIA also will hold a public meeting after the draft EIS has been made available to the public at which the public may comment. All the comments on the draft EIS, whether received in writing or through the public meeting, will be considered and addressed in the final EIS. The information included within that final EIS will be considered by the Secretary while she determines whether or not to take the Cowlitz Tribe's Clark County parcel into trust. Therefore, the views of local elected officials, local citizens, and even the card rooms will be available to the Secretary for consideration before she makes a decision as to whether to take this land in trust for the Cowlitz Tribe.

Finally, it needs to be made clear that, after the Secretary of the Interior has considered all the public comments, including information about impacts and mitigation, *if* she does decide to acquire trust title to the land, Interior's regulations provide the public with a very clear and very unambiguous opportunity to challenge the Secretary's decision in federal court before she implements that decision. (*See* 25 CFR 151.12(b), which requires the Secretary to give the public at least 30 day's notice of her decision to take land into trust before she will actually take the action to acquire trust title.) Accordingly, if the public ultimately is not satisfied that its concerns have been addressed through either the fee-to-trust or the NEPA processes, it can bring suit against Interior to try to prevent it from taking the land in trust.

Given the extensive opportunities for public participation in the process for acquiring land in trust for gaming that I have just described, and in which the Tribe has cooperated fully, we believe it is misleading to the public, and insulting to us, for the opponents of our proposed project to say things like "from the outset, this Tribe has worked to bar local governments from bringing into the process concerns about detrimental impacts a casino might impose on their communities." Ed Lynch, Chairman of CARS (citing Cowlitz filing of a restored lands request), Citizens Against Reservation Shopping press release, *Anti-Casino Groups Ask Interior to Vacate Coulitz Opinion* (Jan. 15, 2006). We understand that our opponents would be happier if the land that we have asked to take into trust did not meet the restored lands legal test. But the fact is that it is in the fee-to-trust process where any detrimental impacts on the community are properly addressed – not in a restored lands determination. To better illustrate the point, let me now turn more directly to the restored lands and initial reservation exceptions.

PART IV
THE RESTORED LANDS AND INITIAL RESERVATION PROCESSES: PRACTICAL REALITIES

The relevant language of IGRA's restored lands and initial reservation exceptions is:

> (a) Prohibition on land acquired in trust by the Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, ...
>
> (b) Exceptions
>
> (1) Subsection (a) of this section shall not apply when . . .
>
> (B) lands are taken into trust as part of ...
>
> (ii) the initial reservation of an Indian tribe acknowledged by the secretary under the Federal acknowledgement process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(25 U.S.C. § 2719(b)(1)(B)(ii) and (iii))

As discussed earlier, we understand the general intent behind the initial reservation and restored lands exceptions to be essentially the same, *i.e.*, to assist tribes that were not recognized and/or did not have a land base in 1988. *See City of Roseville*, 348 F.3d 1020; *Grand Traverse*, 198 F. Supp. 2d 920, aff'd 369 F.3d 960. Not only are the public policy rationales for the two exceptions congruous, but, depending on the circumstances, some tribes newly recognized under the Federal Acknowledgment Process also meet the standards for restored tribes/restored lands. It is not surprising, then, that there is significant overlap in the standards and criteria that are required to meet either of the two exceptions. For example, for both, the tribe must be able to demonstrate that the area in which the land is located is of both historical and modern significance to the tribe.

However, as outlined below, there are some differences in the processes by which restored lands opinions and reservation proclamations are issued.

(Initial) Reservation Proclamations

The Secretary of the Interior has authority to proclaim Indian lands to be a reservation pursuant to Section 7 of the Indian Reorganization Act (25 U.S.C. § 467). The Department has not yet promulgated regulations to govern the exercise of the Secretary's authority to issue proclamation requests, but the general requirements are provided in a list of "guidelines." To obtain a reservation proclamation, the tribe must file an application, providing the information outlined in the guidelines. The tribe's application is reviewed by the local Regional Office of the Bureau of Indian Affairs and then by the Office of Trust Services at BIA headquarters in Washington.

BIA currently takes the position that a tribe's land must already be in trust before it will review and process a reservation proclamation request. Thus, it is our understanding that, as a practical matter, a tribe newly recognized through the Federal Acknowledgement Process (FAP) must complete the entire fee-to-trust process (which, for gaming acquisitions, must be approved both at the Regional Office and then at BIA Headquarters through the Office of Indian Gaming Management) before the Office of Trust Services will begin to process the tribe's request for a reservation proclamation. Because the reservation proclamation process takes place after the fee-to-trust process, the FAP tribe is forced to complete the entire fee-to-trust process, exhausting several years and consuming extraordinary financial resources, before the tribe can get a real read from the federal government as to whether it agrees that the proposed tribal lands are located in an appropriate place. Further, even if the federal government agrees that the lands are appropriately located, the tribe is forced to wait for some indefinite period – six months, a year, more? – after the land has been taken into trust before the tribe will receive a proclamation designating its trust land to be a reservation. (The reservation will be considered as an "initial reservation" within the meaning of Section 20(b)(1)(B)(iii) if it is the first land to be designated as the tribe's reservation.)

This is a very significant burden for a newly recognized, landless tribe with limited funding. We previously have recommended that Interior process reservation proclamation requests and fee-to-trust applications simultaneously to avoid this delay, thereby reducing the pressure put on the Tribes and local communities by the bifurcated review process currently in place. We hereby reiterate that request, and further respectfully suggest that it would be in *everyone's* better interest to consolidate review of fee-to-trust and initial reservation proclamation requests into one office, *i.e.*, the Office of Indian Gaming Management. We believe that this office is in the best position to counsel tribes (and local communities) early in the process as to the propriety of any particular location for gaming purposes. Further, the Office of Indian Gaming Management becomes so familiar with the tribe, the local community, and the specifics of the proposed land acquisition during the fee-to-trust process that it seems to make more sense to have that office complete the proclamation process rather than forwarding the proclamation request to an entirely new office to begin another review de novo.

Restored Lands Legal Opinions

Unlike the issuance of a reservation proclamation, which is the result of a process by which the Secretary implements her authority under Section 7 of the Indian Reorganization Act and which ends with an affirmative action by the Secretary, a restored lands opinion is a just that – a legal *opinion*. Either NIGC or Interior looks at the tribe's historical and modern facts and applies the established legal standards to those particular facts to determine whether, in the agency's opinion, the tribe and its lands meet the legal standards set forth by the federal courts. Because a restored lands opinion is a legal opinion, it generally is not the subject of a formal public consultation process.[1] The legal standards by which restored lands opinions are rendered are well fleshed out by the federal courts and previous agency decisions, [2] and Interior has well articulated these standards in its proposed regulations implementing Section 20.

Timing

We believe that it makes sense for the federal government, tribes and the local community to know as early as possible in the fee-to-trust process whether the particular land is in an appropriate location for gaming purposes – before the Tribe spends millions of dollars on a fee-to-trust application and NEPA compliance, before the federal government spends its resources on processing the fee-to-trust application, and before the local community spends significant time and money on the other components of the fee-to-trust

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[1] Although it is our understanding that the development of agency legal opinions generally is not subject to public notice and comment, we note that in fact NIGC reviewed American Land Rights Association materials. NIGC also considered submissions from the Grand Ronde Tribe, two non-Indian card rooms in La Center, the City of La Center, State Representative Richard Curtis, and a number of other groups and private citizens.

[2] *See Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. Of Mich., et at.*, 46 F. Supp. 2d 689 (W.D. Mich. 1999); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000), *see also* NIGC *Grand Traverse Band of Ottawa and Chippewa Indians* Opinion (Aug. 31, 2001); Interior *Confederated Tribes of Coos, Lower Umpqua & Siuslas Indians* Opinion (Dec. 5, 2001); NIGC *Bear River Band of Rohnerville Rancheria* Opinion (Aug. 5, 2002); NIGC *Mechoopda Indian Tribe of Chico Rancheria* Opinion (Mar. 14, 2003); NIGC *Wyandotte Nation Amend Gaming Ordinance* Opinion (Sep. 10, 2004); NIGC *Karuk Tribe of California* Opinion (Oct. 12, 2004).

and NEPA processes. We believe that if everyone knew sooner rather than later whether the general area in which the land is an appropriate location for trust lands for the Tribe that the general public "angst" about "reservation shopping" would be minimized.

It may well be that there are circumstances where a determination that a particular parcel meets the requirements of the restored lands exception cannot properly be made early in the process, but, in our case, there was so much factual historical information already available from adjudicated and federal sources that we thought it prudent to go ahead and ask whether we had met the legal test for a restored lands determination. Indeed, we felt compelled to address this issue up front, because the non-Indian card rooms and their supporters have mounted an aggressive public relations campaign against our proposed acquisition based on assertions that we have no historical connection to Clark County. They have said, over and over again, that we do not belong there. To help us determine whether our understanding of the facts and the law is reasonable, we asked the National Indian Gaming Commission to provide us with an opinion as to whether the Cowlitz Tribe does, in fact, have a sufficient nexus to the Clark County site that it could be considered restored lands within the meaning of the IGRA exception.

While our opponents may be unhappy with the legal conclusions reached by NIGC, there is absolutely nothing wrong with the Cowlitz Tribe asking that a federal agency charged with implementation of IGRA provide its opinion on a specific legal question relevant to the Tribe's proposed gaming development. The Tribe's decision to look for clarity and guidance was entirely proper, and it in no way dictates a particular outcome in the fee-to-trust process.

PART V
THE COWLITZ RESTORED LANDS DECISION

Based on our understanding of IGRA and the law construing the restored lands exception, we believed that the Clark County site would be an appropriate place to locate tribal trust land for gaming purposes. For this reason, we asked NIGC to review adjudicated and federally-established facts to determine whether, under the established legal standards this land would qualify as restored lands. The purpose was not to circumvent the requirements of IGRA or the IRA or the regulations implementing those statutes, but to solicit the federal government's views as to whether we were in the right place sooner rather than later in the process.

Because numerous federal sources (such as the ICC proceedings and BIA's technical reports from the Federal Acknowledgment Process) already document that the Cowlitz Tribe is a restored tribe and that we have historical and modern connections to the area surrounding the Clark County site, our restored lands request relied entirely on existing federal documents and federally adjudicated facts rather than history compiled by a hired expert. NIGC explains in its restored lands opinion that it reviewed and considered the entire record – including the opposition comments and analyses it received from two non-Indian card rooms, the City of La Center, citizen groups and another Indian tribe. NIGC concluded that the Cowlitz Tribe is a "restored tribe" and that, if the Cowlitz parcel is taken

into trust, that the land would qualify as "restored lands" under Section 20 (b)(1)(B)(iii). A brief summary of NIGC's analysis follows.

The Cowlitz Tribe is a Restored Tribe

Relying on findings and conclusions reached by BIA when it extended recognition to the Tribe in 2002, NIGC concluded that the United States generally recognized the Cowlitz "during the mid-to-late 1800s." NIGC's *Cowlitz Tribe Restored Lands Opinion* at 4 (November 22, 2005). In 1855 the United States entered into treaty negotiations with the Cowlitz and other tribes in the Washington territory to try to convince them to cede their lands to the United States. Although the Cowlitz were willing to cede lands, we refused to sign the treaty offered to us because the United States insisted that we relocate to an area that was unacceptable to us. In 1863, an Executive Order opened up most of southwestern Washington, including Cowlitz lands, to non-Indian settlement. Because no reservation had been set aside for us, we became landless soon after the 1863 Executive Order took effect. Over the course of the next fifty years, Interior eventually began to deny services to us because of our landlessness, so that by the early twentieth century the Department considered the Tribe to have been terminated. In 2002, Interior officially re-extended recognition to the Cowlitz through the Federal Acknowledgment Process. For these reasons, NIGC determined that the Cowlitz Tribe is a "restored tribe" under the meaning of Section 20(b)(1)(B)(iii).

The Clark County parcel will qualify as restored lands if it is taken into trust

NIGC applied the same criteria used by the federal courts, NIGC and Interior in past restored lands opinions when it concluded that the Clark County parcel, should it be taken into trust, would meet the standard for restored lands within the meaning of Section 20(b)(1)(B)(iii). These criteria require the Tribe to show that the land is "restored" based on one or more of the following three factors: the factual circumstances of the acquisition, the location of the acquisition (which refers to the historical and modern nexus of the Tribe to the land), and the temporal relationship of the acquisition to the tribal restoration. *Grand Traverse*, 198 F. Supp. 2d at 935.

With respect to factual circumstances of the acquisition, NIGC found convincing the Cowlitz Tribe's long history of attempts to reacquire lands it had lost, a history that significantly pre-dates IGRA. As the opinion describes, Cowlitz members began to seek redress for the dispossession of their lands in the early 1900s, and pursued federal legislation that would allow the Tribe to present its claims in court. Although many bills were introduced and one was even passed by both houses of Congress (but vetoed by President Coolidge), it wasn't until the Indian Claims Commission was created that the Tribe had an opportunity to pursue its land claims against the federal government. In 1969, the ICC found in favor of the Cowlitz Tribe, agreeing that the United States had taken the Tribe's lands without compensation. In the 1970s, we insisted that the federal legislation implementing our ICC settlement provide for some of the funds to be used for land acquisition. Interior refused, insisting that we were no longer recognized. As a consequence, the Cowlitz had no choice but to submit to BIA's federal acknowledgment process, and we submitted evidence to satisfy the Department's recognition criteria for the next quarter century. Two years after Interior recognized the Tribe in 2002, a statute was

finally enacted into law that implemented the Tribe's ICC judgment and included a land acquisition provision.

With respect to the Tribe's historical and modern nexus to the area, NIGC concluded that significant established evidence exists to demonstrate the Tribe's legitimate historical and modern connections to the area. As explained by NIGC, many of the Tribe's historical connections are documented in the ICC litigation and the historical and anthropological technical reports prepared by BIA during the Federal Acknowledgement Process – adjudicated findings that we believe are binding on the federal government. These findings document the historical presence of the Cowlitz Tribe in the area of the site from the time of first white contact through the modern era.[3] In addition, our modern connections to the area are clear, and are reflected in the fact that both the Indian Health Service and the Department of Housing and Urban Development have designated Clark County as a service area for the Cowlitz Tribe.

Finally, with respect to the timing of the trust acquisition, NIGC found that the Cowlitz Tribe's attempts to minimize the time between restoration and the proposed trust acquisition, by applying to have the land taken in trust on the day of BIA recognition, and the fact that this would be the Tribe's first trust acquisition, weighed heavily in favor of the Tribe.

In short, the NIGC opinion found that Cowlitz satisfied all of the requirements for a restored lands determination, based almost completely on adjudicated federal findings and the application of established legal precedent.

PART VI
REGULATIONS GOVERNING THE SECTION 20 EXCEPTIONS

Given the somewhat complex interplay between the process for making determinations under the IGRA Section 20 exceptions and the fee-to-trust process, we can understand how the general public may be confused about what precisely is necessary before Tribes may game on lands that they have acquired in trust. We applaud Interior's efforts to propose regulations that govern the implementation of the Section 20 exceptions, as we believe those regulations will help to dispel some of the confusion in this area by making the process and the standards more transparent. We fully support the promulgation of the Section 20 regulations as a way to improve and regularize the implementation of the Section

[3] Those opposed to the Cowlitz Tribe's efforts to acquire land in Clark County argue that, because other tribes in addition to the Cowlitz historically occupied this area, the lands should not be deemed to meet the restored lands test. There is no precedent for requiring that the ICC's exclusive use and occupancy standard be grafted onto the restored lands standards. To the contrary, established case law suggests that restored tribes need not necessarily return to the exact parcel of land or reservations they previously held. *See City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. of Mich.*, 46 F. Supp. 2d 689 (W.D. Mich. 1999); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004).

20 exceptions. For the same reasons, we also strongly encourage Interior to promulgate reservation proclamation regulations.

PART VII
FINAL THOUGHTS

We think it important to highlight that newly recognized and restored tribes, left landless by the misfortunes of history, have no choice but to carve out lands from existing jurisdictions to acquire land in trust. These lands will, if taken into trust by Interior, come off the local tax rolls and be withdrawn from local jurisdiction. This rarely makes the newly recognized tribe popular with the local community. If, as in our case, the newly recognized tribe acquires land in a local community that generally supports gaming, there likely already are existing gaming establishments there – and, as in our case, those existing gaming establishments have every incentive to fight the newly recognized tribe to the death in order to protect its profits. Conversely, if the newly recognized tribe identifies land where there is no nearby existing gaming facility, it is probably because the local community is disinterested in – or possibly even hostile to – hosting a gaming facility. Neither situation is very comfortable for the tribe or for the local community. For these and other reasons, newly recognized tribes find themselves in the middle of public debates and controversies – controversies often fueled and well-funded by other gaming interests trying to protect their own turf and profits.

The Cowlitz Tribe understands and is sympathetic to the inherent difficulties of having to carve out a homeland from an existing non-Indian jurisdiction. But we take exception to some of the criticism we have received for our efforts to achieve greater clarity early in the process on the question of whether our Clark County parcel is located within an appropriate area.

Chairman McCain, Vice Chair Dorgan, and esteemed members of this Committee, the Cowlitz Tribe implores you to remember that newly recognized landless tribes like Cowlitz are poor tribes in desperate need of the United States' active assistance. We face daunting obstacles to self-governance and self-sufficiency precisely *because* we have no trust land. I am here today to reiterate Chairman Barnett's previous requests that Congress continue to insist that there be a fair and equitable mechanism to put newly recognized and newly restored tribes on a level playing field with tribes that were lucky enough to have had a reservation on October 17, 1988. In that same vein, we ask that this Committee ensure that there never be a blanket moratorium on fee-to-trust acquisitions. No Congressional action could do more damage to the very tribes who most need your help.

Thank you very much for the opportunity to testify.