BEFORE THE DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20240

The Honorable Gale Norton Secretary of the Interior Washington, D.C. 20240	))))	
In the Matter of Restored Lands Determinations/ Reservation Designations	))))	RM ___________
To the Secretary of the Interior and *The Assistant Secretary, the Bureau of Indian Affairs*	))	

PETITION FOR RULEMAKING

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March 30, 2006

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BEFORE THE DEPARTMENT OF THE INTERIOR
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The Honorable Gale Norton Secretary of the Interior Washington, D.C. 20240 In the Matter of Restored Lands Determinations/ Reservation Designations *To the Secretary of the Interior and* *The Assistant Secretary, the Bureau of Indian Affairs*	))))))))))	RM ___________

PETITION FOR RULEMAKING

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553(e), and Department of the Interior (DOI or Department) regulations, 43 C.F.R. Part 14, Citizens Against Reservation Shopping, Stand Up For California, One Nation United, Stand Up For Clark County Citizens, and American Land Rights Association hereby petition the Bureau of Indian Affairs (BIA) to promulgate standards that govern through rulemaking the designation of an initial reservations and determinations of whether land qualifies as "restored land" under 25 U.S.C. § 2719(b)(1)(B)(ii), (iii). The APA directs that "[e]ach agency (of the Federal Government) shall give an interested person the right to petition for the issuance . . . of a rule." 5 U.S.C. § 553(e). The petitioners hereby invoke that authority to secure the promulgation of regulations to ensure that fair and objective decisions are made on these issues.

PETITIONERS

Citizens Against Reservation Shopping (CARS) is an organization comprised of Clark County citizens formed in June 2005. Longtime Vancouver businessman and civic leader Edward Lynch is the Chairman of CARS. CARS supports the Cowlitz

Tribe's right to establish a reservation and to pursue economic opportunities that will benefit its people, but opposes its plan to build a casino in Clark County. The group's concern stems in part from CARS' objection to "reservation shopping" – the practice of selecting an ideal casino site and then working to have it given reservation status. CARS membership represents a broad spectrum of Vancouver and Clark County citizens.

Stand Up For California (Stand Up) is a statewide coalition-building organization that has been in existence for over a decade. It is a non-profit charitable organization tax exempt at both the state and federal levels of government. Stand Up acts as an advocate and informational resource to community groups, individual elected officials, and members of law enforcement trying to respond to the complexities caused by the rapid expansion of tribal gaming. Stand Up does not seek to impede the economic progress and advancement of California's native peoples; rather Stand Up seeks regulatory reforms believed to be in the best interest of all the inhabitants of California.

One Nation United is a non-profit, nonpartisan, public educational organization representing over 300,000 concerned citizens and property owners, elected officials, state and national trade associations, small businesses, and local governments in thirty-seven states across America. One Nation United works to reform federal Indian policy for the benefit of Indians and non-Indians alike.

Stand Up For Clark County Citizens is a citizen-based, grass-roots organization in Washington State founded by citizens concerned about the potential impacts from the Class III casino proposed by the Cowlitz Indian Tribe for Clark County. The potential impacts of the proposed development include: the significant loss of habitat for endangered species, given the sites location between two wildlife refuges; and severe economic and social impacts to an area that is largely low crime and rural in nature. Stand Up For Clark County Citizens' primary goal is to gain information

through research about the potential for severe impacts associated with casino development, the irregular process being employed at the federal level and the breakdown in governmental agency procedures and disseminate that information to others. Stand Up For Clark County Citizens is strongly opposed to the proposed development because of the severe harm it would cause to the surrounding communities.

The American Land Rights Association (ALRA) was founded in 1978 as a grassroots organization. ALRA and its members are dedicated to the wise use of resources, access to Federal lands and the protection of private property rights. With 26,000 members located in all 50 states, ALRA is a national informational clearinghouse and support coalition that encourages multiple-use of federally-controlled and state lands for family recreation, and commodity production. Its purpose is to oppose selfish, restrictive land use designations that damage local economies, schools and roads in rural America.

SUMMARY

This petition, filed by Citizens Against Reservation Shopping, Stand Up For California, One Nation United, Stand Up For Clark County Citizens, and American Land Rights Association, requests that the DOI and the BIA promulgate regulations governing the process and standards for: 1) the designation of an initial reservation for a newly-acknowledged tribe that will be used for gaming purposes; and 2) the determination of when tribes qualify as "restored tribes" and when lands qualify as "restored lands" (hereinafter, a "restored lands determination") on which gaming is permissible under section 20 of the IGRA. 25 U.S.C. § 2719(b)(1)(B)(ii), (iii). Specifically, this petition seeks the following regulations:

1. Confirmation that initial reservation designations and restored lands determinations are made by the Secretary of the Interior (Secretary), not the National Indian Gaming Commission (NIGC).

2. A requirement that public notice shall be provided within 30 days of the filing of any initial reservation designation or restored lands determination request and that the request shall be provided to the affected state and local governments and made available upon request to all other parties. The procedures that govern these determinations shall provide access to any application filed by a tribe seeking such a determination to any interested party.

3. A mandatory public comment opportunity on such requests.

4. A clearly established process and established standards to guide the Department's review of any request for an initial reservation designation or restored lands determination, including the right of any interested party to appeal a decision to the Interior Board of Indian Appeals.

5. A requirement that, in the absence of an Act of Congress, an initial reservation designation or a restored lands finding shall be made only if a tribe meets its burden of proof to show that it has a significant historical and cultural connection to the land.

6. A prohibition specifying that the timeline for such determinations is not affected by other concurrently-filed applications with BIA or the NIGC; if a concurrently-filed application is deemed dependent on either determination, that application shall either be denied if the initial reservation designation or the restored lands determination is not complete by the deadline applicable to the concurrently-filed application, or consideration of the concurrently-filed application shall be suspended during the pendency of the decision-making process for the initial reservation or restored lands determination.

In addition, this petition requests that the Department impose a moratorium on any such decisions currently pending or filed before the promulgation of such regulations. The new regulations shall be applied to any such requests.

The Secretary holds the ultimate authority to designate initial reservations and declare restored lands. The statutory authority for the designation of reservations by the Secretary is found in 25 U.S.C. § 467. For the purposes of 25 U.S.C. §§ 2701-2721, Congress explicitly stated that "[t]he authority to determine whether a specific area of land is a 'reservation' . . . was delegated to the Secretary of the Interior on October 17, 1988." Pub. L. No. 107-63, § 134, 115 STAT. 443. The same primary authority resides with the Secretary for determinations of whether lands qualify as "restored" in a gaming-related trust acquisition request. *See State of Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277-1278 (D. Or. 2003), citing Pub. L. No. 107-63, § 134, 115 STAT. 443. In fact, the Secretary's power to promulgate rules governing initial reservations and restored lands determinations for IGRA purposes was

confirmed several years ago by the BIA in a proposed rulemaking that related to the issue.

ARGUMENTS IN FAVOR OF PETITION

Section 20 of the IGRA restricts gaming to lands that are acquired in trust prior to October 17, 1988 or which are contiguous to a Tribe's existing reservation. *See* 25 U.S.C. § 2710(a).[1] To conduct gaming on after-acquired lands, an exception to the section 20 prohibition must apply or the Secretary, with the concurrence of the Governor of the affected state, must determine that gaming is in the best interests of

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[1] Section 20 provides, in relevant part:

> (a) Prohibition on lands acquired in trust by 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, unless—
>
> (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
>
> (2) the Indian tribe has no reservation on October 17, 1988, and—
>
> (A) such lands are located in Oklahoma and—
>
> (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
>
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
>
> (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

the tribe and not detrimental to the surrounding community. *See id.* § 2719(b)(1)(A), (b)(1)(B)(i-iii).

There are three exceptions[2] to the section 20 prohibition. The exceptions apply to lands taken into trust as part of:

> i. a settlement of a land claim;
>
> ii. the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or
>
> iii. the restoration of lands for an Indian tribe that is restored to Federal recognition.

Id. § 2719(b)(1)(B).

If none of these exceptions applies, gaming can be conducted on after-acquired trust lands only if:

> The Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

Id. § 2719(b)(1)(A). This provision is frequently referred to as the "two-part determination" test.

The two-part determination test provides crucial protections for state and local governments and the communities they represent. The purpose of the test is to evaluate the interests of a tribe wishing to conduct gaming and the interests of the

---

[2] A few additional exceptions are included in section 20, but are tribe- or location-specific. *See e.g.*, 25 U.S.C. § 2719(b)(2),(3).

affected state and local communities. The provision allows states to prevent a practice referred to as "casino-shopping," whereby a tribe selects land to which it has little or no relationship to gain access to a large gaming market. As the BIA has noted, the two-part determination gives "the Department and the local political community a voice in deciding whether to allow gaming. More importantly, it g[ives] the Governor of the State a veto." Memorandum from the Associate Solicitor, Division of Indian Affairs to Assistant Secretary – Indian Affairs, regarding *Confederated Tribe of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d (D.D.C. 2000), and proposed gaming on the Hatch Tract in Lane County, Oregon, dated December 5, 2001 at 7.

Underscoring the importance of the two-part determination, the Acting Deputy Assistant Secretary – Indian Affairs testified in a May 18, 2005, hearing before Congress that:

> We have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development. . . . [B]y requiring that the Governor of the affected state concur in the Secretary's determination, the statute acknowledges that in a difference of opinion between a sovereign tribe and an affected state, *the state prevails*.

Testimony of George T. Skibine, then-Acting Deputy Assistant Secretary – Indian Affairs for Policy and Economic Development, Department of the Interior at the Oversight Hearing Before the Senate Committee on Indian Affairs Concerning Taking Land Into Trust (May 18, 2005) (emphasis added).

Thus, whether the two-part determination applies in any given case is critically important to state and local governmental entities and the communities they represent. Decisions regarding its applicability cannot be lightly made. The importance of state and local community rights in the context of Indian gaming must be rigorously respected, requiring a narrow interpretation of the exceptions to the two-part

determination and the general section 20 prohibition. Indeed, with regard to the exceptions to section 20, "Congress likely did not intend to substantially undercut the general prohibition on gaming on lands acquired after IGRA's passage." Letter from the National Indian Gaming Commission (NIGC) General Counsel to Judge Douglas W. Hillman, regarding whether the Turtle Creek Casino Site that is held in trust by the United States for the Benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from IGRA's general prohibition of gaming on lands acquired after October 17, 1988, at 15 (Aug. 31, 2001) (NIGC *Grand Traverse Band* Opinion).

In light of the importance of the two-part determination, decisions regarding its applicability should be thoroughly and openly considered, with input from state and local governmental entities and the public. Standards must be in place to guide the decision-making process and to ensure that such decisions are made fairly, consistently, and objectively. Unfortunately, the manner in which these decisions are currently made does not comport with these principles and does not ensure that state and local government rights are respected.

THE CURRENT RESTORED LANDS PROCESS

The NIGC and BIA respond to requests for determinations that land qualifies under an exception to section 20 on an ad hoc basis. The only guidance provided for reviewing such important requests is found in a Memorandum of Understanding (MOU), which provides:

> 1) Upon the NIGC's receipt of a request for an Indian lands determination, the NIGC will file a written request for advice and assistance with the Associate Solicitor, Division of Indian Affairs;
>
> 2) The Associate Solicitor will assign an attorney within the Department of Indian Affairs to serve as the liaison between the Department of the Interior and the NIGC;

3) The Department of the Interior will provide advice and assistance to the NIGC to determine whether land qualifies as Indian lands;

4) The NIGC must provide the Department with adequate time to review its draft decisions;

5) When there are emergency circumstances involved, the Department will provide advice and assistance in an expedited manner; and

6) When the Department determines that it needs to address a question relevant to the Indian lands determination, the Department will inform the NIGC that it is reviewing the matter.

Memorandum of Understanding Between the National Indian Gaming Commission and the Department of the Interior, available at <http://www.nigc.gov/nigc/nigcControl?option=MOU> (last visited March 24, 2006).

This MOU fails to provide the type of process appropriate for decisions of such importance to tribes, state and local governments, and the public. Despite the fact that determinations to exempt gaming from the two-part determination have the potential to affect the most critical of states' rights and the interests of local communities, as protected by Congress in IGRA, the MOU and the process employed by the NIGC and BIA does not provide any notice of a Section 20 request to potentially affected state and local governments or the public. In addition, no formal opportunity exists for meaningful participation. Indeed, participation is only possible if, by happenstance, governmental entities or the public discover, within a reasonable amount of time, that a request has been filed.

In addition to the current procedural inadequacies, no established standards exist to guide the NIGC's and BIA's decisions for restored lands requests. As noted above, standards are critical to ensure that decisions are made objectively and consistently, in every case. Although previous Indian lands determinations provide

some guide posts to agency decision-making, the NIGC has substantially deviated from that precedent, thereby eliminating, without any required process, the two-part determination as the only means of authorizing gaming in certain cases.

Finally, the existing approach which shuns input from third parties prevents the NIGC and BIA from taking advantage of the information and technical assistance that are available from outside sources. In many cases, state and local governments, other Indian tribes, academic institutions, and the public will have information that bears on the restored lands issue. This information not only can be useful to inform the agencies' determination by supplementing the documents otherwise available for review, it also can bring balance and objectivity to the overall record. The tribe seeking restored lands status will almost certainly present only the information that is supportive of its request. Typically, neither the NIGC nor BIA will be in a position to conduct their own research. Without a broader public review process, the record for the decision is likely to be limited and biased.

The value of providing for comment from third parties is confirmed by other BIA procedures, especially those where technical information is required and the interests of states, local communities, and the public are potentially affected. For example, under the trust acquisition regulations, input from state and local jurisdictional authorities is sought to help guide the BIA's trust acquisition decisions. *See e.g.*, 25 C.F.R. §§ 151.10(e), (f) and 151.11(a). While these procedures are weak and inadequate, they at least provide an opportunity for comment. Likewise, in the context of tribal acknowledgment petitions, notice and opportunity to comment and participate is provided to all interested parties so that they can "submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment." *Id.* § 83.9(a). Nothing less should be accorded states, local governments and the public in the context of federal decisions that have a critical bearing on the authorization of off-reservation gaming.

THE RESTORED LANDS DETERMINATION FOR THE COWLITZ TRIBE ILLUSTRATES THE INADEQUACY OF THE NIGC'S AND BIA'S DECISION-MAKING PROCESS

The insufficiency of NIGC's and BIA's current approach to restored lands determinations is demonstrated by the NIGC's recent review of a request filed by the Cowlitz Indian Tribe (Tribe). On March 15, 2005, without notice to the affected State, local governments or the public, the Tribe filed a request with the NIGC for a restored lands opinion for a 157-acre parcel of land located near La Center, Washington (Parcel). The Parcel is the subject of trust acquisition and initial reservation designation requests now pending before the BIA, and the land is intended to be used for a massive casino resort.

To obtain a restored lands determination in an expedited manner, and without input from other affected parties, the Tribe linked its restored lands request to the submission of a Class II tribal gaming ordinance. It did so by making the ordinance site-specific. The Tribe filed its restored lands request in March 2005, and then added the gaming ordinance request in August 2005. NIGC regulations do not require a gaming ordinance to identify the site at which gaming is to be conducted. *See* 25 C.F.R. § 522.2. The regulations do, however, require that gaming ordinances be reviewed within a 90-day period. *See id.* § 522.4. The Tribe argued that it was necessary to make the restored lands decision prior to the NIGC's decision whether to approve the ordinance because the ordinance was site-specific.

The Tribe's gaming proposal has been a highly controversial proposal for a number of reasons, including: 1) the Tribe's refusal for over two years to disclose its development plans during the trust acquisition process; 2) the magnitude of the proposed casino and the adverse impacts it would have on the local communities; and 3) the tenuous connection of the Tribe to the land involved. Public concern has been extraordinarily high throughout the BIA's trust acquisition review process for the

Cowlitz request; yet, despite the obvious public interest and concern, neither BIA nor the NIGC provided notice of the Tribe's restored lands request to the State, local governmental entities, or the public.

In fact, efforts by citizen groups to discover whether the Tribe had applied for a restored lands determination were stymied by the BIA. The BIA Regional Office either ignored for extended periods of time or denied Freedom of Information Act requests, including one specifically inquiring as to whether the Tribe had filed for a restored lands request. A request filed by the Congressional Representative for the region, Brian Baird, went unanswered for months. In a meeting between a citizen group and Deputy Assistant Secretary-Indian Affairs George Skibine in Washington, D.C. in May 2005, Mr. Skibine indicated that he thought that a restored lands request had been filed by the Tribe, but when the organization contacted NIGC attorney Sandra Ashton, she would not confirm that the Tribe had filed a restored lands determination request.

This same citizens group then requested Representative Baird's assistance. His district director Pam Brokaw contacted Stanley Speaks, director of the BIA's Northwest Regional Office, who denied any knowledge of a restored lands application. In fact, on July 27, 2005, the citizens group received a letter from the BIA's Acting Northwest Regional Director stating that, "[w]ith respect to application of the exemption of restored land pursuant to Section 20 of the Indian Gaming Regulatory Act, please be advised that this office has received no such request from the Cowlitz Tribe." On that same day, Mr. Skibine testified before Congress about the issue of off-reservation gaming. In his written testimony, Mr. Skibine presented a table which indicated that the Tribe had only submitted a reservation designation request, not a restored lands determination.

It was not until October, 2005, that another citizens group was able to confirm that there was indeed a restored lands determination request pending before the NIGC.

During another meeting with Mr. Skibine, the group's representatives learned that a restored lands request was pending at the NIGC. The existence of the application was finally confirmed with the NIGC on October 14, 2005, only about one month before the deadline for the gaming ordinance decision.

Because the Tribe had linked its gaming ordinance to the restored lands finding, by the time the restored lands request became known to the public, less than 40 days were left before the NIGC's decision deadline. In that time, it was discovered that the Tribe had submitted extensive, and misleading, documents and legal arguments to the NIGC in support of its request. At the same time, BIA had failed to make available to the NIGC important information relevant to this question that it had in its possession. BIA's failure to provide this information was in contravention to the MOU signed by the BIA and NIGC.

Interested parties were able to submit comments and briefs, but were forced to do so within an unreasonably short period of time. The public had approximately 30 days to review the materials the Tribe had submitted, gather their own documents, conduct legal research, and file comments with the NIGC.

The NIGC's final opinion reflects the fact that the Tribe was the only entity with a meaningful opportunity to participate. The opinion itself deviates from prior precedent, which uniformly requires a tribe to have a significant cultural and historical connection to the land before a particular area can be determined to be restored lands. In this case, the NIGC substituted the longstanding requirement for significant cultural and historical connection to the land with a new emphasis on the mere act of prompt filing of a trust land application soon after its acknowledgment. Thus, rather than using the temporal relationship of the filing for trust land to limit those cases in which land could qualify as restored lands, the NIGC allowed the fact that the Cowlitz Tribe filed its request the day after it received tribal recognition to serve as the proxy for a demonstrable significant historical and cultural connection to the site. The prompt

filing of an application cannot be considered to be the "difficult hurdle" the NIGC previously viewed the phrase "restoration of lands" to present, *see* NIGC *Grand Traverse* Opinion at 15, when every tribe in the nation understands the significance of a trust land request in the gaming context, and tribes seeking acknowledgment are invariably poised to pursue casino development.

The NIGC's opinion also contravenes Congress' clear mandate that the Secretary, not the NIGC, make all reservation and restored land determinations for the purposes of 25 U.S.C. §§ 2701-2721. *See City of Roseville v. Norton*, 348 F.3d 1020, 1029 (D.C. Cir. 2003) ("Congress . . . enact[ed] legislation stating that the authority to determine whether land is a 'reservation' was delegated to the Secretary as of the effective date of IGRA. *See* Pub. L. No. 107-63, § 134 (2001)"); *State of Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277-1278 (D. Or. 2003) ("It requires no great leap of logic to conclude that the Secretary's authority to interpret the term 'reservation' within the contiguous lands exception extends to the phrase 'restoration of lands' within the restored lands exception. Therefore, I find that the restored lands exception contains an implicit delegation of authority to the Secretary to provide meaning to the terms 'restore' and 'restoration' of lands.").

Finally, the NIGC's opinion is inconsistent with past practice as reflected in a BIA rulemaking from several years ago. On September 14, 2000, the BIA issued a Proposed Rule that would have established procedures that an Indian tribe must follow in seeking a Secretarial determination that gaming would be permissible on lands acquired in trust after October 17, 1988. *See* 65 Fed. Reg. 55471 (Sept. 14, 2000). The proposed rule related to a separate subsection in 25 U.S.C. § 2719, the same provision for which Petitioners seek a rulemaking here. Further, section 2719, in contrast to all other provisions in the IGRA, refers to the authority and responsibilities of the Secretary, not to the Chairman of the NIGC. The draft regulations now being considered for implementing section 20 were developed by the BIA and it is the BIA

that will implement the regulations. These new regulations, as well as the BIA's 2000 rulemaking, confirm that it possesses the authority to promulgate regulations implementing 25 U.S.C. § 2719 for purposes of the Secretarial determination allowing gaming is equally applicable to other subsections of the same section.

The NIGC's decision is arbitrary and capricious and reflects the fact that the decision-making process suffers from a lack of standards and objectivity. This petition for rulemaking and the attached regulations are aimed at remedying this problem.

BIA'S CONSIDERATION OF THE COWLITZ TRIBE'S INITIAL RESERVATION REQUEST FURTHER ILLUSTRATES THE NEED FOR REGULATIONS

Even before filing its restored lands request, the Tribe was seeking a way to avoid the two-part determination and its related procedural steps. The Tribe's other avenue for avoiding section 20 has been to seek an initial reservation designation. In March, 2004, immediately following County approval of a memorandum of understanding with the Tribe (approval which was given with the good-faith understanding that the only requested action was to have a parcel of land taken into trust), the Tribe submitted a trust request and added the request that the BIA designate the land as its initial reservation.

There is a critical difference to the local governments between trust status and initial reservation status. Section 20 of IGRA prohibits gaming facilities on newly-acquired trust land, in the absence of passing the two-part determination and achieving the Governor's concurrence. As noted above, an exception to this prohibition is for land that is taken into trust as an initial reservation. Furthermore, the act of placing land in reservation status makes it possible for a tribe to have subsequently-acquired parcels placed in trust status under the more permissive standards of 25 C.F.R.

§ 151.10, as opposed to the requirements of 25 C.F.R. § 151.11, which provide greater protection to local communities.

The Tribe's attorney has openly acknowledged that the reason the Cowlitz were seeking initial reservation status for the 157-acre parcel was to avoid the two-part determination. Congress enacted the rigorous standards of section 20 to avoid such attempts by tribes to export gaming away from their primary place of residency and tribal operations to a more favorable market location without regard to the interests of local communities. Yet, despite the importance of the two-part determination, BIA has no standards to make initial reservation designations, and no public comment procedures are provided. Thus, there is significant room for abuse of this exception to the two-part determination requirement.

SUMMARY AND REQUEST FOR RULEMAKING

For the foregoing reasons, Petitioners request that the Department of the Interior and the BIA promulgate regulations according to Appendix A. Seventeen years after the enactment of IGRA, the absence of regulations to govern these critically important decisions is inexcusable. As these experiences with the Cowlitz Tribe confirm, the absence of such standards is causing great harm to State and local governments and the general public while promoting controversy and conflict. The first step for addressing this problem is the promulgation of regulations that establish clear procedures and rigorous standards for government action. The enclosed draft regulations set forth the requested content of these rules. Please inform the undersigned of any determination or action on this petition.

Respectfully submitted,

____
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March 30, 2006

APPENDIX A – PROPOSED RULE

PART 292: GAMING ON LANDS ACQUIRED AFTER OCTOBER 17, 1988 UNDER THE INITIAL RESERVATION AND THE RESTORED TRIBES/RESTORED LANDS EXCEPTIONS TO THE TWO-PART DETERMINATION OF SECTION 20 OF IGRA

Sec. 292.1 What is the purpose of this part?

This part contains procedures that the Department of the Interior will use to determine whether lands proposed for trust acquisition qualify as an initial reservation under 25 U.S.C. § (b)(1)(B)(ii) or as the restored lands of a restored tribe under 25 U.S.C. § 2719(b)(1)(B)(iii).

Sec. 292.2 How are key terms defined in this part?

All terms have the same meaning as set forth in the definitional section of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2703(1)-(10). In addition, the following terms have the meanings given in this section.

(1) Appropriate state and local officials means the Governor and Attorney General of the affected state, and appropriate officials of units of local government within 30 miles of the site of the proposed gaming establishment, unless a greater distance is appropriate.

(2) BIA means Bureau of Indian Affairs.

(3) Day means calendar day.

(4) Former reservation means lands that are within the boundaries of the last reservation for that tribe established by treaty, Executive Orders, or Secretarial Orders.

(5) Aboriginal lands means lands determined to be used exclusively by an Indian tribe as determined by the Indian Claims Commission or other federal court or by Congressional Act or federal treaty.

(6) IGRA means the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701-2721.

(7) Nearby Indian tribe means an Indian tribe with Indian lands, as defined in 25 U.S.C. § 2703(4) of IGRA, located within a 75-mile radius of the location of the proposed gaming establishment.

(8) NIGC means the National Indian Gaming Commission.

(9) Regional Director means the official in charge of the BIA regional office responsible for all BIA activities within the geographical area where the proposed gaming establishment is to be located.

Sec. 292.3 When can a tribe conduct gaming on trust lands acquired after October 17, 1988?

In accordance with section 20 of IGRA, a tribe can conduct Class II or Class III gaming activities on trust lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after October 17, 1988 only if the land meets the conditions in section 292.4.

Sec. 292.4 What criteria must trust land meet for gaming to be allowed?

(a) For class II or III gaming to be allowed on trust land, the land must meet one of the criteria shown in the following table:

The land must:	As required by:
1. Be located within or immediately touching the boundaries of the tribe's reservation as it existed on October 17, 1988	25 U.S.C. 2719(a)(1)
2. Be taken into trust as part of the settlement of a land claim	25 U.S.C. 2719 (b)(1)(B)(i)
3. Be taken into trust as part of the tribe's initial reservation that the Secretary acknowledged under the federal recognition process, as determined under section 292.15 of this part	25 U.S.C. 2719(b)(i)(B)(ii)
4. Be taken into trust as part of the restoration of lands for a tribe that is restored to federal recognition, as determined under section 292.12 of this part	25 U.S.C. 2719(b)(i)(B)(iii)
5. Be exempted from requirements of this section because the Secretary determines that gaming is in the best interest of the tribe, would not be detrimental to the surrounding community, and the governor of the affected state concurs.	25 U.S.C. 2719(b)(i)(A)
6. Meet one of the criteria in paragraph (b) of this section, if the tribe had no reservation on October 17, 1988.	25 U.S.C. 2719(a)(2)

(b) If a tribe had no reservation on October 17, 1988, the land must meet one of the criteria in the following table:

If the land is located in ...	It must be ...	Or ...	As required by ...
Oklahoma	Within the boundaries of the Tribe's former reservation	Contiguous to other land held in trust or restricted status by the United States for the tribe in Oklahoma	25 U.S.C. 2719(a)(2)(A)(i)(vv)
In state other than Oklahoma	Within the boundaries of the tribe's last recognized reservation within the state where the tribe is presently located		25 U.S.C. 2719(a)(2)(B)

Sec. 292.5 Where must a tribe file on application for a restored tribe/restored lands finding or initial reservation designation?

A tribe must file its application for a restored tribe/restored lands finding or initial reservation designation with the Regional Director of the BIA Regional office having jurisdiction over the land where the gaming establishment is to be located. If a request is made with the NIGC that requires a finding that land qualifies as restored lands under this section, the NIGC shall direct the tribe to file a restored lands request with the Regional Director of the appropriate Regional Office. Any decision requiring a determination that the lands referenced qualify as restored lands shall be suspended or denied until such time as the Office of Gaming Management has rendered a decision on the application for a restored tribe/restored lands finding.

Sec. 292.6 May a tribe request a restored tribe/land finding or initial reservation designation for lands not yet held in trust?

Yes. A tribe can request a restored tribe/restored lands finding for land not yet held in trust. Any restored lands decision shall not affect the BIA's decision on any trust request, and shall be contingent on the acquisition in trust of land.

Sec. 292.7 What must an initial reservation designation request contain?

A request for an initial reservation designation must contain:

a) The full name, address, and telephone number of the Indian tribe submitting the application;
b) A physical description of the location of the land, including a legal description supported by survey or other document;
c) Proof of present ownership and title status of the land;
d) A listing of any other land owned in fee or held in trust or reservation status, or for which the tribe possesses an option to purchase;
e) Evidence of the tribe's historical and cultural connection to the land which the tribe wishes to conduct gaming, as described in section 292.11;
f) The uses to which the land will be put, including a showing of relative usage for governmental, housing, social, educational and other tribal purposes compared to gaming;
g) The factual circumstances of the acquisition;

Sec. 292.8 What must a restored lands request contain?

In addition to the information under section 292.7, the restored lands request shall contain:

a) Evidence demonstrating that the tribe was previously recognized by the federal government, as described in section 292.9;
b) Evidence demonstrating that the tribe's relationship with the federal government was terminated, as described in section 292.10; or
c) Evidence that the tribe's relationship with the federal government was re-recognized, as described in section 292.11

Sec. 292.9 What evidence demonstrates that a tribe was previously recognized by the federal government?

One or more of the following provides evidence that a tribe was previously recognized by the federal government:

a) Existence of ratified treaty;

b) Congressional action indicating that a government-to-government relationship exists;

c) Executive order;

d) An unratified treaty and congressional or executive action; or

f) The United States at one time acquired land in trust for the tribe.

Sec. 292.10 What evidence demonstrates that a tribe's relationship with the federal government was terminated?

The following provides evidence of later termination:

a) Congressional termination; or

b) Administrative termination demonstrated by historical testimony or documentation from the Department of the Interior.

Sec. 292.11 What evidence demonstrates that a tribe was re-recognized?

The following is evidence of a tribe being restored to federal recognition:

a) Federal recognition through administrative process under 25 U.S.C. Part 83; or

b) Congressional recognition.

Sec. 292.12 What qualifies as restored lands?

To qualify as restored lands, it must be demonstrated that there exists a significant historical or cultural connection to the land, as evidenced by:

a) Specific identification of the land in legislation restoring the government-to-government relationship between the United States and the Tribe; or

b) The land was once designated as the tribe's reservation by treaty or executive order; or

c) The land is located in an area to which the tribe can demonstrate that it had significant, documented connections, including:

   1) The land was the site of a substantial, long-standing prior tribal village; or

   2) The land was the site of a substantial tribal cemetery or religious site; or

   3) The land is within an area determined by the Indian Claims Commission or a federal court to be the aboriginal lands of the tribe; and

   4) The tribe had exclusive use and occupancy to the preclusion of other tribes.

Sec. 292.13 What factors shall the Secretary consider when looking at the factual and/or temporal circumstances of the acquisition?

The Secretary shall consider the following factors when evaluating the factual circumstances of the acquisition:

a) The timing of the acquisition such that the longer period between the acquisitions, the stronger the connection to land is required;
b) The tribe's ownership of other lands;
c) The site of tribal government, whether on fee or Indian lands; and
d) The purposes to which the land is proposed for use.

Sec. 292.14 How shall the Secretary balance the factual circumstances of the acquisition with the tribe's connection to the land?

The Secretary shall not determine that lands qualify as restored lands, unless the tribe can demonstrate the factors identified in section 292.12. The factual and/or temporal circumstances of the acquisition shall be used to limit those cases where land qualifies as restored lands only. The factual and/or temporal circumstances of acquisition shall not be used to compensate for a tribe's failure to demonstrate the existence of a significant historical or cultural connection to land.

Sec. 292.15 What must be demonstrated to meet the initial reservation exception?

To be designated as an initial reservation, the land must:

a) Meet the criteria of § 292.12 for restored lands; and
b) Serve a predominant tribal purpose other than gaming; and
c) Have been declared a new reservation pursuant to 25 U.S.C. § 467.

Sec. 292.16 What must the Regional Director do upon receiving an application for a restored lands determination or initial reservation designation?

Upon receiving an application, the Regional Director must:

a) Notify the tribe within 30 days of the receipt of the tribe's application and indicate whether any required information is missing;
b) Provide copies of the application, if complete, to the Office of Indian Gaming Management for its consideration;
c) Notify the NIGC of the application for a restored lands finding;
d) Provide written notice to the Governor and potentially affected local governments, and officials of other nearby tribes; and

e) Publish notice of the request in the Federal Register and newspapers of general circulations in the area affected by the request.

Sec. 292.17 How will the Regional Director conduct the process for collection of information for a restored lands determination or an initial reservation designation?

The Regional Director will conduct the evidence gathering process by:

a) Making all materials submitted by the tribe publicly available ;
b) Providing a 120-day period for any party to provide evidence or arguments on the request; and
c) Conducting public hearings, as public interest requires.

Sec. 292.18 What must the Regional Director do at the end of the comment period?

Upon completion of the comment period described in section 292.17, the Regional Director shall forward all materials to the Office of Gaming Management for review.

Sec. 292.19 What must the Office of Gaming Management do upon receiving the materials forwarded by the Regional Director's office?

The Office of Gaming Management shall:

a) Review the materials submitted to the Regional Director and determine whether the evidence meets the requirements for a restored lands determination or initial reservation designation.
b) Forward a draft determination to the Solicitor's Office for consideration:
    1) If the Solicitor's Office approves the decision, forward the draft decision to the Regional Office to be circulated for public comment for 30 days; or
    2) If rejected, reconsider the decision at the direction of the Solicitor's Office.
c) Extensions of the public comment period shall be liberally granted upon request by state or local government officials or the public.

Sec. 292.20 How will the Office of Gaming Management consider the public comments on the draft decision?

The Office of Gaming Management shall consider all public comments submitted by the expiration of the comment period and shall respond to these public comments in its final decision.

Sec. 292.21 Are the Office of Gaming Management's decision appealable?

All restored lands/restored tribes determinations and initial reservation designations are subject to appeal before the Interior Board of Indian Appeals.