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March 24, 2006

Via Federal Express

James Cason
Associate Deputy Secretary
Department of Interior
1849 C Street, NW
Room 6117
Washington, DC 20240

Re: BIA NEPA Review of Cowlitz Casino Proposal

Dear Mr. Cason:

On behalf of Citizens Against Reservation Shopping (CARS), located in Clark County, Washington, we are writing to follow up on your request for additional information regarding the problems presented by the Cowlitz proposal and to present one of the most troubling aspects of the Tribe's efforts to establish a casino in Clark County. This issue concerns the manner in which the Pacific Northwest Regional Office of the Bureau of Indian Affairs (BIA Regional Office) is fulfilling its federal trust land acquisition regulatory responsibilities and its duties under the National Environmental Policy Act (NEPA) on the proposed trust acquisition request. In particular, we seek your assistance in addressing the result-oriented and legally insufficient approach to the NEPA analysis being pursued by the BIA Regional Office, apparently at the behest of the Tribe. This presents a serious problem that requires resolution at the BIA headquarters level.

For more than four years we have seen repeated efforts by the BIA Regional Office and the Tribe to shortchange public review and NEPA compliance associated with this trust acquisition request. The Tribe has repeatedly attempted to conceal its plans to develop a large-scale casino at the proposed trust site, which consists of 151.6 acres of land adjacent to I-5 near La Center, Washington (La Center parcel), and to minimize the amount of environmental review and public scrutiny necessary for such a large multi-stage development proposal. Much of the controversy, dispute, expense and delay associated with this proposal results from the Tribe's refusal to consider alternative development and locations that, while still providing for all legitimate tribal needs, would avoid the adverse economic and environmental impacts associated with the La Center parcel. Unfortunately, the BIA Regional Office has not only done nothing to address this ongoing problem, but by its inaction, has affirmatively enabled the Tribe to narrow the review effectively to a single location contrary to the directives under NEPA.

The current version of the draft environmental impact statement (DEIS) illustrates this problem. The DEIS, which is currently under consideration by cooperating agencies,

fails to meet NEPA requirements or serve the public interest because it does not consider this proposed action in a reasonable and objective manner. The DEIS is a biased and outcome-oriented document that reads like a prospectus for the casino at the La Center site, not a balanced review of the proposed action, its impacts, and alternatives. The City of Vancouver has issued strong negative comments on this document. CARS concurs in the City's comments. The DEIS not only violates NEPA but also guarantees maximum conflict and controversy by virtually preordaining the selection of the Tribe's preferred alternative and eliminating from consideration, or failing to consider altogether, reasonable alternatives to the La Center location.

It is not the purpose of this letter to provide a detailed critique of the DEIS. We will submit our specific comments at the appropriate time. As a preliminary matter, however, there are two fundamental problems with the DEIS that must be addressed at the policy-level of the Department of Interior before the document is released for public review. These problems are: 1) the failure to consider an adequate range of alternatives; and 2) the need for a programmatic-type review in addition to the site specific EIS for gaming-related trust land acquisition.

To date, the BIA Regional Office has continually refused to address these issues and has consistently failed to respond to public concerns about the Cowlitz proposal over a period of many years. By this letter, we are asking you to intervene in this matter now to prevent a seriously deficient DEIS from being circulated and to avoid initiating a decision-making process that will result in a highly contentious and prolonged conflict. Further discussion of these problem areas associated with the DEIS is provided below.

A. NEPA Requirement to Objectively Consider Reasonable Alternatives

1. Purpose of a Properly Prepared EIS

The purpose of an EIS "is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1. An EIS must consider and assess the environmental consequences of the proposed action and reasonable alternatives to the action. *Id.* § 1502.14. It is the consideration of alternatives that is "the heart of the environmental impact statement." *Id.* So critical is the consideration of alternatives to the NEPA process that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

NEPA regulations require that the underlying purpose and need for a proposed action be stated in an EIS. *Id.* § 1502.13. As explained by the Ninth Circuit, "[t]he stated goal of a

project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1995) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C. Cir.1991)). "The rule of reason guides 'both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative.'" *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir.1999) (quoting *City of Carmel-by-the-Sea*, 123 F.3d at 1155). "[F]or alternatives which were eliminated from detailed study, [an agency must] briefly discuss the reasons for their having been eliminated." *Id.* (quoting 40 C.F.R. § 1502.14(a)). NEPA prohibits agencies from preparing an EIS simply to "justify [] decisions already made." 40 C.F.R. § 1502.2(g). The DEIS fails to meet these tests by a significant margin.

2. Fundamental Shortcomings of the DEIS

One of the most significant problems with the DEIS is the review of alternatives. The range of alternatives considered in a DEIS is based on the statement of purpose and need. In this case, the DEIS properly adopts a broad statement of purpose and need:

The purpose and need for taking the property into Federal trust, issuing of a reservation proclamation, and approving the gaming development and management contract is to advance the BIA's "Self Determination" policy of promoting the Tribe's self-governance capacity.

Although this statement is sufficiently broad, the BIA Regional Office and the Tribe have limited the NEPA review in application.

The DEIS constrains the review of alternatives to: 1) no action; 2) a large-scale casino resort located at La Center; 3) a large-scale casino resort located to the south even closer to the Portland gaming market; or 4) an alternative for the La Center site that would involve non-gaming commercial development. There is no legitimate basis for such a narrow review. Drawing an imaginary line at La Center and refusing to look to the north closer to the traditional Cowlitz Tribal lands, is an example of directing the agency review process to achieve a specific end result. The current range of alternatives is purely arbitrary. It is designed to make the La Center parcel appear to be the only viable option, rather than addressing, as an EIS must, the purpose and need statement through the review of reasonable alternatives.

If BIA is to meet its legal obligations under NEPA, it must address all viable alternatives. Such alternatives must include multiple sites closer to the Tribe's historic lands, which lie northeast of the La Center site. Cowlitz and Lewis counties are the historical, cultural and geographic center of the Cowlitz Tribe. Furthermore, most of the tribal

membership today live to the north of Cowlitz County, in and around the metropolitan area of Olympia, Washington, with fewer than five percent (5%) of tribal members living in Clark County, south of the Tribe's historic lands.

Clearly, the Tribe may choose one of several economically, logistically, and culturally viable sites within its historic lands. Land is available for acquisition, and studies show that these sites would be very profitable casino locations, more than adequate to meet the DEIS purpose and need statement. In fact, one such study of a viable alternative as yet to be considered by the BIA was presented to you during our group meeting on February 16th, and a copy of an updated version of that report is included for the record with this letter. Attachment 1. Finally, there are many uses for such lands other than casino development that will meet the legitimate needs of the Tribe.

Until the BIA Regional Office considers the full range of viable alternatives, the DEIS will violate NEPA and persist as a fraud upon the public. Given that this issue has been raised many times before, it is clear that the BIA Regional Office and the Tribe will comply with NEPA only if directed to do so by Department of the Interior policy officials or, ultimately, the courts.

3. Financial Interests of Mr. David Barnett and Salishan-Mohegan LLC and the Integrity of the NEPA Review Process

CARS's concern over the NEPA review is also heightened by the connection between the La Center parcel and Mr. David Barnett (Mr. Barnett), son of Cowlitz Tribal Chairman, John Barnett. Mr. Barnett is the President of Salishan-Mohegan LLC, a development partnership between the Cowlitz Tribe and the Mohegan Tribe of Uncasville, Connecticut. The details of Mr. Barnett's relationship to the La Center parcel and its future use by the Tribe are not fully known and have not been completely disclosed. Based on the limited information uncovered to date, however, Mr. Barnett's financial interests in the properties that constitute the La Center parcel raise serious concerns regarding his participation in the NEPA review process.

What is known is that, in 2001, Mr. Barnett entered a contract to purchase approximately one-half of the La Center parcel with the current owner, the Gregerson Living Trust. Gregerson—Barnett Real Estate Contract (as recorded with title insurance documentation). Attachment 2. This approximately 75-acre parcel sits to the north of 319th Street (which bifurcates the La Center parcel). At this same time, the Cowlitz Tribe filed its trust acquisition request with BIA.

Under this land purchase contract, Mr. Barnett, in his individual capacity, agreed to pay interest through March 2004, when a balloon payment would come due. The land had

not, of course, been acquired in trust by that time, due to the multiple deficiencies in the BIA review process and the Tribe's initial refusal to disclose its intent to develop a large-scale casino on the site. In fact, the comment period on the environmental assessment (EA) for the La Center parcel did not close until early June 2004. In the same month, the Tribe announced both its so-called "voluntary" decision to prepare an EIS and its partnership with the Mohegan Tribe through Mr. Barnett's company, Salishan-Mohegan LLC.

The strong public opposition to the EA clearly demonstrated that an EIS was needed and that a decision could not be made on the existing record. It seems that Mr. Barnett then renegotiated the contract with the Gregerson Living Trust under terms that are not known, but apparently extended the deadline of the March 2004 balloon payment. According to a recent article in *The Columbian* (*Columbian Article*), final payments on this parcel have apparently been extended into March 2006 and will be paid by Salishan-Mohegan LLC. Cami Joner, "Tribes buying acreage for casino," *The Columbian* (February 21, 2006). Attachment 3.

Mr. Barnett has similar ownership interests in the approximately 75-acre parcel of land that composes the southern portion of the La Center parcel, located to the south of 319th Street. On January 3, 2006, the previous owner of this land, Mr. Earl Bates, transferred his interest in the property to Salishan-Mohegan LLC. The sale price for this land was \$8,887,359, with an additional \$5,000,000 to be paid by Salishan-Mohegan LLC to Mr. Bates for the remaining acreage in the southeast corner of the proposed casino development site. Bates—Salishan-Mohegan LLC Statutory Warranty Deed, Attachment 4; *see also Columbian Article*. This is in addition to the approximately two-acre parcel in the northeastern corner of the La Center parcel that Mr. Barnett and the Salishan-Mohegan LLC have owned for several years. *See Columbian Article*.

We do not yet know all of the facts associated with these real estate transactions or their exact relationship to the proposed trust acquisition request. However, what is clear is that Mr. Barnett possesses a significant personal financial interest in this particular casino site and in assuring that the casino proposal for the La Center parcel is ultimately approved. CARS is concerned that Mr. Barnett's property interests and his role in the NEPA process through the participation of the Tribe as a cooperating agency has the potential to impact the consideration of alternatives in the DEIS.

Our concerns over the role that Mr. Barnett is playing in influencing the NEPA review have been exacerbated by Mr. Barnett's public comments regarding the process. In an article concerning recent meetings convened by the BIA and the NIGC to discuss the process related to the Cowlitz casino proposal, Mr. Barnett is quoted as explaining that the public will not be allowed to treat this as a question and answer period. He stated that "[c]asino opponents somehow think these meetings are going to give them an opportunity to express

their opinions about the project. When in fact these meetings are only to explain the process and the timelines. If the public doesn't like what they hear, that's their problem." Mike Andersen, "Meetings on casino scheduled," *Longview Daily News* (Jan. 20, 2006). Attachment 5. Similarly, in an article published in *The Oregonian* on January 22, Mr. Barnett is quoted as saying: "[The BIA review process] will continue frustrating those [parties concerned about the casino] until the land is put in trust . . . [A]t that time, they will be joining us in the line at the buffet when the casino opens." Allan Brettman, "David Barnett – Cowlitz developer not afraid to butt heads with critics in defending efforts to complete project," *The Oregonian* (January 22, 2006). Attachment 6. In the same article, Mr. Barnett admits that the Cowlitz Tribe is preventing public access to documents about its plans because other parties would be in a position to use such information to raise criticisms or concerns. As he is quoted: "I'm not going to hand somebody a knife and have them stab me in the back." *Id.*

Clearly, Mr. Barnett's comments do not reflect the underlying goals of NEPA. The Tribe's status as cooperating agency, and Mr. Barnett's ability to participate in that process through the Tribe's cooperating agency status, raise obvious concerns. We bring this issue to your attention because the BIA Regional Office appears to be developing its review of the proposal in a manner that fails to consider all economically viable alternatives, thereby violating federal law. The DEIS instead focuses only on the La Center site – the parcels in which Mr. Barnett or Mr. Barnett's company, Salishan-Mohegan LLC, have a financial interest. If this approach by the BIA Regional Office is an acceptable method for these (and therefore future) proceedings governing trust acquisition by the United States government, we would request full public disclosure of the legal basis and policy rationale for doing so.

B. The Need for a Regional Programmatic Review in Addition to a Site-Specific EIS

The Cowlitz proposed casino would be located 16 miles north of Portland, and it would include a \$510 million resort with an 877,000 square-foot casino, convention space, hotel resort with 3,000 slot machines and 155 gambling tables. At the same time, the Warm Springs Tribe is proposing its own massive gaming resort, consisting of a 603,000 square-foot casino with 2,000 slot machines and 70 gaming tables, only 43 miles to the east of Portland at Cascade Locks in the Columbia River Gorge. Recently, the Yakama Tribe has indicated it too will seek to open a casino in Battleground, 25 miles to the north of Portland and only 12 miles from the Cowlitz site.

All of these casino proposals are driven by the same goal: to get as close as possible to the Portland market. According to a recent report in *The Oregonian*, the Cowlitz and Warm Springs Tribes expect their casinos to "reap a combined \$665 million a year, surpassing the gambling at all nine of Oregon's tribal casinos." Allan Brettman, "It's no

bluff, Portland, Tribes see a jackpot here: The Warm Springs and Cowlitz are pushing for mega-casinos," *The Oregonian* (January 22, 2006). Attachment 7. Indeed, a regional gaming expert has determined that the Portland market "[is] not anywhere close to saturation." *Id.*

These tribal proposals, when considered together, demonstrate the clear need for a regionally-based NEPA review, not just the segmented site-specific EIS analysis now being considered for each site in isolation. The case law under NEPA is crystal clear on this point. For example, the Ninth Circuit faced a similar situation in *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (1990), involving a decision by the Forest Service authorizing the harvesting of old growth timber in the Tongass National Forest, a forest which covers about 17 million acres, by private timber companies. The court stated:

Where there are large-scale plans for regional development, NEPA requires both a programmatic and site-specific EIS. *See City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985)(citations omitted). This court has held that where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS. *See LaFlamme v. Federal Energy Regulatory Commission*, 852 F.2d 389, 401-02 (9th Cir. 1988). There, emphasizing the likelihood of future development, the court remanded to the agency for further consideration of cumulative impact because the agency had examined single projects in isolation without considering the net impact that all the projects in the area might have on the environment. *See LaFlamme*, 852 F.2d at 401-403.

Under the facts of the situation presented by the development of large-scale Indian gaming in the greater Portland area, it is clear that an additional programmatic EIS is required. Indeed, the facts in this situation are far more compelling than in the *Tenakee Springs* case. In that case, the area at issue covered virtually the entire southeast Alaska panhandle. Here, two if not three major casinos are under consideration on a closely circumscribed area around the City of Portland, focusing on the same gaming market, invoking the same BIA trust land acquisition authority, and occurring under the same time frame.

In closing, we note that the Cowlitz Tribe characterizes this trust acquisition and reservation designation as a necessary action for a "landless tribe" seeking a homeland. If that is indeed the case, then it follows that there are multiple locations and land uses that should be reviewed. In fact, it would appear that the Cowlitz Tribe's interests are not being well-served by the singular focus on the La Center parcel. Less controversial and more environmentally-acceptable, yet still highly profitable, locations for a Cowlitz casino and

reservation exist within its traditional land base. Had the Tribe pursued those locations four years ago on the basis of tribal interest, instead of the simple goal to maximize casino profits through the site that apparently is subject to the Barnett/Salishan-Mohegan LLC real estate interests, it is entirely possible that this dispute could have been avoided with the Tribe already benefiting from a designated reservation with economic development in place achieved through an uncontroversial, consensus-based process.

Based upon these concerns, we believe BIA has an obligation to expand the scope of this review under both NEPA and the trust land acquisition legal authorities. With so many tribes competing for the Portland market, and with the existence of other Tribal and non-Indian casinos in the surrounding area, BIA has a clear legal obligation to consider the regional effects under NEPA, and indeed, to look for regional solutions that are fair to all parties, without giving the Cowlitz or Warm Springs Tribes an unfair advantage. In addition, BIA must evaluate alternative sites that would fulfill the needs of the Cowlitz Tribe without the conflicts and adverse impacts of the proposed location. The same principle would appear to apply to the Warm Springs Tribe.

C. Conclusion

BIA's current segmented, result-oriented approach in this matter is preventing a negotiated regional solution from emerging. Instead, the approach being followed is forcing the trust acquisition process into years of conflict and controversy without serving the best interests of the Cowlitz Tribe or the other numerous parties, public and private, who will be harmed by developing the proposed casino on the La Center parcel. These issues require serious review from the Department's policy level to prevent the issuance of a DEIS that undermines the process and to ensure that a consensus solution is reached. Thank you for your careful consideration of this matter.

Sincerely,

Peter D. Mohr

cc: The Honorable Brian Baird
George Skibine
Stanley Speaks
The Honorable Maria Cantwell
The Honorable Christine Gregoire

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The Honorable Ted Kulongoski
The Honorable Robert McKenna
The Honorable Patty Murray
The Honorable Gordon Smith
The Honorable Greg Walden
The Honorable David Wu
The Honorable Ron Wyden
The Honorable Royce Pollard
Mr. Marc Boldt