



2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

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V. Heather Sibbison
(202) 457-6148
hsibbison@pattonboggs.com

Hon. John McCain
Chairman, Senate Indian Affairs Committee
836 Hart SOB
Washington, DC 20510

Dear Chairman McCain:

Chairman John Barnett of the Cowlitz Indian Tribe asked that I forward to you his written testimony for the Senate Indian Affairs Committee's Oversight Hearing on IGRA Exceptions and Off-Reservation Gaming, scheduled for July 27, 2005.

Please do not hesitate to contact Chairman Barnett at (360) 577-8140 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. Heather Sibbison', written in a cursive style.

V. Heather Sibbison

Enclosure

cc: The Hon. John R. Barnett,
Chairman, Cowlitz Indian Tribe



Cowlitz Indian Tribe

TESTIMONY OF THE HON. JOHN R. BARNETT, CHAIRMAN

THE COWLITZ INDIAN TRIBE OF WASHINGTON

SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON IGRA EXCEPTIONS AND
OFF-RESERVATION GAMING

JULY 27, 2005

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

For over 25 years I have been traveling to speak to this great body on behalf of my Tribe -- more than fifty trips -- always on my own dime, and always focused on righting the historical wrongs that have been committed against my people.

Most recently, over the past few months I have testified before this Committee on behalf of the Cowlitz Tribe about the burdens imposed on us by the Department of the Interior's administrative Federal Acknowledgment Process (FAP) and about the challenges we face as a newly recognized tribe. As you know, we were finally recognized through the Federal Acknowledgement Process in 2002, a process that took over twenty-five years. But no challenge has been greater for us than the process of acquiring land for our people. For this reason, I very much appreciate having this opportunity to tell you about the Cowlitz Tribe's views on acquiring land in trust and how the Indian Gaming Regulatory Act's (IGRA's) Section 20 exceptions affect us.

There is so much talk and controversy about "off-reservation" gaming and about "reservation shopping." We fear that in the rush to "fix" the Section 20 exceptions, Congress and the Department of the Interior may fail to remember that newly recognized landless tribes are poor tribes in desperate need of the United States' active assistance. We fear our friends in Washington may have forgotten that newly recognized tribes face daunting obstacles to self-governance and self-sufficiency precisely *because* we are landless

and poor. Without a land base, we are unable to provide housing to our members, unable to build health clinics, unable to participate in federal programs that are tied to being “on or near a reservation,”¹ and, perhaps most importantly, unable to conduct the economic development necessary to generate the revenue a tribe must have to provide governmental, health and housing services to its members.

I am here today to ask that Congress continue to insist that there be a fair and equitable mechanism to put newly recognized tribes on a level playing field with tribes that were lucky enough to have had a reservation on October 17, 1988. IGRA’s current “initial reservation” exception serves that purpose, and it must be preserved.

The Initial Reservation Exception

As you know, the Indian Gaming Regulatory Act prohibits the conduct of Indian gaming on lands acquired in trust after October 17, 1988. In its wisdom, however, Congress understood that it would be wildly inequitable to apply this prohibition under certain circumstances. One such circumstance, and I would argue the most compelling of these circumstances, is the one that allows a tribe newly recognized through the Department of the Interior’s Federal Acknowledgement Process to game on its “initial reservation.” *See* 25 U.S.C. § 2719(b)(1)(B)(ii).

I think it needs to be made clear that there are relatively few FAP-recognized tribes. Over almost 27 years that the administrative process has been in existence, the Department has recognized only 15 tribes. *To the best of our knowledge, there are only six FAP-recognized tribes which are landless today, including the Coulitz and our good friends of the Snoqualmie Tribe, also of Washington State.* I would like to recognize representatives of the Snoqualmie Tribe who are also here today at this hearing. We extend our greetings and best wishes to them as they struggle with the same land acquisition issues as do we.

Even though there are so few landless FAP-recognized tribes, the deck is heavily stacked against our efforts to get land in trust, particularly where we want to use the land for economic development involving gaming. Despite the fact that Interior has the authority to acquire land for newly recognized tribes (through the Indian Reorganization Act), Congress has not appropriated funding for land acquisition since 1950. For that reason, a landless newly recognized tribe must identify appropriate land, find the financial means to acquire title to the land, and complete a wide variety of expensive, time-consuming studies, data preparation, and other work relating to the fee-to-trust process with no financial assistance and very little technical assistance from the federal government. I trust then it comes as no surprise that newly recognized tribes are hard pressed to generate the funds needed to pay for these things.

¹ Examples of federal programs that are tied to having a reservation land base include the Indian Business Development Program, 25 U.S.C. §§ 1521 et seq., 25 C.F.R. Part 286; the Employment Assistance Program, 25 C.F.R. Part 26; and the Vocational Training Program, 25 C.F.R. Part 27. Further, because Interior’s fee-to-trust regulations impose more burdensome requirements for “off-reservation” acquisitions, future acquisitions that are not contiguous to parcels proclaimed as the Tribe’s reservation will also be deemed to be “off-reservation.”

It also must be understood that, by definition, any land a newly recognized tribe identifies for trust acquisition is treated by Interior as an “off-reservation” acquisition because newly recognized tribes do not have reservations. That means the tribe has to comply with Interior’s more rigorous “off-reservation” fee-to-trust regulations. Most notably, where the tribe plans to use the land for gaming, the Tribe will have to find the money to pay for an exhaustive environmental review – in most cases, like ours, this means the preparation of an Environmental Impact Statement (EIS) under NEPA.² For the Cowlitz, preparation of the EIS alone will cost much more than \$1 million.

Of course, any land that a landless FAP tribe acquires will, if taken into trust by Interior, come off the local tax rolls and be withdrawn from local jurisdiction. As you can imagine, this rarely makes the newly recognized tribe popular with the local community. Further, if, as in our case, the newly recognized tribe acquires land in a local community that generally supports gaming, there likely already is another gaming establishment there that will 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’s probably because the local community is disinterested in – or possibly even hostile to – hosting a gaming facility. Again, not a way to gain popularity in the tribe’s local community. For these reasons, it is little wonder that newly recognized FAP 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. Imagine, then what will happen to us if federal legislation is enacted to require the affirmative concurrence of local governments before land could be acquired in trust for gaming for a newly recognized, landless FAP tribe?³ Certainly such treatment of a landless tribe is inconsistent with the United States’ general trust responsibility. Congress’ wisdom in including the initial reservation exception in IGRA in 1988 should not be undermined in 2005.

The Cowlitz Tribe’s Efforts to Obtain Land

The Cowlitz Tribe has identified a parcel of land that is located squarely within the service area established for us by the federal Indian Health Service and by HUD’s Office of Public and Indian Housing, where many of our tribal members currently live. That parcel of land is also squarely within an area to which the Cowlitz Tribe has strong historical connections, as reflected in materials prepared by the Department of the Interior’ Office of Federal Acknowledgment (formerly the Branch of Acknowledgment and Research). In addition, our historical ties to this area were documented in the Indian Claims Commission (ICC) litigation, and the parcel is only fourteen miles south of the boundary drawn by the

² See March 2005 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations under Section 20 of the Indian Gaming Regulatory Act, at 10.

³ We are particularly concerned about proposed legislation introduced by Congressman Rogers (H.R. 2353, section 6) and Senator Vitter (S. 1260, section 2). Congressman Rogers’ bill would require approval by the “State, city, county, town, parish, village, and other general purpose political subdivisions of the State with authority over land that is concurrent or contiguous to the lands acquired in trust for the benefit of the Indian tribe for the purposes of gaming.” Senator Vitter’s proposal eliminates the “initial reservation” exception all together and would require a Tribe to satisfy a significantly more onerous version of the current “two-part” exception.

ICC that delineated the area used and occupied exclusively by the Cowlitz.⁴ It is one mile southeast of the Lewis River, where the Cowlitz Tribe historically lived, hunted, gathered and fished, and there are a multitude of other historical connections to the surrounding area recognized by the ICC and the federal government that are too numerous to mention here. These lands are some of the very lands that we lost as a result of the federal government's wrongful actions so many years ago. Given these circumstances, the Cowlitz's efforts to re-acquire this land in trust can hardly be considered "reservation shopping."

It has been particularly painful for us to be the subject of a misinformation campaign launched by non-Indian gaming interests maligning our connections to this land simply to protect their monopoly on gaming in southwestern Washington. Their mischaracterization of our ties to this land is ironic given that we became landless precisely because we refused to move from our traditional lands to a reservation in another tribe's territory when Governor Isaac Stevens came to secure a land cession treaty from us in 1855. Despite the fact that we did not cede our lands and no reservation was established for us, President Lincoln opened our lands to white settlement by Executive Order in 1863. As non-Indians settled our traditional lands, we became entirely landless and scattered throughout southwest Washington. As a consequence of our landless status, the Department of the Interior eventually came to view us as unrecognized.

Even more ironic, we brought suit before the Indian Claims Commission in 1946 to obtain compensation for our lost lands. The ICC issued an order in 1969 finding that we had never been paid for the lands taken from us and that we were entitled to compensation. The Tribe insisted that any settlement legislation implementing the ICC judgment must set aside some of the money for land acquisition, but for over thirty years the Department of the Interior opposed the draft settlement legislation on the grounds that unrecognized tribes could not acquire tribal lands and that all the money had to be distributed on a per capita basis. Because we refused to take payment for our lost lands until some of that money was set aside for land acquisition, we did not obtain legislation authorizing the payment of our ICC damages award that included a provision setting aside settlement money for land acquisition until just *last year*.

In short, the Cowlitz Tribe lost both its land base and its federal recognition because *it refused to move from its home territory, the same territory in which we now seek to put land into trust*. The irony is that if we had agreed to a reservation outside our historical area, we would not have suffered from a century-and-a-half of non-recognition and landlessness. And we almost certainly would not be suffering now from the disingenuous and inflammatory attacks of our opponents.

Working Within the System

The Cowlitz Tribe is working hard to work within the system. We are painstakingly following all the rules established by the federal government, as evidenced by our twenty-five year ordeal completing the federal acknowledgement process, our submission of a fee-to-trust application identifying the parcel we want to acquire in trust for gaming, our support of BLA's decision to prepare an EIS for the trust acquisition, and

⁴ The Cowlitz shared occupancy in the area in which the parcel is located with a Chinookan group that unfortunately was entirely destroyed by European disease and encroachment by non-Indian settlers. See *Simon Plamondon v. United States*, 21 Ind. Cl. Comm. 143, 171 (I.C.C. 1969).

our submission of a management contract to the NIGC for approval. We have done these things at significant cost to the Tribe.

Further, my Tribe is not beholden to unscrupulous developers or anyone else that is trying to manufacture tribal connections to maximize their profits. We have been very fortunate in that we have found a partner in Indian Country to help get us on our feet. While we entertained offers from a number of top-tier development companies, we are proud to be working with and learning from the Mohegan Tribe of Connecticut. In 1994, the Mohegan Tribe also successfully emerged from the Federal Acknowledgement Process as a newly recognized, landless tribe. Today the Mohegan Tribe is reinvesting in Indian country, helping their Cowlitz cousins from across the country. We are grateful for the opportunity to work with the Mohegan Tribe, and we hope that this partnership will demonstrate that tribes can use gaming development to achieve good things for Indian people. I would like to take this opportunity to recognize and express our sincere gratitude to Mark Brown, the Chairman of the Mohegan Tribe, who is with us here today. He and his Tribe have shown that Indian tribes can and will reach out to help each other and will succeed if given half a chance. Mr. Chairman, we applaud you for encouraging successful tribes to help those who are less fortunate. We are the beneficiary of your efforts.

Improvements That Should be Made

In the context of our strong view that the federal government has an affirmative and solemn obligation to assist newly recognized landless tribes, we respectfully offer that there are a couple of improvements that could and should be made to the existing initial reservation exception.

First, the Department of the Interior has taken the position that the initial reservation exception of IGRA Section 20(b)(1)(B)(ii) requires that the Secretary of the Interior issue a reservation proclamation pursuant to her authority under Section 7 of the Indian Reorganization Act (25 U.S.C. § 467) before the FAP tribe may game on land acquired in trust for it. To obtain a reservation proclamation a tribe must apply to an office within BIA that is entirely separate from the offices which process the fee-to-trust and Section 20 applications. Further, BIA has taken the position that the reservation proclamation process is subject to NEPA, thereby in some cases adding additional process and financial burdens to newly recognized tribes.

While the Secretary's interpretation of Section 20(b)(1)(B)(ii) may be plausible, in fact we have been able to find no IGRA legislative history supporting the idea that Congress in fact had intended to graft this additional administrative/procedural requirement onto the land acquisition process for newly recognized FAP tribes. As you can imagine, imposing yet another application process (one handled by an entirely different office within BIA) on top of the already applicable fee-to-trust, Section 20, and NEPA processes simply adds more time and expense to the process for the FAP tribe without any clear cut public policy benefit being achieved. Hence, we would ask that Congress seriously consider clarifying that the first land taken into trust for a newly recognized FAP automatically becomes that tribe's initial reservation so that the tribe is not subjected to yet another expensive, time consuming process.

Second, and very importantly, Congress should impose time deadlines on Interior's processing of fee-to-trust/Section 20 applications. The process can and always does take *years* to accomplish. Some of this time is legitimate – certainly it takes some time to review an application and to properly complete NEPA compliance work. I know this Committee is concerned about the political influence brought to bear on Indian lands decisions. We are worried about that too. We think the only way to protect the integrity of the system is direct the Department of the Interior to make decisions within specified time frames. This will help force substantive decisions to be made rather than allow for political forces to prolong the process indefinitely. In our view, it is reasonable to require that Interior process and make a decision on a landless FAP tribe's fee-to-trust application within two years of it being submitted.

Conclusion

We understand that there have been abuses in the way fee-to-trust applications and the Section 20 exceptions have been handled by a few tribes, and certainly there are situations in which developers and lobbyists have tried to manipulate the system in order to maximize their business opportunities. But that is not happening here, and we do not think it is appropriate or just that the initial reservation exception, which applies only to a handful of tribes, should be sacrificed on the altar of political expediency. The misdeeds of a few should not become the basis for wholesale revisions to IGRA that fail to take into account the unique histories and modern circumstances of individual tribes. I am asking that, as the lawmakers for our nation, you act with due care and deliberation before altering the balance of federal, state and tribal interests created by the Section 20 exceptions, particularly the initial reservation exception. A rush to embrace any one-size-fits-all solution that is meant to address the actions of a very few tribes and a few greedy developers is likely to cause harm to the very tribes who most need your help -- tribes like mine that are simply trying to find a piece of land to call our own, on which we can rebuild our tribal government, promote our sovereignty and self-determination, and create economic opportunities for our people.

The Cowlitz Tribe thanks you for the opportunity to provide this testimony, and we offer our continuing assistance to the Committee as it considers whether and/or how to amend Section 20 of IGRA.