TESTIMONY OF THE HON. JOHN R. BARNETT, CHAIRMAN

THE COWLITZ INDIAN TRIBE OF WASHINGTON

BEFORE THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON THE SECOND DISCUSSION DRAFT OF LEGISLATION REGARDING OFF-RESERVATION INDIAN GAMING

NOVEMBER 9, 2005

Chairman Pombo, Ranking Member Rahall, and respected members of this Committee, I thank you for the opportunity to testify this morning on this most important matter.

For over 25 years I have been traveling to speak to Congress 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. My position as an elected leader of my Tribe came with a small salary, but I've always felt that our scarce tribal funds should be used to meet the desperate needs of my people – not its elected leaders. Because of this, every time I receive a check I write a check back to my Tribe to return these tribal funds.

Mr. Chairman, I want to begin this morning by expressing my personal gratitude to you for your leadership on this controversial issue. The draft legislation that you have circulated and the hearing you host today serve two fundamentally important purposes – facilitating a much-needed dialogue on the issue of "reservation shopping" and educating the public on this complex issue. I sincerely appreciate your consultation with Indian tribes and others on this issue and your efforts to craft meaningful legislation to address public policy concerns inherent in the "reservation shopping" debate.

I have worked my whole life to restore the Federal recognition of my Tribe. Our struggle for federal recognition was about righting a historic wrong, it was about self-

determination and respect, and it was about ensuring that the coming generations of Cowlitz people have a brighter future. Now I have one last goal, one last promise to my people – to regain a homeland and ensure that the Cowlitz people have the same rights and economic opportunities that other sovereign tribes enjoy – maybe then they will let me retire.

These days, the media frenzy over "reservation shopping" has escalated to a point where some are losing sight of the very real benefits Indian communities receive from Indian gaming. We must remember that revenues from Indian gaming make health care available to a population that lags far behind the rest of America in every major health category, that gaming revenues provide our future leaders with educational opportunities that earlier generations could only dream of, and that those revenues provide desperately needed housing and daily care services for our elders who have sacrificed so much to ensure our survival today. For the first time in American history, gaming revenues are providing Indian country with a real opportunity to be self-sufficient.

Earlier this year I testified before the Senate Committee on Indian Affairs about the burdens imposed on us by the Department of the Interior's Federal Acknowledgment Process (FAP). I know you understand all too well the problems with the current recognition system. It took us 25 years to go through that process – a quarter of a century of my lifetime. I also testified about the challenges we face as a newly recognized tribe. No challenge has been greater for us than the process of acquiring land and establishing a reservation for our people. For this reason, I very much appreciate having this opportunity to tell you about our history and about the current obstacles we face.

As you know, newly recognized tribes like the Cowlitz emerge from the Federal Acknowledgement Process without a federally protected land base and without a reservation. We are poor and in desperate need of the United States' active assistance. We 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.

We urge you, Mr. Chairman, to ensure 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.

[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."

THE INITIAL RESERVATION AND RESTORED LANDS EXCEPTIONS

As you know, the Indian Gaming Regulatory Act prohibits the conduct of Indian gaming on off-reservation lands acquired in trust after October 17, 1988. Congress understood that in certain limited circumstances it would be wholly inequitable to apply this prohibition to tribes that were unrecognized and had no trust land in 1988. One such circumstance is for a tribe 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 restored and FAP-recognized tribes. The Department of the Interior recently explained that since the enactment of IGRA seventeen years ago, it has approved only twelve gaming acquisitions for restored tribes, and in the 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 that are landless today, including the Cowlitz and our good friends of the Snoqualmie Tribe, also of Washington State.* Emerging from that process with federal recognition is not only rare, but it takes a better portion of one's lifetime to receive a decision from Interior.

Even though there are so few landless restored and FAP-recognized tribes, once recognized we face the almost insurmountable task of getting land in trust. Our tribal right to property – a federally protected land base that nearly every other federally-recognized tribe enjoys – is particularly difficult to exercise where we want to use the land for economic development involving gaming. Because we are a recently recognized tribe without a reservation, by definition, any land identified for trust acquisition is treated by Interior as an "off-reservation" acquisition. That means we have to comply with Interior's more rigorous "off-reservation" fee-to-trust regulations. As a result, landless newly recognized tribes must 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. Most notably, if we plan to use the land for gaming, NEPA requires us 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). For the Cowlitz, preparation of the EIS alone will cost much more than $1 million. It should come as no surprise then that newly recognized tribes are hard pressed to generate the funds needed to pay for these things and statutes like NEPA squeeze what limited resources we have from being used for tribal health care, education and other much needed services.

Of course, any land that a landless 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, already there is likely another tribal or non-Indian 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, this is not a way to gain popularity in the

tribe's local community. 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. We are concerned about imposing a requirement for affirmative concurrence of local and tribal governments before land could be acquired in trust for gaming for a newly recognized, landless FAP or restored tribe. The financial, political and social costs of such concurrences may be devastating to poor tribes. We submit that any new legislation should protect our ability to acquire a reservation land base through the existing statutory structure that tribes before us have been allowed to utilize.

THE COWLITZ TRIBE'S EFFORTS TO OBTAIN LAND

Let me tell you about the parcel we have acquired. Our parcel 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. That parcel of land is also squarely within an area to which the Cowlitz Tribe has strong historical connections. The parcel is a mere two miles from a tribal village occupied historically by the Cowlitz people and only fourteen miles south of the boundary drawn by the ICC that delineated the area used and occupied exclusively by the Cowlitz.[2] 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 and 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

[2] 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).

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.

It is a sad day indeed when some established gaming tribes who make millions every year are using those profits to oppose legitimate efforts like ours rather than using those funds as envisioned by IGRA to provide services and create new economic opportunities for their communities. These tribes use their substantial resources to oppose a tribe with nothing – all with the intent of depriving us of our sovereign right to economic development under IGRA. Congress sacrificed a significant portion of tribal sovereignty through the passage of IGRA and some established gaming tribes now are trying to weaken our sovereignty even further by denying us from exercising any rights under IGRA.

We have heard much in the press about the issue of "reservation shopping" as it relates to tribes in California. Quite frankly, we don't know enough about what is going on in California to draw a conclusion about whether tribes are "reservation shopping" or whether this catch phrase is just being used by wealthy tribes seeking to block any competition. We do believe, however, that FAP tribes should not be sacrificed as part of this public policy debate.

WORKING WITH INDIAN COUNTRY

Many speculate that unscrupulous developers are driving "reservation shopping." 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. The Mohegan Tribe has shown that Indian tribes can and will reach out to help each other and will succeed if given half a chance.

IMPROVEMENTS THAT SHOULD BE MADE

We know that you share our view, Mr. Chairman, that the United States has an affirmative and solemn obligation to our Indian Nations. We respectfully offer a couple of

suggestions that could be made to the existing initial reservation exception and the draft legislation circulated for comment.

First, the draft legislation could build upon the current exception for FAP tribes by clarifying that the first parcel of land taken into trust for a FAP tribe automatically becomes that Tribe's initial reservation. We believe that this clarification reflects Congress' intent in creating the exception in the first place, but Interior appears to have concluded otherwise. Such a clarification would ensure that FAP tribes are not subjected to yet another expensive, time-consuming process.

Second, the draft legislation provides for nearby tribes to exercise a veto over gaming facilities established by FAP tribes. We believe that tribes with existing gaming facilities should not be able to veto a gaming facility located within a restored or recently recognized Tribe's area in which it has strong historical and modern connections simply because the other tribe established a facility first. Moreover, such a veto is unnecessary. The Department of the Interior already considers the views of tribes within a 50-mile radius of a proposed off-reservation trust land acquisition. Similarly, we are concerned about an additional requirement of state legislative concurrence in that it adds an additional hurdle for tribes already struggling though the process.

Third, at a minimum the draft legislation should grandfather and preserve the rights of tribes that have petitioned for or received federal recognition. Tribes that have petitioned or emerged from the process should be subject to the current process because, in cases like ours, the petition was filed well before the modern advent of Indian gaming and the passage of IGRA.

Finally, Section 2 of the draft legislation should be revised to clarify that any federal decisions issued regarding the eligibility of Indian lands for gaming remain in effect and that those lands shall not be effected by the amendments made by this draft legislation. This revision would serve to protect tribes that have invested significant resources under the current process and have received the approval of the federal government that such lands are eligible for gaming if they are taken into trust.

CONCLUSION

We understand that there may 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. That is not happening here. I know that this honorable body will agree that 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 know Mr. Chairman that this Committee will act with due care and deliberation before altering the balance of federal, state and tribal interests created by the Section 20 exceptions. A rush to embrace any one-size-fits-all solution that is meant to address the actions of a very few tribes 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 Mr. Chairman for your leadership on this issue and for the opportunity to provide this testimony. We offer our continuing assistance to the Committee as it considers how to address the issue of "reservation shopping."