



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

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September 8, 2023

Sent via USPS and Email

Regional Director Bryan Mercier  
Bureau of Indian Affairs - Northwest Region  
911 Northeast 11th Avenue  
Portland, Oregon 97232  
Email: Bryan.Mercier@bia.gov

**SUBJECT:** Yakama Nation's Comment Letter – re: the Colville Tribe's Land Acquisition Application Proposing a Gaming Facility within Yakama Nation's Treaty Territory (Case No. 49888)

Dear Regional Director Mercier,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") to follow up on my June 6, 2023 letter, which sought additional time to comment on the Confederated Tribes of the Colville Reservation's ("Colville Tribe") application to acquire lands within Yakama Nation's Treaty Territory under 25 C.F.R. 151.11. The Bureau of Indian Affairs ("BIA") responded on June 8, 2023 by granting an extension to comment on the above-referenced matter, with a submission deadline of September 8, 2023. Please accept this letter as Yakama Nation's formal comment to the BIA's May 8, 2023 Notice of Gaming Land Acquisition Application ("Notice"). Yakama Nation asks the Secretary of the Department of Interior ("Secretary"), acting through the BIA, to reject the Colville Tribe's March 27, 2023 Land Acquisition Application ("Application").

The lands described in the Application as the "Pasco Property" are located within Yakama Nation Treaty Territory. The Colville Tribe requests that the Secretary and the BIA exercise their discretionary authority to acquire the Pasco Property into trust for the use and benefit the Colville Tribe. The Colville Tribe asserts its intended purpose for the Pasco Property is economic development, including gaming under the Indian Gaming Regulatory Act ("IGRA").

Yakama Nation challenges the Application in full. In support of Yakama Nation's position, this letter (I) asks that the Secretary and the BIA take notice of procedural errors and administrative obstacles, (II) provides an overview of Yakama Nation's interests, (III) explains why the Secretary and the BIA should scrutinize the Application, its underlying assertions, and is stated justifications, and (IV) requests that the Secretary and the BIA disapprove the Colville Tribe's request to take the Pasco Property into trust.

## I. Procedural Errors and Administrative Obstacles

### A. 25 C.F.R. Part 151 versus 25 C.F.R. Part 292

In its introduction, the Application states it is submitted “[p]ursuant to 25 U.S.C. § 5108 and 25 C.F.R. Part 151” to acquire land into trust to be used for “economic development, including *gaming under the Indian Gaming Regulatory Act*.”<sup>1</sup> Although it invokes 25 C.F.R. Part 151, the Application explicitly states the purpose of the proposed acquisition is for gaming.<sup>2</sup> The Application intentionally conflates the two land acquisition processes – 25 C.F.R. Part 151 and 25 C.F.R. Part 292 – which serve different purposes, require decidedly different responses, and are scrutinized under different standards. An Application that includes “gaming” as one of its intended purposes is ineligible to utilize the 25 C.F.R. Part 151 process and must follow the process set forth in 25 C.F.R. Part 292. The Secretary and the BIA must reject the Application on this basis alone.

The BIA’s May 8, 2023 Notice similarly applies the wrong regulatory process given the proposed use stated in the underlying Application. The Notice bears the title “Notice of *Gaming Land Acquisition Application*.”<sup>3</sup> The Notice states it is issued “[p]ursuant to the Code of Federal Regulations, Title 25, INDIANS, 151.11 Off-Reservation.”<sup>4</sup> The Notice provides that the intended use of the Pasco Property is “for a planned hotel and *gaming facility*.”<sup>5</sup> Given the proposed use identified by both the Application and the Notice, Yakama Nation contends the Notice should have been issued pursuant 25 C.F.R. § 292.13 (Secretarial determination), and 25 C.F.R. § 292.19 (consultation). This mistake of process is not a simple error. It is fatal as the two land acquisition processes—25 C.F.R. Part 151 and 25 C.F.R. Part 292—are distinct and not interchangeable. Here, the BIA’s conflation of these two separate processes makes it unclear for Yakama Nation (and others wishing to comment) which specific criteria to address. The Secretary and the BIA must resolve this procedural error.<sup>6</sup>

### B. FOIA and Application Redactions

Yakama Nation’s comments are delivered despite the above-noted procedural errors committed by the BIA and the errors found in the Application. These errors frustrate Yakama Nation’s ability to offer a properly focused comment. This frustration is deepened by unfair administrative obstacles that severely prejudice Yakama Nation’s opportunity to provide meaningful comment on the Application’s substance.

The BIA’s May 8, 2023 Notice states the Application is only available for review at the BIA’s Regional Office after submitting a written request for appointment.<sup>7</sup> Elected officials and local government staff should not need to travel to Portland, Oregon to view a

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<sup>1</sup> See Application at 1 (emphasis added).

<sup>2</sup> *Id.*

<sup>3</sup> See Notice at 1 (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2 (emphasis added).

<sup>6</sup> Cf. 04/18/23 Letter from Paula L. Hart, Director, Office of Indian Gaming to Yakama Nation (stating “As required by our regulations, Regional Director Mercier will conduct consultations pursuant to 25 C.F.R. § 151.11 and 25 C.F.R. §292.19.”; directing Yakama Nation to petition the BIA for consultation pursuant to 25 C.F.R. § 292.2).

<sup>7</sup> See Notice at 2.

copy of the Application. For many, this unnecessary burden is more than a mere inconvenience. It is a barrier to meaningful participation in the comment process. The Pasco Property is more than 200 miles from the BIA's Regional Office. Affected local governments may not have the time or budgets available to cover this travel, and for those that do, it still means weighing this allocation of limited resources against other governmental needs. In short, if a local government wishes to be fully informed about the Notice and provide meaningful comments, it must first pay for the privilege of viewing the Application. As a consequence, there may be local governments that find such burden impractical and choose to submit uniformed comment, or worse, submit no comment at all. There is something fundamentally wrong with the BIA's implementation of the comment process—either 25 C.F.R. Part 151 or 25 C.F.R. Part 292.

Regardless, for Yakama Nation at least, the offer to view the Application at the BIA's Regional Office proved hollow. Despite requesting an appointment across multiple points of contact, Yakama Nation received no reciprocal scheduling communication from the BIA. Instead, the BIA advised Yakama Nation to submit a Freedom of Information Request ("FOIA") and ask for a copy of the Application. Yakama Nation had already done this on April 24, 2023, and the BIA had yet to process Yakama Nation FOIA request. The BIA agreed to extend the comment period, but cautioned that its response to Yakama Nation's FOIA request would likely be delayed because of the BIA's obligation to solicit and consider objections from the Colville Tribe.<sup>8</sup>

On August 11, 2023, more than three months after issuing its Notice, the BIA finally produced the *heavily* redacted Application. Yakama Nation and local governments alike were already required to navigate an unnecessary FOIA process. Yet, once this challenge was overcome, the Colville Tribe and the BIA created a new challenge through redaction efforts that defy acceptable reason. Providing meaningful comments on the substance of the Application is near impossible in its redacted form. Approximately 50% of the Application and its associated exhibits have been gratuitously designated as exempt from disclosure.

Yakama Nation acknowledges and appreciates the need to protect certain information from public disclosure, such as commercial trade secrets, inter-agency memorandum, attorney-client communications, personal and medical files, etc. But that is not what was redacted here. Yakama Nation has focused on the Application's non-redacted information and is compelled to make assumptions about the information that has been redacted. Relying only on context clues, there seems to be no rational justification for the great majority of the redactions. For example, the Application provides historical record and related statements that presumably explain why the Colville Tribe's limited on-Reservation rights somehow extend over a hundred miles beyond their Reservation and into Yakama Nation's Treaty Territory.<sup>9</sup> Whether this information could have bearing on decisions made by the Secretary or the BIA is unknown, but Yakama Nation has effectively been denied the opportunity to provide meaningful comment because what is claimed underneath the redaction has been willfully suppressed. Similarly, significant portions of the Application addressing the claimed need for the off-Reservation acquisition of the Pasco Property and the scope of its proposed use are also redacted.<sup>10</sup> Also, information regarding

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<sup>8</sup> See 06/08/23 Letter from Brian Mercier, Regional Director, BIA, to Yakama Nation.

<sup>9</sup> See Application at 3.

<sup>10</sup> *Id.* at 6-7.

contacts with local government entities has been completely redacted, making it unclear what jurisdictional problems exist and how those will be addressed.<sup>11</sup> Other problematic redactions are noted elsewhere within this comment letter.

Yakama Nation's ability to provide meaningful comment has been significantly curtailed by the BIA's implementation of the FOIA process and redactions to the Application done at the Colville Tribe's behest. Yakama Nation is confidently able to discern only the following facts from the Application: 1) the Colville Tribe has filed a land acquisition application, 2) the proposed land to be acquired is located off-Reservation in Pasco, Washington, and 3) the proposed use of the land is for gaming under IGRA. However, due to the excessive redactions, Yakama Nation is unable to discern what unique interests the Colville Tribe claims within Yakama Nation's Treaty Territory that could potentially justify the discretionary acquisition of lands at the direct expense of Yakama Nation's interests.

## **II. Overview of Yakama Nation's Interests**

The May 8, 2023 Notice serves as the BIA's recognition of Yakama Nation's status as a local government having regulatory jurisdiction over lands subject to possible acquisition under 25 C.F.R. § 151.11 (off-reservation acquisitions). The legal description of the lands proposed for acquisition confirm the Pasco Property unquestionably falls within Yakama Nation's Treaty Territory established by the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951. Clearly then, if the Secretary and the BIA were to exercise their discretion and approve the Application underlying the Notice, this federal undertaking would adversely impact Yakama Nation's exercise of regulatory jurisdiction. Although the Notice states it is issued pursuant to 25 C.F.R. Part 151, the underlying basis of the Application—acquisition of land for gaming under IGRA—signals that this federal undertaking implicates 25 C.F.R. Part 292, which similarly must consider impacts to Yakama Nation as a nearby Indian tribe and/or a member of the surrounding community.

### **A. The Yakama Treaty**

Since time immemorial, the fourteen original, free, and independent Nations that comprise the Yakama Nation thrived both within and beyond the exterior boundaries of what later became the State of Washington. These fourteen tribes and bands—Yakama, Palouse, Piquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat—reached an accord on June 9, 1855, at the Walla Walla Treaty Council. These fourteen tribes and bands joined as one unified Nation under a shared political identity—the Confederated Tribes and Bands of the Yakama Nation. Together, they entered into a Treaty with the United States and established a government-to-government relationship between two sovereign Nations that endures to this day.

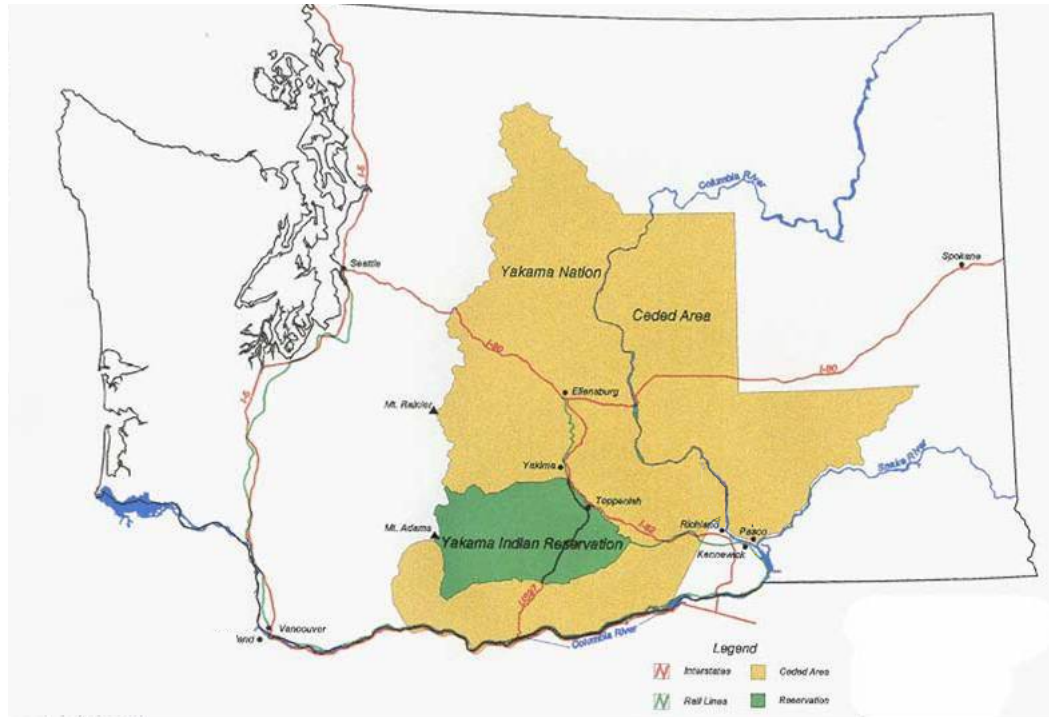
### **B. Yakama Nation's Treaty Territory**

Article II of the Yakama Treaty reserved to Yakama Nation a Reservation for its exclusive use and benefit. Article I and Article III of the Yakama Treaty reserved other

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<sup>11</sup> *Id.* at 8.

vested rights across Yakama Nation's ceded lands and usual and accustomed areas. The below illustration places the size and scope of this federally affirmed footprint into context:



Article II of the Yakama Treaty establishes the boundaries of the near 1.4 million acre Yakama Reservation, while Article I of the Yakama Treaty details Yakama Nation's cession of certain rights throughout its Treaty Territory. Article I of the Yakama Treaty recognizes that, at the very least, Yakama Nation's fourteen tribes and bands ranged over twelve million ceded acres at the time the Yakama Treaty was signed. This Treaty Territory encompasses a region that extends from the confluence of the Columbia and Methow Rivers southwesterly along the Columbia to the Cascade Range; it includes Mount Adams and stretches up to the North Cascade Mountains; it returns east back to and across the Columbia River out to the north side of the Snake River; its returns downstream to the confluence of the Palouse.<sup>12</sup> While covering an expanse of land roughly one-third the size of modern Washington State, the Treaty Territory identified in Article I does not fully encapsulate Yakama Nation's Article III traditional and cultural use territories, which stretch down from the 49th Parallel to the south of the Columbia River, and from the Puget Sound east into Buffalo Country.<sup>13</sup>

<sup>12</sup> See Yakama Treaty, Art. I (listing geographic calls).

<sup>13</sup> See *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1238-1239 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); see also *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (holding Yakima Indian Nation v. Flores' factual findings regarding the vast size and scope of Yakama Nation's traditional and cultural use territories to be unchallenged and binding).



Where Article II of the Yakama Treaty establishes lands for Yakama Nation's exclusive use and benefit, it is Article I and Article III of the Yakama Treaty that establish, at the very least, a primary, reserved, and perpetual right to access, use, and derive income and other benefit ("usufructuary rights") from over twelve million acres of *off*-Reservations lands—Yakama Nation's Treaty Territory. Accordingly, Yakama Nation has an interest in any federal action or undertaking (proposed, in fact, or otherwise sanctioned) within its Treaty Territory that might adversely impact its rights and interests secured and reserved by the Yakama Treaty.<sup>14</sup> The Pasco Property, located in Franklin County in Washington State, unquestionably falls within Yakama Nation's Treaty Territory.

### C. Foreseeable Impacts to Yakama Nation's Interests

As provided by the applicable federal regulations, impacts to Yakama Nation's interest are measured differently depending on whether the land acquisition process falls under 25 C.F.R. Part 151 (non-gaming) versus 25 C.F.R. Part 292 (gaming). Because the process utilized by the BIA in this instance lacks the certainty demanded by the applicable regulations, Yakama Nation is unable to tailor an appropriate response. This requires Yakama Nation to apply a hybrid, non-standard approach to providing its comment regarding foreseeable impacts to Yakama Nation's interests.

If the Secretary or the BIA were to exercise their discretion and approve the Application utilizing considerations applicable to 25 C.F.R. Part 151 (non-gaming), this federal undertaking would adversely impact Yakama Nation's exercise of regulatory, civil, and criminal jurisdiction over lands within its Treaty Territory that are directly proximate to the Pasco Property. Off-Reservation jurisdiction is not common among Indian tribes. However, the Yakama Treaty affords Yakama Nation broader jurisdictional authority compared to most other Indian tribes. For example, Yakama Nation's usufructuary rights extend over twelve million acres of off-Reservations lands within Yakama Nation's Treaty Territory.<sup>15</sup> These are lands over which Yakama Nation manages and controls resources, applies its laws, exercises its jurisdiction, and enforces its police powers "in common" with the states. The above illustration at II.B. demonstrates that Yakama Nation's jurisdiction surrounds the Pasco Property in all directions. The Application states that the Colville Tribe "is prepared to assume regulatory jurisdiction over the land", as well as "civil and criminal jurisdiction to the full extent of federal law." Yakama Nation already exercises jurisdiction throughout its Treaty Territory, and disputes will arise if the Colville Tribe attempts to exercise any such jurisdiction that conflicts with what Yakama Nation already exercise.

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<sup>14</sup> See *Confederated Tribes and Bands of the Yakama Nation v. United States Dep't of Agric.*, 2010 WL 3434091, at \*4 (E.D. Wash. 2010) (observing that a threatened federal undertaking "would immeasurably harm the [off-Reservation] resources and waterways enjoyed by the Yakama Nation . . . as well as the Yakama Nation's [commercial] logging industry.").

<sup>15</sup> See *Confederated Tribes and Bands of the Yakama Nation v. Airgas USA, LLC*, 435 F. Supp. 3d 1103, 1124 (Or. Dist. 2019) (quoting and finding persuasive leading treatise on Indian law, which states that resources managed by, controlled by, or appertaining to the tribe may include not only resources held in trust or restricted status for tribal members, but additional resources over which the tribe exercises governmental control or areas on which tribes retain usufructuary rights outside reservation boundaries . . . Cohen, *Handbook of Federal Indian Law* § 10:05[3] at 804" (internal quotes omitted).

If the Secretary or the BIA were to exercise their discretion and approve the Application utilizing considerations applicable to 25 C.F.R. Part 292 (gaming), this federal undertaking would adversely impact Yakama Nation's government functions, infrastructure, or services given Yakama Nation's status as a nearby Indian tribe and/or member of the surrounding community. At its closest point, the linear distance between the Yakama Reservation and the Pasco Property is 30 miles. Today, IGRA and its implementing regulations found at 25 C.F.R. Part 292 are not tailored to address impacts claimed by an Indian tribe with usufructuary rights and resources on lands located off-Reservation, but still within its Treaty Territory. IGRA pigeonholes Yakama Nation as a "nearby Indian tribe" within the definition for "surrounding community,"<sup>16</sup> overlooking Yakama Nation's usufructuary rights reserved throughout Yakama Nation's Treaty Territory. Instead, the regulations provide that an Indian tribe located beyond the 25-mile radius of the location of a proposed gaming facility may be consulted if it establishes that the proposed gaming facility will directly impact, immediately impact, and significantly impact *at least one* of the following: (1) government functions, (2) government infrastructure, or (3) government services.<sup>17</sup>

Yakama Nation offers the following contention: the Colville Tribe's proposed gaming facility at the Pasco Property rests on and around lands where Yakama Nation enjoys usufructuary rights, exclusively reserved to Yakama Nation by the Yakama Treaty. These usufructuary rights form the foundation of Yakama Nation's identity, cultural practices and traditions, political integrity, and economic wellbeing. The Colville Tribe's proposed gaming facility will directly, immediately, *and* significantly impact Yakama Nation's usufructuary rights and resources, which in turn will result in direct, immediate, *and* significant impact to Yakama Nation's governmental functions, Yakama Nation's governmental infrastructure, Yakama Nation's governmental services. Yakama Nation commits considerable energy and resources to protect, preserve, and enhance natural and cultural resources throughout its Treaty Territory. Within the areas directly proximate to the Pasco Property, Yakama Nation's tribal programs are heavily engaged in fisheries restoration activities, cultural resource protection activities, environmental cleanup activities, and law enforcement activities. The Yakama Reservation is more than 25 miles from the Pasco Property, but the entire community immediately adjacent to the Pasco Property benefits greatly from Yakama Nation's stewardship over the lands and resources within its Treaty Territory. These efforts are carried out by Yakama Nation's government. Yakama Nation is able to provide these services and functions, in large part, due to revenues from its own gaming facility located on the Yakama Reservation. Yakama Nation is hesitant to comment on the potential economic impact from a new gaming facility at the Pasco Property because descriptions of size and scope are redacted from the Application. Without this information, the level of economic impact and reduction of services is unknown and cannot be calculated with any degree of certainty. This information must be disclosed so that Yakama Nation can provide meaningful comment.

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<sup>16</sup> See 25 C.F.R. § 292.2.

<sup>17</sup> *Id.*

### III. Scrutiny of the Application's Substance, Claims, and Justifications

#### A. Distance Between the Colville Reservation and the Pasco Property

Yakama Nation requests that the Secretary and the BIA give special attention to the distance from the Pasco Property to the Colville Tribe's agency headquarters—165 miles—or the edge of its true Tribal homelands established by Executive Order—125 miles. This is a distance so great and significant that it merited redaction in the Application.<sup>18</sup> The Pasco Property is off-Reservation and nowhere close to the Colville Tribe.<sup>19</sup>

The regulations emphasize that “as the distance between the tribe's reservation and land to be acquired increases, the Secretary *shall* give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition”.<sup>20</sup> The regulations further provide that such scrutiny will include the Secretary giving greater weight to written comments from governments who receive the 25 CFR Part 151 Notice.<sup>21</sup> As applicable here, the regulations direct that the Secretary and the BIA give greater weight to Yakama Nation's comments, and further direct that the Secretary and the BIA apply a heightened level of scrutiny regarding the Colville Tribe's claims, its justifications regarding its need for the acquisition, and also the extent to which it is simply not acting in good faith.

#### B. The Colville Tribe's Claim to its Self-Declared “Aboriginal” Lands

As noted above, the Application is heavily redacted. This deliberate suppression raises significant concerns, particularly where the Colville Tribe makes claims about “the protection and restoration of Tribal homelands” when describing its history and detailing its need for additional land to add to its existing inventory.<sup>22</sup> The land proposed to be acquired is not in close proximity to the Colville Tribe's agency headquarters—165 miles—or the edge of its *true* Tribal homelands established by Executive Order<sup>23</sup>—125 miles.

Review of the Application suggests the significance the Colville Tribe places on the Pasco Property is tied to its assertions of a shared history with Yakama Nation. Below is a representative passage from the Application:

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<sup>18</sup> See Application at 10 (distances redacted).

<sup>19</sup> For reference, the linear distance between Seattle, Washington and Portland, Oregon is 145 miles; the linear distance between Seattle, Washington and Yakama Nation's agency headquarters is 128 miles; the linear distance between Portland, Oregon and Yakama Nation's agency headquarters is 129 miles.

<sup>20</sup> See 25 C.F.R. § 151.11(b) (emphasis added).

<sup>21</sup> *Id.*; see also 25 C.F.R. § 151.11(d).

<sup>22</sup> See Application at 5.

<sup>23</sup> The Colville Tribe and its Reservation were established by Executive Order of July 2, 1872. Colville's Reservation was diminished by an 1891 Agreement where the Colville Tribe sold the northern half of its Reservation for \$1,500,000. See *Antoine v. United States*, 420 U.S. 194, 197-198 (1975).



(b) (4)(b) (4)(b) (4)(b) (4)

misleading. It is a position that has been repeatedly rejected by the federal courts despite the Colville Tribe's claims that it enjoys and benefits from the Yakama Treaty.<sup>26</sup>

In no way can the Colville Tribe's assertions—rejected across various levels of the federal courts—form the basis for acquiring lands within Yakama Nation's Treaty Territory either under 25 C.F.R. Part 151 or 25 C.F.R. Part 292. The rights vested pursuant to the Yakama Treaty belong to Yakama Nation as a whole, and not to its constituent bands individually. In the Yakama Treaty, Yakama Nation reserved rights that extend broadly throughout Yakama Nation's Treaty Territory, and remain *exclusive and primary* as to any other original Nation within the lands described in Article I. To claim a right within Yakama Nation's Treaty Territory, the Colville Tribe's constituent band must have “maintained sufficient political continuity with [the Nation] who signed the treaty [so] that it may fairly be called *the same tribe*.”<sup>27</sup> A showing of common ancestry alone is not sufficient to establish political cohesion.<sup>28</sup> Likewise, a showing that an Indian tribe includes descendants of a signatory Indian tribe is inadequate.<sup>29</sup> None of the Colville Tribe's constituent bands have maintained any degree of political continuity with Yakama Nation that is legally required to claim a right within Yakama Nation's Treaty Territory.

The Secretary and the BIA must reject the Colville Tribe's effort to rewrite its history and manipulate Yakama Nation's history. The Colville Tribe and its constituent bands owe their existence as a federally recognized sovereign to an Executive Order and subsequent agreements.<sup>30</sup> These properly define and place limitation on what can be considered the Colville Tribe's Tribal homelands. Here, the Pasco Property, which the Colville Tribe purports to claim for themselves, is, without question, land defined by Article I of the Yakama Treaty—the very Treaty which numerous federal courts have already concluded cannot be claimed by the Colville Tribe.

### C. The Colville Tribe's Claim of “Need” for the Pasco Property

The Colville Tribe's misleading propositions are not limited to its claim to Yakama Nation's Treaty Territory. It also exaggerates its claim of “need” for the Pasco Property. There is little doubt that the Colville Tribe's business plan—generically identified as a hotel and gaming facility—would create significant employment opportunities. The proof is evident in the three gaming facilities the Colville Tribe already owns and operates. No other Indian tribe in Washington has three gaming facilities. A fourth gaming facility would create jobs; however, it is disingenuous to claim these jobs will be filled by members of the Colville Tribe. The Colville Tribe states it has more than 9,300 enrolled members who live on or near the Colville Reservation.<sup>31</sup> At its closest point to the Pasco Property, the Colville Reservation is 125 miles away. At its furthest point, it is 200 miles away. Jobs will be created, but it is doubtful that the Colville Tribe's enrolled members will make the

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<sup>26</sup> See, e.g., *United States v. Oregon*, 787 F. Supp. 1557 (D. Or. 1992), *aff'd* 29 F.3d 481 (9th Cir. 1994), *amended*, 43 F.3d 1284 (9th Cir. 1994), *cert. denied* 515 U.S. 1102 (1995); *United States v. Or.*, 2008 U.S. Dist. LEXIS 62743 (D. Or., Aug. 13, 2008), *aff'd sub nom United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010).

<sup>27</sup> See *United States v. Oregon*, 29 F.3d at 484, fn. 2.

<sup>28</sup> *Id.* at 484 (citing *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990)).

<sup>29</sup> See *Suquamish Indian Tribe*, 901 F.2d at 776.

<sup>30</sup> *Supra* at 23.

<sup>31</sup> *Id.* at 2.

estimated daily round trip of 250 to 400 miles for work. While some may move to be closer to work, this simply promotes an economic exodus of the Colville Tribe's enrolled members from the Colville Reservation into Yakama Nation's Treaty Territory.

**D. Missing Information from the Application**

The Application should have included a section on impacts to nearby and surrounding Indian tribes, but it did not. Or if it did, it was redacted. In its May 8, 2023 Notice, the BIA recognized Yakama Nation's status as a local government having regulatory jurisdiction over lands subject to possible acquisition under 25 C.F.R. § 151.11. Although required, this was not addressed in the Application, with the Colville Tribe omitting Yakama Nation from the list of entities that the BIA should send Notice of Application letters to.<sup>32</sup> As noted above, Yakama Nation exercises jurisdiction throughout its Treaty Territory, including the area proximate to the Pasco Property. Yet, the Colville Tribe has made no effort to engage with Yakama Nation on this jurisdiction issue.

Another piece of missing information is evidence of the Colville Tribe's compliance with the National Environmental Protection Act ("NEPA"). NEPA demands invitation to be extended to any affected Indian tribe as part of the environmental review process. Yakama Nation regularly engages in the NEPA process throughout the full range of its Treaty Territory, which includes the area on and around the Pasco Property. To date, Yakama Nation has not been invited to participate in the environmental review process. Inexplicably, the entirety of the Application's section pertaining to NEPA compliance has been redacted.<sup>33</sup> Yakama Nation has legitimate reason to question whether the Colville Tribe is acting in good faith and whether the Colville tribe can be trusted with carrying out this critical obligation. To the extent there is an ongoing NEPA environmental review being conducted in relation to the Application, Yakama Nation formally requests to be included as a participating agency and a consulting party to ensure that Yakama Nation has every opportunity to protect its interests.

**IV. Conclusion**

Yakama Nation asks the Secretary and the BIA to reject the Colville Tribe's March 27, 2023 Land Acquisition Application. Yakama Nation should not have to once again rely on the courts to stop the Colville Tribe from asserting a false history to claim rights under the Yakama Treaty. Yakama Nation and the Colville Tribe have already had that fight, multiple times, and the Colville Tribe has decidedly lost. Yakama Nation should be able to rely on the Secretary and the BIA to step forward and uphold the United States' fiduciary trust responsibility to protect Yakama Nation from the Colville Tribe's illegitimate pursuit of acquiring lands through the 25 C.F.R. Part 151 or 25 C.F.R. Part 292 process. This is especially the case when the Colville Tribe has more gaming facilities than any other Indian tribe in Washington State, the largest Reservation of any other Indian tribe in Washington State, and sufficient assets and an existing income stream to employ and provide services to its enrolled membership.

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<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.* at 9-10.

The comments provided in this letter should not be considered final. These are merely preliminary based on the limited information made available thus far. Yakama Nation reserves the right to supplement these comments with more information when the Colville Tribe's full and unredacted Application is provided for review, including required NEPA and 25 C.F.R. Part 292 documentation.

Yakama Nation further reiterates and renews its demand for face-to-face consultation regarding this matter. This demand has been repeated again and again, yet to no avail has any federal official met with Yakama Nation to discuss the great harm being perpetuated against our interests. A fundamental tenet of the trust obligation is the duty to meaningfully consult on federal actions that could have a detrimental impact on Yakama Nation's inherent sovereign and Treaty-reserved rights. Executive Orders No. 13084 and 13175 confirm this duty, directing federal agencies to engage in "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications", and directing federal agencies to "honor tribal treaty and other rights" and to "strive to meet the responsibilities" arising from the government-to-government relationship "when formulating and implementing policies that have tribal implications."<sup>34</sup> This includes any departmental regulation, rulemaking, policy, guidance, or operational activity that may have a substantial direct effect on Yakama Nation.

For further discussion regarding this comment letter and the renewed request for consultation, please respond in writing with a courtesy copy to Mr. Ethan Jones, Lead Attorney for the Yakama Nation Office of Legal Counsel, at P.O. Box 151, Toppenish, WA 98948, and electronically at [ethan@yakamanation-olc.org](mailto:ethan@yakamanation-olc.org).

Respectfully,



Gerald Lewis, Chairman  
Yakama Nation Tribal Council

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<sup>34</sup> See 65 Fed. Reg. 67249, Executive Order No. 13175 (November 6, 2000); See also 63 Fed. Reg. 27655, Executive Order No. 13084 (May 19, 1998).