Hon. Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDERSON & MIDDLETON COMPANY, Plaintiff, vs. HON. KEN SALAZAR, in his Official Capacity as Secretary, United States Interior; HON. CARL ARTMAN, in his official capacity as Assistant Secretary, Indian Affairs, United States Department of Interior, and STANLEY M. SPEAKS, in his official capacity as Regional Director, Bureau of Indian Affairs, United States Department of Interior. Defendants	No. C09-5033 (RBL) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: JUNE 19, 2009
QUINAULT INDIAN NATION, *Plaintiff*, **v.**	

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HON. KEN SALAZAR in his, Official Capacity as Secretary, United States Interior; HON. CARL ARTMAN, In his official capacity as Assistant Secretary, Indian Affairs, United States Department of Interior, and STANLEY M. SPEAKS, in his official capacity as Regional Director, Bureau of Indian Affairs, United States Department of Interior.

Defendants.

I. RELIEF REQUESTED

Plaintiff Quinault Indian Nation requests that the Court grant a summary judgment pursuant to Fed. R. Civ. P. 56(a). Summary judgment is appropriate because there are no genuine issues of material fact concerning the United State's implementation of the American Indian Probate Reform Act (AIPRA), 25 U.S.C. § 2216(f).

Plaintiff is entitled to judgment as a matter of law, specifically declaratory relief that: (1) declaratory judgment pursuant to Fed. R. Civ. P. 56(a), that the Nation is not required to participate in a public, open competitive bidding process to exercise its rights to purchase individually owned Quinault Reservation trust allotments for sale or disposition in accordance to AIPRA; (2) that 25 CFR §§152.27 (b), and 152.28 do not apply to this AIPRA disposition of property; (3) that the Bureau of Indian Affairs process for determining the AIPRA purchase price the Nation is entitled to exercise to match, is arbitrary and capricious; and injunctive relief recognizing that, under the facts in this matter: (4) AIPRA authorizes the Nation to purchase these properties at fair market value;

II. QUINAULT INDIAN RESERVATION & FACTS

This matter stems from the Defendants' disposition of trust property on the Quinault Indian Reservation. As a result of the General Allotment Act of 1887 the United States divided the Quinault Indian Reservation into 2340 parcels of land approximately 80 acres in size and assigned them to individuals. Prior to this time, all lands were owned collectively by the Nation

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on behalf of and for the use of its members. With the Allotment Act, came the first vestiges of individual ownership of tribal lands, and created the nightmare of federal oversight of allotment lands. These various federal acts, and legal rulings form the roots of the matter at hand. (AR, QIN Opening Brief)

These federal acts and agency implementation, regulation and oversight of tribal trust lands on the Reservation persist today. Even a hundred years after the Allotment acts, and several federal acts to reverse the scourges of allotment, the Nation is working to consolidate these lands, and comprehensively enhance and protect its jurisdiction over the Reservation. This includes the Nation engaging in active consolidation of these fractionalized interests, and purchase of trust allotments to prevent them from leaving trust status. (*Id.*)

In efforts to address the chronic land management, economic hardship and jurisdictional damage inflicted by the Allotment Act, the Nation has adopted a Land Consolidation Plan. The Plan provides a proactive strategy for consolidation of the Reservation land base through acquisition of land and reduction of fractional interests in trust allotments as a high priority. In adopting the Plan, the Business Committee, the Nation's governing body, authorized a comprehensive planning process that will result in a permanent program of land consolidation and conservation, which will preserve Quinault culture and traditions, protect key natural lands and waters and support economically and ecologically sustainable natural resource management of the Quinault Reservation. (Dkt. 9, Ex – Declaration of John Beck)

Other measures that the Nation implemented to protect and enhance the trust land status and its jurisdiction include dedicated funding, strategic plans, staff, and adopted laws and restrictions on land use within the Reservation. Quinault law restricts land use on the Reservation. The Coastal area of the Reservation is designated as a Sensitive Areas and access

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or use is significantly restricted. Use of beach lands (land seaward of the high tide line) is prohibited. (AR, QIN Opening Brief)

The Quinault Reservation is primarily Indian owned, with 88% of the land held by the Nation, its members or other Indians. The Nation owns 63,358 acres in either fee or trust status, including Lake Quinault with approximately 3,000 acres. Approximately 118,343 acres are held by the United States in trust for individual Indians. Of the remaining 25,326 acres of fee lands not owned by the Nation or individual Indians (12% of the Reservation lands), approximately half (12,106 acres) are owned by one timber company, Anderson Middleton. The remaining 13,220 acres are owned by a multitude of private landowners. (*Id)*

According to the 2000 Census, 75% of the entire residential population for the Quinault Reservation is American Indian or Alaska Native (1,023 out of a total population of 1,370). The Quinault Indian Reservation contains approximately 207,000 mapped acres. There is relatively little development on the Reservation. Development has long been limited to three areas on the Reservation, the village of Taholah, the village of Queets and Amanda Park, adjacent to Lake Quinault. Aside from these village areas, the Reservation is undeveloped and heavily forested, which is reflected in its zoning designations. In addition to its isolation from developed areas, the Reservation is surrounded by undeveloped lands as it is bordered primarily by federal or state forest lands, and by the Pacific Ocean on its Western Coast. (*Id*.)

The Nation designates the majority of the Reservation property, approximately 201,000 acres, as natural resources management zone. Allowable uses for this designation include forest and timber uses. The other remainder of the Reservation is zoned as 600 residential acres; 80 commercial acres; and the remaining 5,500 coastal zone acres, much of which is timbered.

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The Nation has continued to dedicate significant resources to consolidating its ownership of Reservation lands. In 2006, the Nation purchased a total of 623 acres of Reservation trust and fee patent lands. These figures do not include recent purchases. At this rate, with continued concentration of resources, the Nation could reasonable project consolidation of Reservation lands to arrive at 100% Indian ownership within the next 25 years. (*Id*.)

The land acquired under the Nation's Land Consolidation Plan lends three primary benefits to the Nation. First, the protection and acquisition of trust lands adds to the Nation's ownership of the Reservation land base. This enhances the Nation's jurisdiction, and minimizes the opportunity for disputes from other jurisdictions that may arise. Second, the purchase of Quinault Reservation property adds to the Nation's forested lands, and economic opportunities. The additional forest acres acquired add to the Nation's federally approved annual allowable cut (AAC) for timber harvest numbers. If the Nation purchases trust interests from individual Indians, then that interest transfers from the BIA's AAC, to the increase the Nation's ACC. This increase provides an economically enhances the welfare of the Nation, with additional job opportunities for tribal member, and serves to increase timber revenue opportunities for the Nation's commercial timber venture, the Quinault Land and Timber Enterprise (QLTE. Revenues generated by QLTE provide funding for essential government services, including land consolidation of Reservation lands. The Nation's land consolidation purchases of Reservation properties increases the property available for tribal members to exercise their treaty rights to hunt and gather. Not all members own land within the Reservation, and the Nation's lands provide some of the primary opportunities for their exercise of treaty rights. Finally, the Nation's consolidation of trust interests also allow for a significant reduction in the BIA's administrative costs of maintaining and accounting for the allotments. Such administrative

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matters include the cost for notice to all landowners for a trust parcel that can have over 500 owner interests involved, distribution of road fees for hauling routes, and the distribution of harvest payments to those owners. Consolidation of these multiple interests reduces the burden of maintaining separate property lines for numerous owners. The BIA manages administrates the realty functions, including timber harvest, for all 118,343 acres of individually owned Quinault Reservation allotments, more than half the trust land on the Reservation. (AR, QIN Opening Brief, Declaration of John Beck, and Mike Stamon).

In 1988, the BIA entered into an agreement concerning the Quinault Land and Timber Enterprise right to meet high bid on timber sales on allotted lands within the Reservation. Upon expiration of the agreement in 1998, the parties renewed the agreement for five years. In 2004, upon the expiration of the agreement, the BIA did not renew the agreement and stated that many landowners rejected the tribal opportunity to match the high bid, and that:

> "*three large timber purchasers …had stopped bidding on Quinault Reservation sales because of the right-to-meet clause, and doubt that they would bid if this was included in the advertisement*." (Supp#5)

As to the sale or disposition of Quinault allotments, the BIA, pursuant to federal statutes and regulations oversees and administrates such matters. The Nation uses tribal funds to acquire the allotment interests of Helen Sanders. Unlike state, local or federal government supported by broad tax revenues for their government services for activities such as land management and purchases, the Nation uses tribal funds for such expenditures. These tribal funds would otherwise be available for essential government services to its members, instead of having to restore the Nation's ownership over Reservation lands.

In this case, the BIA and Helen Sanders worked together for about a year to prepare for the sale and disposition of her interests in Quinault allotment interests, including the timber

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products. On June 21, 2006, Helen Sanders sent a letter to BIA Northwest Regional Office requesting that all of her interests in Quinault allotments be advertised for sale and:

> *This is my formal application for an advertised sale of certain allotments I own within the Quinault Indian Reservation pursuant to 25 C.F.R. § 152.26…*
> *Specifically, I wish to sell these properties as a single lot and I will only consider bids which are for all of the identified properties. As for the terms of the sale, I reserve the right to refuse any and all bids after reviewing the responses to the advertisement…*
> *I do not consent to the Quinault Tribe's having a right to meet the high bid. In addition, I do not consent to an oral auction following the bid opening.* [original underline] (AR## 26, 27)

On June 27, 2006, the BIA responded to Helen Sanders:

> *Your letter indicates that you do not consent to the Quinault Tribes having a right to meet the high bid. Although 25 C.F.R. Section 152.27(b) (1) currently provides: " With the consent of the owner and when notice of the sale so stated, the tribe or members of such tribe shall have the right to meet high bid. Section 217 of the American Indian Reform Act (AIPRA), 25 U.S.C. Section 2216(f), has changed how the Bureau of Indian Affairs (BIA) will handle advertised sales. Under that section, if the advertised sale results in a high bidder who will take the land in fee status, the Quinault Nation has a right to match the high bid. BIA is bound by the terms of the statute,* ***even though the regulations have not yet been updated to reflect the change in the law****. [emphasis added] (*AR#24)

In October 2006, the Taholah Agency approached the Quinault Forestry Technical Services staff, Larry Wiechelman to gather data concerning values of the Helen Sanders allotment interests. (AR#22) John Miller, of the Taholah BIA agency requested inventory information for parcels that belonged to Helen Sanders, whom wished to sell her the subject properties, and needed to be appraised by Christmas 2006. Mr. Miller requested that Mr. Wiechelman examine as many of the non-merchandisable stands as possible. It was not an unusual request. Mr. Wiechelman obliged, as he was aware that the Nation would likely be interested in obtaining. *Id*. In between November 2006 and January 2007, the BIA and the Quinault Nation complete their inventories of the subject allotments. (AR#21); *Id.*

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On February 19, 2007 Helen Sanders requested to review the BIA draft advertisement/public invitation for bids, and conveyed that the appraisals need not be completed before the BIA shared the draft advertisement for her review. (AR#20) April 13, 2007 the BIA sent copies of the 26 allotment appraisals to Helen Sanders. (AR#19). On April 24, 2007 the BIA, via memo, informed Helen Sanders discussing: 1) the a draft advertisement/prospectus drawn up; 2) the current proposed [25] CFR 152 that was " `years' from being adopted. The question is [h]ow long a time frame is `years'?" (AR, p. ANDERSON001010).

As Helen Sanders requested, on April 26, 2007, the BIA sent her a "*DRAFT Invitation, Bid and Award* related to the sale of all of her interests in Quinault trust allotments." [emphasis original] (AR 18). The BIA further provided Helen Sanders with an Individual Interest Report, Title Holdings with the percentage ownership and decimal interest for each tract for each of the 26 interests of which to be disposed. (AR#17)

On May 21, 2007, Helen Sanders met with the BIA to push the sale of the advertisement to close by July 4th, 2007. The meeting details also included Helen Sanders providing the BIA a list of the papers she wished to have the BIA place advertisement. The BIA noted that she specifically directed: Do not advertise that [the] Tribe has right to match high bid because no bidders will submit. That requirement discourages bidders from even showing interest in the Indian Land. The advertisement should emphasize that bidders can bid on the whole listing not just individual tracts, and she would accept bids from the Quinault Tribe – if they could come up with the money, she didn't care who bought it. (AR#16).

On June 8, 2007 the BIA shared a copy of a public bid announcement with Helen Sanders, and noted that the notice would appear in the six newspapers she chose. The BIA

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reported that they received 4 requests during the week, and that a bidder's list has been perfected and a packet would be mailed to each the following week. (AR#14)

In June 2007, prior to the BIA publication of the bid notice, the Portland Regional Director, Stan Speaks met with Quinault Indian Nation President Fawn Sharp and Tribal Operations Director, Randy Scott to inform them that all the Quinault allotment interests owned by Helen Sanders would be sold in a BIA bid process. Stan Speaks suggested that the Nation could apply for a BIA loan guarantee program as a measure to assist in securing funding for allotment interests. (AR, Opening Brief, Declaration of Fawn Sharp)

In response, the Nation's Tribal Operations Manager requested that Mr. Beck, the Quinault Land Acquisition Manager make recommended priority list of property acquisition that the Nation should consider. In the meantime, John Beck saw the *Public Notice Advertisement for Sale of Indian Lands – Invitation to Bid* and he then included the Sanders properties as a recommended major purchase for the Nation. (*Id, at Declaration John Beck).*

On June 11, 2007 Helen Sanders met with the BIA and looked over the bid prospectus. She emphasized the importance of the order of allotments listed in the bid prospectus, and stated that the BIA should omit the timber product values, that would otherwise appear in the prospectus. (AR# 13) Anderson Middleton, contacted the BIA on June 20, 2007 and asked about the safeguards the BIA used to protect the bidding process. The BIA faxed a copy. (AR# 11).

At the President's request, John Beck began to prepare the Nation's bid to submit for the entire packet of the 26 advertised Sanders allotments. That process spanned over a week and included Quinault DNR Technical staff conducted field surveys, reporting, road and culvert assessments, and harvest and road costs and excluded cedar salvage values resulting in gathered and assessed forest product values on the properties, including cedar salvage. This process

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included consultation with Bruce Lutz, the individual who had done all the cedar salvage on Helen Sanders' properties.

In efforts to prepare the Nation's bid, several key pieces of bid guidance were absent from the bidding documents. The bid directions appear on a document labeled: *Form 5, May 1995*, and is titled *INSTRUCTIONS TO BIDDERS TERMS AND CONDITIONS OF THE INVITATION FOR BIDS.* Section 5,*TIME FOR RECEIVING BIDS is printed as follows*:

> *Bids received prior to the time of opening will be securely kept, unopened. The officer whose duty it is to open them will decide when the specified time has arrived, and* ***no bid received thereafter will be considered****…Telegraphic bids will not be considered, but modifications will be considered if received* ***prior*** *to the hour set for opening.*
> *[*emphasis added]

> *General information and instructions to bidders are contained in the terms and condition attached hereto. Bidders may bid on individual tracts or the entire listing totaling 1,706 acres. Forest product inventories and evaluation reports provided are estimates only. It is the responsibility of each bidder to view the property.* (AR#12)

The bid invitation and packet directions contained details on the secured submission of bids, time for receiving bids, award and rejection of bids. Section 8 of the Instructions:

> *The award will be made to the highest responsible bidder complying with conditions of the invitation for bids, provided his bid is reasonable and it is to the best interest of the Indian owner and the United States to accept it. Id.*

There were no directions or criteria specific to how high bids would be determined among the 26 allotment interests, what order or priority partial package or individual tract bids might be considered. *Id.* The lack of detail concerning partial versus whole packet bids was an important factor in determining the Nation's submitted bid.

On June 29, 2007, the Nation met with Northwest Area Director, Stan Speaks. In addition to the presence of Mr. Speaks, was an unnamed BIA employee, and the Nation's

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President, Fawn Sharp, along with several other elected officials and staff. The Nation's purpose for this meeting was to seek to purchase the allotments for fair market value without the Nation having to participate in the competitive public bidding process, and in the event the bid was to proceed, then request a corrected bid notice, and finally seek guidance as to how the BIA would determine a high bid if there were bids that were whole package bids, particularly against individual discretely bid parcel that were high, and how would the BIA equitably determine a high bid among potentially combined tract bids, individual tract bids, partially lumped sum bids, lumped or single parcel bids. Although the bid advertisement encourage partial or whole package bids, the advertisement and corresponding prospectus instruct lacked any mention of any direction or guidance on the BIA's criteria for a high bid determination. (AR, QIN Opening Brief, Declaration of Fawn Sharp)

The President discussed that the Nation's primary concern was in protecting these 1,700 acres of trust land interests from being conveyed into non-Indian ownership, and adversely affecting the Indian character of the Reservation. She also explained that the BIA held a trust duty in this matter to prevent the transfer and as supported under the American Indian Probate Reform Act. Mr. Speaks stated that the trust parcels would be auctioned to the highest bidder.

The Nation then informed Mr. Speaks that the public notice of invitation to bid was inaccurate. Those parcels, like most of the Reservation are zoned for forestry or timber uses. The bid stated that the permissible uses for the parcels included home sites and recreational uses, which are disallowed under the Nation's zoning designations applicable to these allotments. The Nation's President further detailed concerns that this notice is an erroneous example to the local real estate industry that the Reservation is open to home sites and recreational use, when in fact this is wrong. Even the Reservation beaches are closed to public access to without permission

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from the Nation. The BIA's mistake describing those parcels would cause inflated bids. Mr. Speaks refused to correct its public notice and invitation to bid mistake. Mr. Speaks inquired if the Nation had identified those parcels which would have higher priority than others. The Nation's response was that it was interested in acquiring all of the parcels.

The Nation then inquired as to the anticipated process for the determination and award of a high bid. Mr. Speaks said that the seller wished to sell all the properties, and that whole package or partial bids would be considered; and that the Nation should get an application to the BIA loan guarantee program. The meeting ended. (*Id.)*

The Nation proceeded finalized its bid in preparing a bid package for all the allotments. Mr. Beck completed the *Schedule of Bid* form for the President's signature. Mr. Beck filled out all the boxes on the *Amount of Bid* column of the form. There we no instructions concerning leaving that column blank, he filled in each line for the total bid value of the sale of every parcel. The instructions failed to give any guidance concerning such bid practices. The President signed the bid. John Beck hand delivered the Nation's bid along with the required deposit check. (*Id, and Declaration of John Beck)*

On July 6, 2007, Anderson Middleton (AM) hand delivered the BIA, Portland -Northwest Area Office a sealed bid for the advertised Quinault Reservation Land Sale. The AM Bid Schedule listed individual tract "Amount of Bid" dollar values for each parcel numbers 1-4. Their "Amount of Bid" for tract numbers 11-26 was filled in with "*ITEMS NUMBERED 11 THROUGH 26 ARE BID FOR THE LUMP SUM AMOUNT OF $3,073,643.00*." (AR 7,10) On July 9, 2007, the Nation similarly delivered its bidding document along with a check, to satisfy the 10% bidding deposit. The Nation bid on each of the tract numbers 1-26, including individual dollar values submitted under "Amount of Bid". (AR# 8)

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On July 14, 2007, David Martin, Quinault Land and Timber Enterprise General Manager attended the BIA's opening and announcement of the bids at the Olympic Peninsula Agency. Aside from the bidding parties, were BIA agents and the landowners. (AR# 9). The BIA commenced to announcing three bids: first the Mark Rice for parcels 3, 9, 18 and 19; next the Anderson Middleton bids, with individual bids for four of the parcels and then a collective lump sum for the remainder of the twenty parcels; then the Nation's bid by its entirety and individual values. David Martin then watched as the representatives for Anderson Middleton asked the BIA to see the Nation's bid numbers. The BIA then left the bidding process without naming a high bidder. (Dkt 9, Declaration of David Martin) On July 16, 2007, Gary Sloan, BIA called AM to request further bids that delineated values for each of the parcels for the twenty bids:

> *This letter is to request that you* ***provide us with a breakdown of your bids for items 11 through 26 as per your phone conversation with Gary Sloan, NWRO acting Realty Officer*** *around 9:30 a.m.*
>
> *Although your offer clearly included four individual tract bids broken down in dollar amounts, and you clearly chose to eliminate six tracts from the entire listing, we find that we will need the remaining 16 tracts broken down in dollar amounts so that we can be consistent in our analysis... Please FAX a copy of your breakdown for items 11 through 26 so that we can provide you with information that you will need as soon as possible. (AR 6)*

That same day, Mr. Hockett supplied the requested detailed bid amounts and further assigned values to individual parcels. In each instance the AM "Amount of Bid" values created for each of the tracts exceeded the values that the Nation submitted in its sealed bid prior to the public announcement of those values. The BIA provided no notice to the Nation or other parties of AM's submission of additional values after the close the public bid. (AR#5).

On July 16 or 17, Joe Fitting, BIA staff member at the Taholah Agency with a document that was titled *Supervised Land Sale Bid Opening at OPA 11:00 am, 7.14.07*, which had a figure

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of $5,476,415 labeled Highest Potential Value placed at the bottom. He further informed the Quinault President that if the Nation wished to obtain all the parcels, that the price would be $5,476,415.00. This was the time that the BIA mentioned the high bid criteria as the "highest potential value" which the BIA would in turn determine to be the purchase price that the Nation must match under AIPRA, 25 U.S.C. § 2216(f). (Dkt 9, Declaration of Fawn Sharp)

On July 17, 2008, Quinault Nation President, Fawn Sharp, and several elected and staff members attended a conference call with BIA Northwest Regional Director, Stan Speaks. The discussion included the award of the high bid, and if the Nation was the highest bidder. (*Id*, Declaration of Mike Stamon) On July 30, 2007, the BIA determined that the Nation was not the highest bidder. The Nation received written notice, signed by BIA Northwest Regional Director, which informed the President Sharp:

> *You are hereby notified that you were the unsuccessful bidder on advertised land sale that was conducted on July 14, 2007 for items 1 through 4 and items 11 through 25. The high bidder on those items was Anderson & Middleton with an offer of $4,391,025.00; these tracts include twenty (20) Quinault allotments… The Quinault Tribe is being provided an opportunity to match the purchase price that has been offered for these allotments…If the Quinault Tribe wishes to match the purchase price offered for the above cited allotments, the Tribe should submit their resolution no later than 30 days after receipt of this notice…*

This payment of $5,476,415 would be $676,415 more than Quinault's original whole package bid. (AR#1) The Nation filed an administrative appeal before the Interior Board of Indian Appeals (IBIA) making the claims described above. The IBIA upheld the Defendant's actions, rejecting the Nations claims.

This is the first sale of trust land on the Quinault Reservation under the 2004 AIPRA amendments. The Nation's claims are larger in scope than just contesting an actual bidding process imposed by the Bureau. Ultimately, the Nation seeks relief from the Bureau using this

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arbitrary process for the current and future sales concerning any application to terminate the trust status or remove the restrictions on trust or restricted land under 25 U.S.C §2216(f).

III. ISSUES

1. Whether, as a matter of law, the Court should grant Plaintiff's requested relief because there are no issues of material fact concerning Defendant's obligation under AIPRA to provide an opportunity to exercise its right to purchase the disputed properties, without the Plaintiff having to participate in a public, open and competitive bidding process.

2. Whether, as a matter of law, the Court should grant Plaintiff's requested relief because 25 C.F.R. §§ 152.27(b) and 152.28 do not apply to the sale and disposition of these properties.

3. Whether, as a matter of law, the Court should grant Plaintiff's requested relief because the Defendant acted arbitrarily and capriciously in determining the purchase price that the Plaintiff must match to exercise its AIPRA rights to purchase these properties.

4. Whether, as a matter of law, the Court should grant Plaintiff's requested relief to purchase at fair market value, because the Plaintiff's purchase equitably and fairly complies with the letter and spirit of AIPRA, and keeps the landowner whole.

IV. EVIDENCE RELIED UPON

Plaintiff relies on the portions of the Administrative Record, Supplemental Record and parties' pleadings filed concerning the Interior Board of Indian Appeals administrative appeal, concerning this matter .

V. ANALYSIS

1. Plaintiff Satisfies the Standard for Summary Judgment

Summary judgment is proper when "there is no genuine issue of material fact and… the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) An absence of disputes as to the material facts, summary judgment provides an inexpensive, expedient and just disposition for every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Once the moving party has presented those portions of the record that it believes demonstrate an absence

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of material fact, unless the non-moving party can come forward with evidence that creates a genuine issue as to a material fact, summary judgment should be entered. *Id.*

In this matter, there are undisputed fundamental material facts, which leave only legal questions to be answered. Here, material facts are that: 1) the Defendant asserts that it never told the Plaintiff Nation that it must participate in a competitive open public bidding process as a prerequisite to exercise its right to match a purchase price under AIPRA; 2) the Defendant admitted and advocated that the C.F.R.'s §§152.27(b) and 152.28 do not apply to the disposition of these properties; 3) the Defendant's public bidding notice and prospectus omitted any mention of any tribal statutory right for the Nation to match a purchase price under AIPRA; 4) the Defendant's failed to provide any statutory, procedural or bidding prospectus standards to determine the high bidder on multiple differing parcel/package bids; 5) the Plaintiff Nation's 4,800,00 bid was what it believed to be fair market value for the entire set of properties; 6) the Defendant imposed a deadline for the submission of sealed bids for the subject properties; 7) the Defendant publically announced each of the sealed bids; 8) the Defendant subsequently solicited additional bidding values from AM after the bidding deadline, and public announcement of bids; 9) the Defendant then recognized those post deadline values as winning bids; 10) the Defendant imposed a "highest potential value standard" to determine the purchase price for the Nation to match under AIPRA; 11) AM would not have bid on these Quinault allotments, had the Defendant published the tribal right to match; 12) the purposes of AIPRA are to promote tribal land consolidation. With these facts undisputed, there are no genuine issues of material fact, and because the Plaintiff is entitled to judgment as a matter of law, summary judgment is the fair and appropriate way to resolve this matter.

2. Plaintiff is Entitled to Exercise its Rights under 25 U.S.C. §2216(f)to Match a a Purchase Price for Any Application to Terminate Trust Status or Remove the Restrictions on Alienation from a Parcel of or Interest in, Trust or Restricted Land – without participating in an competitive public bidding process.

Defendant and Plaintiff agree, Congress enacted the American Indian Probate Reform Act to benefit Indian Tribes by protecting and consolidating the Indian ownership of

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trust lands. Congress declared a federal policy of preventing the further fractionalization of trust allotments; consolidation of fractional interests and ownership that enhances tribal sovereignty; promoting tribal self-sufficiency; and to reverse the effects of the allotment policy on Indian Tribes. American Indian Probate Reform Act Declaration of Public Policy, Pub.L. 106-462,§ 102, Nov. 7, 2000; 114 Stat. 1992. Congress passed the act to remedy the devastation caused by the allotment of reservation lands and federal policies.

> *The General Allotment Act, also known as the Dawes Act, was passed by Congress in 1887. The Act had two primary goals: to eliminate tribal culture by assimilation of Indians into the expanding European-American culture and to open reservation lands to non-Indian ownership. From the passage of the General Allotment Act until the allotment policy was repudiated by the passage of the Indian Reorganization Act in 1934, tribes lost approximately [2/3] of their reserved lands, some ninety million acres. Once a reservation was selected, a census was taken of its tribal inhabitants, the land was surveyed and partitioned into "allotments" –parcels of land between eighty and one hundred sixty acres… The remaining lands were then declared "surplus"… The Act did not require consent of the affected tribes to allot their land."*
>
> Excerpted from *The Changing Landscape of Indian Estate Planning And Probate: The American Indian Probate Reform Act*, Douglas Nash and Cecelia E. Burke 5 Seattle J. for Soc. Justice 121 (2006).

In response to the resulting failure of allotment and increased fractionalization of allotments, Congress enacted the American Indian Probate Reform Act. 25 U.S.C. § 2001 et seq. **The Act was intended to facilitate the consolidation of Indian land ownership and restoring economic viability to Indian assets**. There is no intended benefit for non-Indians. To the contrary, the legislative history reflects that the Act is remedial legislation to prevent further harm caused by the allotment of Reservation lands. Where a statute is remedial in nature, it should be broadly construed to effectuate its purposes. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

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In this matter, the BIA made it very clear, that it would engage in a public competitive bidding process for the disposition of the property. Upon the Nation learning of the BIA's public notice, it visited the BIA Northwest Area Regional Director, Stan Speaks. When the Nation inquired as to exercising its rights under AIPRA, the Director simply was either non-responsive or misleading. Bureau Defendant, Stan Speaks, requested to meet with the Nation and encourage the purchase of the properties. (Dkt. No. 1, Ex. C to Complaint). The Bureau otherwise did not provide any guidance on how it would afford the Nation its rights under AIPRA. The Nation to inquired with the Bureau as to the process for obtaining the properties under 25 U.S.C. §2216(f). The Bureau responded by telling the Nation that: (1) the trust properties would be sold to the highest bidder; (2) it should bid on the properties so that they would not leave trust status; and (3) to apply for a BIA credit program for property purchases.

The Defendant acknowledges that the Nation is entitled to match the purchase price. However, there is no record where the Defendant provided the Nation with any applicable information, outline, plan or procedure in which the BIA would administratively fulfill its statutory duty under 25 U.S.C. §2216(f).

3. Defendant Admitted that 25 C.F.R. §§ 152.27(b) and 152.28 are Inapplicable to the Sale and Disposition of Quinault allotments under 25 U.S.C. §2216(f).

The amended provisions of 25 U.S.C. § 2216 (f) took effect in June 2006. Congress added the language mandating tribes an opportunity to match a bid proposed for land subject to an application and Bureau approval to leave trust. The Defendant cites several cases to support an administrative construction by an agency of its own regulations is "of controlling weight" unless "plainly erroneous or inconsistent with the regulation." *United States v. Larinonoff*, 431 U.S. 864, 872 (1997); see also *Pyramid Lake Pauite Tribe of Indians v. Hodel*, 882 F.2d 364, 370 (9th Cir. 1989).

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The Defendants have not enacted corresponding amendments or updates to the federal regulations to implement the AIPRA amendments for a tribal right to match. Plaintiff agrees with the Defendants' argument before the IBIA that it could not have followed the outdated regulation and comply with the Congressional intent for the tribal right to match:

> *B. The Regional Director Properly Did Not Follow the Superseded Regulatory Provision.*
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> *A&M also asserts that the Regional Director's decision to allow the QIN to match its high bids was inconsistent with applicable regulations, citing 25 C.F.R. § 152.27 A&M Brief at 3, 13-14. While section 152.27 (b)(1) does state that a tribe will be allowed to meet the high bid if the selling owner consents, this section of the regulations was promulgated in 1973, and the needed regulatory revision has not yet been finalized to reflect the change in the law. It is well established that when conflicts between a statute and a regulation arise, the statute trumps the regulation. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984); Indeed, in a very similar situation, this Board held that new provisions found in 25 U.S.C. § 2216(b) override the provisions of the regulations found in 25 C.F.R. §§ 152.24 and 152.25(d). Bernard v. Acting Great Plains Director, 46 IBIA 28, 42 (2007) ("where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls"). The Regional Director could not comply with the regulation without violating statutory law.*
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> (Docket 14, Ex. Q, Regional Director's Answer at 8-10.)

4. Defendant Implemented an Arbitrary and Capricious Determination of the Purchase Price the Nation Must Match under 25 U.S.C. §2216(f).

The record fails to include any statutory, regulatory or internal criteria guiding the BIA's determination of the price it would otherwise impose upon the Nation's statutory right to match to prevent these properties from leaving trust. The Defendant has admitted that 25 C.F.R. 152.27(b) and 152.28 are not updated to implement the 2004 AIPRA amendments. For that reason, the BIA is not interpreting its own regulations, and therefore not entitled to deference. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

The Defendant, over a period of months, drafted a bidding prospectus, with the consent of the landowner. The BIA's Public Announcement and bidding forms encouraged and emphasized that bidders could submit bids for both individual and whole package bids. When

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the Nation brought the question to the BIA as to how it would determine varying bids that included the same property - whole package bids compared to bids for a portion of the properties in the prospectus, the BIA denies it provided any guidance, expect that the highest bidder would be selected. (Dkt. No. 1, Ex. C). But it appears that the Defendant had a fair idea of how it would proceed, to the surprise of Helen Sanders:

> …after the bidders had left, Gary Sloan, realty officer for the BIA, suggested to me and my family that the BIA may provide the Tribe with the right to meet the high bid after all. I responded by showing him Section 152.27 and he appeared to let it drop." (Supp 3, p. ANDERSON001211)

The Defendant shows no statutory or regulatory for omitting such fundamentally material criteria. Even the BIA contends that there was no authoritative interpretation, for which it is properly entitled deference. The Defendant argued before the administrative appeal judge that:

> *QIN's Bid Cannot Lawfully Be Considered the Highest Bid When It Covered Different Parcels Than Other Bids…The explicit instructions in the invitation allowed bidders to bid on either some or all of the parcels for sale. AR 12. Inherently, therefore, BIA had to consider bids on a parcel by parcel basis. If the purpose of an advertised sale is to determine the highest price a potential bidder will offer, and the purchasers need not bid on all the parcels, the offers must be evaluated on an equitable basis – parcel to parcel. It is the only way to ensure the landowners' interests are protected.*
>
> ***When it became apparent upon opening of the bids that A&M combined its offers for 16 parcels into a single price, BIA needed some way to determine who the high bidder was on each of those 16 parcels. Although the QIN characterizes the request from the BIA to A&M to break out the bids for each of the 16 parcels a "re-opening" of the bids, QIN Brief at 24, there is no basis for this characterization. A&M was unable to change its bid as a result of this request.*** [emphasis added] *The sum of the total bids for each of the 16 parcels was the same as the lump sum A&M originally bid. Compare AR #7 and AR#5. Further, there is no indication that A&M used this request to gain an advantage over the QIN. Comparing the QIN and A&M bids parcel by parcel demonstrates that in <u>every case</u> [underline original] A&M was willing to spend more for a parcel than QIN. Compare AR #8 and AR#5. This is also true for those four parcels in which A&M's original bid was broken out. Id.* (Regional Director's Answer, AR p. ANDERSON001031)

The Defendant provided no authority for requesting the additional bid information after the deadline included in the Public Announcement and Bidding Packet. There are no safeguards

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to keep any bidder from adjusting bids to their favor – in every case. The Defendant arbitrary solicited sales, omitted material warnings, both about the tribal right to match, and any criteria for bidders to anticipate how their competing bids will be equitably compared – for this multimillion dollar sale of 1,700 acres of interests in Quinault Reservation trust lands. The Defendant cannot show anywhere in the record where it is authorized or even informed any of the potential bidders to that the criteria for determining the highest bid would be the "an equitable parcel-by-parcel" comparison to arrive at the "highest potential value." Then Defendant imposed upon the Nation on the next business day after the close of bids – the purchase price that the Nation must meet under AIPRA, 25 U.S.C. §2216(f). (Dkt# 9, Ex C, K).

If Defendant does argue that such authority or guidance exist, there is nothing to substantiate why such information should be withheld from inquiring bidders.

5. The Plaintiff's Purchase of the Quinault Reservation Allotments for Fair Market Value Keeps the Landowner Whole, and is Consistent With the Intent and Explicit Authorization of AIPRA, 25 U.S.C. §2216(f)

There is no dispute that Congress provided plain language that foresees the event where no party bids on trust allotments under AIPRA. In such a case, the tribe with the jurisdiction over that parcel shall be entitled to purchase by paying fair market value. AM indicated that had the Defendant's bid announcement and packet clearly disclosed the Nation's right to match a purchase price for the subject properties, that they would not have submitted any bids. (Dkt#9, Ex. M) The landowner and Defendant both have seen similar impacts where tribal rights to match have proven to discourage bidders in timber harvest sales on the Quinault Reservation. (Supp# 5) To preserve its declared interest in land consolidation, and protect its jurisdictional land base, the Nation submitted in good faith and believed was an accurate fair market value for

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those properties. The record shows that the Defendant also acknowledges that AIPRA's purposes include:

> … *in 2004 as part of the American Probate Reform Act (AIPRA), [t]he amendment significantly broadened the types of conveyances subject to the statutory right to match. Congress eliminated language referencing only "conveyances "under this section" and substituted a provision applicable "[i]n general." The tribal right to purchase now arises before the Secretary approves virtually any application to terminate the trust status or remove the restrictions on alienation from a parcel of, or interest in, trust or restricted land. 25 U.S.C. §2216(f).* (AR, p.ANDERSON001021)

VI. CONCLUSION

There is no factual dispute as the material facts. What remains at dispute is the legal implementation of the first advertised land sale of protected Indian trust land under the 2004 AIPRA amendments to 25 U.S.C. §2216(f). It is the prayer of the Nation, that Defendant's will not be allowed to conduct land sales that fail to ensure fair and equitable statutory purposes of both landowners, and the intended purpose of land consolidation of reservation lands.

DATED and signed at Taholah, Washington, on the Quinault Indian Reservation on this 22nd day of May, 2009.

Respectfully submitted:

/s/ Naomi Stacy

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