Congress of the United States
Washington, DC 20510

August 27, 2013

The Honorable Kevin Washburn
Assistant Secretary
United States Department of the Interior
Bureau of Indian Affairs
Washington, DC 20240

Dear Assistant Secretary Washburn:

We write to strongly urge you to take no further action on the Discussion Draft Proposed Changes to Part 83 of Chapter 1 of Title 25 of the Federal Regulations – Procedures for Establishing that an American Indian Group Exists as an Indian Tribe ("Discussion Draft") as written.

We greatly respect the sovereignty of federally recognized Native American Tribes and their contributions, both culturally and economically, to the United States. We support a strong, fair, and equitable process to provide federal recognition to those Tribes that have maintained their Tribal organization and identity over the years. Indeed, the current administrative process—along with Congressional approval of federal recognition—has resulted in the recognition of 566 Tribes. However, the proposed changes in the Discussion Draft may result in unintended, adverse impacts on federally recognized Tribes that have gone through the current process.

Indeed, the Discussion Draft does a dramatic disservice to the 566 federally recognized Tribes by eviscerating key principles on which the administrative granting of federal recognition has been based for almost 40 years, eliminating an impartial administrative review of Department decisions on federal recognition and watering down the criteria for providing federal recognition. The Discussion Draft would have a significant impact on Connecticut residents and, in some ways, seems to uniquely single out our state for disparate treatment.

The Connecticut delegation, together with the Governor and Attorney General of Connecticut and many municipal and community leaders, are united in opposing the Discussion Draft.

We fully understand that there are some aspects of the federal recognition process that could be improved—most notably the long delay from the date of filing of the petition to actual decision-making. This delay can be attributed to a lack of sufficient resources. Lowering the standards for which an Indian group may be recognized as a Tribe and eliminating access to an impartial check on the Bureau's decisions regarding federal recognition, however, is not an appropriate remedy.

Federal Recognition Criteria

Federal recognition of an American Indian group as a Tribe is an extraordinarily powerful designation. With recognition, the Indian Tribe has the authority to: (1) claim land currently in private ownership—in cases in Connecticut the land may be owned by families for generations; (2) establish its own zoning and land use rules, in some cases permitting certain types of development not allowed in that area by the town's plan of conservation and development; (3) exercise quasi-sovereign powers, including establishing its own government and enacting its own laws; (4) be exempt from most state laws and taxation; and (5) in Connecticut and other states, open additional gaming facilities.

Because of these significant powers and impact, for nearly 40 years, federal recognition has only been accorded to those American Indian groups who could prove that they have been continuously identified as an American Indian entity since 1900, that they comprised a distinct community since historic times, and that they maintained political influence or authority over its members as an autonomous group since historic times.

Simply put, if a tribal entity was able to maintain their organizational structure both internally and externally throughout history, the federal government would convey recognition and substantial powers on this group, reestablishing a government to government relationship with the recognized Tribe.

The Discussion Draft turns these critical criteria on their head, seemingly allowing for any group of descendants from an Indian group to only prove that they were organized as a tribal entity since 1934. Allowing such entities—which may have lacked any organizational structure for centuries—to be accorded the same powers and rights as tribal entities that survived intact as tribal governments is not in keeping with the intent of the goals of the federal recognition process.

Further, for some inexplicable and illogical reason, the Discussion Draft eliminates the need for Indian groups to meet even this watered down criteria if some of the descendants of an Indian group lived on a state reservation since 1934. Under this proposed change, if some members of an Indian group lived on a state reservation, descendants of an Indian group would seemingly receive a pass on proving they had maintained <u>any</u> political organization or distinctive community, regardless of whether the members actually formed an organized entity during that period.

The existence of a state reservation, however, conveys nothing about the Indian group's ability to maintain political structure or a distinct community within a particular town or towns. For example, one of Connecticut's state reservation lands consists of one house on one quarter acre. Merely living on land set aside by a state for an Indian group does not provide evidence of an organizational or community structure. In fact, in 2005 this very issue was reviewed by the Interior Board of Indian Appeals (IBIA) in two Connecticut cases. The IBIA found that the existence of a state reservation could <u>not</u> be counted as evidence of continuous community and political organization. This finding has been upheld by federal courts.

More broadly, because states vary in their criteria for recognition of reservation land, the existence of a reservation is an inappropriate surrogate for federal recognition. We are particularly concerned that the Discussion Draft creates a 'supercriteria' that appears to only apply in practical terms to our state. Research from the Connecticut Attorney General's office indicates that only Connecticut has had state reservation lands in existence since 1934 and had petitioning groups rejected. As such, we believe that the proposed changes in the draft simply reverse the outcome of Connecticut-specific cases which is an abuse of administrative rulemaking.

Elimination of an Administrative Review

Under current law, a decision by the Assistant Secretary approving federal recognition can be appealed to the Interior Board of Indian Appeals (IBIA). This appeals process allows for an impartial administrative review without the delay of filing an administrative appeal in United States District Court.

Under federal law, the Bureau of Indian Affairs is charged with providing technical assistance to petitioning groups as they go through the recognition process. The IBIA, by contrast, is a separate legal entity from the Assistant Secretary-Indian Affairs, and is located with the Office of Hearings and Appeals. The IBIA hears appeals on many different Department of Interior administrative decisions regarding Native American matters and the Office of Hearings and Appeals reviews many other non-Native American decisions by Department of Interior officials. As such, the IBIA specifically—and the OHA more generally—provide an effective, independent, and impartial administrative review of Interior administrators' decisions. There is no sound public policy reason for eliminating this critical review for federal recognition decisions that have such significant impact on Native Americans and communities across our nation.

Under the Discussion Draft, the Office of Federal Acknowledgement (OFA) is charged with making the critical decision of according federal recognition—and quasi-sovereign authority—to an Indian group. Yet, the Discussion Draft also provides that the OFA "shall maintain guidelines for and general suggestions on how and where to conduct research (for evidence to meet the recognition criteria)" and "shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition."

So, not only does the Discussion Draft establish a clear advocacy function for the very entity also charged with making recognition decisions, but the Discussion Draft also eliminates the IBIA, leaving the United States District Court as the only avenue for appeal.

Other Issues

There are some changes contained in the Discussion Draft that may be worthy of consideration in specifically dealing with the main frustration with the current process: the long delay between petition filing and decision-making. The Discussion Draft establishes a short time period for review of petitions, setting a quicker standard and higher expectation of the processing of such petitions. Further, the Discussion Draft also creates an expedited negative finding if the petition fails to meet some of the criteria that do not require volumes of documentation, such as

evidence of members descending from an Indian Tribe. It simply makes sense not to waste valuable BIA resources reviewing a full petition—including the political and community criteria—if the petition cannot meet the other criteria, whose proof of which is not too time-consuming. Unlike the proposed expedited positive finding, an expedited negative finding process does not weaken the standard for according quasi-sovereign authority on an Indian group.

For all the reasons above, we believe that the Discussion Draft is fundamentally flawed. If the Department is looking for ways to expedite the recognition process without weakening the criteria and eliminating an impartial review of such decisions, we urge you to start anew with a substantially rewritten, narrowly tailored approach.

Thank you.

Sincerely,

RICHARD BLUMENTHAL
United States Senate

CHRISTOPHER S. MURPHY
United States Senate

ROSA L. DELAURO
Member of Congress

JOHN B. LARSON
Member of Congress

JOE COURTNEY
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