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United States Secretary of the Interior
Sally Jewell
1849 C Street NW
Washington, D.C. 20240

Re: Proposed Rule Change for Tribal Acknowledgement
25 C.F.R. part 83 et. seq.

Dear Secretary;

I have carefully reviewed the lengthy and largely vague, ambiguous proposed rule changes to 25 C.F.R. part 83 and in particular the proposal to eliminate or in effect the "gutting" of the most important provisions and criteria currently set out in 25 C.F.R. part 83.7.

As you know, or should know, there has been an effort to create and codify objective criteria to insure that real Indian ***tribes*** having all the characteristics of a bona fide Native American ***Tribe*** were the only tribes that were acknowledged and recognized by the federal government.

The Indian ***Reorganization Act*** of 1934 [IRA 25 U.S.C. 465 et.seq.] was enacted by Congress largely to undo the effects of the Dawes Act (1891 Tribal land Allocation Act). That Act had the effect of dissolving and terminating bona fide Indian ***tribes*** and ***tribal*** governments that existed historically when all of the ***tribal lands*** were allocated to tribal members.

Over the years leading up to the I.R.A. and then in response to the I.R.A. many agents of the B.I.A. (the former Indian Service) set about the County to find any group or family identified as "Indians" in any agency records or from information found anywhere. When these families, groups or communities were located, they were offered the opportunity to vote for or against participating in the I.R.A. Many times these persons voting were just a family of three or four people who self-identified themselves as a "tribe" because they believed it would entitle them to

federal welfare, grants, loans or other benefits or sometimes considered themselves some fractional "off shoot" of a real or bona fide recognized Indian tribe. Often in that case, they would simply add something to the actual tribal name for example a Miwok descendant would become a "Ione Miwok" or a "Jackson Miwok" or sometimes they would just change the spelling, for example MeWak, etc.[1] Predictably this led to a process where, groups that were clearly non-tribal entitles and in some cases even non-Indians, being acknowledged as an Indian tribe by the federal government.

As set out in the attached declaration of attorney William Wirtz, this led to numerous erroneous federal acknowledgements of faux Indian "***tribes***." Attorney Wirtz was a long time attorney and solicitor serving the Pacific Regional offices of the B.I.A. one of the worst offenders in this acknowledgement abuse. [A copy of Attorney Wirtz's declaration is attached hereto marked as EXHIBIT "A" and is incorporated herein by that reference.]

The motivation to obtain federal acknowledgement increased from time to time often at or about the time Congress would enact special programs and benefits and services provided for Indian tribes including those laws and policies enacted to compensate tribes, groups and Indian communities for land lost or taken, sometimes payments were made 2 and 3 times over.

Because of the vague, arbitrary and capricious acknowledgement practices occurring between 1934 and 1978 the 25 C.F.R. part 83 list and acknowledgement criteria were established. It was hoped this process would create objective criteria that could be used to ascertain the existence of any bona fide historical Indian tribe actually entitled to federal acknowledgement and the benefits and services that would then become available to them. The first "list" published in 1978 and 1979 contained the names of groups previously identified as "tribes" many of which had never qualified or had been previously verified as meeting the acknowledgement criteria. Recognized criteria, that had been sporadically applied correctly in federal administrative acknowledgements, and which had been established within the agency over the years prior to 1978. In some highly questionable cases, the name of unverified entities were placed on the 1st part 83 list anyway as if they were a bona fide tribe when they were not.

The criteria and procedure set out in 25 C.F.R. part 83 once it was codified and particularly the mandatory elements set out in 25 C.F.R. 83.7 were refined and further developed following the 1978 enactment up until the present time.

The enactment of the Indian Gaming and Regulatory Act [the I.G.R.A. 25 U.S.C. 2701 et.seq.] created a widespread impetus amongst any group that could lay claim to

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[1] See for example the four members of the Oliver family located at Buena Vista in Amador County, California and residing on a 69 acre Rancheria parcel without any lawful assignment, later erroneously listed by the B.I.A. as "The Buena Vista Rancheria of MeWuk Indians" as if they represented an Indian tribe.

be entitled to federal recognition and federal acknowledgement using any theory or flimsy historical information. By attaining that acknowledgement and also eligible "Indian lands" as is set out in 25 U.S.C. 2703 (4) and (5), they could team up with a gambling investor or group to build a lucrative gambling casino in numerous communities where casinos did not exist or were illegal under prior law.

Since enactment of the I.G.R.A. numerous applicants, who heretofore were never heard of as Indian "***tribes***," have materialized, each claiming a right to recognition and federal acknowledgement and some who have obtained that acknowledgement erroneously or under suspicious circumstances.

In order to inject some rational criteria into the right of a legitimate Indian tribe to transfer fee owned lands into Indian trust, pursuant to the Indian Reorganization Act [I.R.A.] (needed to engage in class II or class III gaming under the I.G.R.A.) several states challenged the wide open authority of the Administrative processes of the Secretary of Interior to bring fee land into trust under the I.R.A. [See Carcieri v. Salazar [2009] 555 U.S. 379.

These putative "tribes," some with only one or two "tribal members," and who were seeking gaming authority have been clamoring to have Congress enact a law changing the rule of law set down in the Carcieri decision supra. and which they euphemistically call a "Carcieri fix."

That decision held that any "Indian tribe" must have been under the superintendence and jurisdiction of the federal government on or before 18 June 1934 in order to bring fee lands into trust status under the authority of the I.R.A.

Having been unsuccessful in that effort to get a Congressional "fix" these aspiring "tribes" have put pressure on the Department of Interior Bureau of Indian Affairs to find some way to evade the Carcieri decision by "Administrative processes" and rule changes.[2] The current proposed rule changes, a copy of which is attached hereto marked as EXHIBIT "B", appears to be an effort to make it easier for these fractional groups, families and individuals to obtain ***tribal*** status through the acknowledgement and recognition processes of the D.O.I. and B.I.A. notwithstanding the rule of law set out in the Carcieri case supra and the proper application and interpretation of 25 C.F.R. part 83.7, the mandatory criteria discussed in the recent case of Muwekma Ohlone Tribe v. Salazar [813 F.Supp.2d 2011] decided and affirmed just last March in the Washington D.C. Circuit Court of Appeals ____ F.3d ____.

In efforts by the Santa Ynez Band of Mission Indians [now calling themselves the Santa Ynez Band of Chumash Indians] to bring a parcel of land into trust, the Pacific Regional Director obtained a solicitors opinion, and then without establishing the

[2] As discussed herein the Department of Interior is currently proposing changes to 25 C.F.R. part 83 in an effort to make acknowledgement as an Indian tribe easier and including any requirement to submit documentation prior to 18 June 1934 to evade the Carcieri rule.

existence of the mandatory criteria in 25 C.F.R. 83.7, opined that any (person) group, community of "Indians" that were offered the opportunity to vote for or against the I.R.A. since it's enactment in 1934, necessarily were under the "superintendence and jurisdiction" of the federal government and therefore met the legal standard set down in the Carcieri case to be eligible to bring land into trust under the I.R.A. This essentially retroactive "boot-strap" argument, that is, that an offer to vote under the I.R.A. after June 18, 1934 meant that a "tribe" existed on or before 18 June 1934 is an erroneous theory currently part of an appeal before the I.B.I.A.

Lastly, recent court decisions have given the citizens and local governments the rights to obtain legal standing and challenge the arbitrary, capricious and unlawful administrative actions and decisions of the Secretary of Interior in acknowledging Indian tribes "unqualified to be an Indian tribe," and to challenge erroneous decisions to bring land into trust as well as unlawful decisions to approve gambling operations and other actions by these putative tribes which in several cases Indian casino cases in California were approved on ineligible lands.

See for example the following recent cases.

City of Sherrill New York v. Oneida Indian Tribe of New York [2005] 544 U.S. 197 and,

Carcieri v. Salazar [2009] 555 U.S. 379, and,

Patchak v. Salazar [2-12] 567 U.S. ____ and,

Amador County v. Salazar [2011] 640 F.3d 373 and also;

Muwekma Ohlone Tribe v. Salazar [2012] 813 F.Supp.2d 2011 recently affirmed by the D.C. Circuit ____ F.3d ____.

Conclusion

A careful analysis of the proposed rule changes, [attached EXHIBIT "B"] reveal they are largely an effort to make tribal acknowledgement of unqualified groups much easier to become acknowledged tribes to evade the impact of 25 C.F.R. 83.7 and the Muwekma case supra defining what it takes to be a ***tribe***. Also these rule changes, definitions and processes as proposed are clearly intended to circumvent the Carcieri case supra by imposing acknowledgement criteria only from 1934 forward. This amounts to a not very subtle attempt at an "end run" around the rule of law set out in the Carcieri case supra.

Lastly these rule changes appear to make it more difficult for the citizens and local governments who are most seriously impacted by tribal acknowledgements and "resultant sovereignty," and legal and tax immunity, and to make it easier to suppress the community's right to challenge arbitrary, capricious and illegal actions or

inaction under the Administrative Procedures Act 5 U.S.C. 701 et.seq. A right that has now been made clear by the Supreme Court in Patchak v. Salazar 567 U.S. ____ supra. A decision that resulted because Congress has repeatedly failed to give local governments and communities a voice in the creation of gambling casinos and the creation of tax exempt and legally immune Indian owned businesses and Indian lands located in their midst. Congress has failed to Act despite repeated promises of Senators like Sen. McCain who promised as recently as 2004 as Chairman of the Senate Indian Affairs Committee to amend the I.G.R.A. to include input and establish effective influence and control by local governments and citizens.

Similarly, despite the clear directive from the Supreme Court set out in Kiowa Tribe of Oklahoma v. Manufacturing Technology, Inc. [1998] 523 U.S. 751 Congress has failed to eliminate tribal immunity from lawsuits in cases where any tribe opens and operates a casino or other business open to the public, having non-Indian employees and customers giving legal immunity to those Indian "tribes" for their torts, breaches of contract and violations of law injuring and damaging non-Indian customers and employees and leaving the victims with no legal recourse.

As the court opined in that case, Congress could easily eliminate the antiquated common law tribal immunity doctrine by simply amending the Foreign Sovereign Immunity Act to include Indian tribes doing business with the non-Indian public and having non-Indian workers.

The one comment that addresses all of these many vague proposed part 83 rule changes, is that 25 C.F.R. ***part 83 rules do not need to be changed at all.*** The proposed changes are detrimental to the non-Indian public and are nothing more than an attempt at a Carcieri "fix," a Patchak "fix" and now a Muwekma Ohlone "fix" using the Administrative processes of the BIA/DOI and the purported authority of the I.R.A. to make it easier to attain tribal acknowledgement and to bring off-reservation fee land into trust and ultimately to expand off-reservation class II and class III Indian casino gambling casinos by ***tribes*** who are improperly acknowledged.

Very truly yours,

James E. Marino

James E. Marino

cc: Office of Acknowledgement