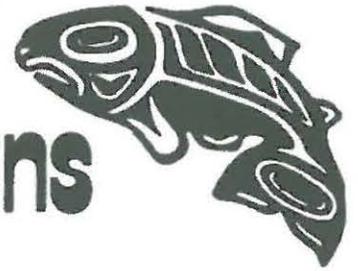




Puyallup Tribe of Indians



September 16, 2013

Honorable Kevin K. Washburn
Assistant Secretary – Indian Affairs
1849 C Street NW
Washington, DC 20240

VIA ELECTRONIC MAIL (consultation@bia.gov) AND U.S. MAIL

RE: Draft Proposal to Revise Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 CFR Part 83 (“1076-AF18”)

Dear Assistant Secretary Washburn:

We write to express our grave concerns regarding the proposed revisions to the Federal Acknowledgment Regulations. The proposal would reduce the standards for determining whether a group is entitled to federal recognition as an Indian tribe, undermine the integrity of the acknowledgment process, and threaten the governmental sovereignty of recognized Indian tribes. We strongly urge you to take no further action on the draft proposal as written.

We are aware of criticism that the current regulations are inefficient, lack transparency, or otherwise create procedural unfairness. The cause of any such problems can be debated, but the point here is that the proposed revisions are not merely procedural in nature. Without explanation, the proposal would make historic and unprecedented changes in federal Indian policy by weakening the substantive criteria for tribal recognition, essentially eliminating the fundamental requirement that a group seeking recognition be able to establish that it has maintained a continuous tribal existence as a functioning political entity.

The proposal was developed with little or no input from recognized tribes, and without any explanation includes elements previously rejected by the Department on the ground that they would undermine the essential requirement that a petitioner demonstrate historic continuity of tribal existence. The result is a one-sided proposal which will lead to acknowledgment of voluntary groups of descendants who have not existed continuously as tribal political entities, and have no history of self-government, or clear sense of tribal identity. **The extension of tribal sovereignty to such groups has the potential to redefine tribes as racial, rather than political entities. Tribal sovereignty is based on the status of Indian tribes as sovereign political entities predating the establishment of the United States and continuously existing to the present.** By eliminating any meaningful requirement that petitioning groups establish continuous existence as sovereign entities with political influence and authority over their own members, the proposal undermines the very foundation of tribal sovereignty and threatens all

tribes.

Following is a summary of our concerns regarding the proposed revisions in terms of specific sections of 25 CFR Part 83:

Sec. 83.3(d):

The proposal would delete language limiting acknowledgment to groups that have functioned as autonomous tribal entities throughout history. This would abandon the Department's longstanding position that the acknowledgment process is not intended to create tribes from mere groups of descendants nor grant governmental sovereignty to such groups. Rather, the purpose has been to acknowledge groups that have demonstrated that they have continuously existed socially and politically as Indian tribes since the beginning of European settlement. Absent new legislation from Congress, we know of no general legal authority for the Department to administratively acknowledge a group as an Indian tribe that cannot demonstrate continuous tribal existence since first sustained European contact.

Sec. 83.3(f) and sec. 83.10(r):

The proposed revisions would allow groups that were denied acknowledgment because they were unable to demonstrate substantially continuous existence to reapply and successfully petition for acknowledgment under the proposed weakened standards. This would repudiate and abandon decades of consistent federal Indian policy and greatly burden the acknowledgment process with new petitions from groups who were previously denied.

Sec. 83.6(d)(1):

The existing "reasonable likelihood" standard is already a relaxed burden of proof in comparison to the "preponderance of the evidence" standard that is generally applicable in civil matters. However, the proposal would go even further by requiring that the Department "view the evidence in the light most favorable" to the group seeking acknowledgment. This would take the legal standard for summary judgment motions and absurdly apply it to the process of weighing all of the evidence for a decision on the merits – a highly inappropriate context for which it was never intended. This would eliminate the ability of the Department to utilize its expertise in the weighing of evidence for and against a petition for acknowledgment.

Sec. 83.7(a):

The proposal would totally delete the requirement that a group demonstrate that it has been identified as an Indian entity on a substantially continuous basis since 1900. There is no justification for this. Groups that are able to satisfy the criteria of social and political continuity of subsections 83.7(b) and 83.7(c) should have no difficulty in meeting this requirement.

Sec. 83.7(b):

The proposed revision would eliminate the requirement that a group demonstrate that it has existed as a distinct community from historical times to the present by replacing it with a requirement that the group be able to demonstrate such existence only from 1934 to the present. However, there is simply no basis in fact or law for granting a presumption of existence as a distinct community prior to 1934. The effect would be to transform the federal acknowledgment process into a procedure that creates tribes from mere racial groups of descendants and grant them governmental sovereignty. As a general matter this would be an unprecedented and startling change in federal Indian policy with profoundly damaging effects on tribal sovereignty.

Sec. 83.7(c):

Here the proposed revisions would eliminate the requirement that a group be able to demonstrate that it has exercised political influence or authority over its members from historical times to the present by replacing it with a required showing of political influence or authority from 1934 to the present. However, the arbitrary use of 1934, the year of the Indian Reorganization Act, has no meaningful rationale in the context of federal acknowledgment and has no substantive evidentiary basis in general. Again, this would allow voluntary groups of descendants to acquire federal recognition as Indian tribes and thereby undermine the sovereignty of recognized tribes that have exercised authority as political entities continuously since European contact.

Sec. 83.7(c)(2)(5):

The proposal would allow groups that can demonstrate the existence of a continuous line of leaders and the means of their selection, without more, to constitute sufficient evidence of the exercise of continuous political influence or authority. However, voluntary groups, community organizations and fraternal clubs typically have individuals that can be identified as leaders. The fact that a club or voluntary group has "leaders" does not establish that the "leaders" exercised political influence or authority over the membership of such groups. This would make subsection (c) essentially meaningless and would represent a dramatic departure from longstanding federal Indian policy.

Sec. 83.7(e):

The proposed revision would allow the unsupported opinions of paid, contemporary "expert witnesses," historians and anthropologists to suffice as a substitute for primary evidence of tribal descent. Without corroborating evidence this would undermine the validity and respect for acknowledgment decisions and frequently lead to "enrollment" controversies for groups that are granted federal acknowledgment as sovereign tribal governments through such a process.

Sec. 83.8:

Incredibly the proposal would eliminate the requirement that a group claiming previous unambiguous federal acknowledgment demonstrate that it is in fact the same entity that was previously acknowledged; moreover it would remove the requirement that the persons identified as the leaders of such groups actually exercised political influence and authority since the time of the claimed acknowledgment, as well as eliminating the safeguard that the petition provide at least one other form of evidence that the petitioner satisfied the criteria of subsection (c). This is belied by what the Department has previously found, that groups claiming acknowledgment may not be the same group as a previously acknowledged historic tribe of the same name.

Sec. 83.10(g):

The current proposal would allow expedited positive findings if a group shows a reservation recognized by a state since 1934 or if the United States has held title to land for the group at any time since 1934. Here again the proposal would completely abandon and repudiate longstanding federal policy without any explanation. Proof that the United States unambiguously held title for a group should continue to be addressed as evidence to be considered but should not lead to an "expedited" procedure leading to acknowledgment as a tribe since there may be no evidence that the petitioning group is the same entity for whom the United States holds or once held title or that the group has continued to exist as a political and social tribal entity from the time that the United States last held title to the land to the present.

Sec. 83.10(m)-(r):

The Assistant Secretary should retain decision making authority, and a hearing should be held only when necessary where a petitioning group or interested party can identify a genuine dispute regarding a material issue of fact as the regulations presently provide. Outside of the IBIA, the Office of Hearings and Appeals has little or no experience or expertise in Indian affairs or acknowledgment decisions and therefore is an inappropriate body for delegated authority and responsibility regarding acknowledgment of petitioning groups as Indian tribes. Contrary to the ostensible procedural reasons said to motivate the proposed regulations, this provision also would appear to unnecessarily result in a full hearing on nearly every acknowledgment petition, increasing the burden on OFA and the parties, and further slowing the acknowledgment process. It is significant that the separation and marginalization of OFA staff would enable the rejection of staff recommendations without standards, procedures or transparency, therefore exposing acknowledgment decisions to political influence.

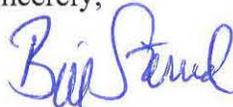
Sec. 83.10(k) and (n)(2):

The proposed revisions would limit access to the record to petitioning groups. This requires interested parties to obtain the record by making requests under the Freedom of Information Act

(FOIA). Additionally under the proposal petitioners would have the right to present evidence and cross examine OFA staff without according similar due process rights to interested parties. Again, to support the ostensible goals of transparency and procedural fairness, interested parties should be provided the same rights of access to information and the same procedural rights as petitioners. As noted, a full evidentiary hearing should be necessary only where a petitioner or interested party can identify a genuine dispute of material fact as the current regulations provide.

Adoption of the proposed revisions would be an historic abandonment of any reasonable standard for federal acknowledgment of sovereign Indian tribes. Due to the profound damage to the governmental sovereignty of recognized tribes this would cause, we call upon the Department to withdraw the proposal and begin anew through full, timely and meaningful consultation with recognized tribes to develop revisions that actually could serve to address the efficiency and transparency concerns that have been identified.

Sincerely,



Herman Dillon, Sr.
Chairman
Puyallup Tribal Council

cc: Senator Patty Murray
Senator Maria Cantwell
Representative Suzan DelBene
Representative Rick Larsen
Representative Jaime Herrera Beutler
Representative Doc Hastings
Representative Cathy McMorris Rodgers
Representative Derek Kilmer
Representative Jim McDermott
Representative David Reichert
Representative Adam Smith
Representative Denny Heck
Honorable Sally Jewell