

**COMMENTS OF LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA ON PRELIMINARY
DISCUSSION DRAFT REGULATIONS RE ACKNOWLEDGMENT OF TRIBES**

INTRODUCTION

The Little Shell Tribe of Chippewa Indians of Montana (Tribe) is a petitioner for federal acknowledgment which has not received a final and effective determination on its petition as of the date of these comments. On June 21, the Assistant Secretary-Indian Affairs (AS-IA) made an announcement of “Consideration of Revisions to Federal Acknowledgment Regulations” and issued preliminary discussion draft regulations for comment, with comments to be submitted by September 25, 2013 (hereafter, draft regulations). In addition, several consultations with tribes and public meetings were scheduled in various parts of the country, and the Tribe testified in favor of the amendment process at the first of those hearings. These comments supplement the statement made by the Tribe at that hearing.

The Tribe welcomes the opportunity to comment on the draft regulations and congratulates the AS-IA for undertaking this initiative. As the Tribe can bear witness, and as has been established in numerous congressional hearings, substantial changes to the recognition process are long overdue. The process is broken; it is cost-prohibitive, interminable, rigid, unreasonable, and violative of Tribes’ substantive and due process rights. A fundamental problem with the regulations as they presently exist is that they attempt to impose a pre-conceived, abstract, idealized concept of tribe onto myriad historical circumstances which defy that linear approach. The regulations must conform to the reality on the ground, and not vice-versa. Much of the complex reality on the ground was caused by ill-advised or illegal federal policy, and non-recognized tribes should not pay the price for that federal action.

Peoples’ inherent rights are at issue here; it is fundamental that the regulations do not create tribes or convey sovereignty to tribes. *See, e.g.,* Coen, Barbara N., Tribal Status Decision Making: A Federal Perspective On Acknowledgment, 37 New Eng. L. Rev. 491, 499 (2003). To allow bureaucratic

processes to further deny those rights is inconsistent with the special trust obligations which the federal government owes the indigenous peoples of this country, with substantive law, both domestic and international, and with international standards relating to indigenous peoples.

The international community, including the United States,¹ through the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) recognizes the inherent rights of indigenous peoples, without any requirement that they first be recognized. The Declaration recognizes in Art. 1 that “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” “Indigenous peoples ... are free and equal to all other peoples...” Art. 2. Aspects of this view are consistent with domestic law. *See, e.g., Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411 (1968) (tribe retains treaty hunting and fishing rights despite termination of government-to-government relationship); *Bottomly v. Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 1979) (sovereign immunity from suit without federal recognition); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 ((1st Cir. 1975) (non-recognized tribe protected by 25 U.S.C. § 177, which establishes a trust relationship with all tribes); *U.S. v. Washington*, 394 F.3d 1152, 1155 (9th Cir. 2005) (Tribe need not be recognized to exercise treaty fishing rights).

The Declaration acknowledges “that indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources...” This is certainly true of the Little Shell experience and that of many other Indian tribes in the United States. Federal recognition must be viewed against this backdrop of inherent rights and historic

¹ “And today I announce that the United States is lending its support to this declaration. The aspirations it affirms – including the respect for the institutions and rich cultures of Native peoples – are ones we must always seek to fulfill...” “But I want to be clear: What matters far more than words – what matters far more than any resolution or declaration – are actions to match those words.” <http://www.youtube.com/watch?v=YMv2xiqaWYc> President Obama speaking to tribal leaders, December, 16, 2010.

injustice which has prevented the full enjoyment of those rights for a century or more. Federal recognition, while not necessary to a tribe's existence or to its inherent sovereignty, is nevertheless important to the full exercise of sovereign rights, to the receipt of the full range of federal benefits and to the dignity and respect owed to all indigenous peoples. It is an injustice to withhold that recognition, and the regulations should reflect the purpose to end, not perpetuate this injustice.

Taking into account the inherent rights of tribes, the unjust denial of those rights because of colonial federal policy, and taking guidance from the Supreme Court, the regulations should ensure that if a decision to recognize a Tribe would not be an arbitrary extension of that label to a group of people, then they should be recognized for what they are – a sovereign tribe. *Cf. United States v. Sandoval*, 231 U.S. 28 (1913). In other words, if there is substantial evidence, which, when viewed in the light most favorable to the petitioner, and in the light of adverse effects produced by federal policy, could lead a reasonable mind to conclude that the petitioner is a tribe, then that must be the result. Congress has historically exercised great flexibility in its dealings with indigenous peoples and the Supreme Court has upheld those dealings. The regulations should reflect that same flexibility. A brief sampling of the varied tribal situations which exist or have existed in this country, quickly discredits the notion that a cookie-cutter approach to recognition will properly vindicate tribal rights. The guiding principle must be flexibility to reflect the reality on the ground.

A. *United States v. Sandoval*, 231 U.S. 28 (1913) presented the question of whether the Santa Clara Pueblo was Indian country for purposes of federal jurisdiction - whether the Pueblo were Indians within the meaning of the Indian Commerce Clause. *See id.* at 38. The Pueblo, unlike some other Indians, were a sedentary and agricultural people, and the Pueblo owned its land in communal fee simple under grants from the King of Spain which were confirmed by Congress.² *See id.* at 39-40. The

² Leaving aside the Pueblo's inherent rights to land.

Court concluded that Congress had in the past treated Pueblos as Indians and the Court would defer to that determination, subject to one caveat:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe....

231 U.S. at 46, citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866) and *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

B. Many Indians had political organizations much different from those of the eastern tribes. Some had “little or no tribal organization.” *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 664 (1979). Yet, political organizations different from those characteristic of the eastern tribes proved no impediment to federal dealings with them: “[T]he record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties.” *Fishing Vessel Ass’n*, 443 U.S. at 664 n.5.³ As pointed out in the *Handbook of Federal Indian Law*: “Congress has created “‘consolidated’ or ‘confederated’ tribes consisting of several ethnological tribes, sometimes speaking different languages.”⁴ Felix S. Cohen, *Handbook of Federal Indian Law*, 6 (1982 ed.). A specific example of consolidation is mentioned in *Washington v. Yakima Nation*:

The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered ‘one nation’ and that specified lands would be set aside for their exclusive use.

439 U.S. 463, 469 (1979).

“On the other hand, Congress has sometimes divided a single tribe, from the ethnological

³ The citations in this section should not be taken to endorse the actions taken, but to show that a variety of approaches have been taken and upheld.

⁴ “Examples are the Wind River Tribes (Shoshone and Arapahoe), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation.” Cohen, *supra*, at 6

standpoint, into a number of tribes or ‘bands.’” Cohen, *supra*, at 6.⁵ The American Indian Policy Review Commission in 1977 provided an additional overview of different tribal situations and how, by historical accident, many tribes came to be unrecognized. AIPRC , Vol. 1, 461-484.

C. “The term ‘Natives of Alaska’ has been defined to include all members of the aboriginal races inhabiting Alaska at the time of its annexation to the United States, and their descendants.” Felix S. Cohen, *Handbook of Federal Indian Law*, 401 (1942 ed.) [Hereinafter Cohen, 1942 *Handbook*]. Alaska's aboriginal races include Eskimos, which are distinct from Alaska's two other aboriginal groups, Indians and Aleuts. *See id.* That Congress extended its power to the aboriginal peoples of Alaska in the same manner that it applied to Indians in the contiguous 48 States is reflected in the 1867 Treaty of Cession, by which the United States acquired Alaska from Russia, albeit in racist language. The third article of that Treaty provided in pertinent part:

The inhabitants of the ceded territory ... [may] remain in the ceded territory [and], with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States.... The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Cohen, 1942 *Handbook, supra*, at 402.

The political status of Alaska Native villages as tribes was definitively clarified in 1993 with the issuance of a List of Federally Recognized Tribes which acknowledged more than 200 Alaska Native villages as federally recognized sovereign tribes. *See* 58 Fed. Reg. 54,364 (1993). The Secretary explained that “[t]he purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) [(1993)] and to eliminate any doubt ... [as to whether] the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the

⁵ “Examples are the Chippewas, the Sioux, and several groups which remained behind when the majority of their members were removed west during the mid-nineteenth century.” *See, e.g., United States v. John*, 437 U.S. 634 (1978) (Choctaws remaining in Mississippi after most moved west); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Delaware Tribe divided into ‘Kansas Delawares’ and ‘Absentee Delawares’); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Eastern Band of Cherokees in North Carolina a ‘tribe’ even though main body of tribe had moved to Oklahoma).” *Id.* at 6 n. 26.

contiguous 48 states.” 58 Fed. Reg. 54,365 (1993). The government has also recognized the Metlakatla Tribe which relocated from Canada to Alaska. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

D. The Indian Reorganization Act, 25 U.S.C. §§ 461-479, 1934, provides a mechanism for the creation of tribes. Section 19 defines “Indian” to include members of recognized Indian tribes as well as “all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... all other persons of one-half or more Indian blood. . . .” and further provides that “The term ‘tribe’ wherever used in [this Act] shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” 25 U.S.C. § 479 (1994). This provision, along with other provisions of the Act, has been used as a basis to form new tribes. Section 5 of the Indian Reorganization Act provides that the

Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, ... within or without existing reservations, ... for the purpose of providing land for Indians.... Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe *or individual Indian* for which the land is acquired ...

25 U.S.C. § 465 (1994) (emphasis added). Once individuals become beneficiaries of land held in trust they can organize themselves as a government and, as a ‘reservation’ tribe or band, become eligible for organization under the IRA. Cohen, *supra*, at 15. This procedure has been followed in numerous instances.⁶

In *United States v. John*, 437 U.S. 634 (1978), the Court reviewed the conviction of Smith John, a Choctaw Indian, under state law. The Court reviewed Choctaw history and found that the federal government had made several efforts to remove the Choctaws from the state of Mississippi, including the Treaty at Dancing Rabbit Creek. That Treaty, in addition to providing for removal also allowed

⁶See Cohen, *supra*, at 15 and n.86 for a listing of tribes for whom this procedure has been followed.

Choctaws to “remain and become a citizen of the State,” to receive land and not to “lose the privilege of a Choctaw citizen.” *Id.* at 641 (quoting Treaty at Dancing Rabbit Creek, Sept. 27, 1830, U.S. - Choctaw Tribe, 7 Stat. 333). The Mississippi Choctaws voted to accept the provisions of the Act. *See id.* at 645-646. In 1939 Congress passed an act placing title to all the lands previously purchased for the Mississippi Choctaws in trust, and in 1944, the Secretary of the Interior proclaimed the lands a reservation. *See id.* at 646. In 1945, the Mississippi Band of Choctaw Indians adopted a constitution under the Indian Reorganization Act and the constitution was approved by the federal authorities in 1945. *See id.* at 646.

The Mississippi Supreme Court had held that the 1944 proclamation had no effect because the Indian Reorganization Act was not meant to apply to the Mississippi Choctaws. *See id.* at 649. The U.S. Supreme Court disagreed, since the IRA defined “Indians” to include “all other persons of one-half or more Indian blood” even if not members of a recognized tribe. *Id.* at 650. The Court rejected the argument that federal powers over the Choctaw were lessened by the history of federal neglect and unchallenged state jurisdiction. *See id.* at 652-53. “Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.” *Id.* at 653.

This brief overview, which does not do full justice to the complexity on the ground, at least indicates that tribes and their histories are unique, and the recognition process must have the flexibility to do justice in each situation.

BACKGROUND OF LITTLE SHELL RECOGNITION

The Tribe initiated its quest for recognition under the present process in 1978, by filing a letter of intent. Its request has been pending for all or parts of five decades, providing an elegant testimonial to the unworkability of the system. On July 14, 2000, Kevin Gover, the Assistant Secretary-Indian Affairs (“AS-IA”), signed a “Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa

Indians of Montana." 65 Fed. Reg. 45,394 (July 21, 2000). After summarizing the evidence under each of the criteria, the Assistant Secretary concluded that "the petitioner should be acknowledged to exist as an Indian tribe." *Id.* at 45,396. The Assistant Secretary felt that the regulations needed to be interpreted flexibly to address the historic situation of the Tribe, largely caused by federal policy towards them. No substantive negative comments were received during the extended comment period, and the state of Montana, all relevant local governments, and all federally recognized tribes in Montana support the Tribe's recognition. Relying largely on the positive preliminary finding, the Supreme Court of Montana issued an opinion that the Tribe met the common law test for a tribe set forth in *Montoya v. United States*, 180 U.S. 261 (1901). *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 315 Mont. 510, 68 P. 3d 814 (2003). Notwithstanding all of these factors, and notwithstanding extensive submissions by the Tribe offering further support for their petition in 2005, on November 3, 2009, the Acting Principal Deputy, Assistant Secretary-Indian Affairs, published in the federal register, a Final Determination (FD) against recognition of the Little Shell Tribe of Chippewa Indians of Montana (Tribe), thereby reversing the favorable proposed finding. 74 Fed. Reg. 56,861.

The Tribe appealed to the Interior Board of Indian Appeals (IBIA) on several grounds within IBIA jurisdiction, as set forth in 25 C.F.R § 83.11 (d)(9). On June 12, 2013, the IBIA rejected the Tribe's arguments based on the grounds within its jurisdiction. The Tribe also raised arguments outside the jurisdiction of the IBIA which have been referred to the Secretary of the Interior (SOI) under §§ 83.11 (f)(2) and (g)(2). 25 C.F. R. § 83.11 (f) (2) provides that the Secretary has the "discretion to request that the Assistant Secretary reconsider the final determination on [the] grounds" referred by the IBIA. The Tribe provided timely comments to the SOI on the questions referred by the IBIA, and requested suspension of its petition pending resolution of the process to amend the regulations. As of the date of these comments, no decision has been rendered by the SOI and the Tribe has not received a decision that is final and effective. Many of the points raised in the comments to the Secretary are the subject of

these comments on the draft regulations, and arise out of the specific experience of the Tribe in the recognition process. In several cases the draft regulations propose to accept recommendations argued for by the Tribe over the years of consideration of its petition.

COMMENTS ON THE CHANGES PROPOSED IN THE DRAFT REGULATIONS

A. The Proposal to Delete Criterion 25 C.F.R. § 83.7 (a) is a Good One.

The Tribe has argued to OFA and in testimony before Congress that criterion (a) should be deleted. 25 C.F.R. § 83.7 is titled "Mandatory criteria for Federal acknowledgment." Failure to meet any criterion results in a negative Final Determination. 74 Fed. Reg. 56,861. Criterion (a) requires a showing that "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900." While such a showing constitutes evidence that a tribe exists, it cannot be a mandatory criterion. No tribe has ever been denied recognition based solely on a failure to meet criterion (a). The unacceptability of (a) as a mandatory criterion is demonstrated by a simple thought experiment. Imagine that a tribe definitively satisfies the other six criteria – in other words, demonstrates tribal existence in every substantive sense. Imagine further, that they have not been referred to as a tribe, or even as a collective by unknowing outsiders "on a substantially continuous basis since 1900". They would be denied acknowledgment under the regulations. That result violates common sense and the equal protection clause of the Constitution which requires those similarly situated to be treated similarly. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). It would also violate Congressional legislation requiring that all tribes be treated equally. Federally Recognized Indian Tribe List Act of 1994, PL 103-454 (1994).

The AS-IA apparently agrees with this position as the draft regulations propose to delete criterion (a). See §83.7(a) of draft regulations. This is a welcome proposal and present criterion (a) should be deleted from the new regulations when they are adopted. Instead, the criterion should be viewed as evidence of a tribe's existence.

B. The Proposal That A Favorable Final Determination Will Be Automatically Issued Following a Favorable Preliminary Finding, If There Have Been No Negative Comments from the State or Local Government Where the Petitioner's Office is Located, or From Any Federally Recognized Tribe within the State, Is A Good One And Is Required Under the Law; Any Other Result Would Be Arbitrary And Capricious.

The draft regulations provide at § 83.10 (m) that:

At the end of the period for comment on a proposed finding, [OHA or AS-IA?] **will automatically issue a final determination acknowledging petitioner as an Indian tribe** if the following are met (emphasis supplied):

- (1) The proposed finding is positive, and
- (2) [OHA or AS-IA?] does not receive timely arguments and evidence challenging the proposed finding from the State or local government where the petitioner's office is located or from any federally recognized Indian tribe within the state.

Under such circumstances, an automatic favorable final determination is required by the law as any other result would be arbitrary and capricious. *Cf. Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1407 (D.C. Cir. 1996). This proposal precisely addresses the situation with the Tribe's petition, and the proposed changes should be adopted in the final regulations.

C. The Draft Regulations Make Some Improvement in According Due Process to Petitioners, but Fall Short of What is Required.

There are substantial benefits that flow from federal recognition. § 83.2 provides that "Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States...." Given their inherent rights under domestic law and under the Declaration, as well as the importance of the benefits which flow from recognition, tribes have a right to due process in the recognition process. *Kelly v. Railroad Retirement Board*, 625 F.2d 486, 490 (3d Cir. 1980); *Marconi v. Chicago Heights Police Pension Board*, 836 N.E. 2d 705, 725-26 (Ct. App. Ill. 2005). The 9th Circuit has

acknowledged a right to be heard in the Federal recognition context, stating “the Supreme Court has noted that ‘in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.’” *Greene v. Babbitt*, 64 F.3d 1266, 1273-1274 (9th Cir. 1995) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970)).

§ 83.10 (n)(2) of the draft regulations provides for the opportunity for a hearing on the “reasoning, analyses, and factual bases for the proposed finding, comments and responses. [OHA or AS-IA?] may require testimony from OFA staff involved in preparing the proposed finding. Any such testimony shall be subject to cross-examination by the petitioner.” While this is a beneficial change, it does not go far enough. There should not be discretion involved in deciding whether to elicit testimony from OFA staff. The opportunity to cross examine the OFA staff is essential to due process, so they must be made available for testimony, including cross-examination.

But the draft regulations do not address at all an additional deficiency in according due process. Due process requires a meaningful opportunity to present one’s own case. This cannot be done without access to all relevant materials. In the Tribe’s case, after its last filings in OFA, an OFA staff member made an additional, extensive field trip to the Tribe, during which 71 individuals were interviewed in 56 interview sessions. FD page 49, fn 38. Scores of other documents were obtained and relied upon in the FD. *Id.* There is no provision in the present regulations for petitioners to review documents under such circumstances and the FD was issued without the Tribe having had the chance to review and comment on this evidence.⁷ The FD specifically indicates that the OFA relied on “evidence that the Department researchers developed during their verification research.”⁸ 74 Fed. Reg. 56,862. The draft regulations do not address this serious problem

⁷ Indeed, the Tribe was required to file a FOIA request to even obtain the materials which should have been provided to it as a matter of course. It then had to wait months to get the materials, was denied access to some materials, and was required to pay costs of over \$5000 to receive the documents that were provided.

⁸ Along with the numerous interviews OFA relied upon which were not available to the Tribe, the FD did not even mention a three hour favorable interview with Dr. Nicholas Vrooman. *See e.g.* FD at 99-105. This further

In the IBIA, the Tribe was faced with trying to overcome an existing decision on appeal, rather than trying to influence a decision yet to be made. Having the opportunity to appeal a negative decision is far different from having the opportunity to influence the decision before it is made. See *Wertheim v. State of Arizona*, 1993 WL 603551 at n.5 (D. Ariz. 1993) (discussing the relationship between notice and the opportunity to comment in the rulemaking context). This heavier burden imposed on the Tribe denied it due process. The draft regulations should be revised to require that all materials be turned over to petitioners in a timely manner, and that they be given an opportunity to review and comment on the materials before a decision is made.

D. The Draft Regulations Propose Some Excellent Improvements in Streamlining the Process If A Petitioner Demonstrates Previous Federal Acknowledgment, But Do Not Correct the Confusion As To What Must Be Shown To Demonstrate Previous Federal Acknowledgment.

The draft regulations provide in § 83.8 (d) (2) and (3) that if previous federal acknowledgment is shown, then community § 83.7 (b) and political influence § 83.7 (c) need only be shown for the present time. These are excellent proposals and should be adopted in the final regulations. Unfortunately, the draft regulations do not clarify what must be shown to establish previous federal acknowledgment. The present regulations have been interpreted by OFA to require that a petitioner show not only that its existence was previously acknowledged, **but also** that it had a previous government-to-government relationship with the United States. See, e.g., 74 Fed. Reg. 56,863. The new regulations should clarify that previous acknowledgment of a tribe's existence is sufficient and that a previous government-to-government relationship need not be shown.

1. A Government-to-Government Relationship with the United States is Not Necessary to a Tribe's Existence And Is Not A Proper Element For Previous Federal Acknowledgment.⁹

demonstrates the Due Process violations created by the current regulations because the Tribe certainly would have highlighted this interview if provided an opportunity to comment on OFA's interviews before the FD.

⁹ The Tribe is aware of the article by William W. Quinn, Jr. "Federal Acknowledgment of American Indian Tribes: The Historical Development of A Legal Concept", *American Journal of Legal History* (Oct. 1990) which argues that "acknowledgment" and "recognition" are now synonymous terms. The Tribe disagrees, but even assuming arguendo that were correct, it does not detract from the distinction which the Tribe draws between the acknowledgment of the existence of a tribe

As noted previously, the regulations do not create tribes or convey sovereignty to tribes. *See, e.g., Coen, supra.* Also, as previously stated, unrecognized tribes have sovereign powers, may hold federal rights or be beneficiaries of federal responsibilities, all without the benefit of a full blown government-to-government relationship with the United States. *See, e.g., Bottomly; supra, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, supra; U.S. v. Washington, supra; Menominee Tribe of Indians v. U.S., supra.* Some tribes have been acknowledged to exist even though not "in amity with" the United States. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

Thus, acknowledgment of a tribe's existence is distinct from, and not dependent on, recognition of a government-to-government relationship with the United States.¹⁰ *Cf. Carciari v. Salazar*, 555 U.S. 379 (2009) where Justice Breyer's concurring opinion noted that for the purpose of taking land into trust under the IRA, a tribe might have been under federal jurisdiction in 1934 without having been recognized at that date. *Id.* at 398. This suggestion has been utilized by the Secretary in determining which tribes are eligible to have land taken into trust under the IRA. *See, Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar and Cowlitz Indian Tribe* (Defendant Intervenor), Case Nos. 11-cv-00284 and 11-cv-278-BJR (D. D. Col. 2013) (challenging decision of Secretary to take land into trust for the Cowlitz Indian Tribe based on a determination that it was under federal jurisdiction in 1934, though recognized decades later.)

The Secretary of Interior has made multiple statements and findings over the years evidencing an awareness of a difference between tribal existence and a government-to-government relationship with Tribes. In a 1937 Opinion, the Secretary explained that the St. Croix Tribe may exist as practical

(perhaps synonymous with Quinn's "cognitive recognition") and the decision to enter into a government-to-government relation with a tribe (Quinn's "jurisdictional recognition"). The very presence of a process to determine tribal existence indicates that there are tribes which do exist, but do not presently have a government-to-government relationship. That has been true in the past as well.

¹⁰ The existence of a government-to-government relationship necessarily includes the concept of tribal existence, but the reverse is not necessarily true. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) (finding the federal recognition process determines whether a tribe "exists" as a legal entity according to the federal government, but that "is not to say, obviously, that non-federally recognized tribes do not exist, or do not possess rights. However, as a general matter, absent federal recognition, tribes do not enjoy the same status, rights, and privileges accorded federally recognized tribes.")

matter, and may at one time have even been recognized by the U.S. government, but cannot currently be recognized because Congress determined it could not. Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758, 2762–2763 (Feb. 8, 1937). Further, in recent Federal Register notices of Final Determination of Federal Recognition, the Secretary has stated that the BIA “acknowledges that [name of Tribe] exists as an Indian Tribe.” *See e.g.* Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002).¹¹

Federal legislation has also drawn a distinction between existence and recognition of a government-to-government relationship. *See*, Pub. L. 96-484 (1980), by which the federal government ratified a land settlement between the Pamunkey Tribe and a railroad. The following proviso was inserted in Section 8 of the Act:

"Nothing in this Act constitutes **recognition** or **acknowledgment** of the Pamunkey Indians as a tribe subject to the plenary control of Congress or affects the rights of the Pamunkey Indians to petition the Secretary of the Interior for acknowledgment of their status as an Indian tribe and to seek entitlement to all rights, privileges, and immunities enjoyed by other recognized or acknowledged tribe...." (emphasis supplied)

The Deputy Assistant Secretary, in a letter to the Secretary of the Interior, stated:

"Inclusion of an Indian group in Acts of Congress is often taken as evidence that the group **constitutes a tribe or a recognized tribe.** (emphasis supplied). Section 9 of H.R. 7212 (which should be renumbered as section 8) is intended to make it clear that no position is taken on whether the Pamunkeys are either a recognized or unrecognized tribe. **We recommend, however, that the words 'or acknowledgement' (sic) be inserted after 'recognition' and that**

¹¹ Some earlier Federal Register notices also state that BIA acknowledges that those Tribes “have existed autonomously since first contact.”¹¹ Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980); Final Determination for Federal Acknowledgment of Jamestown Clallam as an Indian Tribe, 45 Fed. Reg. 81,890 (Dec. 12, 1980). *See also* Final Determination for Federal Acknowledgment of the Tunica-Biloxi Indian Tribe of Louisiana, 46 Fed. Reg. 38,412 (July 27, 1981) (stating “these have a documented existence back to 1698”); Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24, 083 (June 11, 1984) (stating “the Band has existed as a distinct political unit since before the Creek War”). Such language demonstrates that federal acknowledgement process centers on Tribal existence rather than a government-to-government relationship.

the words "or acknowledged' be inserted after 'recognized'." (emphasis supplied). H.R. Rep. No. 96-1144, at 10 (1980).

This legislation language and its legislative history make clear that acknowledgment and recognition are distinct concepts. Cf. Paskenta Band Restoration Act, 25 U.S.C. § 1300m-1 "Federal recognition is hereby extended to the Tribe." Existence was not an issue since the existing tribe was being restored to a government-to-government relationship. "Recognition" is "A formal political act [which] permanently establishes a government-to-government relationship between the United States and the recognized tribe . . ." H.R. Rep. No. 96-11454, at 10 (1980) (emphasis supplied).

Thus, case law, Federal policy, and legislation agree that tribal existence and recognition of a government-to-government relationship are separate concepts. The present regulations and the policy history upon which they are based largely recognize the same distinction, with one ambiguity which should be clarified in the revised regulations as we suggest *infra*.

2. The Regulations Govern The Process For Demonstrating That A Tribe *Exists*, So Previous Acknowledgment of *Existence* Should Be Sufficient For A Tribe To Avail Itself Of the Relaxed Standards of § 83.8.

The distinction between a tribe's existence and the existence of a government-to-government relationship is inherent in the establishment of a process to determine that Indian tribes exist even though not acknowledged and is implicit in the title to 25 C.F.R. Part 83 which reads: "Procedures For Establishing That An American Indian Group **Exists** As An Indian Tribe." (emphasis supplied). That title is consistent with the stated purpose of the regulations as set forth in 25 C.F.R. § 83.2: "The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups **exist as tribes**." (emphasis supplied). "Indian tribe" is defined as any tribe that "the Secretary of the Interior presently acknowledges to *exist* as an Indian tribe." § 83.1 (emphasis supplied). § 83.4 (b) provides for filing request acknowledgment "that an Indian group exists as an Indian tribe". § 83.8 (a) itself states that "Unambiguous previous Federal acknowledgment is acceptable evidence of the

tribal character of a petitioner to the date of the last such previous acknowledgment." (emphasis supplied). § 83.7 sets forth the "Mandatory criteria for Federal acknowledgment." For obvious reasons, there is no requirement in the mandatory criteria to demonstrate a present or previous government-to-government relationship.¹² That relationship is the result of a successful petition establishing existence. Coen, *supra*, at 491: "An administrative determination that a group is a tribe...establishes a government-to-government relationship between it and the United States."

The distinction between acknowledgment and recognition in the law and regulations is consistent with federal policy and practice prior to adoption of the regulations. The 1942 treatise by Felix Cohen indicates that the existence of a government-to-government relationship was not historically required to demonstrate acknowledgment of tribal existence.

The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a 'tribe' or 'band' have been:

- (1) That the group has had treaty relations with the United States.
- (2) That the group has been denominated a tribe by act of Congress or Executive Order.
- (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.

.... Felix Cohen, Handbook of Federal Indian Law 271 (1942).

Obviously, criterion (1), the existence of treaty relations, establishes both a government-to-government relationship and existence as a tribe. But criteria (2) and (3) establish tribal existence whether or not there is a government-to-government relationship. Sections 83.8 (c) (2) and (3)

¹² Such a relationship follows automatically from a demonstration of tribal existence. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). See also, § 83.2 which provides that "Acknowledgment of **tribal existence** is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." (emphasis supplied). *Cf.*, *Miami Nation of Indians v. United States Department of the Interior*, 255 F.3d 342, 345, 350 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 1067 (2002)(noting significance in regulations between acknowledgment and recognition).

specifically incorporate those two Cohen criteria: "Evidence to demonstrate previous Federal acknowledgment includes, but is not limited to: (2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order." and "(3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds." Nothing in §§ 83.8 (c) (2) or (3) requires a showing of a government-to-government relationship.

In summary, Federal law recognizes that acknowledgment and recognition are distinct concepts and a previous government-to-government relationship is not a necessary prerequisite, to a finding of previous federal acknowledgment of tribal existence. This distinction is made clear by the title of the regulations, the statement of the purpose of the regulations, the mandatory criteria of § 83.7, the concern of § 83.8 with "tribal character" and the fact that under § 83.8, forms of evidence which do not indicate a government-to-government relationship demonstrate previous federal acknowledgment.

This clarity has been clouded by an arguable conflation of the two concepts in the present definition of previous federal acknowledgment. Previous Federal Acknowledgment is defined to mean "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States." 25 C.F.R. § 83.1. The "explanatory comments" in the preamble to 25 C.F.R. Part 83 state that "the regulations require that previous acknowledgment be unambiguous and clearly premised on acknowledgment of a government-to-government relationship with the United States." Interior commentary on the final rule implementing § 83.8, 59 Fed. Reg. 9280, 9283 (1994). Even under the present regulations this conclusion is unwarranted because the definition refers only to a relationship and that exists as to all tribes, recognized and unrecognized. *Passamaquoddy, supra*.

Fortunately, the process of amending the regulations offer the opportunity to avoid this result by making clear that to establish previous federal acknowledgment, all that need be shown is that the

petitioner was previously acknowledged to exist and deleting the reference to a previous government-to-government relationship.

E. The Draft Regulations Do Not Deal Adequately with the Standard of Proof Required to Establish the Criteria for Acknowledgment, and in Some Respects Seem to go in the Wrong Direction; Substantial Evidence – That Which a Reasonable Mind Could Find Sufficient, Should be the Applicable Burden of Proof, and the Evidence Should be Viewed in the Light Most Favorable to the Petitioner, Taking Into Account Adverse Consequences of Federal Policy.

§ 83.8(a) specifically provides that "If a petitioner provides **substantial evidence** of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section." (emphasis supplied).¹³ Substantial evidence should be the standard for all elements of proof under the regulations, and in keeping with the general rule that laws should be interpreted in favor of the Indians, the evidence should be viewed most favorably as to them, and in the light of detrimental historical actions by western governments. *Cf. Winters v. United States*, 207 U.S. 564, 576-77 (1908) (statutes liberally construed); *United States v. Walker River Irrig. Dist.*, 104 F. 2d 334, 337 (9th Cir. 1939)(ambiguities resolved in Indians' favor). "[S]ubstantial evidence" is consistent with the general burden required by § 83.6 for the mandatory criteria presently contained in § 83.7: "A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion." "[R]easonable likelihood of the validity of the facts" is a fair restatement of the substantial evidence test.

"Substantial evidence is less than a preponderance [of the evidence], but enough so that a reasonable mind might find it adequate to support the conclusion." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992). The Supreme Court of the United States has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate

¹³ This statement is itself problematic as "unambiguous" seems to be in tension with "substantial evidence" which is "enough so that a reasonable mind might" find adequate. The new regulations should address and clarify the actual standard which applies.

to support a conclusion." *Richardson v. Peralas*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).¹⁴ Thus, if a petitioner can produce evidence that a reasonable mind might accept as adequate to establish that it is a tribe, it has met its burden of proof and the OFA staff must issue a positive determination.

While the present regulations can arguably be said to make the substantial evidence test applicable, the OFA staff have become rigid in demanding overwhelming proof of the criteria, ignoring the need to look at federal policy and its effects on the petitioner and the context of each tribe's history. Unfortunately, the draft regulations do not solve this problem. § 83.6 presently provides that : "A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to the criterion." As written, this provision only addresses whether the facts related to a criterion have a reasonable likelihood of being valid and does not address the sufficiency of those facts to establish that the criterion is met. In an attempt to address this problem, the draft regulations establish a two-step process to evaluate if a criterion is met. "§ 83.6 (d) (1) provides that "A criterion shall be considered met if (i) a preponderance of the evidence supports the validity of the facts claimed when viewed in the light most favorable to the petitioner..." and then addresses the adequacy of the facts by then providing that the facts demonstrated under this standard must "...establish a reasonable likelihood that the criterion is met." This two-step approach should be exchanged for the straight forward statement that the criterion must be considered met "if the evidence is sufficient for a reasonable mind to conclude that the criterion is met viewing the evidence in the light most favorable to the petitioner, in the specific cultural, social, political, and historical context of the tribe and in the light

of adverse consequences caused by federal policy or actions.” If there is substantial evidence to support the conclusion that a tribe exists under these circumstances, there is no violation of the arbitrariness standard of *Sandoval* and the petitioner must be acknowledged.

F. The Draft Regulations are Correct in Recognizing that the Timeline for Proof of Community and Political Influence Must Be Changed, and in Recognizing that the Evidence to Establish These Criteria Must Also Be Changed, But the Changes Proposed Are Inadequate and In Important Respects Flawed.

1. It is an important step in the right direction for the draft regulations to change the period for which community must be shown from historic times to 1934, but no absolute date can be specified, and criterion (b) rests on fundamentally flawed assumptions which must be substantially revised in ways that go beyond those suggested in the draft regulations.

The draft regulations propose substantial changes to criterion § 83.7 (b) which are in general salutary, but the final regulations need to go further. § 83.1 of the draft regulations defines community as follows, and this precise phraseology should be used in § 83.7 (b):

Community means a group of people with consistent interactions and significant social relationships within its membership and whose members are differentiated from and identified as distinct from nonmembers. Distinct community must be understood in the context of the history, geography, culture and social organization of the group.

The Tribe suggests adding after “understood” the word “flexibly” and after “social” in the second sentence, the words “and political: and that this definition govern determinations under criterion (b) without the distortions introduced to it by other parts of § 83.7 (b), some of which are addressed by the draft regulations.

The draft regulations change the requirement that a petitioner show that a “predominant portion” of the petitioning group comprise a distinct community to a showing that (XX) per cent do so, and changes the time frame for such a showing from historic times to from 1934. The proposal to eliminate the reference to “predominant portion” is a good one, but the proposal to insert a percentage is fundamentally flawed. A percentage arrived at in the abstract cannot do justice to the complexity on the ground. Rather, a determination should be made “based on an overall evaluation of the totality of

the evidence” and a favorable finding “should not be precluded because of some gaps in the record.” The determination should be governed by the “substantial evidence” test, with the evidence viewed in the light most favorable to the petitioner, and taking into account historical circumstances and any adverse effects of federal actions or policy.

The present definition of community refers to “consistent interactions and significant social relationships within its membership”. The present regulations distort this definition when they set forth the types of evidence that can be presented to meet the criterion of community, by references to “*significant rates of marriage*”, “*significant rates of informal social interaction which exist broadly among the members of the group*”, “*a significant degree of shared or cooperative labor...*”, “*evidence of strong patterns of discrimination...*”; “*Shared sacred or secular ritual activity encompassing most of the group*”; cultural patterns shared among a *significant* portion of the group...”. These qualifiers distort the meaning of the definition which does not imply any specified portion of the community must engage in any specific activity. Rather, it just requires consistent interaction and relationships of significance “within the membership”. Few recognized tribes today could meet the arbitrary standards imposed by the qualifying terms contained in the references to the types of evidence listed. It is best to list the types of evidence without the qualifiers which seem to introduce arbitrary standards at every turn and then to make a determination based on the totality of the evidence.

Likewise the draft regulations propose changes in the ways in which community can be definitively shown. The present provisions provide that community can be shown by demonstrating 50 per cent in-marriage, 50 per cent sharing of distinct cultural patterns, or 50 per cent concentration in residential areas. The draft regulations delete the reference to 50 per cent and instead indicate [XX] per cent. § 83.7 (b) (2). If percentages for *definitive* showings of community are ultimately adopted, it should be made clear that these percentages do not imply that something close to those percentages is needed to establish community absent such a definitive showing.

The present and draft regulations correctly note the important relationship between community and political influence. The United States itself would be hard pressed to meet any rigid definition of community, but it clearly constitutes a “people”, entitled to self-determination by international law and therefore is a community in an important sense. Tribes are “peoples” as well and the same considerations should apply to any determination of community. Thus, § 83.7 (b) (1)(ix) provides that “A demonstration of historical political influence under the criterion in § 83.7 (c) shall be evidence for demonstrating historical community.” § 83.7 (b) (2) provides that “A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:

“The group has met the criterion in § 83.7 (c) using the evidence described in § 83.7 (c) (2).”

§ 83.7 (c) (2) provides that political influence can be shown by “demonstrating that group leaders and/or other mechanisms exist or existed which:

- (i) Allocate group resources such as land, residence rights and the like on a consistent basis;
- (ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;
- (iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;
- (iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.”

The draft regulations propose a new “(v) Show a continuous line of group leaders and a means of selection or acquiescence by a majority of the group’s members.” This is a good revision if the word “majority” is deleted and with that change should be adopted.

2. Criterion (c)

Criterion (c), political influence likewise changes the relevant period for which political authority is measured from historic times to 1934. § 83.7 (c). This is an important step in the right direction, but

once again adopts an arbitrary criterion. 1934 is obviously based on the date of the passage of the Indian Reorganization Act (IRA), but that Act contemplated actions related to recognition occurring after that date, and that factor should be reflected in the final regulations. In addition, the situation on the ground may be such, that starting from 1934 does not adequately do justice to the Tribe's situation, and in that case the regulations must be flexible enough to deal with the history and context of each Tribe. Once again, the decision must be made based on the totality of the evidence without the present qualifiers attached to the type of evidence, such as "significant numbers of members", "most of the membership". If, the evidence provides "substantial evidence" of political influence, then the criterion must be considered met.

3. criterion (e) – the time period for this criterion should likewise be shortened as for (b) and (c) and also applied flexibly based on historical context.

General Suggestions for Amendment to the Present Regulations

1. The definition of "indigenous" should be retained. It is inappropriate to delete this at a time that the U.N. Declaration on the Rights of Indigenous Peoples has been adopted by 150 Nation States and endorsed by the United States itself.

2. § 83.2 Purpose - needs substantial revision as it insinuates that the US is granting something to tribes, rather than at last rectifying an injustice by acknowledging their inherent rights. It incorrectly states that acknowledgment is "a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." We know from *Passamaquoddy*, that certain protections exist without such acknowledgment. The paragraph goes on to state that "Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." We know from *Bottomly*, *Menominee*, *Passamaquoddy*, and *US. V. Washington, supra*, that tribal immunities, privileges and powers, exist without regard to acknowledgment. All in all, this provision turns on its head the fundamental tenets of federal Indian law that Indian rights are inherent rights, *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) , a concept contained in the U.N. Declaration on the Rights of Indigenous Peoples which states "Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples...". Finally, the paragraph states that "Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected." This gratuitous statement is misplaced and unnecessary as the subject of the paragraph is the remedying of past injustice.

A more appropriate statement of purpose in paragraph § 83.2 would be along the following lines:

“The purpose of this part is to remedy long standing injustice to the indigenous peoples of this country by providing a swift, economical, transparent process to acknowledge their status as inherent sovereigns with all rights appertaining thereto, including those contained in the United Nations Declaration on the Rights of Indigenous Peoples.”

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