

COMMENTS OF THE NATIONAL INDIAN YOUTH COUNCIL  
on the  
PRELIMINARY DISCUSSION DRAFT OF POTENTIAL REGULATIONS  
TO IMPROVE THE FEDERAL ACKNOWLEDGMENT PROCESS

**The Federal Register Notice**

These are comments on a preliminary discussion draft of potential revisions to improve the Federal acknowledgment process announced in the notice “Procedures for Establishing That an American Indian Group Exists as an Indian Tribe,” 78(124) Federal Register 38617 (June 27, 2013). They address the intent of the notice to identify potential improvements in the recognition process and maintain the integrity of acknowledgment decisions (paraphrasing the notice at 38617). Such must be done in principles that comply with the rule of law and set out ascertainable standards to prevent abuses of discretion in the recognition process.

**Interest of Commentator**

The National Indian Youth Council (NIYC) is an American Indian non-governmental organization that is accredited to the United Nations Economic and Social Council. It was founded in 1960 and is recognized as a leading international advocate for indigenous human rights.<sup>1</sup> These comments are drafted by James W. Zion, its international legal counsel and former attorney for the Little Shell Tribe of Chippewa Indians of Montana who submitted comments on the original 25 CFR Part 54 regulations noticed on June 16, 1977.

The NIYC notes a trend for the United States to disengage itself from responsibility toward American Indians, and urban Indians in particular, and comments on these regulations to put the United States on notice that it is bound by the Declaration on the Rights of Indigenous Peoples with regard to the definition and identification of individual Indians as indigenous peoples and the Little Shell Tribe of Chippewa Indians of Montana as exemplar of American Indian collectives and individuals entitled to recognition by the United States as such, regardless of place of residence.

**The Proper Legal Context of Standards for Recognition**

---

<sup>1</sup> See, Henry Minde, *The International Movement of Indigenous Peoples: an Historical Perspective*, University of Tromso Centre for Sami Studies [Norway] (1995); Douglas Sanders, *Indigenous Peoples at the United Nations*, in The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors 93 at 105 (van Boven et als, editors, Utrecht, 1997) (NIYC one of the 13 first U.N. indigenous NGOs); and Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 Duke L.J. 660 at 694 (1990) (NIYC a co-author of the “Draft Declaration of Principles” (1985) that is part of the core of the Declaration on the Rights of Indigenous Peoples and initiated its process). There is general acknowledgment that the NIYC coined the “Red Power” movement during the Civil Rights era.

American Indians are at the core of the existence of the United States of America and the definition of the legal terms “Indian tribe” or “Indian nation” are essential because of the treaties assumed by the United States as the successor state to those concluded by Great Britain in negotiations with Indian collectives or representatives.<sup>2</sup> They relate to, and implement, provisions of the Constitution of the United States that give Congress the power to regulate commerce “with” “the Indian tribes” and the authority to conclude treaties with Indian nations under the Treaty Clause).<sup>3</sup> While Congress is said to have the “plenary power” to make Indian affairs policy it makes specific or implied delegations of power and authority to other branches of government that likewise implement a constitutional function and must comply with the intent of the Constitution to maintain the original international law relationship.

The most specific statement of authority for the proposed “potential improvements” is that in the Federally Recognized Indian Tribe List Act of 1994.<sup>4</sup> That Act of Congress (exercising its constitutional powers in relation to Indians,<sup>5</sup> defines the term “Indian tribe” as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.”<sup>6</sup> The scope of the congressional delegation of authority is more precisely stated in the finding in Section 103(3) that “Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;’ or by a decision of a United States court.” Accordingly, an “Indian tribe” may be defined in some form of “recognition” by an Act of Congress (such as a statute, statutory coverage or object of appropriations), the “Recognition Procedures” being discussed here or a decision of a Court of the United States that “recognizes” a collective as an Indian tribe. There must be a review of whether there has been prior recognition before the secretarial process is used. Given the formalism and procedural difficulty of the proposed process, prior recognition should not elevate form above substance, and substantial recognition should exist using the canons of liberal construction discussed below.

The initial focus, for the Little Shell Tribe of Chippewa Indians of Montana, should be whether one or more of the three means of recognition has occurred and, more importantly, whether the proposed regulations meet the requirements of the Federally Recognized Indian Tribe List Act with regard to the congressional definition and statutory policy, as stated. This refers to judicial recognition and

---

<sup>2</sup> See, Cohen’s Handbook of Federal Indian Law 135 (2005 Ed.) (discussion of the “federal purposes” of the terms and their relation to treaty negotiation).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, 136.

<sup>5</sup> Codified at 25 U.S.C. §§ 479a, 479-a-1.

<sup>6</sup> *Id.*, session law at Sec. 102(2) (definitions).

the fact that the Little Shell Tribe has been recognized as constituting and representing a distinct segment of Pembina Indians.

There is an additional consideration: Provisions of the Declaration on the Rights of Indigenous Peoples will be reviewed below, and the pertinent question is what weight the Declaration should be given for purposes of this process. While some claiming to represent the interests of the United States dismiss the Declaration, others (such the U.S. State Department) recognize that there are elements it states that, as with some others, rise to the standard of binding international customary law.<sup>7</sup> We do know that the rights of Indian tribes of the United States “fall under” Principle VII of the Helsinki Final Act, which is an international human rights instrument.<sup>8</sup> Indian treaties are “international” under federal law<sup>9</sup> and American Indian human rights are recognized as international human rights in that statement of recognition of the application of the international Helsinki Act’s human rights provisions.

The Declaration on the Rights of Indigenous Peoples<sup>10</sup> is a statement of indigenous human rights that the United States implicitly recognizes in adoption of the Helsinki Final Act and specifically recognizes in the “Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples” promulgated by President Obama on December 16, 2010. It states that “The United States supports the Declaration, which ... has both moral and political force.”<sup>11</sup> While the United States disclaims the finding force of the Declaration as “law” it does recognize that some

---

<sup>7</sup> Both the United States and Canada accepted the Declaration in an understated way, but the question of the actual weight it carries under national Canadian law was put before the Federal Court of Canada in the case of *Canadian Human Rights Commission v. Attorney General*, 2012 FC 445 (2012) (the Court has jurisdiction over a range of “aboriginal law matters”). Amnesty International and the Assembly of First Nations pointed to the Declaration (as “formally endorsed by Canada”) and the Federal Court stated that it could “inform the contextual approach to statutory interpretation” to avoid an interpretation “that would put Canada in breach of its international obligations.” *Id.*, ¶¶ 350, 351 and 353. Given that United States courts interpret Indian law issues in light of executive recognition of principles of international law, the same conclusion applies in the United States.

<sup>8</sup> United States Commission on Security and Cooperation in Europe, Fulfilling Our Promises: The United States and the Helsinki Final Act at 149 (November 1979). The Commission is a statutory body, with member of Congress commissioners, that was established in 1976 to monitor and encourage compliance with the Helsinki Final Act. Public L. 94-304.

<sup>9</sup> *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1976).

<sup>10</sup> United Nations General Assembly Resolution No. A/61/L. 67 (13 September 2007).

<sup>11</sup> United States Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (n.d.), at 1.

principles within it may be customary. The United States note verbale of July 10, 2012, given to the President of the U.S. General Assembly in conjunction with its bid to election to the Human Rights Council, reaffirms commitment to the Declaration as a document that “carries considerable moral and political force.”<sup>12</sup>

The important thing is that President Obama’s commitment, and the U.S. Permanent Mission’s note verbale<sup>13</sup> are statements of an *opinio juris sive necessitatis* or an international law “opinion of law or necessity” that shows an official belief that the United States is in fact committed to the principles of the Declaration on the Rights of Indigenous Peoples.<sup>14</sup> They are acts of acceptance of the validity of the principles stated in the Declaration that require that the Department of the Interior must acknowledge and honor as part of trust responsibility to tribes eligible for recognition and respect for their sovereignty.<sup>15</sup>

### **The Declaration and Individual and Collective Rights to Recognition as a “tribe”**

The Honorable James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, made some important remarks that go to the proper interpretation of the Declaration in his 15 July 2010 report to the Expert Mechanism Human

---

<sup>12</sup> Note verbale dated 10 July 2012 from the Permanent Mission of the United States of America to the United Nations addressed to the President of the General Assembly, U.N. Document No. A/67/151.

<sup>13</sup> A “note verbale” is a kind of diplomatic communication—in this case a statement of commitment to the President of the General Assembly of the U.S. position on the Declaration.

<sup>14</sup> See *The Paquete Habana*, 175 U.S. 677, 700-714 (esp. 700) (1900) for the canon of American constitutional law that “International law is part of our law” and the kinds of “evidence” courts can use to find the “customs and usages of civilized nations.” President Obama’s statement of “acceptance” and the note verbale of commitment to the Declaration are in fact statements of *opinio juris*, and the Commission on Security and Cooperation in Europe is a specific statement that American Indians have human rights and rights to self-determination that are now enshrined in the Declaration.

<sup>15</sup> See finding No. (2) in the Federally Recognized Indian Tribe List Act, *supra* at n. 2. The responsibilities in that finding run to “recognized” tribes and the ultimate question is which tribes fairly fall within that definition as a matter of human rights law. Accordingly, the National Indian Youth Council’s observations on the adequacy of given provisions of the proposed draft regulations will be driven by the Declaration, in the context of historical American Indian law and policy.

Rights Council.<sup>16</sup> He noted that adoption of the Declaration in 2007 and pending review by the United States and Canada (before adoption), and he then spoke to implementation of the Declaration by way of a commitment to its rights and principles “free from vague assertions that the Declaration is not obligatory.”<sup>17</sup> Mentioning the fact some describe the Declaration as not “legally binding” and the power of the General Assembly only to make “recommendations,” Anaya pointed to the “significant normative weight grounded in its high degree of legitimacy” and the fact that “even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the United Nations Charter, other treaty commitments and to customary international law.”<sup>18</sup> He then made recommendations flowing from that fact.

The *Paquete Habana* decision speaks to a generally-recognized process of identifying how the United States declares its *opinio juris* on various international obligations and human rights and how to find “evidence” that certain matters are “law,” and when considering United States membership in the United Nations, its leadership in the adoption of the Universal Declaration of Human Rights, ratification of international covenants dealing with the abolition of discrimination and civil and political rights and eventual “acceptance” of the Declaration, then principles in it that are driven by ratified international covenants (such as Article 27 of the International Convention on Civil and Political Rights) lead to the conclusion that there is in fact *opinio juris* in favor of principles of the Declaration that related to the individual rights it states and the collective rights it secures, including forms of “recognition” of various kinds of collective arrangements, including that commonly known as an Indian “tribe.”

### **Declaration Provisions on Individual and Collective Rights and Recognition**

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations following decades of discussion in a process that the United States closely followed through representatives, and the United States had ample opportunity to attract other states to its views on “internal sovereignty” with respect to indigenous groups. A working group of state and indigenous representatives “elaborated” the draft of the document, the Human Rights Council adopted it on 29 June 2006 and the General Assembly proclaimed it on 13 September 2007. It is an elaboration or statement of human rights norms that flow from the Universal Declaration of Human Rights and from international covenants adopted to effectuate it, including those that the United States ratified.

---

<sup>16</sup> Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples, Agenda Item 4: The United Nations Declaration on the Rights of Indigenous Peoples (15 July 2010).

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

There are 24 unnumbered statements of intent and purpose in the preamble to the Declaration and there are four considerations in them that must be applied here: The Declaration recognizes “the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.” The key word is “structures” and that reflects the reality of a wide variety of means to exercise political, economic and social rights. There is specific acknowledgment of indigenous “treaties, agreements and other constructive arrangements with States. The Little Shell Tribe of Chippewa Indians was a signatory to treaties or its members were the subjects of treaties. “Constructive arrangements” includes a wide variety of written statements involving or about indigenous individuals or collectives, and even arrangements of less formality than a treaty are recognized as conferring enforceable rights. One preamble statement specifically welcomes the fact that “indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they may occur.” The use of the term “are organizing” means that the formation of collectives is not an historic but an ongoing process, making cutoff dates irrelevant, such collectives are precisely geared to attaining “enhancement” of the nature that is mentioned, and that the object of organization is to “end all forms of discrimination and oppression.” For example, the Federal Court of Canada recently terminated the exclusion of Metis and non-status Indians from the scope of the expression “Indians and lands reserved for Indians” in the organic *Constitution Act, 1867* and one of the foundations for that decision was recognition of the “racial” nature of that constitutional provision and the discrimination caused by a refusal to recognize Metis and non-status Indians.<sup>19</sup> The same principle applies in the United States with respect to interpretation of the term “Indians” in the Constitution. The Declaration does not create or state new rights—it restates human rights protections found in the Charter of the United Nations; the Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the United Nations Programme of Action, all of which “affirm” the right of self-determination of all peoples so they can “freely determine their political status [with states] and freely pursue their economic, social and cultural development.” Those preamble findings of fact and law are the basis for the statements of specific rights that follow.<sup>20</sup>

---

<sup>19</sup> Daniels v. Her Majesty the Queen, 2013 FC 6 (January 8, 2013). See particularly ¶ 114 of the decision that reviews prior decisions on the constitutional provision that was construed that recognize that the section “creates a racial classification and refers to a racial group.” The decision dealt with discrimination in application of the classification.

<sup>20</sup> The anti-discrimination interpretation that the Federal Court of Canada used to interpret the status of Metis and Non-status Indians applies to the United States under the International Convention on the Elimination of Civil and Political Rights that likewise prohibits such discrimination as being “racial.” The United States report to the United Nations Committee on the Elimination of Racial Discrimination, and the NIYC will watch developments here for comments to the Committee when it takes up the U.S. report.

1. Collective *and* individual rights.

Article 1 states the right to the full enjoyment of human rights by Indigenous peoples as either a collective or as individuals. One of the important things to note in the United States is that eligibility of a wide range of benefits for “Indians” hinges on membership in a “recognized” Indian tribe. This statement of a basic right to fully enjoyment of “all” human rights and fundamental freedoms is not restricted to an historic term such as tribe, and it guarantees full access to benefits for collectives called “Indians” beyond the scope of the historic term “tribe.” The question is whether a given collective or organization is “indigenous.” That term is not defined in the Declaration.<sup>21</sup>

2. Self-determination

The debate on this article in Geneva was heated, but at end the United States position that “self-determination” means a scope of activity fixed in national law in statutes such as the Indian Self-Determination and Education Assistance Act of 1975 was not adopted as the definition. The right is broad and it allows all Indigenous peoples, including the Little Shell, to “freely” determine their political status and “pursue” economic, social and cultural development. That means that the definition of “tribe” for purposes of the enjoyment of the rights to “determine” political status and “pursue” development must be sufficiently broad to secure “enjoyment.”

3. Self-Government

All Indigenous peoples within the United States (using the term broadly) have the right to autonomy or self-government to manage their internal and local affairs. That could support the emerging “social club” theory of tribal powers, that they have about as much authority over their affairs as a social club or ethnic club, but the right is keyed to “financing their autonomous functions.” That means that the right to self-government is intimately connected to state financial support, and that right is implicit in other provisions having to do with non-discrimination, development and various other economic and social rights.

4. Right to Recognition of Indigenous Community or Nation

Article 9 secures the right “to belong to an indigenous community or nation” based on “traditions and customs of the community or nation concerned.” The right to membership assumes governmental recognition of a given indigenous “community” or “nation,” depending on national usage of such terms. This is a broad right to recognition and it is based on the groups “traditions and customs” and not those framed in some national capitol.

5. Right to Participation

---

<sup>21</sup> See Sanders, *supra* n. 1. The full story of that decision is not in the literature, but it has to do with a final decision that the Declaration must be universal in scope and definitions limited to colonialism and focus on the Americas were rejected.

One of the key provisions of the Declaration is the right to free, prior and informed consent and the right to justice and remedies. There are three United Nations mechanisms to effectuate the rights stated in the Declaration, and one of the most important is the Expert Mechanism on the Rights of Indigenous Peoples. It is essentially a standards-setting body that is under the direct supervision of the Human Rights Council (and the United States is a member of the Council). The Council authorized two studies by the Expert Mechanism that are relevant to the regulations under discussion. The first relates to the content and scope of the human right to participate in decision making. There is a “Final report on indigenous peoples and the right to participate in decision-making”<sup>22</sup> that sets standards that the Department has violated in its notice of consultations on the discussion draft with “tribal consultation sessions reserved only for representatives of federally recognized tribes.”<sup>23</sup> It is most curious that tribes that are already recognized are the only ones who get to confer with individuals who are likely to draft the actual regulations and the only ones who can both comment and establish working relationships with drafters. That is a glaring violation of the right to participate (as is the general Interior Consultation policy). The right of consultation for free, prior and informed consent to the proposed standards is an important human right secured by the Declaration.

Another key provision of the Declaration is the Article 40 right to “access to and prompt decision through just and fair procedures” and to “effective remedies.” The Expert Mechanism approved a preliminary study on access (that includes the right to adequate remedies) at a session in Geneva in July 2013 and it will continue its consideration of those rights in 2014.<sup>24</sup> The provisions that apply to the proposed regulations under consideration have to do with the right to petition review bodies, such as an administrative review tribunal or the U.S. courts, and with the adequacy of the remedy of recognition provided, and the right to reasonable ascertainable standards founded in the Constitution and referenced statute and the right to a meaningful review of recognition decisions are in fact human rights.

## 6. Border Issues

While such is not directly involved, Article 36 deals with indigenous peoples whose traditional places of residence and lands are transected by international borders and that does affect the Little Shell tribe, given its associations with Canada. The right to cross the magic line, secured by international treaties, is one to be considered and the Little Shell and its members will require national “tribal”

---

<sup>22</sup> Expert Mechanism on the Rights of Indigenous Peoples, “Final report of the study on indigenous peoples and the right to participate in decision-making,” No. A/HRC/18/42 (17 August 2011).

<sup>23</sup> 78(124) Federal Register at 38617.

<sup>24</sup> Expert Mechanism on the Rights of Indigenous Peoples, Access to justice in the promotion and protection of the rights of indigenous peoples, No. A/HRC/EMRIP/2013/2 (29 April 2013).

status for that purpose.

## 7. Treaties, Agreements and “Other Constructive Arrangements”

Article 37 secures the human right of Indigenous peoples for the recognition, observance and enforcement of their treaties, agreements and other constructive arrangements whether such involve them directly, as parties or signatories, or the document is about them or affects them. Although the United States Congress ceased treaty-making in 1871, the case law is to the effect that the United States can still conclude “treaty-like” arrangements and that has to do with the kind of *opinio juris* decision-making that implies recognition of the “tribal” status of bodies such as the Little Shell. That needs to be reflected in both “prior recognition” provisions and in recognition standards.

The lessons of the Declaration for this process are that the Little Shell Tribe and its members are entitled to all the rights stated as both individuals and as a collective. The Declaration guarantees self-identification of identities and there is no definition of “indigenous peoples” or of “tribes.” That should guide the United States to a liberal (in terms of statutory construction) set of standards for recognition because, at the end of the day, this is about benefits to individuals and a seat at the table to negotiate benefits and relationships.

Therefore, the international human rights approach outlined in this section drives principles that are already part of American Indian Affairs Law and that apply to this process:

### **Principle 1: There must be liberal construction of recognition statutes and that must be part of the any final regulatory recognition scheme.**

Indian nation judiciaries also contribute to the corpus of American Indian Affairs Law and there is a unique Indian law principle that federal Indian statutes, regulations and executive orders must “be liberally construed in favor of the Indians.”<sup>25</sup> Additionally, “all ambiguities are to be resolved in favor of the Indians.”<sup>26</sup> The third related principle of liberal construction is that “tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”<sup>27</sup>

---

<sup>25</sup> Cohen’s Handbook of Federal Indian Law, *supra* n. 2, at 119 (citations omitted). There is a Harvard Law Review note that collects the case law on this principle, highlights the four “Indian law canons of construction,” and explains the international law rationale for the principle, pointing up the international character of the relationship between the United States and its indigenous partners. *Indian Canon Originalism*, 126 Harvard L. Rev. 1100, 1104, 1110-1115 (2013). As this collection points out, the command of liberal construction in favor of Indian rights, and as “the Indians understand it,” is also a constitutional command.

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> *Id.* (citations omitted).

This exercise is not simply a matter of elaborating technical standards and procedures for recognition. This process, that includes consideration of the identity and role of both “Indians” and Indian “tribes” under the Constitution, cannot be divorced from the principle that “Contemporary rights and obligations of Native Americans, unique to Indian law, derive from this historic legal basis,” namely five centuries of “international jurisprudence, constitutional principles, federal jurisdiction, conflicts of law, corporations, torts, domestic relations, procedure, trust law, intergovernmental immunity, and taxation.”<sup>28</sup>

“Recognition” speaks to a governmental relationship that has distinct policy consequences and there are meaningful goals of in the process. It derives from international practice and relations and the policy foundations for such recognition in the Indian nation context cannot be ignored.<sup>29</sup>

Indian nations also contribute to the corpus of American Indian law, and the “treaty canons” of liberal construction were summed up in the Navajo Nation Supreme Court decision of *Means v. District Court* showing that Indian interpretations of the relationship drive the process of the relationship.<sup>30</sup> The thrust of contemporary interpretations of federal Indian Affairs Law and of principles of international human rights law is that, given congressional delegation of leadership in the Federal-Indian relationship, the courts will defer to the executive. That is why a new approach to the “encounter” of recognition and a reassessment of the definition and role of “Indian” in this process is important.<sup>31</sup>

**Principle 2: Greater Deference Must Be Given to Judicial Recognition and to International Standards and Principles of Intergovernmental “Recognition.”**

The proposed recognition standards ignore the command of Section 103(3) of the Federally Recognized Indian Tribe List Act of 1994 that judicial recognition is a valid means of attaining federal executive recognition.<sup>32</sup> The history of recognition of the Little Shell Tribe of Chippewa

---

<sup>28</sup> *Id.*, 7-8.

<sup>29</sup> *See, e.g.*, the discussion of recognition policies and principles in Ian Brownlie, *Principles of Public International Law* 87-96 (4<sup>th</sup> ed. 1992).

<sup>30</sup> 7 Navajo Rep. 383, 389 (Nav. Sup. Ct. 1999) (summing up the five canons of treaty construction).

<sup>31</sup> *See*, Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 *Duke L.J.* 660 (1990) (survey by one of the leading United States jurists on international human rights law and indigenous rights, calling for a redefinition of relationships in light of the principle of human survival).

<sup>32</sup> *Supra*, n. 5.

Indians of Montana shows how that applies, and how judicial recognition has been glossed over in the discussion draft of regulations.

The Little Shell Tribe is specifically recognized in the Final Award made by the Indian Claims Commission on October 5, 1961. The Little Shell Band of Chippewa Indians has a named petitioner in claims “for and on behalf of and for the benefit of the members and decedents of members of the Red Lake and Pembina Bands, as such bands were constituted and recognized by the United States at the time of the Treaty of October 2, 1863” and the Commission made an award on those claims.<sup>33</sup>

The United States Court of Claims confirmed the claim for the benefit of the Pembina Band of Indians, that included membership in the Turtle Mountain and Little Shell Bands, and recognized the Little Shell as an “entity.”<sup>34</sup> The Claims Commission judgment was affirmed in the case of *Turtle Mountain Band of Chippewa Indians v. United States* and the Little Shell were identified as part of the Pembina group.<sup>35</sup> A subsequent case sought an accounting for funds distributed under two appropriations to settle Chippewa land claims specifically found that the Little Shell Tribe of Chippewa Indians of Montana was “the successor in interest to the Little Shell Band of Chippewa Indians ... in the 1970s Indian Claims Commission litigation.”<sup>36</sup>

The Little Shell are not latecomers or a splinter group—they are an Indian group that should be found to be on an equal plane with the Turtle Mountain Band of Chippewa Indians of North Dakota, a federally-recognized Indian tribe that was the second half of the Pembina Band recognized by the Indian Claims Commission.

Judicial recognition can be *de facto*, as is seen in many kinds of Indian law litigation, and while a federal court may not specifically rule on the existence of an Indian tribe, it does give recognition that must be enforced by other elements of federal government when determining rights that are “tribal.”

**Principle 3: The “recognition” regulations must not be used as a vehicle and pretext for pushing American Indians out of federal programs and benefits.**

---

<sup>33</sup> Red Lake, Pembina and White Earth Bands, et al. V. United States, “Final Award” slip decision, Indian Claims Commission, October 5, 1961.

<sup>34</sup> Red Lake and Pembina Bands et al. v. Turtle Mountain Band of Chippewa Indians, Little Shell Band of Chippewa Indians and Red Lake, Pembina and White Earth Bands, 355 F.2d 936 (Ct. Cl. 1965).

<sup>35</sup> Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Fed. Cir. 1974).

<sup>36</sup> Delorme v. United States, 354 F.3d 810 (8<sup>th</sup> Cir. 2004).

When viewing the broad sweep of American Indian policy we see the treaty policy of making agreements with Indian nations and Indian individuals to obtain cessions of land, and the definition of “dependent Indian communities” evolved to give the same recognition to stranded Indians as those who remained on a reservation fixed by treaty, statute or executive order. The Indian Reorganization Act carefully separated out Indian tribes that continued to exist under their own inherent powers and those who sought and got charters from the federal government. The Navajo Nation is an example of one Indian nation, the largest in land base in the United States, that is deemed to exist without formal federal acknowledgment. Despite that, there were groupings of Indians who were still stranded and that is the reason for the exercise we are undertaking here.

This is an important “exercise,” not only because of Indian groups, both real and fake, that want recognition to get land to operate casinos, but because it implicates benefits to individual Indians. The definition of “Indian” has largely evolved to mean primarily those who are members of a “recognized” tribe. When Congress chose, in the Indian Self-Determination and Education Assistance Act of 1975, to delegate the authority to operate federal programs in favor of Indians “throughout the United States” recognized tribes, that had the effect of dropping Indians who did not live on in “Indian country.” Tribes with “638” monies know that the amounts given to perform federal trust functions are not sufficient, so they jealously limit participation to residents of the given reservation. That leads to the interesting situation where 76% of more of American Indians live off a reservation and are locked out of benefits. The remaining 24% share dwindling amounts of federal funding and what we are talking about here are other groups of Indians who are struggling for recognition to act as a conduit for federal benefits to individual Indians or that simply want to get rich from casino gambling.

Accordingly, there must be a revisit of the concept of federal recognition not only to accord recognition, and its benefits, to groups that fit an historic and social role as aggregations of individual Indians but to individuals who genuinely are “Indian” and who are the beneficiary of the declared federal trust in their favor.

**Principle 4: The discussion draft of recognition regulations should be scrapped, and the larger questions of “Indian-ness,” benefits to Indians and aggregations under the Declaration on the Rights of Indigenous Peoples should be put out for broader public discussion.**

We recognize that the proposed regulations are limited to “Indians” and not to indigenous peoples in general. Recognizing that, the discussions of the legal context of standards for recognition of indigenous peoples asserting group and collective rights, principles of the Declaration on the Rights of Indigenous Peoples and its standing in United States law and policy and the four principles that flow from this review show that the Secretary of the Interior must cease the process of republishing “recognition” regulations for Indian Tribes, back up and put the entire matter of federal trust responsibility on the table for public discussion. The process must be done following adequate public notice, the inclusion of all interested persons and organizations and with an eye to genuinely following federal trust responsibilities to Indian tribes and to the Indian individuals who make them

up.

The National Indian Youth Council advocates in favor of the rights of *all* Indigenous peoples within the United States and *all* American Indians, regardless of residence. That means, in context, that urban Indians, the 76% of all American Indians who do not live within the boundaries of an Indian reservation or in “Indian Country,” must have the benefit of membership in “recognized” Indian tribes, but the NIYC reminds the United States that “recognition” must not be used as a vehicle or pretext for dishonoring trust responsibilities to *all* American Indians, regardless of tribal affiliation or membership and regardless of place of residence.

Respectfully submitted,

NATIONAL INDIAN YOUTH COUNCIL

By Cecelia Belone, Its President

318 Elm Street, S.E.  
Albuquerque, NM 87102

(505) 247-2251

\* \* \*