

Towns of
Ledyard North Stonington Preston
Connecticut

September 25, 2013

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW., MS 4141
Washington, D.C. 20240

Re: Comments on the Department of the Interior’s Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 1076–AF18

Dear Secretary Jewell and Ms. Appel:

The Towns of Ledyard, North Stonington, and Preston, Connecticut (the “Towns”) submit these comments on the proposed revisions to the tribal acknowledgment process under Part 83 of Title 25 of the *Code of Federal Regulations* (25 C.F.R. part 83). Mr. Kevin Washburn, the Assistant Secretary of the Interior for Indian Affairs (AS-IA) released the proposed revisions on June 21, 2013 (the “Washburn Proposal”) as part of a tribal consultation process. We are submitting these comments to you because the Washburn Proposal raises fundamental questions about the Constitutional limits of the Secretary’s own authority and is so extreme in its pro-tribal petitioner bias that Secretarial level management is clearly warranted. For the reasons discussed in this letter, we ask that you take the steps that are necessary to bring the proposed Part 83 revisions into line with legal precedent, balanced and objective decision-making, and the general public interest.

Our Towns have extensive experience with the tribal acknowledgment process. We participated in good faith, and at considerable expense, as interested parties in the Part 83 reviews of the Eastern Pequot and Paucatuck Eastern Pequot petitioner groups, beginning in 1998 and continuing through the entire procedure until the Department of the Interior

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 2

(Department) properly denied Federal acknowledgment to the merged Historic Eastern Pequot (HEP) group in the Revised Final Determination (FRD) issued on October 11, 2005. 70 Fed. Reg. 60099 (Oct. 14, 2005). We were forced to do so because of the Eastern Pequot group threat to file a land claim lawsuit against landowners in our area.¹ In addition, our Towns are concerned over the potential for another reservation, more trust land, and expanded casino would develop in this region, all of which would be exempt from state and local regulation and generate significant negative impacts in addition to those already caused by the Foxwoods Casino of the Mashantucket Pequot Tribe. We also have commented on previous acknowledgment process revisions and reviews over the last 15 years and testified before Congress on this subject in person and by written testimony. Along with the State, the Towns litigated acknowledgment process violations against Assistant Secretary Gover in 2001, achieving concessions from the Department to ensure a more transparent process. *Connecticut v. Department of the Interior*, No. 3:01-CV-88 (D. Conn. 2001). This extensive experience gives us very significant insights into the Part 83 regulations and a deep appreciation for the appropriate revisions to the acknowledgment process. Based on this experience, we can say without question that the Washburn Proposal is deeply flawed and extreme, and it must be rejected in virtually every respect.

I. The Washburn Proposal Review Process Is Not Objective and Did Not Solicit Balanced Public Comment

As an initial matter, the Towns object to the procedure used up to this point to seek input on the Washburn Proposal. It is understood that Federal policy calls for reaching out to consult with tribes on Indian law and policy matters. The Towns support such outreach and believe it is appropriate for the Department to consult with tribes on proposed revisions to the acknowledgment regulations.

The Department also must adhere, however, to the Obama Administration's policies on open government and public participation. See Memorandum for the Heads of Executive Departments and Agencies, Executive Office of the President, Office of Management and Budget (Dec. 8, 2008). Under this Directive, "participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society." *Id.* at 1. This Directive also establishes a "presumption of openness" within the Federal agency decision-making process. *Id.* Further, the Department was required to create an Open Government Plan under the Directive. See Department of the Interior Open Government Plan, Version 1.1 (Dec. 25, 2010). As part of its

¹ A map depicting potential land claims in Connecticut is set forth in Exhibit 1.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 3

Open Government Plan (the “Plan”), the Department states that “[c]itizen engagement has long been a hallmark of DOI and relationships between communities and our field offices are central to our success. ... DOI cares about the interests and concerns of its stakeholders and tries to consider their interests and perspectives in carrying out the Department’s varied – and at times conflicting – missions.” *Id.* at 4. The Plan also touts the goals of “transparency,” “informing the public of significant actions of Interior,” “plans for engaging the public,” and “collaboration with the public.” *Id.*, Appx. at 18-19. These policy directives apply to the general public; no interest groups are favored under the President’s policy. As a result, the Department should have extended equal participation rights to all parties, not just tribes and tribal interests.

The procedure used for the Washburn Proposal violated these directives because the Department failed to reach out to nontribal interested parties to the same degree it did so with the tribal side. Letters were sent directly to tribal representatives, not to the other key stakeholders such as our Towns, the State of Connecticut, and affected landowners. In addition the Department selected forums for public meetings only at tribal facilities. Throughout the country, five regional meetings were held at tribal facilities on Indian reservations that were not central to the regions. The selection of these locations suggests that the Department does not understand that the Part 83 regulations have a dramatic effect on non-tribal entities and that the Department must give equal time, access, and consideration to all parties.

Another serious flaw in the consultation process for the Washburn Proposal is that no meeting was held in Connecticut. As will be discussed in these comments, the Proposal will have a dramatic effect in Connecticut, virtually guaranteeing the expedited reversal of the HEP decision in favor of a positive final decision with almost no process and contrary to well-established precedent. The result also would occur for the Schaghticoke Tribal Nation (STN) and possibly other previously denied petitioners. Such an outcome would reopen long-settled disputes, lead to revived or strengthened land claims, result in reservations and trust lands removed from State and local control, create the potential for casinos, and give rise to massive political and legal conflicts throughout the State. Clearly, the authors of the Washburn Proposal knew this. Yet, no effort was made to give Connecticut a forum to speak. The closest meeting was over 350 miles away in Maine, where there are no significant acknowledgment issues. It appears the Department does not want critical comment.

Finally, it is very troubling that the Department released what is, in effect, a highly detailed final product that contains specific proposed revisions to virtually every aspect of the Part 83 regulations, in track changes format *in advance of any public dialogue*. This aspect of the Proposal is troubling for three reasons.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 4

First, the detailed nature of the Washburn Proposal suggests it is a “done deal.” The Washburn Proposal purports to be outreach for tribal and public input. Early consultation should be used to solicit ideas, identify issues, debate competing concepts, and engage in open dialogue, not to solicit comment on a highly detailed proposal decreed by political appointees, as is the case for this Proposal. Rather than seek input on underlying principles and issues, the Proposal sets forth what appears to be a *fait accompli* -- a specific, carefully-crafted revision of regulations that is complete down to the finest details. The public has been presented with what amounts to a proposed rule, not an honest request for ideas and conceptual recommendations.

Second, as advanced and specific as the Washburn Proposal is, *it is not accompanied by any explanation*. Mr. Washburn has simply thrown out a line-by-line revision of the regulations with no discussion of how any of the terms and revisions were selected. The failure to provide any rationale for the proposed changes leaves interested parties and commenters groping in the dark, trying to understand the Washburn Proposal’s intent, not to mention its likely consequences. As a result, the Washburn Proposal does not provide a meaningful opportunity for a dialogue or discussion. Such a sterile approach would be problematic for even minor revisions to agency policy, and it is totally unacceptable for sweeping revisions to the regulations that have dramatic legal effect on petitioners and interested parties alike.

Third, the Washburn Proposal is quite clearly the result of decision-making crafted to advance a political agenda to make it easier for petitioner groups to obtain federal acknowledgment; it is not a reasoned proposal that reflects the participation of agency career staff or the professionals in the Office of Federal Acknowledgment (OFA). The Towns submitted Freedom of Information Act (FOIA) requests about the Washburn Proposal to the OFA and the Assistant Secretary’s Office. The OFA responded with *no* documents, confirming it has had little or no role in drafting the Washburn Proposal. The Assistant Secretary’s Office has violated the FOIA by failing to respond at all, well beyond the statutory deadline. The comment letter submitted by former OFA staff member George Roth, currently in the docket, also confirms that the Washburn Proposal is the result of politically-dictated action. As Roth testifies, the OFA staff-generated proposal for Part 83 rejected many of the extreme components of the Washburn Proposal, including reliance on State reservations as the basis for an expedited finding and the 1934 date for the application of criteria (b) (social community) and (c) (political authority). Exhibit 2.²

² On November 4, 2009, on behalf of the Obama Administration, Acting Principal Deputy Assistant Secretary for Indian Affairs and Acting Chairman of the National Indian Gaming Commission George Skibine testified that, under the direction of AS-IA Larry EchoHawk, he was to be the “chief architect” of trying to “fix what

All of these problems can be resolved only if the Washburn Proposal is withdrawn and an honest and open dialogue with all sectors of the public is undertaken first to elicit balanced and objective ideas and principles.

II. The Department Lacks Constitutionally-Delegated Authority to Acknowledge Tribes Under Federal Law

Throughout the Eastern Pequot acknowledgment procedure, our Towns raised the underlying problem with the lack of statutory authority for the Executive Branch to acknowledge Indians tribes under Federal law. *See, e.g., In re Federal Acknowledgment Petition of the Eastern Pequot Indians of Conn., et al., Request for Reconsideration of the Final Determinations of the Assistant Secretary on the Petitions for Tribal Acknowledgment of the Eastern Pequot and Paucatuck Eastern Pequot Petitioner Groups of the Towns of Ledyard, North Stonington, and Preston, Connecticut, 4-5 (2002).*

The essence of this argument is that Congress may delegate its legislative power to the Executive Branch, but only when the statute involved specifies the standards that the agency receiving the delegated power must meet. The extreme nature of the Washburn Proposal and its extraordinary departure from the current Part 83 regulations clearly implicates this doctrine. Over the course of the acknowledgment program since 1978, this issue has not arisen in a serious legal challenge because the Department has developed and adhered to a reasonably rigorous set of acknowledgment criteria and procedures. The Washburn Proposal, however, casts virtually all of that precedent aside and, in doing so, reveals the potentially disastrous consequences of vesting unbridled discretion for such an important federal government determination in the Executive Branch. The Washburn Proposal invites legal challenges and confirms the underlying constitutional defect of allowing agency subcabinet level political appointee to wield great power (*i.e.*, establish a government-to-government relationship between the United States and tribes with sovereign status) without any guiding principles or standards set forth by Congress. As discussed in this section, the U.S. Constitution would prohibit implementation of the Washburn Proposal.

is broken with the acknowledgment process.” *Fixing the Federal Acknowledgment Process: Hearing Before the Senate Comm. on Indian Affairs, 111th Cong., 1st Sess., 6 (2009)*. Skibine confirmed that the reform effort, at that time, would focus on procedures: “The problems fundamentally are the timeline and how you weigh the evidence.” *Id.* at 14. He conceded that, “I am not sure that the criteria in themselves are necessarily the problem.” *Id.* Since then, however, the acknowledgment reform process has been taken over at the AS-IA level and transformed into a wholesale revision of virtually every aspect of Part 83. The Washburn Proposal provides no explanation of the reasons why the narrowly focused reform effort under the previous AS-IA has been transformed into an extreme proposal to weaken the major substantive criteria as well.

1. Constitutional Standard

Article I, section 1, of the U.S. Constitution vests “All legislative Powers” in the “Congress of the United States.” For that reason, as the U.S. Supreme Court noted in *Chrysler Corporation v. Brown*, 441 U.S. 281, 302 (1979): “[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.” See also accord *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) (reiterating that “[a]n agency may not confer power on itself”); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (reiterating that “an agency’s power is no greater than that delegated to it by Congress”).

The preamble in the final acknowledgment rule that was promulgated in 1978 contains the following provision that identifies the statutes that purportedly delegated the Deputy Assistant Secretary of the Interior for Indian Affairs authority to promulgate the rule: “AUTHORITY: 5 U.S.C. 301; and sections 463 and 465 of the revised statutes 25 U.S.C. 2 and 9; and 230 DM [Department of the Interior Manual] 1 and 2.” See 43 Fed. Reg. 39362 (1978). However, none of those statutes grants such authority, and the Washburn Proposal tests the question of whether the quasi-legislative act of promulgating the Part 83 regulations passes Constitutional muster.

Congress may only delegate a portion of its legislative power to the Executive Branch if the text of the statute delegating that authority sets out an “intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform” *J. W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 409 (1928). The U.S. Supreme Court elaborated on this standard in *Yakus v. United States*, 321 U.S. 414, 426 (1944), and stated that a statute that delegates legislative authority is invalid if its text contains “an absence of standards for the guidance of [Executive Branch action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed” See also *AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *In re NSA Telecomms. Record Litig.*, 671 F.3d 881 (9th Cir. 2011).

The U.S. Supreme Court invoked the nondelegation doctrine, as articulated in *J.W. Hampton*, in *Panama Refining Company v. Ryan* to strike down a provision of the National Industrial Act. 293 U.S. 388 (1934). Section 9(c) of Title I of the National Industrial Act delegated authority to prohibit the transportation of petroleum and petroleum products in interstate and foreign commerce to the President. Section 9(c) stated:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 7

thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.” *Id.* at 407.

This delegation language sets minimal limits on the President’s authority to prohibit the transportation of petroleum products. The Court found that, in enacting section 9(c), Congress “has declared no policy, has established no standard, has laid down no rule” for the President’s exercise of the legislative power that the statute delegated, in violation of the nondelegation doctrine. *Id.* at 430.

Similar to the delegation provisions at issue in *Panama Refining*, the delegation provisions that the Department is relying on to issue the revised Part 83 regulations, described in more detail below, do not contain any standards constraining the legislative powers that Congress purportedly conferred upon the Department. The delegation provisions that the Department is relying on are very broad and do not articulate any Congressional policy, standards, or rules that Interior must follow when acting under its delegated authority. Under the standards set forth in *J.W. Hampton* and *Yakus*, such a delegation violates the U.S. Constitution.

While the Federal courts have upheld broad delegations of legislative power that contain minimal standards and principles to guide the Executive Branch in exercising those powers, it is unlikely that a court would uphold a delegation of legislative power that contained *no* standards or principles to guide the Executive Branch.³ As discussed below, the delegation statutes that the Department is relying on as the basis for its authority to issue the Part 83 regulations impose *no* standards or principles to guide Interior in exercising this authority. As such, the unconstrained delegation of legislative power to the Department violates the nondelegation doctrine and the U.S. Constitution.

³ In *South Dakota v. Dept. of the Interior*, the Eighth Circuit relied on the delegation doctrine to find that the Secretary did not have authority to acquire land in trust for tribes under Section 465 of the Indian Reorganization Act (IRA). 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996). Section 465 states that “[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire...any interests in lands...within or without existing reservations...for the purposes of providing land for Indians.” 25 U.S.C. 465. The Court invalidated this delegation of legislative authority and stated that “There are no perceptible “boundaries,” no “intelligible principles,” within the four corners of the statutory language that constrain this delegated authority...” 69 F.3d at 882.

2. Statutory Authority Relied on By BIA for The Acknowledgment Process

As described below, the assertion that Congress intended 5 U.S.C. § 301 and 25 U.S.C. § 2 and § 9 to convey to the Secretary of the Interior (Secretary) the legislative authority that the Indian Commerce Clause grants to Congress to create new federally recognized tribes - *i.e.*, tribes in a political sense - is incorrect.

a. 5 U.S.C. § 301

The relevant provision of 5 U.S.C. § 301, which Congress enacted in 1966 - *see* Pub. L. No. 89-554, 80 Stat. 379 - provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

On its face, that statutory text does not delegate authority to the Secretary to acknowledge new federally recognized tribes in Congress's stead. In fact, this provision does not even mention Indians. And if Congress did intend the text to convey that legislative authority, the text contains "no standards for the guidance of [Executive Branch action], so that it would be possible in a proper proceeding [in which the Secretary by final agency action creates a new federally recognized tribe] to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. If this provision could serve as a Constitutionally-valid source of delegation, any agency could take any action without regard to Congressional limitations or standards.

b. 25 U.S.C. § 2

Congress enacted 25 U.S.C. 2 *181 years ago*. *See* ch. 174, sec. 1, 4 Stat. 564 (1832). As now codified, the text of the statute reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." If, in 1832, Congress intended that text to convey to the Commissioner of Indian Affairs (Commissioner) legislative authority to create new federally recognized tribes in Congress's stead, on its face the text contains no standards that control the Commissioner's exercise of that legislative authority.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 9

In fact, however, Congress intended no such result. The circumstances existing in 1832 when Congress enacted this law confirm a very different intent.

In 1806 Congress created the office of Superintendent of Indian Trade inside the War Department to manage the Indian trading posts that Congress had authorized the President to operate on the frontier. *See* 2 Stat. 402 (1806). In 1816, President James Madison appointed Thomas McKenney as Superintendent. *See Herman J. Viola, Thomas L. McKenney, Architect of America's Early Indian Policy: 1816-1830* 4-5 (1974). In 1822, Congress enacted a statute that ordered the trading posts closed. *See* 3 Stat. 683 (1822). As a consequence, Superintendent McKenney no longer had any statutorily mandated duties. To fill the vacuum, in 1824 "Secretary of War [John C.] Calhoun, by his own order, and without special authorization from Congress, created in the War Department what he called the Bureau of Indian Affairs [BIA]. To head the office Calhoun appointed McKenney and assigned him two clerks as assistants" Francis P. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* 57 (1979).

Secretary Calhoun's decision to create the BIA may have been a sensible policy choice. But the Secretary's action was without congressional action. For that reason, with Secretary Calhoun's approval, in 1826 Thomas McKenney drafted a bill that he submitted to Congress and whose enactment would create the BIA. *Id.* 58-59. In 1832, Congress enacted the McKenney bill as ch. 174, sec. 1, 4 Stat. 564 (1832); today, 25 U.S.C. § 2.

By 1832 the Secretary of War was distributing annually more than \$1 million in gratuities to Indians, operating 54 Indian schools, and as of 1830 had issued 98 licenses to traders doing business in Indian country. As Senator Hugh White of Tennessee, the chairman of the Committee on Indian Affairs, informed his colleagues when the bill that would be enacted as 25 U.S.C. § 2 reached the floor of the Senate, "To all these different branches the personal attention of the Secretary of War is now required. The creation, therefore, of such an officer [*i.e.*, the Commissioner of Indian Affairs] as is provided by the bill, be deemed to be indispensably necessary." *See* 8 Gales & Seaton's Register of Debates in Congress, at 988 (1832). Senator White's explanation in 1832 is the accurate description of the intent of Congress embodied in 25 U.S.C. § 2, and the extraordinary power of acknowledging the existence of Indian tribes in a government-to-government relationship with the United States is well outside the scope of that job description.

There is, therefore, no basis to conclude that, in 1832, Congress intended its enactment of 25 U.S.C. § 2 to delegate an employee of the War Department with unfettered authority to decide which groups would be designated as federally recognized tribes whose members

henceforth would have a “government-to-government” relationship with the United States. That interpretation of Congress’s intent stretches credulity past breaking.

c. 25 U.S.C. § 9

Congress enacted 25 U.S.C. § 9 *179 years ago*. See ch. 162, sec. 17, 4 Stat. 738 (1834). As now codified, the text of the statute reads: “The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.” If, in 1834, Congress intended that text to convey to the Commissioner legislative authority to recognize new federal tribes in Congress’s stead, on its face the text contains no standards that control the Commissioner’s exercise of that legislative authority.

Again, however, as with 25 U.S.C. § 2 and § 9, Congress intended no such result. The text of the statute only grants the President legislative authority to prescribe regulations to carry into effect the provisions of an “act relating to Indian affairs.” It does not convey the authority to acknowledge Indian tribes, and it certainly does not prescribe any standards. Many Federal laws contain similar grants of rulemaking authority, but such power is conferred for purposes of carrying out the requirements of the contextual law, which serves as the standards to be applied. Section 9 has no such context, and can at best attach itself only to other Acts of Congress “relating to Indian Affairs.” There is no Act of Congress on tribal acknowledgment; Congress has been silent on this subject. As a result, there are no standards to apply.

d. 43 U.S.C. § 1457

In 1991, AS-IA Eddie Brown published for public comment a proposed rule whose promulgation would revise 25 C.F.R. Part 83 (as 25 C.F.R. 54.1 *et seq.* (1978), the original acknowledgment regulations, had been recodified) in a number of respects. See 56 Fed. Reg. 47320 (1991). As authority for the proposed rule, as had been the case in 1978, the rule cited 5 U.S.C. § 301 and 25 U.S.C. § 2, 9. See *id.* 47324. However, in 1994 when AS-IA Ada Deer promulgated a final rule, see 59 Fed. Reg. 9280 (1994), without comment or explanation, she added 43 U.S.C. § 1457 to the list of authorities. See *id.* 9293.

The terms of 43 U.S.C. § 1457 charge the Secretary with responsibility for “the supervision of public business relating to” thirteen different subject areas. One of those subject areas is “Indians.” That is the sum of the statute. Nothing in the text of 43 U.S.C. § 1457 delegates to the Secretary Congress’s legislative authority to recognize new tribes under Federal law. If Congress did intend 43 U.S.C. § 1457 to delegate the Secretary that authority,

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 11

the text does not contain any “intelligible principle” for the exercise of that authority with which the Secretary would have a nondiscretionary duty to comply.

Thus, as the preceding discussion confirms, Congress has never spoken on the tribal acknowledgment issue; it has not extended such power to the Secretary, and it has not articulated any standards on principles. As a result, the Washburn Proposal would be in direct violation of the Supreme Court’s delegation doctrine.

The Department itself has acknowledged this problem, as it expressed in 1975 when the BIA’s Chief of the Office of Tribal Relations informed the Huron Potawatomi Tribe:

[F]ormer Secretary [of the Interior Rogers] Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action. Nor, even if such authority can be said to exist, does the law appear clear as to the applicable standards and procedures for recognition.

Letter from Leslie N. Gay, Jr., Chief, BIA Branch of Tribal Relations, to David Mackety, Huron Potawatomi Athens Indian Reservation (December 18, 1975). Exhibit 3.

BIA Branch Chief Gay expressed an entirely correct legal concern in 1975. At the same time in 1975, Congress established the 11-member American Indian Policy Review Commission (AIPRC) to conduct a comprehensive review of the relationship between the United States and Indians.

To conduct the review, co-chairmen Senator James Abourezk (D-SD) and Representative Lloyd Meeds (D-WA) assembled a staff of more than one hundred persons, and in May 1977 the AIPRC submitted its report to Congress. American Indian Policy Review Comm’n Final Report, submitted to Cong. May 17, 1977 (“AIPRC Report”). In chapter eleven the report observed that “[t]here are more than 400 tribes within the Nation’s boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of ‘unrecognized’ tribes, are excluded from the protection and privileges of the Federal-Indian relationship.” AIPRC Report at 461. To remedy that situation, the report recommended that

Congress adopt, in a concurrent resolution, a statement of policy affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and

Indian policy; and directing the executive branch to serve all Indian tribes. *Id.* at 480.

To insure that the above declaration is carried out, *Congress, by legislation* create a special office, for a specific period of operation, such as 10 years, independent from the present Bureau of Indian Affairs, entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal-Indian programs to these tribal communities. (Emphases added). *Id.*

The recommendations that *Congress* pass a resolution and *enact a statute* that would create an office (presumably inside the Department) to which Congress would delegate authority to "affirm [] [unrecognized] tribes' relationships with the Federal government" are consistent with the Indian Commerce Clause of the U.S. Constitution, which grants *Congress* - not the Executive Branch - exclusive authority over Indian policy. In short, the AIPRC recommended action that would be consistent with the delegation doctrine.

In January 1977 at the beginning of the 95th Congress, as the AIPRC staff was finishing writing the AIPRC Report, the Senate decided to modernize its committee structure. Senator Abourezk used that procedural occasion to persuade the Senate to create a temporary Select Committee on Indian Affairs, of which he became chairman, whose principal responsibility was to consider bills whose enactment would implement the forthcoming recommendations of the AIPRC.

To implement the recommendations in the AIPRC report regarding recognition of new federally recognized tribes, on December 15, 1977 Senator Abourezk introduced S. 2375. The bill established a "special investigative office" inside the Department to "review all petitions for acknowledgment of tribal existence presently pending before the Bureau of Indian Affairs" and make recommendations to the Secretary as to whether a particular petition should be approved. The bill further directed:

If the Secretary determines, on the basis of such report [of the special investigative office], that a [petitioning Indian] group is an Indian tribal entity within the purview of this Act, the Secretary shall designate such group as a federally acknowledged Indian tribe. Upon the publication by the Secretary of that fact in the Federal Register, such tribe shall be entitled to all the rights,

privileges, immunities, benefits, and other services which other federally acknowledged Indian tribes are eligible to receive by reason of their status.

S. 2375, 95th Cong. § 4(e) (1977). S. 2375 was referred to the Select Committee on Indian Affairs, which, as above stated, Senator Abourezk chaired.

On March 16, 1978 and August 7, 1978, Representative Charles Rose (D-NC) introduced S. 2375 in the House of Representatives as H.R. 11630 and H.R. 13773, where the bills were referred to the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs. H.R. 11630, 95th Cong. (1978); H.R. 13773, 95th Cong. (1978). Significantly, in addition to providing for an express delegation of power, S. 2375 also enumerated the standards under which acknowledgment would be conferred. Again, like the AIPRC Report, these bills called upon Congress to delegate such authority to a special office created for that purpose and subject it to delineated standards.

A year earlier and a month after the AIPRC issued its report, on June 16, 1977, the Deputy Commissioner published for public comment a proposed rule whose promulgation would provide one year for Indian groups to petition the Secretary to acknowledge a group's status as a "federally recognized tribe" and for the Commissioner to approve or deny a petition, subject to review of that decision by the Secretary. *See* 42 Fed. Reg. 30647 (1977). On June 1, 1978 the AS-IA published, again for public comment, a revised version of the proposed rule whose text differed from the text of the original rule in various respects. *See* 43 Fed. Reg. 23743 (1978). In pertinent part, the revised version of the proposed rule provided:

Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally acknowledged tribes and entitled to the privileges and immunities available to other federally acknowledged tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes.

Proposed 25 C.F.R. 54.10(g), *reprinted at* 43 Fed. Reg. 23746 (1978).

Two months after publication of the revised proposed rule, on August 10, 1978, the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held a hearing on H.R. 13773 and related bills. *See Federal Recognition of Indian Tribes: Hearing on H.R. 13733 and Similar Bills Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong. (1978).*

One of the witnesses was Deputy AS-IA Rick Lavis who informed the Subcommittee that the Department opposed H.R. 13733 because “We believe the existing structure in the Bureau of Indian Affairs is competent and capable of carrying this [*i.e.*, the task of tribal recognition] out.” *Id.* at 22. When Representative Teno Roncalio (D-WY), the chairman of the Subcommittee, asked, “You feel that you can make recognition for the tribes without statutory requirement of Congress?”, Deputy Lavis answered: “We are operating on the assumption that the statutory authority already exists.” *Id.*

When Chairman Roncalio then asked for a “quick citation” of that statutory authority, Deputy Lavis deferred to Scott Keep, an Assistant Solicitor, who responded: “Mr. Chairman, it is from a general interpretation of the various laws including the *Passamaquoddy* case⁴ and also the Indian Reorganization Act and the way that has been implemented.” Mr. Keep also informed the Chairman that “The Department also takes the position that sections such as 25 United States Code, sections 2 and 9, giving the Secretary and the Commissioner of Indian Affairs responsibility for Indian affairs gives him the authority to determine who is encompassed in that category.” *Id.*

Two weeks after the hearing, on August 24, 1978 Deputy AS-IA George V. Goodwin promulgated the proposed regulations as a final rule. *See* 43 Fed. Reg. 39361 (1978) (codified as 25 C.F.R. 54.1 *et seq.* (1978)).⁵ Since that time, the Department has continued to rely on these generalized sources of Executive Branch authority over Indians to serve as the basis for its specific authority to acknowledge tribes under Federal law.

Since the promulgation of the regulations, Congress has not taken action to resolve the delegation/lack of standards deficiency. This failure to act does not confirm Congressional acceptance of the Department’s actions on the lack of concern over the absence of standards. To the contrary, over a period of many years, Congressional committees and bill sponsors have repeatedly introduced legislation that would both delegate acknowledgment authority to an Executive Branch entity *and* establish meaningful standards.⁶ Many of these bills were deeply

⁴ *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff’d*, 528 F.2d 370 (1st Cir. 1975). In *Passamaquoddy* the District Court held that Congress intended the undefined word “tribe” in the Nonintercourse Act of 1793 to mean tribe in its ethnological sense, rather than tribe in its political sense. Contrary to the Department’s assertion, that holding has nothing to do with the question of whether prior to 1977 Congress had enacted a statute that delegated the Secretary authority to create new federally recognized tribes in Congress’s stead in a political sense.

⁵ The regulations were subsequently recodified without amendment as 25 C.F.R. 83.1 *et seq.*

⁶ In fact, at least 27 such bills have been introduced between 1989 and 2011. Exhibit 4.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 15

flawed, but the key fact is that they support the argument that legislative authorization is needed for Executive Branch acknowledgment of Indian Tribes under federal laws.

The Department of the Interior and BIA also have conceded to Congress the need for Congressional action to resolve the questions of delegated authority and legislative standards. In 1994, for example, Patrick Hayes, the Acting Deputy Commissioner for BIA, accompanied by Branch of Acknowledgment and Research (BAR) officials Holly Reckord and George Roth, expressed the Department's position that "we are not opposed to some form of legislation [on tribal acknowledgment]" specifically seeking "ratification of previous acknowledgment decisions," and stating that "[w]e also believe that a specific confirmation of the Secretary's authority to extend recognition and establish standards would be most helpful." *Federal Recognition of Indian Tribes: Hearing on H.R. 2549, H.R. 4462, H.R. 4709, Before the Subcomm. of Native American Affairs of the House Comm. on Natural Resources*, 103rd Cong. 2d Sess. 108, 111-12 (1994).

Again, in 1995, the Department testified in Congress on the need to enact legislation to cure the delegation doctrine defect. Michael Anderson, Deputy AS-IA, accompanied by Deputy Commissioner Hilda Manuel and BAR Chief Holly Reckord, testified to the Senate Committee on Indian Affairs: "Also, we would support legislation which would confirm the Secretary's authority to acknowledge tribes and establish the basic procedure for law." *Federal Recognition Administrative Procedures Act: Hearing on S.479, Before the Senate Comm. on Indian Affairs*, 104th Cong. 1st Sess. 59, 108 (1995).

Furthermore, as recently as 2007, AS-IA Artman testified to Congress in favor of legislation that would clearly confer authorization on the Department, stating "[t]he Department does, however, support Congressional affirmation of the Department's authority to give clear Congressional direction as to what the criteria should be." *H.R. 2387, Indian Tribal Federal Recognition Administrative Procedures Act: Hearing Before the H. Comm. on Nat. Resources*, 105th Cong. 23 (2007) (statement of Carl J. Artman, Asst. Sect. for Indian Affairs, Bureau of Indian Affairs, Wash., D.C.).

Indeed, this very problem was noted as recently as the March 19, 2013 hearing on tribal acknowledgment in the House Subcommittee on Indian and Alaska Native Affairs. In that hearing, Chairman Don Young (R-AK) asked AS-IA Washburn where the Department had received its authority to acknowledge tribes. He was given the same vague answer about

general Indian responsibilities that has served as the Department's justification for Part 83 for 35 years.⁷

e. Case Law

Over the 35 years of the Federal acknowledgment program, the courts have often deferred to, or made reference to, the Department's role in acknowledging tribes under Federal law. Very few of these cases, however, have involved challenges to the Department's authority to take such action. And, of those cases, only one weakly-briefed and distinguishable case has addressed the delegation doctrine.

In a 2003 law review article, Solicitor's Office attorney and tribal acknowledgment expert Barbara Coen states, "[t]he United States Constitution, Article 1, Section 8, provides

⁷ Oral testimony of AS-IA Washburn from the hearing is as follows:

Chairman Young: As you're writing this proposal to reform, do you think there will be any legislation needed?

Assistant Secretary Washburn: We don't intend to seek...to be drafting a bill for you all, we intend to be drafting a regulatory reform effort for us.

Chairman Young: But in doing that, what I'm saying, in doing that, do you think you have the authority to what you're suggesting without legislation?

Assistant Secretary Washburn: Yes, Chairman, we do. We think that we have the authority...under longstanding laws to do this. You know there wasn't specific legislative authorization for Part 83, we did it under very general authorities that have existed for many, many decades and we will be acting under that same general authority here.

Oral Testimony of Kevin K. Washburn, AS-IA, Dept. of the Interior, at 1:05:20-1:06:20, *Hearing on Authorization, standards, and procedures for whether, how, and when Indian tribes should be newly recognized by the federal government: Perspective of the Dept. of the Interior Before Subcomm. on Indian and Alaska Native Affairs of the H. Comm. On Natural Res.*, 113th Cong. (2013), available at http://resources.edgeboss.net/wmedia/resources/113/2013_03_19_iana.wvx.

In raising this inquiry, Chairman Young presented the same problem over the lack of Secretarial authority he recognized in 2012: "[r]ightly or wrongly, the Executive Branch through the Department of the Interior has wrestled control of Indian recognition from its rightful, constitutional authority: The Congress. Rather than establishing a recognition policy authorized by statute, the Department considers cases in a closed, unaccountable system." *Oversight Hearing on Authorization, Standards, and Procedures for Whether, How, and When Indian Tribes Should be Newly Recognized by the Federal Government Before the Subcomm. on Indian and Alaskan Native Affairs of the H. Comm. On Natural Res.*, 112th Cong. (2012), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=299616>.

Congress with the power to regulate commerce with Indian tribes, and Congress delegated implementation of its statutes dealing with Indian affairs to the Department of the Interior. Pursuant to this statutory authority, the regulations governing the process were issued following notice and comment rulemaking under the Administrative Procedure Act (APA).” Barbara N. Coen, *The Role of Jurisdiction in the Quest for Sovereignty: Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New. Eng. L. Rev. 491, 493 (2003). She asserts in a footnote that “[t]he Secretary of the Interior’s authority to promulgate the regulations was upheld” in four cited cases. *Id.*, n.16. As discussed below, none of these cases confronts the delegation doctrine issue head on.

***James v. U.S. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987)**

In this case, a faction of the Gay Head Wampanoag Tribe of Massachusetts brought suit against the Department seeking Federal recognition as a tribe. The Court rejected the tribal faction’s petition and required it to exhaust administrative remedies provided by Part 83 before seeking judicial relief.

The Court acknowledged that the tribal faction was required to exhaust administrative remedies before seeking judicial relief “since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations.” *Id.* at 1137. In making that statement, the Court cited 25 U.S.C. §§ 2, 9.

The Court also reasoned that “Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations.” *Id.* at 1138. The Court never addressed the delegation doctrine and this statement is mere dicta because in their amended complaint and in the briefing at both the District and Circuit Courts, the plaintiff *did not challenge the validity of the regulations*.

***Miami Nation of Indians of Indiana, Inc. v. Babbit*, 887 F. Supp. 1158 (N.D. Ind. 1995)**

The Miami Nation of Indians in Indiana challenged the validity of the 1978 Federal acknowledgment regulations. The Nation argued that in promulgating the 1978 regulations, the Department exceeded its authority to regulate Indian affairs and relations. The Nation focused its challenge on violations of the Administrative Procedure Act (APA), not on violations of Constitutional principles. The Court examined whether, in promulgating the 1978 rules, the Department violated the limits that the APA places on Congressional delegations of authority, not on whether the Department violated the limits that the Constitution places on such delegations of authority.

The Court acknowledged that “[n]o statute explicitly authorized the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian tribes” and noted that “the Secretary relied upon his general statutory authority contained in 25 U.S.C. §§ 2 and 9 when promulgating the acknowledgment regulations.” *Id.* at 1163.

The Court also stated that “[a]lthough the Miamis assert that such authority is “tenuous,” they do not contend that the Secretary is wholly unauthorized to promulgate any regulations concerning the acknowledgment of Indian tribes.” *Id.* at 1164. The Court cites the holding in *James* (discussed above) that upheld the Secretary’s authority to promulgate the 1978 regulations under 25 USC §§ 2, 9. The Court in *Miami Nation*, like the court in *James*, did not discuss the delegation issue.

***United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10th Cir. 2001)**

The United Tribe of Shawnee Indians of Kansas brought action against the Department of the Interior and the Department of Defense seeking a declaration of its status as a federally recognized tribe and a declaration that a constructive trust in favor of the Tribe be placed on certain lands.

The Court’s discussion focused on whether the Tribe’s suit was barred by sovereign immunity and whether, if it was not barred by sovereign immunity, the Tribe was required to exhaust all administrative remedies before seeking judicial relief.

In its discussion of whether the *ultra vires* exception to the doctrine of sovereign immunity applied so as to allow the Tribe’s claim to go forward, the Court noted that the doctrine only applies where the government officer *lacked* delegated power. *Id.* at 548. The Court rejected the *ultra vires* exception and found that the Secretary *did have* delegated power to decide the status of Indian tribes. *Id.* at 549. The Court stated, without elaborating, that the “BIA has been delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes.” *Id.* at 549. As with the other cases, a claim was not made under the delegation doctrine and the Court did not address the need for meaningful standards.

***Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002)**

A group of Native Hawaiians brought a claim asking the Court to declare the Part 83 regulations unconstitutional because the regulations exclude Native Hawaiians from consideration for Federal acknowledgment as an Indian Tribe. The Court dismissed the Native Hawaiians’ claim as a nonjusticiable political question.

The Court addressed the delegation issue in an overview of the Federal acknowledgment process but does not discuss the Constitutional issue. *Id.* at 1215. The Court's analysis in this cases focuses on the application of the political question doctrine to the Federal acknowledgment process, not on whether the delegation to the Department violated Constitutional principles.

***Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D.D.C. 2002)**

The Burt Lake Band of Ottawa and Chippewa Indians of Michigan brought suit against the Department seeking Federal recognition as a Tribe. The Court dismissed the Tribe's claim for failure to exhaust administrative remedies. In relation to the delegation issue, the Court simply stated that "Congress authorized DOI and its Bureau of Indian Affairs ("BIA") to regulate and manage all matters relating to Indian affairs under the direction of the Executive Branch...Pursuant to this delegation of authority to DOI, BIA promulgated regulations establishing procedures for federal recognition of Indian groups as Indian tribes." *Id.* at 77. The court did not address the issue of whether proper standards had been used for that purported delegation.

***Robinson v. Salazar*, 885 F. Supp. 2d 1002 (E.D.Cal. 2012)**

The only case to directly raise the delegation doctrine is *Robinson v. Salazar*, 885 F.Supp. 2d 1002, 1034 (E.D. Cal. 2012). In that case, the Kawaiisu Tribe of the Tejon of California brought suit against the Department seeking Federal recognition as a Tribe, title to certain lands in California, and relief from other alleged violations of common and statutory law. The Tribe directly raised the issue of whether Congress' broad delegation of authority to the Department under 25 U.S.C. §§ 2 and 9 violated the nondelegation doctrine. The Tribe argued that Congress' delegation of authority, as it relates to Interior's authority to issue the Part 83 regulations, violated the nondelegation doctrine because Congress did not give the Department clear guidelines to follow for determining tribal status. *Id.* at 1036. The Court rejected this nondelegation argument. In rejecting the nondelegation argument, the Court stated:

This Court does not find that delegation to the DOI to determine tribal recognition violates the non-delegation doctrine. Plaintiffs' citations to generalized legal authorities are inapplicable in light of the vast statutory authority before this Court and including centuries of history and judicial opinions adjudicating and upholding the DOI regulations. Plaintiffs generalities do not demonstrate that Congress' delegation to the Executive, and

thereby, the promulgation of regulations by DOI, violate the non-delegation doctrine.

Id. at 1037.

This decision is not dispositive of the delegation argument. It relies principally on *James*, which, as noted above, only addressed the issue in gratuitous *dicta*. Moreover, the issue is treated lightly in the pleadings, with a mere paragraph in plaintiffs third amended complaint, and a brief discussion in plaintiff's opposition brief, in both instances raised as an argument against the Federal defendant's affirmative defense that the Kawaiisu Tribe had failed to exhaust its administrative remedies by seeking acknowledgment under the Part 83 regulations. The Court never points to the standards that it believes satisfy the delegation doctrine; it only assures that they exist. The Court's decision suffers from the same "generalities" that it observed the plaintiff's argument suffering from. Finally, as discussed above, it is the Washburn Proposal that fully propels the delegation doctrine argument because it so perfectly confirms the fatal flaw of allowing the Executive Branch to act in the important area of tribal acknowledgment without a clear grant of power or the formulation of guiding standards.

Over many years, the Department has managed to avoid triggering a meaningful legal challenge to its acknowledgment program under the delegation doctrine because the Part 83 regulations have provided for a generally accepted, rigorous, and objective process that has resulted in decisions that adhere to case law precedent and have been consistent with each other. While there is a clear legal infirmity, there has been no need to carry the argument forward in a legal challenge. The Washburn Proposal would, however, change all that. It would result in extreme results that are inconsistent with precedent. The Washburn Proposal criteria would be so far afield from current Part 83 standards as to illustrate the very problems that the delegation doctrine is designed to avoid -- Executive Branch action unfettered by controlling legal principles that results in wild swings in agency decision making untethered by any guidance from Congress or the existence of enforceable standards.

III. The Acknowledgment Criteria and Procedural Requirements of the Washburn Proposal Are Fatally Flawed

A. Deficiencies In Proposed Substantive Changes to the Acknowledgment Criteria

In addition to the absence of legal authority for such sweeping changes, the Washburn Proposal suffers from serious defects in its proposed terms. Some of the most egregious problems are discussed in this section.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 21

The proposed revisions would eliminate the requirement for petitioners to provide evidence of external identification of tribal existence since 1900 (criterion 83.7(a)). The suggested changes would also dramatically reduce the time period of evaluation of evidence for criteria 83.7(b), community, and 83.7(c), political influence or authority, from a present maximum of 224 years to the 80-plus years since 1934. These provisions are critical to confirming the existence of a tribe and achieving consistency with case law that self-recognition by a tribe does not suffice.

For those few petitioners that have had State-recognized reservations since 1934, the proposed new language would eliminate altogether the requirement of providing evidence of external identification of tribal existence (criterion 83.7(a)), meaningful community interaction (criterion 83.7(b)), and tribal governance (criterion 83.7(c)) either at present or over any historical continuum. For those petitioners determined to have “unambiguous previous Federal acknowledgment” the suggested changes would waive the requirement for demonstrating criterion 83.7(c), political influence or authority, since the date of prior acknowledgment, requiring only sufficient evidence at present. Allowing for acknowledgment without proof of social community or political authority is both unsound and unprecedented.

In regard to criterion 83.7(e), descent from an historical tribe, the contemplated revisions have the potential of significantly lowering the percentage of present group members that would be required to trace back to ancestors in the historical tribe in order to meet the criterion. It would definitely be problematic if the Department decides to establish the requirement at 75 percent or lower. A group should not be recognized or acknowledged as a tribe if a quarter or more of its current members cannot establish that their ancestors were part of the historical tribe from which the group claims to descend. The Washburn Proposal, however, leaves open this possibility.

What is of critical concern to the Towns is that the proposed changes would also break from the rule that has been in place during the 35 years since the Acknowledgment regulations were established in 1978 that petitioners denied Acknowledgment are not entitled to re-petition.

These contemplated changes of key aspects of the regulations have the potential of creating a “perfect storm” for re-petitioning in Connecticut. The language proposed for Section 83.10(r) provides that the cases of denied petitioners could be reconsidered if they can prove *“by a preponderance of the evidence, that a change from the previous regulations to the current version of the regulations warrants reversal of the final determination.”* If the language proposed for section 83.10(g) is also adopted, the final revised version of the regulations would be much more favorable to the previously denied Golden Hill Paugussett (GHP), HEP, and STN

petitioners. That is because the proposed section 83.10(g) waives the requirement of meeting criteria 83.7(b) and 83.7(c), and requires only evidence for criteria 83.7 (d) through (g) for those tribal groups that have had a State-recognized reservation since 1934. The combination of the ability to use sections 83.10(r) and 83.10(g) has the potential of creating an especially fast track for reconsideration of the HEP and STN because they were both previously found to meet criteria 83.7(d)-(g). GHP would face a greater challenge because it was previously found not to meet criteria 83.7(e), descent from an historical tribe, but if it could solve this problem it too could seek an expedited positive final result.⁸

An additional problem is that there are eight other petitioners in Connecticut that either have claimed or may claim to be associated with the State's Indian reservations whose cases the Department has yet to consider.⁹ Approval of the proposed revisions for section 83.10(g) would create an opportunity for these eight petitioners to also be exempted from providing evidence for criteria 83.7(b) and 83.7(c) either at present or historically. The proposed provisions for section 83.10(g) give no indication that the Department has even considered the very real problem of multiple petitioners claiming the same State-recognized reservation, although that situation should be painfully obvious from evaluation of the HEP and STN cases.¹⁰

The Department's determinations in these cases, as well as in the GHP case, make it clear that it is a mistake of mammoth proportions to assume that a petitioner has continuously maintained a community over which it has had political authority based solely on the fact that it has been associated with a State-recognized reservation. Based upon the decision of the Interior Board of Indian Appeals (IBIA) in *In re Federal Acknowledgment of the Historical Eastern*

⁸ A map of the land claims that could result from the acknowledgment of all three of these groups due to the Washburn Proposal is set forth in Exhibit 1.

⁹ Current Connecticut petitioner groups are:

1. The Southern Pequot Tribe (Waterford)
2. The Grasmere Band of Wangunk Indians (Glastonbury)
[formerly the Pequot Mohegan Tribe]
3. The Poguonnock Pequot Tribe (Ledyard)
4. The Western Pequot Tribal Nation (West Haven)
5. The Schaghticoke Indian Tribe (Kent)
6. The Schaghticoke Tribe (Bridgeport)
7. The True Golden Hill Paugussett Tribal Nation (New Haven)
8. The Paugussett Tribal Nation (Waterbury), DOI, OFA, List of Petitioners by State as of July 31, 2012, pp. 17-18: <http://bia.gov/cs/groups/xofa/documents/text/idc-020619.pdf>.

¹⁰ The Towns are aware that the HEP group has lobbied the Department of the Interior on this issue.

Pequot Tribe, 41 IBIA 1 (2005), the Department found that the State reservations in Connecticut were no longer an area of habitation for the vast majority of the members of these groups and that political influence or authority on the reservations was either non-existent or splintered for significant periods. *Id.* at 18-21; *Reconsidered Final Determination Denying Federal Acknowledgment to the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut*, at 91-140 (Oct. 11, 2005). BIA reached a similar conclusion in the Reconsidered Final Determination for the STN petition, which has been upheld by the Courts. *STN v. Kempthorne*, 587 F. Supp.2d 389 (D. Conn. 2008), *aff'd per curiam*, 587 F.3d 132 (2nd Cir. 2009), *cert. denied*, 131 U.S. 127 (2010). These Departmental and Federal court decisions serve as a definitive basis for rejecting the Washburn Proposal's reliance on the use of State reservations as the basis for an expedited final finding for *any* Connecticut petitioner.¹¹

The legislative, judicial, and executive precedents hold that the tests or criteria for determining tribal existence must be measured over a significant historical continuum that is more than the 80-plus years proposed by the draft language for revisions of the acknowledgment regulations. The proposed shortening of the historical period of evaluation runs counter to the judicial precedent established by the U.S. Supreme Court in *Montoya v. United States*, 180 U.S. 261, 266 (1901). For over a century, Federal courts have applied the common law test adopted by the Court for the determination of tribal existence in that case over a much longer historical continuum, including in the *Passamaquoddy* (1975), *Mashpee* (1979), and *Shinnecock* (2005) decisions. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480 (1st Cir. 1987); *New York v. Shinnecock Indian Nation*, 400 F. Supp.2d 486 (E.D.N.Y. 2005). In all of these cases, and many others, the courts examined evidence of tribal existence over an historical continuum that began in the 18th century.

Congress has retained the Constitutional authority to recognize tribal entities or restore their previous Federal status. Between 1982 and 2000, Congress exercised its powers to recognize or restore nine tribal groups that were also petitioners in the Department's

¹¹ The fact that some petitioners had State-recognized reservations, including the Lower Muskogee Creek Tribe-East of the Mississippi in Georgia and the MOWA Band of Choctaw in Alabama at the time of evaluation, and the Mohegan Tribe of Indians of Connecticut until at least 1861, was given no special weight in the Department's findings and determinations. See Memorandum, Commissioner of Indian Affairs to Assistant Secretary-Indian Affairs, Recommendation and Summary of Evidence of Proposed finding against Federal acknowledgment of the Lower Muskogee Creek Tribe-East of the Mississippi, Inc. of Cairo, Georgia pursuant to 25 C.F.R. § 54, January 29, 1981, at 5 (this was the first proposed finding issued under the 1978 regulations); DOI, Assistant Secretary-Indian Affairs, Summary Under the Criteria and Evidence for Proposed Finding against Federal Acknowledgment of the MOWA Band of Choctaw, April 26, 1993, at 1-186.

acknowledgment process. While Congress has not established any specific criteria or standards for its recognition of tribal status, it is clear from the legislative record of the statutes that recognized or restored these nine entities that it considered the history of the existence of the groups over a significant continuum, extending back in some cases to the 17th century.¹²

In 1941 the Department published a list developed by Assistant Solicitor Felix S. Cohen of the considerations it had relied upon in determining if a group constituted a “tribe” or “band” for purposes of the Indian Reorganization Act (IRA). In comparison to the *Montoya* test, the so-called “Cohen Criteria” placed much more emphasis on Federal interaction with a group and much less on community and race. The standard the two sets of criteria most share in common is the requirement for demonstrable “leadership or government” or “political authority” and it is this standard that was carried forward in criterion 83.7 (c) of the Federal Acknowledgment regulations.

In the contemporary nomenclature of Indian Affairs, federally recognized or acknowledged tribes are deemed to have a “government-to-government” relationship with the United States. This rather recent term of art captures the essence of both the Federal relationship with recognized tribes *and the necessity of unrecognized groups to demonstrate political influence or authority over their members throughout a significant historical continuum*. This is one of the reasons why it would be both unprecedented, if not absurd, to waive the requirement for demonstrating political influence or authority (criterion 83.7(c)) for those groups that have a State-recognized reservation as proposed for the revision of Section 83.10(d). How can the United States possibly establish a government-to-government relationship with a group when it has not evaluated whether that group has maintained political influence or authority in a bilateral relationship over a significant historical continuum? In other words, how can the United States establish a government-to-government relationship with any party, be it a tribe or foreign nation, without establishing that that party actually has a *government* with which it can have relations? And how can it do so when, in the only relevant

¹² See Cow Creek Band of Umpqua Indians, Oregon, 96 Stat. 1961 (1982); Western Mashantucket Pequot Tribe, Connecticut, 97 Stat. 851 (1983); Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Oregon, 98 Stat. 2250 (1984); Aroostook Band of Micmacs, Maine, 105 Stat. 1143 (1991); Pokagon Potawatomi Indians of Michigan and Indiana, 108 Stat. 2153 (1994); Little Traverse Bay Bands of Odawa Indians, Michigan, 108 Stat. 2157 (1994); Little River Band of Ottawa Indians, Michigan, 108 Stat. 2156 (1994); Loyal Shawnee Tribe, Oklahoma, 114 Stat. 2913 (2000); Federated Coast Miwok (Graton Rancheria), 114 Stat. 2939 (CA 2000).

precedent (Connecticut), the Department itself has acknowledged that the State in no way considered political authority or social community in establishing reservations.¹³

The acknowledgment regulations promulgated in 1978 required petitioners to provide evidence of external identification as a tribe, the existence of a community with significant social interaction, and political influence or authority going back to the date of first contact with non-Indians, which for some petitioners was in the 17th century. No special priority was given petitioners that had evidence of a previous Federal relationship, and State recognition was only considered to be one of the kinds of evidence that could be used to demonstrate external identification (criterion 83.7(a), and not at all for criteria 83.7(b) and 83.7(c).

As stated in the preamble to the 1978 regulations, “maintenance of tribal relations – a political relationship- is indispensable.” 43 Fed. Reg. 39,361. As the mandatory criteria of the regulations have been interpreted by Department attorney Barbara Coen, “the essential requirement for acknowledgment as an Indian tribe ... is that a group has existed as a community with retained political powers.” Cohen, Handbook of Federal Indian Law, 496 (1941).

Given the fact that continuous political existence has been the Department’s “indispensable” standard for evaluating tribal status since at least the enactment of the IRA in 1934, it defies reason why the Department would now waive that essential evidentiary requirement for the few groups that have a State-recognized reservation, as it now proposes to do. How can the continuous existence of a “community with retained political powers” be assumed from the fact that sometime prior to 1934 a State or Colony set aside reserved land for a group? The Department’s Final Determinations in the acknowledgment cases of the GHP, HEP, and STN petitioners provide ample evidence that such an assumption cannot and should not be made.

Likewise, how can the continuous existence of “a community with retained political powers” be adequately measured without the identification of such a tribal entity by external sources, including, but not limited to, Federal, State, and tribal governments and newspapers and other publications, including scholarly studies over some historical continuum? The answer again is that continuous tribal existence cannot be evaluated sufficiently in the absence of evidence of periodic external identification. Yet, this is what the Washburn Proposal would do by eliminating criterion 83.7(a). Indeed, the 35-year experience of the application of the

¹³ In fact, in Connecticut, no legislative fact-finding or hearing process occurred in connection with the state reservations.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 26

Federal acknowledgment regulations in determining tribal existence should make it obvious that self-identification is a worthless measure. Every petitioner on record has identified itself as a tribe, but only a small percentage will demonstrate that they meet the mandatory criteria. External identification over a period of more than a century is thus a critical criterion that should not be jettisoned.

In 1994 the Department revised the Federal acknowledgment regulations after seeking public comments on its proposed revisions. Some commenters suggested then that groups only be required to evince continuity since 1934. The Department's official response was that a starting date of 1934 was not sufficient to demonstrate continuous tribal existence because an assumption could not be made that a tribe existed continuously prior to that date. 59 Fed. Reg. 9281. It also held that the evidence for unrecognized groups in the 1930's was inadequate and that petitioners needed a much longer historical continuum in order to meet the mandatory criteria.

Other commenters on the proposed revisions stated that criterion 83.7 (a), external identification, was "unfair, burdensome, and unnecessary." In response to these charges, the Department stated that:

continued identification complements criteria (b), community, (c), political influence or authority, and (e) descent from a historical tribe. The criterion is intended to exclude from acknowledgment those entities which have only recently been identified as being Indian or whose Indian identity is based solely on self-identification.

Id.

The Department's position in 1994, that 1934 was not a sufficient starting date for measuring tribal existence and that criterion 83.7(a) was an essential complement to the other criteria and that recent identification and self-identification were problematic, remains valid today. Lessening or eliminating these fundamental requirements in an effort to hasten the evaluation process is not a prudent policy decision. In fact, the Department will still be required to look at historical evidence prior to 1934 in order to determine if and when two groups may have merged into one and if the merged group continued as one entity after the merger. Likewise, in most cases, the Department will have to evaluate evidence from earlier historical periods in order to determine the last date of "unambiguous previous Federal acknowledgment" for those petitioners that claim this prior status. Why then should it move away from the uniform

standard it has applied for 35 years that all petitioners must provide evidence of tribal existence over a historical continuum that most often exceeds 200 years?

Federal and State courts have applied the common law *Montoya* test to the question of continuous existence. *See Montoya*, 180 U.S. at 266. (“By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . .”). While the case law varies by jurisdiction and by underlying claim, the vast majority of courts require that to be a tribe an Indian community must show that it existed either since first contact with non-Indian settlers (*New York v. Shinnecock Indian Nation*, 400 F. Supp.2d 486), before the creation of the United States (*United States v. 43.47 Acres of Land*, 855 F. Supp. 549, 551 (D. Conn. 1994), before the date of incorporation into the United States (*Kahawaiolaa v. Norton*, 386 F.3d at 1272-73) or, where an action involves the enforcement of a treaty, before the date the treaty was signed (*Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170, 177 (S.D.N.Y. 2001)). This requirement has a simple underlying policy justification: tribal sovereignty must be *retained*; it cannot be *created*. No Federal court has ever used 1934 as the date from which to determine a tribe’s continuing existence.

While an “[a]gency is entitled to change its mind on a policy matter as long as its new direction falls within the ambit of its authorizing statute and the policy shift is adequately explained. . . .” *Arkema, Inc. v. EPA*, 618 F.3d 1, 6 (D.C. Cir. 2011), an agency must provide a more detailed justification for a changed policy than would be necessary for a new policy when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996)); *see, e.g., United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670–675 (1973); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *Verizon Telephone Cos. v. Fed. Comm’n*, 570 F.3d 294 at 304 (D.C. Cir. 2009)(“[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.”).

Here, serious reliance interests exist and are based upon both the common law of what constitutes a tribe and the Department’s longstanding acknowledgment regulations. For this reason, the Department cannot simply abandon the historical continuity test in favor of looking to only the post-1934 period. Certainly, the Department is entitled to no deference in its decision to do so.

In 2008, the Department made a significant revision of the time period for which petitioners were required to provide evidence, changing the period from “*first sustained*

contact” with non-Indians to 1789, the year in which the Constitution was ratified. 73 Fed. Reg. 30147 (May 23, 2008). This notice indicated that the Department’s official position just five years ago was that it was still necessary to have a maximum historical continuum of over 200 years in order to evaluate the validity of continuous tribal existence.

Based on the Department’s interpretation and application of the Federal acknowledgment regulations in scores of final determinations over a period of 35 years and its considerations of tribal existence under the Cohen Criteria going back to 1934, the proposed revisions of the regulations are both unprecedented and unnecessary. The contemplated changes also run counter to the *Montoya* test of tribal existence applied by the Federal courts since 1901, which has required evidence of being “united in a community under one leadership or government” for a much longer historical period.

B. Deficiencies In Proposed Procedural Changes to the Acknowledgment Criteria

The Washburn Proposal also contains numerous changes to the acknowledgment procedures that are unfair to interested parties and biased in favor of petitioners. Foremost among these is the lowering of the burden of proof required of petitioners (to the so-called preponderance of the evidence test) and the directive to consider all evidence in the light most favorable to the petitioner. The entitlements bestowed by establishing a government-to-government relationship with the United States are far too significant to defer to a process that gives an evidentiary advantage to groups attempting to establish sovereign governmental rights. The current Part 83 regulations place the burden where it belongs -- on the petitioners. The Department rejected these changes when it revised the Part 83 regulations in 1994. In doing so, it specifically declined to make the very change that the Washburn Proposal seeks to promulgate now. 59 Fed. Reg. 9280 (Feb. 25, 1994). At that time, the Department made it clear that the current regulations were fair to petitioners and account for the “inherent limitations of historical research on community and political influence.” Since then, the Department has fairly administered Part 83, including in reaching its decision on the HEP petition. There is no reason to meddle with a process that has worked in a manner that is fair and consistent. The only possible reason to adopt the preponderance of the evidence test is to give a favorable presumption to the petitioner for the available evidence to build a pro-acknowledgment bias into Part 83. Of course, such a motivation is improper and contrary to law.

Other proposed changes in the Part 83 process that should be rejected are as follows:

- Eliminating the letter of intent (83.4(a), (b)), which is needed to measure how many groups are seeking acknowledgment and serves as notice to local governments.

- Setting a page limit (83.6(a)), because such action arbitrarily constrains the evidence and, when considered with the presumption in favor of petitioners, will result in a bias in favor of acknowledgment.
- Allowing petitioners to withdraw from active consideration (83.10(e)), because doing so is inefficient and allows a petitioner to stop the process if it is losing and in an effort to bolster its case before final action.
- Requiring a State or local government to challenge a Final Determination (FD) to position other interested parties to do the same (83.10(j)). Of course, the Towns believe that this right must be accorded to the State and local governments. We also believe, however, that other interested parties must be accorded the same rights. Landowners subject to land claims or with other legitimate interests should be free to challenge an FD of their own accord. The public has a right to participate.
- Eliminating the all-important administrative appeal procedure for an FD to the IBIA (83.11(a)). As demonstrated by the HEP decision, IBIA review is a critical part of the acknowledgment process. In HEP, it was the IBIA that corrected the egregious error of relying on State recognition to fill gaps in evidence under criteria 83.7(b) and (c). IBIA review therefore provides an important level of independent and objective legal analysis that is important to the validity of the outcome of petition review. IBIA also improves the overall efficiency of Part 83 because it places legal issues in their proper perspective, clarifies the record, and helps reduce litigation risk. All of these goals further the purported goals of the Washburn Proposal. Our Towns are concerned that the Washburn Proposal would eliminate IBIA review principally because it presents a threat to the apparent political objective of the proponents of these changes to: 1) reverse the negative findings for Connecticut petitioners; 2) allow those groups to repetition under more favorable standards; 3) limit the rights of the Towns, the State and others to participate; and 4) remove the potential for IBIA to overturn a Department ruling in favor of those petitioners based on the precedent from the 2005 IBIA decision. Needless to say, these are not valid grounds for revising Part 83. The Towns request that the administrative appeal process and IBIA review be retained.
- Imposing page limits on evidence (83.6(d)), because such a change will work in favor of petitioners when there are gaps in the evidence that would then be subject to the presumption that all evidence must be read in the light most favorable to petitioners. Under that rule, as a general matter, the less evidence the better for many petitioners.

- Creating a complex hearing process in front of the Office of Hearings and Appeals, and giving petitioners preferential rights to control and participate in such a hearing distinct from those available to interested parties. (83.10(n)(2)(i)-(ii)) It defies logic that the Washburn Proposal, which claims to seek to make the acknowledgment process more streamlined and less costly, would support a hearing process. Again, the apparent justification for this proposal appears to be to facilitate petitioners in obtaining favorable decisions and to do so, in part, by giving them preferential rights at various stages of the Part 83 process.

The principle that should control any revision to the procedures regarding participation in the tribal acknowledgment process should be that interested parties are accorded equal rights to petitioners. This is necessary not only to accord equal treatment and due process to interested parties but also to ensure that the Department has a complete and objective record. The Washburn Proposal greatly diminishes the rights of interested parties, and it should be withheld from further action until that imbalance is addressed.

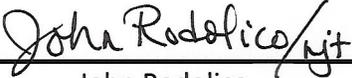
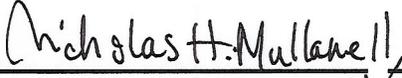
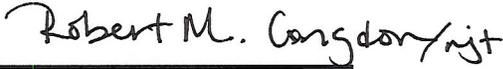
Conclusion

For all of these reasons, the Washburn Proposal is unworkable. It is a radical departure from decades of acknowledgment precedent and case law, and it does not serve as a valid starting point for revisions to the Part 83 rules. These defects in content are augmented by the biased and closed procedure used to date to obtain public input. To adhere to Obama Administration directives and to undertake a meaningful public input process, the Washburn Proposal should be scrapped and the Department should use the input gathered to date to prepare an advance notice of proposed rulemaking that will ask the appropriate questions for defining needed changes to the acknowledgment process. Such a review will no doubt establish that the extreme changes in the Washburn Proposal are not valid and that only minor changes are needed to Part 83. The real solution to the problems with the tribal acknowledgment process is simple -- more funding for more staff to process petitions more quickly. Rather than generate a massive, controversial, litigation-prone debate over the content of Part 83, the Department should simply find a way to give the OFA the staff that it needs. More technical assistance, instead of inappropriate political meddling and policy level interference (directed at the goals of lowering the bar for petitioners and impeding interested party participation) is the obvious answer to what ails the Federal acknowledgment process.

Thank you for considering these comments. Please contact us if you have questions about the position of the Towns.

The Honorable Sally Jewell
Elizabeth Appel
September 25, 2013
Page 31

Very truly yours,

 _____ John Rodolico Mayor Town of Ledyard	 _____ Nicholas H. Mullane II First Selectman Town of North Stonington	 _____ Robert M. Congdon First Selectman Town of Preston
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cc: Senator Richard Blumenthal
Senator Chris Murphy
Representative Joe Courtney
Representative Rosa DeLauro
Representative Elizabeth Etsy
Representative James Himes
Representative John Larson
Governor Dan Malloy
Attorney General George Jepsen
Assistant Secretary Kevin Washburn

EXHIBIT 1

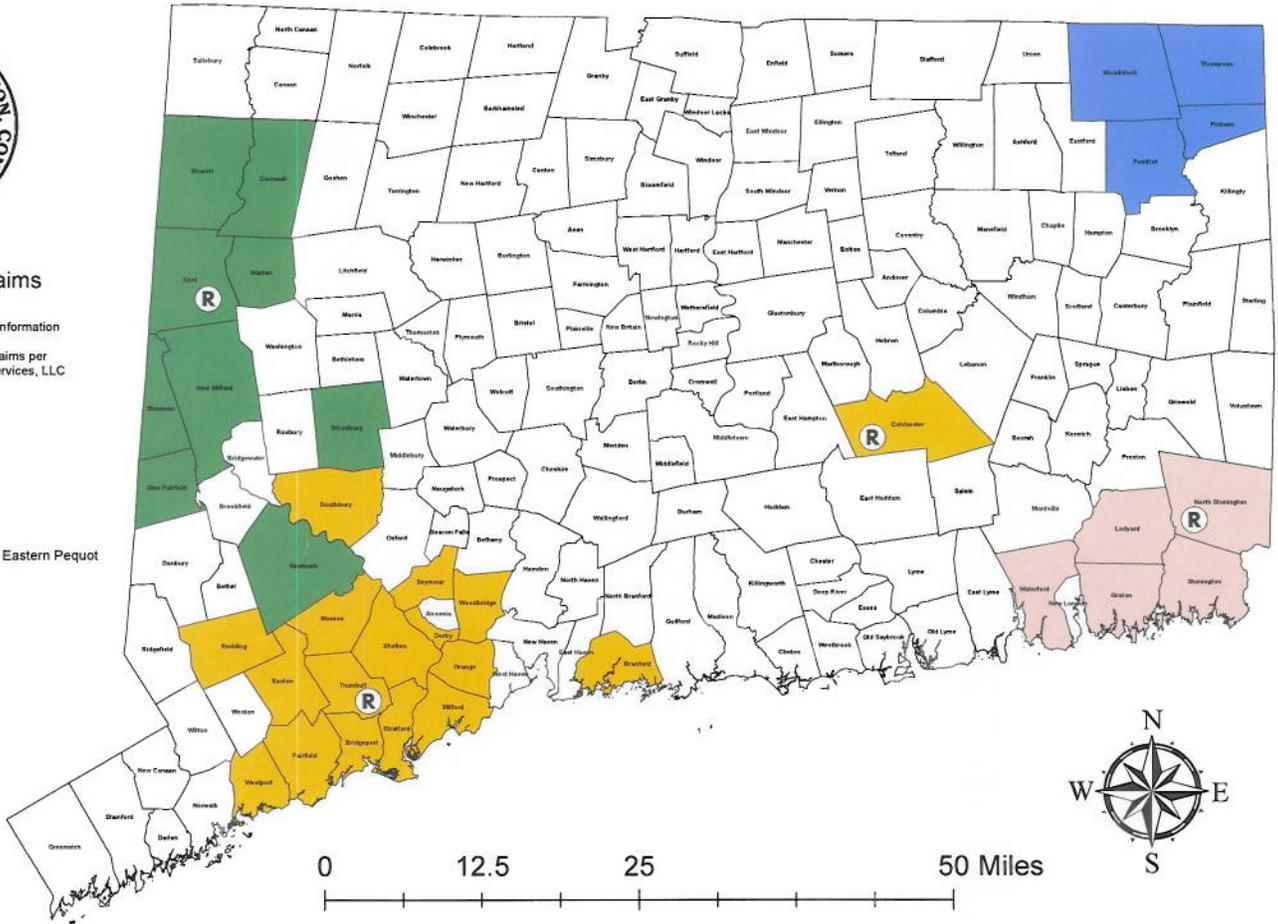


Potential Land Claims

Town boundary per CT DEEP GIS information
 Reservation and potential land claims per
 Historical Consulting & Research Services, LLC

Legend

-  Reservation
-  Eastern Pequot / Pawcatuck Eastern Pequot
-  Golden Hill Paugussett
-  Nipmuc
-  Schaighticoke Tribal Nation



Map #: 1870
 Map Date: 5/9/2013

Notes

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 100 Main Street, Suite 200, North Stonington, CT 06359
 Phone: 860-399-1234
 Fax: 860-399-1235
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 Website: www.hcrs.com

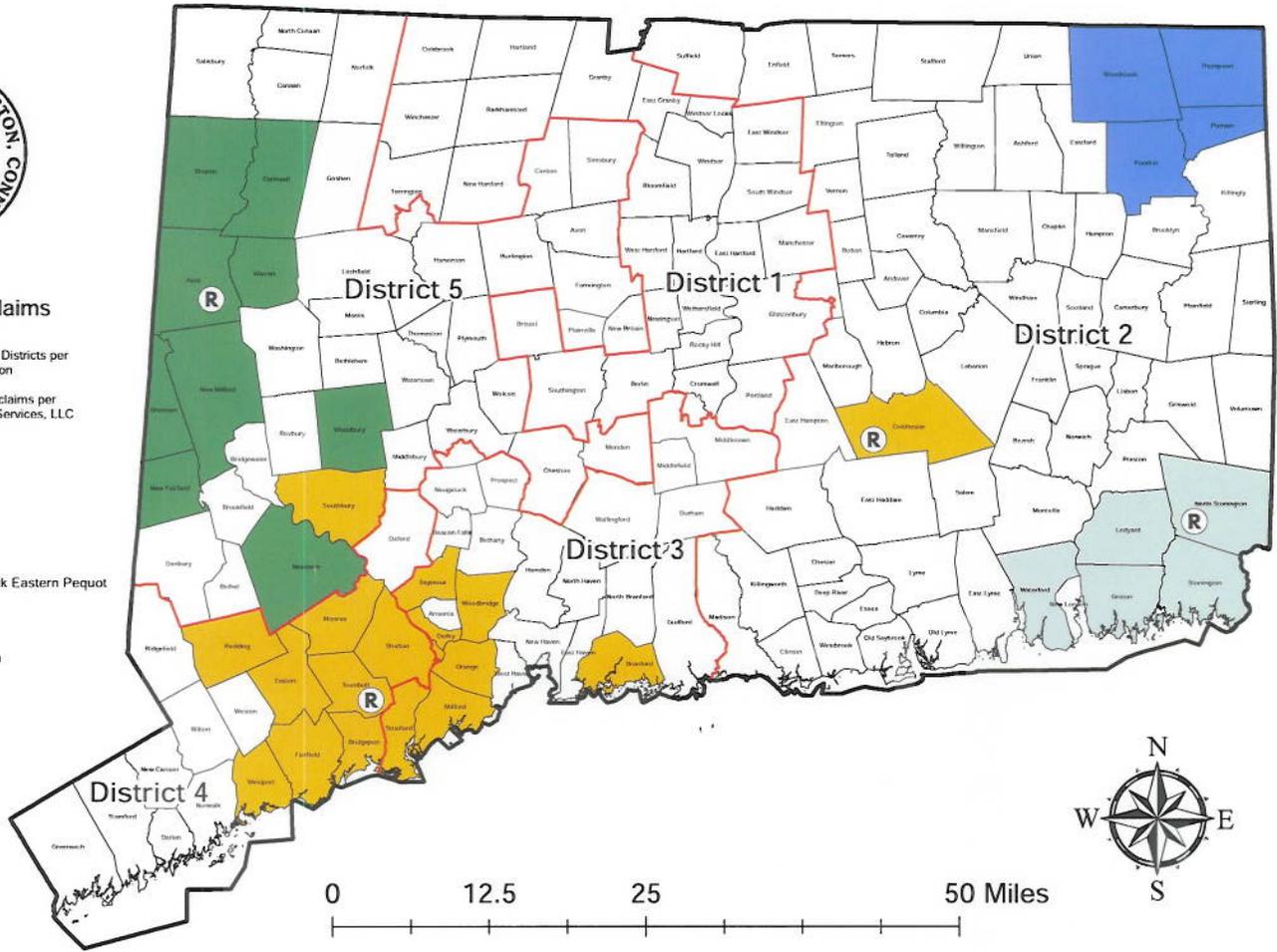


Potential Land Claims

Town boundary and US Congress Districts per CT DEEP GIS information
 Reservation and potential land claims per Historical Consulting & Research Services, LLC

Legend

- US Congress Districts
- Reservation
- Eastern Pequot / Pawcatuck Eastern Pequot
- Golden Hill Paugussett
- Nipmuc
- Schaightoike Tribal Nation



Map #: 1870
 Map Date: 8/9/2013

Notes

This map was prepared for the purpose of showing potential land claims. It is not intended to be used for any other purpose. The information on this map is based on the best available information at the time of preparation. The information on this map is not a warranty, representation, or guarantee of accuracy. The information on this map is provided as a service to the user and is not intended to be used for any other purpose. The information on this map is not a warranty, representation, or guarantee of accuracy. The information on this map is provided as a service to the user and is not intended to be used for any other purpose.

EXHIBIT 2

**Comments on Discussion Draft Proposal for Revision
of the Acknowledgment Regulations (25 CFR 83)**

Prepared by George Roth, Ph.D.
August 14, 2013

Commentor's Qualifications

I offer the following comments on the discussion draft for revision of the acknowledgment regulations. I write on the basis of 33 years with the Office of Federal Acknowledgment (OFA) I was one of the original staff members, beginning in 1978, when the first regulations were published. I contributed major portions of the 1991 proposed revision and was the lead drafter of the revised regulations published in 1994. In addition, I participated in the extensive discussions at OFA in 2010 and 2011 concerning revisions to the regulations. The resulting draft proposed revised regulations (referred to here as the "OFA Draft"), were prepared at the request of the then Deputy Assistant Secretary - Indian Affairs (ASIA) George Skibine.¹

General Comment

The proposed revisions are presented as a method of streamlining the Federal acknowledgment process and making it more transparent. Numerous changes instead greatly weaken the requirements in the regulations. They are a complete abandonment of any reasonable standard for showing continuous tribal existence and thus eligibility for acknowledgment as a sovereign Indian tribe.

Start Date for Tracing Tribal Existence (83.3(d), 83.7)

The idea that tribal existence need only be traced to 1934 was among the comments on the 1991 proposed revised regulations that were reviewed and rejected in preparing the 1994 final regulations. The same rationale was offered then as now, that this was the date of the Indian Reorganization Act and the major changes in Federal Indian policy towards supporting tribes.

The Department's 1994 comments in rejecting this idea apply equally here:

The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians. Acknowledgment as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time (59 FR 9280, 2/25/1994).

The use of 1934 has no meaningful rationale or any substantial evidentiary basis. The changes in Federal Indian policy then per se provided no evidence for or against tribal existence. Some investigations made in this era concluded certain groups no longer existed as tribes. In other

¹While I have referred to this draft here, I do not have a copy nor did I consult with Interior employees in preparing these comments.

cases, the Department concluded that some groups were tribes but that the Department had no authority to recognize them.

Such an extreme change also raises the question whether the Department, absent specific legislation, has legal authority to implement revised regulations using a 1934 start date.

Instead of 1934, revised regulations should incorporate the language of the “Directive” of 2008, which provided a revised interpretation of the present regulations (Federal Register Vol. 73, No. 101, May 23, 2008). Under the directive’s interpretation, tribal existence only need be traced from the formation of the United States or first sustained contact, whichever is later, rather than from first sustained contact, which often greatly predated the establishment of the United States government . This provision was utilized in acknowledging the Shinnecock Tribe.

The reasoning was stated in part,

The purpose of the evaluation under the regulations is that an Indian tribe has existed continuously and is entitled to a government-to-government relationship with the United States. In order to reduce the evidentiary responsibilities of the petitioner, it is reasonable to interpret the regulations as requiring the petitioner to document its claim of continuous tribal existence only since the formation of the United States, the sovereign with which it wishes to establish a government-to-government relationship. . . .

Therefore, if the petitioner was an Indian tribe at that time the Constitution was ratified, its prior colonial history need not be reviewed. The date of the period of earliest sustained non-Indian settlement and/or governmental presence in the local area, thus, should be on or after March 4, 1789.

Expedited Favorable Determination (83.6(c))

The draft proposes two criteria for an expedited positive determination (if the petitioner has shown historical tribal ancestry under 83.7(e)). These criteria are proposed to be, in themselves, determinative for acknowledgment, without more evidence demonstrating community and political processes. Neither proposed criterion is valid or appropriate as automatically acknowledging a petitioner.

The first expedited favorable criterion is “The petitioner has maintained since 1934 a reservation recognized by the State and continues to hold a reservation recognized by the State (83.10(g)(i)).”

State recognition with a reservation, when only traced to 1934, does not merit the extreme weight the proposal gives it, that it is determinative of tribal existence by itself. The Department in proposed and final determinations on Eastern Pequot and Schaghticoke did give state recognition some weight as evidence for criteria b and c (thus not giving it the extreme weight proposed here), but only on the basis that a state relationship, including a reservation, from colonial times

provided evidence of continuous existence. Tracing only to 1934 does not show the long continuity which was the basis for these conclusions.²

The many sections of the proposed rule that reflect the use of the 1934 date should be revised to restore the requirement of continuity from the establishment of the United States. More specific comments concerning modifications of language are not provided here.

The second criterion for an expedited positive finding, at 83.10(g)(ii), is “The United States has held land for the group at any point in time since 1934.” Without further qualification of the term “held land” and basis for it, it doesn’t provide evidence of tribal existence or, the implied Federal recognition. Where land was clearly purchased based on tribal existence and recognized status, this would equate with previous Federal recognition, and should be included in 83.8.

Land that was purchased might not have been held in trust for a tribe. Land might have been purchased for a group or community, by any Federal agency, for whatever purpose, in the same manner as for any organization. For example, purchase of land for some Lumbee in the 1930's by the Agriculture Department was not an indication that this was done because they were an Indian tribe or that a Federal relationship was being established. (See also Little Shell PF where a Federal land purchase originally intended for some of the landless Indians now known as Little Shell, was never made put in the name of the group, and further did not indicate a Federal relationship had been established (Little Shell Proposed Finding, 2000, Technical Report).

Decision Maker

The discussion draft moves the acknowledgment proposed finding decision to OFA from the Assistant Secretary, with the final determination to be made either by the ASIA or the Office of Hearings and Appeals (OHA) (the choice is offered for comment). (At page 19, the proposed rule states that the Assistant Secretary is bound by final determinations decision, presumably if made by OHA). Based on the history of the IBIA appeal process in the current regulations, and consultations with that office in working on the OFA draft, it is unlikely that the IBIA would accept such a role, nor does it have the expertise to do so.

This change inappropriately separates the ASIA from his staff, the OFA, and may create an adversarial situation. The ASIA should be the decision maker for the proposed finding as well as the final determination. And the ASIA’s final determination should be made with the advice, and consultation of his staff, OFA. The proposed separation could make it easier for the ASIA to change decisions proposed by OFA without any stated procedures or standards, which is a very undesirable change, exposing acknowledgment decisions to political influence.

Elimination of Criterion 83.7(a)

The elimination of criterion a was seriously considered in preparing the 1994 regulations, but

²Notably, this use of the continuous state reservation as evidence was overturned on appeal by the Interior Board of Indian Appeals.

instead it was changed to limit the requirement to after 1900, to avoid problems of 19th century identifications. In practice, no petitioner has been denied solely on the basis of not meeting this criterion. However, analyses of criterion a in various findings have consumed considerable petitioner and OFA time, while of limited value to the actual finding. Thus it is appropriate to remove this criterion.

Although the suggestion is made in the cover notice concerning the draft regs that it is demeaning to depend on external identifications, positive external identifications are equally or more unreliable, as outsiders uncritically agree with a group's unmerited claims (see Mowa Choctaw and Machis Creek findings). It should be noted, however, that the presence or absence of identifications may provide evidence whether a group even exists at a particular point in time. Evidence about external views of a group can be useful evidence for criterion b.

Modifications of Criterion 83.7(b)

The draft proposes that specification in this criterion to show that "a predominant portion of the petitioning group" comprise a community be changed to specify a percentage, with requested comment on what percentage. "Predominant" technically only means more than half. It is undesirable to reduce this reasonable standard, if this is what is intended, and thus weaken the requirements.

The regulations at 83.7(b)(2) describe levels of evidence strong enough in themselves, without more, to demonstrate community. The proposal requests comment whether these, which now specify 50 percent. These should not be change, as the purpose of this section is to identify communities where the level of social integration is high enough that a single measurement of social connection is sufficient as to not require a more detailed inquiry. Reduction in the percentage means that this reasoning would not be valid.

Addition to Evidence for Criterion 83(c)

The proposal adds to evidence for criterion c, as evidence sufficient in itself, without any supporting evidence, to "Show a continuous line of group leaders and a means of selection or acquiescence by a majority of the group's members" (83.7(c)(2)(v)).

The fact that a petitioner may have had a continuous string of elected leaders and formal organization over a long period of time does not distinguish it from a club or voluntary association whose members have no other connection and whose "political function" does not meet the requirements of the definition of political. Thus this is evidence of only minimal value, and certainly not sufficient in itself to show the criterion is met. The existence of continuous organizations with elected leaders has not treated as useful evidence in previous acknowledgment decisions to date, including notably Indiana Miami, which was upheld in 2001 by the U.S. Circuit Court of Appeals.

Modification of Criterion 83.7(e)

The draft proposal leaves open, for comments, the percentage of a petitioner's membership that

needs to show historical tribal ancestry. The criterion as established in the original 1978 regulations and continued in 1994 said simply that the members must be descended from an historical tribe, without qualification as to percentage. The Department's precedent in interpreting this criterion has been that it was reasonable to allow some small portion of the membership to not have made this demonstration of tribal ancestry. The Department in preparing the 1994 regulations declined recommendations that it specify a minimum percentage to meet this criterion, preferring to continue its precedent, but allow some flexibility. It is preferable to continue this. Alternatively, the figure of 80 percent should be used, which matches precedent. Lesser percentages to a significant degree tend to correlate with questions about the history and character of the petitioning group. It would not be appropriate to specify a higher percentage..

The proposal adds to the list of evidence for ancestry, "Historians' and anthropologists' conclusions drawn from historical records, and historical records created by historians and anthropologists" (83.7(e)(1)). This should be omitted. Source identifications of ancestry need to be contemporary, and essentially be primary evidence. As presented in the draft, any book or article, referring to any period of time, but created much later, could be used, basically circumventing any actual review process. Such are already usable as evidence). Note that "scholarly" literature which might deny the tribal ancestry of a petitioning group, and have not been used in past decisions.

Repetitioning 83.10(r)

It is expectable that many of the previously denied petitioners will seek to repetition, if the proposed changes are made, because of the severely weakened standard. Repetitioning should not be permitted under the proposed changes. If current standards were maintained, some form of repetitioning, after the passage of substantial number of years, might be of some value.

Expedited Negative Findings

The proposal moved the present language for expedited negative findings into the main process of consideration instead of coming before active consideration. This is an appropriate change. However, the rule should go further by allowing a negative proposed finding on any single criterion, not just e, f and g. The 2008 Directive stated that since under the regulations a petitioner must meet all seven criteria, the failure to meet any one criterion would result in a negative determination. This allowed a negative finding on a single criterion negative, a very efficient use of staff resources, for cases which have little or no evidence for tribal existence. It has already been used in decisions in the past several years (e.g., 2011, Florida Band of Choctaw). The revised regulations should put the relevant language from the 2008 Directive, into the regulations in place of the present "expedited negative finding" language.

Previous Federal Recognition 83.8

Language developed for the OFA draft should be substituted for the proposed 83.8. This language, subject of extensive review and analysis, makes this part less cumbersome, takes out some of the unnecessary complications and provides a clearer view of the kind of evidence necessary. However, this revised 83.8 continued the present regulations's requirement of a

stronger form of external identification than in criterion 83.7(a), to ensure that the petitioner was the same group as previously acknowledged. Since this has not previously presented serious questions, where the history of the petitioning group is well documented, it may be safely omitted from the OFA draft.

However, the OFA proposal made clear the meaning of and application of 83.8, that continuous political existence from the point of last Federal recognition needed to be demonstrated. (Past decisions did not require continuous historical community, despite the present regulations' language (at 83.8(d)(5) (see for example, the Snoqualmie Tribe Final Determination of 1999)). The proposal eliminates this vital element for demonstrating historical existence as a political entity, requiring only a demonstration for the present-day group, thus substantially weakening this provision of the regulations.

Role of Interested and Other Third Parties

The proposal substantially reduces the role interested parties in the acknowledgment process p. 17 (m). It does so by limiting the third parties that can respond to a proposed finding to the state and local government where the petitioner has its office and recognized tribes within the state. This is narrower than the definition of "interested party" in 83.1,. This would for example eliminate other unrecognized groups, or recognized tribes or local governments not in the home state of the petitioner from commenting, even if the proposed decision would materially affect them. The original definition of interested party, which is retained in the proposals should apply at this major stage of consideration. The role of interested third parties is part of the strength of the process, and helps limit the possibilities of post decision litigation of favorable decisions, because parties had ample opportunity to respond during the administrative process. Limiting the ability to respond to proposed decisions, a critical weakening of the process, without justification.

Definitions, 83.1.

The revision incorrectly removes the definition of "indigenous" on the stated ground that it is already incorporated into the definition of "Indian group." "Indigenous" refers to the requirement that a petitioner have been within what became the present boundaries of the continental United States at the time of sustained contact, that is from the beginning point for tracing tribal existence. The definition of "Indian group" does not contain this requirement, hence Indians migrating into the U.S. in historical times would be eligible for recognition. Congress has almost always avoided this type of action in recognition legislation, characterizing, in recognition legislation, even the Pasqua Yaqui of Mexico and Maine Micmacs (from Canada) as having been at least in part within the United States throughout the relevant history, though the evidence for this was limited or questionable. Thus the definition of indigenous should be restored as well as the language in 83.3 (a) (Scope) specifying the limitation of application of the regulations to indigenous Indian tribes.

Base Tribal Roll 83.12

The language in 83.12 (b) defining the base roll of a tribe that becomes acknowledged has not been modified. The OFA draft made major clarifications of language and improvements of the

process of establishing a base roll, an important part of the acknowledgment process. Revised regulations should adopt the revised language of this section from the OFA draft. This will establish clearly the newly acknowledged tribe's membership while allowing for appropriate modifications and changes.

Criterion 83.d

The OFA draft regulations shifted the requirements stated in criterion d from being a specific criterion to a requirement for the submitted documented petition in order for it to be considered. This approach should be taken here, to make the consideration process more efficient. Also, evaluation of criterion e and sometimes f and g require knowledge of how memberships lists were compiled, and are needed at the beginning of any evaluation.

Letter of Intent

The discussion draft eliminates the letter of intent from the process, which follows the OFA draft proposal and is an appropriate simplification of the process.

Splintering of Petitioning Groups

The 2008 Directive contains extensive language establishing procedures for dealing with the problem of "splintering" petitioners. This problem has occupied large amounts of OFA staff time, diverting scarce resources from processing petitions.. The basic outlines of the procedures in this directive should be incorporated into the regulations.

IBIA Appeal Process

The discussion draft removes the IBIA appeal process and doesn't offer an alternative. The present process is cumbersome and lengthy. While an appeal process appears to have some merits, devising a suitable approach, and one that does not unduly lengthen the consideration process, has not been developed. The discussions for the OFA draft, in consultation with the Interior Board of Indian Appeals, drafted a more streamlined and focused procedure for appeal to IBIA than in the present regulations. The Deputy ASIA however concluded to not have any IBIA process and it was not included in the final OFA draft. It is not clear that such an appeal process would necessarily reduce litigation of completed decisions.

83.10(e) Withdrawal from Consideration

The proposed revision allows a petitioner to withdraw from consideration after active consideration has begun. Language was added in the 1994 regulations to prevent withdrawals without the ASIA's consent. In reviewing comments on this for the 1994 regulations, the Department cited concern with the waste of staff time and resources and with potential withdrawals simply to avoid a negative finding. These arguments are still valid, hence the language of the 1994 regulations should be retained.

Additional Comments on Discussion Draft Proposal for Revision of the Acknowledgment Regulations (25 CFR 83)

Prepared by George Roth, Ph.D.
September 20, 2013

Introduction

These comments are in addition to comments submitted August 14, 2013, and should be read together with that document.

Treatment of Evidence and Standards of Proof

The draft proposal changes the standards of proof outlined in 83.6(d) of the present regulations (Though it apparently adopts some of the refinements of 83.6(d) done for the OFA draft). Crucially, the draft adds new language which states that a criterion shall be considered met if “A preponderance of the evidence supports the validity of the facts claimed when viewed in the light most favorable to the petitioner” (emphasis added) (83.6(d)(1)). Depending on how this clause is interpreted, it could result in no real weighing of evidence or investigation of a case.

This added clause conflicts with the rest of the language concerning standards and much of the rest of the consideration process in the regulations. That process envisions a gathering of evidence and judicious weighing of it to produce the conclusions most supportable by the overall body of evidence, irrespective of whether this would support or deny a petitioner. The added language could easily be interpreted to mean that if there is any “positive” evidence, then the most favorable interpretation is to disregard any evidence to the contrary.

A further indication of this change in standard is that the proposed draft omits the language in the present regulations which states that “a petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria (83.6(d))” (emphasis added). This removes a key part of the balanced process of weighing evidence.

Bilateral Political Relationship

The “presentation” concerning the draft proposal, as posted on the web, includes the question whether a “bilateral political relationship” needs to be demonstrated. Nothing could be more central to demonstrating tribal existence than that its members are in a political relationship with the tribe and that the tribe exercises influence or authority over its members.

“Bilateral” expresses the requirement that the members are in “tribal relations,” which is defined in the regulations as “participation by an individual in a political and social relationship with an Indian tribe.” Without this participation (which must be in more than a limited or trivial sense) the petitioning “tribe” is no better than a club. The Federal court decision upholding the Indiana Miami final decision concluded that the regulations, in providing criteria and reasoning for determining whether a tribe no longer existed, incorporated the idea of “abandonment of tribal

relations" (Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, 255 F.3d 342, 350 (7th Cir. 2001)).

Additional Comment on the Proposal to Use 1934 as the Start Date

A second argument for using 1934 as a start date for measuring tribal existence is that if a tribe existed then, this showed it had survived since first sustained contact, and the earlier history need not be examined. However, this assumption of continuous historical existence is undermined by the fact that a group may have formed during historical times and not be a continuation of a historical tribe. For example, the acknowledgment findings in Ramapough Mountain Indians petitioning group and United Houma Nation (proposed finding, not finalized) indicate the present groups came into existence in the 19th century (leaving aside other reasons cited in the findings that the regulatory criteria were not met). It is unlikely these are the only such groups in the country.

EXHIBIT 3



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:

Tribal Government Services

DEC 18 1975

Mr. David Mackety
Huron Potawatomi Athens Indian
Reservation
Fulton, Michigan 49052

Dear Mr. Mackety:

This will acknowledge receipt of your letter of November 12 concerning a petition for Federal recognition of the Huron Band of Potawatomi Indians.

While the first page of your letter appears to be part of your original letter, the second page is a reproduction and the petition you referred to was not included. Notwithstanding these facts, former Secretary Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action. Nor, even if such authority can be said to exist, does the law appear to be clear as to the applicable standards and procedures for recognition. In short, they felt that the "recognition" concept is an exceedingly indefinite one. As a result attorneys in the Solicitor's office researched various questions connected with recognition and prepared detailed memoranda. That memoranda is now being reviewed.

Until that review is concluded and the future policy relating to administrative recognition of Indians tribes or bands has been determined, we will be unable to act upon the petition of the Huron Band of Potawatomi Indians. If you will send the petition forward, however, we will be happy to hold it in our files for immediate action following the determination of future policy.

Sincerely yours,

Luci M. Ray, Jr.
Chief, Branch of Tribal Relations



ATTACHMENT

EXHIBIT 4

Congressional Bills regarding Federal acknowledgment of Indian Tribes

1989-2011

S. 912, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups. 101st Congress, 1st Session, May 3, 1989.

S. 1315, To transfer Administrative Consideration of applications for Federal Recognition of an Indian tribe to an independent commission, and for other purposes. 102d Congress, 1st Session, June 18, 1991.

H.R. 3430, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups. 102d Congress, 1st Session, September 26, 1991.

H.R. 2549, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups. 103d Congress, 1st Session, June 29, 1993.

S. 1844, To transfer Administrative Consideration of applications for Federal Recognition of an Indian tribe to an independent commission, and for other purposes. 103d Congress, 2nd Session, February 10, 1994.

H.R. 4462, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 103d Congress, 2nd Session, October 8, 1994.
(Accompanied by House Report 103-782 on HR 4462)

H.R. 671, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 104th Congress, 1st Session, January 25, 1995.

S. 479, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 104th Congress, 1st Session, February 28, 1995.

H.R.2591, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 104th Congress, 1st Session, November 7, 1995.

H.R. 2997, To establish certain criteria for Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 104th Congress, 2nd Session, February 19, 1996.

H.R. 1154, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 105th Congress, 1st Session, March 20, 1997.
(Accompanied by House Report 105-737 on HR 1154)

H.R. 361, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 106th Congress, 1st Session, January 19, 1999.

S. 611, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 106th Congress, 1st Session, March 15, 1999.

S. 504, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 107th Congress, 1st Session, March 9, 2001.

H.R. 1175, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 107th Congress, 1st Session, March 22, 2001.

S. 1392, To establish procedures for the Bureau of Indian Affairs of the Department of the Interior with respect to tribal recognition. 107th Congress, 1st Session, August 3, 2001.

H.R. 3548, To provide for uniform recognition of Indian Tribes by the Bureau of Indian Affairs, and for other purposes. 107th Congress, 1st Session, December 19, 2001.

S. 297, To provide reforms and resources to the Bureau of Indian Affairs to improve the Federal Acknowledgement process, and for other purposes. 108th Congress, 1st Session, February 4, 2003.

S. 462, To establish procedures for the acknowledgement of Indian tribes. 108th Congress, 1st Session, February 26, 2003.

H.R. 5134, To require the prompt review by the Secretary of the Interior of the long-standing petitions for Federal recognition of certain Indian Tribes, and for other purposes. 108th Congress, 2nd Session, September 23 2004. (Accompanied by House Report 108-788 on HR 5134)

H.R. 464, To establish Administrative Procedures to extend Federal Recognition to certain Indian groups, and for other purposes. 109th Congress, 1st Session, February 1, 2005.

H.R. 512, To require the prompt review by the Secretary of the Interior of the long-standing petitions for Federal recognition of certain Indian Tribes, and for other purposes. 109th Congress, 1st Session, February 2, 2005. (Accompanied by House Report 109-694 on H.R. 512)

S. 630, To establish procedures for the acknowledgement of Indian tribes. 109th Congress, 1st Session, March 15, 2005.

H.R. 2837, To provide for administrative procedures to extend Federal recognition to certain Indian groups, and for other purposes. 110th Congress, 1st Session, June 22, 2007.

H.R. 6087, To sunset the Federal recognition and acknowledgement process within the Bureau of Indian Affairs of the Department of the Interior, and for other purposes. 110th Congress, 2nd Session, May 20, 2008.

H.R. 3690, To establish a Commission on Recognition of Indian Tribes to review and act on petitions by Indian groups applying for Federal recognition, and for other purposes. 111th Congress, 1st Session, October 1, 2009.

H.R. 3103, To establish a Commission on Recognition of Indian Tribes to review and act on petitions by Indian groups applying for Federal recognition, and for other purposes. 112th Congress, 1st Session, October 5, 2011.