ROBB & ROSS
AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

JOSEPH W. ROBB *
STERLING J. ROSS, JR. *†
ALAN J. TITUS
PHILIP A. ROBB
ALEXIS LYNCH

591 REDWOOD HIGHWAY, SUITE 2250
MILL VALLEY, CA 94941
TELEPHONE: (415) 332-3831
FAX: (415) 383-2074

*A PROFESSIONAL CORPORATION

† CERTIFIED SPECIALIST IN ESTATE PLANNING, PROBATE AND TRUST LAW THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

September 25, 2013

Bureau of Indian Affairs
Office of Regulatory Affairs & Collaborative Action
1849 C Street NW, MS 4141-MIB
Washington, DC 20240

Re: Request for Comments on Preliminary Discussion Draft of Revisions to Part 83 Procedures for Establishing That an American Indian Group Exists as an Indian Tribe

Dear Sir or Madam:

I write on behalf of Artichoke Joe's, a state licensed cardroom in San Bruno, California, with comments on the preliminary discussion draft of revisions to the regulations governing procedures to establish that an American Indian group constitutes an Indian tribe (the "recognition regulations").

When the recognition regulations were first promulgated in 1978, Indian tribes were not engaged in the business of gaming. Since then Indian gaming has become a $26 billion a year industry. New Indian groups form regularly and seek recognition in order to be able to participate in this new industry. This raises issues that were not apparent in 1978 and are not adequately addressed in the current regulations.

The growth and success of Indian gaming is largely attributable to the exemption Indian tribes enjoy from state laws. Indian tribes are allowed to conduct forms of gambling that the state prohibits. New groups of Indians seek to be recognized as tribes in order to buy lands currently under state control, to have title taken into trust, and to claim sovereignty over the newly obtained lands so they can conduct activities on the land that were prohibited under state law. That phenomena did not exist in 1978, and it is not clear that the recognition regulations were intended to establish tribal sovereignty.

The first issue raised then is to confirm the purpose of acknowledgment. As the leading treatise on Indian law stated in 1982, "various purposes" are served by

acknowledgment. *Cohen's Handbook of Federal Indian Law*, p. 3 (1982 ed.). The Handbook identifies at least two very distinct purposes.

The main purpose served by acknowledgment is to identify Indian groups that are eligible to receive federal benefits. The federal government provides certain services and financial benefits to Indian tribes, and the BIA, in administering these benefit programs, needs to determine which tribes are eligible for those services and benefits. In this vein, the List Act, passed in 1994, requires the BIA to maintain "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. §479a-1. Federal benefits have never been limited to Indians in tribes with a land base or who exercise some measure of sovereignty. In fact, the rancheria program in California was largely directed at "scattered" Indians who had left their tribe.

A second purpose of acknowledgment, and the one pertinent to gaming and that seems to have developed since 1978, is to identify which groups have been recognized as political entities or are currently recognized as political entities. In this regard, in its 1994 amendment of these regulations, the BIA described the purpose of the regulations as to determine which groups have "a government-to-government relationship" with the United States. 59 FR, Issue 38 (February 25, 1994). Acknowledgment becomes akin to recognition of political sovereignty.

These two purposes are very different. An Indian group might be entitled to receive special federal benefits available only to Indians despite lack of a land base and lack of legislative and adjudicative jurisdiction over the land. The tribal organization might serve quasi-governmental functions of receiving and distributing federal benefits. In these cases, determination of eligibility to receive federal benefits does not affect rights of third parties. In contrast, sovereignty is dependent on possession of lands, and determination that a tribe has legislative and adjudicatory jurisdiction over certain lands has the potential to greatly affect the rights of numerous third parties, including nearby residents and businesses.

Due to these differences, the qualifications for acknowledgment for one purpose should be very different than the qualifications for acknowledgment for the other purpose. Where the purpose of acknowledgment is to determine eligibility for federal services and benefits, the issue is whether the organization serves Indians to whom the government still owes trust duties.

However, where the purpose of acknowledgment is to recognize legislative jurisdiction and sovereign political powers, and to determine that the group is not subject to the state's jurisdiction, the issues are very different. Case law dictates a number of elements which must be established. First, the tribe must have land. Second, the tribe must have inherent or aboriginal jurisdiction over that land. Third, it must have exercised this jurisdiction continuously since the state was formed. Fourth, the tribe must form a separate and distinct political community. These factors ensure that a claim of Indian sovereignty is legitimate, and serves to protect the important interests of non-Indians from what amounts to "a state within a state" with different laws governing different segments of the population.

A determination of sovereignty should be specific to the tribe and to the specific land the tribe holds at the time of recognition, and should not apply to after-acquired land. The fact that a tribe is sovereign over one site is irrelevant when they subsequently obtain trust title over an additional site. The prior determination would be irrelevant to the tribe's jurisdiction over the new site.

Current regulations do not sufficiently differentiate between the two different purposes served, and do not delineate appropriate criteria, as derived from existing case law, to make a determination for either purpose. With regard to acknowledgment of a tribe for the purpose of recognizing sovereignty, many elements are missing, including that the tribe has land, that the tribe has inherent or aboriginal jurisdiction which predated formation of the state, and that the tribe forms a separate and distinct community. As to the element of continuity, the regulations currently require that the tribe trace its history back only to 1900 and not to formation of the state. The use of that year is arbitrary and does not satisfy the requirements for continuity since the state was admitted into the union.

The proposed regulations would be even worse. They would not require any sort of continuity before 1934, and so would not be sufficient to determine sovereignty in any of the lower 48 states. This would be completely contrary to the law, and would presume tribal existence without any proof.

This also contradicts the BIA's prior position on the issue. During the process of amending the regulations, commentators suggested use of the 1934 date, and the BIA strongly rebuffed that suggestion. In the Final Rule adopted in 1994, BIA wrote in the review of public comments, in a section entitled "Standards of Evidence and Stringency of Requirements":

> Comment: ...A variant of this was a suggestion that petitioners only be required to demonstrate continuity since 1934. This date was suggested because it was the period of initial implementation of the 1934 Indian Reorganization Act.
>
> Response: ...[I]n the Department's view it is inappropriate to establish a specific interval during which tribal existence may be presumed... [¶] 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...Thus, as a practical matter, 1934 would not be a useful starting point.

That argument is as valid today as in 1994. To the extent that the recognition regulations seek to acknowledge the sovereignty of a tribe (as opposed to just entitlement to benefits), the group's sovereignty must be traced back to before the state was formed. It must be established that the group was allowed to exist as a separate people when the state was formed, and has continued from that time until the present. No explanation is provided for the BIA's 180 degree change in position or why the BIA thinks its prior position is incorrect.

Last, the process for acknowledgment of sovereignty is inadequate. Third parties who are greatly impacted by these decisions need to be included in the process. If the recognition regulations are going to adjudicate the sovereignty of a tribe and affect the rights of third parties, those parties need notice and a right to be heard. That would include not just the state and local government, but residents and businesses in the area.

We appreciate your consideration of these comments.

Sincerely,

Alan Titus