# House Subcommittee on Indian, Insular and Alaska Native Affairs

Don Young, Chairman

Hearing Memo

April 20, 2015

To: Natural Resources Committee Members

From: Majority Staff, Subcommittee on Indian, Insular and Alaska Native Affairs

Hearing: Oversight hearing on "*The Obama Administration's Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, not Recognize Them.*"

When/Where: Wednesday, April 22, 2015, at 4:00 P.M. in room 1324 Longworth HOB

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**Summary**

On May 22, 2014, the Bureau of Indian Affairs (BIA) published a proposed rule to "revise regulations governing the process and criteria by which the Secretary [of the Interior] acknowledges an Indian tribe."[1] The public comment period closed on September 30, 2014. The Department of the Interior has informed staff that a final rule is anticipated before the end of this year, possibly by this summer. The proposed rule largely mirrors (with a few small changes) a "discussion draft" publicly circulated in 2013. A chart prepared by the BIA comparing the current rule and the proposed rule and a reason for each change accompanies this memo.

Regulations by which the Secretary recognizes a tribe is commonly called "Part 83" because it is contained in Part 83 of Title 25 of the Code Federal Regulations (25 CFR 83). The Office of Federal Acknowledgment (OFA) within the Department processes petitions from groups seeking recognition as tribes under Part 83.

On March 26, 2015, a bipartisan letter was sent to Secretary Sally Jewell by Chairman Rob Bishop, Subcommittee Chairman Young, and Representatives Mike Thompson (D-CA), Joe Courtney (D-CT), and Elizabeth H. Esty (D-CT) to express concern with the proposed revisions to Part 83 and to urge the Department to "refrain from issuing final regulations until we have conducted the oversight necessary to evaluate thoroughly the issues associated with recognition …"[2]

Please note that in the context of federal Indian policy, the terms "acknowledgment" and "recognition" are used interchangeably by tribes and the BIA.

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[1] http://www.bia.gov/cs/groups/public/documents/text/idc1-026830.pdf

[2] http://naturalresources.house.gov/uploadedfiles/lettertojewell_3_26_15.pdf

**Main Messages**

- Federal recognition regulations under Part 83 were created by the Department of the Interior, not Congress, even though Article I, Section 8, Clause 3 of the Constitution delegates only to Congress the power to regulate Indian affairs

- As a result, a political question (i.e., extending political relations to an Indian tribe) reserved to Congress has been converted by the Department into a kind of entitlement under which a petitioner must meet Department-invented criteria

- The recognition of new tribes has profound consequences on the federal budget, on existing recognized tribes, on state civil, criminal, and tax jurisdiction, and on individual rights

- The Department's proposed rule to revise Part 83 relaxes the standards by which a petitioner may obtain recognition, leading to a concern the Department will create a tribe, not recognize an historic tribe

**Invited Witnesses**

*Mr. Kevin Washburn*, Assistant Secretary—Indian Affairs
U.S. Department of the Interior
Washington, D.C.

*Mr. Brian Cladoosby*, President
National Congress of American Indians
Washington, DC

*The Honorable Robert Martin*, Chairman
Morongo Band of Mission Indians
Banning, CA

*Mr. Glen Gobin,* Vice-Chair and Business Committee Chair
Tulalip Tribes
Tulalip, WA

*The Honorable Fawn Sharp,* President
Quinault Indian Nation
Taholah, WA

*Mr. Donald C. Mitchell*
Attorney at Law
Anchorage, AK

## Overview of Recognition

Article I, Section 8, Clause 3 of the Constitution grants Congress power to "regulate commerce … with the Indian tribes." Supplemented by the Treaty making powers in the Constitution, the so-called Indian Commerce Clause delegates to Congress what the Supreme Court has said is "plenary" power over Indian affairs.[3] Inherent in this delegation of authority to Congress is the power to recognize a tribe, as well as the prerogative not to extend recognition and to terminate a tribe's political status.

The names of recognized tribes are published annually by the Secretary of the Interior. The current list contains 566 tribes, with 337 in many of the Lower 48 states and 229 in Alaska,[4] though the legal status of tribes in Alaska as "federally recognized" has been the subject of dispute.

It is important to distinguish the political meaning of tribe from its ethnic sense. Federal recognition is a political act making American Indians eligible for the special rights, immunities, and federal services and benefits because of their status as American Indians. A group of Indian people who lack federal recognition as members of a tribe possess no such privileges and immunities.

Recognition of a tribe "is one of the one of the most solemn and important responsibilities delegated to the Secretary of the Interior."[5] Recognizing a new tribe creates an expectation that Congress will increase appropriations for Indian programs to account for a larger service population. A tribe is eligible for a variety of federal services and benefits, including operation of a casino on its lands, and absolute sovereign immunity against anyone except the federal government. It usually obtains federal protection in controversies where states, local governments, or private citizens are adverse parties. A tribe may exercise special political authority over its territory and its Indian members. Land acquired in trust for a tribe divests state and local government jurisdiction over such property. A tribe is not deemed to be a party to the Constitution and as a result, an individual under a tribe's civil or criminal jurisdiction does not possess on that tribe's lands any of the rights guaranteed by the Constitution, except as provided by Congress.

## How Tribes Obtain Federal Recognition

Until the 1970's, federal recognition was extended to Indian tribes through treaties, Acts of Congress, and Executive Orders. In 1871 Congress prohibited the United States from contracting thereafter with tribes by treaty. Executive Orders similarly fell into disuse.

Recognition is a political question. Congress can choose to recognize a tribe for limited purposes or not to recognize a tribe. While Congress's power in this area is broad, it is not unlimited. At a minimum, members of a federally recognized tribe must have Indian ancestry and they must constitute a distinct Indian community. Until the last three decades, Congress set the standards for tribal membership, such as a minimum degree of Indian ancestry. In modern times, however, neither Congress nor the Department has required minimum

[3] According to the Supreme Court, Congress's power regarding Indian tribes "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) at 565.

[4] http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029079.pdf.

[5] Testimony of Michael D. Olsen, Counselor to the Assistant Secretary—Indian Affairs, Testimony before the House Committee on Resources, April 1, 2004.

membership standards, leaving this up to each tribe. In recent cases this has led to several tribes expanding membership rolls, and others expelling members.

In 1994, Congress enacted the Federally Recognized Tribes List Act to require the Secretary to publish annually a list of all recognized tribes. This Act, however, does not contain a delegation of authority to the Department to extend recognition to a tribe.

***Department of Interior Regulations***

In 1978, the Bureau of Indian Affairs (BIA) crafted regulations under 25 CFR 54 to recognize any group that can meet seven mandatory criteria to establish a continuous existence as an autonomous Indian tribe throughout history to the present. The BIA developed these regulations even as Congress discussed but did not enact a law to establish recognition standards. The BIA's regulations were later placed in 25 CFR 83.

In 1994, the BIA revised several key mandatory criteria in the regulations. One of the revisions relaxed the requirement that a petitioner must "inhabit[] a specific area or live[] in a community viewed as American Indian and distinct from other populations in the area."

Currently, 25 CFR Part 83 requires a petitioner to meet the following 7 mandatory criteria for establishing that an American Indian group exists as an Indian tribe within the meaning of federal law (the following are in abbreviated form):

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historian Indian tribes which combined and functioned as a single autonomous political entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

Since 1978, under Part 83 the Secretary has extended recognition to 17 tribes, while declining to recognize 34. There are more than 300 petitions for recognition pending with the BIA but many are little more than letters of intent to seek recognition.

The Part 83 process has been criticized as burdensome on the petition, and fraught with delays, a lack of public transparency, and claims of undue political influence (depending on the outcome of the petition). For example, in 2002, the Inspector General for Interior investigated alleged improprieties relating to tribal recognition and Indian gaming. As a result, the recognition of several tribes granted in the last days of the Clinton presidency was reversed by the Bush Administration. See: http://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-01-i-00329/pdf/GPO-DOI-IGREPORTS-01-i-00329.pdf

The Department has also recognized tribes outside of its own regulatory process. Dozens of Rancherias in California have been recognized as tribes by Interior through stipulated settlements in federal court. Rancherias were originally federal land assignments for displaced Indians found homeless and itinerant in a number of California communities in the early 1900's. In the 1958 California Rancheria Act, Congress established a process for terminating federal supervision of the Rancherias and conveying title of these properties to their occupants. In several lawsuits beginning with the 1979 *Tillie Hardwick* class action, attorneys for the terminated Rancherias challenged Congress's authority to terminate federal supervision over them. Rather than utilize available legal defenses to dismiss these lawsuits or go to trial, Interior entered into stipulated settlements to recognize the Rancherias as sovereign Indian tribes.

The Department has also "reaffirmed" the recognition of at least three groups it claims to have overlooked or accidentally left off its list of recognized tribes. These are the Lower Lake Koi, Ione Band of Miwoks, and Tejon Tribe, all of California. There is, however, no known regulation, guideline, statute, or court-ordered procedure for recognition through "reaffirmation."

A comprehensive set of documents relating to the Department's recognition of tribes may be found here: http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm

These documents include the number of petitioners seeking recognition, where they are located, and the status of all recognition cases.

The most recent group obtaining a proposed positive finding that it is a tribe under Part 83 is the Pamunkey Tribe of Virginia. The group's recognition is not yet final, possibly because new information was recently submitted to the Department alleging that a substantial number of members of the group are not American Indians.[6]

**Analysis and Concerns with Proposed Part 83 Revisions**

The proposed rule to revise Part 83 dramatically relaxes the high standards of evidence that a group is an Indian tribe within the meaning of federal law. There are a large number of proposed changes to the criteria and to OFA's procedures for reviewing evidence. Details on the proposed rule are here: http://www.bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm

[6] Letter to Assistant Secretary of Interior from Cheryl Schmitt, Director, Stand Up for California! March 25, 2015.

Several major changes to Part 83 are summarized as follows:

***Current Criterion:*** Petitioner must document identification by others that it is an Indian entity since 1900 and that its community existed since 1789.

> ***Proposed Revision:*** No external identification required. *A tribe may submit a "brief narrative that petitioner existed at some point in time during the historical period.*" [that is, a tribe may write its own history]. 1934 will be the starting point for its "historical period," not 1789.

***Current Criterion:*** Members must descend from a tribe in existence as of 1789.

> ***Proposed Revision:*** Only 80% of members must descend from a tribe in existence as of 1900. This may imply that up to 20% of a petitioner's members may be non-Indians.

***Current Criterion:*** A "predominant portion" of the petitioner's membership must comprise a community.

> ***Proposed Revision:*** Only 30% of the petitioner's membership must comprise a community.

***Current Criterion:*** A petitioner must document an uninterrupted history of being a tribe from 1900 (in other words, there cannot be large gaps in the historical record of the tribe's existence).

> ***Proposed Revision:*** Gaps of time in the historical record do not necessarily disqualify a tribe from being recognized.

In addition to these changes, under the proposed rule a group previously declined may have an opportunity to petition for recognition under the new, lower standards.

Determining how many petitioners could obtain recognition is speculative at this point. Nonetheless, a consultant experienced in the field of historical research and analysis pertaining to tribal recognition authored a study regarding California groups seeking recognition in which he argues that, "The Proposed Rule would give all California petitioners a much easier path to Federal Acknowledgment …"[7]

The study also concludes:

> The net effect of the proposed changes would significantly relax the standards for Federal Acknowledgment and vest considerable discretion in the decision-maker, the Assistant Secretary. The proposed revisions would undoubtedly have the desired effect of allowing many more Indian groups to qualify for Federal Acknowledgment, dramatically altering the pattern of acknowledgment of the last 36 years and significantly increasing the number of recognized tribes across the country.[8]

A number of tribes recognized under Treaty or statute oppose the proposed rule. Several of these tribes will be testifying in the hearing, as will an attorney who is an expert on Indian and Alaska Native legal history.

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[7] Lawson, Michael, PhD, California Indian Petitioners and the Proposed Revisions of the Federal Acknowledgment Regulations, July 7, 2014 at 2.

[8] *Ibid* at 34.