Stand Up For California!
"Citizens making a difference"

www.standupca.org

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September 30, 2014

Sally Jewell
Secretary of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Comments on Proposed Regulations on Federal Acknowledgment of American Indian Tribes (RIN 1076-AF18), and Hearing and Re-Petition Authorization Processes Concerning Acknowledgment of American Indian Tribes (RIN 1094-AA54)

Dear Secretary Jewell:

Stand Up for California! respectfully submits these comments regarding the proposed revisions to the regulations governing the acknowledgment of Indian tribes. *See* 79 Fed. Reg. 30766 (May 29, 2014) and 79 Fed. Reg. 35129 (June 19, 2014). The acknowledgment of Indian tribes is an extraordinarily important federal decision. Tribal governments enjoy sovereignty, are exempt from state and local taxes, have jurisdiction to varying degrees over non-Indians, and have access to myriad federal programs. Nor can the financial appeal of tribal gaming be ignored in the acknowledgment context. The desire to be acknowledged is clearly informed by the opportunities acknowledgment presents, and the Department must be diligent in protecting the legal processes and its employees from influences that may corrupt the process and the decision-makers.

The current process clearly requires improvement. But the dedication of additional resources to ensure timely final determinations is key to that improvement, not wholesale change. The Department has instead proposed revisions that will erode the process, unreasonably reduce the legal standards that apply to such critical decisions, reduce transparency and the ability of the public to participate in the decision-making and result in lower quality, less accurate decisions.

Acknowledgment cannot be erroneously bestowed on groups that do not meet the definition of an Indian tribe under federal law. These decisions raise difficult constitutional questions and have dramatic on-the-ground impacts on the communities where acknowledged tribal petitioners obtain land. The Department's efforts to re-write the very definition of a tribe and the process

for reaching such decisions will undermine the fairness, transparency, and integrity of the acknowledgment process.

Stand Up!

Stand Up for California! ("Stand Up!") is a non-profit organization that focuses on gambling issues affecting California, including tribal gaming. Stand Up! has been involved in the ongoing debate of issues raised by gaming and its impacts for over a decade. Since 1996, Stand Up! has assisted individuals, community groups, elected officials, members of law enforcement, local public entities and the State of California with respect to gaming. Additionally, Stand Up! acts as a resource of information to local, state and federal policy makers.
Stand Up regularly hears from the members of the communities where tribes are located. Many communities have strong relationships with their neighbor tribes, but for many others, the relationships are difficult and often contentious. Access to property, conflicting development, disputes over water resources, noise, traffic, pollution, property disputes--these are only a few of the issues the tribes and the communities must face. In addition, there can be no denying that gaming has substantially affected interest in tribal acknowledgment. Moreover, acknowledgment of a tribe will impact the gaming environment in which existing tribes operate and possibly undermine the investments that they have been made.

These are not reasons to deny a group entitled to acknowledgment their recognition. But these are problems that underscore some of the potential consequences of acknowledgment and why it must be carefully and transparently considered.

Although the Department has claimed that the proposed changes only streamline the process and add clarity and consistency with past practice. Even a cursory reading of the regulations belies those claims. The lower evidentiary standards are likely to result in a dramatic increase in the number of recognized Indian governments in California. Other states could see dramatic changes as a result of the proposed regulations, including potentially Massachusetts, Connecticut, Michigan, Ohio, Virginia and others. The net effect of the proposed rules would be to replace longstanding, clearly defined criteria that have been in effect since 1978 with much more lenient and subjective standards that grant enormous discretion to the Assistant Secretary for Indian Affairs.

Stand Up! established a national project to engage in the acknowledgment process and to address the national implications these proposed regulations will have. The general purposes of the National Project are to: 1) evaluate the legal underpinnings for the acknowledgment process; 2) evaluate how the process has been and is being applied to pending and potential petitioners; 3) educate state and federal policy makers and elected leaders regarding the long-term implications of acknowledgment in their state; and 4) monitor the Department's development and application of federal regulations affecting state and tribal interests. Stand Up! has a legal and factual interest in acknowledgment proceedings and this rulemaking and provides specific comments, as follows.[1]

[1] Stand Up! recently submitted comments on the Proposed Finding for Acknowledgment of the Pamunkey Indian Tribe and incorporates those comments (attached to this letter) by reference.

1. The Ability of Third Parties to Participate Meaningfully in the Process.

Public participation in the acknowledgment process is critically important. Members of the public often have valuable information to contribute to the process, either in support of or opposed to petitioners.

Yet the proposed regulations restrict the ability of interested third parties to participate as full parties at all stages of the administrative proceedings, including before the Interior Board Indian Appeals ("IBIA"). This approach violates the Administrative Procedure Act, 5 U.S.C. § 555(b), as does the proposed regulation which allows for automatic acknowledgment if state and local governments or affected Indian tribes do not file opposition comments.

The full participation of interested parties has in the past been proven to be indispensable to the correction of incorrect acknowledgment determinations. The proposal offers no explanation for why the full participation of third parties should be limited.

2. The Requirement of Continuity Should Be Retained.

The Supreme Court has always required continuity of tribal existence from the time of first sustained contact with non-Indians to qualify as a tribe. Community, political organization, and descent must all be established from first sustained contact. If this requirement is eliminated or watered down, the regulations will violate Supreme Court precedent going back to the Marshall Trilogy.

In particular, the proposed regulation requiring only 30% of the membership be part of the community is inherently arbitrary and capricious. So too is the proposal to allow political leadership to be demonstrated on the basis of "acquiescence" of the group. This approach eliminates the long-standing requirement of a *bilateral* political relationship.

The proposed standards for descent, community, and political organization are contrary to established precedent, including the federal common law definition of tribe, the long-standing acknowledgment regulations, IBIA case law, and federal court decisions regarding the recognition of Indian tribes and should be rejected.

3. The proposed burden of proof is contrary to law and the proposals to amend the evidentiary requirements would render decision-making unsupportable.

Federal civil cases have long required facts to be established by a preponderance of the evidence ("more likely than not"). If anything, the exceptional nature of tribal sovereignty should demand that acknowledgment be established only by exceptionally strong evidence, but at the least, the evidence should at least rise to a "more likely than not" showing. The lowering of the standard to "more than a mere possibility" would confer sovereign status, immunity, entitlement to tax exemptions, jurisdiction over members and non-Indian members to a group that is probably not a tribe. That cannot be accepted as the standard for such critical decisions.

4. The Department Cannot Ignore the Evidentiary Gaps it Proposes to Permit.

The proposed regulations would allow 20-year gaps in evidence and would also allow the Department to rely on a statistical sampling of evidence. Under this approach, a petitioner could satisfy the acknowledgment standards, even when there is no showing of tribal existence for almost a generation. This proposed reduction is arbitrary, unsupported by the record, and likely to lend itself to abuse.

Moreover, the cross-over provisions should be clarified to apply only in the absence of evidence establishing that the required criteria have not been met. Similarly, no irrebuttable presumptions (such as the state reservation/federal trust land proposal) are appropriate. While some categories or types of evidence may tend to establish the existence of a tribe, given that every tribe's history is unique, all evidence must be considered.

5. *Other objections to the proposed changes.*

The proposal to allow previously denied petitioners to re-petition is contrary to the principles of res judicata and the equitable and reliance interests of the interested parties that previously participated. Communities that have invested substantial resources in opposing an acknowledgment and which have prevailed in court should not be subjected to the re-petitioning process. In some cases, those parties were not formally designed a "party" by the Department, but nor were they denied that status. Those parties do not appear to have the right to object under the proposed regulations, but should be able to given their participation in the process. Similarly, in cases where a petitioner was denied acknowledgment, but did not appeal, parties that opposed did not participate in the administrative appeal, nor federal litigation. They should not have denied res judicata, because of the Department's attempt to manipulate the re-petition standard.

Finally, there are some basic concerns regarding the proposed regulations. The enrollment provision at 25 C.F.R. 83.12(b) must be retained to prevent fraud and abuse, and to ensure that tribe continues to be the same group acknowledged. There are cases all over the country where tribes have expanded their roles to take advantage of federal dollars and to justify trust decisions, only to have those tribes later disenroll members to drive up per capita payments

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In California alone, disenrollments have led to massive disruption within tribes; tribes have hired armed guards and swat teams at casino entrances to prevent competing factions' access; there have been casino cyber-attacks from one tribal faction on the other; and there are accusations of theft of tribal property, including jet airplanes, sacks of cash, gold and embezzlement by tribal leadership. Small tribes are losing political control of the tribal government to new members that have little relationship to the historic tribe. Not only are tribal governments being torn apart, the disruption that ensures spills over into the surrounding communities and threatens the safety of the non-tribal public.

The BIA is responsible for a great deal of this disruption by refusing to intervene in disputes and by supporting unification of small restored tribes with petitioning groups, who have only recently requested federal recognition. Further, acknowledging petitioner groups that do not have a strong history of community and government are far more likely to self-destruct, when the vast wealth that gaming dollars can create are involved. By lowering standards and allowing tribes to swell

their membership after acknowledgment, BIA is creating the very circumstances that cause such chaos and undermine tribal stability.

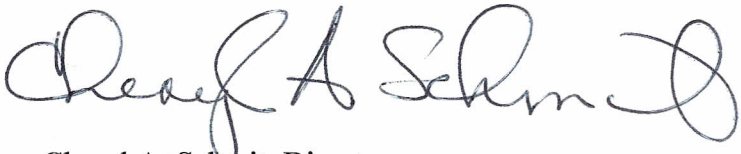
The regulations should make clear that they are the *only* way for an unrecognized group to be administratively acknowledged. California, again, has seen tribes "reaffirmed" and judicially "restored" through friendly suits. These approaches to acknowledgment are without legal basis and must be stopped. Any change to the proposed regulations must make that clear.

Finally, it became apparent to Stand Up! that the Department was not properly evaluating whether a petitioner group was complying with the Indian Civil Rights Act and other applicable federal law before acknowledgment. The proposed Pamunkey acknowledgment was stunning to Stand Up! It is simply appalling that the Department would recommend acknowledgment of a group that flagrantly violates the civil rights of its members. Whatever authority a tribe may have over its membership, it cannot be permitted to violate the rights of women and minorities and our government can no more permit them to do so than they would allow a state or local government to impose racially discriminatory laws or laws that discriminate on the basis of gender.

Conclusion

The proposed revisions would systematically stack the deck in favor of petitioners, and would inevitably result in the acknowledgment of groups that do not qualify as Indian tribes under federal law. The proposed regulations must therefore be rejected.

Sincerely,



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