# United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 14 1994

Honorable George Miller
Chairman, Committee on Natural Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the hearing before the Subcommittee on Native American Affairs on H.R. 734, to amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes," we were asked by Mr. Richardson to provide a list of nonhistoric Indian tribes.

The Bureau of Indian Affairs (BIA) does not maintain a comprehensive list of non-historic tribes per se. The determination is usually made on a case by case basis and arises in the context of our review of proposed constitutions submitted pursuant to the Indian Reorganization Act (IRA) of June 18, 1934, (48 Stat. 984) to the Secretary of the Interior (Secretary) for his legal and technical review and approval of such documents. The 1988 amendments to the IRA require, among other things, the Secretary to advise the tribe in writing 30 days prior to calling the election of any provision which he found contrary to applicable Federal law. Since passage of the IRA the Department of the Interior (Department) has distinguished between the powers possessed by an historic tribe and those possessed by a community of adult Indians residing on a reservation, i.e. a non-historic tribe. The distinction affects the group's authority to define its membership and determines who is allowed to vote. Members of historic tribes are entitled to vote even if they permanently reside off the reservation. Members of adult Indian communities are entitled to vote only if they reside on the reservation or are temporarily absent. Because the distinction between historic and nonhistoric tribes affect the Secretary's view of their powers, it is key to advising the tribe what provisions of their proposed constitution or amendment may be contrary to applicable Federal law as required by the IRA.

Section 16 of the IRA as original enacted provided in part:

> Section 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on

such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

49 Stat. 978, 25 U.S.C. § 476 (1986).

In response to a request for an explanation of what were the powers vested in an Indian tribe by "existing law," the Solicitor issued a lengthy opinion discussing the inherent powers of Indian tribes. Solicitor's Opinion (Oct. 25, 1934), 55 I.D. 14 (1934), 1 Op. Sol. on Indian Affairs 445, 459 (U.S.D.I. 1979). Shortly, thereafter, on December 13, 1934, the Solicitor advised the Secretary that Section 16 contemplated two distinct and alternative types of organization. These were explained and defined by the Solicitor as follows:

> In the first place, it [the IRA] authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for the purposes of this act), under Section 16 to organize without regard to past tribal affiliation.

Solicitor's Opinion, M-27810 (December 13, 1934), 1 Op. Sol. on Indian Affairs 484, 487 (U.S.D.I. 1979).

The Solicitor further explained that when Indians organized under Section 16 as members of a tribe or tribes their constitution and bylaws must be ratified by a majority vote of the adult members, whether residents or nonresidents of the reservation. On the other hand, if the Indians were organized as residents of a single reservation, ratification of their constitution and bylaws could be accomplished only by a majority vote of the adult Indians residing on such reservation.

The Solicitor's views were embodied in Amended Rules and Regulations for the Holding of Elections under the IRA of June 18, 1934, promulgated by the Commissioner of Indian Affairs on October 18, 1935. 55 I.D. 355. The interpretation of Section 16 as providing or two types of tribal organization with different voting rights for nonresidents is retained in the current regulations on Secretarial elections. 25 C.F.R. Part 81.

In addition, the IRA authorized the Secretary to acquire land through purchase for Indians, landless or otherwise, and to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by the IRA. (See Sections 5 and 7 of the IRA, 48 Stat. 984, 25 U.S.C. §§ 465, 467 and the legislative history of the IRA). Section 19 of the IRA defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also "all other persons of one-half or more Indian blood." The practical effect of these provisions was the creation of new "tribes" where none previously existed. Once the land was acquired for these Indians, they then were entitled to organize under the provisions of Section 16 of the IRA and adopt a constitution and bylaws.

The constitutions adopted pursuant to Section 16 of the IRA varied considerably with respect to the form of tribal government. The powers of self-government vested in the tribes organized under the IRA also varied according to the circumstances, experiences and resources of the tribes. See F. Cohen, Handbook of Federal Indian Law, p. 130.

In implementing the reorganization of tribes, the Department made the distinction between groups which were organized as historic tribes and groups which were organized as communities of Indians residing on one reservation. F. Cohen, Handbook of Federal Indian Law 130, n. 67 (1942). The distinction between the powers of the two types of organization was established in a Solicitor's Opinion. Solicitor's Opinion, April 9, 1936, 1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979). The same opinion but with a different heading and bearing a date of April 15, 1938, appears at 1 Op. Sol. on Indian Affairs 813 (U.S.D.I. 1979).

The distinctions were based on the differing requirements of the IRA, i.e., the reorganization of existing tribes and the creation of "new" tribes, and the unique historical circumstances that existed in some parts of the country. For instance, self-governing tribes generally did not exist in California in the same sense as they did elsewhere. See The Legal Status of the California Indian, California Law Review, Vol. XIV, No. 2, January, 1926; See also A. L. Kroeber, Handbook of the Indians of California, and A. L. Kroeber, History of California. Most of the California rancherias have unique historical circumstances and were organized without regard to tribal affiliation or historical tribal status. Generally, these rancherias did not represent tribes but were collections or remnants of Indian groups for whom the United States bought homesites for homeless California Indians under various statutes. They were placed on trust land which was purchased for landless, homeless California Indians without regard to tribal status. Recognizing the unique historical circumstances of the Indians of California, the Congress recently enacted status clarification legislation to address the problems facing California Indians. See the Act of October 14, 1992, Public Law 102-416, 106 Stat. 2131.

In 1936, Congress amended the IRA to permit the reorganization of "tribes" in Alaska without first establishing a reservation as required in the contiguous 48 states. Moreover, the 1936 Alaska amendments permitted "groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district" to reorganize as "tribes." 49 Stat. 1250, 25 U.S.C. § 473a.

The BIA's view is that an historic tribe has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been expressly limited by Congress or is inconsistent with the dependent status of tribes. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In contrast, a community of adult Indians is composed simply of Indian people who reside together on trust land. A community of adult Indians may have only those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated to it by the Secretary. In addition, a community of adult Indians may have a certain status which entitles it to certain privileges and immunities (See United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe. cf. Native Village of Stevens v. Alaska Management & Planning, 757 P. 2d 32 (Alaska 1988), holding that reorganization under the IRA did not establish that the Native Village of Stevens was entitled to assert sovereign immunity.) However, those privileges and immunities are derived as necessary incidents of a comprehensive Federal statutory scheme to benefit Indians, not from some historical inherent sovereignty.

Those powers not within the powers of a community of Indians residing on the same reservation include the powers to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxes upon community members or others, and the regulation of law and order. It is within the community's authority to levy assessments and fees upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. The community may also levy assessments on non-members coming or doing business on community lands. However, such assessments would be levied in its exercise of the community's powers as a land owner, not some historical, inherent power to tax.

As we indicated earlier, while the BIA has not developed a comprehensive list of nonhistoric tribes, we can provide a list of those for whom a determination has been made in the context of reviewing and approving their constitution. That list is as follows:

Mississippi Band of Choctaw Indians of Mississippi[11]
Pascua Yaqui Tribe of Arizona[12]
Port Gamble Indian Community of Washington[13]
Prairie Island Indian Community of Minnesota[14]
Quartz Valley Rancheria of California[15]
Redwood Valley Rancheria of California[16]
Reno-Sparks Indian Colony[17]
Sokaogon Chippewa Community of the Mole Lake Band, Wisconsin[18]
St. Croix Chippewa Indians of Wisconsin[19]
Yavapai Prescott Tribe of the Yavapai Prescott Reservation, Arizona[20]

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[11]See F. Cohen, Handbook of Federal Indian Law 273 (1941); See also Solicitor's Opinion, August 31, 1936, 1 Op. Sol. on Indian Affairs, 668 (U.S.D.I. 1979); and United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian Country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe.

[12]See letter of January 27, 1983, from Deputy Assistant Secretary - Indian Affairs (Operations) to Superintendent, Salt River Agency; letter dated October 15, 1987, from Assistant Secretary - Indian Affairs to Superintendent, Salt River Agency; Letter dated November 3, 1991, from Director, Office of Tribal Services to Chairman, Pascua Yaqui Tribe.

[13]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[14]See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.I. 1979).

[15]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[16]See letters of October 6, 1986, and March 30, 1987, from the Assistant Secretary - Indian Affairs, to Superintendent, Central California Agency; letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Central California Agency.

[17]See United States v. McGowan, 302 U.S. 535, 537 (1938).

[18]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[19]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[20]See letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Truxton Canon Agency; letter of December 8, 1992, from Director, Office of Tribal Services to Chairman, Yavapai Prescott Tribe.

EXAMPLES OF NONHISTORIC INDIAN TRIBES

Burns Paiute Indian Tribe[1]
Blue Lake Rancheria of California[2]
Coast Indian Community of the Resighini Rancheria, California[3]
Cuyapaipe Indian Community of the Cuyapaipe Reservation, California[4]
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada[5]
Elk Valley Rancheria of California[6]
Ely Shoshone Indian Tribe[7]
Jamul Indian Village[8]
Lower Elwha Indian Community of the Lower Elwha Reservation, Washington[9]
Lower Sioux Indian Community of Minnesota[10]

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[1]See letters of March 12, 1987, and November 2, 1987, from the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) to Chairman, Burns Paiute Indian Colony.

[2]See letter of June 6, 1988, from the Deputy Assistant Secretary - Indian Affairs (Tribal Services) to the Superintendent, Northern California Agency.

[3]See Proclamation of Acting Secretary of the Interior dated October 21, 1939; letter of May 19, 1953 to the Commissioner of Indian Affairs from Sacramento Area Director; letter of November 8, 1956, to the Field Representative, Hoopa, from Sacramento Area Director; letter of June 8, 1989, to the President, Coast Indian Community from Deputy Assistant Secretary - Indian Affairs (Tribal Services); letter November 15, 1991 to President, Coast Indian Community from Director, Office of Tribal Services.

[4]See letter of March 17, 1982 to Superintendent, Southern California Agency from Deputy Assistant Secretary - Indian Affairs (Operations).

[5]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, 1947.

[6]See letter of November 8, 1992, to Chairman, Elk Valley, from Director, Office of Tribal Services.

[7]See letter of September 28, 1988 from Deputy Assistant Secretary - Indian Affairs to Superintendent, Eastern Nevada Agency.

[8]See letter of November 16, 1980, from Commissioner of Indian Affairs to Superintendent, Southern California Agency.

[9]Land purchased in 1936 and 1937 under Section 5 of the Indian Reorganization Act.

[10]See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.C. 1979).

Yomba Shoshone Tribe of the Yomba Reservation, Nevada[21]

In addition to the foregoing list of examples of nonhistoric tribes, we believe that most if not all of the original California rancherias listed in the Act of August 18, 1958, (P. L. 85-671, 72 Stat. 619) as amended, and which have not already been so designated, would fall within the nonhistoric tribal designation. Recognizing that the tribal status of California rancherias was uncertain, the United States District Court in Tillie Hardwick v. United States, U.S. District Court, Northern District of California, No. C-79-1710-SW, relieved them of the application of the California Rancheria Act, which terminated them from Federal supervision, and restored these "Indian entities" to "the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act." Similar language is contained in other court decisions restoring individual rancherias to Federal status. Congress recognized the uncertain status of California Indians by the passage of the the Act of October 14, 1992, P.L. 102-416, 106 Stat. 2131) creating the Advisory Council on California Indian Policy (Advisory Council). One of the Advisory Council's principal functions is to conduct a comprehensive study of the social, economic and political status of California Indians and develop recommendations for specific actions that will help ensure that California Indians have life opportunities comparable to other American Indians.

We appreciate the opportunity to respond to your request for information. If we may be of further assistance, please let us know.

Sincerely,

Wyman D. Babby

Acting Assistant Secretary - Indian Affairs

cc: Assistant Solicitor, Tribal Government/Alaska

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[21]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.