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TESTIMONY ON "AUTHORIZATION, STANDARDS, AND PROCEDURES FOR WHETHER, HOW, AND WHEN INDIAN TRIBES SHOULD BE NEWLY RECOGNIZED BY THE FEDERAL GOVERNMENT"

WEDNESDAY, JUNE 27, 2012

Mr. Chairman, and members of the Subcommittee, my name is Diane Dillon. I am one of five elected Supervisors comprising the Board of Supervisors of Napa County, California. The Board of Supervisors is both the legislative and the executive authority in Napa County. In its Executive role, the Board of Supervisors sets priorities for the County. We approve budgets; supervise the official conduct of County officers and employees; control all County property; and appropriate and spend money on public safety, human service, health, and other programs that meet the needs of County residents. In its legislative role, our Board's most important function is to make determinations consistent with our County's comprehensive land use plan. Our Executive function also includes the power to direct and control the conduct of litigation in which the County or any public entity which the Board governs is a party.

On June 15, 2012 I was invited to appear as a witness and present testimony at this Oversight Hearing, and I am grateful for the opportunity to offer the views of both Napa County and its neighbor, Sonoma County, on some of the issues that we believe to be of interest to this Subcommittee.

As set out more fully below, the Counties believe lawsuits by Congressionally-terminated California Indian tribes – in which alleged plaintiff-tribes ask federal district courts to "restore" their government-to-government relationship with the United States and the Department of the Interior acquiesces to those requests – represent a constitutionally impermissible usurpation of Congressional authority. Under the Constitution, Congress alone has the authority to re-establish a government-to-government relationship with tribes following their termination by Congress. Congress specifically exempted this tribal restoration power when it delegated other powers to the Department of the Interior. But despite that clear separation of powers, the Department of the Interior facilitates restoration by inviting terminated tribes to sue the Department, and the Department then stipulates to a settlement restoring the tribe. In this way the Department achieves through orchestrated and unopposed litigation what the Department cannot do administratively. Such coordinated lawsuits usurp Congress's authority and violate the separation of powers required by the Constitution. Counties like ours are concerned with the impropriety of this practice, which lacks notice, transparency, and public participation – but no one should be more concerned than Congress.

We understand some tribal representatives are here to register complaints about how long it takes the Bureau of Indian Affairs Office of Federal Acknowledgment ("OFA") to decide whether or not to grant an applicant's request to be acknowledged or recognized as an Indian

tribe. Those decisions, governed by extensive BIA regulations, rest principally on the ethno-historical materials provided by the tribal applicant. The BIA's analysis may require consideration of evidence scattered over two centuries or more, and evaluating such material requires expertise in Indian history and ethnicity, and often requires a great deal of time as gaps in the historical record must be filled in. The BIA must be satisfied that the historical record supports the applicant's position. While we can understand the frustration of applicants who often wait years for a decision, the official determination that a group should be recognized as a distinct political and cultural body has important consequences not only for the applicant but also for the broader communities in which its members reside. The Counties have a compelling interest in the possible federal recognition of an Indian tribe within its borders because of the inherent and inevitable jurisdictional tensions and other impacts that will occur as a competing government seeks to establish itself within the physical borders of another.

But I am not here to address such orderly, deliberate, and expert assessments of tribal recognition by the Office of Federal Acknowledgment when it considers applications seeking recognition of a new tribe under established standards. Rather, I am here to speak about what happens in litigation, when an entity claiming to be the successor-in-interest to a tribe terminated by Congressional act sues the United States to have its terminated status overturned. In such litigation, the federal district court replaces the Indian-expert Office of Federal Acknowledgment, and the tribal-plaintiff's legal claims substitute for the OFA's established tribal recognition regulations. It should come as no surprise to this Subcommittee that divorcing the decision-making from the OFA's subject matter expertise and established standards renders the judicial route to restoration less informed, reliable, and predictable. But it might come as a surprise that the tribal applicants who sue for restoration of a previously-terminated government-to-within relationship with the United States often find in the federal defendants (the Department of Interior and senior government officials) partners who are prepared to stipulate to restoration without advancing available legal defenses or even fully testing the plaintiff's alleged successor-in-interest relationship to the terminated (historic) tribe.

Remaining passive in the face of such unproven legal claims is not just misguided litigation strategy or bad policy. We believe in *such stipulated settlements the Department of Interior abandons its role as a defendant and acts in concert with plaintiffs to accomplish through litigation what the Department could not accomplish through administrative action.* That is a violation of constitutional dimensions: The collaborative lawsuits circumvent Congress' exclusive and plenary power to restore tribes that have been terminated by congressional act, and thus undermine bedrock constitutional requirements respecting the separation of powers. Moreover, such pre-planned and cooperative litigation fails to rise to the level of a legitimate case or controversy within the meaning of Article III, thereby undermining the federal courts' jurisdiction. In addition, as the issue of tribal recognition is a political question (*Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005)), resort to the courts for either initial or restorative tribal recognition should be prohibited under the political question doctrine. *See Miami Nation of Indians of Ind., Inc. v. United States Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001).

The Counties' views in this regard derive largely, though not exclusively, from our experience in litigation now pending in the United States District Court for the Northern District

of California. The case points up a clear example of the Department of the Interior's assumption of a responsibility that is the exclusive province of Congress, and the details of our experience will demonstrate the need for Congressional action on this issue.

A purported tribal entity calling itself "The Mishewal Wappo Tribe of Alexander Valley" commenced the lawsuit in 2009 alleging that the federal government, nearly half a century ago, unlawfully terminated the "Alexander Valley Rancheria" pursuant to the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 490. As this Subcommittee may be aware, the California Rancheria Act, passed by Congress in 1958, provided for the termination of 41 Rancherias situated in the State of California. The Mishewal Wappo plaintiff named Interior Secretary Ken Salazar and Assistant Secretary Larry Echo Hawk as defendants.

The relief currently sought by the Mishewal Wappo plaintiff includes a direction that the Interior Secretary "restore" Plaintiff, and include it on the list of recognized and acknowledged Indian tribes maintained by the Department of the Interior, pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. Plaintiff's Amended Complaint also asks the court to "[d]irect[] the Secretary . . . to identify and transfer to the Tribe, as trust lands . . . all public lands held by the Department of the Interior which are not currently in use and are available for transfer that are within the Tribe's historically aboriginal land" and further, that "[o]nce the land has been transferred to the Tribe . . . directing the Secretary to immediately take action such that those lands are considered 'Indian Country' as defined in 18 U.S.C. § 1151 and 'restored lands' as defined by 25 U.S.C. § 2719(b)(1)(iii) [the Indian Gaming Regulatory Act]. The lands that Plaintiff seeks to have transferred are not identified in the complaint.

According to Plaintiff, the lawsuit was commenced at the suggestion of the Bureau of Indian Affairs. Attached to the Complaint is a letter dated June 22, 2009 from Assistant Secretary Larry Echo Hawk, advising Scott Gabaldon, a representative of the plaintiff-tribe, that:

> Because the Rancheria Termination Act is still in full force and effect, the Department of the Interior does not have authority to restore your Tribe administratively. The only means by which your Tribe could be restored is through an act [of] Congress or the courts.

In advising the Mishewal Wappo that the Department lacked authority to restore the tribe administratively, the Department correctly stated the law as set forth in 25 C.F.R. Part 83. Those regulations explicitly require that a petitioning group establish that "[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." In other words, tribes seeking restoration after termination by federal legislation such as the California Rancheria Act are foreclosed from pursuing administrative restoration. As a result, the Department directed the Mishewal Wappo to their lawyers and the courthouse.

Although the action was commenced in June of 2009, the Counties were not given any notice by the plaintiff-tribe or the federal government defendants and only learned about the suit fortuitously when an article appeared in a local newspaper in January 2010. The Counties

promptly moved to intervene in the action, citing our significant interests in the matter, and pointing out that the Counties' interests would not be protected by the existing parties to the action. The Counties' request to intervene was granted by the court, and since late May 2010 the Counties have participated in the action as intervenor-defendants. Plaintiff has recently moved to revoke the Counties' intervenor status, seeking to remove them from the case. Although the Counties have vigorously opposed that effort, the federal defendants have remained silent on the issue. The application is currently under consideration by the federal judge.

Thus far, the Counties' intervention in that litigation has stymied what appears to have been a concerted effort by the Mishewal Wappo and the federal defendants to achieve an agreed-upon restoration of the Plaintiff through a settlement that would be endorsed by the court.

What is the evidence of this collaborative effort? Besides appearing to invite the Mishewal Wappo lawsuit the federal defendants have (1) failed to press viable defenses that any legitimate defendant would pursue; (2) continued to treat the Plaintiff as a client to whom fiduciary responsibilities run; and (3) turned a blind eye to documentary records showing that the modern tribal Plaintiff is not related to the historic group of Indians who occasionally resided on the Alexander Valley Rancheria. We address these three concerns in more detail below in the context of the Mishewal Wappo litigation, but note that these concerns are equally applicable to other restoration litigations.

The Department's Failure to Press Valid Defenses. The federal defendants have failed to press what are objectively valid (and we believe) unassailable defenses to Plaintiff's claims. The most startling example of this lies in the fact that while the action was commenced nearly 50 years after termination of the Alexander Valley Rancheria, the federal defendants made no effort to seek dismissal of the action as untimely. Similarly, although Plaintiff contends that it is the successor-in-interest to the individuals who were allegedly harmed by the allegedly wrongful termination of the Alexander Valley Rancheria, the federal defendants have not attempted to put Plaintiff to its proof. Legal standing to sue is a threshold issue in litigation; it is typical for the issue of a plaintiff's standing to be litigated and resolved at the inception of a lawsuit. The federal defendants in the Mishewal Wappo litigation, however, made no effort to have the court rule on Plaintiff's standing to advance the claims it interposed, and proceeded almost immediately to settlement talks – which is where the Counties found the parties when we got wind of the lawsuit many months after it had been commenced, and moved to intervene.

The Department's Close Relationship to Plaintiff. The Bureau of Indian Affairs considers Native Americans to be its "clients," and the Bureau's management structure and operations reflect that institutional bias. The existence of a fiduciary relationship between the federal government and tribal and non-tribal Indians perhaps explains why the Department has not acted like a legitimate defendant when it is sued in tribal restoration litigation, and instead cooperates with the plaintiff-tribes. But such close relationships between the plaintiff-tribes and federal defendants skew the party relationships while undermining the integrity of the litigation. As a result, the Department of the Interior has met numerous times with the Mishewal Wappo

plaintiff, while Interior has refused to meet with the Counties, despite our numerous requests as well as requests by our Congressional representatives.[1]

The Department's Failure to Consider Evidence Undermining Plaintiff's Standing. The federal defendants have turned a blind eye to the growing body of evidence – assembled by the Counties – showing that the Mishewal Wappo plaintiff is not related to the historic group of Indians who occasionally resided on the Alexander Valley Rancheria. The Counties retained a noted ethno-historian, Professor Stephen Dow Beckham, to examine the historical records relating to the establishment, occupancy and termination of the Alexander Valley Rancheria. Prof. Beckham submitted an expert report and two affidavits in opposition to the Mishewal Wappo's restoration lawsuit. Prof. Beckham's report details the use and occupancy of the Alexander Valley Rancheria from its creation in 1909 (it was purchased by the federal government for the benefit of landless Indians of the Russian River and Alexander Valley) to its termination in 1961 pursuant to the California Rancheria Act.

Based on census and other contemporaneous records maintained by the Department of the Interior, Prof. Beckham concluded that the Alexander Valley Rancheria was only occasionally occupied by Indians as they mostly worked as migrant farmers living away from the Rancheria. The Indians abandoned the Rancheria altogether before it was terminated in 1961. Indeed, the federal records document, as of 1951, the presence of only a single family living on the Rancheria, together with an African-American squatter. The family consisted of a half Hawaiian/Indian male (neither Pomo nor Wappo), his non-Indian wife, and their children. This family had lived on the Rancheria for a number of years, constructing a house and otherwise improving the property. The Indians of Alexander Valley, for whose benefit the Rancheria was established, had all moved away. After hearing about the proposed Rancheria termination and distribution of land, one Wappo/Pomo family claimed land in 1959. The final distribution of the Rancherias' assets was made in 1961, with the land being divided between the long-term non-Wappo/Pomo residents and the recently returned Pomo-Wappo family.

Most significantly, Prof. Beckham reports that the BIA records show that throughout the fifty-year existence of the Alexander Valley Rancheria, the Indians of the Alexander Valley never had a tribal organization and never entered into a government-to-government relationship with the federal government.[2]

Prof. Beckham examined whether the modern Mishewal Wappo plaintiff has any genealogical relationship to the historic group of Alexander Valley Indians who once resided on

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[1] The Counties are cognizant of the special trust relationship between Indian tribes and the federal government (*see Cohen's Handbook of Federal Indian Law* (2005 ed.), § 5.04[4][a], at p. 418). But that special relationship should not operate to diminish the intensity with which the government litigates tribal claims. But for the Counties' intervention in the Mishewal Wappo litigation, it is apparent that issues such as plaintiff's standing, the applicability of the statute of limitations, and the question of plaintiff's prejudicial delay in instituting the action (*i.e.*, laches) would not have been presented for determination by the court.

[2] Although records indicate that on June 11, 1935 fourteen unnamed and undocumented adult residents of the Rancheria voted in favor of the Indian Reorganization Act, BIA records are devoid of any evidence of a formal tribal organization at the Rancheria, or any government-to-government relationship between the Rancheria residents and the United States.

the Rancheria. Based on the available records (Plaintiff has repeatedly refused access to the tribe's membership rolls) Prof. Beckham concluded that the Plaintiff does not have a meaningful genealogical connection to the historic group of Indians who once resided on the Rancheria. The federal defendants have remained conspicuously silent on the question of Plaintiff's standing to bring suit despite having access to Plaintiff's tribal rolls. If this were a genuine lawsuit between adversarial parties, the federal defendants certainly would have raised this fundamental threshold issue at the outset of the litigation and before entertaining settlement discussions.

The BIA's recommendation that the Mishewal Wappo plaintiff-tribe commence litigation against the Department of the Interior, and the federal government's obliging "defense" of that litigation, is only the latest in a series of efforts in the State of California to circumvent both the expertise of the Office of Federal Acknowledgment and the authority of Congress when it comes to the restoration of a government-to-government relationship between the United States and an Indian tribe.

The recent experience of our sister County of Sacramento and the City of Elk Grove is particularly distressing, and mirrors Interior's practice of planned acquiescence seen in the Mishewal Wappo litigation. Several years ago the Wilton Miwok Rancheria sued the Department of the Interior to overturn the 1964 termination of the Rancheria, pursuant to the California Rancheria Act, and to have lands situated in the County of Sacramento and adjacent to the city of Elk Grove, taken into trust on its behalf.

Neither Sacramento County nor the City of Elk Grove were made aware of the suit until after the parties had entered into a settlement restoring the tribe and agreeing to take lands into trust for the tribe. The Wilton Miwok and the federal defendants were unquestionably aware of the significant interests of the local County and City governments. In fact the venue of the suit was transferred from the District of Columbia to California, in recognition of those interests, but no effort was made to inform the County or City of the pendency of the action. The County and City had to seek intervention after they learned that the stipulated judgment had been entered.

According to the County's and City's motion to vacate the stipulated judgment, "[b]y all appearances, plaintiffs have steered this case so as to avoid opposition to their efforts to remove these parcels from regulatory jurisdiction of the County . . . and to deprive the County and City of the opportunity to protect their significant interests by failing to name them as parties or even telling them about this lawsuit. <u>And the United States has acquiesced</u>."

In the Wilton Miwok litigation the United States permitted judgment to be entered against it despite having asserted several apparently unassailable defenses in its answer to the complaint, such as the untimeliness of plaintiff's action – which had been commenced some 40 years after termination – and the fact that the Supreme Court's holding in *Carcieri* precluded the taking of any lands into trust for the tribal-plaintiff in that case. Making matters worse, the United States opposed the County's and City's motion to vacate the stipulated judgment.

Among the earliest examples of Interior's usurpation of Congressional authority over Indian affairs in the context of restoration of terminated tribes is the *Tillie Hardwick* litigation. In 1979 dozens of California tribes filed a class action suit in the Northern District of California,

challenging their termination under the California Rancheria Act. *Tillie Hardwick v. United States*, Case No. C-79-1710-SW (N.D. Cal.) Pursuant to a settlement reached between plaintiffs and the United States, 17 Rancherias that had been terminated pursuant to the California Rancheria Act were "restored and confirmed," by an Order of the court in December 1983.

There are other examples as well. In *Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977), the Interior Secretary consented to an "agreed statement of facts" which effectively conceded that the termination of the Robinson Rancheria in Lake County, California, was unlawful. In *Smith v. United States*, 515 F.Supp. 56 (N.D. Cal. 1978), the Interior Secretary conceded that termination of the Hopland Rancheria in Mendecino County, California was unlawful. And by a notice published at 57 Fed. Reg. 5214 (Feb. 12, 1992), the federal government announced that it settled litigation reinstating the status and rights of three California Indian Rancherias with which the Federal government had terminated its relationship. Effective September 6, 1991, the Indians of the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of California, were reinstated to the status they had before termination.

In each of these prior restoration lawsuits, as well as in the Mishewal Wappo litigation, the judicial determination of tribal recognition is uncertain, resting on the unique facts as to each of the Congressionally-terminated tribes, and based on evolving legal theories. The form of potential relief limited only by the imagination of plaintiff's counsel. *The order, predictability, and consistency of the administrative processes is lacking in such litigation.*

The uncertainty goes beyond removing the tribal recognition question from the expertise of the Office of Federal Acknowledgment. The Mishewal Wappo plaintiff-tribe seeks through its lawsuit to have a court order the transfer of lands into trust for the tribe – thereby circumventing the regulatory requirements under 25 C.F.R. Part 151 pertaining to the acquisition of land by the United States in trust status for individual Indians and tribes. Those regulations "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory" and require the Department of the Interior to consider, among other things, "jurisdictional problems and potential conflicts of land use which may arise." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-221 (2005).

Similarly, Plaintiff asks the court to compel the Interior Secretary to immediately take action such that those lands are considered "restored lands" under the Indian Gaming Regulatory Act – performing an end run around the National Indian Gaming Commission and its regulatory authority to designate lands as "restored lands" (*see* 25 C.F.R. Part 292; 25 U.S.C. §§ 2704, 2706). In this way, the vagaries of individual lawsuits substitute for the established administrative procedures, policies, and regulations developed for the class of Indian applicants.

The principal lesson to be drawn from these California restoration lawsuits is clearly that the Department of the Interior is utilizing the federal courts to do what it cannot do administratively. While we do not intend to express endorsement of the policies which led to enactment of the California Rancheria Act, Interior's mechanism of achieving restoration through the courts is an affront to the exclusive authority of Congress to manage the restoration of government-to-government relationships it has terminated. The mechanism also appears to be

carried out in a manner calculated to push these restorations through with a minimum of opposition, to the detriment of local governments possessing significant interests in the issue. While tribal advocates may argue that the Counties' interest will not arise unless and until a restored tribe seeks to have lands taken into trust for its benefit, that position ignores the reality that every applicant seeking tribal recognition seeks to exercise its tribal authority over lands which it considers its tribal territory.

As set forth in *Cohen's Handbook of Federal Indian Law* (2005 ed.), "[l]and forms the basis for social, cultural, religious, political, and economic life for American Indian nations. . . ." § 15.01 at p. 965.[3] In other words, every tribe aspires to have its own territory, which means that every request for tribal recognition (or restoration) carries with it the tribe's defining need for that land base and the prospect of jurisdictional conflict. *See id*. ("Land ownership can also be a critical factor in determining the relative bounds of tribal, federal, and state jurisdiction.") Accordingly, the Counties have a compelling interest in federal recognition of an Indian tribe within the Counties' borders because of the inherent, inevitable jurisdictional tensions and other impacts that will occur as a competing government seeks to establish itself within the physical borders of another. These tensions are inevitable even if the tribe does not seek a large land base or seek to establish large scale gaming or pursue other highly disruptive land uses. Of course, because federal recognition is necessary both for taking land into trust for a tribe's benefit (see 25 U.S.C. § 479), and for gaming under the Indian Gaming Regulatory Act (see 25 U.S.C. § 2703), the pursuit of tribal recognition either through the OFA (for initial acknowledgment) or a lawsuit seeking restoration of terminated status is of paramount interest to the locality in which the tribe's land base is, or will be, located.

In the last decade, the Supreme Court has reminded us that Congress has "plenary and exclusive" authority over Indian affairs, pursuant to the Indian Commerce Clause of the United States Constitution. *United States v. Lara*, 541 U.S. 193, 200 (U.S. 2004). Although Congress may have delegated a measure of authority to the Department of the Interior (*see e.g.*, 25 U.S.C. §§ 2, 9.), Congress did not delegate the right to restore a government-to-government relationship that it previously terminated. This is evidenced by 25 C.F.R. 83.7(g), which precludes administrative recognition or acknowledgment where congressional legislation has expressly terminated a prior Federal relationship with an Indian tribe. Yet Interior is effectively orchestrating end-runs around its lack of authority, by referring restoration applicants to the courts, where Interior can facilitate restoration by entering into settlements, without notice to Congress, or state and local governments, and despite the existence of viable defenses.

The historical California experience with restoration litigation, and our current experience with the Mishewal Wappo litigation, underscore the need for Congress to reclaim its authority in regard to the restoration of Indian tribes which Congress itself had terminated. We respectfully urge the Subcommittee to take the appropriate steps to ensure that the Department of the Interior respects the separation of powers principle and adheres to the Constitutional requirement that a tribe terminated by Congressional act may be restored only by an equivalent act of Congress.

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[3] Just last week the Supreme Court invoked these comments in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __ (Dec. June 18, 2012).

Thank you for the opportunity to address you today.