

**CALIFORNIA INDIAN PETITIONERS
AND THE PROPOSED REVISIONS OF THE
FEDERAL ACKNOWLEDGMENT
REGULATIONS**

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Introduction

This report analyzes how Indian groups in California that have petitioned for Federal Acknowledgment in accordance with Part 83 of Title 25 of the *Code of Federal Regulations* (25 C.F.R. Part 83) would be affected by the revisions of the regulations contained in the Proposed Rule issued by Kevin Washburn, the Assistant Secretary of the Interior for Indian Affairs (Assistant Secretary), on May 22, 2014. It concludes that the weakening of the existing criteria and lowering of standards would result in a significant increase in the number of recognized tribes in California.

Federal Acknowledgment of a tribal entity means that the United States has acknowledged that it has a government-to-government relationship with that tribal entity. A federally acknowledged tribe is entitled to all of the privileges and immunities that are available to sovereign tribes, including the right to Federal services that have been specifically established for Indian tribal entities and their members, sovereign immunity, trust land that is exempt from state and local taxation and regulation, and the ability to open casinos.

The Department of the Interior (DOI)¹ first established the Federal Acknowledgment regulations in 1978. These regulations were based on precedents of law and administrative decisions regarding the fundamental

¹ This report refers to the Department of the Interior as the administrator of the Federal Acknowledgment process because since July 27, 2003, the Office of Federal Acknowledgment (OFA), which has the responsibility for evaluating petitioners' evidence, has been administratively located within the Office of the Assistant Secretary-Indian Affairs, which is under the Office of the Secretary of the Interior and outside of the Bureau of Indian Affairs (BIA). Prior to this date, the Branch of Acknowledgment and Research (BAR) carried out the functions of the present OFA and was administratively located within the BIA. The Acknowledgment regulations are published along with other regulations pertaining to the BIA, but they articulate "the duties of the Department" and establish the Assistant Secretary as the decision maker.

characteristics of a tribal entity. These were determined to be the maintenance of a distinct interactive community over a significant historical continuum (originally since first sustained contact with Euro-Americans) that consisted of descendants of an historical tribe and in which informal or formal political influence or authority was exercised. In essence, it would be impossible to acknowledge a government-to-government relationship with a tribal group that was not a political entity in some form.

The DOI revised the Federal Acknowledgment regulations in 1994 for the purpose of refining the process and better defining the standards. These revisions did not alter the fundamental and mandatory criteria for acknowledgment established in 1978. The Proposed Rule represents the DOI's first effort to alter the mandatory criteria, reduce the periods of evaluation, and generally lessen the standards for Federal Acknowledgment that have been in place for 36 years.

The Proposed Rule would give all California petitioners a much easier path to Federal Acknowledgment under the revisions proposed for four of the existing seven mandatory criteria, namely (a) external identification as a tribe since 1900, (b) social cohesion in a community, (c) tribal political influence and authority, and (e) descent from an historical tribe. The Proposed Rule would substantially change the existing criterion (a) and would greatly truncate the period of evaluation for criteria (b) and (c), moving the starting date forward 145 years from 1789, the creation date of our National government, to 1934, the year in which the Indian Reorganization Act (IRA) became law. It would also

significantly shorten the period of evaluation of criterion (e) by redefining “historical” as 1900 or earlier rather than dating back to 1789 or the period of earliest sustained non-Indian settlement and/or governmental presence in the petitioner’s local area. This redefinition reduces the burden of genealogical evidence for most petitioners by more than a century.

In addition, the Proposed Rule would allow greater time gaps in evidence for criteria (b) and (c), reduce the percentage of a petitioner’s members that have to demonstrate social interaction with a tribal community in order to meet criterion (b) from what has in many cases been a vast majority to just 30 percent, and eliminate the standard of having to show evidence of a bilateral political relationship between leaders and followers in order to meet criterion (c). The proposed revisions also add a new category of evidence for meeting criterion (b), which provides that the placement of petitioner’s children in an Indian boarding school or other Indian educational institution would demonstrate in part the existence of a tribal community.

This report concludes further that California petitioners would also benefit by a proposed revision that would, for the first time in the period that the Federal Acknowledgment regulations have been in place, allow previously denied petitioners an opportunity to re-petition under certain conditions. This change would mean that in addition to the 68 California groups whose petitions are still pending before the DOI, the six petitioners from the State that have already been denied Acknowledgment might have an opportunity to go through the process again under much less stringent standards.

During the first 15 years in which the Federal Acknowledgment regulations were in place (1978-1993), the DOI staff evaluating petitions often estimated that only one-third of the petitioners were appropriate entities to be conferred with sovereign tribal status through the acknowledgment process. The history of the application of the Federal Acknowledgment regulations has proven this estimate to be accurate. Since the regulations were first established in 1978, the DOI has acknowledged 17 of the 51 petitioners that have gone through its administrative process (exactly one out of every three). If this number also proved true for California petitioners, under the existing regulations approximately 23 of the 68 groups whose petitions are still pending before the DOI would be acknowledged.

Although the present success rate for California petitioners is about 14 percent (one in seven), less than 10 percent of the groups from that State that could potentially go through the process have been fully evaluated. As is explained in more detail below, the six denied petitioners are also not a good sample because four were fatally flawed from the beginning (two because they were not indigenous and two because they were splinter groups). Many California petitioners with better chances, even under the current Part 83 standards, remain to be evaluated.

It seems reasonable to conclude that if the mandatory criteria are reduced and the evaluation standards are significantly lowered, as is recommended in the Proposed Rule, then the success rate of California petitioners should also increase. The net effect of the Proposed Rule would be to replace longstanding, clearly defined criteria that have been uniformly applied since 1978 with more

lenient and subjective standards that leave considerable discretion with the decision-maker, the Assistant Secretary. This greatly increases the likelihood of creating a result-driven process that could ultimately undermine the significance of tribal sovereignty. Broad executive discretion reduces the objectivity of the acknowledgment process and places it at risk of being politicized and subjective.

The significance of such a regulatory change is most striking in California, which currently has 109 recognized tribes (operating 71 gaming facilities) and 68 pending acknowledgement applications. If only one-half of these petitioners are acknowledged under the relaxed regulations, this would lead to the rapid potential acknowledgment of 34 new Indian tribes in California, an increase of approximately 31 percent in the number of recognized tribal entities. If these newly acknowledged tribes have the same success rate in establishing gaming facilities on Federal trust lands as have the currently recognized California tribes, this could lead to the development of 22 new Indian gaming facilities in the State, an increase of about 31 percent above the present number of such operations.

This report provides an overview of the California petitioners, including those that have been federally acknowledged through the DOI process or by other means, those that have been denied acknowledgment by the DOI, those that have withdrawn from the process, and those whose cases are still pending. It provides a description of the California map developed for this project that indicates the location of petitioners, federally recognized tribal entities, and Indian gaming facilities in the state. This map makes it easier to see the proximity of petitioners to recognized tribes and existing Indian gaming operations and to

better understand the locations where there is the potential development of additional Indian gaming facilities.

In its concluding sections, this report focuses on the potential impact that Federal Acknowledgment petitioners could have on future gaming in California, including new competition with existing casinos and potential casino development in areas that have been free from gaming growth. For example, San Diego and Riverside Counties currently have numerous casinos on Indian lands for recognized tribes. Petitioner groups in the nine Bay Area counties, the four coastal and inland counties south of the Bay Area counties, the coastal counties north and south of Los Angeles, and inland Kern County would have little or no competition for developing casino gaming facilities, if they succeeded in gaining Federal Acknowledgment and taking land into Federal trust. An expansion of new tribes is likely to produce a comparable increase in new gaming facilities as well.

A Profile of California Petitioners

There have been 81 Acknowledgment petitioners in California, which is nearly four times as many as the two states tied for the second largest number of petitioners (Michigan and North Carolina with 21 each). Of this number, one California tribe has been acknowledged through the DOI's process, and six groups from the State have been denied Acknowledgment. Three groups have been acknowledged or restored by other means, and three have withdrawn from the DOI's process.

Of the 68 petitioners still pending, three have documented petitions that are either being actively evaluated by the DOI at present or are close to being put under active consideration. These are the Southern Sierra Miwok Nation (Mariposa County) and the Amah Mutsun Band of Ohlone/Coastanoan Indians (San Mateo), that were placed on active status in August and November 2013 respectively, and the Fernandeño Tatavium Band of Mission Indians (Los Angeles County), which is currently on DOI's ready list of petitioners awaiting active consideration. All of these three petitioners were given the option of proceeding under the current regulations or waiting to proceed until revised regulations are implemented. The Southern Sierra Miwok and the Amah Mutsun Band chose to proceed under the present regulations and the Fernandeño Tatavium Band requested to wait until a later date to make a decision. The majority of the other 65 California groups have submitted letters of intent to petition to the DOI and have yet to provide evidence to demonstrate that they meet the seven mandatory criteria.

The California Map

The map developed for this project shows the location of all of the California petitioners for Federal Acknowledgement based on their address of record. Numbered green dots are used to show these locations within the various counties in California. The address of record does not always correspond with the group's historical area of residence or its aboriginal area of use and occupation. An index is provided to cross-reference the numbers on the green dots with the names of the petitioners. The petitioner index also identifies

the county and U.S. Congressional district in which each petitioning Indian group is located. The map likewise shows the location of the 109 federally recognized tribal entities in California (numbered red dots), as well as the 71 Indian gaming facilities (numbered blue dots) within the state. Separate indices are also provided to cross-reference the numbers on the dots with the names of the federally recognized tribal entities and the names of their gaming operations. The indices also identify the county and U.S. Congressional district in which each recognized tribal entity and gaming facility is located.

The California map also shows the proximity of Federal Acknowledgment petitioners to already federally recognized tribal entities and the casinos and other gaming facilities they operate. The experience in California has shown that most tribes with geographically favorable territory pursue gaming as a form of economic development. The location of the petitioning tribes provides an indication of where trust land may be sought and potential gaming operations developed.²

The Impact of Eliminating the Existing Criterion (a)

The Assistant Secretary's Proposed Rule would eliminate the existing criterion 83.7(a), requiring identification by external sources since 1900, and replace it with a lesser requirement that a petitioner provide a brief narrative with supporting documentation evincing that it existed as a tribal entity at some point in time prior to and including 1900. The standard of evidence for meeting the

² The map does not account for the possibility that the petitioners could seek land in other areas or engage in "casino shopping" to find more favorable locations for gaming facility development.

existing criterion 83.7(a) is having at least one external identification of a tribal entity for each decade since 1900. Doing away with the existing criterion 83.7(a) will make it significantly easier for California petitioners to be acknowledged as “external identification” by outside sources such as media, scholarly researchers, and even local governments has been a significant past barrier to acknowledgement for California tribal groups. Six of the seven petitioners from the state that have gone through the acknowledgment process have failed to meet this criterion. On the other hand, most California petitioners should be able to readily meet the proposed new criterion 83.7(a) by merely describing the historical tribe from which they claim descent as it existed at any time prior to and including 1900.

The reasons for the difficulty in meeting the “external identification” criteria are based on the California tribes’ unique history. The period of the 1960s and 1970s witnessed a renaissance of Native American identity, awareness, pride, and activism, which was greatly influenced by the African-American Civil Rights movement. California became an epicenter of this ethnic cultural and political resurgence, as witnessed, for example, by the 19-month occupation of Alcatraz Island led by the group Indians of All Tribes (IAT) between November 1969 and June 1971. Many small groups of related individuals that had long been dormant as tribal entities began to reorganize political structures. This is a phenomenon that is also relevant to many Acknowledgment petitioners across the nation, but the six previously denied petitioners in California vividly illustrate it here. The denied petitioners, described in more detail below, are (1) the Kaweah Indian

Nation, Inc., (2) the United Lumbee Nation of North Carolina and America, (3) the Muwekma Ohlone Tribe of San Francisco Bay, (4) the Juaneno Band of Mission Indians, (5) the Juaneno Band of Mission Indians, Acjachemen Nation, and (6) the Tolowa Nation. The Kaweah Nation and the United Lumbee groups were formed in the 1980s. The Muwekma Ohlone were found to not have leadership that had a bilateral political relation with its members until the 1990s, and the two Juaneno groups did not have a political structure prior to 1975. Apparently, the Tolowa Nation had leadership capable of submitting a letter of intent to petition in 1983, but the DOI found that its leaders really had no viable community to lead.

The DOI's standard for evidence that meets the existing criterion 83.7(a) includes at least one valid "external" identification by outside observers for every decade since 1900. Because of the inconsistent history, even the total lack of any history for this period, for many California Indian groups, documenting the continuity of this external identification is a considerable challenge, as illustrated by the six denied petitioners. In short, this is a criterion that, in and of itself, goes to the crux of whether a tribe has existed continually over a relevant historical period or, as is the case with some current California groups, whether they do not appear to have maintained any existence. The elimination of this standard is further compounded by the weakening of criteria 83.7(b) which proposes allowing acceptable gaps in evidence for demonstration of community, and (c), political influence or authority, for 20 years or more in some cases.

External identification of tribal entities by outside observers such as scholars, media, and State and local governments should remain an essential

requirement for Federal Acknowledgment. This is because petitioners can always produce some evidence of their internal social and political activities, and of gatherings and meetings that are not known to the public. But if they have continuity as distinct tribal communities over which they have exercised political influence and authority, tribes should be known and identified by their non-Indian neighbors and other external observers. Many Native Californians came together and reorganized tribal political structures and formed other organizations in the 1920s to pursue claims against the United States. However, after these claims were settled, several of these groups failed to sustain themselves as tribal entities, some until there was a resurgence of tribal cultural and political activities inspired by the activism of the 1960s and others until outside influences interested them in the potential of gaming. Eliminating this criterion calls into question the underlying rationale for acknowledgment that it demonstrates being a historical tribe rather than just an ethnic or otherwise linked group or a mere descendant membership organization.

The Impact of Moving the Starting Date for the Evaluation of Criteria (b) and (c) from 1789 up to 1934 and Lowering the Evaluation Standards for these Criteria

Criterion 83.7(b) requires evidence that a petitioner has continuously maintained a community in which there has been significant social, cultural, religious, or economic interaction. Criterion 83.7(c) requires evidence that a petitioner has maintained formal or informal political influence or authority within its community. The proposed revisions for the Acknowledgment regulations would move the starting date for the evaluation of criteria (b) and (c) from the

present date of 1789 up to 1934. The DOI's stated rationale for choosing 1934 is that this was the year in which the Indian Reorganization Act (IRA), also known as Wheeler-Howard Act, was passed into law and that, prior to the IRA's enactment, Federal Government policies were aimed at dissolving tribes.

The IRA was one of the most important pieces of legislation ever enacted for Native Americans. It permitted tribes to organize under constitutional governments and to obtain charters and grants for economic development. It ended the process of allotting Indian lands in severalty at the same time that it authorized the Secretary of the Interior to bring new lands under Federal trust for the benefit of tribes. However, there are no real logical considerations that connect the IRA to the Federal Acknowledgment regulations. The IRA only applied to tribes that were already under Federal jurisdiction, and it was not intended to newly acknowledge Indian groups that did not have some kind of existing or previous Federal recognition. Prior to enactment of the IRA, the Government still recognized and provided benefits to hundreds of tribes and many of its policies, such as establishing Indian Rancherias in California, were aimed at preserving tribal communities. Even after its enactment, the IRA was irrelevant to Congress in the 1950s when it began implementing the so-called "termination policy" to dissolve the Federal relationship with all tribes. Therefore, the significance of 1934 is only that it was a year in which a new era of Indian policy began. It was not a significant year in relation to the history of either unrecognized Indian groups or the Federal Government's interaction with such groups. In that regard, 1934 is far less significant than the present starting date

of 1789, the year in which a Federal Government was established that could recognize Indian tribal entities and undertake the government-to-government relationship that is the core principle of Federal Acknowledgment.

The Proposed Rule's other rationalization for establishing 1934 as a starting date for criteria (b) and (c) is that all previously denied petitioners that failed to meet these criteria from 1934 to the present also failed to meet them prior to 1934. As is amply demonstrated by the six previously denied petitioners in California (see below), the DOI's asserted fact only demonstrates that the petitioners it references failed to establish continuity with an historical tribe during any period of time. Many of these petitioners had little or no Indian ancestry. It does not make sense to allow the failure of these petitioners to meet the criteria before and after 1934 to be used as a justification for lowering the evaluation period for all petitioners. Some of the denied petitioners did meet the criteria during certain periods both before and after 1934, but did not meet them for every period since 1789 or first sustained contact.

When the DOI last revised the Federal Acknowledgment regulations in 1994, it received suggestions during the comment period on the proposed revisions that 1934 be established as the starting date of the evaluation period. Here is how the Department articulated its opposition to that date 20 years ago:

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 of an historic tribe requires continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time. Further, the studies of unrecognized groups in the 1930's were often quite limited and inaccurate.

Groups known now to exist as tribes then, were portrayed as not maintaining communities or political leadership, or had their Indian ancestry questioned. Thus, as a practical matter, 1934 would not be a useful starting point.

No reason has now been given to reverse this carefully considered DOI position that decisively rejected using 1934 as the starting date for evaluating petitioners' evidence for criteria (b) and (c). A change in agency direction, apparently attempting to make it easier for groups to qualify as sovereign tribes, is not a sound basis for now establishing 1934 as the starting date for evaluating these criteria.

The revisions proposed for criteria (b) and (c) would also specifically define allowable gaps in evidence for these criteria as "20 years or less," but would allow for gaps of 20 years or longer where it is found to be "reasonable given the history and the petitioner's circumstances." Allowing evidentiary gaps of 20 years or more in an evaluation period that is only 80-plus years permits much larger proportional gaps than does the present evaluation period that begins in 1789. In effect, a liberal interpretation of this revision might allow for lack of evidence of community and/or political influence for the vast majority of the years since 1934 if a petitioner can demonstrate that it meets these criteria at certain intervals that are not more than 20 years apart. For example, a petitioner might be found to meet these criteria for the periods 1934 to 1939, 1959 to 1964, 1986 to 1991, and 2012 to 2014, but not have adequate evidence for the periods 1939 to 1958, 1966 to 1985, and 1992-2011. This would mean that during the 80 years since 1934, the petitioner would only have sufficient evidence for 17 years but might be found to meet these criteria because it had no "substantial

interruption” of evidence that was more than 20 years. By using a liberal application of 20-year gap standard, the Assistant Secretary would have considerable discretion to even further dilute the already scaled-back Proposed Rule.

In addition, the proposed revisions would significantly lower the existing standard for criterion (b) of evincing that a “predominant portion” of a petitioner’s membership is part of a distinct community. The revisions would define a “predominant portion” as being 30 percent of the petitioner’s membership at any given time, whereas the DOI has previously used a majority standard and in most cases a vast majority rather than a simple majority. No tribal group previously has been granted acknowledgment when as many as 70 percent of its members have not demonstrated social interaction with a core community.

The Proposed Rule’s rationalization for redefining “predominant portion” is that the IRA only required a vote of 30 percent of members to approve a governing document. However, the IRA’s voting requirement was neither measuring social interaction nor considering a community as a whole. Section 16 of the IRA required ratification of a tribal governing document by a majority of either the entire adult tribal members or those residing on a reservation. These adult majorities may have been more than 30 percent of the total membership of these tribal entities. As a result, the proposed changes undermine the integrity of the acknowledgment process and diminish the standing of all recognized tribes because the standards for achieving such status have been weakened and made less objective.

The Proposed Rule also adds a new category of evidence for meeting criterion (b) that would further expand eligibility for acknowledgment, particularly for California petitioners. It provides that the placement of petitioner's children in an Indian boarding school or other Indian educational institution can in part evince community, even if the tribal affiliation of the student was not indicated in the school record. The rationale for this new example of evidence is that the Federal Government identified these children as being Indian and placed them in an area school and that is indicative of the existence of an Indian community in that area. This is not an entirely valid assumption because Indian ancestry and/or phenotype (physical features) were also considerations in enrollment and some students came from families that were isolated from any tribal community. However, this provision would be beneficial to many California petitioners because the Government established several Indian boarding and day schools throughout the state, including the large Sherman Indian Boarding School in Riverside, which was built to educate non-reservation students. It has been estimated that as many as one-third of all the Indian students in the state attended Federal Indian schools until 1848. While attendance in such schools was indicative of a Federal belief that the student was Indian, it is not useful evidence in establishing membership in, or the existence of, a tribal organization.

Further, the Proposed Rule would eliminate the "bilateral political relationship" standard for criterion (c). The measurement of the existence of a bilateral political relationship between a petitioner's leaders and its members (in other words that defined leaders have actual followers and that followers

acknowledge the political influence and/or authority of defined leaders) has long been a standard in the DOI's evaluation of evidence for criterion (c). The proposed interpretation of evidence for this criterion will no longer require documentation of a reciprocal political relationship between a petitioner's leaders and its members. The new standard would not require evidence that members actively participated in tribal political processes or mechanisms.

The Proposed Rule's rationalization for eliminating the standard of bilateral political relationship is that various levels of engagement exist between Federal, State and federally recognized tribal governments and their constituent citizens. However, Federal and State governments and federally recognized tribal governments do not need to demonstrate that they have political influence or authority, whereas unrecognized tribal groups, which often have had self-appointed leaders and which also have no regulatory requirement for a governing document, should be required to demonstrate that there is a significant interactive relationship between its leaders and its members.

A change in the starting evaluation date from 1789 or first sustained contact to 1934 for consideration of fulfillment of criteria (b) and (c) would have a particularly significant impact in California because the very existence before the 1920s is highly questionable and unlikely for many, if not most, Native Californian groups. Unlike tribes in other parts of the country, California tribes experienced a number of influencing factors that caused them to become assimilated into local communities or cease functioning as governmental entities and social communities, including the Spanish mission movement and religious conversion

efforts, the land grant practices of the Mexican government, persecution, the Gold Rush era, and the rapid settlement of California by United States' citizens. As a result of these factors, many tribes ceased to exist, with members becoming California citizens and active participants in non-tribal communities. At least 25 tribes experienced a 70 percent or more decline in membership prior to 1900.

Congress provided for some of the landless California Indians in 1906, when it initiated a series of laws that appropriated funds for the establishment of small reserves of land, which became known popularly as *Rancherias* (Spanish for small ranches). By 1930, the Government had established 36 such reserved lands throughout 16 counties in northern California, ranging in size between five and several hundred acres. These home sites and Rancherias were scattered throughout 16 counties in northern California. Although landless Indian families from a variety of tribal groups were often settled on the Rancherias, their residents eventually became distinct federally recognized tribal entities.³

These facts about the history of Native Californians help explain why there are so many unrecognized Indian groups in the State that have been unable to meet the historical criteria and why this drastic change in the date from which tribal recognition is evaluated from 1900 to 1934 would significantly expand the number of tribal groups in California that could suddenly achieve acknowledgment. Changing the rules to reduce the evaluation of the evidence that these groups have for criteria 83.7(b) and (c) by several decades, as the

³ In 1958, Congress terminated the Federal status of the Indian Rancherias in northern California through its enactment of the California Rancheria Termination Act (72 Stat. 619). In 1964, it amended this statute to extend termination to additional Rancherias (78 Stat. 390). Eventually, beginning in the early 1980s, the Federal trust relationship was gradually restored to most of the terminated tribal entities by Congress or by judicial decrees of Federal courts.

revision of the Acknowledgment regulations propose, would serve to ignore the most significant period of California history as it pertains to Native people, during which many tribal entities experienced dramatic changes that had a direct effect on the nature of their internal community, political organization, and relationship with the United States government.

As is addressed in further detail below, it is indicative of the California Indian experience that none of the six petitioners that have been denied Acknowledgment were found to meet criteria 83.7(b) and (c). The one California petitioner that has been successful in meeting the seven mandatory criteria for Acknowledgment, the Death Valley Timbi Sha Shoshone Band, had the advantage of being federally recognized as late as 1956.

It is significant that California has had 81 Acknowledgment petitioners, nearly four times as many as the states with the second most number of petitioners (Michigan and North Carolina with 21), yet no California petitioner has been acknowledged through the DOI's administrative process in more than 30 years. This situation reflects an important factor about California petitioners, which generally are small modern groups that are trying to demonstrate their connection to small historical tribes, which lack evidence of tribal continuity.

An additional consideration is that changing the date to 1934 is an affront to California's historic tribes and the very nature of tribal sovereignty. Sovereignty must be based on the existence of a continuous and functioning tribal entity with governmental functions. It cannot be based simply on racial heritage. Governance over membership and land and the existence of a true

bilateral government function is the hallmark of current California tribes and those petitioners qualified for Federal Acknowledgment under the existing Part 83 regulations. Reducing the standards for acknowledgment for potentially dozens of petitioner groups undermines the nature of Federal tribal status for existing tribes and will predictably precipitate greatly increased competition, if not conflict, for lands and gaming facility development rights in California.

The Impact of Redefining “Historical” for Evidence that Meets Criterion (e)

The revisions recommended in the Proposed Rule would significantly shorten the period of evaluation of criterion (e), descent from an historical tribe, by redefining the meaning of “historical.” The present regulations, as interpreted by guidelines issued by the Assistant Secretary and published in the *Federal Register* in 2008, define “historical” as dating from 1789 or the period of earliest sustained non-Indian settlement and/or governmental presence in the petitioner’s local area. For some California Indian groups, this starting date might be in the late 1840s. The proposed revision of criterion (e) defines “historical” as dating from 1900 or earlier. This redefinition reduces the burden of genealogical evidence for some petitioners by more than a century. Instead of having to demonstrate ancestral linkage to a tribe that existed in 1789 or when non-Indians first established sustained contact with that tribe at a later date, petitioners would only have to evince their genealogical connection to a tribe as it was enumerated in 1900 or to the most recent enumeration prior to 1900. While it may be worth considering additional evidence that can be brought to bear to support the petitions of California Indian groups seeking acknowledgment, given the State’s

unique history, such a fundamental change in the definition of “historical” undermines the intent of the process to recognize with tribal sovereignty and intergovernmental status those traditional tribal organizations that existed at the time of contact with non-Indians.

Allowing Previously Denied Petitioners to Re-Petition Further Undermines the Regulatory Scheme and Prior Adjudications

The Proposed Rule would allow previously denied petitioners to re-petition the DOI under certain conditions, without having to submit new evidence. One of the conditions of reconsideration is that if a third party participated in an Interior Board of Indian Appeals (IBIA) or Federal court appeal in opposition to a petitioner’s Final Determination, the petitioner must obtain consent from that party in order to re-petition. If there was no such party, or if the third party consents, the petitioner must demonstrate to a judge in the DOI’s Office of Hearings and Appeals (OHA) that either the change in the Federal Acknowledgment regulations warrants reconsideration of its Final Determination or that the reasonable likelihood standard was misapplied in the Final Determination. If the OHA judge determines that these conditions have been met, the DOI is thereby obligated to reconsider the previous negative Final Determination.

The Acknowledgment regulations have never allowed denied petitioners to re-petition. Opening this window invites all of the 34 previously denied petitioners across the nation to try to re-petition. All will be encouraged to do so if the revisions are implemented as proposed by the facts that one of the

previously mandatory requirements, criterion (a), will have been eliminated, the evaluation period for criteria (b), (c) and (e) will have been truncated, and the standards for evidence will have been lowered to the advantage of all petitioners.

The denied California petitioners include (1) the Kaweah Indian Nation, Inc., based in Porterville, Tulare County (Final Determination 1984), (2) the United Lumbee Nation of North Carolina and America, based in Exeter, Tulare County (Final Determination 1985), (3) the Muwekma Ohlone Tribe of San Francisco Bay, based in San Jose, Santa Clara County (Final Determination 2002), (4) the Juaneno Band of Mission Indians based in San Juan Capistrano, Orange County (Final Determination 2011), (5) the Juaneno Band of Mission Indians, Acjachemen Nation, also based in San Juan Capistrano (Final Determination 2011, referred to the Secretary for reconsideration 2013), and (6) the Tolowa Nation based in Fort Dick, Del Norte County (Final Determination 2014). It can be expected that most, if not all, of these denied petitioners will seek re-consideration under the more lenient standards.

Reduced Role for Interested Parties

The more lenient standards and the considerable discretion conferred upon the Assistant Secretary to disregard significant gaps in evidence are coupled with major changes for the role of local governments and interested parties constraining their ability to participate as interested parties in the review of Acknowledgment petitions. Whereas as local governments and entities with property interests can participate fully in petition review under the current Part 83 procedures, the proposed rules would provide this role only to State

governments. Local governments and the parties would not even be entitled to notice of the filing of petition documents or the right to appeal. In the past, such parties have played a crucial role in submitting evidence and affecting the outcome of Acknowledgment petitions. The Proposed Rule would greatly diminish that role and eliminate many of those procedural rights.

Petitioners Located in Prime Areas for Potential Gaming

Gaining Federal Acknowledgment entitles a tribal group to all of the privileges and immunities that are available to other federally recognized tribes. Among these benefits is the right to request the DOI to bring land under Federal trust status for the benefit of the tribal entity. Federal lands held in trust for Indians are generally exempt from State and local government control, and tribes that have such lands have the ability to establish gaming facilities on those lands under certain conditions. Several California petitioners for Federal Acknowledgment are based in locations that are prime areas for the potential development of Indian gaming. This is particularly true of those unrecognized Indian groups that are located in counties surrounding the greater San Francisco and Los Angeles metropolitan areas. As indicated on the map developed for this project, there is a high concentration of existing Indian gaming in some counties, especially in San Diego and Riverside counties in Southern California. However, the map also shows that there are many counties in which petitioning Indian groups would have little or no competition with federally recognized tribes if they achieved both Federal Acknowledgment and fee-to-trust land transfers and were thus eligible to develop gaming on their newly reserved lands.

The federally recognized tribes in California have only barely managed to tap into the prime markets for gaming represented by the areas in and around San Francisco and Los Angeles. For example, there are only three Indian gaming facilities in the nine counties that border the San Francisco Bay (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma). These are the River Rock Casino operated by the Dry Creek Rancheria of Pomo Indians and the Graton Resort and Casino, recently opened by the Federated Indians of the Graton Rancheria, both in Sonoma County, and Casino San Pablo in Contra Costa County, owned by the Lytton Rancheria. There are only six federally recognized tribes in the Bay Area counties and they are all based in Sonoma County (they include the Lytton, Cloverdale, Dry Creek, Graton, and Stewarts Point Rancherias and the Koi Nation).⁴ However, there are five Acknowledgement petitioners based in Bay Area counties, and three of these are located in counties in which there are neither federally recognized tribes nor Indian gaming facilities (as detailed below).

Recent events indicate that recognized tribes do not limit their gaming interests to their historical territories. Two federally recognized tribal entities have failed in their attempts to establish gaming in the Bay Area. The Scotts

⁴ The Koi Nation's former Rancheria was located in Lake County, but this federally recognized tribe's business address is in Santa Rosa in Sonoma County. This raises a question about all of the potential gaming tribes. For purposes of Federal trust land acquisition, will they claim the area in which their office is based or will they claim the area of a prior Rancheria or Reservation or the area used and occupied by the historical tribe from which they descend? The address of record for Federal Acknowledgment petitioners is often just a residence or office space where it has chosen to receive communications pertaining to its petition. These locations may or may not be within the group's historical area of use and occupation. One of the criteria for requesting Federal land acquisition for tribes is a demonstration of the tribe's historical connection to the subject land.

Valley Band in Lake County purchased 28 acres of land in North Richmond (in Contra Costa County, approximately 20 miles northeast of San Francisco) on which it proposed to develop the Sugar Bowl Casino. Many public officials opposed this development, including Senator Dianne Feinstein, former Governor Arnold Schwarzenegger, and the Richmond City Council. The plan suffered a major blow in May 2012 when the Bureau of Indian Affairs (BIA) rejected the Band's application to bring the land into Federal trust status. The BIA claimed that the application failed to demonstrate that the Scotts Valley Band had any historical connection to the subject land.

In 2005, the landless Koi Nation, originally from Lake County, planned to develop a 35-acre gaming site near the Oakland International Airport in Alameda County. The Nation offered to pay the City of Oakland \$600 million over 20 years for the right to develop a casino, hotel, and spa complex. Governor Schwarzenegger announced that he was opposed to this plan and any other tribal land acquisitions in urban areas for the purpose of developing casinos. The proposal ultimately failed when the Oakland City Council rejected it in the face of strong opposition from many quarters, including the nearby cities of Alameda, San Leandro, and Berkeley.

These recent events demonstrate that because of the high attractiveness of these densely populated, economically strong areas, newly acknowledged tribes are likely to make vigorous efforts to locate gaming facilities in these areas, even if their own historical territory is far away. Such developments would bring with them all the consequences associated with Indian casinos in high-developed,

crowded urban areas, including the loss of tax revenue, the disruption of existing planning and usage patterns, traffic congestion, and the social and economic problems resulting from the attraction of patrons with addictive behavior.

Developing tribal casinos in urban and metropolitan areas would also disrupt California's established gaming policy. In 2000, voters approved Proposition 1A, which was a limited expansion of casino style gaming on established Indian lands. More federally acknowledged tribes could place new full service casinos into the urban and metro areas. Developing tribal casinos in these locations would establish competition not only with the State's commercial gaming interests, which pay significant revenues to State and local governments, but also with other established businesses, including entertainment venues, restaurants and hotels.

The five (5) Acknowledgment petitioners in the Bay Area counties include: (1) the Displaced Elem Lineage Emancipated Members (aka DELEMA), whose address of record is in Sonoma County; (2) the Amah Mutsun Band of Ohlone/Costanoan Indians in San Mateo County; (3) the Salinan Nation and (4) the Muwekma Ohlone Tribe, both in Santa Clara County, and (5) the Xolon Salinan Tribe based in Contra Costa County. San Mateo and Santa Clara Counties have neither federally recognized tribes nor Indian gaming facilities. As indicated above, the Muwekma Ohlone Tribe was denied Federal Acknowledgment in 2002. Because the Muwekma group would likely re-petition if given that opportunity by the revised regulations, there is the potential that four petitioners in the Bay Area counties could seek to establish Indian gaming in the

future. As also noted above, the DOI placed the petition of the Amah Mutsun Band under active consideration in November 2013.

South of the Bay Area counties there are also seven (7) petitioners but no recognized tribes or gaming facilities in the coastal counties of Santa Cruz, Monterey, and San Luis Obispo and the inland county of San Benito. These Indian groups include: (1) the Costoanoan Ohlone Rumsen-Mutsun Tribe and (2) the Calusa-Seminole Nation in Santa Cruz County; (3) the Eshom Valley Band of Michahai and Wuksachi, (4) the Southern Chumash Owl Clan and (5) the Ohlone/Costanoan - Esselen Nation, all in Monterey County; (6) the Salinan Tribe of Monterey & San Luis Obispo Counties in San Luis Obispo County; and (7) the Indian Canyon Band of Coastanoan/OhLone People in San Benito County.

There is an even greater potential for gaming development by petitioners based in the four coastal counties north and south of the city of Los Angeles (Santa Barbara, Ventura, Los Angeles, and Orange counties). There is only one federally recognized tribe and one Indian gaming facility in these four counties, both of which are in Santa Barbara County (the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, which operates the Chumash Casino and Resort). However, there are eleven Federal Acknowledgment petitioners in these counties, seven of which are based in Los Angeles County alone. These Indian groups include: (1) Coastal Band of Chumash (Nation) in Santa Barbara County, which is based right in the city of Santa Barbara; (2) the Barbareno/Ventureno Band of Mission Indians in Ventura County; (3) the

Gabrieleno Band of Mission Indians, (4) the Gabrielino/Tongva Nation, (5) the Gabrielino/Tongva Indians of California Tribal Council, (6) the Gabrieleno Band of Mission Indians, (7) the Costanoan-Rumsen Carmel Tribe, (8) the Fernand^o Tataviam Band of Mission Indians, and (9) the San Fernando Band of Mission Indians, all based in Los Angeles County; and (10) the Juaneno Band of Mission Indians, Acjachemen Nation and (11) the Juaneno Band of Mission Indians, based in Orange County.

Of these Indian groups, the Gabrielino/Tongva Indians of California Tribal Council is based in the City of Los Angeles. As indicated above, the two Juaneno petitioners in Orange County were previously denied Federal Acknowledgment in 2011, but their appeals are pending before the IBIA. They each might have the opportunity to re-petition under the revised Federal Acknowledgment regulations. As also noted above, the Fernand^o Tatavium Band in Los Angeles County is the only petitioner currently on the DOI's ready list of petitions awaiting active consideration.

Other inland counties in which there are Federal Acknowledgment petitioners but no federally recognized tribes or Indian gaming facilities include Mariposa (just east of Yosemite National Park) and Trinity (in the northwest largely covered by the Klamath National Forest). In Kern County, which borders Ventura and Los Angeles counties to the north, there are four petitioners but only one federally recognized tribe (the recently recognized Tejon Indian Tribe) and no Indian gaming facilities. The eight unrecognized Indian groups in these four counties include: (1) the Southern Sierra Miwuk Nation and (2) the Chukchansi

Yokotch Tribe of Mariposa in Mariposa County; (3) the Nor-EI-Muk Wintu Nation and (4) Tsnungwe Council in Trinity County; and (5) the Kern Valley Indian Community, (6) the Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians, (7) the Chumash Council of Bakersfield and (8) the Tubatulabals of Kern Valley, all in Kern County.

Mariposa and Trinity Counties are rather isolated with small population centers and no interstate highways. As noted above, the DOI placed the petition of the Southern Sierra Miwuk Nation of Mariposa County under active consideration in August 2013. Kern County has a large population center in Bakersfield (population more than 350,000) and major thoroughfares that run through the county, including I-5, the inland interstate that connects San Francisco to Los Angeles and California State Route 99, a freeway that runs through the densely populated eastern portion of the Central Valley, including the cities of Bakersfield, Visalia, Fresno, Madera, Merced, Modesto, Stockton, Sacramento, Yuba City, and Chico.

This analysis demonstrates that there are significant areas of California, including the nine Bay Area counties, the four coastal and inland counties south of the Bay Area counties, the coastal counties north and south of Los Angeles, and inland Kern County, where Indian gaming has not developed and where the introduction of casinos could have severe impacts on local planning, social conditions, traffic and services. If the revisions of the Acknowledgment regulations are implemented as proposed, the multiple Indian groups that would

suddenly be able to gain Federal Acknowledgment and transfer land into Federal trust, would be well positioned to aggressively pursue gaming in these areas.

Potential Increased Concentration of Gaming Related to Pending Acknowledgment Petitioners in California

This section looks at the potential for the increased concentration of gaming facilities as a result of the changes to the Federal Acknowledgment standards as outlined in the Proposed Rule. It lists the ten largest Indian casinos in California (based on the number of slot machines, game tables, and square footage and not on total revenues) and the relation to Acknowledgment petitioners that are based in the same or closely adjacent counties as these gaming facilities. The casinos are listed in descending order from largest to smallest.

(1) Pechanga Resort and Casino, Temecula, CA (Map No. 43), operated by the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, Riverside County, 50th Congressional District.

There are four petitioners in Riverside County, including:

(1) the Coastal Gabrieleno Diegueno Band of Mission Indians (Map No. 43) in the 41st Congressional District;

(2) the Gabrieleno Band of Mission Indians of California (Map No. 47), 36th Congressional District;

(3) the Diegueno Band of San Diego Mission Indians (Map No. 59), 41st Congressional District; and

(4) the Mission Creek Band of Indians (Map No. 75), 36th Congressional District. As noted above, the two Gabrieleno petitioners may be splinter groups.

(2) Cache Creek Casino Resort, Brooks, CA (Map No. 69), operated by the Yocha DeHe Wintun Nation, Yolo County, 3rd Congressional District.

There are no petitioners in Yolo County or in the six adjacent counties. However, there are six (6) petitioners that are two counties away, including:

(1) The Displaced Elem Lineage Emancipated Members (aka DELEMA) (Map No. 45) in Sonoma County, 5th Congressional District;

(2) the T'Si-akim Maidu (Map No. 48) in Nevada County, 1st Congressional District;

(3) the Yokayo Tribe of Indians (Map No. 20) in Mendocino County, 2nd Congressional District;

(4) the SheBelNa Band of Mendocino Coast Pomo Indians (Map No. 69) in Mendocino County, 2nd Congressional District;

(5) the Wailaki Tribe (Map No. 73) in Mendocino County, 2nd Congressional District; and

(6) the Xolon Salinan Tribe (Map. No 55) in Contra Costa County, 11th Congressional District. As noted above, the DELEMA is a splinter group of a federally recognized tribe.

(3) San Manuel Indian Bingo & Casino, Highland, CA (Map No. 51), operated by the San Manuel Band of Serrano Mission Indians, San Bernardino County, 31st Congressional District.

There is only one petitioner in San Bernardino County, the Ani Ywui Yuchi (Map No. 42), 8th Congressional District. However, as noted in the section on prime areas for potential gaming above, there are 13 petitioners in the more populous adjacent counties of Kern, Los Angeles, and Orange. As indicated in this section under the casinos in Riverside County, there are also four petitioners in that adjacent county.

(4) Thunder Valley Casino, Lincoln, CA (Map. No. 67), operated by the United Auburn Indian Community of the Auburn Rancheria, Placer County, 4th Congressional District.

There was only one petitioner based in Placer County, the Esselen/Coastanoan Tribe of Monterey County (Map No. 29), 4th

Congressional District, which withdrew its petition in 1996. However, there are two petitioners in adjacent counties, including:

(1) the T'Si-akim Maidu (Map No. 48), Nevada County, 1st Congressional District; and

(2) the Honey Lake Maidu (Map No. 52), Lassen County, 1st Congressional District.

(5) Viejas Casino, Alpine, CA (Map No. 68), operated by the Viejas Band of Kumeyaay Indians, San Diego County, 51st Congressional District.

There are four petitioners in San Diego County. They are:

(1) the San Luis Rey Band of Mission Indians (Map No. 16) 49th Congressional District;

(2) The Chiricahua Tribe of California (Map No. 58), 53rd Congressional District;

(3) The Callattakapa-Choctaw Tribe (Map No. 61), 53rd Congressional District; and

(4) The Tejon Band of Kitanemuk Indians (Map No. 76), 53rd Congressional District.

(6) Morongo Casino Resort and Spa, Cabazon, CA (Map No. 37), operated by the Morongo Band of Cahuilla Mission Indians of the Morongo Reservation, Riverside County, 36th Congressional District.

As noted in this section above for (1) Pechanga Casino, there are four petitioners in Riverside County.

(7) Pala Casino Resort and Spa, Pala, CA (Map. No. 40), operated by the Pala Band of Luiseno Mission Indians of the Pala Reservation, San Diego County, 50th Congressional District.

As noted in this section above for (5) Viejas Casino, there are four petitioners in San Diego County.

(8) Red Hawk Casino, Placerville, CA (Map No. 56), operated by the Shingle Springs Band of Miwok Indians, El Dorado County, 4th Congressional District.

There are no petitioners in El Dorado County or in the five adjacent counties. However, two (2) petitioners are just two counties away from El Dorado. They are:

(1) the Calaveras Band of Mi-wuk Indians (Map No. 54) in Calaveras County, 4th Congressional District; and

(2) the T'Si-akim Maidu (Map No. 48), in Nevada County, 1st Congressional District.

(9) Barona Valley Ranch Resort and Casino, Lakeside, CA (Map No. 5), operated by the Barona Group of Capitan Grande Band of Mission Indians, San Diego County, 50th Congressional District.

As noted in this section above for (5) Viejas Casino, there are four petitioners in San Diego County.

(10) Table Mountain Casino, Friant, CA (Map No. 62), operated by the Table Mountain Rancheria, Fresno County, 4th Congressional District.

Of the large casinos, Table Mountain is the one that is most threatened by the potential development of gaming by currently unacknowledged Indian groups. At present, Table Mountain competes with only one other Indian casino in Fresno County, the Mono Wind Casino (Map No. 9) operated by the Big Sandy Band of Western Mono Indians. However, there are eight (8) petitioners in the county that have the potential of developing gaming facilities to compete with these two casinos. They are:

(1) the North Fork Band of Mono Indians (Map No. 13), 4th Congressional District;

(2) the Dunlap Band of Mono Indians (Map No. 14), 4th Congressional District;

(3) the Choinumni Council (Map No. 22), 22nd Congressional District;

(4) the Sierra Foothill Wuksachi Yokuts Tribe (Map No. 49), 4th Congressional District;

(5) the Traditional Choinuymni Tribe (Map No. 51), 21st Congressional District;

(6) the Dumna Wo-Wah Tribal Government (Map No. 57), 4th Congressional District;

(7) the Northern Band of Mono-Yokuts (Map No. 70), 4th Congressional District; and

(8) the Ahwahneechee Band of Paiutes (Map No. 74) 16th Congressional District.

This analysis of the proximity of petitioners for Federal Acknowledgment to California's largest Indian casinos demonstrates the potential for additional casinos to be located in those areas that already have large and well-established Indian gaming facilities. By making the standards for Federal Acknowledgment more lenient, the proposed rules increase the likelihood of additional acknowledged tribes in these locations. Once acknowledged, these tribes will almost certainly seek their own casinos, resulting in risks of over-concentration and saturation of gaming in these locations and the attendant consequences for the economic viability of the existing casinos and existing intergovernmental agreements that may exist between such facilities with surrounding communities.

Conclusion

This report concludes that all Indian groups in California that have petitioned for Federal Acknowledgment will benefit by the revisions of the regulations in 25 C.F.R. Part 83 set forth in the Proposed Rule issued by the Assistant Secretary on May 22, 2014. 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.

California has had more Acknowledgment petitioners (81) than any other state. This report argues that if the mandatory criteria are reduced and the evaluation standards are lowered, as is recommended in the Proposed Rule, then the success rate of California petitioners should also increase from the overall national historical rate of one-third to perhaps a success rate of one-half. This would mean that the revised regulations could lead to the potential acknowledgment of approximately 34 new Indian tribes in California (½ of the 68 pending cases) in the future. This would increase the number of federally recognized tribal entities in the state (presently at 109) by approximately 31 percent. If these newly acknowledged tribes have the same success rate in establishing gaming facilities on Federal trust lands as have the currently recognized California tribes, this could lead to the development of 22 new Indian gaming facilities in the state, an increase of about 31 percent above the present number of such operations.

Associated with this report is a map of California developed for this project that indicates the location of the petitioners, the federally recognized tribal entities, and the Indian gaming facilities in the state. This map illustrates the proximity of petitioners to recognized tribes and existing Indian gaming operations and the locations where there is the potential for acknowledgment of new Federal tribes and the development of additional Indian gaming facilities.

In its preceding sections, this report has demonstrated the potential impact that Federal Acknowledgment petitioners could have on future gaming in California and the competition these unrecognized Indian groups could create for

existing Indian gaming facilities in the state. One of these sections identifies petitioners that are located in prime areas for the development of Indian gaming, that is, the several undeveloped areas including the nine Bay Area counties, the four coastal and inland counties south of the Bay Area counties, the coastal counties north and south of Los Angeles, and inland Kern County, where present unrecognized Indian groups would have little or no competition for developing casino gaming facilities if they succeeded in gaining Federal Acknowledgment and the transfer of land into Federal trust. The development of casinos in these areas could have impacts on local planning, social conditions, traffic, and public services. Another section demonstrates the proximity of petitioners to the ten largest Indian casinos in California. In summary, the economic status quo of federally recognized tribal entities that operate these largest facilities, as well as those that own the other 60 tribally operated gaming facilities in the State, are likely to be negatively impacted by the large number of unrecognized Indian groups that could gain Federal Acknowledgment and eventually become their local competitors, not only for gaming revenue, but also for annual Federal budget allocations for tribal services.