Stand Up For California!
"Citizens making a difference"

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Re: RIN 1076-AF18: Procedures for Establishing That an Indian Group Exists as an Indian Tribe

Dear Mr. Shelanski,

Stand Up For California! submitted comments last August on the proposed regulation by the Bureau of Indian Affairs (BIA) to amend the Procedures for Establishing that an Indian Group Exists as an Indian Tribe (25 C.F.R. Part 83). The proposed rules are currently under review in the Office of Information and Regulatory Affairs (OIRA) (*See*78 Fed. Reg. 38,617, June 27, 2013). The Draft Revisions, if adopted, would have wide-ranging effects that include serious unintended and harmful consequences in California. The proposed rules go beyond procedural streamlining of the acknowledgment process and are a radical departure from the established substantive criteria for acknowledgment. They would result in disproportionate impacts to State and local governments, including substantial economic and federalism impacts, and would undermine the role of State and local governments and other interested parties in the process. Land owners, businesses, school districts, and taxpayers will be impacted by the acknowledgment of new tribes under the dramatically lowered standards.

Far from making the process more efficient, the lowered standards will invite a flood in California of new petitions and re-petitions from previously denied groups, overwhelming the understaffed BIA process and resulting in gridlock rather than streamlining. Additionally, the proposed rules are certain to result in new and contentious litigation. The costs of the proposed rules will far outweigh their intended benefits. A thorough review under E.O. 12866 (Regulatory Planning and Review) and 13132 (Federalism) must ensure that effects on State and local governments are fully evaluated, and the compliance costs to State and local governments must be evaluated under the Unfunded Mandates Reform Act.

Stand Up for California! is a nonprofit benefit corporation that acts as a statewide community watchdog. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts approaching two decades. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California with respect to gaming impacts. Since the introduction of tribal gaming in California, our organization has focused on issues of federal Indian law and

policy that may affect the State of California's gambling policies. The proposed rule will significantly affect California State gaming law and policy, local and state revenues and the welfare of the non-tribal public and operation of good government.

A Reasonable Acknowledgment Process

A reasonable process must ensure review of deserving petitions is not unduly delayed. The Department must balance this objective in light of three fundamental facts: (1) economic incentives, which include the potential for the development of gambling casinos, may drive submission of petitions that are not truly justified, (2) the work required to differentiate between justified and unjustified petitions is often complex and resource intensive, involving review of decades of historical evidence, and (3) the Department must ensure that all interested and affected parties can participate in a fair, transparent and objective process.

I. Economic Incentives Driving Tribal Groups to Federal Recognition

Of the 79 California petitioner groups, nearly half submitted petitions after 1998, the year the first California statewide ballot measure was passed to legalize slot machines on Indian lands located in our state. This raises the substantial question of how the economic promises of gaming have influenced the recognition process. Groups with little to no viable claim have been encouraged to file petitions for federal recognition only to clog the entire process. Relaxing the standards might marginally expedite the process, but it will also facilitate recognition of groups that could not possibly qualify under existing regulations.

The unintended consequences of relaxing the current standards will result in the proliferation of tribal gaming, which will harm existing tribal operations and dilute what it means to be a federally-recognized Indian tribe. This will no doubt create difficult and adversarial litigation for tribes, the BIA, private parties and states. Tribes recognized through the federal process of Part 83 are clear and indisputable exceptions under the Indian Gaming Regulatory Act. These tribes have a congressional exception to acquire an "initial reservation." The potential of *creating a tribe* for the sole purpose of a casino for gaming investors must be taken into consideration and safeguarded against.[1]

New Indian lands are usually acquired through the fee-to-trust process (25 C.F.R. 151). More often than not, this creates a significant negative economic impact to the general funds of local and state government revenues.[2] County and city land use plans are damaged presenting a challenge to local elected officials who are responsible for managing the natural resources of the region equitably.[3] The taking of lands out of the regulatory authority of the state and off of the tax rolls has a significant fiscal impact on local, regional and state

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[1] *See California Corp. Comm'r v First California Diversified Fund*, filed July 29, 2005, regarding fraudulent investment plan in urban trial casinos involving non-federally recognized tribes, *available at:* http://www.standupca.org/court-rulings/cases-of-interest/1cal_complaint.pdf.

[2] In July 2002, the California State Association of Counties in conjunction with the California State Sheriffs Association and the California League of Cities released their Survey of Tribal Gaming Impacts on County Governments. At this time only 54 casinos were operational and maintained by 53 tribal governments in 34 counties. Statewide as of 2002, Indian casinos cost the counties more than $200 million in non-reimbursed road, water, sewage, fire and law enforcement costs.

[3] Local governments, states, businesses, school districts, public safety, social services, and the taxpayers experience a loss in perpetuity of all property, sales and transient occupancy taxes that property might generate in years to come. This has the potential to over time, bankrupt local government.

governments.[4] This has the potential of bankrupting local governments. These and other complex multi-jurisdictional issues regarding public health and safety have and will only increase with the proposed rule which

will exacerbate conflicts and grievances between land owners, competing business owners and governmental entities.

II. Differentiation Between Justified and Unjustified Petitions Is Complex and Resource-Intensive

California can offer examples of how relaxing the rules will affect a valid or invalid petition. In a U. S. Department of the Interior Press Release, Jan. 3, 2012, Assistant Secretary Larry Echohawk issued a *"Reaffirmation of the Tejon Indian Tribe's Government to Government Status"*. Where in federal statute or regulations is there such a thing as reaffirmation? This is the BIA acting on its own to relax the rules. The press release states:

> "(u)pon review of the facts and history of this matter, including prior Assistant Secretaries decisions, I hereby reaffirm the federal relationship between the United States and the Tejon Indian Tribe, thus concluding the long and unfortunate omission of the Tejon Indian Tribe from the list of federally recognized tribes."

However, the *"review of the facts and history of this matter"* are contradicted by another federal agency.[5] Additionally a group claiming to be the Tejon was already in Federal District Court. A suit filed by David Laughing Horse Robinson and a group identifying itself as the Kawaiisu Tribe were suing for federal recognition. As a result of complaints from Tribes and other governmental entities over the "reaffirmation" of the Tejon, the U.S. Department of the Interior Inspector General (IG) got involved and initiated an investigation. A report was finalized on January 9, 2013 but not posted to the web until April 30, 2013. The IG found that, "the Assistant Secretary and his staff did not consult with the Office of Federal Acknowledgment (OFA). Further, the IG found no discernible process used by Echohawk and his staff in selecting the Tejon Tribe for recognition above the other groups". This faction of the Tejon had a gaming investor to assist in its reaffirmation as evidenced below:

> On September 30, 2010 Millenium Gaming's subsidiary Cannery Casino Resorts announced a joint venture with Tribal Financial Advisors to "identify, pursue and enter into agreements with Native American Indian tribes throughout the United States for the financing...and management of...existing or new gaming properties," according to Bloomberg BusinessWeek. Their announcement also said the joint venture would help tribes obtain capital investment.
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> Searches of such databases as OpenSecrets.org by The Mountain Enterprise in 2009 yielded records showing that in 2008 lobbyist Patton Boggs, LLP is reported to have been paid $120,000, and lobbyist Tew Cardenas was paid $50,000 by the Tejon Indian Tribe. The industry category for their lobbying is listed as "Casino/Gambling." Payments reported in 2009 diminished to $20,000, paid to the Patton Boggs firm. [6]

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[4] *$7M in refund claims submitted to county*, Barrett Newkirk, The Desert Sun, April 16, 2014

[5] A History of American Indians in California: Historic Sites – the United States National Park Service, Tejon Indian Reservation, Kern County http://www.cr.nps.gov/history/online_books/5views/5views1h92.htm

[6] *Casino Talk Increases as Branch of Tejon Tribe Wins Federal Recognition,* by Patric Hedlund, Jan. 13, 2012 Mountain Enterprise.

This is not an unusual or arbitrary situation in our State. California has five Tribes[7] that have been reaffirmed without a public process, intensive research by the BIA or consultation with the Office of Federal Acknowledgment or even the State of California. The BIA appears to randomly pick winners and losers, rather than using historical, genealogical, ethno-historical documentation and hard objective facts. Another method employed by the BIA in California is to enter into friendly lawsuits with tribal groups seeking federal acknowledgment. The BIA then settles the suits through stipulated agreements recognizing the new tribal entity. There are approximately 40+ Tribes in California restored through stipulated agreements. This raises serious questions over Secretarial authority to recognize tribes by either reaffirmation or stipulated agreement using these methods.[8]

Congress has further complicated and given the appearance of a broken Federal recognition process by enacting statutes that restore tribal governments. This has occurred as recently as 2000 with the federal recognition of the Federated Miwoks of the Graton Rancheria. The Graton Rancheria in Sonoma County had two persons residing on a small parcel of trust land; however that was not sufficient to achieve a determination for gaming. By joining the Graton Rancheria residence with a petitioning group, the Federated Coast Miwok of Novato, California, listed as Petitioner number 154[9] which had filed a letter to petition the Office of Federal Acknowledgement on February 8, 1995, Congress created a larger group for restoration and mandatory acquisition of land by a congressional act. Congressionally sponsored bills are helped along by a Tribes gaming investor/partner. In this instance, it was Station Casinos of Las Vegas.

The California Los Angeles/Orange County regions with a population of 15+ million persons are a target market of gaming investors willing to assist tribal groups with recognition. Various gaming investors have been involved since 1998 with the Juaneno of San Juan Capistrano[10] and the Gabrieleno[11] of Los Angeles. These tribes, during the time period the FBI was tracking the money and activity of Jack Abramoff, attempted to achieve State recognition and Federal recognition through Congressional as well as administrative action. Again, the BIA by not abiding by the process defined in 25 C.F.R Part 83 has created the appearance of a broken process.

III. A Fair, Transparent and Objective Process Is Necessary

Many interested parties have complained that the process in its current form is one-sided in favor of tribal groups seeking federal recognition. The process is inexorable once begun. Once the Assistant Secretary undertakes active consideration he is required to continue the review, publish propose findings and a final determination in the Federal Register within one year. From the time the documented petition is filed the assistant Secretary can consider any evidence submitted by "interested" or "informed parties". The Assistant Secretary has discretion to suspend active consideration for up to 180 days upon a showing by the petitioner that there are technical problems. Upon publication of the proposed findings, the petitioner and those wishing to challenge or support the proposal findings have 180 days in which to submit arguments and evidence. This

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[7] Reaffirmed Tribes include: Lower Lake Koi, Jamul Indian Village, Karuk Indian Tribe, Ione, and the Tejon.

[8] **The Wilton Rancheria** reached a settlement agreement with the federal government to be recognized as a sovereign tribal nation, June 5, 2009. Also in June 2009, the Mishewal Wappo filed a complaint seeking a settlement agreement with the federal government to be recognized as a sovereign tribal nation, there has been no final ruling in this matter to date.

[9] It will remain unknown if the Federated Coast Miwok of Novato would have been able to meet the substantial standards of Part 83, or if this was a justified petition for federal recognition. As a result a multimillion dollar casino and all of its impacts, social, financial and political, was foisted upon the community without validated historical documentation of the legitimacy of this Tribe. A cloud of validity will forever hang of this group.

[10] Oldaker Biden and Belair LLP, Lobbying Report (2008). *Why does a regulatory process require a lobbyist?*

[11] *See* http://www.standupca.org/off-reservation-gaming/federal-acknowledgement-process/tribal-groups-in-active-status/petitioner-140-gabrielino-tongva-nation/Ltrs%20from%20Chu-Napolitano%20to%20DOI%20on%20Gabrieleno.pdf (letters by members of Congress seeking reaffirmation for tribe).

comment period may be extended an additional 180 days. If the petitioner or an interested party makes a request, the Assistant Secretary shall hold a formal meeting to inquire into the proposed findings. Following any findings there shall be an additional 60-day response period. Following the final determination of the Assistant Secretary, any interested party may file a request for reconsideration with the Interior Board of Indian Appeals. Briefs may be submitted and the Board is required to make a determination within 120 days after publication of the Assistant Secretary's final determination in the Federal Register.

The schedule sets out many opportunities for appeal and reconsideration for the tribal group, but provides only limited participation of interested parties. Comments must be made before the Assistant Secretary makes his proposed findings. After that there is an institutional inertia against change. Ultimately interested parties are left with only the opportunity for judicial review, again through a difficult, costly and adversarial process. *If the process is to be streamlined, participation for interested parties must not be eliminated.*

Conclusion

The existing acknowledgment process at 25 C.F. R. Part 83 provides a timely process with well-defined criteria for the Office of Federal Acknowledgement to follow. However, BIA is not abiding by the regulations through actions of reaffirmation, friendly lawsuits and support of congressional acts, and in so doing, has created the appearance that the process is broken and requires repair. It is only the BIA that requires repair of the regulations in order to justify its actions to choose winners and losers.

The failure of the BIA to follow the rules creates an inequitable practice. To be acknowledged as an Indian tribe, as distinct from an Indian group, the petitioning entity must establish that they meet the seven criteria set out in the federal regulations. Without doubt, these are high standards and high standards should be required in order to achieve the status of a tribal government. Such a government is a sovereign within our federal system. That status vastly exceeds most organizations and approaches the power and independence of the individual states. Upon acknowledgment the Indian group becomes a tribal government and thereafter deals on a government-to-government basis with cities, counties and states. This creates multi-jurisdictional issues between governmental entities that are not easily resolved and which in turn create significant problems that affect the welfare of the public and the operation of governmental entities. Failure to achieve federal status does not mean that the individual Indians are deprived of benefits and programs. The BIA is required to advise individuals on how they may become eligible for services and benefits as individual Indians or become members of an acknowledged tribe. The Pacific Regional Office of the BIA in California has done this. However, this activity by the BIA to move tribal groups in with other federally recognized tribes has resulted in a phenomenon of dis-enrollments. California tribal governments have dis-enrolled several thousand members since gaming became legal in 2000. The reasons given are that the family blood lines are inconsistent with the membership rules of the tribal constitutions. However, dis-enrollments appear to be related to political power-grabs in tribal elections for control of the casino operations and casino stipend payments.

The proposed revisions to Part 83 are a drastic departure from established law and precedent. *Stand Up For California!* asks that any proposed rule: (1) be limited to procedural streamlining of the process, (2) make no revisions to alter the substantive criteria or the burden of proof required, and (3) impose no additional limits to the ability of interested parties to participate in the process.

The proposed rule requires a Federalism Assessment. California has 110 federally recognized tribes and 79 tribal groups seeking federal acknowledgement. Should this rule go into effect our state faces the potential of having 75 million acres of land placed into trust. This is approximately the amount of land Tribes in this State have claimed would have been theirs had the United States ratified the 19th century treaties granting that acreage. The impact of the loss of taxation and police powers over even a fraction of this land in the 21st century is astronomical.

The proposed rule requires evaluation under the Unfunded Mandates Act of 1995. While it is unlikely in 2014 that this proposed rule will exceed a federal mandate of $100 million within one year, federal recognition of a small number of groups, their acquisition of initial reservations, and the potential development of casino operations in metropolitan and urban areas will have a dramatic fiscal impact. The proposed rule does not, at least on its face, require that the federal government incur any obligations whatsoever. It would be wrong to state *"...the overall effect of the rule will be negligible to the State, local or tribal government or private sector."*

Stand Up For California! hopes that you find these comments helpful and useful. Should your Office require additional documentation please do not hesitate to contact me.

Sincerely,

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