



MUCKLESHOOT INDIAN TRIBE

Office of the Tribal Attorney
39015 – 172nd Avenue S.E. • Auburn, Washington 98092-9763
Phone: (253) 939-3311 • FAX: (253)876-3181



September 12, 2013

Honorable Kevin K. Washburn
Assistant Secretary -- Indian Affairs
1849 C Street NW
Washington, DC 20240

Re: Draft Proposal to Revise Procedures for Establishing that an American Indian Group
Exists as an Indian Tribe, 25 CFR Part 83

Dear Assistant Secretary Washburn:

The Muckleshoot Indian Tribe appreciates the opportunity to comment on the draft proposal to revise the procedures for establishing that an Indian group exists as a sovereign Indian tribe entitled to a government to government relationship with the United States. As Chairperson Cross noted in her remarks at the Canyonville tribal consultation meeting, the Muckleshoot Indian Tribe finds the Department's approach to revision of the acknowledgment process extremely troubling. A copy of the written remarks submitted by Chairperson Cross at the Canyonville tribal consultation meeting is enclosed, together with a section by section summary of the Muckleshoot Tribe's comments on the discussion draft which should be read in conjunction with this comment letter.

General Comments on the Discussion Draft

Although the News Release announcing the proposal asserts that the "discussion draft maintains stringent standards for core criteria" and Principal Deputy Assistant Secretary Roberts at the Canyonville consultation meeting stated that the proposal does not "disavow" the requirement that petitioners demonstrate continuous existence from first sustained contact to the present, a reading of the proposal indicates otherwise. The Department's discussion draft proposes elimination of the provisions of Part 83 that require a petitioner demonstrate continuous existence as an autonomous tribal social and political community from first sustained contact. The discussion draft significantly lowers the bar with respect to the requirements for acknowledgment that are retained, and limits the Department's ability to apply its expertise in evaluating petitions for acknowledgment by requiring that the Department view the evidence presented in the light most favorable to petitioners. Indeed, the discussion draft appears to be calculated to grant tribal status to groups that do not meet the existing standards for acknowledgment, and to permit groups that have been denied recognition under the present standards to successfully reapply for acknowledgment.

It has been longstanding Department policy, supported by settled law, that the core requirement of the acknowledgment process is a demonstration of continuous tribal social and political existence from the time of first sustained contact, and that groups seeking recognition are not entitled to a presumption of continuous existence. This requirement reflects the fact that federal acknowledgment of a petitioner as a tribe is more than acknowledgment of a petitioner's ethnic identity. Instead, the acknowledgment standards reflect the fact that federal recognition of tribal status constitutes acknowledgment that a successful petitioner possesses and retains sovereign political authority predating the United States, including the governmental authority to regulate the conduct of its members and control activities of both Indians and non-Indians within its territory.

The revisions to the acknowledgment regulations contained in the draft proposal repudiate the requirement that groups seeking acknowledgment demonstrate continuous tribal social and political existence from the time of first sustained contact. As a result under the draft proposal voluntary groups of descendants who have not existed continuously as tribal political entities, and have neither a history of self-government, nor a clear sense of identity appear to qualify for acknowledgment.

Because tribal sovereignty is based on the status of Indian tribes as sovereign political entities predating the establishment of the United States and continuously existing to the present, acknowledgment of groups that have failed to maintain a real community, one that exercises some measure of political control over its membership, devalues and undermines the status of all Indian tribes, as sovereign political entities with significant governmental authority. The extension of tribal recognition to such groups has the potential to redefine tribes as racial, rather than political entities. And, because the proposal weakens the status of Indian tribes as political entities, it will also result in increased equal protection challenges to federal legislation that benefits tribes and governs the administration of Indian affairs.

At the Canyonville consultation meeting Deputy Assistant Secretary Roberts described the draft proposal as the Department's response to Congressional criticism of the acknowledgment process, referencing comments by members of the Senate Committee on Indian Affairs during its 2009 Hearing entitled, "Fixing the Acknowledgment Process." In that hearing members of the Committee focused on the timeliness of decisions, the financial burden that the process places on participants, perceived inconsistencies in the application of standards, and a perceived lack of clarity or transparency in their application.

While petitioners and their supporters have long sought changes in the criteria used to evaluate petitions, like those contained in the draft proposal, the existing standards were not the basis for the Congressional concerns expressed during the 2009 hearing. Those concerns can and should be addressed by procedural reforms to the acknowledgment process and do not require wholesale changes to the basic acknowledgment criteria. Adequate funding for the process, increased

staffing of the Office of Federal Acknowledgment, further reductions in the time expended by OFA staff on independent research to address gaps or deficiencies in petitioners' submissions, and stricter adherence by all participants to realistic timelines would go far in addressing these concerns.

The Department could insure more transparency and consistency in the application of the standards for acknowledgment by completing and updating its draft precedent manual which explains how the Department has applied the acknowledgment criteria to past petitions. In addition, a great deal of time and Departmental resources could be saved in evaluating petitions by specifying the format of petitions in the regulations, including a requirement that petitioners and others submitting evidence and argument, specifically identify and cite the evidence upon which they rely to establish the facts that they claim.

In this regard it is important to note that courts routinely place the burden on the parties to identify and cite the evidence upon which they rely for their respective factual contentions. No court would tolerate, and neither should the Department as it now appears to do, the submission of tens of thousands of pages of historical documents and genealogical information without it being clearly organized and analyzed with a satisfactory explanation of how the evidence supports a party's factual contentions and argument. For example, the acknowledgment regulations could and should require that petitioners identify and cite with specificity each piece of evidence that supports their factual contentions with respect to criteria (a), (b), and (c) for each decade or other appropriate period of time since sustained contact, or in the case of groups that demonstrate previous unambiguous acknowledgment from the time of such acknowledgment.

One could argue that some petitioners lack the resources to properly prepare and submit a well organized petition that includes appropriate citations and analysis of the evidence accompanying the petition. But if the Department does not require petitioners to properly format and organize petitions with appropriate analysis and citation to the evidence, then the task falls on OFA staff to sift through the entire record, analyzing it to determine whether a petitioners factual contentions are supported. Given OFA budget and staffing limitations inordinate delays in processing petitions become more readily understandable and are indeed unavoidable, if petitioners' submissions are not properly organized and formatted.

At least with respect to the petitions with which the undersigned is familiar the problem is not the length of the petitions, it is a lack of organization, citation, and clear identification of the documentary evidence supporting the petitioner's factual contentions. A requirement that petitions properly identify and cite evidence establishing facts sufficient to support the criteria would undoubtedly streamline and shorten the Department's evaluation process.

Finally, OFA staff time and resources could be saved by requiring that petitioners provide interested parties with copies of all documents and records submitted to the Department, and the

Department provide all parties with copies of correspondence to petitioners and the results of any independent research undertaken by OFA staff. Both the existing regulations and the draft proposal require that interested parties who submit arguments and evidence to the Department provide copies to the petitioner. However, neither the existing rules nor the proposal require that petitioners provide copies of their submissions and correspondence with the Department to interested parties, nor do the regulations require that OFA routinely provide copies of its research results to the parties, necessitating that interested parties make repeated FOIA requests to obtain petition materials. Alternatively, the Department might create a cloud based data room containing the record for each petition accessible to petitioners and interested parties. Requiring petitioners to provide interested parties with copies of their submissions and correspondence with the Department and requiring OFA to provide correspondence and research results to all parties, or establishment of an internet accessible data room for each petition would reduce the number of FOIA requests to which OFA must respond, allowing more staff time to be directed to review of petitions.

Comments on Proposed Changes to the Acknowledgment Standards or Criteria

As noted earlier, the discussion draft proposes the elimination of the provisions of the existing regulations that are intended to limit acknowledgement to groups that can demonstrate that they have functioned as autonomous tribal entities throughout history. These provisions are designed to distinguish between relatively recently formed groups of Indian descendants who have not maintained tribal relations, and those groups that have maintained sufficient social and political cohesion through time to have retained their status as functioning political communities possessing tribal sovereignty.

The administrative acknowledgment process is not intended to grant tribal status and sovereignty to groups of Indian descendants based on their ancestry. It was established to acknowledge groups that have retained their tribal existence and sovereignty through history. Describing the requirement that petitioning groups demonstrate continuity of tribal existence in connection with the draft 1978 regulations, the Department stated:

While there is a large number of American citizens who are of Indian descent in this country, many of them do not and have not ever lived in tribal relations. A group of Indian descendants, living in the same general region, does not necessarily constitute an Indian tribe, even though the individuals may have recently joined together in some formal organization such as a corporation. **Under the regulations as proposed, the Assistant Secretary of Indian Affairs would acknowledge only those Indian tribes whose members and their ancestors existed in tribal relations since aboriginal times and have retained some aspect of their aboriginal sovereignty.**

...

The Department must be assured of the tribal character of the petitioner before the group is acknowledged. Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis.

43 F.R. 23743, 23744 (June 1, 1978).

The Department reiterated the fundamental distinction the regulations make between groups of Indians sharing a common heritage and tribes as political communities in its notice adopting the 1978 regulations where it stated:

There will be groups which will not meet the standards required by these regulations. Failure to be acknowledged pursuant to these regulations does not deny that the group is Indian. It means these groups do not have the characteristics necessary for the Secretary to acknowledge them as existing as an Indian tribe and entitled to rights and services as such.

...

The Department must be assured of the tribal character of the petitioner before the group is acknowledged. Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations – a political relationship – is indispensable.

43 FR 39361-62 (Sept. 5, 1978).

When the Department revised the regulations in 1994, it again emphasized that petitioners must demonstrate continuity of tribal existence and that the changes were not intended or expected to affect the outcome of acknowledgment determinations.

The Department's position is, and always has been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous federal acknowledgment. The Federal court in *United States v. Washington*, rejected the argument that “because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence.” The court further defined as a single, necessary and sufficient condition for the exercise of treaty rights, that tribes must have functioned since treaty times as “continuous separate and distinct Indian cultural or political communities” (641 F.2d 1374 (9th Circuit 1981)). [sic] Thus simple demonstration of ancestry is not sufficient.

Petitioning groups may be recently formed associations of individuals who have common tribal ancestry but whose families have not been associated with the tribe or each other for many generations.

. . .

[T]he revisions maintain the essential requirement that to be acknowledged a petitioner must be tribal in character and demonstrate historic continuity of tribal existence.

59 FR at 9282 (Feb 25, 1994).

Significantly, the Department explicitly rejected the suggestion that it now proposes to embrace, that petitioners only be required to demonstrate continuity of existence from 1934, the date of enactment of the Indian Reorganization Act to the present.

The purpose of the acknowledgment process is to acknowledge that a government- to- government relationship exists between the United State and tribes which have existed since first contact with non-Indians. Acknowledgment as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time.

Id. at 9281.

In its 2009 testimony before the Senate Indian Affairs Committee, the Department once again stated its view that continuity of tribal existence is the central requirement of the acknowledgment process.

When the Department acknowledges an Indian tribe, it is acknowledging that an inherently sovereign Indian tribe has continued to exist socially and politically since the beginning of European settlement. The Department is not “granting” sovereign status or powers to the group, nor creating a tribe made up only of Indian descendants.

Prepared Statement of George T. Skibine, Acting Principal Deputy Assistant Secretary for Indian Affairs, Hearing Before the Committee on Indian Affairs, S Hrg. 111-470, Nov. 4, 2009 at 9.

The Department’s longstanding position that continuous tribal existence must be demonstrated and cannot be presumed based on a group’s ancestry and self-identification with a historic tribe is supported by decisions of the Courts of Appeal for the Seventh, Ninth, and Tenth Circuits. *Miami Nation of Indians of Indiana v. U.S. Department of the Interior*, 255 F.3d 342, 350-351 (7th Cir. 2001) (“Probably by 1940, and certainly by 1992, the Miami Nation had ceased to be a

tribe in any reasonable sense. It had no structure. It was a group of people united by nothing more than common descent, with no territory, no significant governance, and only the loosest of social ties. . . . The federal benefits for the sake of which recognition is sought are extended to tribes not individuals, so if there is no tribe, for whatever reason, there is nothing to recognize.”) *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001). (While the 1854 Treaty and *The Kansas Indians* recognized the sovereignty of the Shawnee Tribe in the nineteenth century, those events without more do not speak to the status of the USTI today.”); *United States v. Washington*, 641 F.2d 1368, 1372-74 (9th Cir. 1981) (“To warrant special treatment tribes must survive as distinct communities. . . . We reject [appellants] argument that, because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence.”)

Thus, the regulations have consistently contemplated that a historic tribe recognized by the United States at some prior time ceases to be a tribe when it no longer meets the criteria of community or political influence. At that point the group although perhaps united by common descent from a historic tribe is no longer eligible for federal acknowledgment as a tribe with a government to government relationship with the United States. See, *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001); see also, *United States v. Washington*, *supra*.

The changes proposed to 25 CFR §§ 83.3(a), 83.7(a), 83.7(b), and 83.7(c) summarized below modify the scope of the acknowledgment process opening it to groups that cannot establish a substantially continuous tribal existence as functioning autonomous entities throughout history to the present. They do so by:

- Eliminating the provision that expressly restricts the scope of the acknowledgment process to groups that can establish substantially continuous tribal existence as functioning autonomous entities throughout history (§83.3(a));
- Eliminating in its entirety criteria (a), which requires that a petitioner demonstrate that it has been identified as an Indian entity since 1900 on a substantially continuous basis (§83.7(a));
- Eliminating from criteria (b), the requirement that a group establish that it has existed as a distinct social community from historical times to the present, and requiring such a demonstration only for the period from 1934 to present (§83.7(b)); and,
- Eliminating from criteria (c), the requirement that a group establish that it has maintained political influence or authority over its members from historical times to the present, and requiring such a demonstration only for the period from 1934 to present (§83.7(c)).

It is impossible for recognized tribes and other interested parties to engage in meaningful consultation on the discussion draft without a clear explanation and justification for the Department's proposal to abandon its longstanding positions on acknowledgment repeated by at least three different administrations over the last 35 years. Unfortunately, nowhere does the Department explain why it has rejected its well reasoned position that descent does not demonstrate continuity of tribal existence and that evidence with respect to the nature of a group from 1934 to present provides no basis to assume continuous existence before that time. Nowhere does the Department explain why the process should be opened to groups that cannot establish continuous tribal existence before 1934, and nowhere does the Department demonstrate that it has the legal authority to administratively acknowledge as an Indian tribe a group that is unable to demonstrate continuous existence as a sovereign Indian tribe from the time of first sustained contact.

In a similar vein the Department proposes changes to the provisions contained in §83.8 governing groups claiming previous unambiguous federal acknowledgment that clearly are intended to eliminate the requirement that such groups demonstrate continuity of existence between the time of last unambiguous acknowledgment and the present. To this end the discussion draft proposes:

- Eliminating from §83.8 the requirement that a group claiming previous unambiguous federal acknowledgment demonstrate that it is the same entity as the historic tribe it claims was previously acknowledged 83.8(d)(1); and,
- Eliminating from §83.8 the provisions that require evidence meeting criteria (c) from the point of last federal acknowledgment to the present (83.8(d)(3)).

These changes are proposed notwithstanding the fact, discussed above, that the Department and the federal courts have both made clear that groups of descendants of previously acknowledged tribes are not entitled to a presumption of continuing tribal existence based on their ancestry. Specifically, addressing the requirements that the Department now proposes to delete, the Department in 1994 during the Clinton Administration clearly articulated the need for petitioners claiming previous acknowledgment to show that they are the same group as the one acknowledged in the past and that they have maintained a continuous tribal existence since the time of last acknowledgment.

Petitioning groups may be recently formed associations of individuals who have common tribal ancestry but whose families have not been associated with the tribe or each other for many generations.

The Department cannot accord acknowledgment to petitioners claiming previous acknowledgment without a showing that the group is the

same as one recognized in the past. Several previous petitioners claimed that they were a historical tribe for which previous Federal acknowledgment could be demonstrated. However, it was later found that their members had no genealogical connection with the claimed tribe. **In addition the present group did not connect with the previously acknowledged tribe through continuous historical existence of a distinct community and political leadership.**

59 F.R. at 9282.

Once again the Department offers no explanation or justification for its proposed repudiation of its prior views and settled law. There is no explanation why the concerns that it expressed in 1994 on the need for petitioners to show that they are indeed the same group as previously acknowledged and have maintained their existence as distinct tribal political communities are no longer valid. There is no explanation why the Department believes that it is now appropriate to effectively grant a presumption of continuing tribal existence to petitioners claiming to be the same tribal entity as a previously acknowledged historic tribe.

Other changes are made to the core standards without explanation and justification that significantly lower the bar for acknowledgment. For example, the proposal:

- Without explanation allows criteria (c) to be fulfilled by showing a continuous line of leaders without any requirement to demonstrate that the “leaders” actually exercised political influence or authority, (§83.7(c)(2)(v)), when voluntary organizations like claims groups and fraternal organizations often possess a continuous line of leaders, but those leaders do not exercise political influence or authority over their organizations’ members.
- Without explanation allows historian and anthropological opinion as proof of tribal descent, (§83.7(e)), when such opinion without corroborating documentation may be mistaken, and would likely result in subsequent enrollment disputes in the event that a group were to be acknowledged on the basis of such evidence..
- Without explanation reverses Department policy and makes the existence of a state recognized reservation or the fact that the United States has held title to land in the name of a group all but dispositive without a showing that the group is the same group as the group for which the United States has held title to land, that the group is in fact a tribe, and that it has continuously maintained tribal existence. (§83.10(g)).

Having eliminated the requirement that a petitioner demonstrate continuous tribal social and political existence since first sustained contact and having weakened the remaining requirements for acknowledgment, the Department proposes to drastically lower the burden of proof that a petitioner must satisfy to meet the revised criteria. The discussion draft does so by requiring that

the Department view evidence in the light most favorable to petitioners. (§83.6(d)). This proposal prohibits the Department from utilizing its expertise to weigh the evidence and would allow a petitioner to satisfy the revised criteria in cases where expert evaluation and consideration of the totality of the evidence would result in the conclusion that the criteria for acknowledgment are not met.

While the proposed burden of proof might be appropriate to determine whether a petitioner is subject to an expedited negative determination, it is not appropriate in connection with a final decision on the merits of a petitioner's acknowledgment claim and the proposed revision should be rejected. If any change is made to the burden of proof it should be to replace the existing relaxed "reasonable likelihood" standard with the generally applicable burden of proof in civil matters, "a preponderance of the evidence."

The Muckleshoot Tribe opposes the changes in the standards discussed above that, if adopted, would grant acknowledgment to petitioners who have been denied acknowledgment, or who would be denied acknowledgment under the existing regulations. Indeed, all the proposal appears to require for a successful petition is the presentation of evidence – that when viewed in the light most favorable to the petitioning group – demonstrates that the group:

- a) Is primarily composed of the descendants of a historic tribe;
- b)
 - i) Has possessed a continuous line of leaders since 1934 and a means of selection or acquiescence by a majority of the group;¹ or
 - ii) Is composed of descendants of a historic tribe that was previously unambiguously acknowledged and presently has leaders and a means of selection or acquiescence by the majority of the group; or
 - iii) Has maintained a reservation recognized by a state since 1934; or
 - iv) Has had title to land held for it by the United States at any time since 1934 without a demonstration that it has maintained a continuous tribal existence and is the same group as that for which the United States' held title ;
- c) Is primarily composed of persons who are not members of an existing acknowledged tribe;
- d) Has a governing document or provides a written statement of its membership criteria and governing procedures; and
- e) Is not the subject of legislation terminating or forbidding the federal relationship.

¹ Because a demonstration of political influence is evidence of community for the same time period (§83.7(b)(1)(ix)), the proposal arguably permits a petitioner to satisfy both the community and political influence requirements by showing the existence of "leaders" without any showing that the leaders actually exercised political influence or authority over the group's membership.

Comments on Proposed Procedural Changes to the Acknowledgment Process

The Muckleshoot Indian Tribe strongly opposes the proposed changes to Part 83 that would permit previously denied groups to reapply for acknowledgment. (§§83.3(f), 83.10(r)). As noted earlier, Congressional criticism has focused on the timeliness, efficiency, and transparency of the acknowledgment process, not the standards applied or the outcome of acknowledgment decisions. Considerations of efficiency and finality support maintaining the existing prohibition on reapplication by groups previously denied. Indeed, such considerations support expanding that prohibition to bar groups from seeking acknowledgment under Part 83 that have previously been determined not to be a tribe by a final decision of the federal courts.

The discussion draft requests specific comment whether the Assistant Secretary or the Office of Hearings and Appeals should be responsible for making final acknowledgment determinations. The Tribe believes that the Assistant Secretary should retain authority to make final acknowledgment determinations and should be responsible for conducting any hearings held in connection with the process for two related reasons. First, the application of expertise in Indian Affairs is critical to the acknowledgment process given the historical and factual complexities presented by acknowledgment petitions. Outside of the Interior Board of Indian Appeals, the Office of Hearings and Appeals has little or no expertise in Indian Affairs. Delegation of decision making authority and responsibility for the conduct of hearings to OHA is likely to result in delegation of the Department's decision making responsibilities to an ALJ with little or no knowledge or background in Indian affairs. Second, OHA's lack of expertise is compounded by the fact that OFA is not tasked with defending its proposed decisions in the hearing and decision making process, making a hearing conducted before OHA, a decidedly one sided affair.

The Tribe is also concerned that the discussion draft while affirmatively granting petitioners the right to present evidence and argument, and cross examine witnesses, including OFA staff, does not accord similar rights to interested parties who may be affected by acknowledgment decisions. The Tribe believes that the Assistant Secretary should retain the responsibility for issuing final decisions and should be responsible for holding any required hearings, that OFA should be permitted to defend its preliminary determination in any hearing process, and that interested parties should be accorded full rights to participate in any hearing, including the right to present evidence and argument and cross examine witnesses. Finally, a hearing is only necessary and should only be permitted where a petitioner or interested party can identify a genuine dispute with respect to an issue of material fact, as the regulations presently provide.

Conclusion

As Chairperson Cross noted in her written comments at the Canyonville consultation, the discussion draft represents a threat to the sovereignty of all tribes. Without explanation the discussion draft repudiates longstanding Department policy and settled law and would permit

Hon. Kevin K. Washburn
September 12, 2013
Page 12

groups denied acknowledgment under the current regulations to successfully reapply. Rather than addressing the issues of timeliness, efficiency and transparency, the proposal dramatically reduces the substantive requirements for acknowledgement and would grant tribal status to groups of Indian descendants who have not maintained continuous existence as tribal social and political entities.

In the Muckleshoot Tribe's view the discussion draft does not begin to represent an appropriate starting point for revision of the acknowledgment process. Instead, the process of reviewing Part 83 should be restarted with a focus on procedural improvements to the regulations that retain the existing criteria for acknowledgment.

Sincerely,



Richard Reich
Tribal Attorney

Enclosures

cc: Muckleshoot Tribal Council
Senator Patty Murray
Senator Maria Cantwell
Representative Suzan DelBene
Representative Rick Larsen
Representative Jaime Herrera Beutler
Representative Doc Hastings
Representative Cathy McMorris Rodgers
Representative Derek Kilmer
Representative Jim McDermott
Representative David Reichert
Representative Adam Smith
Representative Denny Heck
Honorable Sally Jewell

**Section by Section Summary of Muckleshoot Tribe's Comments on 25 CFR Part 83
Discussion Draft**

§ 83.3(d) Proposed deletion of language limiting acknowledgment to groups that have functioned as autonomous tribal entities throughout history.

The Department has previously described the fundamental purpose of the acknowledgment process to be acknowledgment of groups that have maintained a continuous tribal existence since first contact. And, both the Department and the courts have emphasized that groups seeking acknowledgment are not entitled to a presumption of continued existence. The Department has noted that the Departmental acknowledgment process established in Part 83 does not create tribes from groups of descendants, nor grant sovereignty to such groups, but merely acknowledges groups that have demonstrated that they have continued to exist socially and politically as Indian tribes since the beginning of European settlement. The proposed revision to this section which strikes language limiting the process to groups that can demonstrate continuous existence throughout history is inconsistent with the nature and purpose of the acknowledgment process. It is doubtful that the Department has the authority to administratively acknowledge a group as an Indian tribe that cannot demonstrate continuous tribal existence since first sustained contact.

§§83.3(f) and 83.10(r) Proposed revisions which permit petitioners who have previously been denied acknowledgment under Part 83 to reapply under the revised regulations.

The proposed revisions allow groups that have previously been denied acknowledgment because they were unable to demonstrate substantially continuous existence to reapply and successfully petition for acknowledgment under new standards which no longer require proof that the group has continuously existed or is the same group as the historic tribe which the group claims to be. This change does nothing to increase the timeliness, efficiency, or transparency of the decision making process. Instead it will burden the process with new petitions from groups previously denied. Finally, and most importantly, the proposed change represents an abandonment and repudiation of 35 years of consistent Departmental policy. Instead of allowing petitioners that have unsuccessfully sought acknowledgment to reapply, the Department should revise the regulations to prohibit groups from seeking administrative acknowledgment that have been found not to qualify as Indian tribes by a final judicial decision on the merits of that issue, or alternatively, provide for an expedited negative determination on that basis.

§83.6(d)(1) Proposed revision to the burden of proof requiring that the Department view the evidence in the light most favorable to the petitioner.

Review of evidence in the light most favorable to petitioner inappropriately applies a legal standard used in connection with consideration of motions for summary judgment (e.g. courts and administrative agencies consider the evidence in the light most favorable to the nonmoving party in connection with motions for summary judgment) and imports it into the process of weighing all of the evidence in connection with a decision on the merits of an acknowledgment petition. Application of such standard would significantly limit, if not eliminate, the ability of the Department to utilize its expertise in weighing the evidence. While such a standard might be appropriate to determine whether a petitioner is subject to an expedited negative determination, it

is not appropriate in connection with a final decision on the merits of a petitioner's acknowledgment claim and the proposed revision should be rejected. If any change is made to the burden of proof it should be to replace the existing relaxed "reasonable likelihood" standard with the generally applicable burden of proof in civil matters, "a preponderance of the evidence."

§83.7(a) Proposed deletion of criteria (a) requiring that a petitioner demonstrate that it has been identified as an Indian entity since 1900 on a substantially continuous basis.

Groups that meet the social and political continuity requirements of criteria 83.7(b) and (c) should have little difficulty in meeting this criteria. There is therefore no reason for its elimination.

§83.7(b) Proposed revision of criteria (b) which currently requires that a group demonstrate that it has existed as a distinct community from historical times to the present, to limit the required showing of community to the period from 1934 to the present.

As the Department has previously recognized a showing of the existence of community or political influence and authority starting in 1934 tells one nothing about the nature or existence of a group prior to 1934. The proposed revision is inconsistent with the fundamental purpose of the acknowledgment process and should be rejected for the same reasons as the proposed revision to §83.3(d).

§83.7(c) Proposed revision of criteria (c) which currently requires that a group demonstrate that it has exercised political influence or authority over its members from historical times to the present, to limit the required showing of political influence or authority to the period from 1934 to the present.

The proposed revision should be rejected for the reasons stated in connection with §§83.3(d) and 83.7(b).

§83.7(c)(2)(5) Proposed addition of provision establishing that the existence of a continuous line of leaders and means of their selection by the group is without more sufficient evidence of the exercise of political influence or authority.

Voluntary claims groups, community and fraternal organizations typically have individuals that can be identified as leaders. The existence of individuals that can be identified as leaders does not tend to establish that the "leaders" exercised political influence or authority over the membership of these groups as a number of acknowledgment decisions by the Department make clear. The proposed change would render criteria (c) largely meaningless and should be rejected.

§83.7(e) Proposed addition of provision to allow historian and anthropological opinion as proof of tribal descent.

The proposal would allow unsupported opinions of historians and anthropologists as a substitute for primary evidence of tribal descent. The contemporary opinions of historians and anthropologists should not be a substitute for primary evidence of tribal descent for the purpose of meeting criteria (e). Moreover, acceptance of such evidence without corroborating primary

evidence of tribal descent would likely result in subsequent enrollment disputes in the event that a group were to be acknowledged.

§83.8 Proposed revision that eliminates the requirement that a group claiming previous unambiguous federal acknowledgment demonstrate that it is the same entity as previously acknowledged, and removes the requirement that persons identified as leaders of such groups actually have exercised political influence and authority since the time of last acknowledgment, as well as, the requirement that the petitioner provide at least one other form of evidence that the petitioner satisfies criteria (c).

The proposed changes eliminate the requirement of a showing of continuity between a petitioner claiming previous acknowledgment and the previously acknowledged historic tribe which petitioner claims to be. As the Department has found, groups claiming acknowledgment may not be the same group as a previously acknowledged historic tribe of the same name. A showing that the petitioner is the same group as previously recognized and has continuously existed since the time of last acknowledgment should remain a requirement of the acknowledgment process for the reasons stated in connection with §§83.3(d), 83.7(b) and (c).

§83.10(g) Proposed revision establishing a procedure for expedited positive findings if the group has maintained a reservation recognized by a state since 1934, or if the United State has held title to land for the group at any time since 1934.

In making the existence of a state recognized reservation all but dispositive, the Department once again without explanation abandons and repudiates longstanding policy. The fact that the United States may hold title to land for a group may be evidence of prior acknowledgment and should continue to be addressed under §83.8. However, whether addressed under a new expedited procedure or §83.8, a demonstration should be required that United States unambiguously holds title for a tribe, that the petitioner is the same entity as the tribe for whom the United States holds or held title, and that the group has continued to exist as a tribal political and social entity from the time that the United States last held title to land for it until the present.

§83.10(m)-(r) The Department seeks comment on whether the AS-IA or the Office of Hearings and Appeals (OHA) should act as the decision maker and hold any required hearings prior to final decision.

Outside of the IBIA, OHA has little or no expertise or experience with Indian Affairs and therefore is an inappropriate body to which to delegate decision making authority or responsibility for the conduct of hearings on petitions for acknowledgment. The Assistant Secretary should retain decision making authority, and a hearing should only be necessary and allowed where a petitioner or interested party can identify a genuine dispute with respect to an issue of material fact as the regulations presently provide. The discussion draft would appear to unnecessarily result in a full hearing on nearly every acknowledgment petition, increasing the burden on OFA and the parties, and further slowing the acknowledgment process.

§83.10(k) and (n)(2) Proposed revisions granting petitioners access to the record and the opportunity to present evidence and cross examine OFA staff.

The proposal limits access to the record to petitioners, requiring interested parties to obtain the record under FOIA and grants petitioners the right to present evidence and cross examine OFA staff without according similar rights to interested parties. Interested parties should be provided with access to the record to the same extent as petitioners, and should be accorded the same rights as petitioners to participate in any contested hearing and to present evidence and argument. However, as noted above a hearing should only be necessary and allowed where a petitioner or interested party can identify a genuine dispute with respect to an issue of material fact as the regulations presently provide.

**Muckleshoot Indian Tribe's
Remarks and Questions for Canyonville Consultation Meeting on the Proposed Revision of
Acknowledgement Process
July 23, 2013**

Good morning, I am Virginia Cross, Chairperson of the Muckleshoot Indian Tribe. The Muckleshoot Tribe appreciates the opportunity to consult with the Department of the Interior today on the Assistant Secretary's draft proposal to revise the regulations governing acknowledgment of groups as sovereign Indian tribes.

The Muckleshoot Tribe agrees that the acknowledgment process can be improved in the areas of timeliness, efficiency, and transparency of the decision making process. However, the problems in these areas are largely procedural in nature and can be addressed without a major revision of the regulations. Adequate staffing of the Office of Federal Acknowledgment, a reduction in the time expended by OFA staff on independent research to address gaps in research submitted by petitioners, adherence by petitioners and the Department to realistic timelines, development of new guidelines more clearly explaining the criteria for acknowledgment and the evidence necessary to satisfy those criteria, and similar measures would address most of the existing problems with the acknowledgment process.

Although a general consensus exists that procedural improvements in the acknowledgment process are needed, we are unaware of a similar consensus for changes in the existing acknowledgment criteria, which the Muckleshoot Tribe believes are appropriate and accurately reflect settled law and long standing departmental policy on the nature of tribal status. Unfortunately from the Tribe's viewpoint, the Assistant Secretary's proposal would dramatically change the existing acknowledgement criteria.

The proposal substantially lowers the threshold for acknowledgment by eliminating portions of the existing regulatory framework that limit the acknowledgment process to groups that can establish a continuous existence as functioning autonomous entities and weakening the existing criteria for acknowledgement. The proposal further lowers the acknowledgment threshold by requiring that the Department view evidence presented in support of a petition in the light most favorable to the petitioner, stripping the Department of its ability to carefully weigh conflicting evidence.

These changes would lead to the acknowledgment of voluntary groups of descendants who have not existed on a substantially continuous basis as tribal political entities, and have neither a history of self-government, nor a clear sense of identity. Groups of descendants that have been denied acknowledgment under the existing regulations, or who would be denied, would become eligible for acknowledgment under the Assistant Secretary's proposal.

The extension of tribal recognition to these groups which have not maintained a continuous existence as autonomous tribal political entities has the potential to redefine tribes as racial, rather than political entities. Moreover, because tribal sovereignty is based on the status of Indian tribes as sovereign political entities predating the establishment of the United States and

continuously existing to the present, the proposal seriously undermines the very foundation of tribal sovereignty and poses a threat to all tribes.

The Assistant Secretary's proposal appears to have been developed without input from recognized tribes, and provides little explanation for the drastic changes in the acknowledgment criteria that are proposed. Many of these changes are inconsistent with longstanding Department policy. Indeed, a number of the proposed changes in the acknowledgment criteria contained in the draft proposal have been previously considered and were expressly rejected by the Department on the ground that they would undermine the essential requirement that a petitioner demonstrate historic continuity of tribal existence.

We find the lack of a clear explanation for the Department's departure from past policies on acknowledgment very troubling. We also believe that the short consultation period scheduled in the middle of the summer and the inconvenient consultation locations chosen by the Department do not allow for the adequate consultation with Tribes on this important proposal. For example, many Northwest tribal leaders who might otherwise have attended this consultation meeting are presently participating in the annual canoe journey.

In summary, the Muckleshoot Tribe views the draft as a one sided proposal that without explanation lowers the standards for acknowledgment in a manner that threatens the sovereignty of all tribes. The Tribe believes the current proposal should be scrapped and a new proposal developed with appropriate tribal input that preserves the existing criteria and focuses on establishing a more timely, efficient, and transparent acknowledgment review process.

Given the lack of explanation provided for the major changes in the acknowledgment criteria contained in the draft proposal, we have a number of questions concerning the Department's current approach to acknowledgment and the draft proposal.

Questions

1. It has been the longstanding view of the Department supported by well settled case law that continuity of autonomous tribal political existence is the essential requirement for acknowledgment of tribal status.

Has the Department's position changed, and does the Department now believe that it has the authority to acknowledge groups to be sovereign Indian tribes that are unable to demonstrate substantially continuous existence as autonomous tribal political entities from the time of first sustained contact to present?

If yes, could you explain the basis for that claimed authority, and explain the reason why the Department has changed its position on the need for a showing of continuous existence.

If no, what is the reason for deleting the requirement that a group has functioned as an autonomous tribal entity throughout history from §83.3(d)? And, how does the ASIA's proposal maintain the requirement that groups eligible for acknowledgment are only those that have existed on a substantially continuous basis as autonomous tribal political entities from the time of first sustained contact to the present?

2. Under existing case law and the regulations, once a historic tribe ceases to exist, the fact that some descendants of the historic tribe may band together and seek to renew tribal activity does not entitle the group to acknowledgment.

Does the ASIAs proposal, if adopted, allow a group of descendants of a historic tribe that has not maintained a substantially continuous existence to be acknowledged as a presently existing sovereign Indian tribe entitled to a government to government relationship with the United States?

3. In 1994, the Department took the position that it could not presume continuity of tribal existence and specifically rejected 1934 as a starting point for demonstration of continuity of tribal existence.

Please explain the reasons for the change in the Department's position that is reflected in the ASIA's draft proposal?

4. The proposal establishes new burden of proof mandating that evidence be viewed in the light most favorable to the petitioner (§83.6(d)), eliminating the Department's authority to weigh conflicting evidence in making a determination. What is the rationale for this change? Why should the Department be precluded from weighing the evidence presented to it?

5. Under the existing provisions of §83.7(c) the existence of persons identified as leaders of a petitioning group was not by itself evidence that the identified leaders actually exercised political influence or authority over the petitioning group. Similarly, under the modified criteria of §83.8 evidence of existence of individuals identified as leaders was insufficient to satisfy modified criteria c, instead petitioners were required to show that the leaders actually exercised

political influence or authority, and provide one other type of evidence showing the exercise of political leadership or authority.

Is it now the Department's position that the existence of individuals identified as leaders is sufficient to satisfy the requirement of criteria c that a group has maintained political authority or influence over its members in a meaningful way?

In the Northwest after 1900, descendants of historic tribes banded together to pursue historic claims against the United States. Under the proposal is the existence of individuals who are identified in the historic record to be leaders of these groups sufficient to satisfy criteria c under the proposal without a further showing that the "leaders" actually exercised political influence or authority over the group in a meaningful way?

6. How does allowing a group previously denied acknowledgment the right to reapply under the new regulations promote efficiency and timeliness in the process?

7. The proposal eliminates the requirement that a group claiming previous acknowledgment demonstrate that it is the same entity previously acknowledged. In light of this proposed change how will the Department be assured that a petitioner seeking the benefit of previous acknowledgment is in fact the group previously acknowledged?

8. The proposal authorizes a hearing at which the petitioner may present evidence and cross examine OFA staff. Will other interested parties including recognized tribes have the right to present evidence and cross examine OFA staff at any hearing authorized under the proposal?

9. The longstanding policy of the Department has been that state recognition is not dispositive of the question of federal acknowledgment. What is the rationale for making the existence of a state recognized reservation dispositive.

10. It would seem that the Department might continue to hold land in the name of a historic tribe after it ceases to exist in a manner similar to that in which it may hold title to land for an individual Indian after his or her death. What is the rationale for the expedited recognition provision for groups claiming to be a tribe in whose name the US may have at some time since 1934 held title to land? What requirements are there if any that the petitioning group demonstrate that it is in fact the same group as that for which the US held title?