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Submitted To The

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

For

"Oversight Hearing on Federal Recognition: Political and Legal Relationship between Governments"

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Chairman Akaka, Vice Chairman Barrasso, and honorable members of the Senate Committee on Indian Affairs, good afternoon and thank you for the opportunity to testify on the federal recognition process. My name is Michael Anderson, and I am the owner of Anderson Indian Law and a member of the Muscogee (Creek) Nation. I have practiced law for twenty-eight years, and served for the past ten years as outside legal counsel to more than two dozen American Indian tribal governments. Before that, I served for eight years in the Clinton Administration at the United States Department of the Interior as Associate Solicitor for Indian Affairs and as Deputy Assistant Secretary for Indian Affairs.

I. SUMMARY

My testimony will discuss the three routes to federal recognition of Indian tribes: legislative, administrative, and judicial. Congress, in the Federal List Act, has recognized that tribes can be recognized through legislation, administrative procedures, and by court decisions.[1] Each of these methods must continue to be utilized. I will also discuss the inconsistent approach in recent Department of Interior policy with respect to its progressive interpretation of the evidence for determining whether a tribe meets the standard for "under federal jurisdiction" in land into trust matters versus its regressive interpretation of whether a tribe meets recognition criteria.

A. Legislative

- Congress recognizes tribes based on its authority under the United States Constitution.
- The United States can and has enacted legislation to recognize tribes.
- Congressional recognition is difficult for tribes because it is a political process, and, in particular, on the Senate side subject to potential filibuster roadblocks. Indeed, without the filibuster problem, perhaps a half dozen tribes or more could be recognized by Congress this session.
- The last Tribe to be recognized by Congress was over 10 years ago in 2000, the Shawnee Tribe of Oklahoma (Loyal Shawnee).

[1] FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, PL 103–454, November 2, 1994, 108 Stat 4791.

B. Administrative

- The Department of Interior recognizes tribes through the Federal Acknowledgment Process in the federal regulations at 25 C.F.R. Part 83.
- This process is lengthy, inconsistent, and expensive for tribes.
- Tribes can also organize under the Indian Reorganization Act's half-blood provision.
- A limited number of tribes that were recognized and mistakenly omitted from the list of federally recognized tribes also have been reaffirmed through administrative error correction. This occurs when tribes whose government-to-government relationship was never severed, lapsed, or administratively terminated are administratively reaffirmed and placed on the list of recognized tribes.

C. Judicial

- The U.S. Supreme Court developed common law standards for federal recognition in the 1901 case *Montoya v. U.S.*[2]
- For example, the Shinnecock Nation was recognized by a federal court using the *Montoya* standards, although that decision was appealed.
- While courts have been reluctant to step in to matters of federal recognition, they have the authority to do so.
- For example, after the federal government failed to live up to its obligations under the California Rancheria Act, a group of California tribes were judicially restored in the *Tillie Hardwick* and *Scotts Valley* cases, among others.

D. Administrative Policy

- The Department of Interior lacks a consistent approach to federal recognition.
- The Department took a progressive view of tribal history and federal interaction with the Tribe in the Cowlitz Record of Decision ("ROD"), in contrast to a narrow view of tribal history in the Final Determination Against Acknowledgment of the Juaneno Band.
- The Department should follow the policies and approach outlined in the Cowlitz ROD and apply them to recognition cases.

II. TESTIMONY

Congress has recognized that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court."[3] In addition, tribes can organize under the half-blood provision of the Indian Reorganization Act. Tribes that were mistakenly omitted from the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau

[2] *See Montoya v. United States*, 180 U.S. 261, 36 Ct.Cl. 577, 21 S.Ct. 358, 45 L.Ed. 521 (1901).
[3] FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, PL 103–454, November 2, 1994, 108 Stat 4791.

of Indian Affairs can also be reaffirmed as federally recognized tribes. All of these methods are valid ways to recognize or reaffirm tribes.

A. Congressional Recognition

Congress has the authority to recognize government-to-government relationships with Indian tribes under the U.S. Constitution, primarily based on the treaty clause and the Indian commerce clause. In a foundational case for Indian law, *Worcester v. Georgia*, the U.S. Supreme Court states "our existing constitution…confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with Indians."[4] Congress historically recognized tribes treaties and through legislation. Only Congress has the power to terminate the government-to-government relationship with a tribe. The last tribe to be recognized through congressional legislation was the Shawnee Tribe of Oklahoma in 2000 (Loyal Shawnee).[5] Regrettably, the United States Senate filibuster process has derailed the potential recognition of tribes in this session of Congress. Unfortunately, some Senators believe only the Department of Interior, and not Congress, should acknowledge tribes.

B. Administrative Recognition

The executive branch has historically and continues to be heavily involved in federal recognition. Some tribes were recognized through executive orders.[6] In addition, the President negotiated treaties, subject to ratification by the Senate.[7]

Authority for federal recognition was also implicitly delegated by Congress to the executive branch. This authority flows from the President to the Secretary of the Interior to the Bureau of Indian Affairs. The Department of Interior issued regulations, found at 25 C.F.R. Part 83, for the Federal Acknowledgment Process (FAP) in 1978 and revised them in 1994. While the procedural process is clearly stated, the implementation of the acknowledgment process is widely recognized as broken. The process is extremely lengthy and burdensome to the petitioners. Tribes have to wait years and even decades for decisions on their petitions. The process leaves the opportunity for inconsistent application of the criteria while also suffering from the problem of applying a one-size-fits-all standard to tribes with widely varying histories and circumstances. While a new federal commission on recognition could be desirable, little congressional support for such a program exists. Given the likelihood that the current Office of Federal Acknowledgment will continue, the best opportunity for qualified tribes to achieve recognition is through fair application of the criteria.

The Indian Reorganization Act also allows tribes to organize under what is known as the "half-blood provision." "Any Indian tribe shall have the right to organize for its common welfare,

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[4] *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (emphasis in original).
[5] P.L. 106-568 (Dec. 27, 2000).
[6] *California Valley Miwok Tribe v. United States*, 515 F. 3d 1262, 1263 (D.C. Cir. 2008).
[7] Felix S. Cohen, Cohen's Handbook of Federal Indian Law 2005 edition.

and may adopt an appropriate constitution and bylaws, and any amendments thereto."[8] This shall become effective when ratified by the Tribe and approved by the Secretary. "The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."[9]

Another way a small set of tribes has been acknowledged is by administrative error correction by the Department of Interior. This is for tribes whose government-to-government relationship was never severed, but through administrative error the tribes did not appear on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, periodically published in the Federal Register.[10] These tribes were never administratively terminated and their government-to-government relationship had not lapsed. Rather than a new recognition, this is a reaffirmation of the government-to-government relationship. Thus, a process similar to that under 25 C.F.R. Part 83 is not required. The statuses of the Lower Lake Rancheria Koi Nation, the Ione Band of Miwok Indians, the King Salmon Tribe, the Shoonaq' Tribe of Kodiak, and most recently the Tejon Indian Tribe were appropriately corrected this way.

In a unique situation involving Alaska Native Tribes, on October 21, 1993, the Department issued its list of tribes in the United States eligible for services from the Department. The list named the Alaska villages recognized under the Alaska Native Claims Settlement Act as tribes, and specifically stated that they have "all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."[11] The over 220 tribes acknowledged in that notice did not achieve recognition through the Office of Federal Acknowledgment, which would have taken decades, but rather through the Department's interpretation of congressional statutes, policies, and directives, which collectively affirm Alaska Native government sovereignty.

In another case, the Muwekma Tribe of California also sought to be reaffirmed to federal recognition for many years. The Verona Band (that the Muwekma Tribe directly descends from) was federally recognized and was not legally terminated, which the Department of Interior acknowledged. The Muwekma Tribe first informed the Department of Interior that it would petition for federal acknowledgment in 1989. The Tribe submitted a formal petition for acknowledgment in 1995, with thousands of pages of supplemental materials. The petition was evaluated under the modified federal acknowledgment regulations at 25 C.F.R. § 83.8. The Department, notwithstanding a solid record of Muwekma's history as a tribe, found that Muwekma "failed to provide sufficient evidence to the Department that it 'has been identified as

[8] 25 U.S.C.A. § 476
[9] 25 U.S.C.A. § 479
[10] First published at 44 Fed. Reg. 7,235 (Feb. 6, 1979).
[11] 58 FR 54364-01(Oct. 21, 1993).

an American Indian entity on a substantially continuous basis since' 1927, when the Verona band was last recognized by the federal government."[12]

Muwekma requested that the Department reaffirm its status through administrative error correction, as it had done with Lower Lake Rancheria Koi Nation and the Ione Band of Mission Indians. The Department refused to do so, and Muwekma sued the Department. As a result of that claim, the Court directed the Department to provide an explanation for why the Part 83 procedures were waived for Lower Lake and Ione but not for Muwekma. If the Tribes were similarly situated, they should have been granted the same waiver. Courts are granted limited review of agency decisions, so the Court could only direct the Department to justify the difference in treatment, rather than reviewing Muwekma's evidence submitted to the Department itself and making its own determination. The Department pointed to a pattern of federal dealings with Ione and Lower Lake, which the Department did not believe it similarly had with Muwekma or Verona band after 1927. The Court found the Department's explanation as to why Muwekma was treated differently sufficient. The important distinction, in the view of the Department, was that the federal government interacted with Lower Lake and Ione as tribes, and Muwekma's evidence only showed interaction with Indian individuals. Although Muwekma presented solid and verifiable evidence, the Department interpreted the evidence only as relevant to individuals rather than the tribe. The Court did, however, confirm the Department's authority to waive regulations under 25 C.F.R. § 1.2, and spoke positively about the reaffirmation process.

C. Judicial Recognition

The courts have also been involved in federal recognition in different ways. In *Worcester v. Georgia*, the U.S. Supreme Court affirmed the Cherokee Nation's status as a federally recognized tribe, based on treaties and Acts of Congress, in the context of federal authority over Indian affairs as opposed to state authority: "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[13]

There are also common law standards for recognition of Indian tribes. In *Montoya*[14] and *Golden Hill*,[15] the Supreme Court and Second Circuit, respectively, considered whether to recognize certain Indians as Tribes without waiting for recognition by the United States.[16] The U.S. Supreme Court defined an Indian Tribe in *Montoya* as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[17] The Shinnecock Nation was a tribe

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[12] *Muwekma Ohlone Tribe v. Salazar*, No. 03-1231, at 5 n.3 (D.D.C. Sept. 28, 2011).
[13] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)
[14] *See Montoya v. United States*, 180 U.S. 261, 266, 36 Ct.Cl. 577, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901).
[15] *Golden Hill Paugusett Tribe of Indians v. Weicker*, 39 F.3d 51 (2d Cir. 1994).
[16] *New York v. Shinnecock Indian Nation*, No. 03-CV-3243 (D. N.Y. Nov. 7 2005).
[17] *Montoya*, 180 U.S. 261, 266 (1901).

recognized by a federal court using the Montoya standards: "The cases described above, beginning with Montoya and continuing to the present, establish a federal common law standard for determining tribal existence that the Shinnecock Indian Nation plainly satisfies."[18] Although the Court found that the Shinnecock Nation met the common law standards for federal recognition, the Nation later became engaged in an administrative recognition process under the Department of Interior. The Department made a final determination on the Tribe's petition in 2010.[19]

A group of California tribes were also restored judicially in *Tillie Hardwick.*[20] Forty-one tribes were terminated by the California Rancheria Act in 1958.[21] The Act required that a distribution plan be made for each tribe and other actions be taken, including the construction of water delivery systems.. Upon compliance with these requirements, the tribes were to be terminated. In 1979, distributees from thirty-four of the tribes sued the United States for violation of the Rancheria Act for failing to satisfy the obligation of the Act and to inform the distributees that they would no longer have access to federal programs and protections.[22] The parties entered into a Stipulation for Entry of Judgment in 1983, restoring federal recognition to seventeen of the tribes. A similar court approved settlement, in *Scotts Valley Band of Pomo v. U.S.*, restored other tribes in 1992.[23] Since then, other tribes in California terminated by the Rancheria Act have also been restored by judicial stipulation.

D. Administrative Policy

The Department of Interior historically and currently lacks a consistent approach to matters of federal recognition and how evidence showing recognition or federal jurisdiction should be viewed. The Department has employed progressive standards in the Record of Decision ("Cowlitz ROD") for a trust acquisition and reservation proclamation for the Cowlitz Indian Tribe[24] and regressive standards in the Final Determination Against Acknowledgment of the Juaneno Band of Mission Indians ("Juaneno Determination").[25] These decisions show an inconsistent approach to how the government interprets federal/tribal interactions. In the Cowlitz ROD the Department of Interior dealt with the question of whether the Tribe was under federal jurisdiction, and in the Juaneno Determination, the Department evaluated whether the Juaneno Band met the standards for recognition in 25 C.F.R. Part 83, however, a comparison of the two is useful to show the Department's varying approach to similar evidence.

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[18] *New York v. Shinnecock Indian Nation*, No. 03-CV-3243 (D. N.Y. Nov. 7 2005).
[19] 75 Fed. Reg. 34760 (June 18, 2010).
[20] *Tillie Hardwick, et al. v. United States of America, et al.,* No. C-79-1710 (N.D.Cal.).
[21] Pub.L. 85-671 (72 Stat. 619)
[22] *Tillie Hardwick, et al. v. United States of America, et al.,* No. C-79-1710 (N.D.Cal.).
[23] *Scotts Valley v. United States* (Final Judgment), No. C-86-3660-VRW (N.D. Cal. April 17, 1992).
[24] United States Department of Interior, Record of Decision Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (Dec. 2010) ("Cowlitz ROD").
[25] Larry Echo Hawk, Assistant Secretary – Indian Affairs, Final Determination Against Acknowledgment of the Juaneno Band of Mission Indians, Acjachemen Nation (Petitioner #84A) (March 15, 2011) ("Juaneno Final Determination").

In Cowlitz, the Department evaluated the question of "under federal jurisdiction" in the context of the Indian Reorganization Act with the goal of taking land into trust. The Department interpreted the evidence needed for course of dealings and superintendence in a very broad fashion. Support for federal superintendence and sovereign status was found in treaty negotiations (even for unratified treaties) census records, BIA expenditures for tribe and individual Indians, placement of Indian children in BIA schools, hiring of attorneys to protect land rights of individual members of a tribe, supervision of allotment sales, funeral expenses for individual members, protection of water rights and other trust assets.[26] A federal attorney contract, according to the opinion, demonstrates the Tribe did not lose jurisdictional status at that point. The Cowlitz were federally acknowledged on February 14, 2000, and their acknowledgement was reaffirmed in 2002. So in the ROD, the Secretary assessed whether the Tribe was under federal jurisdiction in 1934 to determine if the IRA would apply. The attorney contracts were viewed as robust evidence of federal jurisdiction in the Cowlitz ROD.

In Juaneno, the Department evaluated whether there were instances of third party acknowledgement of the tribe under 25 C.F.R. § 83.7 for the purposes of federal recognition. Juaneno, while claiming it also had attorney contracts, did not have a copy of the actual attorney contracts. The Tribe claimed a letter from the Commissioner could be construed as an approval of attorney contracts but that letter was not produced either. Notably, the Office of Federal Acknowledgment ("OFA") did not produce this document either, even though this is a government record. OFA then dismissed this claim as self-identification. Although the Final Determination notes that the evidence of attorney contracts was not evaluated because the actual documents were not produced, it is further noted that "such correspondence merely repeats self-identifications and is not considered identifications under this criteria."[27] In stark contrast, the Cowlitz ROD states "This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to the statutory requirement for Department supervision of its attorney contracts, and thus 'under federal jurisdiction.'" This is supported by a 1948 Solicitor's Opinion construing the 1946 Claims Act as allowing only claims if "political recognition had been accorded to the particular Indian groups asserting them."[28]

In the Cowlitz ROD, the Department used BIA activities for both the tribe and for individual Indians to find "under federal jurisdiction" activity. Importantly, the Department also said the federal government must find probative/affirmative evidence that a tribe was terminated before it can conclude the tribe was not under federal jurisdiction. This correctly shifts the burden to the Department to find such evidence of termination rather than placing the burden on the tribe.

This confusion in the Department's approach leaves the Department open to challenges of its decision-making, which is detrimental both to the Department and the Tribe. For example, the Confederated Tribes of the Grand Ronde Community of Oregon sued the Department for its decision to take land into trust for the Cowlitz Tribe. Grand Ronde's motion for summary judgment attacks the Secretary of the Department of the Interior on his explanation that the term

[26] *See* Cowlitz ROD.
[27] Juaneno Final Determination at 21.
[28] U.S. Dept. of Interior, Sol. Op. No. M-35029 (Mar. 17, 1948).

"recognized" has been used in various senses.[29] The Department has a variety of tools to recognize, reaffirm, or show that a tribe was under federal jurisdiction. The approach developed in the Cowlitz ROD show an approach to characterizing government-to-government relationships that better meets the evolving standards of federal/tribal interaction. This approach should be consistent for all tribes, including those seeking recognition.

[29] *The Confederated Tribes of the Grand Ronde Community of Oregon v. Ken Salazar*, No. 11-cv-00284, Plaintiff's Motion for Summary Judgment (June 20, 2012).