

## Origins and Development of the Mandatory Criteria within the Federal Acknowledgement Process

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**Introduction**

While 566 Indian tribes currently have status as “recognized” or “federally acknowledged,” hundreds of other Indian groups remain nonexistent, ineligible for government services, denied their sovereignty, and dismissed by courts.<sup>1</sup> Groups applying for federal recognition face a long and frustrating process with little chance of a favorable outcome. Most petitioning groups spend years, or even decades, awaiting decisions.<sup>2</sup> The lengthy waiting period drives up the cost of taking a petition to finality, which can run from hundreds of thousands of dollars to many millions.<sup>3</sup> Much of the cost of a petition is spent on research and expert opinions. Volumes of documentary support are required of petitioners chronicling the genealogy, ethno-history, and political life of the group seeking recognition.<sup>4</sup> Some of this information is personally and culturally private, made public to be scrutinized for how it conforms to the non-native’s stereotype of the “ideal tribe.”<sup>5</sup>

How all this information is analyzed and evaluated is a source of perpetual dismay. Critics charge that the process produces inconsistent results, that there is no clear standard of evidence, and that the criteria are interpreted inconsistently.<sup>6</sup> One of the ironies is that in order to meet the criteria, groups must prove social and political qualities that are precisely those that the federal government sought to eradicate

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<sup>1</sup> “Indian tribe, also referred to herein as tribe, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe”; “Indian group or group means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.” 25 C.F.R. § 83.1 (2005).

<sup>2</sup> The issue of time has been the subject of ongoing reforms, as well as litigation for unreasonable delay. See, e.g., *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 33 (D.D.C. 2000).

<sup>3</sup> Though grants are available, they are insufficient, leading some groups to seek external funding, such as by investors who hope to capitalize on the business potential of the future sovereign tribe.

<sup>4</sup> Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1840 (2003).

<sup>5</sup> *Id.* at 1842.

<sup>6</sup> See generally Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991).

or reshape in the era of assimilation.<sup>7</sup> The political coherency and continuity demanded of the acknowledgment criteria are unlikely to be visible after these colonialist tactics.

The most common criticism of recognition is that the process is far too political.<sup>8</sup> Recognition is a competition for scarce federal Indian resources, which leads the government and already recognized tribes to ally against the inclusion of others.<sup>9</sup> Tribes are pitted against petitioning groups who threaten their local gaming monopoly, or will diminish their federal services. Siding with recognized tribes are local governments concerned about the removal of land from their tax base and into federal trust.<sup>10</sup> Parties completely outside the recognition process argue that a threat exists that truly non-Native groups will seek, or even gain, federal recognition, not to claim Bureau of Indian Affairs (“BIA”) resources, but instead, to find a way around state law in which they can open casinos. *(Source Support? What Parties?)*

It is perhaps the fear that the government may recognize groups that are not “real” Indians that sustains the difficult path petitioners must tread. It is my contention that the Federal Acknowledgment Process (“FAP”) is about authentication and certifying “real” tribes. The primary authority for such certification has been anthropology. American anthropology emerged from the study of, and administration to, American Indians in the 19th century. As the discipline grew, it formulated notions of tribal society and tribal identity in dialectic with the fields of law and government. This paper will explore that dialectic, pulling out the anthropological origins of the Mandatory Criteria for federal recognition. The elements of recognition Criteria today, as much as the elements of their predecessors, illustrate core principles of what 19th century social scientists imagined in small scale societies as the counterpoint to their own complex, modern world. These principles include distinctiveness, boundedness, cohesion and solidarity, and the essentialist bundling of race, language, culture, and geography.

## II. The Nature of Recognition

Since the Federal Acknowledgment Process (“FAP”) was created in 1978, 350 groups have stated

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<sup>7</sup> See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Bobbs-Merrill 1982)

<sup>8</sup> Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 493 (2006) (reviewing RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (University of Oklahoma Press 2005); MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS (University of Nebraska Press 2004)).

<sup>9</sup> See *id.* at 500.

<sup>10</sup> See *id.*

their intention to apply for recognition.<sup>11</sup> However, only eighty-four have submitted completed petitions.<sup>12</sup> As of April 29, 2011, seventeen tribes have been acknowledged through the process while thirty-two groups have been denied status.<sup>13</sup> Congressional recognition or restoration has been conferred upon nine tribes, ten were withdrawn, merged, removed, or dissolved, and another three petitions have been resolved by unique means.<sup>14</sup> Thirteen petitions are within the office's current workload, nine of them "active status" and four "ready status."<sup>15</sup> Of the resolved petitions, two are being litigated (Duwamish and Muwekma Ohlone).<sup>16</sup>

"Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government."<sup>17</sup> A tribe that is newly recognized, or is restored to a status of recognition, is not the recipient of a Congressional delegation of authority. Instead, the inherent sovereign powers of a tribal entity, seen as predating the United States itself, are acknowledged as retained.<sup>18</sup>

Establishment of the government-to-government relationship is significant. Federal recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to tribes," and to the "immunities and privileges available to other federally acknowledged Indian tribes."<sup>19</sup> These benefits include access to a full range of services offered by the BIA, including programming in health and human services, education, housing, economic development, agriculture, natural resources, and more.<sup>20</sup> More importantly, recognition is about the reassertion of a dormant tribal sovereignty. As flowing from the powers inherent in tribal self-government, recognized tribes may tax, regulate, establish

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<sup>11</sup> BUREAU OF INDIAN AFFAIRS, LETTERS OF INTENT RECEIVED AS OF JULY 31, 2012 (2012), *available at* <http://www.bia.gov/cs/groups/xofa/documents/text/idc-020609.pdf>.

<sup>12</sup> BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2011), *available at* <http://www.bia.gov/idc/groups/xofa/documents/text/idc013624.pdf> (last visited May 20, 2012).

<sup>13</sup> *Id.* at 4-5.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1, 7.

<sup>17</sup> COHEN *supra* note 7; *Montoya v. United States*, 180 U.S. 261, 266 (1901).

<sup>18</sup> Tribal sovereignty, while of a "dependent" nature, has been recognized consistently by the Court. *See generally* *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981).

<sup>19</sup> 25 C.F.R. § 83.2 (2005).

<sup>20</sup> *Indian Affairs: What We Do*, U.S. DEP'T OF THE INTERIOR, <http://www.bia.gov/WhatWeDo/index.htm> (last visited May 5, 2001). However, note that not all of these benefits are limited to federally recognized tribes.

their own judiciary, and enjoy sovereign immunity from suit.<sup>21</sup> They also gain immunities from most state and local laws, regulations, and taxes within tribal territory, including state regulations or prohibitions on gambling.<sup>22</sup> Many tribes have taken advantage of this last exemption and entered into gaming compacts with states through the Indian Gaming Regulatory Act of 1988.<sup>23</sup> Tribes have developed a multi-billion dollar Indian gaming industry that allows some tribes to fund a vast number of governmental programs themselves,<sup>24</sup> ultimately providing for the health and welfare of their citizens.

### III. History of the Federal Acknowledgement Process

Federal power to recognize Indian tribes flows from the Commerce Clause.<sup>25</sup> Prior to 1871, Congress entered into treaties with Indian nations that it recognized as sovereign. When treaty making ended in 1871, executive orders, agreements, and legislation became the primary means through which the federal government announced its recognition of a tribe.<sup>26</sup> Today, administrative recognition (through the FAP) is the primary means an unacknowledged group must use to gain status. However, recognition can still be achieved by court decision and federal legislation.<sup>27</sup>

The impetus for formalizing the recognition process was, ultimately, Native American. A wave of litigation stemming from the Indian rights movement sought to awaken dormant rights in old treaties. For example, in the 1970's thirteen tribes, some of which were unrecognized, filed suit against the State of Washington, seeking off-reservation treaty fishing rights.<sup>28</sup> The action put pressure on the BIA to lay down guidelines for recognition of tribal status. Congress, pressured by broader activism from Native Americans, established the American Indian Policy Review Commission ("AIPRC") to investigate

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<sup>21</sup> Steven L. Pevar, *the Rights of Indians and Tribes*, 4<sup>th</sup> ed., Oxford University Press, 81-109.

<sup>22</sup> See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>23</sup> See generally Blake A. Watson, *Indian Gambling in Ohio: What are the Odds?*, 32 CAP. U. L. REV. 237 (2003).

<sup>24</sup> See, e.g. National Indian Gaming Commission [http://www.nigc.gov/Media/Press\\_Releases/2011\\_Press\\_Releases/PR-175\\_07-2011.aspx](http://www.nigc.gov/Media/Press_Releases/2011_Press_Releases/PR-175_07-2011.aspx)

<sup>25</sup> U.S. CONST. art I § 8, cl. 3.. See also COHEN, *supra* note 7. See generally Mark D. Meyers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271.

<sup>26</sup> COHEN, *supra* note 7, § 1.03 (9).

<sup>27</sup> The Federally Recognized Indian Tribe List Act of 1994, (codified at 25 U.S.C. § 479a (2006)). Section 103(3) of that Act provides: "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulation denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court."

<sup>28</sup> See generally *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974); John W. Ragsdale, *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. REV. 311, 322 (2000).

problems in Indian country, including recognition.<sup>29</sup> AIPRC's report criticized the lack of a consistent recognition process in the BIA.<sup>30</sup> While legislation was proposed to correct this problem, it was never enacted.<sup>31</sup> Instead, in 1978, the Department of the Interior, under powers delegated by 25 U.S.C. § 9 authorizing the president to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," promulgated regulations governing the federal recognition process. These regulations were codified at 25 C.F.R. §§ 83.1- 83.13.

In 1994, the BIA issued its revised Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.<sup>32</sup> The revisions included (1) clarifying the requirements for acknowledgement and the evidentiary standard, (2) easing the burden of proof for those with prior acknowledgment, (3) new timelines and reduced workloads, aiming to quicken the petition review process, and (4) the addition of an appeals process under the Interior Board of Indian Appeals.<sup>33</sup> In addition to the recommendations on how to satisfy the requirements for acknowledgement, the Office of Federal Acknowledgement ("OFA") has produced a precedents manual, which presents evidence from petitions that both met and did not meet criteria.<sup>34</sup>

#### IV. The Petitioner's Road

The OFA, within the Office of the Assistant Secretary--Indian Affairs ("AS-IA") of the Department of the Interior, implements 25 C.F.R. part 83.<sup>35</sup> The AS-IA has the authority to acknowledge or deny tribal existence and the government-to-government relationship.<sup>36</sup> The OFA applies "anthropological, genealogical, and historical research methods" to verify and evaluate petitions.<sup>37</sup> It also "consults with petitioners and third parties," and makes the proposed and final determinations.<sup>38</sup>

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<sup>29</sup> TASK FORCE TEN, AMERICAN INDIAN POLICY REVIEW COMM'N, 94<sup>TH</sup> CONG., 2D SESS., REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (1976).

<sup>30</sup> Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 872 (2005).

<sup>31</sup> Paschal, *The Imprimatur of Recognition*, *supra* note 7 at 212.

<sup>32</sup> 59 Fed. Reg. 9280 (Feb. 25, 1994).

<sup>33</sup> *Id.* The appeals process is described at 25 C.F.R. § 83.11 (2005).

<sup>34</sup> U.S. DEPT. OF THE INTERIOR, OFFICE OF FED. ACKNOWLEDGEMENT, ACKNOWLEDGEMENT PRECEDENT MANUAL 7 (2002), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001216.pdf> [hereinafter ACKNOWLEDGMENT PRECEDENT MANUAL].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

The scope of the FAP is limited to unacknowledged groups indigenous to the continental U.S. that “can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.”<sup>39</sup> Groups that have splintered off from recognized tribes, or factions that wish to separate, cannot use the FAP.<sup>40</sup> Terminated groups cannot use the FAP.<sup>41</sup>

The formal recognition process begins when a petitioner submits a letter of intent.<sup>42</sup> The BIA will then work with the group on completing its petition, if needed, and exceptionally weak petitions can be weeded out of the process.<sup>43</sup> The “active consideration” period consists of internal review of submitted materials, as well as independent research initiated by the Assistant Secretary “for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner’s status.”<sup>44</sup> This can include consideration of “any evidence which may be submitted by interested parties or informed parties,”<sup>45</sup> as well as original ethnographic fieldwork on the petitioners by BIA anthropologists. Within a year of the start of active consideration, or later if an extension is needed, the AS-IA is required to publish, in the Federal Register, and distribute to interested parties, a report of the proposed findings, including its “reasoning, analyses, and factual basis.”<sup>46</sup> This begins the 180-day public comment phase, in which “any individual or organization wishing to challenge or support the proposed findings” can submit arguments to the AS-IA.<sup>47</sup> At the conclusion of the comment phase, petitioners are given additional time to respond to any comments, after which, the AS-IA sets an “equitable timeframe for consideration of written arguments and evidence submitted during the response period.”<sup>48</sup> Only after all of the above mentioned steps are complete, will the final determination be issued. Petitioners must satisfy *all* criteria in § 83.7 (a)-(g) “for tribal existence to be acknowledged.”<sup>49</sup>

After the final determination is issued, petitioners (or any interested party) may file a request for reconsideration with the Interior Board of Indian Appeals.<sup>50</sup> The Board has the authority to review requests that allege: (1) “new evidence that could affect the determination,” (2) “that a substantial portion

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<sup>39</sup> 25 C.F.R. § 83.3 (2005).

<sup>40</sup> *Id.* § 83.3(d).

<sup>41</sup> *Id.* § 83.3(e).

<sup>42</sup> *Id.* § 83.4.

<sup>43</sup> See 25 C.F.R. § 83.5; see also *id.* § 83.10 (“technical assistance review”).

<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 25 C.F.R. § 83.10.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 83.6 (c).

<sup>50</sup> *Id.* § 83.11.

of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value," (3) that the BIA's research "appears inadequate or incomplete in some material respect," or (4) "that there are reasonable alternative interpretation, not previously considered, of the evidence used for the final determination, that would substantially affect" satisfaction any of the criteria.<sup>51</sup> The AS-IA's findings will be affirmed unless the requesting party establishes at least one of these grounds by the preponderance of evidence.<sup>52</sup> The Board also has the authority to request outside expert comments, technical advice, and recommendations.<sup>53</sup>

## V. The Judicial Route to Recognition

As noted earlier, nine petitions have been resolved by Congress (as recognitions or restorations) since the FAP began.<sup>54</sup> Judicial recognition has been far more difficult to achieve than congressional recognition. Some unrecognized groups have sought to bypass the FAP and gain recognition in the courts. Also, many petitioning groups that have been denied recognition through the FAP have sought judicial review under the Administrative Procedure Act ("APA").<sup>55</sup> The APA gives federal courts jurisdiction to review agency decisions, and since the establishment of the FAP, the courts have consistently seen recognition as an administrative action. However, no petitioning group has succeeded in convincing a court to overturn an OFA finding against recognition. As critics point out, "[t]he doctrines of exhaustion, primary jurisdiction, and judicial deference have prevented the judiciary from hearing the substantive cries of unrecognized tribes."<sup>56</sup>

The Burt Lake Band of Ottawa and Chippewa is one group that has filed suit to have the BIA place it on the list of federally recognized tribes, arguing that they had already been recognized in two treaties.<sup>57</sup> The court refused, saying that the group had failed to exhaust the administrative remedies available for recognition.<sup>58</sup> The court cited *James* and *United Tribe of Shawnee Indians*, both of which noted that despite the evidence of recognition, the courts will not take judicial steps to complete the FAP on behalf

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<sup>51</sup> *Id.* § 83.11(d).

<sup>52</sup> *Id.* § 83.11.

<sup>53</sup> *Id.* § 83.11(e)(3).

<sup>54</sup> STATUS SUMMARY OF ACKNOWLEDGMENT CASES, *supra* note 12.

<sup>55</sup> 5 U.S.C. § 702 (2004) (the challenging party must prove the agency's action was arbitrary and capricious).

<sup>56</sup> Mather, *supra* note 4, at 1853.

<sup>57</sup> *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 78 (D.D.C. 2002).

<sup>58</sup> *Id.* at 79.

of a petitioner.<sup>59</sup> Both the *Schaghticoke* and *Golden Hill* courts argued that judicial deference was needed to bring conformity to the recognition process, and deter excessive litigation.<sup>60</sup> Similarly, in *James*, the court invoked primary jurisdiction to remand the recognition determination of a group to the DOI, arguing “judicial determinations of Indian status would frustrate the congressional delegation of this authority to the DOI.”<sup>61</sup> Two tribes, the Miami Nation and the United Houma Nation (“UHN”), have challenged determinations against recognition.<sup>62</sup> In both cases, complete deference was given to the FAP such that “the judiciary did not even attempt to inquire into the factual and historical circumstances surrounding the Miami Nation and UHNs current unrecognized status.”<sup>63</sup>

Although the courts have deferred to the BIA as the authority on tribes and recognition, Congress has not granted the BIA greater recognition power than it has granted to federal courts. Congress has stated that both the BIA and federal courts may recognize tribes.<sup>64</sup> Under the Federally Recognized Indian Tribe List Act, the only action required of the BIA is the publication of the list.<sup>65</sup> As Congress noted, in critiquing then recent actions by the BIA, “[w]hile the Department clearly *has a role* in extending recognition to previously unrecognized tribes, it does not have the authority to ‘derecognize’ a tribe.”<sup>66</sup> The BIA has a *role* only in extending recognition- they can’t take away recognition. Furthermore, courts have as much power to recognize tribal groups as the OFA and Congress. Yet, courts have declined to accept their recognizing role, and have instead consistently deferred to the BIA.

## VI. Evidence in 25 C.F.R. § 83

One major complaint regarding the regulations, as they were first promulgated, was a lack of clarity regarding evidence. Part 83.6(d) states, in part, that “[a] criterion shall be considered met if the

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<sup>59</sup> *James v. United States Dep’t of Health and Human Serv.*, 824 F.2d 1132, 1136-37 (D.C. Cir. 1987); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001).

<sup>60</sup> *Mather*, *supra* note 4, at 1850-52; *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 194 (D. Conn. 1999). *See generally* *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008); *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 197-98 (D. Conn. 2006).

<sup>61</sup> *Mather*, *supra* note 4, at 1850 (citing *James v. United States Dept. of Health & Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987)).

<sup>62</sup> *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 744 (N. D. Ind. 2000); *United Houma Nation v. Babbitt*, No. CIV. A. 96-2095, 1997 WL 403425 (D. D.C. 1997).

<sup>63</sup> *Mather*, *supra* note 4, at 1848.

<sup>64</sup> 25 U.S.C.A. § 479a.

<sup>65</sup> *Id.*

<sup>66</sup> H.R. REP. NO 103-781, at 3 (1994) (emphasis added).



available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.”<sup>67</sup> The 1994 revision sought to “make explicit the kinds of evidence which may be used to meet the criteria,” but without altering the general standards for interpreting evidence laid out in the regulations.<sup>68</sup> Numerous commenters wanted the FAP to use the preponderance standard, which is common in administrative agencies, instead of “reasonable likelihood of validity.”<sup>69</sup> However, this standard was rejected. The BIA reasoned that under preponderance, the fact finder weighs evidence for and against.<sup>70</sup> However, in acknowledgment, there is usually evidence for, which is scanty or full of gaps, and no evidence against. Therefore, the preponderance standard is inappropriate for acknowledgement.<sup>71</sup> Under § 83, a criterion is established if the evidence passes a certain threshold, regardless of negative evidence.<sup>72</sup> Negative evidence does not detract, and the absence of negative evidence does not lend support. This reflects the fact that the burden of proof is on the petitioner.

The revisions to the regulations added language to describe the kinds of specific evidence considered sufficient to demonstrate that a criterion has been met.<sup>73</sup> The new language also clarified that the lists of specific evidence added do not amount to a test that petitioners must meet; instead, they are merely illustrative.<sup>74</sup> Evaluation takes into consideration the fact that evidence from certain time periods, and due to historical circumstances, may be demonstrably limited or unavailable.<sup>75</sup> It also considers the difficulty of showing continuity and political influence at various points.<sup>76</sup> The purpose of this change was to address concerns about gaps in the historic record, obviously a problem for marginalized peoples, and fluctuations in the level of tribal activity, whether caused by suppression or diminishment of tribal political relations.<sup>77</sup> During the 1994 revisions, other changes in language were made that were intended to lighten the evidentiary burden as to specific criteria.<sup>78</sup> These will be addressed below.

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<sup>67</sup> 25 C.F.R. § 83.6(d) (2012).

<sup>68</sup> See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9,280 (Feb. 25, 1994).

<sup>69</sup> *Id.*

<sup>70</sup> “‘Preponderance’ is a legal standard focused on weighing evidence for versus against a position. It is not appropriate for the present circumstances where the primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion.” *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 25 C.F.R. § 83.6.

<sup>73</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,280.

<sup>74</sup> *Id.*; 25 C.F.R. § 83.6.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

## VI. Part 83.7: Mandatory Criteria for Federal Acknowledgement

As noted above, petitioners must satisfy all seven criteria under § 83.7 to gain recognition. In the last twenty-five years, eighteen groups have been denied recognition through the FAP.<sup>79</sup> Eleven petitioners have failed to satisfy criterion (a), most of them (sixteen petitioners) have failed to satisfy (b), fifteen have failed (c), another sixteen did not meet (d), twelve failed under (e), and only one has not satisfied (g). None have left (f) unsatisfied. Two groups have been denied based on missing one criterion, (e), while most petitioners failed to satisfy, on average, three criteria.<sup>80</sup> I will focus on the first three, which are the criteria that the historical and anthropological research methods will be applied to in a petition under review.

The first mandatory criterion is that “(a) [t]he petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.”<sup>81</sup> The intent of this language, in conjunction with other criteria, was “to exclude from acknowledgment those entities which have only recently been identified as Indian or whose identity is based solely on self-identification.”<sup>82</sup> There are several elements to this criterion. The first is that there must be external identification as an Indian entity. Such external bodies capable of identifying an Indian entity include federal, state, and local governments, Indian organizations, social scientists, and even popular media.<sup>83</sup> But even non-Indian individuals can testify that a group exists; “[e]lderly non-Indian residents of the area” identified the Choctaws, “some non-Indians identified Bay Center on Shoalwater Bay as the location of an Indian settlement,” and the Jamestown group was “considered to be a distinct Indian community by non-Indians in the immediate vicinity.”<sup>84</sup> What is intentionally excluded is any self-identification: “[s]ome of the [third party] comments which mentioned the ‘identity’ of the [Match-e-bc-nash-she-wish] referred to the petitioner’s own self-identification, not to identification by external sources.”<sup>85</sup>

The next two elements derive from the requirement that the identification be “substantially

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<sup>79</sup> *Acknowledgment Decision Compilation (ACD) List: Petitions Resolved by DOI*, U.S. DEPT. OF THE INTERIOR, INDIAN AFFAIRS (Apr. 10, 2012), <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/index.htm>.

<sup>80</sup> See <http://www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm>. Tabulations by the author.

<sup>81</sup> Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7(a) (2012).

<sup>82</sup> Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,280, 9,286.

<sup>83</sup> 25 C.F.R. § 83.7(a).

<sup>84</sup> ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 34, at 17.

<sup>85</sup> *Id.* at 8.

continuous.” Continuous means “extending from first sustained contact with non-Indians throughout the group’s history to the present substantially without interruption.”<sup>86</sup> However, note that criterion (a) replaces the date of first contact with the year 1900, or the point of last previous unambiguous federal acknowledgment.<sup>87</sup> The precedent manual provides only one example of a petitioner successfully meeting the criterion - the Jena Choctaw, who were documented in “records from each decade since 1900.”<sup>88</sup> This demonstrates the difficulty groups may face in meeting the element of “substantially continuous.” In the 1994 revisions, an effort was made to lighten the evidentiary burden imposed by the term continuous. The original “essentially continuous” was replaced with “substantially” because the latter is a “lesser requirement, which means only that overall continuity has been maintained, even though there may be interruptions or periods where evidence is absent or limited.”<sup>89</sup> Yet, as the sole example illustrates, an external recognition of, at a minimum, once a decade is required for a group to satisfy the FAP’s “substantially continuous” evidentiary standard of reasonable likelihood of validity.

Finally, (a) includes the requirement that the petitioning group be recognized as a group and not merely as a collection of individuals.<sup>90</sup> The precedent manual gives the following as examples of evidence that does not meet the criterion: “[s]ome Chinook descendants attended the Government’s Indian schools, but they did so because of their degree of Indian ancestry, not because the Indian Office recognized a Chinook tribe;” “[w]hile [Special Agent] Roblin’s evidence about Duwamish descendants is valuable, his [1919] report identified individuals rather than a tribal entity.”<sup>91</sup> The examples demonstrate that a person can be Indian for some government purposes, like forced boarding schools, but not Indian for other purposes, like recognition.

The second mandatory criterion is that “(b) [a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.”<sup>92</sup> According to the definitions, “[c]ommunity means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers.”<sup>93</sup> Evidence for this

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<sup>86</sup> Definitions, 25 C.F.R. § 83.1 (2012).

<sup>87</sup> See 25 C.F.R. § 83.7(a); see also Previous Federal Acknowledgement, 25 C.F.R. § 83.8(a) (2012).

<sup>88</sup> ACKNOWLEDGEMENT PRECEDENT MANUAL, *supra* note 34, at 7.

<sup>89</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,281.

<sup>90</sup> “Criterion (a) requires identification of an Indian entity, not just Indian individuals.” ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 25, at 6 citing Duwamish PF 1996, 4.

<sup>91</sup> ACKNOWLEDGEMENT PRECEDENT MANUAL, *supra* note 25, at 7.

<sup>92</sup> 25 C.F.R. § 83.7(b).

<sup>93</sup> *Id.* § 83.1.

criterion is derived from social science and includes marriage patterns, social relations, economic activities, maintaining social distinctions, ritual, cultural patterns (language, kinship, religion) that are “more than symbolic” (like revivals), and self-reference.<sup>94</sup> Fifty percent of members must share these distinct social and cultural patterns, or intermarry, or live in a geographic core.<sup>95</sup> These social relationships must be “substantial” and “maintained widely within the membership, i.e., that members are more than simply a collection of Indian descendants.”<sup>96</sup>

Criterion (b) is the most substantially revised criterion. The original rule read as follows: “(b) [e]vidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.”<sup>97</sup> The purpose of the change was to relax standards by recognizing that tribal social relations may be maintained even though members are not in close proximity, and so that the definition of “community” could encompass all forms of social interaction and not just the traditional circumstances where a tribe lived on a separate landbase.<sup>98</sup> However, commenters thought, and I would agree, that this represents an increase in the burden because the new Criteria requires an active showing of significant social relations, as opposed to allowing the inference of such relations through a showing of geographic proximity.<sup>99</sup>

At any rate, the existence of a geographic core shifted from being a criterion to being evidence to support one. However, a crucial element of the original definition remained -that the group be distinct. “Minimal social distinction means that they identify themselves as distinct and that they are identified as different by non-members.”<sup>100</sup> As noted in the revision comments, “[d]istinctness is an essential requirement for the acknowledgment of tribes which are separate social and political entities.”<sup>101</sup> The value of distinctions is that they are “strong evidence of cohesion within a community, since they have the

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<sup>94</sup> *Id.* § 83.7(b).

<sup>95</sup> *Id.*

<sup>96</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,286.

<sup>97</sup> Form and Content of the Petition, 25 C.F.R. § 83.7(b) (1982); see also William W. Quin, Jr., *Federal Acknowledgement of American Indian Tribes: the Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 336 (1990) (“For an unacknowledged Indian group to become acknowledged within the meaning of federal law, i.e., meeting successfully the seven mandatory criteria found specifically in 25 C.F.R. §83 (a-g), such a group must . . . (b) establish that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.”).

<sup>98</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,286-87.

<sup>99</sup> *Id.*

<sup>100</sup> ACKNOWLEDGEMENT PRECEDENT MANUAL, *supra* note 34, at 21.

<sup>101</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,287.

effect of strengthening social interaction and relations within a group.”<sup>102</sup> Such cohesion is necessary because “[i]t is consistent with the intent of the regulations and with the legal precedents underlying the regulations, [to] require demonstration of the social solidarity of the tribe.”<sup>103</sup> What distinguishes a tribe from a collection of descendants is social solidarity or cohesion, as evidenced by “significant social interaction and/or social relationships [that] are actually maintained.”<sup>104</sup>

Despite the fact that “community,” as with “autonomous” and “political influence or authority,” is “to be understood in the context of the history, geography, culture and social organization of the . . . group,”<sup>105</sup> the following evidence from the Duwamish petition was rejected:

Besides annual meetings that occurred during their childhoods in the 1940’s and 1950’s, the only other activities recalled by today’s members of the petitioner were shared gift giving, cooperative hunting, and summertime berry picking. These activities took place, however, among brothers, sisters, aunts, uncles, nieces, and nephews, not among members outside of their own extended families.<sup>106</sup>

Such activities should be seen as distinct acts of social cohesion within the context of this particular culture, but they were not, largely because the OFA researchers discounted the group’s own methods of determining tribal boundaries.<sup>107</sup> Particular evidence of Snoqualmie social distinction was similarly rejected when the OFA concluded that the Snoqualmie “interact extensively with non-Indians and in many contexts[, and t]here was no direct evidence to demonstrate whether there were differences in the degree and kind of interaction with Indians versus with non-Indians.”<sup>108</sup> However, the Snoqualmie membership requirements helped establish distinctiveness because they established “clear social boundaries.”<sup>109</sup>

The third of the anthropological criteria is (c), “[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.”<sup>110</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 25 C.F.R. § 83.1.

<sup>106</sup> ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 34, at 28.

<sup>107</sup> For information on Duwamish social structure, see Wayne Suttles, Central Coast Salish, in *Handbook of North American Indians*, vol. 7 Northwest Coast, Smithsonian Institution Press, 1990 at 453-476.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 33.

<sup>110</sup> 25 C.F.R. § 83.7 (c).

Evidence includes the ability to “mobilize . . . members and . . . resources . . . for group purposes,” “widespread . . . involvement in political processes,” a recognition by most members that the actions of leaders are important, and the existence of mechanisms which allocate resources, settle disputes, organize labor, or influence the behavior of members through norms and sanctions.<sup>111</sup> These elements are reproduced in the definition provided for “political influence or authority.”<sup>112</sup> According to the revision comments, the criterion requires “more than a trivial degree of political influence” or authority.<sup>113</sup> The fundamental requirement, from legal precedent, is that “political influence must not be so diminished as to be of no consequence or of minimal effect.”<sup>114</sup> Despite the fact that fifteen petitioners have failed to meet this criterion, only one example of not meeting the criterion is provided in the precedents manual.<sup>115</sup>

## VII. History of the Definition of a Tribe

During the first few centuries of European colonization, there was little need for a formal definition of tribe (or Indian Nation or band). From the perspective of the colonizers, Indians were racially distinct nations and the boundaries were perfectly clear. Congress had the power to regulate intercourse with the Indian nations through the Indian Commerce Clause, including the power to enter into and abrogate treaties, and the Court respected this.<sup>116</sup> In *Lone Wolf*, the Court discussed these powers, writing that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>117</sup>

The corollary of Congress’s plenary power is the trust relationship. This was articulated in *Cherokee Nation*, in which the Court said that the tribes “are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>118</sup> In *Kagama*, the Court interpreted this guardianship as a duty: “[f]rom their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises

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<sup>111</sup> *Id.*

<sup>112</sup> *See id.* § 83.1.

<sup>113</sup> Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. at 9,288.

<sup>114</sup> *Id.*

<sup>115</sup> That example comes from the Duwamish. ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 25, at 40.

<sup>116</sup> *See Myers*, *supra* note 19, at 272. *See also COHEN*, *supra* note 7 at 268-72.

<sup>117</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

<sup>118</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 3 (1831). *See also Ex Parte Crow Dog*, 109 U.S. 556, 568-69 (1883).

the duty of protection, and with it the power.”<sup>119</sup> The end product of this duty was assimilation of the conquered:

the conquered shall not be wantonly oppressed . . . . Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost and they make one people.<sup>120</sup>

Furthermore, only Congress can decide when that guardianship ends,<sup>121</sup> and to what extent Congress can go in making decisions on behalf of its wards. “[I]n determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.”<sup>122</sup>

Because of the trust relationship, acknowledgement was about more than just deciding which groups the federal government would interact with on a sovereign-to-sovereign basis. When treaty making ended in 1871, the nature of recognition shifted to deciding which of the government’s wards could be “emancipated” from the trust relationship.<sup>123</sup> As noted above, the Court and Congress envisioned the conquered native population eventually becoming fully assimilated or absorbed into American society, and, therefore, no longer in need of the benefits of wardship. In *Perrin*, the Court analyzed the application of federal Indian liquor laws.<sup>124</sup> The Court noted, “a prohibition valid in the beginning doubtless would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control.”<sup>125</sup> Thus, the government always anticipated an end to its Indian business.<sup>126</sup> In the late 19th century, treaty making was officially over,<sup>127</sup> and thus, groups could no longer gain recognition as tribes, and existing wards of the state were emancipated through programs such as allotment and the boarding schools.<sup>128</sup> If assimilation did not

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<sup>119</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

<sup>120</sup> *Johnson v. M’Intosh*, 21 U.S. 543, 589 (1823).

<sup>121</sup> *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911).

<sup>122</sup> *Perrin v. United States*, 232 U.S. 478, 486 (1914).

<sup>123</sup> *See Myers*, *supra* note 19, at 272-73.

<sup>124</sup> *Perrin*, 232 U.S. 478.

<sup>125</sup> *Id.* at 486.

<sup>126</sup> COHEN, *supra* note 7, § 1.04.

<sup>127</sup> *Id.* § 1.03(9).

<sup>128</sup> *Id.* § 1.04.

naturally occur, that is, if tribal relations did not dissolve, as the Indians became Americans, the tribal entity would be terminated.<sup>129</sup>

In the meantime, determinations of who was still Indian needed to be made. Prohibition on the sale of liquor to Indians necessitated many findings of whether certain individuals or groups were still Indian under the Act.<sup>130</sup> If they were no longer living in tribal relations, then the liquor laws were inapplicable to them.<sup>131</sup> But, as the Court noted, “[a]s long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband.”<sup>132</sup> Determinations of tribal status have also been sought by Indians themselves, often in efforts to reclaim treaty rights. A number of groups, much later in time, have sought to reverse coerced land cessions by arguing their invalidity under the Indian Non-Intercourse Act (1802).<sup>133</sup>

Tribal determinations were also important for the Indian Depredation Act of 1891.<sup>134</sup> Under this act, U.S. citizens could file claims against the federal government for property losses from the actions of Indian tribes or bands in amity with the United States, but not ones currently hostile to it.<sup>135</sup> *Montoya v. United States* was a depredations case.<sup>136</sup> The claims arising in *Montoya* resulted from Apache attacks in Arizona allegedly perpetrated by Mescalero Apaches who joined with a chief named Victorio and left the reservation.<sup>137</sup> The issue in *Montoya* was whether the Mescalero Tribe, then in amity with the United States, should be held liable for the depredations of Victorio’s band, or whether this faction was its own entity, capable of shouldering the responsibility for its attack.<sup>138</sup> The Court held that the individuals “who committed the depredation were part of Victorio’s [*sic*] band, operating with them, and that such band was carrying on a war against the Government as an independent organization.”<sup>139</sup> The Mescalero

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<sup>129</sup> See *id.* § 1.06.

<sup>130</sup> See, e.g., *United States v. Sandoval*, 231 U.S. 28 (1913).

<sup>131</sup> *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876).

<sup>132</sup> *Id.*

<sup>133</sup> 25 U.S.C.A. § 177 (West, Westlaw through P.L. 112-207); See, e.g., *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

<sup>134</sup> See Myers, *supra* note 19, at 350.

<sup>135</sup> *Id.* at 350-51.

<sup>136</sup> See *Montoya v. United States*, 180 U.S. 261 (1901).

<sup>137</sup> *Id.* at 270.

<sup>138</sup> *Id.* at 264-65. Victorio was the leader of the Warm Springs band, one of many Apache bands concentrated on the San Carlos Reservation, but also sometimes residing with the Mescalero Apache. See C.L. Sonnichsen, *The Mescalero Apaches*, UNIVERSITY OF OKLAHOMA PRESS, 1973, and Angie Debo, *Geronimo*, UNIVERSITY OF OKLAHOMA PRESS, 1976.

<sup>139</sup> *Id.* at 270.



Tribe was not responsible, and the government not liable, for the acts of Victorio's band because the Court recognized them as a separate entity.<sup>140</sup>

In reaching this decision, the Court set down a seminal definition: “[b]y a ‘tribe’ we understand 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; by a ‘band,’ a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design.”<sup>141</sup> The *Montoya* test was used in *United States v. Candelaria*,<sup>142</sup> and much later in *Mashpee Tribe v. Seabury Corp.*, where the court used it as the “test” for tribal identity.<sup>143</sup> In *Mashpee Tribe*, the court identified four elements in the definition of “tribe”: “(a) same or similar race”; (b) ‘united in a community’; (c) ‘under one leadership or government’; and (d) ‘inhabiting a particular [] territory’.”<sup>144</sup> However, the original purpose was to determine whether a splinter group, in a particular case, was a separate entity.<sup>145</sup>

In other depredations cases, the Court did not impose a rigid test or definition, but rather focused on prior identification or acknowledgment. In *Tully*, the court wrote:

The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted, and to treat with them accordingly.

So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.

Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands *as made by the Indians themselves*, whether such tribes and bands be named by reason of their geographical location or otherwise.<sup>146</sup>

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<sup>140</sup> 180 U.S. at 270.

<sup>141</sup> *Id.* at 266.

<sup>142</sup> *United States v. Candelaria*, 271 U.S. 432, 442 (1926).

<sup>143</sup> *Mashpee Tribe v. Seabury Corp.*, 592 F.2d 575, 582-83 (1979).

<sup>144</sup> *Id.* at 582 (quoting *Candelaria*, 271 U.S. at 442-43).

<sup>145</sup> *Id.*

<sup>146</sup> *Tully v. United States*, 32 Ct. Cl. 1, 7-8 (1896) (emphasis added).

Similarly, the court in *Dobbs* said:

In dealing with this question the court has held, first, that a nation, tribe, or band will be regarded as an Indian entity where the relations of the Indians in their organized or tribal capacity has been fixed and recognized by treaty; second, that where there is no treaty by which the Government has recognized a body of Indians, the court will recognize a subdivision of tribes or bands which has been recognized by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government; third, that where there has been no such recognition by the Government, the court will accept the subdivision into tribes or bands *made by the Indians themselves*.<sup>147</sup>

Note that in these criteria, the Indian entity's existence was established primarily by external sources, but self-recognition was possible.<sup>148</sup>

The work of Felix Cohen,<sup>149</sup> Solicitor for the Department of the Interior in the 1930s and 1940s, is central in understanding how 19th century definitions of "tribe" worked their way into the current Mandatory Criteria of § 83.7. His *Handbook of Federal Indian Law*, originally published in 1942, summarized the state of Indian law at the time.<sup>150</sup> Cohen was also influential in designing and implementing the Indian Reorganization Act ("IRA") in 1934.<sup>151</sup> The factors used to decide whether a tribe could organize under the IRA were developed from the survey in his *Handbook*:

- (1) That the group has had treaty relations with the United States.
- (2) That the group has been denominated a tribe by act of Congress or Executive Order.
- (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- (4) That the group has been treated as a tribe or band by other Indian tribes.

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<sup>147</sup> *Dobbs v. Unites States*, 33 Ct. Cl. 308, 315-16 (1898) (internal citation omitted; emphasis added).

<sup>148</sup> Importantly, in international law, self-identification is still an element in the criteria for recognizing groups as indigenous. Although no formal definition has been adopted by the United Nations or its Permanent Forum on Indigenous Issues (<http://social.un.org/index/IndigenousPeoples.aspx>), a seminal definition by the International Labor Organization is generally relied upon. [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169). ("Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 1.2. )

<sup>149</sup> COHEN, *supra* note 7.

<sup>150</sup> See Harold L. Ickes, *Foreward*, FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 268-72 (U.S. Gov't Printing Office, 4<sup>th</sup> ed. 1945) available at <http://thorpe.ou.edu/cohen.html>.

<sup>151</sup> *Id.*; Russel Lawrence Barsh, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, 57 WASH. L. REV. 799, 800-01 (1983) (book review).

(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items of the group and the social solidarity of the group.<sup>152</sup>

Cohen observed, “the term ‘tribe’ is commonly used in two senses, an ethnologic sense and a political sense.”<sup>153</sup> His criteria were pulled from both of these fields.

The ethnological definition that Cohen cites is from a Bureau of American Ethnology (“BAE”) Bulletin.<sup>154</sup> This bulletin contains the original *Handbook of American Indians North of Mexico*, predecessor to the later Smithsonian series.<sup>155</sup> This *Handbook* is a survey of the social, cultural, and political structures of indigenous peoples in North America. The section on “tribe” begins with a passage that can suffice as a definition, and apparently did for Cohen and others:

Among the North American Indians a tribe is a body of persons who are bound together by ties of consanguinity and affinity and by certain esoteric ideas or concepts derived from their philosophy concerning the genesis and preservation of the environing cosmos, and who by means of these kinship ties are thus socially, politically, and religiously organized through a variety of ritualistic, governmental, and other institutions, and who dwell together occupying a definite territorial area, and who speak a common language or dialect. . .

The tribe formed a political and territorial unit which, as has been indicated, was more or less permanently cohesive: its habitations were fixed, its dwellings were relatively permanent, its territorial boundaries were well established, and within this geographical district the people of the tribe represented by their chiefs and headmen assembled at stated times at a fixed place within their habitation and constituted a court of law and justice.<sup>156</sup>

The elements that we can derive from this description are: (1) tribal members are bound by kinship

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<sup>152</sup> COHEN, *supra* note 7, at 271. These are preserved in the current FAP under § 83.8, and referred to as the “Cohen criteria” in the revisions comments. 59 Fed. Reg. at 9,283.

<sup>153</sup> COHEN, *supra* note 7, at 268.

<sup>154</sup> Bureau of American Ethnology, Bulletin 30. Washington, Government Printing Office, 1907.

<sup>155</sup> HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 2 (Frederick Webb Hodge ed., 1910), available at <http://books.google.com/books?id=zEcSAAAAYAAJ>. The Handbook of North American Indians, produced by the Smithsonian (which absorbed the BAE) began publishing in 1978 and was recently suspended. See *Handbook of the North American Indians*, NATIONAL MUSEUM OF NATURAL HISTORY, <http://anthropology.si.edu/handbook.htm> (last visited Jan. 27, 2013).

<sup>156</sup> *Id.* at 814-15.

(consanguinity refers to blood relations and affinity refers to marriages); (2) this kinship unit shared a set of religious beliefs; (3) through the uniformity of belief and the ties of kinship, political structure emerges; (4) the tribe occupies a specific territory with clear boundaries; and (5) the tribe shares a common language or dialect. When all the elements are present, a tribe exists and is “more or less permanently cohesive.”<sup>157</sup>

Next, it is important to draw the parallels between the different definitions of tribe, comparing the elements permeating this discourse of Indian sociality. In *Montoya*, the Court emphasized the elements of race (members of a tribe are of a single race), community, political authority, and territoriality.<sup>158</sup> These are all elements of a definition of tribe in the ethnological sense, according to Cohen.<sup>159</sup> Next, in *Tully* and *Dobbs*,<sup>160</sup> the Court did not use what Cohen considered the ethnologic elements, and instead used “historical” elements, such as criterion (a) in the current regulations, which asks whether the group has been recognized in the past as an Indian entity.<sup>161</sup> Interestingly, and in contrast to today’s Mandatory Criteria, the *Tully* and *Dobbs* courts used both external identification and self-identification.<sup>162</sup> This seems to have been filtered out by Cohen.

Under Cohen, the first four criteria are “historical”; they ask about the previous recognition of the group.<sup>163</sup> Cohen’s fifth criteria, the political authority question, is ethnological, carried over from *Montoya*.<sup>164</sup> Attached to these enumerated five are “special appropriation items” (unique circumstances) and “social solidarity.”<sup>165</sup> Solidarity is the ethnological community element from *Montoya*, turned into Mandatory Criteria (b) in 1994 as a replacement for the element of territoriality (also from *Montoya*, described as “geographic core”).<sup>166</sup> The elements from the *Handbook of American Indians* include kinship (a tribe is a group of people related by blood and marriage--a variant of race), beliefs or culture, territoriality, and language.<sup>167</sup> Language and belief were both subsumed by criterion (b); they now serve as evidence for community rather than as elements on their own.<sup>168</sup> Similarly, the “affinity” (marriage)

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<sup>157</sup> *Id.* at 815.

<sup>158</sup> *Montoya*, 180 U.S. at 266.

<sup>159</sup> See COHEN, *supra* note 7, at 268.

<sup>160</sup> *Tully* 32 Ct. Cl. at 8; *Dobbs*, 33 Ct. Cl. at 316.

<sup>161</sup> Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7(a) (2012).

<sup>162</sup> *Tully* 32 Ct. Cl. at 8; *Dobbs*, 33 Ct. Cl. at 316.

<sup>163</sup> See COHEN, *supra* note 7, at 271.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Montoya*, 180 U.S. at 270.

<sup>167</sup> HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO at 815.

<sup>168</sup> See § 83.7 (b)(1)(vii), (b)(2)(iii).

component of the kinship element is transformed, persisting as evidence for community.<sup>169</sup>

### VIII. Analysis

Underlying these elements are core assumptions and understandings of 19th century social scientific thinking. One of the major figures in the early days of anthropology was Lewis Henry Morgan (1818-1881). He was a lawyer by trade, but had a keen interest in the Indians living near his upstate New York home.<sup>170</sup> Morgan postulated three stages of human social evolution: savagery, barbarism, and civilization.<sup>171</sup> Each of these stages were further subdivided in to lower, middle, and upper conditions. With these categories, any society in the world could be given a rank in a universal hierarchy, a “scale of human advancement.”<sup>172</sup> A society’s assignment on the scale was made based on the type of technology used.<sup>173</sup> From that assignment, the analyst could infer the level of cultural and religious complexity (monotheism being more advanced than polytheism, for instance), as well as the general morality of the people.<sup>174</sup> For example, technological placement at one level, say middle savagery, correlated with a savage state of morality.<sup>175</sup> In his scheme, all Native Americans were, at the time of European contact, in either the upper status of savagery or the lower status of barbarism.<sup>176</sup> From this schematizing grew the possibility, and moral responsibility, of elevating lower peoples to the status of civilization.

Social Darwinism is reflected abundantly in Supreme Court decisions during the era of assimilation. Two examples from major cases will suffice. In *Ex Parte Crow Dog*, the Court, in discussing the program of assimilation, described tribes as being “in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.”<sup>177</sup> In determining the applicability of the Indian Liquor laws to the Puebloan Indians, the Court wrote that they were “Indians in race,” who,

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<sup>169</sup> *Id.* § 83.7 (b)(1)(i), (b)(2)(ii).

<sup>170</sup> Paul Bohannon and Mark Glazer, eds. *High Points in Anthropology*, 2d, McGraw-Hill (1998) at 29.

<sup>171</sup> LEWIS H. MORGAN, *ANCIENT SOCIETY: OR, RESEARCHES IN THE LINES OF HUMAN PROGRESS FROM SAVAGERY THROUGH BARBARISM TO CIVILIZATION* 3 (New York, Henry Holt And Co. 1878), available at <http://books.google.com/books?id=3iguAAAYAAJ>.

<sup>172</sup> *Id.* at 35.

<sup>173</sup> *See id.* at 10-12.

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 415 (“The existence of morality, even among savages, must be recognized, although low in type; for there never could have been a time in human experience when the principle of morality did not exist.”).

<sup>176</sup> *Id.* at 177.

<sup>177</sup> *Ex Parte Crow Dog* 109 U.S. 556, 569 (1883).

“adhering to primitive modes of life, [...] are essentially a simple, uninformed and inferior people.”<sup>178</sup>

While schematizing models of social Darwinism dominated popular, and governmental thinking, another strand of social thought brewed. Rooted in Positivism and represented by the French sociologist Emile Durkheim, this other strand influenced social reformers John Collier and Felix Cohen, both of whom were instrumental in developing and promoting the IRA. A paradigmatic question of Positivist social thought was the Hobbesian question: how do societies cohere? That is, why do individuals band together to form groups, what keeps them together, and what is the cause of social dissolution?

Anthropologist Eric Wolf, one of many theorists to critique 19th century anthropology, summarized the “common postulates” of this line of social thought.<sup>179</sup> The first common postulate is the assumption that social relations can be abstracted from their context and analyzed separately-- that the social is *sui generis*.<sup>180</sup> Second, that social order, the health of a society, depends on social relations among individuals; “[t]he greater the density of such ties and the wider their scope, the greater the orderliness of society.”<sup>181</sup> Social ties can be maximized by strengthening the commonality of beliefs and customs among the members of a society (also referred to as “collective conscience”).<sup>182</sup> The presumption was that any social order fights against a natural tendency to dissolve, to move towards disorder, by emphasizing the internal, often cultural, forces that link people together.<sup>183</sup> Therefore, any society could be evaluated in terms of the degree of coherence, or “social solidarity,” it displayed.<sup>184</sup> As Wolf writes, some societies are “maximized because social relations are densely knit and suffused with value consensus” while in others “social disorder predominates over order because social relations are atomized and deranged by dissensus over values.”<sup>185</sup> As a society dissolves, its members acculturate to another society. The believability of such theories were perhaps inevitable due to their congruency with “the common view that modern life entails a progressive disintegration of the lifeways that marked the ‘good old days’ of our forebears.”<sup>186</sup>

Kinship, like race, provided an objective set of social relations that constituted society. As long as

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<sup>178</sup> United States v. Sandoval, 231 U.S. 28, 39 (1913).

<sup>179</sup> ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY 8 (Univ. of Cal. Press 1982).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 11.

<sup>184</sup> WOLF, *supra* note 179 at 11.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

descent and marriage continued according to group norms, the basic social structure would persist.<sup>187</sup> But, the other force creating social cohesion in solidarity models is shared belief, or collective conscience. Without both forces acting, a society would dissolve, its members disbanding to join other groups and acculturating to new beliefs.<sup>188</sup> Because such acculturation of Indians was seen as desirable by the dominant society and forecast by anthropologists, the continuation of wardship and government benefits were conditioned on a lack of progress in the dissolution of tribal relations.

As noted above, the purpose of late 19th and early 20th century definitions of “tribe” was to determine whether Indians were still living in tribal relations, and thus wards of the federal government, or had ended tribal relations and could be emancipated from guardianship. As the Court stated in *United States v. Waller*, “[t]he tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. [...] Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.”<sup>189</sup> In the 20th century, Indian policy shifted from assimilation (helping Indians to be free of tribal relations) to reorganization (helping Indians preserve tribal relations), and by 1978, the definition of “tribe” was being used to determine whether petitioning Indian groups “have the characteristics necessary for the Secretary to acknowledge them as existing as an Indian tribe and entitled to rights and services as such.”<sup>190</sup> Through these policy shifts, the definition of “tribe” retained the assumption that all societies tend toward dissolution. Consequently, the Mandatory Criteria places an unduly high burden on petitioners to show that they have overcome this natural tendency, and maintained tribal relations.

One final element pervades all the others, and that is distinctiveness. One of the core principles of Positivist social theory, and social Darwinism, was that a society, or a culture, was a discrete whole. The concepts of social solidarity, collective consciousness, and evolutionary stages of mankind, all depend on the assumption that each society is a separate, bounded entity. Ideally, a people (race), or a nation, would have a set territory, its own language, and its own culture, like the “advanced” Northern Europeans. For

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<sup>187</sup> For Anthropology’s take on these theories, see A. R. Radcliffe-Brown, *Structure and Function in Primitive Society*, Glencoe, Free Press (1952).

<sup>188</sup> For discussion of collective consciousness and social solidarity, see Durkheim’s classic work *The Division of Labor in Society* (1893); see also Giddens, Anthony (ed.) (1972). *Emile Durkheim: Selected Writings*. London: Cambridge University Press.

<sup>189</sup> *United States v. Waller*, 243 U.S. 452, 459-460 (1917) (citing *United States v. Nice*, 241 U. S. 591, 598 (1916)).

<sup>190</sup> *Procedures For Establishing that an American Indian Group Exists as an Indian Tribe*, 1978, 43 Fed. Reg. 172 at 39319.