Case No. 15-5118
Oral argument not yet scheduled

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MACKINAC TRIBE,
Plaintiff - Appellant

v.

S.M.R. JEWELL, U.S. Secretary of the Interior,
Defendant - Appellee

On Appeal from the United States District Court for the District of Columbia (Hon. Ketanji Brown Jackson)

FEDERAL DEFENDANT-APPELLEE'S ANSWERING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici**. All parties, intervenors, and amici appearing before the district court and in this court are listed in Plaintiff-Appellant's opening brief.

(B) **Rulings Under Review**. References to the rulings at issue appear in Plaintiff-Appellant's opening brief.

(C) **Related Cases**. This case has not been before this Court previously. Undersigned counsel is unaware of any other case that is related to this appeal within the meaning of D.C. Circuit Rule 28(a)(1)(B).

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GLOSSARY

APA	Administrative Procedure Act
IRA	Indian Reorganization Act
MILCSA	Michigan Indian Land Claims Settlement Act

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Mackinac Tribe (the "Mackinac Group") invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, and 1362. (JA 6.) On March 31, 2015, the district court granted summary judgment to Defendant-Appellee, the U.S. Secretary of the Interior. (JA 4.) The Mackinac Group timely filed a notice of appeal on April 27, 2015. (JA 4.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Under authority delegated by Congress, the U.S. Department of the Interior administers a process for an Indian group to be added to the list of federally recognized Indian tribes and thus enjoy the benefits of a government-to-government relationship with the United States. The Mackinac Group is not on the list. Instead of following Interior's process, the Mackinac Group sought a judicial declaration that it qualifies as a federally recognized Indian tribe. Did the Mackinac Group fail to exhaust its administrative remedies?

INTRODUCTION

This Court has previously addressed federal "recognition" of Indian tribes. *See, e.g.*, *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209

(D.C. Cir. 2013); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132 (D.C. Cir. 1987). As explained in those cases, the U.S. Department of the Interior has, since 1978, administered a process for recognizing Indian groups as Indian tribes, also known as "acknowledgment."

Experts in anthropology, genealogy, and history in Interior's Office of Federal Acknowledgment evaluate acknowledgment petitions.[1] A positive acknowledgment determination results in inclusion on the list of federally recognized Indian tribes, which Interior regularly publishes. 25 C.F.R. § 83.5(a) (2014).[2] Indian tribes appearing on that list are eligible for certain programs and services from the federal government. 25 U.S.C. § 479a-1. Final acknowledgment determinations

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[1] *See* The Office of Federal Acknowledgment, Brief Overview (Nov. 12, 2013), http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024417.pdf (last visited Oct. 30, 2015).

[2] The acknowledgment regulations were originally codified in 1978 at 25 C.F.R. Part 54. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978). In 1982, the regulations were moved to Part 83. 47 Fed. Reg. 13,327 (Mar. 30, 1982). Interior amended Part 83 in 1994. 59 Fed. Reg. 9280 (Feb. 25, 1994). *James* addressed the original regulations. *Muwekma Ohlone* addressed the 1994 regulations. Interior again amended Part 83 while this case was pending. 80 Fed. Reg. 37,862 (July 1, 2015). The changes made by the 2015 amendments are not relevant to this case. This brief refers to the regulations as they existed when the Mackinac Group filed suit in 2014.

are subject to arbitrary-and-capricious review under the Administrative Procedure Act ("APA"). *See, e.g.*, *Muwekma Ohlone*, 708 F.3d at 218–23.

The Mackinac Group has never filed an acknowledgment petition with Interior and does not appear on the list of federally recognized Indian tribes. *See* 79 Fed. Reg. 4748 (Jan. 29, 2014).[3] The Mackinac Group instead asked Interior to conduct a process available to federally recognized Indian tribes: an election to ratify a tribal constitution under the Indian Reorganization Act ("IRA"). *See* 25 U.S.C. § 476. The Mackinac Group then filed suit seeking a judicial declaration that it previously had been recognized in an 1855 treaty and presently qualifies as a federally recognized Indian tribe entitled to a government-to-government relationship with the United States. The district court correctly held that the Mackinac Group could not bypass the administrative process specifically designed to evaluate such claims. *See* 25 C.F.R. § 83.8 (2014). This Court should affirm the district court's judgment in favor of Interior.

[3] The Mackinac Group also does not appear on the new list that Interior issued while this case was pending. 80 Fed. Reg. 1942 (Jan. 14, 2015).

STATEMENT OF THE CASE

Federal Recognition of Indian Tribes. Indian tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Over time, some Indian tribes ceased to exist, "whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution, or movement of population." *Muwekma Ohlone*, 708 F.3d at 219 (quoting *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001)). The federal government maintains a government-to-government relationship with Indian tribes that it recognizes as retaining their inherent sovereignty.

Recognition 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." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting Cohen's Handbook of Federal Indian Law § 3.02(3), at 138 (2005 ed.)). "Federal recognition is a prerequisite to the receipt of various services and benefits available only to Indian tribes." *Muwekma Ohlone*, 708 F.3d at 211 (citing 25

C.F.R. § 83.2). Historically, the federal government recognized Indian tribes by treaty and, after 1871, "through executive orders and legislation." *Id.* at 211.

With the passage of the IRA in 1934 (discussed below), administrative recognition proceedings became necessary because the benefits created by the IRA were made available "to descendants of 'recognized' Indian tribes." *Id.* (quoting *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994)). "From 1934 to 1978, Interior made recognition determinations on an *ad hoc* basis." *Id.* In 1978, "pursuant to broad authority delegated by the Congress," Interior promulgated regulations establishing uniform procedures for recognizing Indian groups as Indian tribes, which became known as the "Part 83 process." *Id.* at 211 & n.1; 43 Fed. Reg. 39,361 (Sept. 5, 1978).

Part 83 applies to "American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department." 25 C.F.R. § 83.3(a) (2014).[4] An Indian group must submit a documented petition explaining how it meets the

[4] All pertinent statutory and regulatory provisions are included in the addendum to the Mackinac Group's opening brief or the attached addendum to this brief.

seven criteria for federal acknowledgment. *Id.* §§ 83.6(c); 83.7. Among other criteria, the petitioner must show that it "has been identified as an American Indian entity on a substantially continuous basis since 1900"; that it "comprises a distinct community and has existed as a community from historical times until the present"; that it has "maintained political influence or authority over its members as an autonomous entity from historical times until the present"; and that its "membership consists of individuals who descend from a historical Indian tribe." *Id.* § 83.7(a)–(c), (e).

Part 83 applies not only to groups seeking recognition in the first instance, but also to currently unrecognized groups that have been recognized as Indian tribes in the past, such as through treaties or executive orders. *Id.* § 83.8; *see also Muwekma Ohlone*, 708 F.3d at 218 ("[T]he Part 83 process applies to a petition of a previously recognized tribe that seeks current recognition on that basis."). Previous federal recognition does not automatically entitle an Indian group to current recognition. Rather, if a petitioner provides "substantial evidence" of "[u]nambiguous previous Federal acknowledgment," 25 C.F.R. § 83.8 (2014), the regulation "relaxes" to some extent the evidence required for

current acknowledgment. *Muwekma Ohlone*, 708 F.3d at 212. A previously recognized Indian tribe nevertheless must show that it comprises a distinct community at present and that it has continued to be identified as an Indian entity and has continued to exercise political authority since the time of previous recognition. 25 C.F.R. § 83.8(d) (2014).

A positive acknowledgment determination makes the group eligible for the "protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." *Id.* § 83.2; *see also id.* § 83.12. Once acknowledged, the group is added to the list of federally recognized Indian tribes, which Interior regularly publishes in the Federal Register. *See id.* § 83.5(a). Interior began regularly publishing that list when it created the Part 83 process. *See* 43 Fed. Reg. at 39,362–63; 44 Fed. Reg. 7235 (Feb. 6, 1979) (first list published pursuant to the new process). Congress subsequently enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994). The List Act instructed the Secretary of the Interior to annually "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for

the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1.

Reorganization Under the IRA. The IRA, 25 U.S.C. § 461 *et seq.*, was enacted in 1934 to revitalize tribal governments. *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA authorized various programs and services for "recognized" Indian tribes. *Muwekma Ohlone Tribe*, 708 F.3d at 211 (quoting *Golden Hill*, 39 F.3d at 57).[5] Under the IRA, a recognized Indian tribe may "adopt an appropriate constitution and bylaws" via a "special election" called by the Secretary of the Interior, also known as a "Secretarial election." 25 U.S.C. § 476(a)(1); *see also Cal. Valley Miwok Tribe*, 515 F.3d at 1264. Interior promulgated regulations implementing this provision in 1981. 25 C.F.R. Pt. 81.[6]

In 1988, Congress amended the IRA to impose certain procedures for Secretarial elections. Indian Reorganization Act Amendments, Pub.

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[5] The IRA also applies to certain persons "of one-half or more Indian blood." 25 U.S.C. § 479. The Mackinac Group does not contend that it falls within that category. (Opening Br. 15–18.)

[6] Interior amended its Part 81 regulations while this case was pending. 80 Fed. Reg. 63,094 (Oct. 19, 2015). This brief refers to the Part 81 regulations as they existed when the Mackinac Group filed suit in 2014. (*See infra* note 14 and accompanying text.)

L. No. 100-581, 102 Stat. 2938 (1988). Under the amendments, Interior must hold such an election within 180 days of "the receipt of a tribal request." 25 U.S.C. § 476(c)(1)(A). During the 180-day period, Interior is to provide "technical advice and assistance" and review the draft constitution and bylaws to determine whether they are "contrary to any applicable laws." *Id.* § 476(c)(2). If a majority of the adult members of the tribe votes to ratify the constitution and bylaws, Interior then must approve those documents unless they are "contrary to any applicable laws." *Id.* § 476(d)(1). "Actions to enforce the provisions in [§ 476] may be brought in the appropriate Federal district court." *Id.* § 476(d)(2).

Procedural history. In 2014, the Mackinac Group filed suit in district court seeking a declaration that it is a federally recognized Indian tribe and an order compelling Interior to hold an election to ratify a constitution for the tribe under the IRA. (JA 12–13.) In its complaint, the Mackinac Group asserted that it is the "historical successor to the Mackinac/Michilimackinac Indians," one of many Indian bands in Michigan that signed the Treaty with the Ottawa and Chippewa on July 31, 1855, 11 Stat. 621. (JA 6.) The Mackinac Group further alleged that, beginning in 1872, Secretary of the Interior

Columbus Delano unlawfully ceased to treat the Michigan Indian bands who signed the 1855 treaty as federally recognized Indian tribes. (JA 9 (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty.*, 369 F.3d 960, 968 (6th Cir. 2004).)[7]

The complaint identified four alleged groups of Mackinac Indians, two of which filed with Interior notices of intent to petition for federal acknowledgment, but neither of which followed through to file an actual petition. (JA 10–11.) In 2011, the "Mackinac Coalition Tribal Government" allegedly decided to reorganize under the IRA and drafted a constitution. (JA 11.) According to the complaint, the Coalition Government requested an election to ratify the constitution under the IRA, and Interior did not hold an election within 180 days as required. (JA 11–12.)

[7] A number of Michigan groups have asserted that they are the historical descendants of the Indian bands that entered into the 1855 treaty. Some of those groups have successfully petitioned Interior for acknowledgment and thus appear on the list of federally recognized Indian tribes. *See, e.g., Grand Traverse*, 369 F.3d at 962. Others have been unsuccessful because they no longer exist as distinct communities or no longer maintain political authority. *See, e.g.*, Final Determination for the Burt Lake Band of Ottawa and Chippewa Indians, Inc., 71 Fed. Reg. 57,995, 57,995–96 (Oct. 2, 2006).

The complaint asserted two claims for relief. Count I asserted that the Mackinac Group is a "federally recognized Indian Tribe whose status has never been legally terminated." (JA 12.) Without identifying a statutory or other cause of action, Count I requested a declaratory judgment that the Mackinac Group is a federally recognized Indian tribe.[8] (JA 12.) Count II asserted that the Mackinac Group is an "Indian tribe" with the right to reorganize under the IRA, 25 U.S.C. § 476(a), and that Interior failed to hold an election on its proposed constitution within 180 days of its request as required by 25 U.S.C. § 476(c). (JA 12.) Count II therefore requested an order directing Interior to conduct an election for the Mackinac Group. (JA 12.)

Interior moved to dismiss Count I because the Mackinac Group does not appear on the list of federally recognized Indian tribes and has

[8] The Mackinac Group asserted that the district court had jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1362 (action by Indian tribe). The Mackinac Group therefore had to plead a federal cause of action. *See Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 281 (7th Cir. 2009) ("[T]he general grant of federal question jurisdiction contained in § 1331, without a federal cause of action, is not enough."); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1058 ("[Section 1362] did not eliminate the requirement that there be a statutory or constitutional underpinning for the cause of action."). The Declaratory Judgment Act, 28 U.S.C. § 2201, does not provide a cause of action. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011).

not petitioned to be added to the list via the Part 83 acknowledgment process. (JA 45–49.) Interior argued that the Mackinac Group must exhaust its administrative remedies before seeking judicial review. Interior also moved to dismiss Count II for failure to state a claim because the Mackinac Group must appear on the list of federally recognized Indian tribes before reorganizing under the IRA. (JA 50–53.) The Mackinac Group opposed the motion, but admitted that it does not appear on the list of federally recognized Indian tribes and has not petitioned to be added to the list via the acknowledgment process.

The district court converted the motion to dismiss into a motion for summary judgment and granted summary judgment to Interior. (JA 205, 213, 218–21.) Finding dispositive this Court's decision in *James*, 824 F.2d at 1137–38, the district court held that the Mackinac Group failed to exhaust its administrative remedies under Interior's Part 83 process. (JA 228–31.) The district court explained that completing that process is an "indispensible precursor to any request that the Secretary call an election for reorganization" under the IRA. (JA 230.) Due to Interior's "unique expertise in Indian affairs," the court found that Interior would be better suited to evaluate in the first instance whether

the Mackinac Group is entitled to recognition. (JA 230–31 (citing *James*, 824 F.2d at 1138).) The court also believed that "the factual record that would be developed during the agency's review" would be useful. (JA 231.) Because the Mackinac Group undisputedly had not started the acknowledgment process and does not appear on the list of federally recognized Indian tribes, the court entered summary judgment in favor of Interior.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 184 (D.C. Cir. 2013).

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to Interior because the Mackinac Group failed to exhaust its administrative remedies under Interior's Part 83 process. In *James*, this Court squarely held that an Indian group claiming to have been previously recognized as an Indian tribe must nonetheless file an acknowledgment petition with Interior. 824 F.2d at 1137–38. Requiring administrative exhaustion permits Interior to apply its expertise in Indian affairs as Congress intended and creates a record helpful to judicial review. *Id.*

Every court of appeals to have subsequently considered this question is in accord with *James*. Moreover, in *Muwekma Ohlone*, this Court recently confirmed that the Part 83 process applies to Indian groups that claim to have been previously recognized but unlawfully terminated. 708 F.3d at 218–19.

The Mackinac Group ignores this precedent and argues that requesting a Secretarial election under the IRA takes it outside the Part 83 process. The Mackinac Group is incorrect because it must appear on the list of federally recognized Indian tribes before it can request a Secretarial election. In the 1988 IRA amendments, Congress provided federally recognized Indian tribes with a cause of action to "enforce" the time limits and other procedures for Secretarial elections. 25 U.S.C. § 476(d)(2). Congress did not provide an avenue to bypass the Part 83 process, which Interior had established a decade earlier. The Mackinac Group's reliance on the List Act, 25 U.S.C. § 479a-1, is similarly unavailing. The List Act codified Interior's practice of publishing a list of federally recognized tribes and provided no exemption from Interior's Part 83 process for adding tribes to the list.

The Mackinac Group must file a petition with Interior showing that it meets the acknowledgment criteria. Interior's experts then will review the petition, and the agency will make a final determination subject to arbitrary-and-capricious review under the APA. The district court correctly so held, and its judgment should be affirmed.

ARGUMENT

I. The Mackinac Group must file an acknowledgment petition with Interior even though it purports to have been previously recognized and unlawfully terminated.

Administrative exhaustion "serves three functions: 'giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, [and] compiling a record adequate for judicial review.'" *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (quoting *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 414 (D.C. Cir. 1998)) (alteration in original). This Court has held that an entity purporting to have been previously recognized as an Indian tribe must first exhaust its administrative remedies by filing a petition for acknowledgment with Interior. *James*, 824 F.2d at 1137–38.

In *James*, an Indian group sought an order directing Interior to add the group to the list of federally recognized Indian tribes, even

though the group had not petitioned Interior for acknowledgment. 824 F.2d at 1134–35. The group argued that "it would be redundant for them to exhaust administrative channels" because the group already had been recognized via several federal-government reports produced in the 1800s. *Id.* at 1137. This Court affirmed the district court's order "dismiss[ing] the claim based on appellants' failure to exhaust administrative remedies." *Id.*

The Court explained that Congress authorized Interior "to prescribe regulations concerning Indian affairs," and that Interior's Part 83 regulations were specifically designed "to determine which Indian groups exist as tribes." *Id.* The Court found that those purposes would be "frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist." *Id.* The Court declined to follow an earlier First Circuit decision not requiring exhaustion, *Mashpee v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), because circumstances had changed since that decision: Interior had promulgated its Part 83 regulations and therefore had developed expertise in history, anthropology, and genealogy. *James,* 824 F.2d at

1138. This Court thus concluded that requiring exhaustion would allow "Interior the opportunity to apply its developed expertise in the area of tribal recognition," and that "the factual record developed at the administrative level would most assuredly aid in judicial review." *Id.* at 1138.

More recently, in *Muwekma Ohlone*, this Court reviewed Interior's denial of an Indian group's petition for acknowledgment. Among other issues, the Court rejected the group's argument that Interior should have waived the Part 83 process under 25 C.F.R. § 1.2 because the group previously had been recognized. 708 F.3d at 212, 214–17. The Court also rejected the group's argument that Interior had unlawfully terminated the group's recognition by denying its acknowledgment petition. *Id.* at 218–19. The Court correctly held that the acknowledgment process "applies to a petition of a previously recognized tribe that seeks current recognition on that basis," *id.* at 218, and that previous recognition does not automatically result in addition to the list because "a once-recognized tribe can fade away," *id.* at 219 (citing *Miami Nation of Indians*, 255 F.3d at 346). The Court further explained that the Part 83 process "allow[s] Interior to engage in

factfinding bearing on" an Indian group's allegedly unlawful historical termination and to "correct any error in not previously placing [the group's] name on tribal recognition lists." *Id.* Because a termination-of-recognition claim is "subject to administrative exhaustion," the Court held that it does not accrue until Interior issues a "[f]inal [d]etermination" on an acknowledgment petition. *Id.*

The Tenth Circuit reached a similar conclusion in *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550–51 (10th Cir. 2001). The Indian group in that case had not completed the acknowledgment process. Instead, it sought a judicial declaration that it had been federally recognized in an 1854 treaty and an 1866 Supreme Court decision. *Id.* at 546. The Tenth Circuit affirmed the district court's refusal to issue such a declaration because "exhaustion is required when, as here, a plaintiff attempts to bypass the regulatory framework for establishing that an Indian group exists as an Indian tribe." *Id.* at 550 (citing *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056–58 (10th Cir. 1993)).

The Tenth Circuit explained that previous recognition "says nothing about whether [an entity] has maintained its identity with the

[tribe] and has continued to exercise that tribe's sovereign authority up to the present day." *Id.* at 548. After discussing this Court's holding in *James*, *id.* at 550–51, the Tenth Circuit agreed that tribal recognition is a matter requiring "specialized agency expertise" and that requiring exhaustion would produce a "useful record for subsequent judicial consideration." *Id.* at 551 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

Indeed, every court of appeals to have considered the question since *James* has reached the same conclusion, albeit after applying varying legal doctrines.[9] The Mackinac Group cites no case holding that an Indian group may skip the Part 83 process and ask a court to issue a

[9] *See Miami Nation of Indians*, 255 F.3d at 350 (applying political-question doctrine and explaining that the acknowledgment process "covers a previously recognized tribe"); *Grand Traverse*, 369 F.3d at 968–69 (holding that Interior had power to restore recognition to illegally terminated Indian tribe via the acknowledgment process); *see also Golden Hill*, 39 F.3d at 58–60 (applying primary-jurisdiction doctrine); *W. Shoshone*, 1 F.3d at 1056–58 (applying zone-of-interests test); *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 78–79 (D.D.C. 2002) (explaining that claims of historical recognition via treaty do not allow an entity to bypass the acknowledgment process); *Sandy Lake Band of Miss. Chippewa v. United States*, No. CIV. 10-3801 DWF/LIB, 2011 WL 2601840, at *1, 4–5 (D. Minn. July 1, 2011); *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013 JFB ARL, 2008 WL 4455599, at *8–18 (E.D.N.Y. Sept. 30, 2008).

determination on federal recognition in the first instance. Most of the cases cited by the Mackinac Group (Opening Br. 22, 25) are distinguishable because they predate or were decided shortly after Interior promulgated the Part 83 process. *See James,* 824 F.2d at 1138 (distinguishing cases); *W. Shoshone*, 1 F.3d at 1056 (same). And in *Grand Traverse*, 369 F.3d at 962, the Indian group at issue had successfully petitioned Interior for acknowledgment using the Part 83 process and thus was federally recognized at the time it brought its claim.

The Mackinac Group also misplaces reliance on *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1990), *rev'd on other grounds*, 501 U.S. 775 (1991). In *Noatak*, the Ninth Circuit concluded that the district court had jurisdiction under 28 U.S.C. § 1362 over a suit brought by two Alaska native villages, Noatak and Circle. The court noted in passing, 896 F.2d at 1160, that the villages met the basic criteria for "tribes" stated in *Montoya v. United States*, 180 U.S. 261, 266 (1901): "bodies of Indians of the same race united in a community under a single government in a particular territory." But the Ninth Circuit proceeded to explain that Noatak Village had organized under

the IRA, 25 U.S.C. § 476, and "ha[d] a governing body approved by the Secretary." *Noatak*, 896 F.2d at 1160.[10] It further explained, *id.*, that both Noatak and Circle are expressly listed as native villages in the Alaska Native Claims Settlement Act, enacted in 1971. *See* 43 U.S.C. § 1610(b)(1).

The Mackinac Group is not similarly situated. In the district court, the Mackinac Group argued (JA 85–86) that Congress recognized it as an Indian tribe in the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143, 111 Stat. 2652 (1997). On appeal, the Mackinac Group only passingly refers to MILCSA in its background discussion. (Opening Br. 10.) The Mackinac Group thus has waived the argument that it was recognized in MILCSA. *City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (per curiam) (argument inadequately raised in opening brief is waived).

Moreover, the argument is incorrect. In MILCSA, Congress listed five tribes that would share in judgments rendered by the Indian Claims Commission in favor of Ottawa and Chippewa Indians in Michigan. Pub. L. No. 105-143, § 104, 111 Stat. 2653–54. Congress did

[10] A provision unique to Alaska, 25 U.S.C. § 473a, authorized Noatak Village to organize under § 476.

not include the Mackinac Group in that list.[11] The Mackinac Group therefore falls under another provision of MILCSA, which requires any tribe not "federally recognized or reaffirmed on the date of the enactment of this Act" to submit a "documented petition for Federal recognition" to Interior within three years of MILCSA's enactment. *Id.* § 110, 111 Stat. 2663–64. MILCSA thus confirms that the Mackinac Group must follow the Part 83 process.

The Mackinac Group also incorrectly states (Opening Br. 25) that the villages at issue in *Noatak* had not been included on Interior's list of federally recognized tribes before the Ninth Circuit's decision.[12] Both Noatak and Circle were on the first list published that included Alaska Native entities, 47 Fed. Reg. 53,130, 53,134 (Nov. 24, 1982), and both have been on every subsequent list. *See* 58 Fed. Reg. 54,364 (Oct. 21, 1993) (discussing treatment of Alaska Native entities on list since

[11] The five listed tribes were the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan, the Little River Band of Ottawa Indians of Michigan, the Little Traverse Bay Bands of Odawa Indians of Michigan, and the Sault Ste. Marie Tribe of Chippewa Indians of Michigan. *Id.*

[12] The Mackinac Group similarly misstated the facts in the district court, as we explained in our reply brief. (JA 109.)

1979). *Noatak* does not support the Mackinac Group's argument that it is exempt from the Part 83 process.

The Mackinac Group also cites *Tillie Hardwick v. United States*, No. C.–79–1710 SW (N.D. Cal. 1979), which concerned the termination of California Rancherias under the California Rancheria Act of 1958, as amended in 1964. *Tillie Hardwick* does not apply here. Interior settled that litigation by restoring recognition to 17 such Rancherias. *See generally United States v. Livingston*, No. CR-F-09-273-LJO, 2010 WL 3463887, at *2 (E.D. Cal. Sept. 1, 2010). Interior determined that it had not complied with the Rancheria Act, and thus the termination of government-to-government relations with the pertinent Rancherias was ineffective. Interior thus restored the relationship with those Rancherias to the *status quo ante*. Here, as explained above, the Mackinac Group must follow the Part 83 process so that Interior may consider whether the Mackinac Group was previously recognized but unlawfully terminated. *See Muwekma Ohlone*, 708 F.3d at 212; *Grand Traverse*, 369 F.3d at 968–69.

The Mackinac Group does not dispute that it has not petitioned Interior for acknowledgment and has never appeared on the list of

federally recognized Indian tribes. (Opening Br. 14–18, 20, 23–24.) Nor does the Mackinac Group attempt to rebut this Court's conclusions in *James* and *Muwekma Ohlone* that the types of claims asserted in this case are subject to administrative exhaustion. The Mackinac Group simply asserts that it should be exempted from the Part 83 process due to the "historical injustice" allegedly inflicted on the Mackinac Group. (Opening Br. 1, 20–23.)

The main problem with the Mackinac Group's argument is that it "assumes the very factual issue at the heart of this litigation." *Shawnee Indians*, 253 F.3d at 548. Even assuming, for purposes of argument, that a historical Mackinac Tribe was unlawfully terminated, the Mackinac Group can "only prevail on its contention if we accept its bare assertion that it is the present-day embodiment" of the Mackinac Tribe. *Id.* The complaint (JA 7–10) sheds little light on how the Mackinac Group's members relate to the historical Mackinac and Michilmackinac bands that signed the 1855 treaty, and to other current bands of Ottawa and Chippewa Indians.

Claims concerning an Indian group's historical recognition and unlawful termination raise precisely the types of questions that must be

reviewed via the Part 83 process. Because the Mackinac Group has not petitioned for acknowledgment, Interior's experts in the Office of Federal Acknowledgment have not yet had an opportunity to review any evidence bearing on those questions, and the agency has not rendered a final decision on the Mackinac Group's status as an Indian tribe. Interior should address those issues in the first instance, not the district court.

II. The IRA does not permit unlisted Indian groups to bypass the Part 83 process by requesting a Secretarial election.

This Court also should reject the Mackinac Group's argument that it need not file an acknowledgment petition because it sued to compel an election under the IRA. (Opening Br. 14–18, 20.) In *California Valley Miwok Tribe*, this Court clearly explained that Indian tribes are recognized through a "standardized application process administered by the Secretary" and only "once recognized" may they organize under the IRA. 515 F.3d at 1263–64; *see also* Cohen's Handbook of Federal Indian Law § 3.02[6][d], at 146 (2012 ed.) ("[U]nder the IRA, a group has to be considered a tribe in order for it to hold a referendum on a proposed tribal constitution."). An entity that does not appear on the list of

federally recognized Indian tribes therefore cannot request a Secretarial election under 25 U.S.C. § 476.

Nor may an unlisted Indian group sue under 25 U.S.C. § 476(d)(2), which provides that "[a]ctions to enforce the provisions in this section may be brought in the appropriate Federal district court." Section 476(d)(2) expressly provides a cause of action only to "enforce" the time limits and other procedural requirements for Secretarial elections. An Indian group that does not appear on the list of federally recognized Indian tribes cannot use § 476(d)(2) to bypass the acknowledgment process and obtain a judicial determination on federal recognition in the first instance. *See Sandy Lake Band of Miss. Chippewa v. United States*, No. CIV. 10-3801 DWF/LIB, 2011 WL 2601840, at *4–5 (D. Minn. July 1, 2011). The history of enactments in this area shows that Congress did not intend to authorize such suits. *See El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 889 (D.C. Cir. 2014) ("The guiding principle with respect to implied rights of action is legislative intent."); *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) (noting that the Supreme Court has "sworn off" implied rights of action absent "compelling and unusual circumstances").

As this Court explained in *Muwekma Ohlone*, it is precisely because Congress made the IRA's programs and services available to "recognized" Indian tribes that Interior began conducting acknowledgment proceedings. 708 F.3d at 211 (quoting *Golden Hill*, 39 F.3d at 57); *see also* 43 Fed. Reg. at 39,362–63 (establishing list). In 1978, Interior promulgated the Part 83 process and established the list of federally recognized Indian tribes "pursuant to broad authority delegated by the Congress" to manage Indian affairs. *Muwekma Ohlone*, 708 F.3d at 211 & n.1 (citing *Miami Nation of Indians*, 255 F.3d at 345).

It was not until 1988 that Congress added the IRA's election procedures and a cause of action to "enforce" those procedures. Pub. L. No. 100-581, § 101, 102 Stat. 2938–39 (codified at 25 U.S.C. § 476(d)(2)). The 1988 amendments require Interior to hold an election within 180 days of a tribal request, 25 U.S.C. § 476(c)(1)(A), and approve or disapprove a ratified constitution within 45 days of the election, *id.* § 476(d)(1). Those tight deadlines show that Congress did not intend to permit an unlisted group to sue Interior under the enforcement provision. Determining whether a group is a federally recognized Indian tribe can be "an extremely complex and labor-intensive task." *Mashpee*

Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003). The deadlines contained in the 1988 amendments make sense only if Congress expected election-requesting groups to appear on the list of federally recognized Indian tribes. Congress certainly was aware of the list and the Part 83 process, which Interior had established a decade earlier.[13]

The Tenth Circuit rejected an effort to sidestep the Part 83 process in an analogous context. In *Western Shoshone Business Council v. Babbitt*, 1 F.3d at 1056–57, a group purporting to be an Indian tribe submitted a contract to the Secretary of the Interior for approval under 25 U.S.C. § 81. Interior refused to review the contract because the group did not appear on the list of federally recognized Indian tribes. *W. Shoshone*, 1 F.3d at 1054. The group filed suit and, like the Mackinac Group (Opening Br. 25), sought a declaration that it qualified as a federally recognized Indian tribe under *Montoya* and other judicial

[13] The legislative history of the 1988 amendments does not suggest that unlisted Indian groups can use § 476(d)(2) to bypass the Part 83 process. *See, e.g.*, S. Rep. No. 100-577, at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3908, 3916 (stating that § 476(d)(2) gives an "appropriate party" a right to enforce the election procedures).

decisions predating Interior's acknowledgment regulations. *W. Shoshone*, 1 F.3d at 1056–57.

The Tenth Circuit held that the group fell outside the "zone of interests protected or regulated by § 81" because the group did not appear on the list of federally recognized Indian tribes. *Id.* The court explained that "the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation." *Id.* at 1056. Congress delegated authority to Interior to regulate Indian affairs, and Interior developed procedures to add entities to the list of federally recognized Indian tribes. *Id.* at 1057–58 (citing *James*, 824 F.2d at 1138). Consistent with the judiciary's historical deference to "executive and legislative determinations of tribal recognition," the court concluded that "the Tribe's absence from [Interior's] list is dispositive." *Id.* Because the group did not appear on the list, it was not "within the zone of interests of § 81." *Id.* at 1058.

It is undisputed that the Mackinac Group does not appear on, never has appeared on, and has not petitioned to be added to the list of federally recognized Indian tribes. (Opening Br. 14–18, 20, 23–24.) The Mackinac Group therefore falls outside the zone of interests protected

by the IRA's election procedures, 25 U.S.C. § 476, including the provision authorizing actions to enforce those procedures, *id.* § 476(d)(2). *See Delta Const. Co. v. EPA*, 783 F.3d 1291, 1300 (D.C. Cir. 2015) (plaintiff did not "fall[] within the class of plaintiffs whom Congress ha[d] authorized to sue") (quoting *Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1387 (2014)).

The Mackinac Group's arguments to the contrary lack merit. The Mackinac Group first focuses on the IRA's definition of "tribe," which was unchanged by the 1988 amendments. (Opening Br. 15, 17.) It observes that "tribe" means "**any Indian tribe**, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479 (emphasis added by the Mackinac Group). But the Mackinac Group overlooks that "Indian" is defined to include "members of any *recognized* Indian tribe now under Federal jurisdiction." *Id.* (emphasis added). In *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), the Supreme Court explained that the definition of "tribe" incorporates the definition of "Indian." *Accord Muwekma Ohlone*, 708 F.3d at 211 (explaining that the IRA's programs and services are available to members of "recognized" Indian tribes).

The Mackinac Group misconstrues *Carcieri* as having employed a "look-back" test that disregards "whether the tribe appear[s] on the Secretary's list of tribes." (Opening Br. 17.) In *Carcieri*, the Supreme Court interpreted the phrase "now under Federal jurisdiction" in the IRA's definition of "Indian" to refer to tribes that were under federal jurisdiction when the IRA was enacted in 1934. 555 U.S. at 395 (citing 25 U.S.C. § 479). The Court therefore held that a tribe that was added to the list in 1983—but that was not under federal jurisdiction in 1934—did not qualify for certain benefits under the IRA. *Id.* at 384, 395–96. Thus, under *Carcieri*, a tribe not only must be "recognized" at present, but also must have been "under federal jurisdiction" in 1934. *Id.*

The Court did not hold, as the Mackinac Group contends, that it is *unnecessary* for a group to appear on the list of federally recognized tribes to obtain services under the IRA. The Court merely held that inclusion on the list is not necessarily *sufficient* because a group also must have been under federal jurisdiction in 1934. Nor does Justice Breyer's concurrence lend any support to the Mackinac Group. (Opening Br. 17–18.) Justice Breyer merely posited that "later recognition" by

Interior may actually be sufficient when it "reflects earlier 'Federal jurisdiction.'" 555 U.S. at 399. Nothing in *Carcieri* supports the Mackinac Group's argument that the IRA provides it with a cause of action to bypass the acknowledgment process and request a judicial determination that it is a federally recognized Indian tribe.

The Mackinac Group similarly errs in relying on the 1988 IRA amendments' uncodified definitions of the terms "applicable laws" and "tribal request." (Opening Br. 16, 26.) The Mackinac Group observes that "applicable laws" is defined to include treaties. Pub. L. No. 100-581, § 102(1), 102 Stat. 2939. The Mackinac Group thus argues that, in reviewing whether Interior complied with § 476, a court may determine whether a group was previously recognized by treaty. Mackinac Group is incorrect. Section 476 requires Interior to consider whether a *proposed constitution* complies with all "applicable laws." 25 U.S.C. § 476(c)(2)–(3), (d)(1).

Nor does the amendments' definition of "tribal request," 25 U.S.C. § 476(c), as an "appropriate" tribal request suggest that a court should determine in the first instance whether a requesting group is entitled to federal recognition. Pub. L. No. 100-581, § 102(2), 102 Stat. 2939. An

"appropriate tribal request" consists of a "duly enacted tribal resolution requesting a Secretarial election as well as a copy of the proposed tribal constitution and bylaws, amendments, or revocation action." *Id.* A "duly enacted tribal resolution" may be submitted by a "recognized" Indian tribe. *See* 25 U.S.C. § 479 (defining "tribe" and "Indian"). Thus, for all the reasons explained above, a court need only ascertain whether *Interior* has determined that the requesting group is recognized.

The Mackinac Group also misreads Interior's regulations implementing the IRA's election provisions, 25 C.F.R. Pt. 81. (Opening Br. 19.) Those regulations define "tribe" to mean "[a]ny Indian entity that . . . is included, **or is eligible to be included**, among those tribes . . . listed in the Federal Register pursuant to § 83.6(b) of this chapter."[14] 25 C.F.R. § 81.1(w) (2014) (emphasis added by the Mackinac Group). The Mackinac Group argues that it is "eligible to be included" on the list of federally recognized Indian tribes because it allegedly was

[14] Because § 81.1(w) was promulgated in 1981, the cross-reference is to Interior's 1978 acknowledgment regulations. *See* 43 Fed. Reg. at 39,362–63 (providing for list at 25 C.F.R. § 54.6(b)), *redesignated to Part 83 by* 47 Fed. Reg. 13,327 (Mar. 30, 1982). To account for the List Act, Interior recently amended the definition of "tribe" in Part 81 to include any Indian tribe "that is listed in the Federal Register under 25 U.S.C. § 479a-1(a)." 80 Fed. Reg. 63,094, 63,108 (Oct. 19, 2015) (promulgating 25 C.F.R. § 81.4).

previously recognized by treaty. The Mackinac Group therefore concludes that it may petition for an election under the IRA.

The Mackinac Group's interpretation must be rejected because it would effectively nullify the provision of Part 83 requiring groups to submit proof of previous recognition and to demonstrate that they currently satisfy the acknowledgment criteria. *See Nat'l Corn Growers Ass'n v. EPA*, 613 F.3d 266, 272 (D.C. Cir. 2010) (regulation should be construed to avoid rendering other provisions "inoperative or superfluous"). It is not enough to have been previously recognized by treaty. *See* 25 C.F.R. 83.8 (2014). Moreover, the Mackinac Group's interpretation would require Interior to decide in just 180 days whether an unlisted entity satisfies the acknowledgment criteria. *See* 25 U.S.C. § 476(c)(1)(A). In most cases, it would be impossible for Interior to do so given the "complex" and "labor-intensive" nature of that task. *Mashpee Wampanoag*, 336 F.3d at 1100. When interpreting a regulation, courts must "avoid the absurd result of an impossible instruction to the [agency]." *Arkansas Dairy Co-op Ass'n, Inc. v. USDA*, 573 F.3d 815, 829 (D.C. Cir. 2009).

The phrase "eligible to be included" actually addresses the gap between an acknowledgment determination and the next publication of the list, which happens only annually. *See* 25 U.S.C. § 479a-1.[15] The phrase ensures that groups having received a positive acknowledgment determination—but not yet appearing on the list of federally recognized Indian tribes due to the timing of its publication—may receive the IRA's benefits, including a Secretarial election to ratify a constitution. In other words, a group is "eligible to be included" on the list *after* it has received a positive acknowledgment determination from Interior but *before* the next official list is published. *See* 46 Fed. Reg. 1668, 1669 (Jan. 7, 1981) (explaining that, upon being acknowledged, a tribe "at that time also become[s] eligible to be listed in the Federal Register" and thus may "initiate without delay its reorganization"). This Court should defer to Interior's interpretation because it is not "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*

[15] In 1981, when 25 C.F.R. § 81.1(w) was promulgated, Interior's regulations provided for annual publication of the list. *See* 43 Fed. Reg. at 39,362–63 (promulgating 25 C.F.R. § 54.6(b)). Interior's 1994 regulations changed the prescribed publication interval to every three years. *See* 25 C.F.R. § 83.5(a) (2014). Interior's current regulations again provide for annual publication of the list. 25 C.F.R. § 83.6(a) (2015).

v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

The Mackinac Group lacks a cause of action under the IRA because it does not appear on, and has not successfully petitioned Interior to be added to, the list of federally recognized Indian tribes. Congress did not authorize unlisted entities to bypass Interior's acknowledgment process by filing suit under the IRA.

III. The List Act confirms that Congress expected Indian groups to follow the Part 83 process.

The List Act further confirms that Indian groups must petition Interior for acknowledgment. Congress passed the List Act in 1994, six years after it amended the IRA to add the Secretarial election procedures and sixteen years after Interior began publishing the list in the Federal Register. The List Act instructed Interior to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. The List Act defines "Indian tribe" to mean "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the *Secretary of the Interior acknowledges* to exist as an Indian tribe." *Id.* § 479a (emphasis added).

That definition confirms the Secretary's primary role. The List Act shows that Congress intended unlisted groups to follow Interior's well-established Part 83 process even after the 1988 IRA amendments.

Contrary to the Mackinac Group's argument, the List Act's uncodified findings do not show that Congress intended courts to "determine tribal status when the issue arises in judicial proceedings." (Opening Br. 26.) Congress found 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 . . . ; or by a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791. That finding did not dispense with administrative exhaustion. Congress merely confirmed that courts had sometimes issued decisions on tribal recognition, particularly before implementation of the Part 83 process. (*See supra* Argument Section I.)

Congress additionally found that "Interior is charged with the responsibility of keeping a list of all federally recognized tribes," and that the list "should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to

receive services from the United States." Pub. L. No. 103-454, § 103(6)–(7), 108 Stat. 4792. Coupled with the codified provisions of the List Act, 25 U.S.C. §§ 479a & 479a-1, those findings show that Congress intended Interior to address in the first instance whether an entity qualifies as a federally recognized Indian tribe and thus is eligible for the federal programs and services available to such tribes.

The Mackinac Group additionally argues that because it was not immediately added to the list of federally recognized Indian tribes, Interior violated the List Act in 1994. (Opening Br. 13, 23–24.) The Mackinac Group did not plead a violation of the List Act in its complaint (JA 6–13), and it disclaimed any argument under the List Act in its district-court brief (JA 74–76). Thus, the Mackinac Group has waived any claim that Interior violated the List Act. *See El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1279 (D.C. Cir. 2011) ("[P]arties may not raise a claim for the first time on appeal.").[16]

[16] The Mackinac Group did cite the mandamus statute, 28 U.S.C. § 1361, as a source of jurisdiction. (JA 6.) But the complaint did not assert a claim for mandamus (JA 12), nor does the opening brief argue that the high standard for mandamus is met here. Moreover, mandamus is not available because judicial review would be "possible under the APA after plaintiffs have followed the procedures of 25 C.F.R. pt. 83." *W. Shoshone*, 1 F.3d at 1059. Similarly, before the Mackinac

In any event, Interior did not violate the List Act in 1994. Just before the List Act's passage, Interior revised the Part 83 process to relax the evidentiary standards for previously recognized Indian tribes, but not to eliminate the need to satisfy the acknowledgment criteria. *See* 59 Fed. Reg. at 9282–83. Congress did not express any intent in the List Act to alter that requirement. The Mackinac Group must file an acknowledgment petition showing that its members descend from a group previously recognized by treaty and that it meets the other criteria for a previously recognized Indian tribe to be added to the list. *See id.* at 9296 (promulgating 25 C.F.R. § 83.8).

Moreover, even if Interior had violated the List Act in 1994 as the Mackinac Group contends, the six-year limitations period would have expired in 2000, 28 U.S.C. § 2401(a), well before this suit was filed in 2014. The Part 83 process provides the Mackinac Group with an opportunity to present evidence to Interior, and for Interior to reach a

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Group could assert a failure-to-act claim under the APA, 5 U.S.C. § 706(1), it first would have to avail itself of Interior's administrative process for challenging the agency's inaction. 25 C.F.R. § 2.8. *See, e.g.*, *Gilmore v. Weatherford*, 694 F.3d 1160, 1170 (10th Cir. 2012); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10th Cir. 1994). Neither the Mackinac Group's complaint (JA 6–13) nor its district-court brief (JA 55–96) expressly asserted a claim under the APA.

final determination concerning the Mackinac Group's current status as an Indian tribe. *See Muwekma Ohlone*, 708 F.3d at 218–19. Interior's final acknowledgment determination will be subject to judicial review under the APA. *Id.* The Mackinac Group cannot seek judicial review until it completes that process.

CONCLUSION

The Mackinac Group does not appear on the list of federally recognized Indian tribes, nor has it applied for or received a positive acknowledgment determination from Interior. Because the Mackinac Group failed to exhaust its administrative remedies and lacks a cause of action under the IRA, the district court's order granting summary judgment to Interior should be affirmed.

Respectfully submitted,

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ADDENDUM: ADDITIONAL PERTINENT STATUTES AND REGULATIONS

Table of Contents

generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§ 479. Definitions

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. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

(June 18, 1934, ch. 576, § 19, 48 Stat. 988.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

§ 479a. Definitions

For the purposes of this title:[1]

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a–1 of this title.

(Pub. L. 103–454, title I, § 102, Nov. 2, 1994, 108 Stat. 4791.)

REFERENCES IN TEXT

This title, referred to in introductory provisions, is title I of Pub. L. 103–454, Nov. 2, 1994, 108 Stat. 4791, which enacted this section, section 479a–1 of this title, and provisions set out as notes below. For complete classification of this title to the Code, see Short Title note below and Tables.

SHORT TITLE

Pub. L. 103–454, title I, § 101, Nov. 2, 1994, 108 Stat. 4791, provided that: "This title [enacting this section and section 479a–1 of this title and provisions set out below] may be cited as the 'Federally Recognized Indian Tribe List Act of 1994'."

CONGRESSIONAL FINDINGS

Pub. L. 103–454, title I, § 103, Nov. 2, 1994, 108 Stat. 4791, provided that: "The Congress finds that—

"(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

"(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

"(3) 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;

"(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

"(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

"(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

"(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

"(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

§ 479a–1. Publication of list of recognized tribes

(a) Publication of list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

(Pub. L. 103–454, title I, § 104, Nov. 2, 1994, 108 Stat. 4792.)

§ 480. Indians eligible for loans

On and after May 10, 1939, no individual of less than one-quarter degree of Indian blood shall be eligible for a loan from funds made available in accordance with the provisions of the Act of June 18, 1934 (48 Stat. 986) [25 U.S.C. 461 et seq.], and the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.].

(May 10, 1939, ch. 119, § 1, 53 Stat. 698.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Act of June 26, 1936, referred to in text, popularly known as the Oklahoma Welfare Act, is classified generally to subchapter VIII (§ 501 et seq.) of this chapter. For complete classification of this Act to the Code, see

[1] See References in Text note below.

not inconsistent with the regulations in this part 75.

[39 FR 43391, Dec. 13, 1974. Redesignated at 47 FR 13327, Mar. 30, 1982]

PART 81—TRIBAL REORGANIZATION UNDER A FEDERAL STATUTE

Sec.

AUTHORITY: 25 U.S.C. 473a, 476, 477, and 503.

SOURCE: 46 FR 1670, Jan. 7, 1981, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§81.1 Definitions.

As used in this part:

(a) *Adult Indian* means any Indian as defined in paragraph (i) of this section who has attained the age of 18 years.

(b) *Amendment* means any modification, change, or total revision of a constitution or charter.

(c) *Authorizing Officer* means the Bureau of Indian Affairs official having authority to authorize the calling of a Secretarial election.

(d) *Cast ballot* means an official ballot that is cast in the proper manner at the proper time by a duly registered voter. A ballot is cast by duly placing it in the ballot box or, in the case of absentee voting, when the ballot is duly received through the mail by the election board.

(e) *Charter* means the charter of incorporation the Secretary may issue to a reorganized tribe pursuant to Federal Statute.

(f) *Commissioner* means the Commissioner of Indian Affairs or his/her authorized representative.

(g) *Constitution* or *Constitution and Bylaws* means the written organizational framework of any tribe reorganized pursuant to a Federal Statute for the exercise of governmental powers.

(h) *Federal Statute* means one of the following: (1) The Act of June 18, 1934, 48 Stat. 984, as amended (Indian Reorganization Act); (2) the Act of June 26, 1936, 49 Stat. 1967 (Oklahoma Indian Welfare Act); or (3) the Act of May 1, 1936, 49 Stat. 1250 (Alaska Native Reorganization Act).

(i) *Indian* means: (1) All persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 CFR 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the Act of June 18, 1934, 43 Stat. 984, as amended; and (2) any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood.

(j) *Invalid ballot* means an official cast ballot discovered at the time the votes are counted which does not comply with the requirements for voting or is not an official ballot. An invalid ballot is not to be counted for determining the number of cast ballots.

(k) *Member* means any Indian who is duly enrolled in a tribe who meets a tribe's written criteria for membership or who is recognized as belonging to a tribe by the local Indians comprising the tribe.

(l) *Mutilated ballot* means an official ballot that has been damaged to the extent that it is not possible to determine the choice the voter intended to make. There are two kinds of mutilated official ballots:

(1) A ballot that is mutilated and not cast. In this case, the mutilated ballot may be exchanged for a new one. If the need arises to exchange a mutilated absentee ballot, no additional time will

be provided for the new ballot to be received by the election board.

(2) A ballot that is mutilated and cast. A mutilated cast ballot is to be counted in the same manner as a spoiled cast ballot.

(m) *Officer in Charge* means the Superintendent, Administrative Officer, or other official of the local unit of the Bureau of Indian Affairs (or a Bureau employee that such person might designate) having administrative jurisdiction over a tribe.

(n) *Official ballot* means a ballot prepared by the Bureau of Indian Affairs for use in an election pursuant to this part. It is possible that an official ballot may be found to be either spoiled or mutilated at the time the votes are counted.

(o) *Registration* means the act whereby persons, who are eligible to vote, become entitled or qualified to cast ballots by having their names placed on the list of persons who will be permitted to vote.

(p) *Reorganized tribe* means a tribe whose members have adopted a constitution pursuant to a Federal Statute.

(q) *Reservation* means any area established by treaty, Congressional Act, Executive Order, or otherwise for the use or occupancy of Indians.

(r) *Revocation* means that act whereby the adult members of a tribe vote to abandon their constitutional form of government as opposed to their voting to amend or totally revise it.

(s) *Secretarial election* means an election held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from *tribal* elections which are conducted under tribal authority. (See *Cheyenne River Sioux Tribe* v. *Andrus*, 566 F. 2d 1085 (8th Cir., 1977), *cert. denied* 439 U.S. 820 (1978)).

(t) *Secretary* means the Secretary of the Interior or his/her authorized representative.

(u) *Spoiled ballot* means an official ballot that has been marked in such a way that it is not possible to determine the intent of the voter, a ballot that has not been marked at all, or one that has been marked so as to violate the secrecy of the ballot. There are two kinds of spoiled official ballots:

(1) A ballot that is spoiled and not cast. In this case, the spoiled ballot may be exchanged for a new one. If the need arises to exchange a spoiled absentee ballot, no additional time will be provided for the new ballot to be received by the election board.

(2) A ballot that is spoiled and cast. A spoiled cast ballot is to be counted in tabulating the total votes cast in conjunction with determining whether the required percentage of the qualified voters has participated in the election.

(v) *Tribal government* means that entity established pursuant to a tribal constitution as empowered to speak for the tribe or in the absence thereof any group or individual that is recognized by the tribal members as empowered to speak for the tribe.

(w) *Tribe* means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the FEDERAL REGISTER pursuant to §83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs; and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes.

(x) *Voting district* means a geographical area established to facilitate a tribal election process.

§ 81.2 Purpose and scope.

(a) The purpose of this part is to provide uniformity and order in:

(1) Holding Secretarial elections for voting on proposed constitutions when tribes wish to reorganize,

(2) Adopting constitutional amendments,

(3) Ratifying and amending charters,

(4) Revoking constitutions, and

(5) Facilitating the calling of such elections by the Secretary under provisions of a Federal Statute.

(b) This part may also be used as a guideline by tribes wishing to hold constitutional elections that are not held pursuant to a Federal Statute.

(2) Lack of proper qualifications of a signer.

No challenge will be considered which is not accompanied by supporting evidence in writing. In the event that an individual's name appears on a petition more than once, all but one of the names shall be stricken.

§ 82.10 Action on the petition.

(a) Within 30 days after the official filing date, the local Bureau official shall forward to the Area Director, or when the Area Director is the local Bureau official, directly to the Commissioner, the original of the petition and its accompanying signatures, together with recommendations concerning challenges and conclusions concerning:

(1) The validity of the signatures;

(2) The adequacy of the number of signatures; and

(3) The propriety of the petitioning procedure.

(b) The Area Director or the Commissioner, as the case may be, shall within 45 days after the official filing date decide upon each challenge and the sufficiency of the petition and announce whether the petition shall be acted upon. If a decision is reached that the petitioning action is for any reason insufficient, the spokesman for the petitioners and the governing body of the tribe will be so informed and given the reasons for the decision. If a petitioning action warrants action by the Secretary or Commissioner, the spokesman for the petitioners and the governing body of the tribe concerned will be so informed. The decision in such matters shall be final. The procedures for implementing any action initiated by the acceptance of a petition will be determined in accordance with pertinent directives and regulations.

§ 82.11 Duration of petition.

Any petition submitted under this part, shall be considered only for the purpose stated therein. Once a petition has been acted upon, it shall not be used again.

PART 83—PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

Sec.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

§ 83.1 Definitions.

As used in this part:

Area Office means a Bureau of Indian Affairs Area Office.

Assistant Secretary means the Assistant Secretary—Indian Affairs, or that officer's authorized representative.

Autonomous means the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture and social organization of the petitioning group.

Board means the Interior Board of Indian Appeals.

Bureau means the Bureau of Indian Affairs.

Community 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. *Community* must be understood in the context of the history, geography, culture and social organization of the group.

Continental United States means the contiguous 48 states and Alaska.

Continuously or *continuous* means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption.

Department means the Department of the Interior.

Documented petition means the detailed arguments made by a petitioner to substantiate its claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that these arguments address the mandatory criteria in §83.7(a) through (g).

Historically, *historical* or *history* means dating from first sustained contact with non-Indians.

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.

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.

Indigenous means native to the continental United States in that at least part of the petitioner's territory at the time of sustained contact extended into what is now the continental United States.

Informed party means any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.

Interested party means any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. ''Interested party'' includes the governor and attorney general of the state in which a petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

Letter of intent means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

Member of an Indian group means an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.

Member of an Indian tribe means an individual who meets the membership requirements of the tribe as set forth in its governing document or, absent such a document, has been recognized as a member collectively by those persons comprising the tribal governing body, and has consistently maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

Petitioner means any entity that has submitted a letter of intent to the Secretary requesting acknowledgment that it is an Indian tribe.

Political influence or authority means a tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture and social organization of the group.

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Secretary means the Secretary of the Interior or that officer's authorized representative.

Sustained contact means the period of earliest sustained non-Indian settlement and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

Tribal relations means participation by an individual in a political and social relationship with an Indian tribe.

Tribal roll, for purposes of these regulations, means a list exclusively of those individuals who have been determined by the tribe to meet the tribe's membership requirements as set forth in its governing document. In the absence of such a document, a tribal roll means a list of those recognized as members by the tribe's governing body. In either case, those individuals on a tribal roll must have affirmatively demonstrated consent to being listed as members.

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to 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. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

§ 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in §83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which a determination is not final and effective. Such petitioners may request a suspension of consideration under §83.10(g) of not more than 180 days in

order to provide additional information or argument.

§83.4 Filing a letter of intent.

(a) Any Indian group in the continental United States that believes it should be acknowledged as an Indian tribe and that it can satisfy the criteria in §83.7 may submit a letter of intent.

(b) Letters of intent requesting acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary—Indian Affairs, Department of the Interior, 1849 C Street, NW., Washington, DC 20240. Attention: Branch of Acknowledgment and Research, Mail Stop 2611–MIB. A letter of intent may be filed in advance of, or at the same time as, a group's documented petition.

(c) A letter of intent must be produced, dated and signed by the governing body of an Indian group and submitted to the Assistant Secretary.

§83.5 Duties of the Department.

(a) The Department shall publish in the FEDERAL REGISTER, no less frequently than every three years, a list of all Indian tribes entitled to receive services from the Bureau by virtue of their status as Indian tribes. The list may be published more frequently, if the Assistant Secretary deems it necessary.

(b) The Assistant Secretary shall make available revised and expanded guidelines for the preparation of documented petitions by September 23, 1994. These guidelines will include an explanation of the criteria and other provisions of the regulations, a discussion of the types of evidence which may be used to demonstrate particular criteria or other provisions of the regulations, and general suggestions and guidelines on how and where to conduct research. The guidelines may be supplemented or updated as necessary. The Department's example of a documented petition format, while preferable, shall not preclude the use of any other format.

(c) The Department shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition. The Department shall not be responsible for the actual research on behalf of the petitioner.

(d) Any notice which by the terms of these regulations must be published in the FEDERAL REGISTER, shall also be mailed to the petitioner, the governor of the state where the group is located, and to other interested parties.

(e) After an Indian group has filed a letter of intent requesting Federal acknowledgment as an Indian tribe and until that group has actually submitted a documented petition, the Assistant Secretary may contact the group periodically and request clarification, in writing, of its intent to continue with the petitioning process.

(f) All petitioners under active consideration shall be notified, by April 16, 1994, of the opportunity under §83.3(g) to choose whether to complete their petitioning process under the provisions of these revised regulations or the previous regulations as published, on September 5, 1978, at 43 FR 39361.

(g) All other groups that have submitted documented petitions or letters of intent shall be notified of and provided with a copy of these regulations by July 25, 1994.

§83.6 General provisions for the documented petition.

(a) The documented petition may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.

(b) The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition.

(c) A petitioner must satisfy all of the criteria in paragraphs (a) through (g) of §83.7 in order for tribal existence to be acknowledged. Therefore, the documented petition must include thorough explanations and supporting documentation in response to all of the criteria. The definitions in §83.1 are an integral part of the regulations, and the criteria should be read carefully together with these definitions.

(d) A petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria. A petitioner may also

be denied if there is insufficient evidence that it meets one or more of the criteria. A criterion shall be considered met if the 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.

(e) Evaluation of petitions shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria.

(f) The criteria in § 83.7 (a) through (g) shall be interpreted as applying to tribes or groups that have historically combined and functioned as a single autonomous political entity.

(g) The specific forms of evidence stated in the criteria in § 83.7 (a) through (c) and § 83.7(e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions.

§ 83.7 Mandatory criteria for Federal acknowledgment.

The mandatory criteria are:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(1) This criterion may be demonstrated by some combination of the following evidence and/or other evidence that the petitioner meets the definition of *community* set forth in § 83.1:

(i) Significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) Significant social relationships connecting individual members.

(iii) Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by non-members.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in §83.7(c) shall be evidence for demonstrating historical community.

(2) A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community;

(ii) At least 50 percent of the marriages in the group are between members of the group;

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices;

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The group has met the criterion in §83.7(c) using evidence described in §83.7(c)(2).

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(1) This criterion may be demonstrated by some combination of the evidence listed below and/or by other evidence that the petitioner meets the definition of political influence or authority in §83.1.

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in §83.7(b) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions.

(2) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and/or other mechanisms exist or existed which:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis.

(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;

(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(3) A group that has met the requirements in paragraph 83.7(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;

(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and

functioned as a single autonomous political entity.

(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(2) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

§ 83.8 Previous Federal acknowledgment.

(a) Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section.

(b) A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status shall be made during the technical assistance review of the documented petition conducted pursuant to § 83.10(b). If a petition is awaiting active consideration at the time of adoption of these regulations, this review will be conducted while the petition is under active consideration unless the petitioner requests in writing that this review be made in advance.

(c) Evidence to demonstrate previous Federal acknowledgment includes, but is not limited to:

(1) Evidence that the group has had treaty relations with the United States.

(2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order.

(3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds.

(d) To be acknowledged, a petitioner that can demonstrate previous Federal acknowledgment must show that:

(1) The group meets the requirements of the criterion in § 83.7(a), except that such identification shall be demonstrated since the point of last Federal acknowledgment. The group must further have been identified by such sources as the same tribal entity that was previously acknowledged or as a

portion that has evolved from that entity.

(2) The group meets the requirements of the criterion in §83.7(b) to demonstrate that it comprises a distinct community at present. However, it need not provide evidence to demonstrate existence as a community historically.

(3) The group meets the requirements of the criterion in §83.7(c) to demonstrate that political influence or authority is exercised within the group at present. Sufficient evidence to meet the criterion in §83.7(c) from the point of last Federal acknowledgment to the present may be provided by demonstration of substantially continuous historical identification, by authoritative, knowledgeable external sources, of leaders and/or a governing body who exercise political influence or authority, together with demonstration of one form of evidence listed in §83.7(c).

(4) The group meets the requirements of the criteria in paragraphs 83.7 (d) through (g).

(5) If a petitioner which has demonstrated previous Federal acknowledgment cannot meet the requirements in paragraphs (d) (1) and (3), the petitioner may demonstrate alternatively that it meets the requirements of the criteria in §83.7 (a) through (c) from last Federal acknowledgment until the present.

§83.9 Notice of receipt of a petition.

(a) Within 30 days after receiving a letter of intent, or a documented petition if a letter of intent has not previously been received and noticed, the Assistant Secretary shall acknowledge such receipt in writing and shall have published within 60 days in the FEDERAL REGISTER a notice of such receipt. This notice must include the name, location, and mailing address of the petitioner and such other information as will identify the entity submitting the letter of intent or documented petition and the date it was received. This notice shall also serve to announce the opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment and/or to request to be kept informed of all general actions affecting the petition. The notice shall also indicate where a copy of the letter of intent and the documented petition may be examined.

(b) The Assistant Secretary shall notify, in writing, the governor and attorney general of the state in which a petitioner is located. The Assistant Secretary shall also notify any recognized tribe and any other petitioner which appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest in the acknowledgment determination.

(c) The Assistant Secretary shall also publish the notice of receipt of the letter of intent, or documented petition if a letter of intent has not been previously received, in a major newspaper or newspapers of general circulation in the town or city nearest to the petitioner. The notice will include all of the information in paragraph (a) of this section.

§83.10 Processing of the documented petition.

(a) Upon receipt of a documented petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the documented petition and the factual statements contained therein. The Assistant Secretary may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status. The Assistant Secretary may likewise consider any evidence which may be submitted by interested parties or informed parties.

(b) Prior to active consideration of the documented petition, the Assistant Secretary shall conduct a preliminary review of the petition for purposes of technical assistance.

(1) This technical assistance review does not constitute the Assistant Secretary's review to determine if the petitioner is entitled to be acknowledged as an Indian tribe. It is a preliminary review for the purpose of providing the petitioner an opportunity to supplement or revise the documented petition prior to active consideration. Insofar

(h)(1) If the Board finds that no petitioner's or interested party's request for reconsideration is timely, the Assistant Secretary's determination shall become effective and final for the Department 120 days from the publication of the final determination in the FEDERAL REGISTER.

(2) If the Secretary declines to request reconsideration under paragraph (f)(2) of this section, the Assistant Secretary's decision shall become effective and final for the Department as of the date of notification to all parties of the Secretary's decision.

(3) If a determination is reconsidered by the Assistant Secretary because of action by the Board remanding a decision or because the Secretary has requested reconsideration, the reconsidered determination shall be final and effective upon publication of the notice of this reconsidered determination in the FEDERAL REGISTER.

§83.12 Implementation of decisions.

(a) Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

(b) Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of §83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

(c) While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledged tribe.

(d) Within six months after acknowledgment, the appropriate Area Office shall consult with the newly acknowledged tribe and develop, in cooperation with the tribe, a determination of needs and a recommended budget. These shall be forwarded to the Assistant Secretary. The recommended budget will then be considered along with other recommendations by the Assistant Secretary in the usual budget request process.

§83.13 Information collection.

(a) The collections of information contained in §83.7 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076–0104. The information will be used to establish historical existence as a tribe, verify family relationships and the group's claim that its members are Indian and descend from a historical tribe or tribes which combined, that members are not substantially enrolled in other Indian tribes, and that they have not individually or as a group been terminated or otherwise forbidden the Federal relationship. Response is required to obtain a benefit in accordance with 25 U.S.C. 2.

(b) Public reporting burden for this information is estimated to average 1,968 hours per petition, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments

Public Law 100-581
100th Congress

An Act

Nov. 1, 1988
[H.R. 2677]

To establish procedures for review of tribal constitutions and bylaws or amendments thereto pursuant to the Act of June 18, 1934 (48 Stat. 987).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDIAN REORGANIZATION ACT AMENDMENTS

SEC. 101. Section 16 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) is amended to read as follows:

"SEC. 16. (a) Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) for the adoption of a constitution or bylaws.

(c)(1) The Secretary shall call and hold an election as required by subsection (a)—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d)(1) If an election called under subsection (a) results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the

election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

State and local governments.

SEC. 102. For the purpose of this Act, the term— 25 USC 476 note.

(1) "applicable laws" means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts;

(2) "appropriate tribal request" means receipt in the Area Office of the Bureau of Indian Affairs having administrative jurisdiction over the requesting tribe, of a duly enacted tribal resolution requesting a Secretarial election as well as a copy of the proposed tribal constitution and bylaws, amendment, or revocation action;

(3) "Secretary" means the Secretary of the Interior.

SEC. 103. Nothing in this Act is intended to amend, revoke, or affect any tribal constitution, bylaw, or amendment ratified and approved prior to this Act. 25 USC 476 note.

TITLE II—MISCELLANEOUS AMENDMENTS TO EXISTING LAWS

SEC. 201. Subsection (b) of section 3 of the Old Age Assistance Claims Settlement Act (98 Stat. 2317; 25 U.S.C. 2302(b)) is amended to read as follows:

"(b) No payment shall be made to a person under subsection (a) with respect to any unauthorized disbursement from the trust estate of a deceased Indian if—

"(1) the total amount of unauthorized disbursements from such trust estate was less than $50; or

"(2) the payment (not including interest) would be less than $10.".

SEC. 202. Section 4(b) of the Act of September 9, 1988 (Public Law 100-425) entitled "An Act to establish a reservation for the Confederated Tribes of the Grand Ronde Community of Oregon, and for other purposes" is amended by striking out "4" in the first column of the description of the thirty-eighth tract of land listed in that subsection and inserting in lieu thereof "2". 25 USC 713f note.

SEC. 203. Notwithstanding any other provision of law, the plan dated July 7, 1988, that was submitted by the Assistant Secretary of

Public Law 103-454
103d Congress

An Act

To provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Nov. 2, 1994
[H.R. 4180]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

Federally Recognized Indian Tribe List Act of 1994.

SEC. 101. SHORT TITLE.

25 USC 479a note.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

25 USC 479a.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

25 USC 479a note.

The Congress finds that—

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) 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;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 USC 479a-1. Federal Register, publication.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

Tlingit and Haida Status Clarification Act.

TITLE II—CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

25 USC 1212 note.

SEC. 201. SHORT TITLE.

This title may be cited as the "Tlingit and Haida Status Clarification Act".

25 USC 1212.

SEC. 202. FINDINGS.

The Congress finds and declares that—

(1) the United States has acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska pursuant to the Act of June 19, 1935 (49 Stat. 388, as amended, commonly referred to as the "Jurisdiction Act"), as a federally recognized Indian tribe;

(2) on October 21, 1993, the Secretary of the Interior published a list of federally recognized Indian tribes pursuant to part 83 of title 25 of the Code of Federal Regulations which omitted the Central Council of Tlingit and Haida Indian Tribes of Alaska;

(3) the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress;

(4) the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress; and

(5) the Central Council of Tlingit and Haida Indian Tribes of Alaska continues to be a federally recognized Indian tribe.

25 USC 1213.

SEC. 203. REAFFIRMATION OF TRIBAL STATUS.

The Congress reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe.

CERTIFICATE OF SERVICE

On October 30, 2105, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nicholas A. DiMascio
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