No. 17-35368

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK'S LANDING INDIAN COMMUNITY,

Plaintiff-Appellant,

v.

NATIONAL INDIAN GAMING COMMISSION, *et al.,*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Case No. 3:15-cv-05828-BHS (Hon. Benjamin H. Settle)

ANSWERING BRIEF FOR THE APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
Br.	Appellant's Opening Brief
ER	Excerpts of Record
IGRA	Indian Gaming Regulatory Act
NIGC	National Indian Gaming Commission
SER	Supplemental Excerpts of Record

INTRODUCTION

This case presents a challenge to the Department of the Interior's decision that the Frank's Landing Indian Community (Community) is not eligible to conduct gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2720. The Community is not a federally recognized tribe, but has a unique legal status as a self-governing dependent Indian community as provided in specific statutes enacted in 1987 and 1994. Interior concluded that the Community is not eligible for gaming because it does not meet IGRA's definition of an "Indian tribe," 25 U.S.C. § 2703(5). On the basis of Interior's decision, the National Indian Gaming Commission (NIGC) declined to review and act upon the Community's proposed IGRA gaming ordinance.

The Community brought suit under the Administrative Procedure Act (APA), 5 U.S.C. § 704, contending that Interior misread the relevant statutes in concluding that the Community does not qualify as an "Indian tribe" under IGRA. The district court disagreed and entered summary judgment for Interior. As demonstrated below, the district court's decision is correct. First, IGRA's definition of "Indian tribe" requires federal recognition, and the Community is not a federally recognized tribe. Second, the statutes defining the Community's unique legal status do not make the Community eligible for gaming despite its lack of federal recognition. The district court's judgment should therefore be affirmed.

STATEMENT OF JURISDICTION

(a) The Community challenged Interior's March 2015 final decision under the APA, 5 U.S.C. § 704, and the district court had subject-matter jurisdiction under the federal question statute, 28 U.S.C. § 1331.

(b) The district court's judgment is final because it disposed of all claims by and against all parties. Appellant's Excerpts of Record (ER) 1. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court's judgment was entered on March 15, 2017. ER1. The Community filed its notice of appeal on May 2, 2017. ER33-38. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii).

STATEMENT OF THE ISSUE

Whether Interior's conclusion that the Community is not eligible to conduct class II gaming under IGRA is arbitrary, capricious, or contrary to law.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not appended to the Community's brief are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Indian Gaming Regulatory Act

Congress enacted IGRA in 1988 "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44,

48 (1996) (citing 25 U.S.C. § 2702). IGRA created the NIGC, "a federal regulatory agency . . . that oversees the business of Indian gaming," *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716 n.6 (9th Cir. 2003), and divides Indian gaming into three classes. *See* 25 U.S.C. §§ 2703(6)-(8), 2710. Class I includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of . . . tribal ceremonies or celebrations." *Id.* § 2703(6). Class II includes bingo and certain card games. *See id.* § 2703(7). Class III consist of any form of gaming not falling within class I or class II, *id.* § 2703(8), such as slot machines, casino games, sports betting, and pari-mutuel wagering. *See* 25 C.F.R. § 502.4.

To conduct class II or class III gaming, an "Indian tribe" must have a gaming ordinance approved by the NIGC's chairman. 25 U.S.C. § 2710(b), (d).[1] IGRA defines "Indian tribe" as

> any Indian tribe, band, nation, or other organized group or community of Indians which —
>
> (A) *is recognized as eligible by the Secretary* for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> (B) is recognized as possessing powers of self-government.

[1] The Community correctly notes that non-Indians may operate class II gaming facilities under certain conditions. Appellant's Opening Brief (Br.) at 32 n.10. But the Community fails to point out that such operations may occur only if an Indian tribe issues the non-Indians a license to operate a class II gaming facility on the tribe's lands under an NIGC-approved tribal ordinance. 25 U.S.C. §§ 2710(b)(1), (4)(A).

25 U.S.C. § 2703(5) (emphasis added). "The term 'Secretary' means the Secretary of the Interior." *Id.* § 2703(10).

2. The Part 83 federal acknowledgement process

Federal "recognition" of an Indian tribe is "a legal term of art." H.R. REP. NO. 103-781, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768. "It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress legislative powers." *Id.* at 3768-69. Federal recognition

> permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary. Finally, it imposes upon the Secretary … specific obligations to provide a panoply of benefits and services to the tribe and its members. In other words, unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by [Interior] … and establishes tribal status for all federal purposes.

Id. at 3769 (footnotes omitted); *see also* 25 C.F.R. § 83.2 (2015); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004); *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015); Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 3.02[3], at 133-36 (Nell Jessup Newton ed., 2012). A group of Indians may be federally recognized by an Act of Congress; by Secretarial acknowledgement under Interior's "Part 83" regulations, 25 C.F.R. Part 83; or by a decision of a United States court in certain circumstances. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No.

103-454, § 103(3), 108 Stat. 4791, 4791; *see also Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,363 (May 20, 2008).[2]

In 1978, ten years before IGRA was enacted, Interior promulgated the Part 83 regulations establishing a formal process by which a group of Indians may petition the Secretary for federal recognition. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978).[3] "Prior to 1978, Federal acknowledgment was accomplished both by Congressional action and by various forms of administrative decision. . . . The [Part 83] regulations established the first detailed, systematic process for review of petitions from groups seeking Federal acknowledgment." 59 Fed. Reg. at 9280. If the Secretary acknowledges a petitioner as an Indian tribe, the tribe is "eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes." 43 Fed. Reg. at 39,364.

From the onset, the Part 83 regulations required the Secretary to publish and periodically update a list of all recognized Indian tribes (whether recognized by

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[2] A group of Indians may challenge Interior's final recognition decision under the APA, *see, e.g.*, *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013), but only after exhausting its administrative remedies under Part 83. *See, e.g., James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137-38 (D.C. Cir. 1987); *accord Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016).

[3] The regulations were initially designated as 25 C.F.R. Part 54, but were redesignated without textual change as 25 C.F.R. Part 83. *See Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9280 (Feb. 25, 1994).

Secretarial action, Congressional action, or otherwise). *See* 43 Fed. Reg. at 39,362-63. The first such list was published in 1979. 44 Fed. Reg. 7,235 (Feb. 6, 1979). The list is considered "to be the best source to identify federally acknowledged Indian tribes." *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993).

3. The Federally Recognized Indian Tribe List Act

As cited above, Congress enacted the Federally Recognized Indian Tribe List Act (List Act) in 1994. The Act ratifies the Part 83 acknowledgement process, *id.* § 103(3), and directs the Secretary to publish annually "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. § 5131.[4] The List Act states that "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." § 103(8), 108 Stat. at 4792.

The Community has not been recognized as an Indian tribe by any of the three permissible methods. Accordingly, the Community has never appeared on the Secretary's list. ER233; *see also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915 (Jan. 17, 2017).

[4] The cited provisions of the List Act were originally codified at 25 U.S.C. §§ 479 and 479a-1, but were recently transferred without change to 25 U.S.C. §§ 5130 and 5131, respectively. The List Act's findings are not separately codified.

B. Background regarding the Community and its legal status.

Frank's Landing consists of three parcels of land located along the Nisqually River near Olympia, Washington. Those parcels, totaling 19 acres, are held in trust by the United States for the benefit of individually-named Indians and were set aside for these individuals in 1918. The people, society, and government located at Frank's Landing are referred to as the "Community." *See Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). Most of the Community's approximately 60 members are members of the Puyallup or Nisqually Indian tribes, both of which are federally recognized. *See* S. REP. NO. 100-186, at 6-7 (1987), *reprinted in* 1987 U.S.C.C.A.N. 833, 836. The Community and the Nisqually Tribe have been engaged in a "decades-long" dispute over the Community's ability to govern itself as a separate entity. Supplemental Excerpts of Record (SER) 2-3; *see also Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203, 1207 (W.D. Wash. 2009), *aff'd*, 623 F.3d 923 (9th Cir. 2010).

Two federal statutes define the Community's legal status. First, the Indian Law Technical Amendments of 1987 (1987 Act), Pub. L. No. 100-153, § 10, 101 Stat. 886, 889, provides that the Community is "eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act" (Self-Determination Act). The 1987 Act confirmed the Community's authority to contract with federal agencies for the programs and services available to Indian tribes without needing the consent of any federally recognized tribe. *See* S. REP. NO. 100-186, at 7, *reprinted in* 1987 U.S.C.C.A.N. at 836. The 1987 Act, however, was "not intended to create or to

establish Frank's Landing as a Federally-recognized Indian Tribe . . . or to alter in any way existing jurisdictional arrangements." *Id.* Any "reserved rights of residents of Frank's Landing as members of Federally-recognized Indian tribes derive from their membership in such tribes and are not affected in any way by" the 1987 Act. *Id.*

Second, in 1994, Congress added several new provisions to Section 10 of the 1987 Act. *See* Pub. L. No. 103-435, § 8, 108 Stat. 4566, 4569-70 (1994 Act). The existing provisions of the 1987 Act were re-designated (without change) as Section 10(a)(1). A new provision, paragraph (a)(2), was added recognizing the Community as a "self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe." 108 Stat. at 4569. That provision was added "at the behest of [the Community], whose members feared unilateral annexation into the Nisqually Tribal Reservation if a constitution under consideration by the Nisqually Tribe was adopted." *Gregoire*, 649 F. Supp. 2d at 1205. The 1994 Act also created new subsection (b), which places three limits on the Community's powers. As amended, Section 10 provides as follows:

> (a) Subject to subsection (b), the [Community] . . . is hereby recognized —
>
> > (1) as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act [Self-Determination Act] for such services, but the proviso in section 4(c) of such Act (25 U.S.C. 450b(c)) shall not apply with respect to grants awarded to, and contracts entered into with, such Community; and

> (2) as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe.
>
> (b) (1) Nothing in this section may be construed to alter or affect the jurisdiction of the State of Washington under section 1162 of title 18, United States Code.
>
> (2) Nothing in this section may be construed to constitute the recognition by the United States that the [Community] is a federally recognized Indian tribe.
>
> (3) Notwithstanding any other provision of law, the [Community] shall not engage in any class III gaming activity (as defined in section 3(8) of the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2703(8))).

1987 Act, 101 Stat. at 889; 1994 Act, 108 Stat. at 4569-70.

C. Administrative proceedings

In December 2014, the Community submitted a purported class II gaming ordinance to the NIGC for review and approval under IGRA. ER7. In response, the NIGC requested a decision from Interior as to whether the Community qualifies as an "Indian tribe" under IGRA. ER7.

On March 6, 2015, Interior (through the Assistant Secretary-Indian Affairs) transmitted a decision to the NIGC. Interior concluded that the Community is not an "Indian tribe" under IGRA because it is not a federally recognized tribe and does not appear on the annual list of recognized tribes published under the List Act. SER43. Interior explained that the NIGC could rely on the annual list "as a definitive means of determining whether an entity is a federally-recognized Indian tribe" because the list is intended to be "exhaustive." *Id.* Interior also noted that reliance on the list

provides clarity and counters perceptions of "mystery and uncertainty" surrounding which groups of Indians are eligible for gaming under IGRA. *Id.*

Interior's decision also concurred in a legal analysis of the 1987 and 1994 Acts prepared by Interior's Office of the Solicitor. SER45-50. The analysis concluded that the 1987 and 1994 Acts did not confer federal recognition upon the Community or authorize the Community to engage in class II gaming. *Id.* The analysis determined that the purpose of the two statutes was to recognize the Community's governing bodies as "tribal organizations," as defined in the Self-Determination Act, that may contract with federal agencies for the programs and services available to Indian tribes without the consent of any federally recognized tribes, including the Nisqually Tribe with whom the Community had long-standing disputes. SER46, 49.

On March 6, 2015, the chairman of the NIGC informed the Community that in light of Interior's conclusion that the Community did not meet IGRA's definition of an "Indian tribe," the Community's submission did not qualify as a valid "tribal ordinance" under IGRA. SER51, 54. The NIGC thus concluded that it lacked authority to review and act on the Community's submission. *Id.*

D. District court proceedings

In November 2015, the Community filed suit against Interior and the NIGC seeking "a declaration that the Community qualifies as an 'Indian tribe' under IGRA." ER229, 239. In August 2016, the district court dismissed the NIGC from the lawsuit,

holding that the Community's dispute over its eligibility for gaming under IGRA lay solely with Interior. ER23-32.

The remaining parties filed cross-motions for summary judgment. On March 15, 2017, the district issued an opinion and order denying the Community's motion and granting Interior's cross-motion. ER2-22. The court found the relevant statutes ambiguous and held that Interior's conclusion that the 1987 and 1994 Acts did not make the Community an "Indian tribe" within the meaning of IGRA was reasonable and entitled to deference. ER2-22. This appeal followed.

SUMMARY OF ARGUMENT

Interior correctly concluded that the Community does not qualify as an "Indian tribe" under IGRA because the Community is not a federally recognized tribe. IGRA requires that a group of Indians be "recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 2703(5). When IGRA was enacted in 1988, a group of Indians was "recognized . . . by the Secretary" only if it appeared on the list required under the Part 83 regulations, which signifies federal recognition of tribal status. When Congress enacted the List Act in 1994, Congress ratified the Part 83 process and—using virtually the same language contained in IGRA—directed the Secretary to publish a list of all recognized Indian tribes. *See* 25 U.S.C. § 5131. Because the Community is not on the list and is not a federally recognized tribe, the Community does not qualify as an "Indian tribe" under IGRA.

The limited powers granted to the Community in the 1987 and 1994 Acts do not equate to federal recognition. Indeed, the 1994 Act expressly *denies* the Community federal recognition, and the text and history of the 1987 and 1994 Acts confirm that neither statute was intended to authorize the Community to conduct class II gaming under IGRA despite its lack of federal recognition.

The judgment of the district court should therefore be affirmed.

STANDARDS OF REVIEW

This Court reviews "de novo the district court's summary judgment rulings, 'thus reviewing directly the agency's action under the [APA's] arbitrary and capricious standard.'" *County of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1020 (9th Cir. 2017) (quoting *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015)). Under that standard, an agency's decision "must be upheld if a reasonable basis exists for the . . . decision." *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012).

The Community agrees (Br. 40-41) that Interior's interpretation of the relevant statutes is governed by the two-step framework set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[5] If, upon review of a

[5] *Chevron* applies for two reasons. First, Congress has delegated to Interior "the regulation of Indian relations and affairs, *see generally* 25 U.S.C. § 2," *Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016), and has given Interior a "substantial role in administering IGRA," *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007). Second, Interior's March 2015 decision is a final and binding legal determination that the Community is ineligible for IGRA gaming. *See id.* at 466 (applying *Chevron* to informal agency decision involving an "application of an agency's

Cont.

statute's language, structure, purpose, and legislative history, the Court determines that Congress has "directly spoken to the precise question at issue," the Court must give effect to Congress's "unambiguously expressed intent." *Id.* at 842-43. If the Court finds the statute to be silent or ambiguous on the specific issue, the Court must uphold Interior's construction if "permissible." *Mayo Foundation for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (quoting *Chevron*, 467 U.S. at 843). An agency's interpretation is permissible so long as it is not "arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* (citation omitted).[6]

"In Indian law there is a canon that, where a statute is not clear, it must be interpreted liberally in favor of Indians." *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). However, this Court has held when an agency is acting pursuant to Congressionally-delegated authority, the Indian canons "must give way to agency

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delegated authority to particular facts" that "was intended to have the force of law"); *see also Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002). Interior's authority to interpret the relevant statutory provisions is implicit rather than explicit because this case does not directly involve "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44; ER15-16.

[6] The Community concedes (Br. 40-41) that if any of the relevant statutory provisions are ambiguous, Interior's construction must be upheld under *Chevron* so long as it is reasonable. But the Community later inconsistently suggests (Br. 54) that Interior's decision is not entitled to deference because "the question at issue is central to the statutory scheme" and "agency expertise is not germane to filling in a gap in the statute at issue." To the contrary, the question whether the Community, a unique Indian community, is entitled to undertake class II gaming is hardly "central" to IGRA's statutory scheme, and the narrow question *does* implicate Interior's expertise and broad supervisory authority over Indian affairs.

interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law." *Williams v. Babbitt*, 115 F.3d 657, 667 n.5 (9th Cir. 1997); *accord Redding Rancheria*, 776 F.3d at 713 *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990). The Community concedes this point: in this Circuit, "the canons of construction ordinarily applicable in cases involving Indians do not supersede the canons of construction set forth in *Chevron*." Br. 43. Consequently, to the extent the statutory provisions at issue are ambiguous, the Indian canons cannot be applied to "narrow the range of reasonable interpretations." Br. 47. So long as Interior's construction of an ambiguous provision is reasonable, that construction is controlling under *Chevron*.

ARGUMENT

I. IGRA's definition of "Indian tribe" is limited to federally recognized tribes identified under the List Act.

Under IGRA, only an "Indian tribe" may engage in or license and regulate class II gaming. *See* 25 U.S.C. § 2703(5) (defining "Indian tribe"). Interior correctly concluded that IGRA's definition requires that a putative Indian tribe be federally recognized. SER43. And because the List Act directs the Secretary to publish a list of all federally recognized tribes, Interior correctly concluded further that the list provides the definitive means of identifying those entities that qualify as an "Indian tribe" under IGRA. *Id.* To the extent the statutes are ambiguous, Interior's construction is reasonable and entitled to *Chevron* deference.

IGRA defines an "Indian tribe" as a group of Indians that "(A) is *recognized as eligible by the Secretary* for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government." 25 U.S.C. § 2703(5) (emphasis added). When IGRA was enacted in 1988, a group of Indians was recognized by the Secretary as eligible for the programs and services provided by the United States to Indians only if the group appeared on the list required under the Part 83 regulations, which signifies federal recognition of tribal status for all purposes. *See* 43 Fed. Reg. at 39,362-64.

Courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Consequently, Congress was presumptively aware of the Part 83 recognition and listing process, and intended to refer to that process, when it required in IGRA that a group of Indians be "recognized by the Secretary." 25 U.S.C. § 2703(5). And because recognition by the Secretary and inclusion on the list signifies federal recognition, 43 Fed. Reg. at 39,362-64; *LaPier*, 986 F.2d at 305, IGRA's definition of "Indian tribe" requires federal recognition. *Accord* S. REP. NO. 100-446, at 16 (1988) (summarizing IGRA's definition of "Indian tribe" in two words — "federally recognized"), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3086.

Interior's practice is in accord. Since the enactment of IGRA in 1988, "[o]nly federally recognized tribes have engaged in gaming under IGRA." SER45. Interior also stated in a prior rulemaking that "IGRA is a Federal statute concerning federally

recognized tribes, 25 U.S.C. 2703(5)." 73 Fed. Reg. at 29,362; *see also* 25 C.F.R. § 292.2. Courts have uniformly reached the same conclusion. For instance, although the case was ultimately dismissed as moot, this Court recently stated that "only federally recognized tribes may operate gambling facilities under the federal [IGRA]." *Timbisha Shoshone Tribe v. U.S. Dep't of Interior*, 824 F.3d 807, 809 (9th Cir. 2016).[7]

Thus, Interior's conclusion that IGRA's definition of "Indian tribe" requires federal recognition is consistent with the statutory language, the legislative history, long-standing agency practice, and all relevant court decisions. And because the List Act directs the Secretary to publish a list of "all 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," § 103(8), 108 Stat. at 4792, Interior properly concluded that the list provides the definitive means of identifying those entities that qualify as an "Indian tribe" under IGRA. SER43.

[7] *See also*, *e.g.*, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 792 n.4 (1st Cir. 1996) ("[IGRA] has no application to tribes that do not seek and attain federal recognition"); *Carruthers v. Flaum*, 365 F. Supp. 2d 448, 466-67 (S.D.N.Y. 2005) ("IGRA applies only to the activities of federally recognized tribes"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 205, 208 (D. Conn. 2000) ("Lytton cannot conduct class III gaming under IGRA unless it is a federally recognized tribe."); *First Am. Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 208 (D. Conn. 2000) ("IGRA does not apply because defendant has not attained formal federal recognition and therefore is not an 'Indian tribe' within the meaning of IGRA."); *Alabama, ex rel. Rich v. 50 Serialized JLM Games, Inc.*, 2015 WL 2365417, at *3 (S.D. Ala. 2015) (IGRA "only applies to federally recognized Indian Tribes"). We are unaware of any court decision that has reached a contrary conclusion.

The Community argues (Br. 48-52) that Interior has improperly conflated IGRA's definition of "Indian tribe" with the List Act's allegedly distinct definition. *See* 25 U.S.C. § 5130(2) (defining "Indian tribe" for purposes of the List Act as "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."). The Community contends (Br. 52) that because IGRA is a "much narrower statute," and "it is a commonplace of statutory construction that the specific governs the general," *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 640 (2012), IGRA's definition controls over the List Act's definition.

The Community's argument lacks merit. Interior has never asserted that the List Act's definition of "Indian Tribe" modifies or supersedes IGRA's definition (and the Community does not identify a conflict between the definitions in any event). The List Act is relevant because it directs the Secretary to publish a list identifying those groups of Indians that "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. § 5131. That is *precisely* the same condition that a group of Indians must meet to qualify as an "Indian tribe" under IGRA. *Id.* § 2703(5)(A).

Nor is Interior's reliance on the annual list at odds with IGRA's purposes, as the Community asserts (Br. 49-51). IGRA was enacted in part to "provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). The List Act was enacted in part to ensure that the Secretary's annual list is

accurate and comprehensive so that it can be "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." § 103(7), 108 Stat. at 4792. Interior's reliance on the annual list advances both objectives because the list provides a clear standard by which federal agencies and members of the public can easily determine which entities are, and are not, eligible for IGRA gaming. SER43.

Accordingly, Interior properly concluded that IGRA's definition of "Indian tribe" requires federal recognition, and the list published under the List Act identifies those entities that satisfy IGRA's requirement. SER43. To the extent the statutes are ambiguous, Interior's construction is reasonable and entitled to *Chevron* deference.

II. The Community does not qualify as an "Indian tribe" under IGRA.

The Community concedes (Br. 4, 38, 55) that it is not on the current list of federally recognized tribes, that it is not a federally recognized tribe, and that it does not have the powers and privileges of a federally recognized tribe. The Community nevertheless argues (Br. 1, 12-24) that it qualifies as an "Indian tribe" under IGRA because it supposedly meets all of IGRA's requirements: it is (A) a community of Indians that (B) has been recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and (C) has been recognized a self-governing dependent Indian community. The Community's argument fails for two independent reasons. First, the Community ignores that IGRA *also* requires federal recognition, which the Community lacks. Second the 1987 and

1994 Acts do not authorize the Community to engage in gaming under IGRA despite the Community's lack of federal recognition.

A. The 1987 and 1994 Acts do not make the Community a federally recognized tribe as required by IGRA.

The Community concedes (Br. 34) that IGRA requires recognition "by the Secretary," 25 U.S.C. § 2703(5), but asserts that "the caveat that Indian communities must be recognized 'by the Secretary' . . . is irrelevant where Congress has explicitly made that recognition." Br. 36-37. The Community cites *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), *rev'd*, 501 U.S. 775 (1991), for the proposition that "[i]f Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior." *Id.* at 1160. As a general matter, that proposition is correct. However, the proposition does not aid the Community here because the limited powers that Congress has afforded the Community in the 1987 and 1994 Acts do not equate to federal recognition.

As demonstrated above, Congress understood that IGRA's definition of "Indian tribe" requires that a group of Indians be "federally recognized." S. REP. NO. 100-446, at 16. Congress also knows how to confer federal recognition upon a group of Indians. *See, e.g.*, Pub. L. No. 101-42, § 3(a), 103 Stat. 91 (1989) ("Notwithstanding any provision of law, Federal recognition is hereby extended to the Coquille Indian Tribe."); 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993) (1993 tribal list identifying Coquille Tribe); *see also* Br. 35, 37; *Cohen's Handbook of Federal Indian Law* § 3.03[5], at

141. Yet when Congress passed the 1994 Act — six years after enacting IGRA and limiting its applicability to federally recognized tribes — Congress *denied* the Community federal recognition. The 1994 Act amended Section 10 of the 1987 Act to state that "[n]othing in this section may be construed to constitute the recognition by the United States that the [Community] is a federally recognized Indian tribe." § 8, 108 Stat. at 4569. Therefore, no matter what other powers the 1987 and 1994 Acts bestowed upon the Community, they do not make the Community an "Indian tribe" within the meaning of IGRA. *Cf. Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1095 (9th Cir. 1994) (association of Indians had not been "duly recognized by the Secretary" within the meaning of the relevant statute in part because "[n]o statute or treaty identifies the Association as a federally recognized tribe" and the Association had not been recognized under the Part 83 process).

B. The 1987 and 1994 Acts do not authorize the Community to engage in class II gaming despite its lack of federal recognition.

The text, legislative history, and purposes of the 1987 and 1994 Acts confirm that neither statute was intended to authorize the Community to engage in class II gaming under IGRA despite the Community's lack of federal recognition.

1. The 1987 Act granted the Community limited authority to contract under the Self-Determination Act.

Section 10 of the 1987 Act created the provision now designated as Section 10(a)(1), which recognized the Community

> as eligible for the special programs and services provided by the United States [to] Indians because of their status as Indians and is recognized as eligible to contract, and to receive grants, under the [Self-Determination Act] for such services, but the proviso in section 4(c) of [the Self-Determination Act] … shall not apply with respect to grants awarded to, and contracts entered into with, such Community …;

101 Stat. at 889. The Community contends (Br. 15-22) that the first "phrase" of Section 10(a)(1), recognizing the Community "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," satisfies subpart (A) of IGRA's definition of "Indian tribe." As discussed, this argument ignores IGRA's requirement of Secretarial recognition. In addition, courts "do not . . . construe statutory phrases in insolation; [courts] read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). Courts also consider the "purpose and history" of a statute. *County of Amador*, 872 F.3d at 1022. "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . ." *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005) (citation omitted). "And understanding the historical context in which a statute was passed can help to elucidate the statute's purpose and the meaning of statutory terms and phrases." *County of Amador*, 872 F.3d at 1022. All of those factors support Interior's conclusion that the 1987 Act conferred limited authority upon the Community to contract with federal agencies under the Self-Determination Act without needing the consent of any federally recognized tribes, including the Nisqually Tribe with whom the Community had long-running disputes. SER46, 49.

The Self-Determination Act authorizes an "Indian tribe" or "tribal organization" to enter into "self-determination contracts" with federal agencies for five categories of programs and services afforded by the federal government to Indian tribes. 25 U.S.C. § 5321; *see Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1137-39 (9th Cir. 2003) (discussing the five categories); Br. 19-20. The Self-Determination Act (enacted in 1975, before Interior promulgated the Part 83 regulations) defines an "Indian tribe" as any organized group or community of Indians "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). Section 4(c) defines a "tribal organization" as the governing body of an tribe or organization of Indians, and its proviso states "[t]hat in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." 25 U.S.C. § 5304(*l*).

Section 10 of the 1987 Act is built entirely around the Self-Determination Act: it incorporates the Self-Determination Act's definition of "Indian tribe"; it states that the Community is eligible to contract for the programs and services available to Indians under the Self-Determination Act; and it states that Section 4(c)'s proviso does not apply to such contracts. 101 Stat. at 889. The accompanying Senate Report confirms that the purpose of the 1987 Act was to allow federal agencies to enter into contracts with the Community's governing bodies for the programs and services

available to Indians under the Self-Determination Act. *See* S. REP. NO. 100-186, at 6-7, 1987 U.S.C.C.A.N. at 836. Congress also understood that many of the Community's members were enrolled in federally recognized tribes, including the Nisqually Tribe. *Id.* Section 4(c)'s proviso would have given those tribes veto authority over the Community's contracting decisions. By making Section 4(c)'s proviso inapplicable, Congress precluded that result. SER46, 49.

Thus, to use the Community's words, the 1987 Act was about "contracting under the [Self-Determination Act]." SER27; *see also* SER55, 79; ER232. Interior therefore correctly concluded that the 1987 Act does not make the Community an "Indian tribe" within the meaning of IGRA or otherwise authorize the Community to conduct class II gaming. To the extent the 1987 Act is ambiguous, Interior's construction is not only permissible, it is the best construction in light of the text, history, and purpose of the statute. *See County of Amador*, 872 F.3d at 1027.

2. The 1994 Act does not authorize the Community to conduct class II gaming.

Interior also correctly concluded that the 1994 Act does not make the Community an "Indian tribe" under IGRA or authorize the Community to engage in class II gaming. Section 10(a)(2) confirms that the Community is a self-governing dependent Indian Community. 108 Stat. at 4569; *see also Gregoire*, 649 F. Supp. 2d at 1208. Possessing powers of self-government is necessary to qualify as an Indian tribe under IGRA, but it is not sufficient. *See* 25 U.S.C. § 2703(5); *supra* pp. 14-16.

The 1994 Act also created Section 10(b). Paragraph (b)(2) denies the Community federal recognition, and the only other relevant provision is paragraph (b)(3), which states: "Notwithstanding any other provision of law, the [Community] shall not engage in any class III gaming activity (as defined in section 3(8) of [IGRA])." 108 Stat. at 4569 (emphasis added). The Community reads paragraph (b)(3) as an implicit grant of authority to engage in class II gaming. *See* Br. 26. But that reading is implausible.

As discussed above, only federally recognized tribes have engaged in gaming under IGRA, SER45, and Congress understood that IGRA's definition of "Indian tribe" requires federal recognition. If Congress had intended to take the unprecedented step of granting the Community class II gaming rights—while simultaneously denying the Community federal recognition—Congress easily could have done so expressly. But Congress did not, and courts do not "assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message." *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994). *Cf. Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191, 1198–99 (9th Cir. 2016) (rejecting statutory reading that reflected a policy choice Congress could have made "in a far more straightforward manner"). Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

The better reading is that paragraph (b)(3) simply means what it says: notwithstanding any other provision of law, the Community may not engage in class

III gaming. That reading does not render the provision superfluous, as the Community asserts (Br. 27, 56). Even though the 1994 Act itself does not grant the Community federal recognition, Congress necessarily understood that the Community retains the right to petition the Secretary for recognition under the Part 83 process. *See* List Act, § 103(3), 108 Stat. at 4791. Thus, unlike paragraphs (b)(1) and (2), which limit the powers conferred by Section 10 itself, paragraph (b)(3) is not tied to Section 10. It states that the Community may not engage in class III gaming *notwithstanding any other provision of law*. Paragraph (b)(3) thus functions to ensure that if the Community attains federal recognition under an "other provision of law," such as the Part 83 process, the Community is still prohibited from engaging in class III gaming.

Contrary to the Community's arguments, the legislative history of the 1994 Act does not undermine Interior's conclusion that the statute was not intended to make the Community eligible for class II gaming. The 1994 Act was signed into law on November 2, 1994 (the same day as the List Act). 108 Stat. at 4791, 4566. On October 6, 1994, Representative Richardson, Chairman of the House Natural Resources Subcommittee on Native American Affairs, proposed an amendment that would have prohibited the Community from engaging "in any gaming activity" under IGRA. ER160. There is no indication that Congress voted on the proposed amendment. The Community nevertheless places great significance (Br. 8, 25-26) on the absence of the proposed language from the final bill. However, without confirmation that Congress actually voted on and rejected the proposed language, "no

basis exists for inferring a congressional rebuff." *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992). Moreover, the proposed language was unnecessary because two days earlier, the Senate had amended the bill to clarify that it did not grant the Community federal recognition. 140 Cong. Rec. 27,611-12, 27,613-14, 27,988 (1994). Because the Senate amendment already disqualified the Community from gaming under IGRA, the Richardson Amendment would have been redundant. *See* 140 Cong. Rec. 28,627 (1994) (statement of Chairman Richardson) (The legislation "does not confer the powers reserved to federally recognized Indian tribes upon this Community. . . . It cannot get class II or class III gaming because it is not a federally recognized tribe. The group was authorized in the 100th Congress to enter into self-determination contracts. That is the full extent of their powers.").

Accordingly, the text and legislative history support Interior's conclusion that the 1994 Act did not make the Community an "Indian tribe" within the meaning of IGRA or authorize the Community to engage in class II gaming.

* * * * *

"[S]tatutes dealing with similar subjects should be interpreted harmoniously." *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (internal quotation marks omitted); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) (observing the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination"). Interior's conclusion that the Community is not eligible to engage in class II gaming because it is not on the list of federally recognized tribes

properly harmonizes IGRA's definition of "Indian tribe" (which requires federal recognition) with the List Act (which requires Interior to publish a list of all federally recognized tribes) and with the 1994 Act (which denies the Community federal recognition). Interior's conclusion also gives meaning to all of the provisions of the 1987 and 1994 Acts and is consistent with their text, history, and purposes. Although these traditional tools of statutory construction support Interior's conclusion, to the extent the statutory provisions are ambiguous, Interior's construction is reasonable and entitled to deference under *Chevron*.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,100 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any other related cases within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

''The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.''

§ 5303. Tribal and Federal advisory committees

Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund advisory committees or other advisory bodies composed of members of Indian tribes or members of Indian tribes and representatives of the Federal Government to ensure tribal participation in the implementation of the Indian Self-Determination and Education Assistance Act (Public Law 93–638) [25 U.S.C. 5301 et seq.].

(Pub. L. 101–644, title II, § 204, as added Pub. L. 103–435, § 22(b), Nov. 2, 1994, 108 Stat. 4575.)

REFERENCES IN TEXT

The Indian Self-Determination and Education Assistance Act, referred to in text, is Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

CODIFICATION

Section was enacted as part of the Indian Self-Determination and Education Assistance Act Amendments of 1990, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450a–1 of this title prior to editorial reclassification and renumbering as this section.

§ 5304. Definitions

For purposes of this chapter, the term—

(a) ''construction programs'' means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;

(b) ''contract funding base'' means the base level from which contract funding needs are determined, including all contract costs;

(c) ''direct program costs'' means costs that can be identified specifically with a particular contract objective;

(d) ''Indian'' means a person who is a member of an Indian tribe;

(e) ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) ''indirect costs'' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) ''indirect cost rate'' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) ''mature contract'' means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 5321(a) of this title, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) ''Secretary'', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) ''self-determination contract'' means a contract (or grant or cooperative agreement utilized under section 5308 of this title) entered into under subchapter I of this chapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided[1] the last proviso in section 5324(a)[2] of this title, no contract (or grant or cooperative agreement utilized under section 5308 of this title) entered into under subchapter I of this chapter shall be construed to be a procurement contract;

(k) ''State education agency'' means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(*l*) ''tribal organization'' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) ''construction contract'' means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—

[1] So in original. Probably should be ''provided in''.

[2] See References in Text note below.

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

(Pub. L. 93–638, §4, Jan. 4, 1975, 88 Stat. 2204; Pub. L. 100–472, title I, §103, Oct. 5, 1988, 102 Stat. 2286; Pub. L. 100–581, title II, §208, Nov. 1, 1988, 102 Stat. 2940; Pub. L. 101–301, §2(a)(1)–(3), May 24, 1990, 104 Stat. 206; Pub. L. 101–644, title II, §202(1), (2), Nov. 29, 1990, 104 Stat. 4665; Pub. L. 103–413, title I, §102(1), Oct. 25, 1994, 108 Stat. 4250.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Alaska Native Claims Settlement Act, referred to in subsec. (e), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43, and Tables.

Subchapter I of this chapter, referred to in subsec. (j), was in the original ''title I of this act'', meaning title I of Pub. L. 93–638, known as the Indian Self-Determination Act, which is classified principally to subchapter I (§5321 et seq.) of this chapter. For complete classification of title I to the Code, see Short Title note set out under section 5301 of this title and Tables.

Section 5324(a) of this title, referred to in subsec. (j), was repealed and a new subsec. (a) of section 5324 was added by Pub. L. 103–413, title I, §102(10), Oct. 25, 1994, 108 Stat. 4253, which does not contain provisos.

CODIFICATION

Section was formerly classified to section 450b of this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

1994—Subsec. (g). Pub. L. 103–413, §102(1)(A), substituted ''indirect cost rate'' for ''indirect costs rate''.

Subsec. (m). Pub. L. 103–413, §102(1)(B)–(D), added subsec. (m).

1990—Subsec. (e). Pub. L. 101–301, §2(a)(1), inserted a comma before ''which is recognized''.

Subsec. (h). Pub. L. 101–644, §202(1), struck out ''in existence on October 5, 1988,'' before ''which meets this definition''.

Subsec. (j). Pub. L. 101–644, §202(2), substituted ''contract (or grant or cooperative agreement utilized under section 5308 of this title) entered'' for ''contract entered'' in two places.

Pub. L. 101–301, §2(a)(2), (3), substituted ''under this chapter'' for ''pursuant to this Act'' in two places and struck out ''the'' before ''Secretary''.

1988—Pub. L. 100–472 amended section generally, substituting subsecs. (a) to (*l*) for former subsecs. (a) to (d) and (f) which defined ''Indian'', ''Indian tribe'', ''Tribal organization'', ''Secretary'', and ''State education agency''.

Subsec. (h). Pub. L. 100–581, §208(a)(1), substituted ''by a tribal organization'' for ''by tribal organization''.

Pub. L. 100–581, §208(a)(2), which directed the amendment of subsec. (h) by substituting ''a tribal organization or the tribal organization's Indian tribe for purposes of section 5321(a) of this title'' for ''a tribal organization or a tribal governing body'' was executed by substituting the new language for ''a tribal organization or tribal governing body'' to reflect the probable intent of Congress.

Subsec. (j). Pub. L. 100–581, §208(b), substituted ''the Secretary for the planning'' for ''Secretary the planning'' and ''except as provided the last proviso in section 5324(a) of this title, no contract'' for ''no contract''.

§5305. Reporting and audit requirements for recipients of Federal financial assistance

(a) Maintenance of records

(1) Each recipient of Federal financial assistance under this chapter shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used,

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31[1] and a brief annual program report.

(b) Access to books, documents, papers, and records for audit and examination by Comptroller General, etc.

The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Availability by recipient of required reports and information to Indian people served or represented

Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Repayment to Treasury by recipient of unexpended or unused funds

Except as provided in section 13a or 5325(a)(3)[2] of this title, funds paid to a financial assistance

[1] So in original. Probably should be followed by a comma.

[2] See References in Text note below.

(Pub. L. 105–83, title III, § 310, Nov. 14, 1997, 111 Stat. 1590.)

REFERENCES IN TEXT

Public Law 93–638, referred to in text, is Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

Public Law 103–413, referred to in text, is Pub. L. 103–413, Oct. 25, 1994, 108 Stat. 4250, known as the Indian Self-Determination Act Amendments of 1994, which is classified principally to subchapter IV (§ 5361 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title of 1994 Amendment note set out under section 5301 of this title and Tables.

Public Law 100–297, referred to in text, is Pub. L. 100–297, Apr. 28, 1988, 102 Stat. 130, known as the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988. For complete classification of this Act to the Code, see Short Title of 1988 Amendments note set out under section 6301 of Title 20, Education, and Tables.

CODIFICATION

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1998, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450e–2 of this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in the following prior appropriation acts:

Pub. L. 104–208, div. A, title I, § 101(d) [title III, § 310], Sept. 30, 1996, 110 Stat. 3009–181, 3009–221.

Pub. L. 104–134, title I, § 101(c) [title III, § 310], Apr. 26, 1996, 110 Stat. 1321–156, 1321–197; renumbered title I, Pub. L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1327.

§ 5310. Investment of advance payments; restrictions

Advance payments made by the Department of the Interior to Indian tribes, tribal organizations, and tribal consortia pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.)[1] or the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.) may on and after December 8, 2004, be invested by the Indian tribe, tribal organization, or consortium before such funds are expended for the purposes of the grant, compact, or annual funding agreement so long as such funds are—

(1) invested by the Indian tribe, tribal organization, or consortium only in obligations of the United States, or in obligations or securities that are guaranteed or insured by the United States, or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed or insured by the United States; or

(2) deposited only into accounts that are insured by an agency or instrumentality of the United States, or are fully collateralized to ensure protection of the funds, even in the event of a bank failure.

[1] See References in Text note below.

(Pub. L. 108–447, div. E, title I, § 111, Dec. 8, 2004, 118 Stat. 3064.)

REFERENCES IN TEXT

The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), referred to in text, is Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, which was classified principally to subchapter II (§ 450 et seq.) of chapter 14 of this title prior to editorial reclassification as this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Tribally Controlled Schools Act of 1988, referred to in text, is part B (§§ 5201–5212) of title V of Pub. L. 100–297, Apr. 28, 1988, 102 Stat. 385, which is classified generally to chapter 27 (§ 2501 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2501 of this title and Tables.

CODIFICATION

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 2005, and also as part of the Consolidated Appropriations Act, 2005, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450e–3 of this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in the following prior appropriation acts:

Pub. L. 108–108, title I, § 111, Nov. 10, 2003, 117 Stat. 1266.

Pub. L. 108–7, div. F, title I, § 111, Feb. 20, 2003, 117 Stat. 239.

Pub. L. 107–63, title I, § 111, Nov. 5, 2001, 115 Stat. 438.

Pub. L. 106–291, title I, § 111, Oct. 11, 2000, 114 Stat. 942.

Pub. L. 106–113, div. B, § 1000(a)(3), [title I, § 111], Nov. 29, 1999, 113 Stat. 1535, 1501A–156.

Pub. L. 105–277, div. A, § 101(e), [title I, § 111], Oct. 21, 1998, 112 Stat. 2681–231, 2681–254.

Pub. L. 105–83, title I, § 112, Nov. 14, 1997, 111 Stat. 1562.

SUBCHAPTER I—INDIAN SELF-DETERMINATION

§ 5321. Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 5342 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency

or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 5325(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 5325(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 5331(a) of this title.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to

[1] So in original. Probably should be ''paragraph,''.

which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections[2] 5321 or 5322 of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 5331(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the ''Department'') that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

(Pub. L. 93–638, title I, §102, formerly §§102 and 103(c), Jan. 4, 1975, 88 Stat. 2206; Pub. L. 100–202, §101(g) [title II, §201], Dec. 22, 1987, 101 Stat. 1329–213, 1329–246; Pub. L. 100–446, title II, §201, Sept. 27, 1988, 102 Stat. 1817; renumbered §102 and amended Pub. L. 100–472, title II, §201(a), (b)(1), Oct. 5, 1988, 102 Stat. 2288, 2289; Pub. L. 100–581, title II, §210, Nov. 1, 1988, 102 Stat. 2941; Pub. L. 101–644, title II, §203(b), Nov. 29, 1990, 104 Stat. 4666; Pub. L. 103–413, title I, §102(5)–(9), Oct. 25, 1994, 108 Stat. 4251–4253; Pub. L. 106–260, §6, Aug. 18, 2000, 114 Stat. 732.)

REFERENCES IN TEXT

Act of April 16, 1934, referred to in subsec. (a)(1)(A), is act Apr. 16, 1934, ch. 147, 48 Stat. 596, popularly known as the Johnson-O'Malley Act, which is classified generally to section 5342 et seq. of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

Act of August 5, 1954, referred to in subsec. (a)(1)(C), is act Aug. 5, 1954, ch. 658, 68 Stat. 674, which is classified generally to subchapter I (§2001 et seq.) of chapter 22 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Tables.

This chapter, referred to in subsec. (c)(1), was in the original ''this Act'', meaning Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Federal Tort Claims Act, referred to in subsec. (c)(1), is title IV of act Aug. 2, 1946, ch. 753, 60 Stat. 842, which was classified principally to chapter 20 (§§921, 922, 931–934, 941–946) of former Title 28, Judicial Code and Judiciary. Title IV of act Aug. 2, 1946, was substan-

[2] So in original. Probably should be ''section''.

tially repealed and reenacted as sections 1346(b) and 2671 et seq. of Title 28, Judiciary and Judicial Procedure, by act June 25, 1948, ch. 646, 62 Stat. 992, the first section of which enacted Title 28. The Federal Tort Claims Act is also commonly used to refer to chapter 171 of Title 28, Judiciary and Judicial Procedure. For complete classification of title IV to the Code, see Tables. For distribution of former sections of Title 28 into the revised Title 28, see Table at the beginning of Title 28.

CODIFICATION

Except as provided below, section was formerly classified to section 450f of this title prior to editorial reclassification and renumbering as this section.

Subsec. (d) of this section was formerly classified to the last sentence of subsec. (c) of former section 450g of this title prior to redesignation as subsec. (d) of former section 450f of this title by Pub. L. 100–472, §201(b)(1), and editorial reclassification and renumbering of former section 450f of this title as this section. See 1988 Amendment note below.

AMENDMENTS

2000—Subsec. (e)(1). Pub. L. 106–260 inserted ''or any civil action conducted pursuant to section 5331(a) of this title'' after ''subsection (b)(3) of this section''.

1994—Subsec. (a)(1). Pub. L. 103–413, §102(5), inserted concluding provisions.

Subsec. (a)(2). Pub. L. 103–413, §102(6)(A)(i), (ii), (vi), inserted '', or a proposal to amend or renew a self-determination contract,'' before ''to the Secretary for review'' in first sentence and, in second sentence, substituted ''Subject to the provisions of paragraph (4), the Secretary'' for ''The Secretary'', inserted ''and award the contract'' after ''approve the proposal'', substituted ''the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that'' for '', within sixty days of receipt of the proposal, a specific finding is made that'', and inserted concluding provisions.

Subsec. (a)(2)(D), (E). Pub. L. 103–413, §102(6)(A)(iii)–(v), added subpars. (D) and (E).

Subsec. (a)(4). Pub. L. 103–413, §102(6)(B), added par. (4).

Subsec. (b)(3). Pub. L. 103–413, §102(7), inserted ''with the right to engage in full discovery relevant to any issue raised in the matter'' after ''record'' and '', except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 5331(a) of this title'' before period at end.

Subsec. (d). Pub. L. 103–413, §102(8), substituted ''as provided in section 2671 of title 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service)'' for ''as provided in section 2671 of title 28)''.

Subsec. (e). Pub. L. 103–413, §102(9), added subsec. (e).

1990—Subsec. (d). Pub. L. 101–644 inserted ''or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle,'' after ''investigations,''.

1988—Pub. L. 100–472, §201(a), amended section generally, revising and restating provisions of subsecs. (a) to (c).

Subsec. (c)(2). Pub. L. 100–581 which directed amendment of par. (2) by substituting ''section 1452 of this title'' for ''section 1425 of title 25, United States Code'' was executed by making the substitution for ''section 1425, title 25, United States Code'' to reflect the probable intent of Congress.

Subsec. (d). Pub. L. 100–472, §201(b)(1), redesignated the last sentence of subsec. (c) of former section 450g of this title as subsec. (d) of this section and substituted reference to sections 5321 or 5322 of this title for reference to former sections 450g and 450h(b) of this title. See Codification notes above and set out under section 5322 of this title.

Pub. L. 100–446 inserted into sentence beginning ''For purposes of'' the words ''by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations'' after ''claims'', ''prior to, including, or after December 22, 1987,'' after ''performance'', ''an Indian tribe,'' after ''investigations,'' and '': *Provided*, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor'' after ''the contract or agreement''.

1987—Subsec. (d). Pub. L. 100–202 inserted sentence at end deeming a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement to be part of the Public Health Service while carrying out any such contract or agreement and its employees to be employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.

SHORT TITLE

For short title of this subchapter as the ''Indian Self-Determination Act'', see section 101 of Pub. L. 93–638, set out as a note under section 5301 of this title.

SAVINGS PROVISION

Pub. L. 106–260, §11, Aug. 18, 2000, 114 Stat. 734, provided that: ''Funds appropriated for title III of the Indian Self-Determination and Education Assistance Act ([Pub. L. 93–638, former] 25 U.S.C. 450f note) shall be available for use under title V of such Act [25 U.S.C. 5381 et seq.].''

INDIAN TRIBAL TORT CLAIMS AND RISK MANAGEMENT

Pub. L. 105–277, div. A, §101(e) [title VII], Oct. 21, 1998, 112 Stat. 2681–231, 2681–335, provided that:

''SEC. 701. SHORT TITLE.

''This title may be cited as the 'Indian Tribal Tort Claims and Risk Management Act of 1998'.''

''SEC. 702. FINDINGS AND PURPOSE.

''(a) FINDINGS.—Congress finds that—

''(1) Indian tribes have made significant achievements toward developing a foundation for economic self-sufficiency and self-determination, and that economic self-sufficiency and self-determination have increased opportunities for the Indian tribes and other entities and persons to interact more frequently in commerce and intergovernmental relationships;

''(2) although Indian tribes have sought and secured liability insurance coverage to meet their needs, many Indian tribes are faced with significant barriers to obtaining liability insurance because of the high cost or unavailability of such coverage in the private market;

''(3) as a result, Congress has extended liability coverage provided to Indian tribes to organizations to carry out activities under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) [now 25 U.S.C. 5301 et seq.]; and

''(4) there is an emergent need for comprehensive and cost-efficient insurance that allows the economy of Indian tribes to continue to grow and provides compensation to persons that may suffer personal injury or loss of property.

''(b) PURPOSE.—The purpose of this title is to provide for a study to facilitate relief for a person who is injured as a result of an official action of a tribal government.

''SEC. 703. DEFINITIONS.

''In this title:

''(1) INDIAN TRIBE.—The term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) [now 25 U.S.C. 5304(e)].

''(2) SECRETARY.—The term 'Secretary' means the Secretary of the Interior.

''(3) TRIBAL ORGANIZATION.—The term 'tribal organization' has the meaning given that term in section 4(*l*) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(*l*)) [now 25 U.S.C. 5304(*l*)].

''SEC. 704. STUDY AND REPORT TO CONGRESS.

''(a) IN GENERAL.—

''(1) STUDY.—In order to minimize and, if possible, eliminate redundant or duplicative liability insurance coverage and to ensure that the provision of insurance to Indian tribes is cost-effective, the Secretary shall conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study.

''(2) CONTENTS OF STUDY.—The study conducted under this subsection shall include—

''(A) an analysis of loss data;

''(B) risk assessments;

''(C) projected exposure to liability, and related matters; and

''(D) the category of risk and coverage involved, which may include—

''(i) general liability;

''(ii) automobile liability;

''(iii) the liability of officials of the Indian tribe;

''(iv) law enforcement liability;

''(v) workers' compensation; and

''(vi) other types of liability contingencies.

''(3) ASSESSMENT OF COVERAGE BY CATEGORIES OF RISK.—For each Indian tribe, for each category of risk identified under paragraph (2), the Secretary, in conducting the study, shall determine whether insurance coverage or coverage under chapter 171 of title 28, United States Code, applies to that Indian tribe for that activity.

''(b) REPORT.—Not later than June 1, 1999, and annually thereafter, the Secretary shall submit a report to Congress that contains legislative recommendations that the Secretary determines to—

''(1) be appropriate to improve the provision of insurance coverage to Indian tribes; or

''(2) otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

''SEC. 705. AUTHORIZATION OF APPROPRIATIONS.

''There are authorized to be appropriated to the Department of the Interior such sums as may be necessary to carry out this title.''

CLAIMS RESULTING FROM PERFORMANCE OF CONTRACT, GRANT AGREEMENT, OR COOPERATIVE AGREEMENT; CIVIL ACTION AGAINST TRIBE, TRIBAL ORGANIZATION, ETC., DEEMED ACTION AGAINST UNITED STATES; REIMBURSEMENT OF TREASURY FOR PAYMENT OF CLAIMS

Pub. L. 101–512, title III, § 314, Nov. 5, 1990, 104 Stat. 1959, as amended by Pub. L. 103–138, title III, § 308, Nov. 11, 1993, 107 Stat. 1416, provided that: ''With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq. [now 25 U.S.C. 5301 et seq.]) [Pub. L. 93–638, see Short Title note set out under section 5301 of this title and Tables] or by title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended (102 Stat. 385; 25 U.S.C. 2501 et seq.), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act [See Short Title note under section 2671 of Title 28, Judiciary and Judicial Procedure]: *Provided further*, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions: *Provided further*, That nothing in this section shall in any way affect the provisions of section 102(d) of the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq. [now 25 U.S.C. 5301 et seq.]) [25 U.S.C. 5321(d)].''

REFERENCE TO FORMER SECTION 450g(c) IN PUBLIC LAW 100–446

Pub. L. 100–472, title II, § 201(b)(2), Oct. 5, 1988, 102 Stat. 2289, provided that: ''Any reference to section 103(c) [§ 103(c) of Pub. L. 93–638, former 25 U.S.C. 450g(c)] contained in an Act making appropriations for the Department of the Interior and Related Agencies for fiscal year 1989 [Pub. L. 100–446, see Tables for classification] shall be deemed to apply to section 102(d) of such Act [§ 102(d) of Pub. L. 93–638, former 25 U.S.C. 450f(d), now 25 U.S.C. 5321(d)] as amended by this Act.''

See Codification notes above.

§ 5322. Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to section 13 of this title, and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 5321 of this title and the additional costs associated with the initial years of operation under such a contract or contracts; or

(3) the acquisition of land in connection with items (1) and (2) above: *Provided*, That in the

The Administrator has developed criteria for flood plain management in flood-prone areas in accordance with 24 CFR Part 1910.

The final base (100-year) flood elevations for selected locations are:

Source of flooding	Location	Elevation in feet, national geodetic vertical datum
Merrimack River...	South corporate limit.....	254
	Just upstream west road bridge.	260
	West corporate limit.....	266

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 43 FR 7719.)

Issued: July 26, 1978.

GLORIA M. JIMENEZ,
Federal Insurance Administrator.

[FR Doc. 78-24235 Filed 9-1-78; 8:45 am]

[4310-02]

Title 25—Indians

CHAPTER I—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

PART 54—PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

Final Rule

AUGUST 24, 1978.

AGENCY: Bureau of Indian Affairs, Interior Department.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs publishes final regulations which provide procedures for acknowledging that certain American Indian tribes exist. Various Indian groups throughout the United States have requested that the Secretary of the Interior officially acknowledge them as Indian tribes. Previously, the limited number of such requests permitted an acknowledgment of the group's status on a case-by-case basis at the discretion of the Secretary. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable the Department to take a uniform approach in their evaluation.

EFFECTIVE DATE: October 2, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. John A. Shapard, Jr., Division of Tribal Government Services, Branch of Tribal Relations, telephone, 202-343-4045, principal author, Mr. John A. Shapard, Jr.

SUPPLEMENTARY INFORMATION: Various Indian groups throughout the United States have requested that the Secretary of the Interior officially acknowledge them as Indian tribes. Heretofore, the limited number of such requests permitted an acknowledgment of the group's status on a case-by-case basis at the discretion of the Secretary. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable the Department to take a uniform approach in their evaluation.

Proposed regulations were published on June 16, 1977. Revised proposed regulations were published on June 1, 1978 (43 FR 23743). The period for public comment closed on July 3. Throughout this period, from June 16, 1977, the amount of consultation and discussion with tribes and other groups on Federal acknowledgment has been unprecedented. Since June 16, 1977, our records show a total of 400 meetings, discussions, and conversations about Federal acknowledgment with other Federal agencies, State government officials, tribal representatives, petitioners, congressional staff members, and legal representatives of petitioning groups; 60 written comments on the initial proposed regulations of June 16, 1977; a national conference on Federal acknowledgment attended by approximately 350 representatives of Indian tribes and organizations; and 34 comments on the revised proposed regulations, published on June 1, 1978.

This is a project in which the Congress, the administration, the national Indian organizations, and many tribal groups are cooperating to find an equitable solution to a longstanding and very difficult problem.

Most of the changes made in the final regulations from the revised proposed regulations were for clarification. The one concept which has been more strongly emphasized in these final regulations is found in §§ 54.8 and 54.9. In these two sections, provision is made for a wider and more thorough notice of receipt of petition. Provision is also made for parties, other than the petitioner, to present evidence supporting or challenging the evidence presented in the petition or in the proposed findings.

This inclusion is in response to numerous requests from the public in the comments on both the initial and the revised regulations. Further, it is a continuation of the policy of open and candid communication with all parties concerned with the Federal acknowledgment project. We, therefore, have included measures which will keep all known concerned parties fully informed.

Persons interested in obtaining information about a petition or comments made in support of or in opposition to a petition should so request in writing. These records will be available on the same basis as other records within the Bureau.

A number of other comments were submitted by the public on the revised proposed regulations which bear a specific response. It must be emphasized that the Department is not attempting to resolve administratively problems which were not resolved by Congress when the Indian Reorganization Act was passed.

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

Groups in Alaska are entitled to petition on the same basis as groups in the lower 48 States. These regulations, however, are not intended to apply to groups, villages, or associations which are eligible to organize under the Alaskan Amendment of the Indian Reorganization Act (25 U.S.C. 473a) or which did not exist prior to 1936.

It must again be emphasized that terminated groups, bands, or tribes are not entitled to acknowledgment under these regulations. Even though many of these groups would be able to easily meet the criteria, the Department cannot administratively reverse legislation enacted by Congress.

It should also be noted that recognition by State government officials or legislatures is not conclusive evidence that the group meets the criteria set forth herein.

The Department received a number of comments concerning § 54.9(f). Some felt that the Assistant Secretary should be required to notify the petitioner of his decision within a specified time after receipt of the petition. Because of the large backlog of petitions presently on file, the size of the staff and other research considerations, the time requirement was considered impractical. We strongly feel the fairest and most practical approach is the one taken in the regulations.

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

tions—a political relationship—is indispensable.

Finally, the definitions are an integral part of the regulations and should be carefully read as such.

This is a new part 54 to subchapter G of chapter I of title 25 of the Code of Federal Regulations to read as follows:

Sec.
54.1 Definitions.
54.2 Purpose.
54.3 Scope.
54.4 Who may file.
54.5 Where to file.
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AUTHORITY: 5 U.S.C. 301; and sections 463 and 465 of the revised statutes 25 U.S.C. 2 and 9; and 230 DM 1 and 2.

§ 54.1 Definitions.

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Assistant Secretary" means the Assistant Secretary—Indian Affairs, or his authorized representative.

(c) "Department" means the Department of the Interior.

(d) "Bureau" means the Bureau of Indian Affairs.

(e) "Area Office" means the Bureau of Indian Affairs Area Office.

(f) "Indian tribe," also referred to herein as "tribe," means any Indian group within the continental United States that the Secretary of Interior acknowledges to be an Indian tribe.

(g) "Indian group" or "group" means any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

(h) "Petitioner" means any entity which has submitted a petition to the Secretary requesting acknowledgement that it is an Indian tribe.

(i) "Autonomous" means having a separate tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the Indian culture and social organization of that tribe.

(j) "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.

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

(l) "Historically", "historical" or "history" means dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory.

(m) "continuously" means extending from generation to generation throughout the tribe's history essentially without interruption.

(n) "Indigenous" means native to the continental United States in that at least part of the tribe's aboriginal range extended into what is now the continental United States.

(o) "Community" or "specific area" means any people living within such a reasonable proximity as to allow group interaction and a maintenance of tribal relations.

(p) "Other party" means any person or organization, other than the petitioner who submits comments or evidence in support of or in opposition to a petition.

§ 54.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such 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 status as Indian tribes as well as the responsibilities 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.

§ 54.3 Scope.

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

(b) This part does not apply to Indian tribes, organized bands, pueblos or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs.

(c) This part is not intended to apply to associations, organizations, corporations or groups of any character, formed in recent times; provided that a group which meets the criteria in § 54.7(a) (g) has recently incorporated or otherwise formalized its existing autonomous process will have no bearing on the Assistant Secretary's final decision.

(d) Nor is this part intended to apply to splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department, unless it can be clearly established that the group has functioned throughout history until the present as an autonomous Indian tribal entity.

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

§ 54.4 Who may file.

Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in section 54.7, may submit a petition requesting that the Secretary acknowledge the group's existence as an Indian tribe.

§ 54.5 Where to file.

A petition requesting the acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary—Indian Affairs, Department of the Interior, 18th and "C" Streets NW., Washington, D.C. 20245. Attention: Federal acknowledgment project.

§ 54.6 Duties of the Department.

(a) The Department shall assume the responsibility to contact, within a twelve-month period following the enactment of these regulations, all Indian groups known to the Department in the continental United States whose existence has not been previously acknowledged by the Department. Included specifically shall be those listed in chapter 11 of the American Indian Policy Review Commission final report, volume one, May 17, 1977. The Department shall inform all such groups of the opportunity to petition for an acknowledgment of tribal existence by the Federal Government.

(b) The Secretary shall publish in the FEDERAL REGISTER within 90 days after effective date of these regulations, a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs.

Such list shall be updated and published annually in the FEDERAL REGISTER.

(c) Within 90 days after the effective date of the final regulations, the Secretary will have available suggested guidelines for the format of petitions, including general suggestions and guidelines on where and how to research for required information. The Department's example of petition format, while preferable, shall not preclude the use of any other format.

(d) The Department shall, upon request, provide suggestions and advice to researchers representing a petitioner for their research into the petitioner's historical background and Indian identity. The Department shall not be responsible for the actual research on behalf of the petitioner.

§ 54.7 Form and content of the petition.

The petition may be in any readable form which clearly indicates that it is a petition requesting the Secretary to acknowledge tribal existence. All the criteria in paragraphs (a)-(g) of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years. Evidence to be relied upon in determining the group's substantially continuous Indian identity shall include one or more of the following:

(1) Repeated identification by Federal authorities;

(2) Longstanding relationships with State governments based on identification of the group as Indian;

(3) Repeated 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 records in courthouses, churches, or schools;

(5) Identification as an Indian entity by anthropologists, historians, or other scholars;

(6) Repeated identification as an Indian entity in newspapers and books;

(7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity. Evidence acceptable to the Secretary of tribal membership for this purpose includes but is not limited to:

(1) Descendancy rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes;

(2) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being an Indian descendant and a member of the petitioning group;

(3) Church, school, and other similar enrollment records indicating the person as being a member of the petitioning entity;

(4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body, as being an Indian descendant of the tribe and a member of the petitioning entity;

(5) Other records or evidence identifying the person as a member of the petitioning entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

§ 54.8 Notice of receipt of petition.

(a) Within 30 days after receiving a petition, the Assistant Secretary shall send an acknowledgment of receipt, in writing, to the petitioner, and shall have published in the FEDERAL REGISTER a notice of such receipt including the name and location, and mailing address of the petitioner and other such information that will identify the entity submitting the petition and the date it was received. The notice shall also indicate where a copy of the petition may be examined.

(b) Groups with petitions on file with the Bureau on the effective date of these regulations shall be notified within 90 days from the effective date that their petition is on file. Notice of that fact, including the information required in paragraph (a) of this section, shall be published in the FEDERAL REGISTER. All petitions on file on the effective date will be returned to the petitioner with guidelines as specified in § 54.6(c) in order to give the petitioner an opportunity to review, revise, or supplement the petition. The return of the petition will not affect the priority established by the initial filing.

(c) The Assistant Secretary shall also notify, in writing, the Governor and attorney general of any State in which a petitioner resides.

(d) The Assistant Secretary shall also cause to be published the notice of receipt of the petition in a major newspaper of general circulation in the town or city nearest to the petitioner. The notice will include, in addition to the information in section (a) of this part, notice of opportunity for other parties to submit factual or legal arguments in support of or in opposition to the petition. Such submissions shall be provided to the petitioner upon receipt by the Federal acknowledgement staff. The petitioner shall be provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

§ 54.9 Processing the petition.

(a) Upon receipt of a 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 petition and supporting evidence, and the factual statements contained therein. The Assistant Secretary may also initiate other research by his staff, for any purpose relative to analyzing the petition and obtaining additional information about the petitioner's status, and may consider any evidence which may be submitted by other parties.

(b) Prior to actual consideration of the petition, the Assistant Secretary shall notify the petitioner of any obvious deficiencies, or significant omissions, that are apparent upon an initial review, and provide the petitioner with an opportunity to withdraw the petition for further work or to submit additional information or a clarification.

(c) Petitions shall be considered on a first come, first serve basis determined by the date of original filing with the Department. The Federal acknowl-

edgement project staff shall establish a priority register including those petitions already pending before the Department.

(d) The petitioner and other parties submitting comments on the petition shall be notified when the petition comes under active consideration. They shall also be notified who is the primary Bureau staff member reviewing the petition, his backup, and supervisor. Such notice shall also include the office address and telephone number of the primary staff member.

(e) A petitioning group may, at its option and upon written request, withdraw its petition prior to publication by the Assistant Secretary of his finding in the FEDERAL REGISTER and, may if it so desires, file an entirely new petition. Such petitioners shall not lose their priority date by withdrawing and resubmitting their petitions later, provided the time periods in paragraph (f) of this section shall begin upon active consideration of the resubmitted petition.

(f) Within 1 year after notifying the petitioner that active consideration of the petition has begun, the Assistant Secretary shall publish his proposed findings in the FEDERAL REGISTER. The Assistant Secretary may extend that period up to an additional 180 days upon a showing of due cause to the petitioner. In addition to the proposed findings, the Assistant Secretary shall prepare a report which shall summarize the evidence for the proposed decision. Copies of such report shall be available for the petitioner and other parties upon written request.

(g) Upon publication of the proposed findings, any individual or organization wishing to challenge the proposed findings shall have a 120-day response period to present factual or legal arguments and evidence to rebut the evidence relied upon.

(h) After consideration of the written arguments and evidence rebutting the proposed findings, the Assistant Secretary shall make a determination regarding the petitioner's status, a summary of which shall be published in the FEDERAL REGISTER within 60 days from the expiration of the response period. The determination will become effective in 60 days from publication unless earlier withdrawn pursuant to § 54.10.

(i) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 54.7.

(j) The Assistant Secretary shall refuse to acknowledge that a petitioner is an Indian tribe if it fails to satisfy the criteria in § 54.7. In the event the Assistant Secretary refuses to acknowledge the eligibility of a petitioning group, he shall analyze and foward to the petitioner other options, if any, under which application for services and other benefits may be made.

§ 54.10 Reconsideration and final action.

(a) The Assistant Secretary's decision shall be final for the Department unless the Secretary requests him to reconsider within 60 days of such publication. If the Secretary recommends reconsideration, the Assistant Secretary shall consult with the Secretary, review his initial determination, and issue a reconsidered decision within 60 days which shall be final and effective upon publication.

(b) The Secretary in his consideration of the Assistant Secretary's decision may review any information available to him, whether formally part of the record or not; where reliance is placed on information not of record, such information shall be identified as to source and nature, and inserted in the record.

(c) The Secretary may request reconsideration of any decision by the Assistant Secretary but shall request reconsideration of any decision, which in his opinion:

(1) Would be changed by significant new evidence which he has received subsequent to the publication of the decision; or

(2) A substantial portion of the evidence relied on was unreliable or was of little probative value; or

(3) The petitioner's or the Bureau's research appears inadequate or incomplete in some material respect.

(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 Governors and attorney generals of the States involved, and to other parties which have commented on the proposed findings.

§ 54.11 Implementation of decisions.

(a) Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the responsibilities and obligations of such tribes. Acknowledgment shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

(b) While the newly recognized tribe shall be eligible for benefits and services, acknowledgment of tribal existence will not create an immediate entitlement to existing Bureau of Indian Affairs programs. Such programs shall become available upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly recognized tribe.

(c) Within 6 months after acknowledgment that the petitioner exists as an Indian tribe, the appropriate Area Office shall consult and develop in cooperation with the group, and forward to the Assistant Secretary, a determination of needs and a recommended budget required to serve the newly acknowledged tribe. The recommended budget will be considered along with other recommendations by the Assistant Secretary in the usual budget-request process.

GEORGE V. GOODWIN,
Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 78-24674 Filed 9-1-78; 8:45 am]

[8320-01]

Title 38—Pensions, Bonuses, and Veterans' Relief

CHAPTER I—VETERANS ADMINISTRATION

PART 2—DELEGATIONS OF AUTHORITY

Authority to Issue Subpoenas

AGENCY: Veterans Administration.

ACTION: Final regulation.

SUMMARY: This amendment delegates subpoena authority to the General Counsel and the Deputy General Counsel and redesignates positions already exercising subpoena authority to reflect the recent implementation of the Office of the Inspector General within the Veterans Administration. While the exercise of this authority within the Office of the General Counsel is expected to be infrequent, a need has been experienced in connection with the conduct of certain investigations and cases by that office. In addition minor editorial changes have been made.

EFFECTIVE DATE: August 25, 1978.

FOR FURTHER INFORMATION CONTACT:

Neal C. Lawson, Assistant General Counsel, Veterans Administration, Washington, D.C. 20420, 202-389-3294.

SUPPLEMENTARY INFORMATION: On page 12892 of the FEDERAL REGISTER of March 28, 1978, there was published notice of proposed regulatory development to amend § 2.1 relating to delegation of authority to employees to issue subpoenas.

those individuals on a roll must have affirmatively demonstrated consent to being listed as members.

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

Tribe means any Indian tribe, band, nation, pueblo, village or community.

§ 83.2 What is the purpose of the regulations in this part?

The regulations in this part implement Federal statutes for the benefit of Indian tribes by establishing procedures and criteria for the Department to use to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A positive determination will result in Federal recognition status and the petitioner's addition to the Department's list of federally recognized Indian tribes. Federal recognition:

(a) Is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States;

(b) Means the tribe is entitled to the immunities and privileges available to other federally recognized Indian tribes;

(c) Means the tribe has the responsibilities, powers, limitations, and obligations of other federally recognized Indian tribes; and

(d) Subjects the Indian tribe to the same authority of Congress and the United States as other federally recognized Indian tribes.

§ 83.3 Who does this part apply to?

This part applies only to indigenous entities that are not federally recognized Indian tribes.

§ 83.4 Who cannot be acknowledged under this part?

The Department will not acknowledge:

(a) An association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community;

(b) A splinter group, political faction, community, or entity of any character that separates from the main body of a currently federally recognized Indian tribe, petitioner, or previous petitioner unless the entity can clearly demonstrate it has functioned from 1900 until the present as a politically autonomous community and meets § 83.11(f), even though some have regarded them as part of or associated in some manner with a federally recognized Indian tribe;

(c) An entity that is, or an entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship; or

(d) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners).

§ 83.5 How does a petitioner obtain Federal acknowledgment under this part?

To be acknowledged as a federally recognized Indian tribe under this part, a petitioner must meet the Indian Entity Identification (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria and must:

(a) Demonstrate previous Federal acknowledgment under § 83.12(a) and meet the criteria in § 83.12(b); or

(b) Meet the Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

§ 83.6 What are the Department's duties?

(a) The Department will publish in the FEDERAL REGISTER, by January 30 each year, 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, in accordance with the Federally Recognized Indian Tribe List Act of 1994. The list may be published more

AUTHORITY: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

SOURCE: 73 FR 29375, May 20, 2008, unless otherwise noted.

Subpart A—General Provisions

§ 292.1 What is the purpose of this part?

The Indian Gaming Regulatory Act of 1988 (IGRA) contains several exceptions under which class II or class III gaming may occur on lands acquired by the United States in trust for an Indian tribe after October 17, 1988, if other applicable requirements of IGRA are met. This part contains procedures that the Department of the Interior will use to determine whether these exceptions apply.

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701–2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe

by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary-Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

Subpart B—Exceptions to Prohibitions on Gaming on Newly Acquired Lands

§ 292.3 How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?

(a) If the newly acquired lands are already in trust and the request does not concern whether a specific area of land is a ''reservation,'' the tribe may submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming.

(b) If the tribe seeks to game on newly acquired lands that require a land-into-trust application or the request concerns whether a specific area of land is a ''reservation,'' the tribe must submit a request for an opinion to the Office of Indian Gaming.

§ 292.4 What criteria must newly acquired lands meet under the exceptions regarding tribes with and without a reservation?

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.

(b) If the tribe had no reservation on October 17, 1988, the lands must be either:

(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma; or

(2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.