TESTIMONY OF DONALD CRAIG MITCHELL BEFORE THE SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS OF THE COMMITTEE ON NATURAL RESOURCES REGARDING THE OBAMA ADMINISTRATION'S PART 83 REVISIONS AND HOW THEY MAY ALLOW THE INTERIOR DEPARTMENT TO CREATE TRIBES, NOT RECOGNIZE THEM

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Mr. Chairman, members of the Subcommittee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved with Native American legal and policy issues from 1974 to the present day in Alaska, on Capitol Hill, inside the U.S. Department of the Interior, and in the federal courts.

From 1977 to 1993 I served, first as Washington, D.C., counsel, and then as general counsel for the Alaska Federation of Natives, the statewide organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Native land claims by enacting the Alaska Native Claims Settlement Act (ANCSA). From 1984 to 1986 I was counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations. In 1997 I was retained by Alaska Senator Ted Stevens to represent the Senator before the U.S. Supreme Court during the petition stage in Alaska v. Native Village of Venetie Tribal Government, one of the most important Indian law cases involving Alaska that the Court has considered. And from 2000 to 2009 I was a legal advisor to the president of the Alaska Senate and speaker of the Alaska House of Representatives regarding Alaska Native and Native American issues, including the application of the Indian Gaming Regulatory Act in Alaska.

I also have written a two-volume history of the federal government's involvement with Alaska's Indian, Eskimo, and Aleut peoples from the Alaska purchase in 1867 to the enactment of ANCSA, Sold American: The Story of Alaska Natives and Their Land, 1867-1959, and Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960-1971. In 2006 the Alaska Historical Society named Sold American and Take My Land two of the most important books that have been written about Alaska. And most recently, I have finished writing a book on the history of Indian gaming, which contains a chapter devoted to the tribal recognition issue.

I first testified before the Committee on Interior and Insular Affairs (as the Committee on Natural Resources then was known) in 1977. Over the years since I have testified before this Subcommittee and the full Committee approximately a dozen times, most recently in 2009, and then again in 2011, when I was invited to discuss Carcieri v. Salazar, the 2009 decision of the U.S. Supreme Court in which the Court construed the intent of the 73d Congress embodied in section 19 of the Indian Reorganization Act of 1934.

I appreciate having been invited again to discuss tribal recognition generally, as well as the proposed amendments to 25 C.F.R. 83.1 et seq. that Assistant Secretary of the Interior for Indian Affairs Kevin Washburn published in the Federal Register on May 29, 2014.

With respect to those subjects I would like to make five points.

1. Since 1977 When the American Indian Policy Review Commission Recommended That Congress "Recognize All Indian Tribes as Eligible for the Benefits and Protections of General Indian Legislation and Policy" Congress Has Not Addressed the Question of Whether, as a Matter of National Policy, Congress Should Create New "Federally Recognized Tribes," and, If It Should, What Standards Congress Should Employ to Decide Whether to Do So in a Particular Case.

The U.S. Supreme Court repeatedly has instructed that the Indian Commerce Clause in the U.S. Constitution grants Congress - not the President, and certainly not the Assistant Secretary of the Interior for Indian Affairs - "plenary and exclusive power over Indian affairs." (emphasis added). And throughout the nineteenth century Congress exercised its Indian Commerce Clause power to achieve a facinorous objective: the clearing of the public domain of the Native Americans who occupied it.

On the recommendation of President Andrew Jackson, in 1830 Congress authorized the President to persuade Native Americans who occupied land east of the Mississippi River to agree to "voluntarily" relocate to land west of the river. Then beginning around 1850 Congress's policy was to persuade Native Americans who occupied land west of the Mississippi River to agree - again "voluntarily" - to be sequestered on reservations that were withdrawn from the public domain for their occupation. And when the members of a particular ethnological tribe refused to agree to be sequestered, they were compelled by force of arms to settle on the reservation to which they had been assigned. According to historian Robert Utley: "Virtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled."

By 1890 the public domain had been cleared and the objective of Congress's Indian policy became the assimilation of the Native Americans on reservations who had served the clearing (and Native Americans in California and other locations who had not been sequestered on reservations) into the economy and society of the nation in which the reservations were located. To that end, in 1887 Congress enacted the General Allotment Act, which authorized the President to subdivide land within a reservation into allotments whose restricted titles were conveyed to heads of families, single persons both over and under eighteen years of age, and orphan children. And in 1934 the 73d Congress enacted the Indian Reorganization Act (IRA).

In 2011 when he testified before this Subcommittee on behalf of the Department of the Interior in support of H.R. 1234, a bill whose enactment would have reversed the Carcieri v. Salazar decision, Principal Deputy Assistant Secretary of the Interior for Indian Affairs Donald "Del" Laverdure represented to the Subcommittee that the 73d Congress enacted the IRA "to halt the federal policy of Allotment and Assimilation" (emphasis added).

However, that statement is historically incorrect.

The Senate and House Committees on Indian Affairs whose members wrote the statutory text that the 73d Congress enacted as the IRA published the transcripts of their hearings and mark-up sessions. Those transcripts indicate that, to the man and single woman, the members of both Committees were committed to assimilation as the objective of Congress's Indian policy and that they agreed "to halt the federal policy of Allotment" because they were convinced by Commissioner of Indian Affairs John Collier that the allotment of reservations had failed to advance the achievement of the assimilation objective.

To cite two of many examples:

First, section 13(b) of Title I of the original bill Commissioner Collier sent to the 73d Congress defined the term "Indian" as all "persons of one fourth or more Indian blood." When, after they rejected the Commissioner's bill, the members of the Senate Committee on Indian Affairs wrote their own bill, Montana Senator Burton Wheeler, the chairman of the Committee, amended the "Indian" definition to increase the blood quantum requirement to "one-half or more Indian blood" because, as Chairman Wheeler explained to the other members, "What we are trying to do is to get rid of the Indian problem rather than add to it." Senator Wheeler's amendment was, and today remains, codified in section 19 of the IRA.

Second, after the 73d Congress enacted the IRA, when Senator Wheeler and other members of the Senate Committee on Indian Affairs realized that Commissioner Collier and the Bureau of Indian Affairs (BIA) bureaucracy were implementing the statute in a manner that contravened the achievement of Congress's assimilationist policy, they spent the next twelve years attempting (unsuccessfully) to repeal their own bill because, as the members of the Committee explained in 1944,

> *after 10 years of operation under the so-called Wheeler-Howard Act, we do not find a single instance in which Indians, under and through that act, have attained a greater degree of self-determination . . . The Indian Bureau has directly controlled the tribal government of every Indian tribe for the past 10 years . . . It has purchased into Federal trust status with tribal and Federal funds, large parcels of expensive lands, which it attempts to manage for the Indian groups and, through such enterprises, to control their whole economy.*

S. Rep. No. 78-1031, at 7 (1944).

In 1946 the Senate Committee on Indian Affairs held its final hearing on a bill whose enactment would have repealed the IRA. Six years later, in 1953 the 83d Congress, without a single dissenting vote, passed House Concurrent Resolution No. 108 - the so-called "termination resolution" - which reaffirmed that it was "the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship."

The history of Congress's consistent Indian policy set out above is relevant to this Subcommittee's consideration of the tribal recognition issue in the present day because it is evidence that into the 1970s Congress had no interest in creating new "federally recognized tribes" by enacting statutes that would confer that legal status on new groups composed of individuals of varying degrees of Native American descent who did not reside within the boundaries of an existing reservation.

However, in 1972 that situation changed.

In 1994 when he appeared before this Subcommittee to discuss the tribal recognition issue, Senator John McCain observed that, to that date, Congress's creation of new "federally recognized tribes" had involved "little or no application of objective standards or criteria" and had relied "almost exclusively on the political strength of the congressional delegation of the state in which the Indian tribe happens to be located."

That, beginning in 1968, was the situation in Arizona.

The San Carlos Apache Tribe is a federally recognized tribe whose members live on the San Carlos Apache Reservation in southeastern Arizona. In 1889 several families whose members were members of the San Carlos Apache Tribe left the San Carlos Apache Reservation and established an encampment on the East Verde River six miles north of Payson, a ranching and mining town west of the reservation. By 1968 64 individuals who were descendants of members of the families that left the San Carlos Apache Reservation in 1889 were living near Payson squatting on land in the Tonto National Forest.

To provide those individuals a location at which to build a permanent community, in 1968 Representative Sam Steiger, whose congressional district included Payson, introduced a bill whose enactment by Congress would authorize the "Payson Band of Yavapai-Apache Indians" to select 85 acres of land in the forest as a site for a village. The bill also "recognized" the Band "as a tribe of Indians within the purview of the [IRA]."

In 1971 when the House Committee on Interior and Insular Affairs reported Representative Steiger's bill, before it did so the Committee rewrote the bill to remove the Band's "recognition" as a federally recognized tribe because the Department of the Interior had informed the Committee that "we do not now recognize this group and believe that we should not now recognize them. If this group wishes to avail itself of Indian services, they need only to remove themselves to the San Carlos Indian Reservation, which they have refused to do for a number of reasons." <u>See</u> H.R. Rep. No. 92-635 (1971).

In the end, because they apparently wanted to ensure that the members of the Payson Band could receive services from the BIA and the Indian Health Service without having to move to the San Carlos Apache Reservation, the members of the Conference Committee who wrote the version of Representative Steiger's bill that Congress enacted into law (and whose membership, in addition to Representative Steiger, included Arizona Senator Paul Fannin) designated the members of the Band - which later was renamed the Tonto Apache Tribe - as a federally recognized tribe. <u>See</u> Pub. L. No. 92-470 (1972).

Over the succeeding forty-plus years Congress has enacted other statutes that have designated groups composed of individuals of purported Native American descent as "federally recognized tribes." See e.g., Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134 (1983); Auburn Indian Restoration Act, Title II, Pub. L. No. 103-434 (1994); Paskenta Band Restoration Act, Title III, Pub. L. No. 103-454 (1994); Graton Rancheria Restoration Act, Title XIV, Pub. L. No. 106-568 (2000).

In most, if not all, of those cases, Congress enacted those statutes without recorded votes and only because, as Senator McCain noted, "the congressional delegation of the state in which the Indian tribe happens to be located" had decided they wanted Congress to create their particular "federally recognized tribe."

To cite what is perhaps the best known example: In 1983 President Ronald Reagan vetoed the Mashantucket Pequot Indian Claims Settlement Act. The President did so because the Department of the Interior objected to Congress designating the group of individuals who called themselves the Mashantucket Pequot Tribe as a "federally recognized tribe," among other reasons because, as William Coldiron, the Solicitor of the Department of the Interior, explained to this Committee: "We don't even know that they are Indians."

Nevertheless, in the end, President Reagan relented because Connecticut Senators Lowell Weicker and Christopher Dodd and all six members of Connecticut's congressional delegation wanted the Mashantucket Pequot Indian Claims Settlement Act enacted into law.

In a similar regard, it merits mention that on March 18 the members of the Senate Committee on Indian Affairs voted to report S. 465, which, if passed by the 114th Congress and signed into law by President Obama, will create six new "federally recognized tribes" in Virginia. The members did so over the opposition of Senator John Barrasso, the chairman of the Committee. But S. 465 was reported because Virginia Senators Tim Kaine and Mark Warner, who had introduced S. 465, wanted the bill reported.

In summary, since 1972 Congress has created new "federally recognized tribes" by enacting statutes ad hoc and, as Senator McCain noted, with "little or no application of objective standards or criteria" and based "almost exclusively on the political strength of the congressional delegation of the state in which the Indian tribe happens to be located."

Because, as discussed below, Congress's creation of new "federally recognized tribes" has significant policy and budgetary consequences, the Subcommittee should consider holding hearings to obtain information about issues like sovereign immunity and other policy consequences and about the budgetary consequences. And after obtaining that information the Subcommittee should develop a coherent, objective, and comprehensive policy pursuant to which the Subcommittee will evaluate bills whose enactments would create new "federally recognized tribes."

2. Congress Has Not Delegated the Secretary of the Interior Authority to Create New "Federally Recognized Tribes" in Congress's Stead. As a Consequence, the Regulations the Secretary Promulgated in 1978, and Amended in 1994, in Which he Gave Himself That Authority Were and Are Ultra Vires.

In 1975 Congress created an eleven-member American Indian Policy Review Commission (AIPRC) that South Dakota Senator James Abourezk and Washington Representative Lloyd Meeds, who at the time was the chairman of this Subcommittee, co-chaired, and on which the present chairman of this Subcommittee served. The resolution that created it directed the AIPRC to "conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revision in the formulation of policies and programs for the benefit of Indians."

After conducting its review, in 1977 the AIPRC submitted a report to Congress. In chapter eleven the report lamented that "There are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of 'unrecognized' tribes, are excluded from the protection and privileges of the Federal-Indian relationship." To remedy that situation, the report recommended that Congress adopt "a statement of policy affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and Indian policy," and that Congress "by legislation create a special office . . . independent from the present Bureau of Indian Affairs, entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal-Indian programs to these tribal communities." (emphasis added).

Those recommendations were consistent with the Indian Commerce Clause, which grants Congress - and not the executive branch - "plenary and exclusive power over Indian affairs." They also were consistent with the attached 1975 letter in which the chief of the BIA Branch of Tribal Relations states: "[F]ormer Secretary [of the Interior Rogers] Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action."

To implement the recommendations in the AIPRC report regarding the creation of new "federally recognized tribes", in 1977 Senator Abourezk introduced S. 2375. The bill established a "special investigative office" inside the Department of the Interior to "review all petitions for acknowledgment of tribal existence presently pending before the Bureau of Indian Affairs." The bill also delegated the Secretary of the Interior authority to "designate [a petitioning] group as a federally acknowledged Indian tribe."

In 1978 Representative Charles Rose introduced S. 2375 in the House as H.R. 11630 and H.R. 13773.

A year earlier and a month after the AIPRC issued its report, on June 16, 1977 the BIA published a proposed rule that contained regulations whose promulgation as a final rule would delegate the Commissioner of Indian Affairs authority to "determine that an Indian group is a

federally recognized tribe." See 42 Federal Register 30,647 (1977). On June 1, 1978 the BIA published a revised version of its proposed rule that contained regulations whose promulgation as a final rule would delegate the Assistant Secretary of the Interior for Indian Affairs that authority. See 43 Federal Register 23,743 (1978).

Two months after the BIA's publication of its revised proposed rule, on August 10, 1978 the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held a hearing on H.R. 13773.

One of the witnesses was Deputy Assistant Secretary of the Interior for Indian Affairs Rick Lavis who informed the Subcommittee that the Department of the Interior opposed H.R. 13733 because "We believe the existing structure in the Bureau of Indian Affairs is competent and capable of carrying this [i.e., the task of tribal recognition] out." When Representative Teno Roncalio, the chairman of the Subcommittee, asked, "You feel that you can make recognition for the tribes without statutory requirement of Congress?", Secretary Lavis answered: "We are operating on the assumption that the statutory authority already exists."

When Chairman Roncalio then asked for a "quick citation" of that statutory authority, Secretary Lavis deferred to Scott Keep, an Assistant Solicitor, who responded: "Mr. Chairman, it is from a general interpretation of the various laws including the Passamoquoddy case[1] and also the Indian Reorganization Act and the way that has been implemented." Mr. Keep also informed the Chairman that "The Department also takes the position that sections such as 25 United States Code, sections 2 and 9, giving the Secretary and the Commissioner of Indian Affairs responsibility for Indian affairs gives him the authority to determine who is encompassed in that category."

Two weeks after the hearing, on August 24, 1978 the BIA promulgated its proposed regulations as a final rule.

As Assistant Solicitor Keep had predicted, the final rule identified 5 U.S.C. 301 and 25 U.S.C. 2 and 9 as the statutes in which the BIA believed that Congress had delegated the BIA authority to promulgate regulations in which the Assistant Secretary of the Interior for Indian Affairs granted himself the authority to create new "federally recognized tribes" unilaterally by final agency action. See 43 Federal Register 39,362 (1978).

But the texts of those statutes indicate that Congress intended their enactments to delegate the Assistant Secretary no such authority.

The U.S. Supreme Court has instructed that, while Congress may enact a statute in which it delegates a portion of its legislative power to the Executive Branch, the constitutional doctrine

[1] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. 1975). In Passamaquoddy the District Court held that Congress intended the word "tribe" in the Nonintercourse Act of 1793 to mean tribe in its ethnological sense, rather than tribe in its political sense. Contrary to Assistant Solicitor Keep's assertion, that holding has nothing to do with the question of whether prior to 1977 Congress had enacted a statute that delegated the Secretary of the Interior authority to create new federally recognized tribes in Congress's stead.

of separation of powers requires that the text of the statute contain an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform" and that a statute that delegates legislative authority is invalid if its text contains "an absence of standards for the guidance of [Executive Branch action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." See J.W. Hampton, Jr. & Company v. United States, 276 U.S. 394, 409 (1928); Yakus v. United States, 321 U.S. 414, 426 (1944). And see also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986)(reiterating that "[a]n agency may not confer power on itself").

The texts of 5 U.S.C. 301 and 25 U.S.C. 2 and 9 not only do not contain any intelligible principles or identifiable standards to guide the Assistant Secretary's decision-making regarding his creation of new "federally recognized tribes," the texts cannot fairly be read to delegate the Assistant Secretary any authority to create new tribes. Because they do not, the regulations the BIA promulgated in 1978, the amendments to those regulations it promulgated in 1994, and, if they are published in a final rule, the new amendments the BIA published in the Federal Register on May 29, 2014 as a proposed rule were and are ultra vires.

5 U.S.C. 301

5 U.S.C. 301 states: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." On its face that statutory text contains no delegation of authority to create new "federally recognized tribes," and, if arguendo it does, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 2

Congress enacted 25 U.S.C. 2 172 years ago. See ch. 174, sec. 1, 4 Stat. 564 (1832). As now codified, the text of the statute reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." If arguendo in 1832 Congress intended that text to delegate the Commissioner legislative authority to create new "federally recognized tribes" in Congress's stead, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 9

Congress enacted 25 U.S.C. 9 170 years ago. See ch. 162, sec. 17, 4 Stat. 738 (1834). As now codified, the text of the statute reads: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." If arguendo in 1834 Congress intended that text to delegate the President legislative authority to create new federally recognized tribes in Congress's stead, the text contains no standards to guide the exercise of that authority. In addition, the text of the statute only grants the President legislative authority to prescribe regulations to carry into effect the provisions of an "act relating to Indian affairs." What was the

act relating to Indian affairs that the promulgation of the regulations in 1978 carried into effect? There was no such act.

43 U.S.C. 1457

In 1994 when the BIA amended the regulations it promulgated in 1978 it added 43 U.S.C. 1457 to the list of statutes it believes delegates the BIA authority to promulgate the regulations. See 59 Federal Register 9293 (1994). But the text of 43 U.S.C. 1457 simply charges the Secretary of the Interior with responsibility for "the supervision of public business relating to" thirteen different subject areas, one of which is "Indians." That is the sum of the statute. Nothing in the text of 43 U.S.C. 1457 delegates to the Secretary authority to create new federally recognized tribes. And if arguendo Congress did intend 43 U.S.C. 1457 to delegate the Secretary that authority, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 479a-1

On May 29, 2014 when the BIA published its most recent proposed rule, which, if published as a final rule will amend 25 C.F.R. 83.1 et seq., the regulations it promulgated in 1978 and amended in 1994, it added 25 U.S.C. 479a-1 to the list of statutes it believes delegates the BIA authority to promulgate the regulations. 25 U.S.C. 479a-1 is section 104 of the Federally Recognized Tribe List Act (FRITLA), which Congress enacted in 1994. The text of the statute reads: "The Secretary [of the Interior] shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Nothing in that statutory text delegates the Secretary new authority to create new federally recognized tribes. And Congress intended no such result. The text of the FRITLA was written, and then was reported as an amendment in the nature of a substitute for the original text of H.R. 4180, by this Committee. When it reported its amendment the Committee informed the House (and the BIA) that "If enacted, H.R. 4180 would make no changes in existing law." See H.R. Rep. No. 103-781, at 6 (1994). So why the BIA now would represent that this Committee intended Congress's enactment of 25 U.S.C. 479a-1 to delegate the Secretary new authority to create new federally recognized tribes is inexplicable.

3. In 1994 the BIA amended the Regulations It Promulgated in 1978 in Order to Make It Easier for the Assistant Secretary of the Interior for Indian Affairs to Designate a Group Composed of Individuals of Native American Descent as a "Federally Recognized Tribe."

25 C.F.R. 54.7 (1978) required a petition filed by an "Indian group" to establish that the group had satisfied seven eligibility criteria. One of the most important was that the petition demonstrate that a "substantial portion" of the group's membership "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." See 25 C.F.R. 54.7(b) (1978).

In 1994 when the BIA amended its regulations, after designating 25 C.F.R. 54.7(b) (1978) as 25 C.F.R. 83.7(b) (1994), it rewrote that eligibility criterion to state that a petition now need demonstrate only that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." The regulations then defined the term "community" to mean "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers." See 25 C.F.R. 83.1 (1994).

In its final rule the BIA explained the purpose of that change as follows: "The old definition implied a geographic community, while the revised one focuses on the social character of the community." See 59 Federal Register 9287 (1994). In other words, a "federally recognized tribe" henceforth could be a social club whose members live scattered in towns and cities across a state, and indeed throughout the nation.

For example, in 2000 Assistant Secretary of the Interior for Indian Affairs Kevin Gover granted a petition that a group that calls itself the Cowlitz Indian Tribe had filed and designated the group as a federally recognized tribe. See 65 Federal Register 8436 (2000).

Today, the headquarters of the Cowlitz Indian Tribe is located in an office building in Longview, Washington, a town on the Interstate 5 freeway 48 miles north of Portland, Oregon. In 1995 when a BIA anthropologist investigated the Cowlitz Indian Tribe, the anthropologist discovered that 1,030 of the group's 1,577 members lived in 133 different towns and cities throughout the State of Washington, 184 members lived in Oregon, 120 members lived in California, and that the group's 483 other members lived in 34 other states as far south as Alabama and Florida and as far east as New Jersey, New York, and Connecticut. If in 1994 the BIA had not rewritten 25 C.F.R. 54.7(b) (1978) to remove the eligibility criterion that required a "substantial portion" of the members of a group to "inhabit a specific area" that diaspora would have been disqualifying.

4. If They Are Promulgated in a Final Rule, the Changes to the Eligibility Criteria in 25 C.F.R. 83.7 (1994) That the BIA Has Proposed in the Proposed Rule It Published in the Federal Register on May 29, 2014 Will Further Loosen the Eligibility Criteria and, as a Consequence, Will Increase the Number of Petitions the Assistant Secretary of the Interior Will Grant in the Future.

For example:

25 C.F.R. 83.7(a) (1994) requires a group to demonstrate that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." (emphasis added). Proposed 25 C.F.R. 83.11(a) (2014) requires a group to "describe its existence as an Indian tribe, band, nation, pueblo, village, or community at any point in time during the historical period." (emphasis added). And proposed 25 C.F.R. 83.1 (2014) defines "historical" to mean "1900 or earlier."

25 C.F.R. 83.7(b) (1994) requires a group to demonstrate that “a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.” (emphasis added). Proposed 25 C.F.R. 83.11(b) (2014) requires a group to “demonstrate that it existed as a distinct community from 1934 until the present without substantial interruption.” (emphases added).

25 C.F.R. 83.7(c) (1994) requires a group to demonstrate that it “maintained political influence or authority over its members as an autonomous entity from historical times until the present.” (emphasis added). Proposed 25 C.F.R. 83.11(c) (2014) requires a group to demonstrate that it “maintained political influence or authority from 1934 until the present without substantial interruption.” (emphases added). Note: a group no longer will need to demonstrate that it maintained political influence or authority “over its members.”

25 C.F.R. 83.7(e) (1994) requires a group to demonstrate that its “membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.” Proposed 25 C.F.R. 83.11(e) (2014) requires a group to demonstrate that “at least 80 percent of [its] membership . . . consist[s] of individuals who can demonstrate that they descend from a tribe that existed in historical times or tribes that combined and functioned in historical times.” (emphasis added). Note: a group no longer will need to demonstrate that combined tribes functioned “as a single autonomous political entity.”

5. The Creation of New “Federally Recognized Tribes” Has Significant Policy and Budgetary Consequences.

It is reasonable to assume that, because it is proposing to loosen the eligibility criteria in 25 C.F.R. 83.7 (1994), the BIA believes that the creation of additional new “federally recognized tribes” should be encouraged. But the creation - either by Congress or by the Assistant Secretary of the Interior for Indian Affairs - of a new federally recognized tribe has significant policy and budgetary consequences of which Congress should be aware. Two of the most important are:

Sovereign Immunity

Decades ago the U.S. Supreme Court decided that every “federally recognized tribe” has sovereign immunity that it may invoke to prevent the tribe and its businesses and employees from being sued without the tribe’s consent in both the federal and the state courts.

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., a decision the U.S. Supreme Court issued in 1998, after noting that it was the Court, rather than Congress, that invented the rule that federally recognized tribes have sovereign immunity and that the Court had done so “almost by accident,” three dissenting justices condemned the rule as “unjust,” and pondered why federally recognized tribes should “enjoy broader immunity than the States, the Federal Government, and foreign nations?” While the six other justices decided that the doctrine of stare decisis required the Court to continue to adhere to the rule, they settled on that result begrudgingly and only after noting that “There are reasons to doubt the wisdom of perpetuating the doctrine,” and that those reasons “might suggest a need to abrogate tribal immunity, at least

as an overarching rule." Despite their misgivings, in the end those justices decided that, rather than the Court abrogating tribal immunity as an overarching rule, the Court should "defer to the role Congress may wish to exercise in this important judgment."

But since the Kiowa Tribe decision, this Committee and the Senate Committee on Indian Affairs have expressed no interest in investigating whether, in the second decade of the twenty-first century, it is appropriate to allow a federally recognized tribe to invoke sovereign immunity. While sovereign immunity is a subject that is beyond the scope of this hearing, the Subcommittee should be aware that sovereign immunity is implicated each time a new federally recognized tribe is created.

Who Is, or Should Be, an "Indian"?

As noted above, in 1934 Congress decided that an individual is an "Indian" for the purposes of the IRA only if he or she is "of one-half or more Indian blood." And in 1971 Congress decided that an individual is an "Alaska Native" for the purposes of the Alaska Native Claims Settlement Act only if he or she is "of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." But in 1978 the BIA decided that a group should be eligible to petition the Assistant Secretary of the Interior for Indian Affairs to designate the group as a new "federally recognized tribe" as long as the group is composed of individuals who each have any percentage of Native American blood quantum because they each have an ancestor who was a member of "a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity." See 25 C.F.R. 54.7(c) (1978).

In 1994 when it amended the regulations it promulgated in 1978, the BIA maintained its "any percentage of Native American blood quantum" standard. See 25 C.F.R. 83(e) (1994). However, in the amendments to its regulations that it published in the Federal Register on May 29, 2014 as a proposed rule the BIA proposed that a group should be eligible to petition the Assistant Secretary of the Interior for Indian Affairs to designate the group as a new "federally recognized tribe" even if up to 20 percent of the individuals who are members of the group do not have any Native American blood quantum whatsoever. See 25 C.F.R. 83.11(e) (2014).

As a matter of policy, is it appropriate for a group to be designated as a new "federally recognized tribe" because the individuals who are members of the group each had single great or great-great or great-great-great grandparent who was a Native American? What the answer to that question should be is a policy decision for the Congress that is beyond the scope of this hearing, other than to note that the question is implicated each time a new federally recognized tribe is created.

However, the policy concern Oklahoma Senator Don Nickles expressed about the BIA's tribal recognition process in 1993 during the confirmation hearing of Bruce Babbitt to be Secretary of the Interior merits the Subcommittee's consideration. At the time Senator Nickles was a member of both the Senate Committee on Indian Affairs and the Senate Committee on Appropriations, where he served as ranking member of the Subcommittee on Interior and Related Agencies. Senator Nickles advised Secretary-Designate Babbitt that

> *I also think you need to look at blood quantums, because you are going to find that as you visit [IHS] hospitals and others, that we do not have blood quantum requirements. And the net result is two generations from now you are going to have individuals that are 1/132 that are going to be demanding full health care benefits for the remainder of their lives, and it is going to be enormously expensive. It is an open-ended full expense entitlement. So, keep that in mind. It is a growing, expanding, building base. The Indian population has exploded. And one of the reasons is because there is not a qualification for or a requirement on quantum.*

In conclusion, Mr. Chairman, insofar as the BIA's creation of new "federally recognized tribes" is concerned, since 1978 the BIA has maintained that that is a quasi-private matter that concerns only the BIA and the groups that have filed petitions that request recognition. However, as I noted at the outset, the Indian Commerce Clause in the U.S. Constitution grants Congress - and not the BIA - plenary and exclusive power over Indian affairs. And because it does, it is past time for Congress to reassume control of the tribal recognition process.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:
Tribal Government Services

DEC 18 1975

Mr. David Mackety
Huron Potawatomi Athens Indian
Reservation
Fulton, Michigan 49052

Dear Mr. Mackety:

This will acknowledge receipt of your letter of November 12 concerning a petition for Federal recognition of the Huron Band of Potawatomi Indians.

While the first page of your letter appears to be part of your original letter, the second page is a reproduction and the petition you referred to was not included. Notwithstanding these facts, former Secretary Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action. Nor, even if such authority can be said to exist, does the law appear to be clear as to the applicable standards and procedures for recognition. In short, they felt that the "recognition" concept is an exceedingly indefinite one. As a result attorneys in the Solicitor's office researched various questions connected with recognition and prepared detailed memoranda. That memoranda is now being reviewed.

Until that review is concluded and the future policy relating to administrative recognition of Indians tribes or bands has been determined, we will be unable to act upon the petition of the Huron Band of Potawatomi Indians. If you will send the petition forward, however, we will be happy to hold it in our files for immediate action following the determination of future policy.

Sincerely yours,

Leslie M. Gay Jr.
Chief, Branch of Tribal Realtions