Testimony of Fawn R. Sharp, President, Quinault Indian Nation

Before the House Natural Resources – Subcommittee on Indian, Insular and Alaska Native Affairs

Hearing on "The Obama Administration's Part 83 Revisions"

April 22, 2015

Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee, I am Fawn R. Sharp, President of the Quinault Business Committee, the elected governing body of the Quinault Indian Nation ("Quinault" or "Nation"). On behalf of the Nation, I thank you for the opportunity to testify about the Bureau of Indian Affairs' ("BIA") proposed revisions to 25 C.F.R. Part 83, the Federal Acknowledgment Process ("FAP").

Background / History of the Quinault Indian Nation

Located in the northwest corner of the United States, the Quinault Nation was one of the last Native nations in the U.S. to be contacted by the European nations. Less than one year before the foundation of the United States, the first recorded contact between the Quinaults and non-Indians occurred on July 13, 1775, when the Spanish vessel *Sonora* anchored several miles from the mouth of the Quinault River. Not long after first contact, our Nation was sadly subjected to the same greed for our homelands and natural resources that tribes across the continent faced.

Upon its formation, the U.S. acknowledged the existing inherent sovereign authority of Indian tribes over their lands. The federal government entered into hundreds of treaties with Native nations to secure peace and trade agreements, to foster alliances, and to build a land base for the newly formed United States. Through these treaties, tribes ceded hundreds of millions of acres of our homelands. In return, the U.S. promised to provide for the education, health, public safety, and general welfare of Indian people. For the Quinault and other tribes, the U.S. also promised to preserve our rights to fish and hunt our aboriginal homelands and accustomed areas.

The solemn promises that the United States made to the Quinault Nation were detailed in the Treaty of Olympia, signed on July 1, 1855 and on January 25, 1856 (11 Stat. 971). The Treaty acknowledged Quinault's status as a sovereign Nation with inherent rights to govern our lands, our resources, and our people. This includes access to our usual and accustomed lands and waters and the right to co-manage the natural resources outside of our Reservation borders. The United States has unique legal treaty and trust responsibilities to keep these promises to the Quinault Indian Nation.

The inherent self-governing authority of all Indian tribes is recognized in the U.S. Constitution. The Commerce Clause provides that "Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Tribal citizens are referred to in the Apportionment Clause ("Indians not taxed") and excluded from enumeration for congressional representation. The 14th Amendment repeats the original reference to "Indians

not taxed." These provisions acknowledge that Native Americans were citizens of and subject to the authority of their tribal governments and not citizens of the United States. Finally, the Constitution acknowledges that Indian treaties and the promises made therein are the supreme law of the land. By its very text, the Constitution establishes the framework for the federal government-to-government relationship with Indian tribes.

Over the past two centuries, the federal government has consistently violated these solemn obligations. In the late 1800's the federal policy of forced Assimilation authorized the taking of Indian children from their homes. Many of our ancestors were sent to boarding schools where they were forbidden from speaking their language or practicing their religion. The officially sanctioned philosophy was to "kill the Indian, save the man." The concurrent policy of Allotment sought to destroy tribal governing structures, sold off treaty-protected Native homelands, and devastated our economies.

Under the authority of the Allotment policy and subsequent related laws, the federal government destroyed thousands of acres of Quinault Cedar forests making our homelands virtually unrecoverable. The aftermath of these policies continues to plague the Quinault Nation to this day.

The Federal Acknowledgment Process

Like the power to recognize foreign governments, the United States has the authority to determine which groups will be recognized as Indian tribes for governmental and political purposes. The federal government can establish this relationship in one of three ways: through the federal courts, through an Act of Congress, and through the federal acknowledgment process ("FAP"), 25 C.F.R. Part 83 (Prior to 1871, treaties were often used to establish these political relationships).

The BIA promulgated the FAP in 1978 to establish standards for tribes not otherwise acknowledged that respect the great significance of a decision by the United States to enter into a political relationship with an Indian tribe. The stated purpose of the FAP "is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes, [which affords] the protection, services, and benefits of the Federal government…. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes…." 25 C.F.R. Part 83.2. The current FAP "is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3.

The importance of these regulations and the process cannot be overstated. The federal administrative process to reaffirm or restore the political relationship between a tribe and the United States impacts not only the newly acknowledged tribe but can also impact existing federally recognized tribes. The newly acknowledged tribe will have sovereign authority to establish a land base, exercise civil and criminal jurisdiction over those lands, and will have a formal government-to-government relationship with the United States. Conversely, that same

decision may have impacts on existing tribal governments, their rights, and their unique relationship with the United States. Of great importance to the Quinault Nation, the Department's decisions may have the potential to adversely impact our treaty rights and the ability to govern actions on our Reservation.

The Proposed Revisions to the FAP: 79 Federal Register 30766-81 (May 29, 2014)

The stated purpose of BIA's FAP revisions is to streamline the process to increase transparency, consistency, and efficiency. Quinault supports these goals. While some of the proposed revisions foster these goals, several of the proposed revisions undercut these goals by re-opening petitions that have been finalized after decades of debate and by fundamentally changing the mandatory criteria for federal acknowledgment that could adversely impact existing tribal governments.

The following comments and concerns with the proposed revisions to the FAP are best considered against the long held positions of the Quinault Indian Nation in response to attacks on our treaty rights and the authority to govern the Quinault Reservation that have been repeatedly lodged by descendants of the Chinook.

Individuals claiming Chinook descendancy have made claims in the United States Courts and before Congress while attacking the Quinault Nation's status as the federally recognized governing entity of the Quinault Indian Reservation. In 1988, Chinook and Cowlitz testified before Congress against the return of North Boundary lands to the Quinault Nation. The two groups claimed that the federal government has improperly recognized the Quinault Nation as the tribal government over the Reservation and that eight tribes, including the Chinook have equal rights to share in the governance of the Reservation. In 1989, Chinook and other tribal groups filed suit in the United States District Court requesting that the Secretary of Interior be required to organize a new tribal organization to govern the Quinault Indian Reservation. The groups claimed to have equal rights with the Quinault Nation to govern the Quinault Indian Reservation.

The Quinault Nation has consistently maintained that Chinook descendants do not satisfy federal standards for recognition of the Chinooks as an independent tribe. The Interior Department concluded that the Chinook descendants have not existed as a separate social and political community before 1990. Over a hundred years of legal disputes have consistently found that the Chinook descendants have lacked a separate identity. Instead, in 1906, the Court of Claims found that the Chinook had long ago ceased to exist as a tribe. In 1928, the United States District Court, in the *Halbert* case found that there was no Chinook tribal organization. Even as the federal government provided for allotments on the Quinault Indian Reservation, those were based on Chinook descent, and not as a member of an existing Chinook tribal body. The BIA's experts recommended against Chinook recognition based on the extensive records.

The Quinault Nation has been forced to expend considerable resources to defend itself against such repeated assaults on its sovereignty. These are just a couple of examples of the ongoing issues that demonstrate the historic disputes the Chinooks have with the Quinault Indian Nation. The Quinault Nation spent nearly a century defending our treaty and self-governing rights

against these attacks. Federal courts and administrative decisions have repeatedly upheld the exercise of Quinault treaty rights against claims of the Chinook. These decisions have found that only the Quinault Indian Nation has authority to govern the Quinault Reservation and to regulate the exercise of treaty rights reserved to the Quinault under the Treaty of Olympia.

The BIA's proposed revisions to the FAP regulations hold the potential to re-open these settled decisions and could force the Quinault Nation to re-litigate and again defend our solemn treaty rights and inherent sovereign authority to govern our homelands.

Previously Denied Applicants May Re-Petition

Proposed rule § 83.4(b) authorizes a group previously denied acknowledgment under Part 83 to re-petition for federal acknowledgment under the revised rules once finalized. A petitioner may re-petition only if "*[a]ny* third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning." In addition, requests to be allowed to re-petition are to be reviewed by the Department's Office of Hearings and Appeals, and decided on the basis of preponderance of evidence that changes in the regulations would produce a different result or there was a misapplication of the "reasonable likelihood" standard of proof.

The proposal to authorize re-petitioning is unsound for a number of reasons. It will only serve to lengthen and undermine the federal acknowledgment process, prevent interested parties from voicing concerns with applications to re-petition under the revised rules, and will re-open final decisions that have been relied upon by such interested parties.

For example, despite the fact that previously denied petitions may have had multiple opposing parties, the language in proposed § 83.4(b) indicates that only one prior opposing third party would be required to consent, even if the others objected.

The Department has repeatedly stated that the purposes of the proposed revisions are to increase efficiency, clarity, and transparency while maintaining the same requirements as the present regulations. However, § 83.4(b) clearly anticipates that the changes in the regulations will result in the acknowledgment of previously rejected petitioners. (*See* Proposed 83(b)(I)(ii)(A): "The petitioner proves, by a preponderance of the evidence, that a change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination."). As discussed in detail below, the proposed rule makes major changes to the acknowledgment process and criteria that would result in the acknowledgment of groups that do not meet the existing criteria for acknowledgment.

The Clinton Administration considered and rejected a similar proposal to authorize groups to re-petition under the 1994 revisions to the FAP. That Administration reasoned, "there should be an eventual end to the present administrative process. Those petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence. Allowing such groups to return to the process with new evidence would burden the process for the numerous remaining petitioners. The changes in the regulations are not so fundamental that they can be expected to result in different outcomes for cases previously denied." Federal

Register Doc. No: 94-3934 (page unknown) (Feb. 25, 1994) (http://www.gpo.gov/fdsys/pkg/FR-1994-02-25/html/94-3934.htm).

With regard to the current proposed revisions, Department officials have stated publicly that the purpose for reforming the regulations "was not to hit the reset button" for tribes that have already gone through the process. The Department has acknowledged that when third parties invest time and resources into a process they develop equity in the outcome. As a result, those outcomes cannot be ignored. However, as noted above, under the proposed re-petitioning provision as written, opposition from third parties to a re-petition can be circumvented by gaining consent from another third party.

Finally, Department officials have also publicly acknowledged that constitutional questions remain with regard to the third-party consent provisions included in the re-petitioning process. If the third party veto is found unconstitutional, it could result in striking the consent provisions while permitting previously denied petitioners to re-petition under the relaxed revised rules.

The Quinault Indian Nation strongly opposes the proposed changes to Part 83 that would allow previously denied groups the opportunity to re-petition under the revised FAP rules. As noted above, the Quinault Nation has defended our treaty rights and rights to govern our Reservation against attacks from descendants of the Chinook for decades. Quinault invested significant time and resources to successfully defend these rights. Considerations of efficiency and finality and the fundamental legal principle of *res judicata* support maintaining the existing prohibition against reapplication by groups previously denied. The Nation urges the Department to retain the current policy prohibiting groups from re-petitioning and eliminating the provisions related to re-petitioning from any final rule.

Revised Standards for "Community" and "Political Authority"

The proposed rule would substantially revise standards for determining whether a petitioning group meets the mandatory criteria for "community" and "political authority". The proposed revisions also permit additional forms of evidence to meet criteria (b) and (c), which make the demonstration of these criteria no stronger than that of a social club that holds elections by its membership. Together, these proposed revisions would fundamentally change these criteria to the point that it could adversely impact existing tribal governments and the Department's treaty and trust obligations to all of Indian Country.

The "mandatory criteria" under the current FAP regulations require a petitioner to show: (b) that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; and (c) that it has "maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. Part 83.7(b), (c).

The current rule defines *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. Community must be understood in the context of the history, geography, culture and social organization of the

group." Part 83.1. It also defines the term "historical" to mean "dating from first sustained contact with non-Indians." *Id.*

The proposed rule would replace the "historical times" requirements of both (b) and (c), and establish "1934" as the new starting date for proving that a group meets the community and political authority criteria.

In the rulemaking for the only previous revisions to the 1978 FAP, the Clinton Administration rejected a proposal to change the starting point for meeting the "distinct community" criterion from "historical times to the present" to "1934".

> "The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians.
>
> Acknowledgment as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time. Further, the studies of unrecognized groups made by the Government in the 1930's were often quite limited and inaccurate.
>
> Groups known now to have existed as tribes then, were portrayed as not maintaining communities or political leadership, or had their Indian ancestry questioned. Thus, as a practical matter, 1934 would not be a useful starting point."

Federal Register Doc. No: 94-3934 (page unknown) (Feb. 25, 1994) (http://www.gpo.gov/fdsys/pkg/FR-1994-02-25/html/94-3934.htm).

Of vital importance to the Quinault Nation, the proposed revised standards for recognition have the potential to undermine the Nation's Treaty rights affirmed in *U.S. v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981)("Washington II", a successor case to the historic Boldt decision). The Ninth Circuit in *U.S. v. Washington*, rejected the argument that "because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence." The court further defined as a single, necessary and sufficient condition for the exercise of treaty rights, that tribes must have functioned since treaty times as "continuous separate and distinct Indian cultural or political communities." *Washington II*, 641 F.2d at 1374.

The simple demonstration of ancestry is not sufficient for the exercise of treaty rights, and it should not be sufficient to meet the mandatory criteria for federal recognition.

Acknowledging groups that have failed to continuously maintain a community or exercise political control over its membership as federally recognized Indian tribes, devalues and undermine the status of all Indian tribes as sovereign political entities with significant governmental authority. These proposed changes hold the potential to redefine tribes as racial, rather than political entities.

Holding Lands "at any point in time from 1934 to the present"

A major proposed revision to the mandatory criteria is listed in proposed Parts 83.11(b)(3)(ii) and (c)(3)(ii). If adopted, these proposals would conclusively determine that a showing that "the United States has held land for the petitioner or collective ancestors at any point in time from 1934 to the present" is evidence to meet the "distinct community" and "political authority" criteria. *See* Proposed Parts §83.11(b)(3)(ii) and(c)(3)(ii).

Proposed Parts §83.11(b)(3)(ii) and(c)(3)(ii) fail to adequately explain how "held land for the petitioner or collective ancestors at any point in time from 1934 to the present" equates to a petitioner showing that it existed as a distinct community that has maintained political influence or authority without substantial interruption. These proposed revisions fail to include any qualifications for the term "held land" or a description of the basis for acquiring and holding such land, and thus are far too broad. Without more, this provision does not require the petitioner to show evidence of tribal existence or even implied federal recognition. Where land was clearly purchased based on tribal existence and recognized status, this would equate with previous Federal recognition, and should be included as evidence for that point in time, but not as evidence for continued tribal existence after that point in time. The fact that the U.S. "held land" for a group of individuals does not mean that coordinated activities are occurring on the land or that there is a distinct government established to maintain the land. In addition, the fact that the U.S. held land for a petitioner in 1934 does not mean that the petitioner maintained existence as a community or exercised political authority over the group after that date. As a result, this section could apply to some petitioners that are made up of descendants of tribes for which a reservation was established (and continues to exist), but where these descendants had long since ceased to be affiliated with the tribe on the reservation or to form a community outside of it.

For example, in the Northwest and elsewhere, reservations were established or enlarged by treaties and executive orders for historic tribes. Many members of those historic tribes integrated into the reservation communities of tribes that are currently recognized by the United States, while others did not. Proposed §83.11(b)(3)(ii) and(c)(3)(ii) would provide that petitioners demonstrate both community and political influence and authority without any additional evidence, if the United States has held land in trust for the petitioner or the petitioner's collective ancestors at any time between 1934 and the present.

Similar factors were specifically rejected as meeting criteria (b) and (c) in the petition submitted by the Chinook Indian Nation / Chinook Tribe ("CIN/CT") pursuant to Part 83.

In the case of the Quinault Nation, the United States opened our Reservation for allotment through several Acts of Congress. "The 1911 Quinault Allotment Act authorized allotments for "members" of certain 'tribes' affiliated with the Quinault and Quileute tribes 'in' an 1855/56 treaty. The Department granted allotments to individual Chinooks without requiring membership in a Chinook tribe, and contended at the time that a Chinook tribe no longer existed." *See* Reconsidered Final Determination Against Federal Acknowledgment of the CIN/CT, at 16 (July 5, 2002). In denying the CIN/CT application for acknowledgment, the Secretary found that reference to the Chinook and "other tribes" as eligible for allotments was, by itself, insufficient

to substantiate that the Chinook then comprised an existing tribe acknowledged by Congress as a distinct tribe still in existence.

In 1912, Congress heard from the Chinook descendants through their attorney. The topic was United States payments for cessions described in an 1851 treaty negotiated with the then existing Chinook people. Congress never ratified the treaty, and when it considered payments to Chinook people, Congress considered payments only being made to descendants of a tribe that no longer existed.

In 1925, Congress enacted another piece of claims legislation that authorized several "Tribes or Bands of Indians," including the "Chinook," to bring claims "as parties plaintiff' against the United States. Act of February 12, 1925. In 1934, the Court of Claims then found claims filed by the Chinook descendants pursuant to this Act to be without merit.

Finally, federal courts in the 1931 *Halbert v. United States* litigation found that the Chinook did not constitute an Indian tribe. At the District Court level in the Halbert case, the U.S. argued that the Chinook descendants were without tribal affiliation or tribal relations, and implied that they were "descendants who have separated from tribal life." The District Court, accepting the factual premise of the government's argument, concluded that the Chinook tribe had "no tribal organization." While not directly addressing the issue, the U.S. Supreme Court essentially upheld the District Court's ruling that the Chinook held no "... tribal organization [but instead] are 'remnants of bands and tribes.'"

These court rulings and legislative interpretations weighed heavily in the Interior Department's denial of recognition of the Chinook descendants. The Secretary found that the Chinook failed to satisfy the mandatory criteria under the FAP to meet the "distinct community" and "political authority". *See* Department of the Interior, Reconsidered Final Determination Against Federal Acknowledgment of the Chinook Indian Tribe / Chinook Nation (CIT/CN) (July 5, 2002)(online at http://www.bia.gov/cs/groups/xofa/documents/text/idc-001489.pdf). The Department, in the Reconsidered Final Determination, also properly relied on and deferred to the expertise of the Bureau of Acknowledgment and Recognition's 1997 Proposed Findings in reaching these conclusions.

Despite adverse decisions, the Chinook people have consistently maintained that they should be federally recognized, are eligible to exercise Quinault treaty hunting and fishing rights, and possess the rights to govern actions and activity on the Quinault Indian Reservation. The BIA's proposed FAP revisions hold great potential to overturn these decisions and force the Quinault Nation to re-litigate these attacks on our sovereignty. As a result, we strongly oppose the proposed revisions to change the starting date to prove "community" and "political authority" to "1934", and we strongly oppose adding the factor that "the United States has held land for the petitioner or collective ancestors at any point in time from 1934 to the present" as dispositive evidence of meeting the "distinct community" and "political authority" criteria.

Conclusion

The Quinault Indian Nation does not oppose or challenge the right of any group to seek a political relationship with the federal government. However, we must oppose federal actions that hold the potential to jeopardize the Quinault Indian Nation's treaty rights or inherent rights to govern our homelands. The BIA's proposed FAP revisions, if made final in their current form, will re-open settled decisions, force us to re-litigate and defend our treaty and sovereign rights. In addition, the proposed revisions fail to uphold or establish safeguards to protect the federal government's treaty and trust obligations to existing federally recognized tribes.

The Quinault Nation has a great deal of respect for the Chinook Indian people. The issues that we raise today relate to the fundamental principle that the United States has a unique relationship with all Indian tribes, which includes each tribe's unique position deeply rooted in historic and cultural values. The Quinault Nation has a longstanding and unique relationship with the United States. Our Nation's inherent rights emanate from that relationship, which are outlined in our Treaty with the United States.

The Quinault Nation has invested nearly a century in defending our treaty rights and sovereignty from legal, administrative, and legislative challenges. Under no circumstances should the Administration dredge up the past and force us to re-litigate these past settled decisions.

The Quinault Indian Nation cannot support the proposed revisions to the FAP as they hold the potential to threaten the Quinault treaty rights reserved under the Treaty of Olympia. In sum, the proposed revisions to the BIA Federal Acknowledgment Process – while well intended – are flawed.

I again thank the Subcommittee for this opportunity to testify today and urge you to work with the Administration to ensure that if the revised FAP regulations are made final that they address the concerns discussed in this statement.