No. 07-526

In The Supreme Court of the United States

DONALD CARCIERI, *et al.*,

Petitioners,

v.

DIRK KEMPTHORNE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF LAW PROFESSORS SPECIALIZING IN FEDERAL INDIAN LAW AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

ROBERT T. ANDERSON
Associate Professor
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 685-2861

RICHARD A. GUEST
Staff Attorney
Counsel of Record
NATIVE AMERICAN
RIGHTS FUND
1712 N. St., NW
Washington, D.C. 20036
(202) 785-4166

COLETTE ROUTEL
Visiting Assistant Professor
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109
(734) 763-6699

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONS, TREATIES, STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICUS CURIAE*[1]

Amici are the following law professors who write and teach in the area of Federal Indian law:

Robert T. Anderson, Associate Professor of Law, Director of Native American Law Center, University of Washington

Bethany Berger, Professor of Law, University of Connecticut

Matthew L.M. Fletcher, Associate Professor of Law & Director of Indigenous Law & Policy Center, Michigan State University College of Law

Carole E. Goldberg, Professor of Law & Director of Joint Degree Program in Law and American Indian Studies, University of California, Los Angeles

Sarah A. Krakoff, Associate Professor of Law, University of Colorado, Boulder

Patrice Kunesh, Associate Professor of Law & Director of the Institute of American Indian Studies, University of South Dakota

---

[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than the *amici* and its counsel contributed monetarily to the preparation or submission of this brief.

John P. LaVelle, Dickason Professor of Law & Director, Indian Law Program, University of New Mexico

Nell Jessup Newton, William B. Lockhart Professor of Law, University of California, Hastings

Colette Routel, Visiting Assistant Professor of Law, University of Michigan

Judith V. Royster, Professor of Law & Co-Director of Native American Law Center, University of Tulsa

Joseph William Singer, Bussey Professor of Law, Harvard Law School

Kevin Washburn, Rosentiel Distinguished Professor of Law, University of Arizona

The *amici* submit this Brief to explain the legal foundation for the federal government's practice of "recognizing" or "acknowledging" a group's existence as an Indian tribe.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 et seq., Act of June 18, 1934, ch. 576, 48 Stat. 984, authorizes the Secretary of the Interior to acquire lands for "Indians," and defines that term to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479 (2008). In their briefs,

each of the Petitioners claim that this language is unambiguous, and applies only to Indian tribes that were both recognized and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. An understanding of the history of federal recognition of Indian tribes, however, makes this interpretation implausible.

Prior to enactment of the IRA, the government had not made any comprehensive effort to catalog Indian tribes. In 1934, therefore, there was no list of recognized tribes to which the scope of the Act could be limited. Nor were there standard criteria for determining whether recognition had been or should be extended to particular Indian groups. Consequently, Congress would not have intended for the phrase "now under federal jurisdiction" to mean tribes "under federal jurisdiction as of June 18, 1934." It knew that *after* the IRA was enacted the Department of the Interior (the "Department") would have to determine which groups to recognize as Indian tribes.

The language relied on by the Petitioners – if it even applies in this case[2] – requires that a tribe be "recognized" and "under federal jurisdiction" at the

[2] Respondents and *amicus curiae* National Congress of American Indians persuasively argue that Section 5 of the IRA authorizes the Secretary of the Interior to take land in trust for an "Indian tribe or individual Indian," and that the separate definition of "tribe" in the Act plainly includes the Narragansett Indian Tribe. *See* 25 U.S.C. §§ 465, 479a (2008).

moment when the Secretary of the Interior seeks to acquire land in trust on its behalf. This makes sense, because historically tribal status was not static. Some groups considered Indian tribes early in their history were ultimately no longer identified by the federal government as such, because their membership had significantly dwindled in size or had fully assimilated into white society. On the other hand, some groups determined not to be tribes later regained their tribal status. The fluidity of tribal existence made it important that the IRA provide a mechanism that ensured its benefits would only be available for groups that the federal government currently recognized as Indian tribes. Properly read, the definition of "Indian" contains that mechanism.

The legislative history supports this reading of the statute. During hearings on the bill, Senate Indian Affairs Chairman Burton Wheeler expressed concerns that the IRA would apply indefinitely to certain persons who, while under federal supervision in 1934, were "white people essentially." *Hearing Before the Senate Committee on Indian Affairs*, 73rd Cong., 2d Sess., part 2, at 266 (1934). He believed that "you have to sooner or later eliminate those Indians," from the application of the IRA. *Id*. In response, Commissioner of Indian Affairs John Collier suggested that the term "recognized Indian tribe" in the definition of "Indian," be limited by the addition of the phrase, "now under federal jurisdiction." *Id*. This suggestion would only address Senator Wheeler's concerns if "now" was meant to refer to the

moment when the statute was being applied. Then, if at a later date, Congress or the executive branch agreed with his characterization of the Indians in question and chose to terminate the government-to-government relationship with that tribe, it would no longer receive the benefits of the IRA.

At a minimum, this historical context establishes that the IRA's definition of "Indian" is ambiguous, and the Department's interpretation of that term, which is memorialized in formal regulations promulgated after notice and comment, is reasonable and must be upheld. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In fact, it would be unreasonable to adopt the Petitioners' interpretation of the IRA, because doing so would only memorialize past agency mistakes.

After the IRA was passed, the Department of the Interior attempted to decide which tribes would be eligible to vote on and organize under the Act. In its haste, several errors and omissions were made. The 1977 Report of the American Indian Policy Review Commission revealed that dozens of tribes had not been recognized by the federal government due to inadvertence or mistake. At the same time, unrecognized tribes began seeking sovereign status by litigating treaty fishing rights in the Pacific Northwest, filing land claims in the East, and petitioning the Department for federal recognition.

In response, the Department finally created a formal administrative process for recognizing tribes

in 1978. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (codified at 25 C.F.R. Part 83). The first comprehensive list of Indian tribes was published in the *Federal Register* the following year. *See* Indian Tribal Entities that have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7,235 (Feb. 6, 1979). A final list for Alaska tribes was not completed until 1993. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993). All Indian groups not included on these lists were considered "unrecognized," and could generally achieve recognition only through the newly created administrative process or direct congressional legislation. In 1994, Congress ratified these lists and mandated their annual publication. 25 U.S.C. § 479a-1. *See also* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007) (containing the most recent list of federally recognized tribes).

Since 1978, the Department has recognized 16 Indian tribes – including the Narragansett Indian Tribe – through its formal administrative process. To gain recognition, each of these tribes was required to demonstrate that, from historical times to the present, it maintained a continuous existence as a distinct Indian community and exercised political authority over its members. Hence, Indian tribes recently recognized through the administrative

process were existing tribes in 1934; only inadvertence or mistake prevented their immediate recognition under the IRA. The Department's attempts to correct these mistakes should not be thwarted by the Petitioners' unreasonably restrictive reading of the IRA.

ARGUMENT

I. CONGRESS INTENDED THAT THE IRA APPLY TO INDIAN TRIBES RECOGNIZED BY THE FEDERAL GOVERNMENT AT THE MOMENT THE ACT WAS INVOKED

The IRA authorizes the Secretary of the Interior to acquire any interest in lands "for the purpose of providing land for the Indians." 25 U.S.C. § 465 (2008). The term "Indian" is defined as follows:

> The term "Indian" as used in this Act shall include *all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . .

25 U.S.C. § 479 (2008) (emphasis added). The Petitioners claim that the clause highlighted above only applies to Indian tribes that were both recognized

and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. That interpretation is inconsistent with both the historical context of the recognition of Indian tribes by the United States and the legislative history of the IRA.

A. In 1934, There Was No Bright-Line Distinction Between "Recognized" And "Unrecognized" Tribes, There Was No Official List Of Indian Tribes, And No Formal Process Existed For Making Recognition Decisions

Today, all Indian tribes fit into one of two categories: "recognized" or "unrecognized."[3] A recognized tribe is entitled to all of the benefits (health, education, etc.) extended by federal law to Indian tribes.[4] Unrecognized tribes, on the other hand, are not entitled to most federal services and can obtain recognition only by prevailing in the difficult and lengthy administrative process contained in 25 C.F.R. Part 83, or, on rare occasion, through congressional legislation. But this bright-lined differentiation between recognized and unrecognized tribes is recent in origin, and began to emerge only with the passage

[3] The terms "recognized" and "unrecognized" are often used interchangeably with "acknowledged" and "unacknowledged."

[4] *See* H.R. Rep. No. 103-781, at 3 (1994) (noting that recognition imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members).

of the IRA. *See generally* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331 (1990); *Cohen's Handbook of Federal Indian Law* 134-52 (2005 ed.) (discussing history of federal recognition).

For the first 70 years of governance under the Articles of Confederation and U.S. Constitution, there was no concept of "recognized" versus "unrecognized" tribes. In fact, the terms "recognize" and "acknowledge" were almost exclusively used in the cognitive sense, indicating that a particular tribe was known to the United States. Quinn, 34 Am. J. Legal Hist. at 339. Congress enacted legislation that applied to "Indian country,"[5] "Indian tribes," "any band, tribe, or nation in amity with the United States,"[6] "Indian nations,"[7] "Indians,"[8] "Indians not citizens of the

[5] The Indian Trade & Intercourse Acts referred to "Indians," "Indian tribes," and "Indian country." *See* Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of June 17, 1844, ch. 103, 5 Stat. 680; Act of Mar. 3, 1847, ch. 66, 9 Stat. 203; Act of Feb. 13, 1862, ch. 24, 12 Stat. 338; Act of Mar. 16, 1864, ch. 34, 13 Stat. 29.

[6] *See* Indian Depredation Act, Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851.

[7] The system of government trading houses first authorized through legislation passed in 1796, and renewed from time-to-time until their permanent closure in 1823, established federal trading posts along the frontier or in the "Indian country," so

(Continued on following page)

United States,"[9] "Indians not members of any of the states,"[10] and the like. It was then up to the executive branch and the federal courts to determine, on an *ad hoc* basis, to whom these statutes should be applied.

If Congress or the executive branch had previously concluded that a tribe existed, federal courts generally refused to disturb that finding. In *United States v. Holliday*, for example, this Court was asked to determine whether federal laws prohibiting the sale of liquor to Indians applied to a Saginaw Chippewa Indian. 70 U.S. 407 (1865). The defendant claimed that the person he sold liquor to should not be considered an Indian for purposes of the statutory prohibition, because his tribe had been dissolved by the United States. *Id*. at 418. The United States, on

---

that trade could be honestly conducted with "Indian nations" and "Indians." *See*, *e.g.*, Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.

[8] *See*, *e.g.,* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (the Northwest Ordinance); Act of Mar. 3, 1885, § 9, 23 Stat. 385 (the Major Crimes Act); Act of Nov. 2, 1921, ch. 115, 42 Stat. 208 (the Snyder Act).

[9] *See*, *e.g.*, Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71 (prohibiting certain contracts from being entered into with "any tribe of Indians, or individual Indian not a citizen of the United States").

[10] The Articles of Confederation, granted the federal government "the sole and exclusive right and power of . . . regulating trade, and managing all affairs with the Indians, not members of any of the States." Articles of Confederation, Art. 9, para. 4. Proclamations issued by the Continental Congress also used this phrase. *See*, *e.g.*, 25 Journals of the Continental Congress 602 (Sept. 22, 1783).

the other hand, argued that the Saginaw Chippewa still existed as a tribe. *Id.* at 419. This Court deferred to the executive branch and enforced the statute against the defendant, noting:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

Id. *See also The Kansas Indians*, 72 U.S. 737, 755 (1866) ("If the tribal organization of the Shawnees is . . . recognized by the political department of the government as existing then they are . . . governed exclusively by the government of the Union").

Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribe as defined in particular statutes. This Court eventually provided a definition of the terms "tribe" and "band," to aid lower federal courts in making these determinations:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though

> often, of the same race or tribe, but united under the same leadership in a common design.

Montoya v. United States, 180 U.S. 261, 266 (1901). *See also United States v. Candelaria*, 271 U.S. 432 (1926) (applying the *Montoya* definition to the Indian Trade & Intercourse Acts). Not surprisingly, however, confusion still remained.

By the early twentieth century, the concept of recognition of Indian tribes in the jurisdictional sense "was only beginning to take shape," and it "was not universally applied, accepted or, frankly, understood." Quinn, 34 Am. J. Legal Hist. at 347. No comprehensive list of federally recognized tribes was ever created prior to enactment of the Indian Reorganization Act in 1934,[11] and no standard criteria for determining whether to recognize an Indian tribe existed at the time. It is thus extremely unlikely that Congress would have intended the IRA to be interpreted as suggested by the Petitioners, and it would be extraordinarily difficult, if not impossible, to apply the Act in this manner today.

---

[11] In 1894, the U.S. Census Office published a report that included a list of "Principal Tribes known to the Laws of the United States," but as its name indicates, this was not a comprehensive listing of Indian tribes. *See Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890* (1894). This report was not updated, and no other list of Indian tribes was created by the federal government prior to enactment of the IRA.

B. The Legislative History Of The Ira Suggests That The Language Invoked By Petitioners Was Intended To Recognize The Changing Nature Of Tribal Status

Petitioners' suggest that Congress intended to fix tribal status at the moment of enactment of the IRA, but this argument contradicts both the historically fluid nature of tribal status and recognition, and the legislative history of the provision.

Tribal status has never been static. History provides numerous examples of congressional and judicial decisions reversing previous determinations of the status of individual tribes. *See United States v. Lara*, 541 U.S. 193, 202 (2004). While at times, federal policy reflected the notion that Indian tribes would be permanent fixtures within the United States,[12] for the most part, it assumed that Indians

[12] An early treaty with the Delaware Nation raised the possibility that Indian tribes might eventually join the United States, "to form [an Indian] state whereof the Delaware nation shall be the head, and have a representation in Congress." Treaty of Fort Pitt, 7 Stat. 13 (Sept. 17, 1778). Later, some suggested that an Indian state should be created in that portion of the Indian Territory that is now the State of Oklahoma. *See*, *e.g.*, Cong. Globe, 41st Cong., 3d Sess. 734 (1871) (statement of Ohio Representative Garfield). These proposals, however, never gained widespread support despite the direct promises made to certain tribes. *See*, *e.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970) (noting that in the 1830 Treaty of Dancing Rabbit Creek, "the United States pledged itself to secure to the Choctaws the 'jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the

(Continued on following page)

would eventually fully assimilate into white society and abandon their tribal relations.

During the mid-1800s, the United States sought to convince certain "civilized" tribes to voluntarily abandon their tribal relations through specific treaty provisions. One such provision was contained in an 1855 treaty with the Wyandott:

> The Wyandott Indians having become sufficiently advanced in civilization . . . it is hereby agreed and stipulated, that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement . . . and from and after the date of such ratification, the said Wyandott Indians, and each and every of them . . . shall be deemed, and are hereby declared, to be citizens of the United States . . .

Treaty with the Wyandott, 10 Stat. 1159 (Jan. 31, 1855). *See also* Treaty with the Ottawa of Blanchard's Fork, 12 Stat. 1237 (June 24, 1862) (same). Few tribes agreed to these provisions.[13] Furthermore,

---

government of the Choctaw Nation . . . and that no part of the land granted them shall ever be embraced in any Territory or State.' ").

[13] Additionally, treaties containing these provisions nearly always provided tribal members with the option of severing tribal relations and obtaining U.S. citizenship, or remaining tribal members. *See*, *e.g.*, Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856); Treaty with the Kickapoo, 13 Stat. 623 (June 28, 1862).

many who did still continued to operate in their traditional ways. While these tribes may have been considered disbanded for a short period of time, the United States often reestablished the government-to-government relationship upon realization that a tribal organization remained intact.[14]

More common was the loss of tribal status as tribal members became civilized. For decades, the federal government considered *individual* tribal members to no longer be wards of the federal government once they became citizens of the United States, or appeared to abandon their tribal allegiance by living within white settlements. *See*, *e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695

[14] For example, in the 1830s, the Cherokee Nation was removed from its eastern homeland and relocated west of the Mississippi River. Those tribal members who were adverse to removal were, by terms of the treaty, permitted to remain provided that they were ready for and agreed to state citizenship. This Court determined in *Eastern Band of the Cherokee Indians v. United States*, that the approximately 1,200 Indians who refused to remove "ceased to be part of the Cherokee nation, and henceforth they became citizens of and were subject to the laws of the state in which they resided." 117 U.S. 288, 303 (1886). Later, however, federal courts noted that these Indians had "continued . . . their tribal life" and "gradually they were restored to . . . their former status as an Indian tribe under the protection of the United States." *United States v. Wright*, 53 F.2d 300, 303 (4th Cir. 1931). The Eastern Cherokee were permitted to vote on acceptance of the IRA in 1934, and remain a federally recognized tribe today. Solicitor's Opinion M-34989, 1947 WL 7215 (1947); Indian Entities Recognized, 72 Fed. Reg. at 13,649 (listing Eastern Band of Cherokee Indians of North Carolina).

(C.C.D. Neb. 1879); *United States v. Kopp*, 110 F. 160 (D. Wash. 1901).[15] Later, tribes themselves ceased to be under federal jurisdiction during periods of time when their membership as a whole was considered to have fully assimilated into white society.

The Pueblo Indians provide an excellent historical example of this concept. The Indian Trade & Intercourse Act of 1834 provided, in part, that "if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any *Indian tribe* . . . such offender shall forfeit and pay the sum of one thousand dollars." Act of June 30, 1834, ch. 161, § 11, 4 Stat. 729, 730 (emphasis added). Not long after the United States

[15] *See also Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) ("if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people"); Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 Const. Comment. 555 (2000) (describing the confusion that existed in the 1800s regarding the status of individual Indians who owned allotments or had abandoned tribal relations). Ultimately, in *Elk v. Wilkins*, this Court concluded that an individual Indian could not obtain U.S. citizenship simply by voluntarily separating himself from his tribe and attempting to vote in state elections. 112 U.S. 94 (1884). Yet even after *Elk*, many federal officials believed, with the backing of lower court decisions, that if Indians were granted U.S. citizenship through treaty provisions or congressional legislation they were no longer wards of the federal government. It was not until *United States v. Sandoval* that this Court clarified that U.S. citizenship and wardship status were not incompatible. 231 U.S. 28 (1913).

acquired a large swath of land from Mexico in the Treaty of Guadalupe Hidalgo, Congress enacted another statute, which clarified that the Trade & Intercourse Acts "extended over the *Indian tribes* in the Territories of New Mexico and Utah." Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574, 587 (emphasis added). Both of these statutes were implicated in *United States v. Joseph*, when the federal government brought suit against a defendant who had settled on lands belonging to the Taos Pueblo. 94 U.S. 614 (1876). This Court was called upon to determine whether that Pueblo constituted an "Indian tribe" for the purpose of these acts.

The New Mexico Pueblos had been appointed a federal Indian agent to manage their affairs, but the Court believed that the "character and history" of the Indians was more important to determining whether they constituted a tribe. After reviewing the findings of the Supreme Court of the Territory of New Mexico, it concluded that the Pueblo Indians were a peaceful, sedentary, Christian people, whose livelihood revolved around agriculture. *Joseph*, 94 U.S. at 616-17. They were "Indians only in feature, complexion, and a few of their habits." *Id*. at 616. They had been fully assimilated in western society, were now civilized, and therefore, no longer constituted an "Indian tribe." *Id*. at 617. If the defendant was indeed trespassing on Pueblo lands, he could only be punished by a suit under the laws of the Territory. *Id*. at 619.

Forty years later, however, this Court reexamined the condition of the Pueblo Indians and arrived

at a very different conclusion. *United States v. Sandoval* involved a criminal prosecution for distributing alcohol within the boundaries of the Santa Clara Pueblo. 231 U.S. 28 (1913). Federal law prohibited the introduction of alcohol in Indian country, and the New Mexico enabling act provided that "the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557. The Court was thus presented with a statute that, by its explicit terms, applied to the Pueblo Indians. But did Congress have the power to enact such a statute? After all, the Constitution only gave Congress the authority to "regulate commerce . . . with the *Indian tribes*." U.S. Const., Art. 8, cl. 3.

This Court began once again by examining the character and nature of the Pueblos. This time, however, it noted that the Indians, "always living in separate and isolated communities," were "largely influenced by superstition and fetichism," and were "essentially a simple, uninformed, and inferior people." *Sandoval*, 231 U.S. at 39. Quoting extensively from published reports, the Court emphasized that the Pueblo Indians had not, as previously believed, adopted Christianity. They still practiced their "pagan" religion, refused to give up their "secret dances," and recognized their own traditional form of government. *Id*. at 41-44. In light of this information, the Court concluded, Congress was well within its power

when it legislated on behalf of the Pueblo Indians. While Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe," so long as they were "distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id*. at 47.[16]

Thus, tribal status was viewed as fluid. Historic Indian tribes that maintained governmental control over their members would continue to be dealt with as tribes and fall under federal jurisdiction. Fully assimilated members or tribes would no longer be dealt with as such. However, the determination of which tribes existed was largely left to Congress and the Executive.

---

[16] The *Sandoval* Court distinguished *Joseph* by claiming that the Trade & Intercourse Acts were not as comprehensive as the legislation prohibiting distribution of liquor within Indian country, and noting that the observations about the Pueblo Indians' progress towards civilization, which were taken from the Territorial court's opinion, had now been proven to be incorrect. *Sandoval*, 231 U.S. at 48-49. But these distinctions did not last for long. In *United States v. Candelaria*, this Court overruled its decision in *Joseph* by holding that the Pueblo Indians were "wards of the United States" and "Indian tribes" within the scope of the Trade & Intercourse Acts. 271 U.S. 432 (1926).

This history is essential to understanding the IRA's definition of "Indian." As originally drafted, this definition was to include "all persons of Indian descent who are members of any recognized Indian tribe." Senate Indian Affairs Chairman Burton Wheeler, however, was concerned that this provision was too broad. He stated:

> *Chairman*. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Hearing Before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., part 2, at 266 (1934). Wheeler obviously believed that once Indians had fully assimilated into white society, they should no longer be afforded the protection of the IRA even if they were currently under federal jurisdiction.

Commissioner of Indian Affairs John Collier responded to this suggestion, stating:

> *Commissioner Collier*. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction." That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. It is as a result of this very exchange that the phrase at issue in this case was added to the IRA. In suggesting this language, Collier obviously intended that, if at a later date, Congress or the Executive Branch agreed with Senator Wheeler's characterization of the Indians in question, and chose to terminate the government-to-government relationship with that tribe, it would no longer receive the benefits of the IRA. Thus, "now" must refer to the date on which the Secretary of the Interior attempts to exercise his or her authority under the Act.

Petitioners' argument regarding the statutory language, therefore, is exactly backwards. The definition of Indians was not intended to fix tribal status according to its understanding in 1934, but rather to ensure that the tribes to which it would be applied would shift with the changing status of Indian tribes. Indian groups that had once been recognized, but since lost tribal status, would not be subject to the Act. But groups like the Narragansett, who had maintained their tribal status, and who later gained formal recognition, would.

II. THE DEPARTMENT SHOULD NOT BE COMPELLED TO ADOPT THE PETITIONERS' INTERPRETATION OF THE IRA, WHICH WOULD ONLY CODIFY PAST AGENCY MISTAKES

There was no comprehensive list of federally recognized Indian tribes in June 1934. It was only *after* the Act was passed that Commissioner Collier was given the daunting task of determining which Indian groups were or should be recognized by the federal government and permitted to organize and vote on application of the Act. Collier hastily complied a list of 258 groups. Quinn, 34 Am. J. Legal Hist. at 356. This list is universally recognized to include serious omissions,[17] and these mistakes should not be enshrined in the IRA.

Nearly all of Commissioner Collier's mistakes involved landless Indian tribes. This was no

[17] Both the executive branch and Congress have repeatedly acknowledged that inaccurate recognition decisions were made in the 1930s. *See, e.g.,* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9281 (Feb. 25, 1994) ("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"); S. Rep. 103-266 (1994) (when deciding to extend recognition to the Pokagon Band of Potawatomi Indians of Michigan, noting that "[t]he arbitrary fashion by which the United States extended federal recognition to Indian tribes located in the Great Lakes region . . . is unfortunately quite clear").

coincidence. The IRA, as originally enacted, only provided the right to organize a constitutional government, charter a corporation, or vote on application of the Act to any "Indian tribe, or tribes, residing on the same reservation." Act of June 18, 1934, ch. 576, §§ 16, 17, 18, 48 Stat. 984.[18] Thus, Commissioner Collier logically began determining recognized tribes by referring to lists of federal land holdings set apart for Indians. For these reservation tribes, even if he mistakenly believed that they no longer maintained tribal relations, this error could be immediately remedied, because the definition of "Indian" in the IRA also included descendants of previously recognized tribes that resided within the boundaries of an Indian reservation on June 1, 1934. 25 U.S.C. § 479 (2008). Consequently, despite unrecognized status, their existing reservation permitted these Indians to organize under the IRA and immediately regain recognition.[19]

---

[18] The reservation requirement was deleted from the IRA by Congress in 1988. Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2938. *See also* S. Rep. 100-577 (1988) ("The amendment deletes reference to residence on a reservation and eliminates reservation status or ownership of a tribal land base as a condition precedent to organization under the Act").

[19] The Saginaw Chippewa Indian Tribe of Michigan have a history that is similar to that of the Grand Traverse Band of Ottawa & Chippewa Indians, described at 36-38 *infra*. The only difference is that the Saginaw Chippewa Tribe maintained a six-township reservation in Isabella County, Michigan. Therefore, its members were permitted to organize under the IRA as "descendants of members of a recognized tribe" residing on the

(Continued on following page)

Landless Indian tribes had no comparable escape hatch. Although the IRA provided for the creation of "new Indian reservations," 25 U.S.C. § 467 (2008), thus indicating a congressional understanding that landless tribes could take advantage of the Act, the *ad hoc* nature of recognition resulted in many of these tribes being overlooked. For those tribes that did come to the attention of the Department, if Commissioner Collier mistakenly determined that the tribe was no longer in existence, acquisition and reorganization was only possible for half-blood members. 25 U.S.C. § 479 (2008). Because of limited resources, the Department formed fewer than ten half-blood communities.[20] Thus, a wrong recognition decision almost always proved fatal for landless tribes.

Fortunately, many recognition mistakes have been rectified since the 1930s. Indian tribes have been recognized through congressional legislation, *see* Appendix 1, and informal actions of the Executive Branch, *see* Appendix 2. Since 1978, new recognition

---

same reservation. *See*, *e.g.*, Letter from Assistant Commissioner of Indian Affairs William Zimmerman, Jr. to Chairman of the Constitutional Committee of the Saginaw Chippewa Indians (July 31, 1936).

[20] The Department allowed the following groups to form as half-blood communities in the years immediately following enactment of the IRA: the St. Croix Chippewa Indians of Wisconsin, the Mississippi Band of Choctaw Indians, the Quartz Valley Indian Community, the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe, the Port Gamble Indian Community, and the Sokaogon Chippewa Community. *Cohen's Handbook of Federal Indian Law* 152 n.105 (2005 ed.).

decisions have also been made through the formal administrative agency procedures described below, *see* Appendix 3.

In 1975, Congress created the American Indian Policy Review Commission, which was charged with conducting the first comprehensive review of Indian affairs in almost 50 years. The Commission established task forces to consider major issues affecting tribes. One of those task forces focused on the formal recognition of Indian tribes.[21] After two years of study, in its Final Report, the Commission identified dozens of tribes that had not been recognized by the federal government simply due to bureaucratic oversight.[22] It recommended that a special office be established within the Bureau of Indian Affairs to determine the tribal status of any groups that petitioned for federal recognition.

At the same time, many unrecognized tribes began pursuing litigation to restore their sovereign rights and natural resources. In *United States v. Washington*, the Ninth Circuit determined that Indian tribes in the Pacific Northwest that exercised treaty fishing rights – including certain unrecognized tribes – were entitled to half of the commercial fish

---

[21] *See generally* Task Force Ten: Terminated and Nonfederally Recognized Indians, Final Report to the American Indian Policy Review Commission (October 1976).

[22] American Indian Policy Review Commission, 1 Final Report 8, 37, 462 (May 17, 1977).

catch in the State of Washington.[23] 520 F.2d 676, 692-93 (9th Cir. 1975). The court held that the federal government's recognition decisions could "have no impact on vested treaty rights." *Id*. at 693. So long as an unrecognized tribe could establish that it was a party to one or more of the treaties in question, if the court independently concluded that the tribe had "maintained an organized tribal structure," it would be permitted to exercise its fishing rights. *Id*.

Likewise, on the other side of the United States, the First Circuit decided *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In that case, an unrecognized tribe claimed that thousands of acres of land in Maine had been transferred to the state without compliance with the Indian Trade & Intercourse Acts, *see* 25 U.S.C. § 177, and therefore, the United States was required to bring suit against the State to assist the tribe in recovering that land. *Id.* at 372. The court sided with the Tribe, and rejected the United States' contention that it had no such duty because the Passamaquoddy Tribe was unrecognized. Noting that no one had challenged the historic or modern existence of the Tribe, the First Circuit concluded that the actions

[23] The unique history of treaty negotiations in the State produced several landless Indian tribes that were overlooked or mistakenly denied federal recognition following adoption of the IRA. *See* Frank W. Porter III, *In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington*, 14(2) American Indian Quarterly 113 (1990).

complained of fell within the scope of the Act, and the federal government owed a trust responsibility to the Tribe. *Id.* at 373, 376-78, 379.

Encouraged by the Commission's work and these litigation successes, many unrecognized Indian tribes began petitioning the BIA for federal recognition. The sheer number of petitions, along with federal court opinions mandating that the BIA render decisions on those petitions in a prompt manner,[24] led the Department of the Interior to promulgate proposed recognition regulations.[25] On September 5, 1978, after 400 meetings, hearings and conversations with interested parties, and after responding to the written comments of historians, anthropologists, tribal leaders, congressional staff members and others, final "Procedures for

[24] For example, in 1974, the Stillaguamish Tribe filed a petition with the Bureau of Indian Affairs requesting federal recognition. When the BIA failed to take any action on this petition for more than one year, the Tribe brought suit in federal district court in Washington D.C. In *Stillaguamish v. Kleppe*, No 75-1718 (Sept. 24, 1976), the court ordered the BIA to issue a decision on the Tribe's petition within 30 days. As a result of this ruling, the BIA formally recognized the Stillaguamish Tribe in 1976.

[25] Publication of the draft regulations was accompanied by a statement acknowledging that "[t]he recent increase in the number of [petitions for federal recognition] . . . necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation." Procedures Governing Determination that Indian Group is Federally Recognized Indian Tribe, 42 Fed. Reg. 30,647 (June 16, 1977). *See also* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,743 (June 1, 1978).

Establishing that an American Indian Group Exists as an Indian tribe" were published in the Federal Register. 43 Fed. Reg. 39,361 (Sept. 5, 1978).

As amended[26] and codified at 25 C.F.R. Part 83, these regulations have created an elaborate process governing the federal recognition of Indian tribes. An Indian tribe seeking federal recognition must submit a letter of intent, 25 C.F.R. § 83.4, and ultimately, a petition containing thorough explanations and supporting documentation, 25 C.F.R. § 83.6 (2008), demonstrating that the tribe satisfies each of the following criteria:

1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

---

[26] The recognition regulations were amended in 1994 to specify the types of evidence that will be accepted to establish the two most troublesome criteria: tribal community and political influence. The 1994 amendments also attempted to increase the speed at which petitions were processed and lessen the proofs required for tribes that were previously acknowledged by the federal government. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9,280 (Feb. 25, 1994). The Department has also announced various changes in its internal procedures for processing petitions. Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7,052 (Feb. 11, 2000); Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 (May 23, 2008). *See also Cohen's Handbook of Federal Indian Law* 154-163 (2005 ed.) (reviewing history of the post-1978 acknowledgment process).

2. A predominant portion of the petitioning group has existed as a distinct community from historical times until the present;

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

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

5. The membership of the petitioning group is composed principally of persons who are not members of any other recognized Indian tribe.

25 C.F.R. § 83.7 (2008).[27] Voluminous documentary evidence is required to satisfy these criteria. In fact, petitions for recognition take years to assemble and are typically supported by thousands of pages of historical documentation and expert reports.

The Office of Federal Acknowledgment – which has several research teams, each consisting of a cultural anthropologist, genealogical researcher, and an historian – evaluates these petitions, along with

[27] The petitioning group is also required to present a copy of its current governing document and membership criteria. 25 C.F.R. § 83.7 (2008) The requirements are slightly different for tribes that can demonstrate "unambiguous previous Federal acknowledgment." *See* 25 C.F.R. § 83.8 (2008).

any information presented by other interested parties.[28] While Commissioner Collier spent less than one year determining the status of nearly every tribe in the continental United States, an OFA team routinely spends one year or more on *each* documented petition before making a recommendation to the Assistant Secretary of Indian Affairs. After reviewing OFA's recommendations, the Assistant Secretary will publish a final determination in the Federal Register. Since 1978, the Executive Branch has used this process to grant recognition to 16 Indian tribes – including the Narragansett Indian Tribe – and deny recognition to 24 Indian tribes, *see* Appendix 3 & 4.[29]

---

[28] Notice that the OFA has received a letter of intent and/or documented petition is published in the Federal Register to inform interested parties that they may submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment. In addition, the governor and attorney general of the state in which a petitioner is located are specifically notified in writing. 25 C.F.R. § 83.9 (2008). Requests for recognition are often greeted with aggressive opposition. For example, the Connecticut Attorney General submitted eleven thick volumes of data and documents in opposition to the recognition request of the Mohegan Tribe.

[29] The Department recently published findings proposing to deny acknowledgment for three additional tribes. Amended Proposed Finding Against Acknowledgment of the Pointe-au-Chien Indian Tribe of Louisiana, 73 Fed. Reg. 31,142 (May 30. 2008); Amended Proposed Finding Against Acknowledgment of the Biloxi Chitimacha Confederation of Muskogees, Inc. of Louisiana, 73 Fed. Reg. 31,140 (May 30, 2008); Proposed Finding Against Acknowledgment of the Juaneno Band of Mission Indians, 72 Fed. Reg. 67,951 (Dec. 3, 2007).

These recognition decisions have definitively revealed several of Commissioner Collier's mistakes. For illustrative purposes, two such mistakes are described below:

1. *Cowlitz Indian Tribe*. The Cowlitz were recognized by the federal government throughout the mid-to-late 1800s. One unambiguous expression of this recognition occurred in 1855, when the first territorial governor of Washington, Isaac Stevens, commenced treaty negotiations with the "Upper and Lower Chehalis, *Cowlitz*, Lower Chinnook, Quinault and Queets Indians." *See Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 167 (1969) (emphasis added). During these negotiations, the Cowlitz expressed a willingness to cede certain of its lands in exchange for the right to settle on a reservation also being requested by the Upper Chehalis Tribe. *Id*. at 168-69. But Governor Stevens was unwilling to provide the requested reservation, and therefore, no treaty was ever consummated. *Id*. at 169. By the early twentieth century, white settlers had flooded the area and the Cowlitz were disposed of their aboriginal lands.

During the 1920s and 1930s, the federal government ceased recognizing the Cowlitz Tribe, wrongly believing that it no longer maintained its governmental structure and had fully assimilated into white society. For example, in a 1924 letter to the Chairman of the Senate Committee on Indian Affairs, the Secretary of the Interior wrote that "the Cowlitz Indians

are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic." Letter from Secretary Hubert Work, Department of the Interior, to the Honorable J.W. Harreld, Chairman, Senate Committee on Indian Affairs (Mar. 28, 1924).[30] Statements such as these seem to have been made after little to no investigation into the current circumstances of the Tribe. Nevertheless, the Cowlitz were not recognized by the federal government when the Indian Reorganization Act was enacted.

In 1975, the Tribe filed a petition seeking federal recognition. Twenty-five years later, the Department finally extended formal recognition to the Cowlitz Indian Tribe. Final Determination to Acknowledge the Cowlitz Tribe, 65 Fed. Reg. 8,436 (Feb. 18, 2000); Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002). This recognition decision was accompanied by copious documentation and analysis, including more than 400 pages of technical reports prepared by employees at the OFA. The Department concluded that "the Cowlitz petitioner can trace an unbroken line of leaders and a relatively unchanging membership" for more than 100 years. 65 Fed. Reg. at

[30] Likewise, in 1933, Commissioner Collier wrote that "[n]o enrolments [sic] are now being made with the remnants of the Cowlitz tribe which in fact, is no longer in existence as a communal entity." Letter from John Collier to Lewis Layton (Oct. 25, 1933).

8,437. These and other findings establish that the Department was mistaken when, in the 1920s and 1930s, it claimed that the Tribe no longer maintained its "tribal organization."[31]

2. *Grand Traverse Band of Ottawa & Chippewa Indians*. In the 1800s, the Ottawa and Chippewa Indians in Michigan consisted of several autonomous tribes or bands, connected by a similar culture and language. For ease in obtaining large land cessions, however, the federal government gathered together these individual bands – including the Grand Traverse Band – when negotiating treaties, and simply referred to them collectively as "the Ottawa and Chippewa nation of Indians." Treaty with the Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836). This grouping of independent bands proved problematic during treaty negotiations in 1855.

During the 1855 negotiations, the Michigan Ottawa and Chippewa bands insisted on negotiating as independent groups, with the Lower Peninsula Ottawa and Chippewa bands separate from the Upper Peninsula Chippewa bands. The Indian negotiators further

[31] During the period when Secretary Work and Commissioner Collier claimed that the Cowlitz Indian Tribe was "without any tribal organization," the Historical Technical Report prepared by the OFA notes that the Tribe was actually governed by a three-member council. This fact was independently corroborated by several contemporary newspaper articles announcing the results of tribal elections. Historical Technical Report, Cowlitz Indian Tribe 135-37.

requested that the federal government dissolve the fictitious Ottawa and Chippewa "nation." Commissioner of Indian Affairs George Manypenny, who was the lead federal negotiator for this treaty, responded to these requests by including Article 5 of the 1855 Ottawa Chippewa Treaty, which provided that "[t]he tribal organization of the said Ottawa and Chippewa Indians . . . is hereby dissolved." Treaty with the Ottawa and Chippewa, 11 Stat. 621 (July 31, 1855). This provision was intended only to correct the federal understanding of the separate political functioning of the individual bands. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 961 n.2 (6th Cir. 2004) ("*GTB II*"); *United States v. Michigan*, 471 F. Supp. 192, 247-48 (W.D. Mich. 1979).

Yet in the 1870s, long after Commissioner Manypenny had left office, the Secretary of the Interior misinterpreted Article 5 to provide for the dissolution of the individual bands. He therefore decreed that upon completion of the annuity provisions contained in the treaty "tribal relations will be terminated." In 1872, the federal government ceased to recognize the signatories to the 1836 and 1855 treaties, including the Band, and withdrew all government services. *See*, *e.g.*, *GTB II*, 369 F.3d at 961 n.2. The Grand Traverse Band remained unrecognized in 1934, when the IRA was enacted.

In 1980, the Grand Traverse Band became the first tribe to be recognized under the Department of

Interior's newly promulgated recognition regulations. In recognizing the Band, the Department acknowledged that it had misread provisions of the 1855 Treaty. *See* Memo from Acting Deputy Commissioner to Assistant Secretary, "Recommendation and summary of evidence for proposed finding for Federal acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians, Peshawbestown, Michigan pursuant to 25 C.F.R. 54" (Oct. 3, 1979) ("The 'Ottawa and Chippewa Tribes' were a creation of the Federal government. In 1836 these tribes were 'created' in order to sign a treaty with them. The Treaty of 1855 dissolved this legal fiction."). The Department also determined that the Grand Traverse Band existed continuously and "autonomously since first contact, with a series of leaders who represented the band in its dealings with outside organizations, and who both responded to and influenced the band in matters of importance."[32] Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa & Chippewa as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

The Petitioners ask this Court to compel the Department to ignore these and other recognition

[32] Since obtaining recognition, the Department has used the provisions of the IRA to take several parcels of land in trust for the Grand Traverse Band. *Grand Traverse Band v. U.S.*, 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002) (noting that between 1988 and 1990, "[t]he United States took into trust multiple parcels of property" for the Band).

decisions, and instead, when deciding whether to take land into trust for an Indian tribe, rely on the hasty decisions made by Commissioner Collier in 1934. But agencies given the authority to make a particular decision are presumed to have the authority to correct that decision. *See, e.g., United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court can undo what is wrongfully done by virtue of its order"); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457-58 (1998) (concluding that an agency's decision to recalculate a base amount in a fixed reimbursement system, to prevent the distortion of future reimbursements, was reasonable).

Furthermore, this Court should not strain to give the IRA an interpretation that is clearly at odds with current congressional policy. *See Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (favorably quoting language from the Ninth Circuit's decision in *Santa Rosa Band of Indians v. Kings County*, which stated that courts "are not obligated in ambiguous circumstances to strain to implement . . . [a] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship"). In a recent amendment to the IRA itself, Congress confirmed that all federally recognized Indian tribes should be accorded the same treatment regardless of the time or manner of their recognition. Act of Nov. 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 476). Denying Indian tribes the benefits of the IRA – one of the most important

statutes affecting the federal-tribal relationship – would not be in accord with this policy.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

ROBERT T. ANDERSON
Associate Professor
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 685-2861

RICHARD A. GUEST
Staff Attorney
Counsel of Record
NATIVE AMERICAN
RIGHTS FUND
1712 N. St., NW
Washington, D.C. 20036
(202) 785-4166

COLETTE ROUTEL
Visiting Assistant Professor
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109
(734) 763-6699

August 25, 2008

APPENDIX 1

List of congressional legislation recognizing Indian tribes*

1. Tonto Apache Tribe of Arizona (also called Payson Community of Yavapi-Apache Indians), P.L. 92-470 (Oct. 6, 1972)

2. Modoc Tribe of Oklahoma, P.L. 95-281 (May 15, 1978)

3. Pasqua Yaqui of Arizona, P.L. 95-375 (Sept. 18, 1978)

4. Maliseet Tribe of Maine (also called the Houlton Band of Maliseet Indians of Maine), P.L. 96-420 (Oct. 10, 1980)

5. Cedar City Band of Paiutes in Utah, P.L. 96-227 (Apr. 3, 1980)

6. Kickapoo Traditional Tribe of Texas, P.L. 97-429 (Jan. 8, 1983) (recognition as part of Kickapoo Tribe of Oklahoma; organized as a separate tribe on 7/11/89)

7. Mashantucket Pequot Indian Tribe of Connecticut, P.L. 98-134 (Oct. 18, 1983)

8. Ysleta Del Sur Pueblo of Texas, P.L. 100-89 (Aug. 18, 1987)

9. Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100-420 (Sept. 8, 1988)

---

* This list does not include legislation restoring federal recognition to Indian tribes that, while recognized in 1934, were terminated by Congress in the 1950s and 1960s.

10. Yurok Tribe of California, P.L. 100-580 (Oct. 31, 1988)

11. Aroostook Band of Micmac Indians of Maine, P.L. 102-171 (Nov. 26, 1991)

12. Pokagon Band of Potawatomi Indians of Michigan, P.L. 103-323 (Sept. 21, 1994)

13. Little River Band of Ottawa Indians of Michigan, P.L. 103-324 (Sept. 21, 1994)

14. Little Traverse Bay Bands of Odawa Indians of Michigan, P.L. 103-324 (Sept. 21, 1994)

15. Central Council of the Tlingit & Haida Indian Tribes, Alaska, P.L. 103-454 (Nov. 2, 1994)

16. Loyal Shawnee Tribe of Oklahoma, P.L. 106-568 (Dec. 27, 2000)

APPENDIX 2

List of Indian tribes granted federal recognition through informal Executive Branch actions from 1960 to present

1. Miccosukee Tribe of Indians of Florida: Decision by an Assistant Secretary of the Interior (Nov. 17, 1961)

2. Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon: Department of the Interior Solicitor's opinion (Nov. 16, 1967)

3. Nooksack Indian Tribe of Washington: Department of the Interior Solicitor's opinion (Aug. 13, 1971)

4. Upper Skagit Indian Tribe of Washington: Decision by the Deputy Commissioner for Indian Affairs (June 9, 1972)

5. Sauk-Suiattle Indian Tribe of Washington: Decision by the Deputy Commissioner for Indian Affairs (June 9, 1972)

6. Passamaquoddy Indian Tribe of Maine: Administrative decision (June 29, 1972)

7. Penobscot Tribe of Maine: Administrative decision (July 14, 1972)

8. Sault Ste. Marie Tribe of Chippewa Indians of Michigan: Decision by the Deputy Commissioner for Indian Affairs/clarified by the Department of the Interior Solicitor's opinion (2/27/74) (Sept. 7, 1972)

9. Coushatta Tribe of Louisiana: Decision by the Assistant to the Secretary of the Interior (June 27, 1973)

10. Stillaguamish Tribe of Washington: Decision by the Assistant to the Secretary of the Interior responding to *Stillaguamish v. Klepp* (Oct. 27, 1976)

11. Karuk Tribe of California, Decision by the Assistant Secretary – Indian Affairs, January 15, 1979

12. Jamul Indian Village of California, Deputy Assistant Secretary – Indian Affairs designation as a half-blood community (July 7, 1981)

13. Ione Band of Miwok Indians of California, Decision by the Assistant Secretary – Indian Affairs, Mar. 22, 1994

14. King Salmon Tribe, Alaska, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

15. Shonnaq Tribe of Kodiak, Alaska, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

16. Lower Lake Rancheria, California, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

APPENDIX 3

Indian tribes granted federal recognition pursuant to 25 C.F.R. Part 83

1. Grand Traverse Band of Ottawa & Chippewa Indians, Michigan (May 27, 1980)

2. Jamestown S'Klallam Tribe, Washington (Feb. 10, 1981)

3. Tunica-Biloxi Indian Tribe, Louisiana (Sept. 25, 1981)

4. Death Valley Timbi-Sha Shoshone Band, California (Jan. 3, 1983)

5. Narragansett Indian Tribe, Rhode Island (April 11, 1983)

6. Poarch Band of Creek Indians, Alabama (Aug. 10, 1984)

7. Gay Head Wampanoag Indian Tribe, Massachusetts (April 11, 1987)

8. San Juan Southern Paiute Tribe, Arizona (March 28, 1990)
9. Mohegan Tribe, Connecticut (May 14, 1994)
10. Jena Band of Choctaw Indians, Louisiana (Aug. 29, 1995)
11. Huron Potawatomi, Inc., Michigan (Mar. 17, 1996)
12. Samish Indian Tribe, Washington (Apr. 26, 1996)
13. Match-e-be-nash-she-wish Band of Pottawatomie Indians, Michigan (Aug. 23, 1999)
14. Snoqualmie Tribe, Washington (Oct. 6, 1999)
15. Cowlitz Indian Tribe, Washington (Jan. 4, 2002)
16. Mashpee Wampanoag Tribe, Massachusetts (May 23, 2007)

APPENDIX 4

List of Indian tribes denied federal recognition pursuant to 25 C.F.R. Part 83

1. Lower Muskogee Creek Tribe-East of the Mississippi, Georgia (Dec. 21, 1981)
2. Creeks East of the Mississippi, Florida (Dec. 21, 1981)
3. Munsee-Thames River Delaware, Colorado (Jan. 3, 1983)
4. Principal Creek Indian Nation, Alabama (June 10, 1985)
5. Kaweah Indian Nation, California (June 10, 1985)

6. United Lumbee Nation of North Carolina and America, California (July 2, 1985)
7. Southeastern Cherokee Confederacy, Georgia (Nov. 25, 1985)
8. Northwest Cherokee Wolf Band, Oregon (Nov. 25, 1985)
9. Red Clay Inter-tribal Indian Band, Tennessee (Nov. 25, 1985)
10. Tchinouk Indians, Oregon (Mar. 17, 1986)
11. MaChis Lower Alabama Creek Indian Tribe, Alabama (Aug. 22, 1988)
12. Miami Nation of Indians of Indiana, Inc., Indiana (Aug. 17, 1992)
13. Ramapough Mountain Indians, Inc., New Jersey (Jan. 7, 1998)
14. MOWA Band of Choctaw, Alabama (Nov. 26, 1999)
15. Yuchi Tribal Organization, Oklahoma (Mar. 21, 2000)
16. Duwamish Indian Tribe, Washington (May 8, 2002)
17. Muwekma Ohlone Tribe of San Francisco Bay, California (Dec. 16, 2002)
18. Snohomish Tribe of Indians, Washington (Mar. 5, 2004)
19. Golden Hill Paugussett Tribe, Connecticut (Oct. 14, 2005)

20. Paucatuck Eastern Pequot Indians, Connecticut (Oct. 14, 2005)

21. Schaghticoke Tribal Nation, Connecticut (Oct. 14, 2005)

22. Burt Lake Band of Ottawa and Chippewa Indians, Inc., Michigan (Jan. 3, 2007)

23. St. Francis/Sokoki Band of Abenakis, Vermont (July 2, 2007)

24. Steilacoom Tribe of Indians, Washington (Mar. 19, 2008