

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AKIACHAK NATIVE COMMUNITY	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:06-cv-00969 (RC)
	)	
DEPARTMENT OF THE INTERIOR,	)	
et al.	)	
	)	
Defendants.	)	
_____	)	

**FEDERAL DEFENDANTS’  
MOTION FOR RECONSIDERATION**

In 2006, four Alaskan Tribes and one individual Alaska Native filed lawsuits challenging the Secretary of the Interior’s regulations, 25 C.F.R. § 151, which govern procedures used by the Secretary of the Interior, in her discretion, to acquire title to land in trust for Indian tribes and individuals. These land-into-trust regulations state that they do not apply to the acquisition of land-into-trust in Alaska other than for the Metlakatla Indian Community or its members (the “Alaska exception” to the regulations). On March 31, 2013, this Court found that the Alaska exception is arbitrary and capricious and granted summary judgment in favor of plaintiffs, but withheld ruling on remedy. See Memorandum Opinion (ECF No. 109).

Pursuant to the Court’s inherent authority to reconsider interlocutory rulings before entering final judgment, the Federal Defendants respectfully request that the Court limit its ruling that the Alaska exception is arbitrary and capricious to the Court’s holding that Interior’s legal rationale in support of the Alaska exception was incorrect. See John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 88 (1922) (because the order was interlocutory, “the court at any time

before final decree may modify or rescind it.”); Zimzores v. Veterans Admin., 778 F.2d 264, 266 (5th Cir. 1985) (“it is plain that pending an appealable judgment the district court must retain the power, unburdened by the requirements of Rule 60(b), to revise or vacate its interlocutory orders”). In its Memorandum Opinion, the Court found that Interior promulgated the Alaska exception based on a misunderstanding of the law, that being Interior’s now-abandoned interpretation of Alaska Native Claims Settlement Act (“ANCSA”) and the Indian Reorganization Act (“IRA”). In 2001, Interior retained the Alaska exception even though Interior’s legal position had changed. Accordingly, as discussed below, the Court can revise its decision to rest solely on the ground that Interior retains its authority to take land-into-trust in Alaska under Section 5 of the IRA and did not legally justify retaining the exception without reaching whether Interior violated 25 U.S.C. §§ 476(f) and (g).

In further support of the request herein to limit the Court’s broad holding on subsections 476 (f) and (g), we discuss the ambiguity found in the statutory text, the background of the 1994 Amendment that constituted the “privileges and immunities” language, and the complexities of what are “privileges and immunities available” to “federally recognized tribes.” The Court’s holding is sweeping in its broad, unlimited statements regarding the 1994 Amendment. We discuss below the potentially unintended consequences across the federal government of the Court’s 476(f) and (g) holding and application of the Court’s approach to other federal actions. In sum, we respectfully request that the Court avoid relying on subsections 476(f) and (g) and limit its decision to the holding that Interior’s prior rationale relying on ANSCA in support of the Alaska exception was legally flawed.

**I. In finding the Alaska exception arbitrary and capricious, the Court need not have reached 25 U.S.C. §§ 476(f) and (g).**

Plaintiffs challenge the “Purpose and Scope” provision of the land into trust regulations, which states the purpose of these regulations as “set[ting] forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes.” 25 C.F.R. § 151.1. The last sentence of this section contains the “Alaska exception:”

These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its [sic] members.

Id. In its March 31, 2013 Memorandum Opinion, the Court rejected Interior’s rationale adopted in promulgating the Alaska exception that Alaska Native Claims Settlement Act (“ANCSA”) prohibited taking land-into-trust in Alaska. Instead, the Court held that it is “possible to give effect to both ANCSA and [the IRA,] the statute giving the Secretary land-into-trust authority in Alaska.” Mem. Op. at 18.<sup>1</sup> The Court further concluded (Mem. Op. at 25) that the Alaska exception is “contrary to law,” on the ground that it violates 25 U.S.C. § 476(g), which provides as follows:

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(g). On the basis of this finding, the court concluded that the Alaska exception “has no force and effect.” Mem. Op. at 25. In finding the Alaska exception arbitrary and

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<sup>1</sup> As discussed below, and as this Court understood (Mem. Op. at 20), Interior does not now view ANCSA as precluding the acquisition of trust in Alaska.

capricious, the Court need not have reached 476(f) and (g). Instead, the Court could have made the same finding based on the relationship of the IRA and ANCSA.

The Court characterized Interior's position on the question of whether it retained authority to take land-into-trust in Alaska as "many ambiguous pronouncements and years of internal debate." Mem. Op. at 12. In 1980, when Interior first promulgated the Land into Trust regulations, Interior reasoned that ANCSA "does not contemplate the further acquisition of land in trust status, or the holding of land in such status in the State of Alaska." 45 Fed. Reg. 62,034 (Sept. 18, 1980) (AR 18). This rationale was set forth in a 1978 Opinion of the Acting Solicitor. Memorandum from Associate Solicitor to Assistant Secretary-Indian Affairs, Trust Land for the Natives of Venetie and Arctic Village (Sept. 15, 1978) (AR 3). Since 1994, however, Interior has called this rationale for the Alaska exception into question numerous times. See, e.g., 66 Fed. Reg. 3,452, 3,454 (Jan. 16, 2001) (AR 589); Memorandum from Solicitor to Assistant Secretary-Indian Affairs, Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled "Trust Land for the Natives of Venetie and Arctic Village" (Jan. 16, 2001) ("2001 Leshy Memo") (AR 619). Interior has now taken the position in this litigation that ANCSA does not preclude the Secretary from taking land into trust in Alaska. See Fed. Defs.' Reply In Support of Summary Judgment (ECF No. 67 at 1-2); see also Fed. Defs.' Supplemental Brief in Response to Court's Order (ECF 101). Despite its rejection of the legal rationale that underlies the Alaska exception, Interior has maintained the Alaska exception in the regulations.

As the Court pointed out, the question presented in this lawsuit is whether the Alaska exception "is legally valid." Mem. Op. at 23. An agency rule is arbitrary and capricious if the agency relies upon improper factors, ignores important arguments or evidence, fails to articulate a reasoned basis for the rule, or produces an explanation that is 'so implausible that it could not

be ascribed to a difference in view or the product of agency expertise.’’ Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 822 F.2d 104, 111 (D.C. Cir. 1987) (quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983)). This Court has now ruled that ANCSA did not repeal the provisions of the IRA that permit land to be taken into trust in Alaska, and has concluded that ANCSA does not prohibit the Secretary from taking land into trust in Alaska as a matter of law. Id. 11-20. Accordingly, the Court should limit its opinion and find the Alaska exception arbitrary and capricious on the grounds that Interior retains its authority to take land-into-trust in Alaska pursuant to Section 5 of the IRA and, as the Court effectively found, that the Alaska exception is not supported by Interior’s own statements that call into question the prohibition. See, e.g., AR 619 (2001 Leshy Memo), AR 589.

**II. The ambiguity of the statutory text, background of the 1994 Amendment, and the potential for unintended consequences further weigh in favor of the Court limiting its holding to a finding that the Indian Reorganization Act authorizes the Secretary to take land into trust in Alaska.**

The ambiguity of the statutory text along with the complex and unique history of 25 U.S.C. §§ 476(f) and (g) provide further bases for the Court to limit its holding to the ruling that the Secretary retains the authority to take land into trust in Alaska pursuant to the IRA. Below, the Federal Defendants provide additional information not previously presented to the Court regarding the scope of 25 U.S.C. §§ 476(f) and (g), which helps demonstrate why it would be appropriate to rely on the ground that Interior retains the discretion to take land into trust in Alaska under the IRA, rather than basing its decision on a plain language interpretation of 476(f) and (g). This information includes the history of the 1994 Amendment along with Interior’s contemporaneous interpretation of the provisions, which show that determining the scope of 476(f) and (g) is complex. Additionally, the Court’s broad holding on 476(f) and (g) may have

unintended consequences on all manner of federal government actions outside the facts of this case.

This Court has held that a plain language reading of 25 U.S.C. § 476 (g) deprives the Alaska exception of “force and effect” because “it diminishes the privileges of non-Metlakatlan Alaska Natives relative to all other Indian tribes, by providing that the Secretary will not consider their petitions to have land taken into trust.” Mem. Op. at 23-24. The Court stated that “25 U.S.C. § 476(g) plainly applies to “[a]ny regulation” that violates its prohibition.” *Id.* at 24. As discussed below, the scope of 476(f) and (g) is not clear on the face of these provisions. The history of the 1994 Amendment and Interior’s contemporaneous interpretation of the provisions show that determining the scope of 476(f) and (g) is complex. Additionally, the Court’s broad holding on 476(f) and (g) may have unintended consequences on all manner of federal government actions outside the facts of this case.

In interpreting subsections 476(f) and (g), the first step is to ascertain whether any of the statutory terms in subsections (f) and (g) are ambiguous. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* at 341. If the plain language of the statute is unclear or ambiguous, it is appropriate to examine the legislative history of the statute to determine the intent of Congress. AFGE, Local 3295 v. FLRA, 46 F.3d 73, 77 (D.C. Cir. 1995) (Wald, C.J., dissenting)). A reviewing court should also consider the contemporaneous interpretation of the agency charged with administering the statute.

First, the statutory phrase “privileges and immunities” that are “available to a federally recognized Indian tribe” is ambiguous.<sup>2</sup> “[T]he existence of two reasonable, competing interpretations is the very definition of ambiguity.” See Friend of the Everglades v. South Florida Water Management District, 570 F.3d 1210, 1227 (11th Cir. 2009) (upholding EPA’s regulation because it followed one of the two readings the court found reasonable). The statute at issue here, does not define or otherwise explain what “privileges” are protected by §§ 476(f) and (g), and the phrase is capable of more than one reasonable interpretation. On the one hand, the phrase “privileges and immunities” has been interpreted in the context of the Fourteenth Amendment, to refer to fundamental rights of citizens. Slaughter–House Cases, 16 Wall. 36, 21 L.Ed. 394 (1872); see Saenz v. Roe, 526 U.S. 489, 503 (1999) (continuing to struggle with what are fundamental rights in the context of privileges and immunities of citizens). Therefore, “privileges and immunities” in the context of Section 476 of the IRA could be interpreted to reference fundamental governmental rights and powers of Indian tribes. See, e.g., United States v. Wheeler, 435 U.S. 313, 329 (1978) (recognizing as important aspects of tribal sovereignty the power to “punish members of the Tribe for violations of tribal law;” to administer “their internal and social relations;” “to determine tribe membership;” to regulate domestic relations among tribe members”; to prescribe rules for the inheritance or property;” and any additional powers delegated to tribes by Congress). On the other hand, “privileges and immunities of federally recognized tribes” could encompass a broader category of tribal authorities and benefits available to tribes. “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . .” United States v. Mazurie, 419 U.S. 544, 557 (1975); see

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<sup>2</sup> Of note, with regard to plaintiff Alice Kavairlook, the language of 476(f) and (g) only applies to “privileges and immunities of federally recognized tribes” and not to individual Indians.

also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). As “privileges and immunities” of federally recognized tribes could have different, plausible meanings, the phrase is the very definition of ambiguous.

The term “available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes” continues the ambiguity. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (“The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.”). Webster’s defines “available” as “ready for immediate use” or “obtainable.” See <http://www.merriam-webster.com/dictionary/available> (last visited May 28, 2013). “Available” could apply to actions Congress has “required or mandated,” discretionary actions or benefits for which an Indian tribe may be eligible, or some combination thereof.<sup>3</sup> Thus, Congress’ intent cannot be deciphered from the plain language of subsections 476(f) and (g) on its face.

The historical background that gave rise to the 1994 Amendment sheds light on its unique origins and Interior’s varying interpretations of the underlying legal questions regarding the status of Indian tribes. Congress enacted subsections 476 (f) and (g) in 1994 after learning that Interior was making improper distinctions between tribes in implementing Section 16 of the IRA. Based upon two now overturned Solicitor’s Opinions, Interior had created a distinction between “historic” versus “non-historic” or “created” tribes, and sought to distinguish between the sovereign “powers” of these “categories” of tribes. See Ex. A (Sioux - Elections on Constitutions, 1 Op. Sol. On Indian Affairs 618 (U.S.D.I 1979)); see also Ex. B (Powers of Indian Group Organized Under IRA But Not As Historical Tribe, 1 Op. Sol. On Indian Affairs

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<sup>3</sup> As this Court has held, Mem. Op. at 18, Section 465 authorizes the United States to choose to become the legal title holder of land in trust for Indians as a discretionary matter.



813 (U.S.D.I 1979)). By the time Congress passed the IRA, Indian tribes had been subjected to the allotment and termination eras and many Indian tribes had been moved to different locations and tribes had broken apart; the IRA therefore allowed for different groups to organize as an “Indian tribe” regardless of historic origins. The now overturned 1936 Solicitor Opinions held that certain tribes did not have the same “sovereign capacity” as other “historic” tribes who had organized under the IRA. Id. Specifically, the Solicitor decided that “non-historic” tribes did not have the power to condemn, regulate inheritance of property or to tax. Id.<sup>4</sup>

In view of concerns regarding Interior’s practice, Senators McCain and Inouye introduced a stand-alone piece of legislation containing language identical to what became 25 U.S.C. §§ 476 (f) and (g). On May 14, 1994 (after moving to amend the Technical Corrections Bill of 1994) Senators McCain and Inouye engaged in a colloquy about the purposes and intended effects of the 1994 Amendment. Senator McCain began by stating that “Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government.” 140 Cong. Rec. S6146. He continued “all Indian tribes enjoy the same relationship with the United States and exercise the same

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<sup>4</sup> See Ex. C (Letter from Wyman D. Babby, Acting Assistant Secretary-Indian Affairs to Representative George Miller (Jan. 14, 1994)). In that letter, sent to Congress before introduction of the 1994 Amendment, Interior explained that the distinction is “based on the differing requirements of the IRA, i.e., the reorganization of existing tribes and the creation of ‘new’ tribes, and the unique historical circumstances that existed in some parts of the country.” Id. at 3. The 1994 letter expresses that BIA viewed the powers of an historic tribe as “deriv[ing] from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been expressly limited by Congress or is inconsistent with the dependent status of tribes.” Id. at 4 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). In contrast, Interior explained that ‘new’ tribes “may have only those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated to it by the Secretary.” Id. Interior stated that “those privileges and immunities [for ‘new’ tribes] are derived as necessary incidents of a comprehensive Federal statutory scheme to benefit Indians, not from some historical inherent sovereignty.” Id.

inherent authority.” Id. McCain condemned Interior’s position at that time as being “inconsistent with the principle policies underlying the IRA, which were to stabilize Indian tribe governments and to encourage self-government.” Id.

Senator Inouye then stated his understanding that the amendment would “void any past determination by the Department that an Indian tribe is created and would prohibit any such determination in the future.” Id. at S6147. In response, Senator McCain clarified that the amendment was intended to prohibit “the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law.” Id. Senator McCain noted instances where he understood Interior had carried the “historic” and “created” classification into other laws. Id. As such, “our amendment to Section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.” Id.

Senator Inouye agreed with that statement and added that Indian tribes stand on “equal footing” to each other and to the Federal government. “That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes with a government-to-government relationship with the United States.” Inouye continued “[e]ach federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities.” Id.

The Technical Corrections Act of 1994 including the amendment to the IRA was enacted on May 31, 1994, Pub. L. 103-263, 10 Stat. 709 as follows:

(f) Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 [the Indian Reorganization Act] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies,

enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. §§ 476(f) and (g).

On July 13, 1994, Solicitor Leshy provided his view of the 1994 Amendment. See Ex. D (Memorandum from Solicitor John D. Leshy to Assistant Secretary-Indian Affairs Ada E. Deer, Amendment of the Indian Reorganization Act (July 13, 1994) (hereinafter “1994 Leshy Memo”)). In the 1994 Memo, Solicitor Leshy explained that when the 1994 Amendment was passed, his office had been analyzing the practice, based on the 1936 Opinions, of categorizing tribes. Solicitor Leshy concluded that 476(f) and (g) had overruled the 1936 Solicitor’s Opinions and provided some discussion of the issues raised by the 1936 Opinions to assist the Assistant Secretary with application of the new Amendment.<sup>5</sup>

In the 1994 Memo, Solicitor Leshy notes that Congress can enact legislation affected or limiting the powers of a particular tribe. See 1994 Leshy Memo at 4, n.5 (listing examples).

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<sup>5</sup> The 1994 Leshy Memo also explored how the 1936 Solicitor’s Opinion was developed, including discussion of a debate between Felix Cohen and Charlotte Westwood (attachments to Ex. D) as to the meaning of the following provision in Section 16: “In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers.” Ms. Westwood argued that Interior should not distinguish between “historic” and “created” tribes because the IRA does not support such a distinction on its face and doing so contradicts the purpose of the IRA to facilitate Indian tribes’ “home rule” and local self-government. Mr. Cohen, on the other hand, favored distinguishing between tribes and argued “that the powers of each tribe will be determined in the light of the history of that particular tribe.” He further stated that “under [his] interpretation, the power to levy taxes, to regulate trade, to regulate inheritance, and to maintain law and order is very severely limited.”

After surveying the definition of "tribe" in the Land Consolidation Act 25 U.S.C. § 2205(a); the Indian Child Welfare Act, 25 U.S.C. § 1903(8); and the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10), Solicitor Leshy concludes

Congress has long been aware of the ethnological, cultural and historic differences ... among Indian governance organizations, yet Congress for the most part makes no distinctions among tribes in recognizing their existing authorities or vesting them with new ones. But see footnote 5, above [examples of specific legislation affecting or narrowing powers of a particular tribe]. In any event, apart from these specific statutory modifications, Congress has now settled the debate by rejecting the distinction drawn in the 1936 Opinion.

Leshy Memo at 7. The 1994 Memo Solicitor Leshy did not expound further on which "privileges and immunities" were covered by the 1994 amendments, but noted that "Senator McCain made clear in his floor statement that its reach was not confined to the IRA." Id. at n. 3. Leshy expressly stated that his memorandum did not address "other possible applications of the amendment beyond [overturning] the 1936 Opinion." Id.

As is illuminated by the statutory language, the legislative history and the agency's contemporaneous interpretation, application of 25 U.S.C. §§ 476(f) and (g) is more complex than the Court's opinion suggests. Additionally, Interior should be provided the opportunity to opine on the extent and reach of 476(f) and (g) in the first instance because if and when the agency decides to, it will be afforded appropriate deference. These considerations weigh in favor of the Court revisiting its opinion and avoiding reliance on 476(f) or (g).<sup>6</sup>

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<sup>6</sup> While the prior case law interpreting 476 (f) and (g) is not extensive, and provides limited guidance, courts (including the DDC) have agreed with the approach that Congress intended to address a specific concern in enacting sections 476 (f) and (g). In Sac and Fox Nation v. Norton, 585 F.Supp.2d 1293 (W.D. Ok. 2006), the tribe claimed that Interior had violated Section 16 by not certifying election results within a certain time frame. Id. at 1296-1297. In that case, the federal defendants argued that Oklahoma tribes are not covered by the IRA and the tribe argued that the Oklahoma Indian Welfare Act, 25 U.S.C. 503, permits Oklahoma tribes to make a claim as rights under the IRA if the tribe has amended its charter or constitution to so provide. Id. at 1298. The federal defendants argued that the date of the tribe's amendment to its charter in light of the effective date of the Oklahoma Welfare Act meant that the

Additionally, the potentially broad and unintended effect of the Court’s opinion counsels in favor of the Court’s limiting its opinion. The Court’s March 31 opinion acknowledges no limitations to application of 476(f) and (g). It holds that the Alaska exception violates 25 U.S.C. § 476 but does not address whether the exception challenged here concerns a “privilege or immunity.” At the same time, the Court found that taking land-into-trust is a discretionary action. Mem. Op. at 18 (“the Secretary retains the discretion – but not the obligation – to take . . . lands . . . into trust [in Alaska].”). These two premises create the potential predicate for an argument that agency decisions which Congress intended to be discretionary could violate 25 U.S.C. §§ 476(f) or (g).

Additional impacts from the Court’s interpretation of these provisions include the potential that federal agencies would be subject to suit for violating subsections 476(f) and (g) when upholding treaty rights held by only certain tribes when those rights are otherwise implemented through an administrative processes. For example, the Makah Nation is the only tribe that holds treaty whaling rights, and federal agencies treat the Makah differently from other Indian tribes for purposes of issuing take permits. Under the Court’s current holding, it could be

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IRA, Section 16 did not apply. *Id.* at 1299, n. 10. The court noted that defendant’s position establishes “two classes” of tribes based on the date when the tribe invoked its rights under the Oklahoma Welfare Act and the date of the enactment of the Oklahoma Welfare Act. Accordingly, the court stated that that position violated 476 (f). *See also United Houma Nation v. Babbitt*, 1997 WL 403425 at \*7 (D.D.C., July 8, 1997) (holding that the 1994 Amendment did not impact the federal acknowledgment regulations and did not reach other regulations outside the IRA, *id.* at \*7, n.11).

The D.C. Circuit has also mentioned 476 (f) in passing twice. In *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003), the court rejected a challenge to an Interior decision to take land into trust after noting “the Cities lack standing to invoke 25 U.S.C. § 476 (f), which protects tribes against agency decisions that diminish the privileges and immunities available to one tribe relative to other federally recognized tribes.” *See also, Butte County v. Hogan*, 613 F.3d 190, 198 (D.C. Cir. 2010) (J. Rogers dissenting) (citing 25 U.S.C. § 476 (f) for the proposition that “[i]n ‘mak[ing] any decision or determination . . . with respect to a federally recognized Indian tribe,’ the Secretary could not subclassify a tribe by denying it privileges and immunities available to other federally recognized tribes”).

argued that any such permitting decision that treats other tribes differently is subject to challenge under 476(f) and (g). This unintended consequence of the Court's current holding could be avoided by limiting its rationale to the relationship between the IRA and ANCSA.

In sum, we respectfully request the Court limit its decision to its holding that Interior's rationale in support of the Alaska exception was based on a flawed legal premise and not reach subsections 476(f) and (g).

RESPECTFULLY SUBMITTED,

ROBERT G. DREHER  
ACTING ASSISTANT ATTORNEY GENERAL

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DATED: July 3, 2013

# Exhibit A

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DEPARTMENT OF THE INTERIOR

MARCH 31, 1936

superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. \* \* \* (At page 259.)

The question of navigability of the Missouri River at the point in question is irrelevant to the question of ownership of the river bottom. Clearly neither the State of North Dakota nor any Indian tribe could interfere with commerce on a navigable stream, regardless of the ownership of the land under water. The question of such ownership should be considered in terms of its actual implications. It is well known that the Missouri River in the region of the Fort Berthold Reservation is a river of changing outlines, with banks generally moving in one direction or another and sometimes in both directions at once. Can it be plausibly declared that at the time of setting aside Fort Berthold Reservation the Government intended to recapture islands or strips of land that might be formed from what was at the moment river bottom? Or did the Government simply reserve what it could not in any event alienate, namely, a public highway for navigation under Federal protection and control?

Viewed in this light, the intent of the Government appears clear. I am of the opinion that the river bed, at the point in question, was part of the Fort Berthold Indian Reservation prior to the admission of North Dakota to statehood. The State of North Dakota, on its admission to the Union, expressly disclaimed all right and title to Indian lands. Constitution of North Dakota, Article XVI, section 203. It follows that islands subsequently formed from the river bed, which belonged to the Indians of the Fort Berthold Reservation, retained the original status of the river bed and must now be recognized as part of the Fort Berthold Reservation.

NATHAN R. MARGOLD,  
*Solicitor.*

Approved: March 31, 1936.  
T. A. WALTERS, *First Assistant Secretary.*

#### SIoux—ELECTIONS ON CONSTITUTIONS

*April 15, 1936.*

*Memorandum to Mr. Zimmerman  
Assistant Commissioner of Indian Affairs.*

In connection with the matter of calling elections on the constitutions for the Lower Sioux Indian

Community and the Prairie Island Indian Community under the Pipestone jurisdiction, the two constitutions and the letters addressed to the two constitutional committees have been revised in this office to accord with certain legal principles.

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.

In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits of the powers for such group. These powers were the power to condemn land of members of the community, to regulate the inheritance of the property of members of the community, and to levy taxes upon members of the community. The first two powers were eliminated but the last was modified to restrict it to a permissible scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges. As these assessments would be incidental to the ownership of community property it is considered that the community would be privileged to impose them. The reasons for these changes were reported to the Indians in the letters to the constitutional committees. It is believed that the Indians will have no objections to these changes but if they should have they may seek the postponement of the elections as already suggested in the letters addressed to the committees. The remaining powers were found justified on the bases of one of the above mentioned principles. The power over law and order is made subject to review by the Secretary of the Interior, and may be sustained as a delegation of power.

As these changes were legally necessary and did not involve considerations of policy and as there has been prolonged delay in calling the elections for these two communities, the above changes were made in this office without returning the files to the Indian Office. It is requested that you call this memorandum to the attention of the Organization Division in order that the above stated legal principles may be followed in future cases of organiza-



APRIL 15, 1936

OPINIONS OF THE SOLICITOR

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tions of Indians upon the basis of residence on a reservation.

*Solicitor.*

FIVE CIVILIZED TRIBES—ATTORNEY'S FEES

M-28309

*April 16, 1936.*

The Honorable,  
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

At the request of the Assistant Commissioner of Indian Affairs, a question relating to the application of F. M. Goodwin and associates, attorneys, of Washington, D.C., for the allowance of a fee for services rendered in representing the petitioner in the Sandy Fox case (*Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418), has been submitted to me for opinion. Before proceeding to a discussion of the immediate problem, however, it is essential that the events leading to and including a certain arrangement between the Department and the applicants, the scope of which is in dispute, be reviewed briefly.

Prior to 1924, the Department had employed Wolf and Company, of Chicago, Illinois, and the F. W. Freeborn Engineering Corporation, of Tulsa, Oklahoma, in behalf of the restricted members of the Five Civilized Tribes, to assist in seeking the abatement or refund of certain Federal income taxes for the years 1917 to 1920, inclusive, under various headings, including depletion, depreciation and discovery allowances. Certain recoveries were thereby effected. The question then arose whether income derived from tax exempt land held by a restricted Indian should be subject to *any* Federal income tax. With the approval of the Department, a number of Indians thereupon employed Messrs. Robert B. Keenan, of Tulsa, and W. R. Banker, of Muskogee, Oklahoma, to prosecute claims for refunds of income taxes paid during past years, and other Indians employed other attorneys for the same purpose.

On March 15, 1924, the Attorney General rendered an opinion (34 Ops. Atty. Gen. 275) favorable to the Indians' contention and Treasury Decision No. 3570, in pursuance thereof, was issued shortly thereafter. Thereupon, the Superintendent of the Five Civilized Tribes filed refund claims with the Collector of Internal Revenue for the Oklahoma District in behalf of a number of restricted members of the Tribes.

On January 12, 1932, Mr. Goodwin, who with his associates had been active in similar Osage income tax refund cases, addressed a letter to the First Assistant Secretary of the Interior, from which the following is quoted:

"The Superintendent of the Five Civilized Tribes, on behalf of the incompetent members of the said Tribes, has already submitted applications for certain tax refunds. However, the records at the Agency at Muskogee have not been kept so as to reveal the amount which has been sent for the incompetent Indians for taxes. The Superintendent, acting on the best information available to him, submitted his applications on behalf of the Indians, but it is now believed that approximately 1,000 Indians are entitled to refunds of varying amounts which have not been covered by the applications made by the Superintendent. The exact amount of such probable refunds cannot be stated, but from all the information available, they will amount to a substantial sum. \* \* \*

"Mr. Whitney has discussed these cases with me and asked me and my associates to join with him in seeking your approval of our employment to make a thorough check of all the incompetent cases to obtain additional tax refunds. The data for this can only be obtained by an exhaustive examination of the returns and records of the Internal Revenue Bureau in Oklahoma and in Washington, D.C. For this reason, it is impossible for the Superintendent, or his assistants, to function in this matter. The logical and reasonable course would be to employ attorneys and cause a thorough check to be made of the Internal Revenue records so that any refunds to which these Indians are entitled may be obtained.

"I am willing to undertake this work on a *quantum meruit* basis, subject to your approval of such employment and of the fee to be paid on refunds actually obtained. As there will be a mass of details to consider, it will be necessary for me to have associates. \* \* \* In view of the fact that the Osage tax claims have been so recently handled by the Internal Revenue Bureau and that its attorneys and agents are now more familiar with the Indian laws and problems than usual, it is believed that this is a very appropriate time to undertake this work, and it would be to the advantage of the Indians as well as of the Government to expedite the same as much as possible."

On April 18, 1932, the Commissioner of Indian Affairs, after discussing the events hereinbefore

# Exhibit B

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members of the tribe and would therefore not be entitled to share in tribal property.

*Acting Solicitor.*

#### ROSEBUD SIOUX—ADOPTION OF MEMBERS

*April 12, 1938.*

*Memorandum for the Assistant Secretary:*

The attached letter to the Rosebud Sioux Tribal Council, prepared for your signature by the Indian Office, contains several erroneous allegations. The letter states:

"The purpose of Section 2, Article II in the Rosebud Constitution is to enable the Council by ordinance to prescribe the qualifications of those who shall be considered eligible for adoption and to outline the procedure or method necessary, and when this has been done it would be the responsibility of the Council to pass and act on all applications. There would be *no appeal or review* of the action by the Council."

There is no justification for this peculiar interpretation. The provision in question reads:

"Sec. 2. The Tribal Council shall have power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members."

Certainly, this language does not require the Council to state in advance by detailed ordinance when it will and when it will not adopt a member, nor does the constitutional provision say that the Secretary of the Interior shall not have the right to review action by the Council. Indeed, a contrary position has been taken by the Department in Circular No. 3123, dated November 18, 1935, in which it is said that unless there is a specific restriction upon adoptions which prevents the adoption of persons not related by marriage or descent to members of the tribe, each adoption should be approved by the Secretary of the Interior. The Department was unable at that time to specify in advance the exact circumstances under which the adoption of individual Indians would be approved here. I do not see how we can criticize the Indian Council for being equally unwilling to commit itself in advance on all possible cases.

The letter further criticizes the ordinance adopted by the Rosebud Council for the reason that

under this ordinance an adoption fee must be deposited with the president of the Council. Objection is made that "By reference to the Constitution it will be noted that it is the Treasurer's duty to receive such funds and he is bonded to account for them." Actually, the Constitution says nothing about custody of funds and the bylaws say only that "The Council Treasurer shall be the custodian of all monies which come under the jurisdiction or the control of the Rosebud Sioux Tribal Council." I do not think that a deposited fee is necessarily under the jurisdiction or in control of the Council. In this Department and elsewhere a clear distinction is made between monies deposited with an executive officer pending consideration of a matter and monies in the United States Treasury, under the control of Congress.

Since the assigned reasons for rescinding the ordinance are, I believe, legally untenable, the ordinance should not be rescinded. Inasmuch as this ordinance was approved in the field, positive approval by you, at this time, is unnecessary, and non-action will have the effect of approval.

I suggest, finally, that the criticism of typographical and grammatical errors, in proposed letters to the Tribal Council, is of doubtful propriety. If there is any criticism of these matters, it should be directed, in a case like the present, to the superintendent of the reservation who approved the ordinance and who presumably supplied the stenographic help which the Council required. Certainly, we would not think of criticizing an ordinance adopted by a territorial legislature, for instance, on grounds of typographical and grammatical inaccuracy, where such inaccuracies do not raise any substantial question of interpretation.

NATHAN R. MARGOLD,  
*Solicitor.*

Approved:  
*Assistant Secretary.*

#### POWERS OF INDIAN GROUP ORGANIZED UNDER IRA BUT NOT AS HISTORICAL TRIBE

*April 15, 1938.*

*Memorandum to Mr. Zimmerman,  
Assistant Commissioner of  
Indian Affairs.*

In connection with the matter of calling elections on the constitutions for the Lower Sioux Indian Community and the Prairie Island Indian Community under the Pipestone jurisdiction, the two constitutions and the letters addressed to the two

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## DEPARTMENT OF THE INTERIOR

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constitutional committees have been revised in this office to accord with certain legal principles.

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.

In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits of the powers for such group. These powers were the power to condemn land of members of the community, to regulate the inheritance of the property of members of the community, and to levy taxes upon members of the community. The first two powers were eliminated but the last was modified to restrict it to a permissible scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges. As these assessments would be incidental to the ownership of community property, it is considered that the community would be privileged to impose them. The reasons for these changes were reported to the Indians in the letters to the constitutional committees. It is believed that the Indians will have no objections to these changes but if they should have they may seek the postponement of the elections as already suggested in the letters addressed to the committees. The remaining powers were found justified on the basis of one of the above-mentioned principles. The power over law and order is made subject to review by the Secretary of the Interior and may be sustained as a delegation of power.

As these changes were legally necessary and did not involve considerations of policy and as there has been prolonged delay in calling the elections for these two communities, the above changes were made in this office without returning the files to the Indian Office. It is requested that you call this memorandum to the attention of the Organization Division in order that the above stated legal principles may be followed in future cases of organization of Indians upon the basis of residence on a reservation.

*Solicitor.*

OKLAHOMA INDIAN WELFARE ACT—  
COOPERATIVE

*April 22, 1938.*

*Memorandum for the Secretary:*

With the memorandum addressed to you from Mr. Herrick, Acting Commissioner of Indian Affairs, dated October 28, 1937, transmitted herewith, there was attached a compilation of provisions of Oklahoma Laws, which were deemed relevant for the purpose of considering what Oklahoma laws would be applicable to cooperative associations organized under section 49 of the Oklahoma Indian Welfare Act (49 Stat. 1967 June 26, 1936). Mr. Herrick in his memorandum asked to be advised which provisions of the Oklahoma law, if any, would govern these cooperative associations and recommended that such provisions be compiled and furnished to the associations. He also asked that if it is determined that the cooperatives must comply with some provisions of Oklahoma law, representatives of the credit section of the Indian Office be permitted to discuss the provisions informally with one of your representatives. Consideration of this question in this office was delayed by pressure of other work and the need for extended study of the problem.

The problem is as follows: Section 4 of the Oklahoma Indian Welfare Act, hereinafter referred to as the Welfare Act, provides:

"Any ten or more Indians, as determined by the official tribal rolls, or Indian descendants of such enrolled members, or Indians as defined in the Act of June 18, 1934 (48 Stat. 984), who reside within the State of Oklahoma in convenient proximity to each other may receive from the Secretary of the Interior a charter as a local cooperative association for any one or more of the following purposes: Credit administration production marketing consumers' protection, or land management. The provisions of this Act, the regulations of the Secretary of the Interior, and the charters of the cooperative associations issued pursuant thereto shall govern such cooperative associations: *Provided*, That in those matters not covered by said Act, regulations, or charters, the laws of the State of Oklahoma, if applicable shall govern.

\* Further regulations are provided for in section 9 of the Welfare Act.

"The Secretary of the Interior is hereby authorized to prescribe such rules and regula-

# Exhibit C



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

FILED  
SERIAL

JAN 14 1994

Honorable George Miller  
Chairman, Committee on Natural Resources  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

At the hearing before the Subcommittee on Native American Affairs on H.R. 734, to amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes," we were asked by Mr. Richardson to provide a list of nonhistoric Indian tribes.

The Bureau of Indian Affairs (BIA) does not maintain a comprehensive list of non-historic tribes per se. The determination is usually made on a case by case basis and arises in the context of our review of proposed constitutions submitted pursuant to the Indian Reorganization Act (IRA) of June 18, 1934, (48 Stat. 984) to the Secretary of the Interior (Secretary) for his legal and technical review and approval of such documents. The 1988 amendments to the IRA require, among other things, the Secretary to advise the tribe in writing 30 days prior to calling the election of any provision which he found contrary to applicable Federal law. Since passage of the IRA the Department of the Interior (Department) has distinguished between the powers possessed by an historic tribe and those possessed by a community of adult Indians residing on a reservation, i.e. a non-historic tribe. The distinction affects the group's authority to define its membership and determines who is allowed to vote. Members of historic tribes are entitled to vote even if they permanently reside off the reservation. Members of adult Indian communities are entitled to vote only if they reside on the reservation or are temporarily absent. Because the distinction between historic and nonhistoric tribes affect the Secretary's view of their powers, it is key to advising the tribe what provisions of their proposed constitution or amendment may be contrary to applicable Federal law as required by the IRA.

Section 16 of the IRA as original enacted provided in part:

Section 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on

such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

49 Stat. 978, 25 U.S.C. § 476 (1986).

In response to a request for an explanation of what were the powers vested in an Indian tribe by "existing law," the Solicitor issued a lengthy opinion discussing the inherent powers of Indian tribes. Solicitor's Opinion (Oct. 25, 1934), 55 I.D. 14 (1934), 1 Op. Sol. on Indian Affairs 445, 459 (U.S.D.I. 1979). Shortly, thereafter, on December 13, 1934, the Solicitor advised the Secretary that Section 16 contemplated two distinct and alternative types of organization. These were explained and defined by the Solicitor as follows:

In the first place, it [the IRA] authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for the purposes of this act), under Section 16 to organize without regard to past tribal affiliation.

Solicitor's Opinion, M-27810 (December 13, 1934), 1 Op. Sol. on Indian Affairs 484, 487 (U.S.D.I. 1979).

The Solicitor further explained that when Indians organized under Section 16 as members of a tribe or tribes their constitution and bylaws must be ratified by a majority vote of the adult members, whether residents or nonresidents of the reservation. On the other hand, if the Indians were organized as residents of a single reservation, ratification of their constitution and bylaws could be accomplished only by a majority vote of the adult Indians residing on such reservation.

The Solicitor's views were embodied in Amended Rules and Regulations for the Holding of Elections under the IRA of June 18, 1934, promulgated by the Commissioner of Indian Affairs on October 18, 1935. 55 I.D. 355. The interpretation of Section 16 as providing for two types of tribal organization with different voting rights for nonresidents is retained in the current regulations on Secretarial elections. 25 C.F.R. Part 81.

In addition, the IRA authorized the Secretary to acquire land through purchase for Indians, landless or otherwise, and to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by the IRA. (See Sections 5 and 7 of the IRA, 48 Stat. 984, 25 U.S.C. §§ 465, 467 and the legislative history of the IRA). Section 19 of the IRA defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also "all other persons of one-half or more Indian blood." The practical effect of these provisions was the creation of new "tribes" where none previously existed. Once the land was acquired for these Indians, they then were entitled to organize under the provisions of Section 16 of the IRA and adopt a constitution and bylaws.

The constitutions adopted pursuant to Section 16 of the IRA varied considerably with respect to the form of tribal government. The powers of self-government vested in the tribes organized under the IRA also varied according to the circumstances, experiences and resources of the tribes. See F. Cohen, Handbook of Federal Indian Law, p. 130.

In implementing the reorganization of tribes, the Department made the distinction between groups which were organized as historic tribes and groups which were organized as communities of Indians residing on one reservation. F. Cohen, Handbook of Federal Indian Law 130, n. 67 (1942). The distinction between the powers of the two types of organization was established in a Solicitor's Opinion. Solicitor's Opinion, April 9, 1936, 1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979). The same opinion but with a different heading and bearing a date of April 15, 1938, appears at 1 Op. Sol. on Indian Affairs 813 (U.S.D.I. 1979).

The distinctions were based on the differing requirements of the IRA, i.e., the reorganization of existing tribes and the creation of "new" tribes, and the unique historical circumstances that existed in some parts of the country. For instance, self-governing tribes generally did not exist in California in the same sense as they did elsewhere. See The Legal Status of the California Indian, California Law Review, Vol. XIV, No. 2, January, 1926; See also A. L. Kroeber, Handbook of the Indians of California, and A. L. Kroeber, History of California. Most of the California rancherias have unique historical circumstances and were organized without regard to tribal affiliation or historical tribal status. Generally, these rancherias did not represent tribes but were collections or remnants of Indian groups for whom the United States bought homesites for homeless California Indians under various statutes. They were placed on trust land which was purchased for landless, homeless California Indians without regard to tribal status. Recognizing the unique historical circumstances of the Indians of California, the Congress recently enacted status clarification legislation to address the problems facing California Indians. See the Act of October 14, 1992, Public Law 102-416, 106 Stat. 2131.



In 1936, Congress amended the IRA to permit the reorganization of "tribes" in Alaska without first establishing a reservation as required in the contiguous 48 states. Moreover, the 1936 Alaska amendments permitted "groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district" to reorganize as "tribes." 49 Stat. 1250, 25 U.S.C. § 473a.

The BIA's view is that an historic tribe has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been expressly limited by Congress or is inconsistent with the dependent status of tribes. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In contrast, a community of adult Indians is composed simply of Indian people who reside together on trust land. A community of adult Indians may have only those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated to it by the Secretary. In addition, a community of adult Indians may have a certain status which entitles it to certain privileges and immunities (See United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe. cf. Native Village of Stevens v. Alaska Management & Planning, 757 P. 2d 32 (Alaska 1988), holding that reorganization under the IRA did not establish that the Native Village of Stevens was entitled to assert sovereign immunity.) However, those privileges and immunities are derived as necessary incidents of a comprehensive Federal statutory scheme to benefit Indians, not from some historical inherent sovereignty.

Those powers not within the powers of a community of Indians residing on the same reservation include the powers to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxes upon community members or others, and the regulation of law and order. It is within the community's authority to levy assessments and fees upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. The community may also levy assessments on non-members coming or doing business on community lands. However, such assessments would be levied in its exercise of the community's powers as a land owner, not some historical, inherent power to tax.

As we indicated earlier, while the BIA has not developed a comprehensive list of nonhistoric tribes, we can provide a list of those for whom a determination has been made in the context of reviewing and approving their constitution. That list is as follows:

Mississippi Band of Choctaw Indians of Mississippi<sup>11</sup>  
Pascua Yaqui Tribe of Arizona<sup>12</sup>  
Port Gamble Indian Community of Washington<sup>13</sup>  
Prairie Island Indian Community of Minnesota<sup>14</sup>  
Quartz Valley Rancheria of California<sup>15</sup>  
Redwood Valley Rancheria of California<sup>16</sup>  
Reno-Sparks Indian Colony<sup>17</sup>  
Sokaogon Chippewa Community of the Mole Lake Band, Wisconsin<sup>18</sup>  
St. Croix Chippewa Indians of Wisconsin<sup>19</sup>  
Yavapai Prescott Tribe of the Yavapai Prescott Reservation, Arizona<sup>20</sup>

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<sup>11</sup>See F. Cohen, Handbook of Federal Indian Law 273 (1941); See also Solicitor's Opinion, August 31, 1936, 1 Op. Sol. on Indian Affairs, 668 (U.S.D.I. 1979); and United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian Country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe.

<sup>12</sup>See letter of January 27, 1983, from Deputy Assistant Secretary - Indian Affairs (Operations) to Superintendent, Salt River Agency; letter dated October 15, 1987, from Assistant Secretary - Indian Affairs to Superintendent, Salt River Agency; Letter dated November 3, 1991, from Director, Office of Tribal Services to Chairman, Pascua Yaqui Tribe.

<sup>13</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

<sup>14</sup>See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.I. 1979).

<sup>15</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

<sup>16</sup>See letters of October 6, 1986, and March 30, 1987, from the Assistant Secretary - Indian Affairs, to Superintendent, Central California Agency; letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Central California Agency.

<sup>17</sup>See United States v. McGowan, 302 U.S. 535, 537 (1938).

<sup>18</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

<sup>19</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

<sup>20</sup>See letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Truxton Canon Agency; letter of December 8, 1992, from Director, Office of Tribal Services to Chairman, Yavapai Prescott Tribe.

EXAMPLES OF NONHISTORIC INDIAN TRIBES

Burns Paiute Indian Tribe<sup>1</sup>  
Blue Lake Rancheria of California<sup>2</sup>  
Coast Indian Community of the Resighini Rancheria, California<sup>3</sup>  
Cuyapaipa Indian Community of the Cuyapaipa Reservation, California<sup>4</sup>  
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada<sup>5</sup>  
Elk Valley Rancheria of California<sup>6</sup>  
Ely Shoshone Indian Tribe<sup>7</sup>  
Jamul Indian Village<sup>8</sup>  
Lower Elwha Indian Community of the Lower Elwha Reservation,  
Washington<sup>9</sup>  
Lower Sioux Indian Community of Minnesota<sup>10</sup>

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<sup>1</sup>See letters of March 12, 1987, and November 2, 1987, from the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) to Chairman, Burns Paiute Indian Colony.

<sup>2</sup>See letter of June 6, 1988, from the Deputy Assistant Secretary - Indian Affairs (Tribal Services) to the Superintendent, Northern California Agency.

<sup>3</sup>See Proclamation of Acting Secretary of the Interior dated October 21, 1939; letter of May 19, 1953 to the Commissioner of Indian Affairs from Sacramento Area Director; letter of November 8, 1956, to the Field Representative, Hoopa, from Sacramento Area Director; letter of June 8, 1989, to the President, Coast Indian Community from Deputy Assistant Secretary - Indian Affairs (Tribal Services); letter November 15, 1991 to President, Coast Indian Community from Director, Office of Tribal Services.

<sup>4</sup>See letter of March 17, 1982 to Superintendent, Southern California Agency from Deputy Assistant Secretary - Indian Affairs (Operations).

<sup>5</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, 1947.

<sup>6</sup>See letter of November 8, 1992, to Chairman, Elk Valley, from Director, Office of Tribal Services.

<sup>7</sup>See letter of September 28, 1988 from Deputy Assistant Secretary - Indian Affairs to Superintendent, Eastern Nevada Agency.

<sup>8</sup>See letter of November 16, 1980, from Commissioner of Indian Affairs to Superintendent, Southern California Agency.

<sup>9</sup>Land purchased in 1936 and 1937 under Section 5 of the Indian Reorganization Act.

<sup>10</sup>See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.C. 1979).

Yomba Shoshone Tribe of the Yomba Reservation, Nevada<sup>21</sup>

In addition to the foregoing list of examples of nonhistoric tribes, we believe that most if not all of the original California rancherias listed in the Act of August 18, 1958, (P. L. 85-671, 72 Stat. 619) as amended, and which have not already been so designated, would fall within the nonhistoric tribal designation. Recognizing that the tribal status of California rancherias was uncertain, the United States District Court in Tillie Hardwick v. United States, U.S. District Court, Northern District of California, No. C-79-1710-SW, relieved them of the application of the California Rancheria Act, which terminated them from Federal supervision, and restored these "Indian entities" to "the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act." Similar language is contained in other court decisions restoring individual rancherias to Federal status. Congress recognized the uncertain status of California Indians by the passage of the the Act of October 14, 1992, P.L. 102-416, 106 Stat. 2131) creating the Advisory Council on California Indian Policy (Advisory Council). One of the Advisory Council's principal functions is to conduct a comprehensive study of the social, economic and political status of California Indians and develop recommendations for specific actions that will help ensure that California Indians have life opportunities comparable to other American Indians.

We appreciate the opportunity to respond to your request for information. If we may be of further assistance, please let us know.

Sincerely,

*Wyman D. Babby*  
Acting Assistant Secretary - Indian Affairs

cc: Assistant Solicitor, Tribal Government/Alaska

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<sup>21</sup>See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

# Exhibit D



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

July 13, 1994

## Memorandum

To: Ada E. Deer  
Assistant Secretary -- Indian Affairs

From: John D. Leshy  
Solicitor

Subject: Amendment of the Indian Reorganization Act

This responds to your request for my views on the meaning of Section 5(b) of the Technical Corrections Act of 1994 (Pub. Law 103-263; 108 Stat. 707) which amended Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476, by adding two new subsections. The new subsections provide:

(f) **PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES;  
PROHIBITION ON NEW REGULATIONS.**-Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) **PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES;  
EXISTING REGULATIONS.**-Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

These subsections were added to unrelated technical amendments on the Senate floor immediately prior to enactment. The only relevant legislative history is a colloquy

between Senators Inouye and McCain.<sup>1</sup> In proposing the amendment, Senator McCain stated:

The purpose of the amendment is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes. In the past year, the Pascua Yagui [sic] Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted section 16 to authorize the Secretary to categorize or classify Indian tribes as being either created or historic.

140 Cong. Rec. S6147 (daily ed. May 19, 1994).

It is clear from their colloquy that Senators Inouye and McCain are referring to the interpretation in the Solicitor's Opinion dated April 15, 1936, styled "Sioux - Elections on Constitutions" (1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979))("Opinion")<sup>2</sup>. The Opinion concluded that, in authorizing the adoption of tribal constitutions in Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476, Congress distinguished between the governmental powers which may be exercised by, respectively, what have come to be known as "historic" tribes on the one hand, and "non-historic" or "created" tribes or adult Indian communities on the other. While not expressly using the term "non-historic" or "created" tribe, the Opinion referred to the latter as Indian "groups" which were "organized on the basis of their residence upon reserved land." Opinion, at 618.

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<sup>1</sup> These subsections were previously introduced in independent bills in the Senate (S. 2017) and House of Representatives (H.R. 4231) in mid-April. No action was taken on either bill. In remarks nearly identical to those he made upon introduction of the language added to the Technical Corrections Act, Senator McCain noted that the Department might take action on its own to modify its prior interpretation of section 16. 140 Cong. Rec. S4339 (daily ed. April 14, 1994). When he introduced H.R. 4231, Congressman Richardson made similar, albeit more brief, remarks. There is no other legislative history from the House.

<sup>2</sup> The same opinion appears with the heading "Powers of Indian Group Organized Under IRA But Not As Historical Tribe" as Solicitor's Opinion, April 15, 1938, 1 Op. Sol. on Indian Affairs 813 (U.S.D.I. 1979). The date of 1938 appears to be a typographical error, because the elections for the Lower Sioux Indian Community and Prairie Island Indian Community referred to in the opinion in the future tense were held on May 16 and 23, 1936, respectively.

As you know, my office was in the final stages of reviewing that Opinion, pursuant to your request, when Congress acted. Your January 1994 Senate testimony on the Pascua Yaqui legislation was sharply critical of the distinction.

The amendment, signed into law by President Clinton on May 31, 1994, overrules the 1936 Opinion.<sup>3</sup> You should therefore instruct the Bureau of Indian Affairs to place no reliance on it in future dealings with Tribes. You may also want to notify the Tribes that have previously been regarded as "created" of this change.

While my reconsideration of the Opinion is now moot, some discussion of it may be helpful to you in applying the new law. With little elaboration, the Opinion based its conclusion that the IRA authorized a distinction between "historic" and "non-historic" or "created" tribes on a single sentence found in Section 16 of the IRA.

Section 16 as originally enacted provided, in relevant part:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

The effect of the distinction drawn in the 1936 Opinion was that a community of adult Indians organized on reserved land under Section 16 of the IRA may not have certain sovereign powers enjoyed by other "historic" tribes, unless the powers have been delegated to the tribe by the Secretary of the Interior or are incidental to the tribe's ownership of the property or to the carrying on of business. The tribe's power to regulate law and order, for example, could only be sustained where there was a delegation of power from the Secretary of the Interior. Other powers possibly affected include the power to condemn land of community members, to regulate

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<sup>3</sup> The amendment, which was not provided to my Office in advance of its introduction, and upon which we had no opportunity to comment, is not merely a simple overruling of the 1936 Opinion, and Senator McCain made clear in his floor statement that its reach was not confined to the IRA. Instead, he characterized it as "intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify, or implement the categories or classifications." 140 Cong. Rec. S6147 (daily ed. May 19, 1994). This memorandum does not address other possible applications of the amendment beyond the 1936 Opinion.



inheritance of the property of community members, and to levy taxes upon community members and others.

The distinction drawn in the 1936 Opinion has had a limited practical effect. The occasions for applying it have been relatively infrequent; principally, in BIA review of tribal constitutions or constitutional amendments pursuant to Section 16.<sup>4</sup> In the nearly sixty years since the Opinion was issued, in fact, fewer than twenty of the more than 500 federally recognized tribes have received notice that their particular constitution or their exercise of constitutional powers might be impermissible because they were considered to be "created" rather than "historic" tribes.

The Opinion's impact has also been limited because it recognized that "created" tribes may exercise some of the powers listed above as incident to other powers they have that do not derive from sovereignty. As the Opinion put it: "The group . . . may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior." Opinion, at 618.

The underlying question is solely one of statutory interpretation -- of the meaning to be ascribed to this sentence in Section 16 of the IRA. In legislating in the arena of tribal powers, Congress can and sometimes has differentiated among the powers and authorities of tribes or Indian groups.<sup>5</sup>

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<sup>4</sup> In 1988 Congress amended Section 16 of the IRA to require the Secretary to hold elections on proposed new tribal constitutions and constitutional amendments within stated time periods. The 1988 amendments also required the Secretary to advise the tribe in writing 30 days prior to calling the elections of any provision which he found contrary to applicable law.

<sup>5</sup> Title 25 of the United States Code is replete with special legislation limiting or otherwise affecting the powers of individual tribes, such as the Navajos and the Hopis, or groups of tribes, such as the Five Civilized Tribes (Cherokees, Creeks, Chickasaws, Choctaws and Seminoles) or all those tribes in a particular state. For example, all matters involving tribal powers, immunities and jurisdiction of the Catawba Tribe are governed by a settlement agreement and the Congressionally sanctioned State Act (25 U.S.C. § 941b); Oregon has been granted civil and criminal jurisdiction within the boundaries of the Coquille Reservation (25 U.S.C. § 715d); New York has criminal jurisdiction on Indian reservations (25 U.S.C. § 232) and New York courts have civil jurisdiction (25 U.S.C. § 233); Kansas has criminal jurisdiction on Indian reservations (18 U.S.C. § 3243), see, Negonsott v. Samuels, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1119 (1993); Maine has civil and criminal jurisdiction over reservations (25 U.S.C. § 1725); Texas has civil and criminal jurisdiction over the

While my office was reexamining this Opinion, our research into its history unearthed some interesting background; specifically, memoranda from two Assistant Solicitors taking contrary positions on the question shortly before the Opinion was released. In one, Charlotte Westwood argued that no distinction should be drawn, while in the other Felix Cohen, a pioneering figure in Indian law, argued for the distinction. In the end, the Solicitor sided with Cohen.<sup>6</sup> The two memoranda are attached for your information.

Notwithstanding the Solicitor's interpretation, the Opinion has come into serious question in recent times. For one thing, the distinction it drew is not based on the express terms of Section 16 of the IRA.<sup>7</sup> For another, it may also have been undercut by the 1988 amendments to Section 16. See Pub. L. No. 100-581, 102 Stat. 2938; in the following paragraph, the 1988 additions are shown in boldface and the deletions struck-through.

(a) Any Indian tribe, ~~or tribes, residing on the same reservation,~~ shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, **and any amendments thereto,** which shall become effective when --

- (1) ratified by a majority of the adult members of the tribe, ~~or tribes of the adult Indians residing on such reservation,~~ **as the case may be,** at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe;

Section 19 of the IRA defines "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The definition was not changed by the 1988 amendments. The legislative history of the 1988 amendments simply notes:

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Ysleta Del Sur Pueblo (25 U.S.C. § 1300g-4(f)).

<sup>6</sup> But see the statements of Senators McCain and Inouye in introducing the recent amendment on the Senate floor. 140 Cong. Rec. S1646 (daily ed. May 19, 1994).

<sup>7</sup> After nearly sixty years of relative obscurity, this Opinion has, as you know, recently gained a surprising amount of attention. A front-page article in the April 4, 1994, Seattle Post-Intelligencer, for example, quoted tribal officials and attorneys who characterized the Opinion in strongly negative and sweeping terms; e.g., that it "came out of nowhere," was "just wrong, historically," and could be applicable to more than 200 tribes.

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 this Act.

The Committee's deletion of the references to the rights of Indians residing on the same reservation to organize under the 1934 Act does not alter the authorities with respect to the organization of such Indians because of the definition of "tribe" in section 19 of the 1934 Act (25 U.S.C. 479) which includes "the Indians residing on one reservation." In the case of such a "tribe" the members of the tribe are the residents of the reservation.

S. Rep. No. 100-577, 100th Cong., 2d Sess. 2 (1988).

Moreover, the modern trend of Federal statutes affecting Indian tribal governmental powers on a national basis is to define "tribe" in broad terms. See, e.g., the definition in the Indian Civil Rights Act of 1968: "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." 25 U.S.C. § 1301(1). See also, the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801(5).

Congress effectively limited or partially overruled the 1936 Opinion in the Indian Land Consolidation Act by defining "tribe" to mean "any Indian tribe, band, group, pueblo or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). The power to regulate inheritance of property of community members was one of the sovereign powers not vested in "created" or "non-historic" tribes, according to the 1936 Opinion, but the Land Consolidation Act authorizes any Indian tribe so broadly defined, subject to approval of the Secretary, to "adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction." 25 U.S.C. § 2205(a).

The Indian Child Welfare Act defines "tribe" to mean: "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in Section 1602(c) of Title 42." 25 U.S.C. § 1903(8). The Indian Self-Determination and Education Assistance Act, one of the more important pieces of Indian legislation in the last 20 years, defines Indian tribe to mean:

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

25 U.S.C. § 450b(b). See also, the Indian Child Protection and Family Violence Prevention Act; 25 U.S.C. § 3202(10).

As these varied yet uniformly sweeping statutory definitions of "tribe" make clear, Congress has long been aware of the ethnological, cultural and historic differences among Indian governance organizations, yet Congress for the most part makes no distinctions among tribes in recognizing their existing authorities or vesting them with new ones. But see footnote 5, above. In any event, apart from these specific statutory modifications, Congress has now settled the debate by rejecting the distinction drawn in the 1936 Opinion.

There remains the question of how the recent amendment is to be implemented with respect to tribes heretofore regarded as "created," whose constitutions contain limitations based upon the 1936 Opinion. The need for and the process to be employed in amending these constitutions may raise legal issues that will have to be addressed in my office. I believe the best course is to await a specific factual context before attempting to resolve any such issues. Please consult my office when such requests for amendments are made.

#### Attachments

cc: Associate Solicitors  
All Regional and Field Solicitors

MEMORANDUM:

The question has been raised as to whether a group of Indians which do not constitute a "tribe" but which organize as a tribe under the Indian Reorganization Act can have the powers of an Indian tribe as described in the Solicitor's memorandum of October 25, 1934. It is my opinion that such a group of Indians may have such powers in their constitution in so far as they and the Secretary of the Interior may consider them appropriate. My reasons for this opinion may be classified under the following three headings: (1) The intent of Congress as expressed throughout the reorganization act; (2) the administrative interpretation given to the act in organizing the Indians; and (3) the considerations of practical policy.

(1) Section 19 of the reorganization act provides that Indians residing on one reservation may be considered as a "tribe" for the purposes of the act. Section 16, in providing for the organization of Indians under "appropriate constitutions", makes no distinction between organization of an historic tribe or of the Indians residing on one reservation or of a group of tribes organizing as a new unit upon one reservation. Throughout the reorganization act there is manifest an intent to equip Indians with a new tool with which to improve their economic welfare. This tool is group organization, or, in technical terms, organization as an Indian tribe. The statement of purposes of the act includes as one purpose "to grant certain rights of home rule to Indians". The term "home rule" is commonly understood to mean local self-government, and there is nowhere expressed in the act an intention to allow such local self-government only to that group of Indians organizing under the act which happens already to be a tribe.

It may be assumed that Congress recognized the fact that present-day status as a tribe is in many cases purely fortuitous and often an historical tribe may consist of a group of Indians who are in fact far less united than a group of Indians who are living on a common reservation. Since before 1887 and until the reorganization act was passed the policy of Congress has been to break up the tribes. This was intended to be accomplished as much by the allotment system as by physical dismemberment of the tribe and separation of various portions over a large area. An example of the former method may be found in the case of the four tribes in Nebraska, and an example of the latter method in the dispersion of the Potawatomi Tribe in Kansas, Wisconsin, and Michigan. I refer to the tribes in Nebraska since I am more intimately acquainted with the tribes in that area. In the case of the Santees and Poncas, their reservations have been completely allotted and sold and they now have no tribal land at all other than small sections of

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land reserved for agency purposes and which are controlled by the Federal Government. The Poncas had no tribal organization in recent years and tribal meetings had been abandoned until the reorganization act was presented to them. Certainly, they had not been exercising any of the "powers of an Indian tribe" which are included in their constitution. It seems to me that powers of an Indian tribe may be lost as much through the result of certain Federal acts and policies as through direct prohibition in the acts themselves, and that Congress intended these powers to have been lost through their very incompatibility with the fulfillment of the allotment system. If Congress intended to allow a group of Indians such as the Santees and Poncas with only the most tenuous tribal connections to organize with full powers of an Indian tribe, it intended equally that a group of Indians such as the Mdewakanton Sioux residing on communally owned land and in a self-contained community might organize with the same power.

The phrase in section 16 which has been construed as permitting the powers of an Indian tribe to be conferred upon a group which is historically a tribe, reads as follows: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers." If this were interpreted to mean that any particular tribe could have only those powers which it may happen to have retained in spite of 50 years of Congressional attack, the intent of Congress to confer home rule upon the Indians would be defeated. This would be even more true in the case of the organization of a group of Indians residing on one reservation or a group of tribes residing on one reservation as neither of those groups as such have any tribal powers vested in them by existing law. However, the above-quoted phrase is open to an interpretation far more in line with the purpose of the entire act by construing it with the paragraph preceding it; namely, that the powers vested in an Indian tribe may be included in so far as they are "appropriate" in the constitution adopted by the particular group organizing. Moreover, such an interpretation follows the general rule that statutes passed for the benefit of Indian tribes or communities, are to be liberally construed. Alaska Pacific Fisheries v. United States, 248 U. S. 78, 89.

(2) Where a statute is open to more than one reasonable interpretation it is a familiar principle that the interpretation given to the statute by the agency authorized to administer the act is entitled to great weight. It is my belief that the Interior Department has so far been conferring upon groups of Indians organizing under the reorganization act those powers of an Indian tribe which are appropriate to it and not restricting the constitution to those powers which the group may, in fact, have had. This is clear in the case of a group which was already a tribe as illustrated above with the Santees and Poncas. It is true in the case of Indians residing on one reservation as seen in the proposed constitu-

tions for the Potawatomi groups in Michigan and Wisconsin. It is also true in the case of a group of tribes organizing on one reservation, as in the Fort Belknap constitution. In the latter case not only did the new "Fort Belknap Indian Community" not have tribal power previously but no formal transfer to the new group was made of whatever powers the constituent tribes may have had. In a prolonged discussion in the Solicitor's Office and in the Indian Office as to whether the Chippewas of Minnesota should organize as a tribe or as residents of the various reservations, nothing was said, to my memory, of the fact that if the Indians organized as residents of a reservation they would be entitled to no powers of self-government. The Chippewa reservations are, of course, not coincident with bands as illustrated by the White Earth reservation.

Turning to formal administrative expression, the Solicitor's opinion on the powers of an Indian tribe is careful to deal simply with the powers of an Indian tribe in general and does not discuss the situation of organization as a tribe of groups of Indians, not a tribe. The explanatory statement on the drafting of constitutions makes no distinctions between the types of powers which an organized tribe may have depending upon what its status was before organization. Of course, if any particular statutes or treaties limited the powers of any Indian group, such limitations would automatically limit the powers of that group when it is organized but this would result whether or not the group had previously been a tribe. In the explanatory memorandum on the drafting of charters, it is recognized that as a result of the powers enumerated in the tribal constitutions, the tribal councils are no longer "simply debating societies or grievance committees". (See page 3.)

(3) The administrative interpretation given to this section is, I believe, correct. It effectuates the policy of the act to develop Indian communities as a means of education in self-government and self-advancement. Moreover, it is practical in that the basis of organization of an Indian group and the powers which are conferred upon it will depend upon factual criteria, including the group's own resources and ability, and not upon fortuitous historical survivals.

*Charles T. Wirth*  
 Assistant Solicitor.

MEMORANDUM:

After reading the attached memorandum prepared by Mrs. Westwood I am still of the opinion that section 17 of the Wheeler-Howard Act does not grant any new powers, other than the powers expressly enumerated, to any Indian tribe, that it is therefore improper to include in the constitution of a group of Indians not heretofore constituting a tribe any powers which cannot be justified on the basis of tribal history or Congressional legislation.

The language of section 17 was thus interpreted by the Commissioner of Indian Affairs in the first "Analysis and Explanation of the Wheeler-Howard Indian Act" issued soon after the passage of the act: "The powers which may be exercised by an Indian tribe or tribal council include all powers which may be exercised by such tribe or tribal council at the present time, and also include the right to employ legal counsel etc." (p.6.) This interpretation is definitely inconsistent with the broader interpretation of section 17 defended by Mrs. Westwood.

The narrower interpretation in the Commissioner's explanatory memorandum is supported to a certain degree by the legislative history of the Wheeler-Howard Act. The act as first introduced (H.R.7902) provided:

"An Indian community chartered under this Act shall be recognized as successor to any existing political powers heretofore exercised over the members of such community by any tribal, or other native political organizations comprised within the said community. \* \* \*

Here the intent is clear that it is only the existing powers of the particular tribe that are confirmed by Congress. Subsequent modifications in the language of this provision, resulting finally in the present section 17, do not appear to support an argument of changed Congressional intent.

The Solicitor's opinion on "Powers of Indian Tribes", dated October 25, 1934, is not clear on the point here in question. It seems to me, however, that the general argument in this opinion assumes that the powers of each tribe will be determined in the light of the history of that particular tribe. Otherwise, there would be



little point in the second sentence of the opinion which reads: "The question of what powers are vested in an Indian tribe or tribal council by existing law cannot be answered in detail for each Indian tribe without reference to hundreds of special treaties and special acts of Congress." It may, however, be argued that even under the broad construction advocated by Mrs. Westwood, reference to special treaties and special acts would be necessary to supplement or restrict a list of "powers generally vested in an Indian tribe." The difficulty with this argument is that it ignores specific statutes which, by terminating the tribal relationship of certain Indians, actually nullify tribal duties and tribal powers theretofore recognized.

Mrs. Westwood's argument that Congress must have intended to confer upon newly organized Indian groups rights equivalent to those enjoyed by recognized tribes, would be conclusive to my mind but for the fact that many important rights, powers, and privileges may be secured to a newly organized reservation group even under a strict construction of the statute. So far as rights of property and economic organization are concerned it makes little or no difference which interpretation of section 17 is followed. And it is hard to find any clear intent of Congress that such other matters as law and order and taxation should be entrusted to all tribes. In fact, the elimination from earlier drafts of the Wheeler-Howard Act of sections permitting the Secretary to make these grants to all tribes indicates that Congress was not willing to make a general grant of these powers to all Indian groups but was willing to confirm and guarantee any powers that any particular Indian group might already enjoy.

I disagree entirely with the position that this narrow interpretation of section 17 would rule out such grants of power as have been made to the Ponca Tribe and the Fort Belknap community. I do not think it is true that "Powers of an Indian Tribe may be lost as much through the result of certain Federal acts and policies as through direct prohibition in the acts themselves, and that Congress intended these powers to have been lost through their very incompatibleness with the fulfillment of the allotment system." The Solicitor's opinion on "Powers of Indian Tribes" already cited has the following to say on this point:

"It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have

been challenged by an Indian tribe. 'Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user.' (United States ex rel. Standing Bear v. Crook, 5 Dill. 453, 460.) The Wheeler-Howard Act, by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves.

"Neither the allotting of land in severalty nor the granting of citizenship has destroyed the tribal relationship upon which local autonomy rests. Only through the laws or treaties of the United States, or administrative acts authorized thereunder, can tribal existence be terminated. \* \* \*

"Save in such instances, the internal sovereignty of the Indian tribes continues, unimpaired by the changes that have occurred in the manners and customs of Indian life."

The argument advanced in Mrs. Westwood's memorandum with respect to the Fort Belknap community seems to be based upon a misinterpretation of the Fort Belknap constitution. The Fort Belknap Indians have long been recognized as a tribe, owning tribal land and possessing certain tribal funds. At the same time the existence of the Assiniboin and Grosventre Tribes on this reservation has been recognized for certain purposes. The statement that "no formal transfer to the new group was made of whatever powers the constituent tribes may have had" is incorrect. Article V, section 4 expressly refers to "rights and powers heretofore vested in the tribes of the Fort Belknap Indian Community" and impliedly confirms the surrender of such power in the matters expressly covered under section 1 of that article.

I do agree entirely with Mrs. Westwood in thinking that a broader interpretation of section 17 would be administratively desirable, and that the interpretation which I have given to the phrase in dispute will prove very annoying in the future operations of those groups now organizing on a reservation basis.

For the present, however, and on the basis of the conclusions reached above, I do not think it necessary to modify any of the clauses in the attached constitutions dealing with tribal powers.

Undoubtedly, under the foregoing interpretation, the power to levy taxes, to regulate trade, to regulate inheritance, and to maintain law and order is very severely limited. However, I think that certain exercises of these powers may be justified on the basis of tribal ownership of land. I think too that those powers which are subject to departmental review may be amplified from time to time through the surrender or delegation of departmental powers which are not specifically conferred upon the Department by act of Congress but are only tenuously derived from such acts. (For example, departmental powers in the maintenance of law and order.)

It might be better policy to tell these Indians from the start just what the restrictions on their future powers will be. There are, however, in this case countervailing considerations of policy which make it undesirable to delay these constitutions any longer. From a strictly legal point of view we cannot object to a grant of power merely because that power may be used in an illegal way. Any of the powers in any constitution might be used illegally. Furthermore, the statement of powers in these constitutions is expressly restricted by applicable Federal laws. (The Indians themselves suggested that further restrictions imposed by State laws be respected, but this phrase was eliminated at Mr. Flanery's suggestion.) I think that where a stated power vested in the tribal organization can be used for proper and legal purposes, we should give the tribe the benefit of the doubt and approve the constitution. Specific questions of abuse of power will arise inevitably and will be considered when they do arise. For these reasons I am initialing the attached letters and constitutions while recording my opinion that they do not and cannot confer the broad powers which, under Mrs. Westwood's interpretation of section 17, they would confer.

*F. L. Cohen*

Assistant Solicitor.

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