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Rosemary Sweeney

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# FEDERAL ACKNOWLEDGEMENT OF INDIAN TRIBES: CURRENT BIA INTERPRETATIONS OF THE FEDERAL CRITERIA FOR ACKNOWLEDGMENT WITH RESPECT TO SEVERAL NORTHWEST TRIBES

Rosemary Sweeney\*

After taking from Indian tribes their land and their identity, and violating many of the treaties it made with them, the federal government established a lengthy and expensive process that Indian tribes must go through to obtain federal acknowledgment. Federal acknowledgment brings health, education, and housing benefits. In order to obtain federal acknowledgment, a presently unacknowledged Indian tribe must prove that it meets seven criteria. This process often requires more than twenty years, substantial funds, and untold man-hours of labor by the tribe, its hired experts and lawyers, and the understaffed Branch of Acknowledgment and Research of the Bureau of Indian Affairs.<sup>1</sup> The process cannot be viewed in isolation. Past federal policies regarding Indian tribes have often, though not always, made it less likely that modern tribes are able to meet the criteria.

From the outset, breathtaking arrogance governed European interactions with North American Indians. This interaction resulted in the Indians' loss of eighty-six million acres of North American land<sup>2</sup> and the acquisition of lifestyles characterized by poverty, frustration, and despair.<sup>3</sup> Europeans initially believed that they were authorized by God to do whatever was necessary to bring Catholicism to the Indians.<sup>4</sup> This included war and

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\*J.D., 2001, University of Washington School of Law; Ph.D., 1982, University of Colorado at Boulder. The author is a patent attorney in private practice in Seattle, Washington.

1. The Branch of Acknowledgment and Research currently has a backlog of over 200 petitions for acknowledgment. At least some documentation has been submitted for about seventy-two of these petitions. BUREAU OF INDIAN AFFAIRS, BRANCH OF ACKNOWLEDGMENT AND RESEARCH, SUMMARY OF ACKNOWLEDGMENT CASES, at <http://www.doi.gov/bia/bar/indexq.htm> (last visited Apr. 4, 2000) (on file with author).

2. Sidner Larson, *Fear and Contempt: a European Concept of Property*, 21 AM. INDIAN Q. 567, 567 (1997).

3. Infant mortality among US Indians is 1400% the national rate. About 50,000 U.S. Indian homes are officially considered uninhabitable. Indians die from exposure at five times the national rate and from malnutrition at twelve times the national rate. The suicide rate among U.S. Indian teenagers is 10,000% that of non-Indian youth. Ward Churchill, *Charades Anyone? The Indian Claims Commission in Context*, 24 AM. INDIAN CULTURE & RES. J. 43, 45 (2000).

4. Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in THE EXPANSION OF EUROPE: THE FIRST PHASE 191-92 (James Muldoon ed., 1977); Bull "Inter Caetera Divinae" of Pope Alexander VI Dividing the New Continents and Granting America to Spain (May 4, 1493), in CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 153-57 (Sidney Ehler & John Morrall transl. & eds., 1967).

violent punishment. An implicit assumption was that Native Americans would be improved by European contact because they were "naked," had "no iron or steel weapons," and did "not hold any creed."<sup>5</sup>

However, when the brutality with which the Spanish implemented this policy became known, not all Spaniards felt that God authorized this conduct. In 1511, a Dominican friar, Antonio de Montesinos, was the first to publicly denounce Spanish brutality on the island of Hispaniola.<sup>6</sup> In 1532, Francisco de Victoria, a Dominican scholar, presented a lecture entitled "On the Indians Lately Discovered," which became very influential in shaping future thought on how the Indians should be dealt with.<sup>7</sup> De Victoria posited that Indians had natural legal rights as a free people and that the pope had no authority to grant any nation the right to subjugate them. However, he also believed in the existence of a natural "Law of Nations" that bound all nations, including the Indians. Under this law, De Victoria felt that the Indians owned the land encompassed by the Americas, but were obligated to allow the Spanish to travel through these lands unhindered. So long as the Indians were not hurt by these activities, De Victoria believed the Spanish had a right to profit from trade and commerce. The Spanish also endeavored to bring Christianity to the Indians.<sup>8</sup> Although these ideas allowed the Spanish a large freedom to profit from the New World, they also recognized American Indian tribes as sovereign nations whose rights to their land could not be trampled without limits.

Relationships between North American Indians and Caucasians after the American Revolution were largely governed by the notions outlined by de Victoria. The policy of the United States was to sign treaties with Indians for their land rather than take it from them by force.<sup>9</sup> Two early Supreme Court cases gave further legal shape to American policy with respect to Indians. In *Johnson v. McIntosh*,<sup>10</sup> the Court found that when a European nation discovered land previously undiscovered by any other European nation, partial title to that land transferred to the discovering nation. Any Indians occupying the discovered land were not dispossessed; they retained the absolute right to use and occupy the land. The discovering nation held title, minus the right of use and occupancy, to all lands discovered. Thus,

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5. ROBERT F. BERKHOFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 6 (1978).

6. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 85-86 (1990).

7. *Id.* at 97-103.

8. *Id.* at 100-03.

9. Vine Deloria, Jr., *American Indians in Historical Perspective, in NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN LAW AND COLONIALISM BEFORE 1776-1903*, at 123, 125-26 (John R. Wunder ed., 1996).

10. 21 U.S. (8 Wheat.) 453 (1823).

the U.S. government held partial title to all lands discovered by Americans on the American continent. Consequently Indians could not transfer the entire title to their land to any party other than the government.

A second case, *Worcester v. Georgia*,<sup>11</sup> added a further clarification of Indian political rights and rights with respect to land. First, the Court found that Indian tribes, unless conquered, were sovereign powers, although dependent on the United States. Thus, states could not legislate or control any lands lawfully held by Indian tribes. In response to this holding, the state of Georgia passed laws distributing Cherokee lands to several counties in Georgia.<sup>12</sup> Shortly thereafter the U.S. Congress passed legislation authorizing the "removal" of Indian tribes from their homelands.<sup>13</sup> Nearly 16,000 Cherokees, as well as Indians of many other tribes, were forced to march west of the Mississippi, an epic now called the "Trail of Tears."<sup>14</sup>

Before Caucasians took up residence in the Pacific Northwest in 1827,<sup>15</sup> around forty-five thousand Indians populated the area.<sup>16</sup> These included the Salish tribes, who occupied the Pacific Coast of Washington State and the coastlines of Puget Sound and Georgia Strait, near the present-day cities of Seattle and Vancouver.<sup>17</sup> According to some accounts, the coastal Indians were able to make a living with very little labor by fishing for very abundant salmon.<sup>18</sup> They lived as a large number of distinct groups, engaging in frequent intermarriage and trade.<sup>19</sup> The tribes formed a sort of net spanning the region, where each tribe could be seen as a knot in the net.<sup>20</sup> Marriage to someone in a distant place was considered advantageous both economically and politically.<sup>21</sup> Such marriages allowed families to share resources of the tribe that their son or daughter married into and also made attack by that tribe less likely.<sup>22</sup> Because of frequent intermarriage,

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11. 31 U.S. (6 Pet.) 515 (1832).

12. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, in *NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN LAW AND COLONIALISM BEFORE 1776-1903*, at 136, 139 (John R. Wunder ed., 1996).

13. *Id.* at 142-43.

14. Deloria, *supra* note 9, at 129; see also DAVID H. GETCHES & CHARLES F. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 97 (2d ed. 1986).

15. ALEXANDRA HARMON, *INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND* 15 (1998).

16. Cliff Snider, as told to R.J. Bob Brown, *In the Beginning — The Chinook Indian Nation*, in *CHINOOK INDIAN TRIBE, CHINOOK NATION* (n.d.) (available from the Chinook Tribe upon request).

17. Margaret Greene, No. Indian 93-1, app. B at 7 (Dep't of Interior, Aug. 31, 1995).

18. JAMES C. STRONG, *WAH-KEE-NAH AND HER PEOPLE, THE CURIOUS CUSTOMS, TRADITIONS, AND LEGENDS OF THE NORTH AMERICAN INDIANS* 126 (G.P. Putnam's Sons 1893).

19. HARMON, *supra* note 15, at 85.

20. Margaret Greene, No. Indian 93-1, app. B at 10.

21. *Id.* app. B at 7.

22. *Id.* app. B at 7-8.

many Salish Indians were related by blood to members of other groups or tribes.<sup>23</sup>

The first Caucasians to settle in the Pacific Northwest were employees of the Hudson's Bay Company.<sup>24</sup> In the first half of the nineteenth century, Indians and Caucasians interacted in ways that each perceived to be to their advantage.<sup>25</sup> Northwest Indian views on many matters, including justice,<sup>26</sup> war,<sup>27</sup> etiquette,<sup>28</sup> personal hygiene,<sup>29</sup> and personal property<sup>30</sup> were very different from those of the Caucasian settlers in the area. The vastly outnumbered white settlers traded desirable items, such as blankets, clothes, guns, and ammunition, for fish, furs, and services from Indians, such as transportation in their canoes.<sup>31</sup> Although the white settlers perceived that they were profiting greatly from interactions with Indians, the Indians who interacted with them also found the association profitable due to the wealth they received and the prestige gained among other Indians because of their association with strange and wealthy foreigners.<sup>32</sup>

Most of these early settlers were men, and beginning in the 1820s marriage between settlers and Indian women was common.<sup>33</sup> This practice was consistent with the Salish practice of establishing links with distant tribes through marriage. White settlers were attractive matches because of their economic resources and because they could defend their in-laws' rights to remain on their lands.<sup>34</sup> The children of such unions were not always welcome in the emerging society of the white settlers.<sup>35</sup> This early dilution of Indian blood lines, which continued, led to difficulties in distinguishing people of mixed race from whites in the later half of the nineteenth century. Although some settlers valued and sought to maintain their contact with Indians,<sup>36</sup> others considered Indians no more than "human weeds, vegetable men, occupying the earth in its primitive form, as it were in trust until a superior race supplants them."<sup>37</sup> Given such attitudes, it is not surprising

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23. See HARMON, *supra* note 15, at 13-14.

24. *Id.* at 15.

25. *Id.* at 60, 62, 63.

26. *Id.* at 57, 75.

27. *Id.* at 91-95.

28. *Id.* at 48, 50.

29. *Id.* at 51.

30. Kenneth Tollefson et al., *Tribal Estates: a Comparative and Case Study*, 35 ETHNOLOGY 321 (1996) [hereinafter Tollefson et al., *Tribal Estates*]; see also HARMON, *supra* note 15, at 49.

31. HARMON, *supra* note 15, at 16, 52, 60.

32. *Id.* at 40, 42.

33. *Id.* at 30, 31; see also Margaret Greene, No. Indian 93-1, app. B at 10 (Dep't of Interior, Aug. 31, 1995).

34. Margaret Greene, No. Indian 93-1, app. B at 10.

35. *Id.*

36. See HARMON, *supra* note 15, at 107.

37. James Visscher, *The Place Between: A Cultural Center for the Duwamish Tribe* 10

that people with Indian heritage that was not immediately apparent in their appearance did not go out of their way to identify themselves as Indians. Thus, racial prejudice may have contributed to the dispersal of tribes.

In December 1854, Issac Stevens, then the governor of the newly formed Washington territory, began his campaign to persuade all tribes to sign treaties in which they gave up title to the land they occupied in exchange for land on reservations as well as certain services and a monetary payment.<sup>38</sup> Because Pacific Northwest tribes were already as far west as they could go, they could hardly be "removed" as eastern tribes had been. Therefore, reservations were created for them. An important goal of the treaties in Stevens' eyes was to encourage American settlement of the area by confining the Indians to reservations, because some settlers preferred not to live among Indians.<sup>39</sup> To make this project more manageable, Stevens often grouped tribes and bands into "treaty tribes" and appointed a head chief for these groups who could speak the Chinook jargon commonly used in dealings between Caucasians and Indians at the time.<sup>40</sup> These chiefs were often not tribal leaders in any general sense. This gave Stevens one person he could deal with. In reality, leadership in Salish tribes was often dispersed and for specific purposes. For example, an expert in a certain fishing technique might lead the tribe in this activity, but in no other activity. Stevens' treaties granted the tribes the right to fish in their "usual and accustomed grounds,"<sup>41</sup> a right that has been very valuable in recent years. Several similarly worded treaties were signed, such as the Point Elliot Treaty and the Medicine Creek Treaty.<sup>42</sup> Because Indians had no history of buying and selling land,<sup>43</sup> it is open to question how they viewed the treaties. They very likely expected that Stevens would finally pay for the use of land by white settlers as was promised in the treaties.<sup>44</sup> Native people likely understood the signing of the treaties to be a reciprocal affirmation of the participants' status and friendship, whereas the white settlers likely imagined that they had confirmed Indians' subjection to U.S.

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(1998) (unpublished Master of Architecture thesis, University of Washington) (on file with author).

38. HARMON, *supra* note 15, at 79; *see, e.g.*, Point Elliot Treaty, Jan. 22, 1855, U.S.-Duwamish, Suquamish, Etc., 12 Stat. 927, in 2 INDIAN AFFAIRS: LAWS AND TREATIES 669 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

39. HARMON, *supra* note 15, at 78, 86.

40. Visscher, *supra* note 37, at 11.

41. *See e.g.* Point Elliot Treaty art. 5, 12 Stat. at 928, *reprinted in* KAPPLER, *supra* note 38, at 670.

42. *See* Point Elliot Treaty, 12 Stat. 927, *reprinted in* KAPPLER, *supra* note 38, at 669; Medicine Creek Treaty, Dec. 26, 1954, U.S.-Nisqualli, Puyallup, Etc., 10 Stat. 1132, *reprinted in* KAPPLER, *supra* note 38, at 661.

43. HARMON, *supra* note 15, at 79.

44. *Id.*; *see, e.g.*, Point Elliot Treaty art. 6, 12 Stat. at 928-29, *reprinted in* KAPPLER, *supra* note 38, at 671.

authority.<sup>45</sup> Not all tribes signed a treaty because some found the terms unacceptable.<sup>46</sup>

However, the treaties did not bring about immediate change.<sup>47</sup> Payment to the Indians was slow in coming,<sup>48</sup> and officials were slow to mark the boundaries of reservations and, moreover, had no power to force Indians to live there.<sup>49</sup> Throughout the 1850s and 1860s, few Northwest Indians moved to the reservations.<sup>50</sup> During the 1870s and 1880s, as the Caucasian population in the area skyrocketed, some Indians acceded to pressure and went to live on the reservations. Indians often failed to conform to the new rules laid down by government agents, upon which were conditioned the Indians' receipt of land and services.<sup>51</sup> In any event, it was not possible for all Indians to move to reservations, because even if they were willing, the land base was inadequate to support them.<sup>52</sup>

In the late nineteenth century, the U.S. government viewed assimilation of Indians into the general population as a way to solve the "Indian problem."<sup>53</sup> In general terms, the plan was to segregate Indians from the white population on reservations and remake them in the white American image.<sup>54</sup> One aspect of the plan involved giving land allotments to individual Indians hoping to break Indians' attachment to tribes and instill pride of ownership, a hallmark of American civilization.<sup>55</sup> However, Indians were not universally pleased by the allotment system. To some, the idea of individually owning land, instead of using it in common with other members of their tribe, was one they were not ready to accept.<sup>56</sup> To some it meant giving up fields they had cleared to people who had done nothing.<sup>57</sup> Others who took allotments had to wait so long for certificates entitling them to the land they accepted that they left the reservation to take homesteads in the public domain instead.<sup>58</sup> Another aspect of the remaking was the education of Indian children in reservation schools, where teachers tried to transform Indians into good and industrious Yankees.<sup>59</sup>

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45. HARMON, *supra* note 15, at 82-83.

46. *Id.* at 85; *see also* 62 Fed. Reg. 8983 (1997).

47. HARMON, *supra* note 15, at 97.

48. *Id.* at 96.

49. *Id.* at 97.

50. *Id.*

51. *Id.* at 98.

52. Kenneth D. Tollefson, *The Political Survival of Landless Puget Sound Indians*, 16 AM. INDIAN Q. 213, 221-22 (1992) [hereinafter Tollefson, *Political Survival*].

53. HARMON, *supra* note 15, at 160.

54. *Id.* at 103.

55. *Id.* at 113.

56. Tollefson et al., *Tribal Estates*, *supra* note 30, at 323.

57. HARMON, *supra* note 15, at 114.

58. *Id.*

59. *Id.* at 115-16.

The Indian Reorganization Act of 1934 (IRA) signaled a short-lived reversal of the assimilationist policy that prevailed throughout the late nineteenth and early twentieth centuries. The IRA allowed tribes to adopt formal governing structures including federally chartered corporations with the authority to manage tribal assets.<sup>60</sup> Although some Northwest tribes organized governments under the IRA,<sup>61</sup> such organizations had little impact on the lives of most Western Washington Indians at least through the 1940s.<sup>62</sup> Insufficient financial support was probably a partial cause of this, as was the fact that many Indians directed their energies into well-paying civilian jobs in the lumber, fishing, naval, and aircraft industries that became available during World War II.<sup>63</sup>

In 1953, Congress reversed its relatively benevolent stance towards tribes with the passage of a resolution announcing termination of the relationship of the U.S. government and the tribes as the formal policy of the government.<sup>64</sup> Subsequently, 109 tribes were terminated, meaning that their tribal sovereignty was ended, their lands sold, all federal programs discontinued, and state legislative and judicial jurisdiction imposed.<sup>65</sup>

The Nixon administration gave the impetus for many pieces of legislation beneficial to Indian tribes.<sup>66</sup> Nixon sought to "strengthen the Indian's sense of autonomy without threatening his sense of community"<sup>67</sup> and felt that tribes should be encouraged to exercise greater self determination.<sup>68</sup> Since this time, Congress has passed many pieces of legislation beneficial to tribes.<sup>69</sup>

This history of alternate governmental encouragement and discouragement of tribal cohesion, left many Northwest tribes scattered by the 1970s and, consequently, more likely to be omitted from BIA lists of recognized tribes. Short of obtaining an act of Congress conferring federal recognition upon a tribe,<sup>70</sup> unrecognized Northwest tribes were forced to petition the BIA to obtain federal acknowledgment of their existence.

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60. *Id.* at 195.

61. *Id.* at 201-05.

62. *Id.* at 205.

63. *Id.*

64. GETCHES & WILKINSON, *supra* note 14, at 131-32.

65. *Id.* at 134-36.

66. *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2000); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1994).

67. *President's Message to Congress: The American Indian*, 116 CONG. REC. 23,131 (1970).

68. *Id.*

69. *See, e.g.*, Indian Education Act of 1988, 25 U.S.C. §§ 2601-2651(2000); Tribal Self Governance Act of 1994, 25 U.S.C. § 450 (2000).

70. William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 41-42 (1992).

*The Administrative Route for Federal Acknowledgment*

Achieving federal acknowledgment by satisfying the criteria laid down in 25 C.F.R. §§ 83.7, 83.8 is a process that is characterized by massive amounts of paper and the passage of many years.<sup>71</sup> Tribes typically refer to petitions in pounds or inches, rather than pages. The BIA ultimately reciprocates to such a petition with a massive finding of its own including four distinct documents, a Summary of Criteria and Evidence, a Genealogical Report, an Anthropological Report, and a Historical Report. In the case of the successful petition for acknowledgment of the Cowlitz Tribe, these documents came to about 245 pages. This reply takes years to come.<sup>72</sup>

Before 1978, tribes obtained recognition by congressional action or by various forms of administrative decision.<sup>73</sup> There were no administrative standards for determining whether a tribe was or should be federally acknowledged. The BIA kept a list of Northwest tribes with whom it had "formal relationships," which apparently could be changed on the advice of a branch office of the BIA.<sup>74</sup> According to one BIA employee, "It was never intended to be a list of federally recognized tribes as such, [although] it may have evolved into that."<sup>75</sup> This haphazard practice led to inconsistencies between lists created in different years, profoundly impacting tribes. For example, the Samish tribe was on the 1966 list, but not on the 1969 list. Apparently, the Portland Office advised the BIA that the Samish should be recognized "for claims purposes only."<sup>76</sup> This seemingly casual bureaucratic communication, made for now-unknown reasons,<sup>77</sup> led to a twenty-five-year struggle for federal acknowledgment by the Samish.

In 1978, due to an increasing number of requests for federal acknowledgment by tribes, in order to enable them to "take a uniform approach in their evaluation,"<sup>78</sup> the Department of the Interior adopted a set of regulations governing federal acknowledgment. These rules established seven mandatory criteria, all of which a petitioning tribe had to fulfill in order to obtain federal acknowledgment.<sup>79</sup> The rules required not only that the members of the tribe be descendants of a historical tribe, but also that the tribe maintained its status as a political entity from historical times until the

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71. For example, it took the Samish Tribe twenty-four years to achieve acknowledgment. See *Greene v. Babbitt*, 943 F. Supp. 1278, 1281 (W.D. Wash. 1996); 61 Fed. Reg. 15,825 (1996).

72. See *infra* notes 103-10, 176-80 and accompanying text.

73. 59 Fed. Reg. 9280 (1994).

74. Margaret Greene, No. Indian 93-1, app. B at 1 (Dep't of Interior, Aug. 31, 1995).

75. *Id.*

76. *Id.*

77. *Id.*

78. 43 Fed. Reg. 39,361 (1978).

79. 25 C.F.R. § 83.1-83.13 (1985). See tbl. I for a paraphrased version of these criteria.

present.<sup>80</sup> Decisions under these regulations were reconsidered within the Department of the Interior only upon the request of the Secretary of Interior.<sup>81</sup> Presumably, then, the only path for appeal that a petitioning tribe could control was an appeal to the federal courts through the Administrative Procedures Act.<sup>82</sup> In that situation, however, the BIA's findings would be reviewed under a highly deferential standard,<sup>83</sup> and reversal would therefore be unlikely.

In 1994 a revision of the rules introduced many changes.<sup>84</sup> Although commentators on the new rules requested a specific statement on the weight of evidence required to meet the criteria, such as a preponderance of evidence, the BIA found this legal criteria inappropriate.<sup>85</sup> Instead, the BIA replied that "facts [to meet the criteria] are considered established if the available evidence demonstrates a reasonable likelihood of their validity,"<sup>86</sup> a standard with no established legal interpretation. To make up for this lack of clarity, the revision added language specifying types of acceptable evidence to show facts satisfying 25 C.F.R. § 83.7(b) and (c).<sup>87</sup> The new regulations also lowered the amount of evidence required for tribes previously acknowledged to exist by the federal government by, for example, signing or negotiating a treaty with the tribe in question.<sup>88</sup> But this change also imposed on previously recognized tribes the necessity of demonstrating their continuous existence as an entity recognizable to outsiders starting from the point of last federal acknowledgment, which, for most Pacific Northwest tribes, was 1855, when the Stevens treaties were signed. Previously unrecognized tribes had to demonstrate this criterion from 1900 to the present.<sup>89</sup> Thus, with respect to this criterion, previously recognized Northwest tribes who choose to be evaluated under 25 C.F.R. § 83.8(d)(1) and § 83.1(d)(3) may bear a heavier burden than previously unrecognized tribes evaluated under 25 C.F.R. § 83.7(a) and § 83.7(c). Another change of significance is the addition of more generous opportunities for independent review of a finding for or against federal acknowledgment by the Interior Board of Indian Appeals (IBIA).<sup>90</sup> However, such a review may be conducted with no actual hearing; a hearing occurs only at the discretion of the IBIA.<sup>91</sup>

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80. See 25 C.F.R. § 83.7(a)-(g) (1985).

81. 25 C.F.R. § 83.10 (2001).

82. 5 U.S.C § 702 (2000).

83. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

84. See 59 Fed. Reg. 9280 (1994); tbl. I.

85. 59 Fed. Reg. 9280 (1994).

86. *Id.*

87. *Id.* at 9281.

88. Compare 25 C.F.R. § 83.8(d)(1)-(3) (2001) to *id.* § 83.7(a)-(c).

89. Compare *id.* § 83.8(d)(1) to *id.* § 83.7(a).

90. See *id.* § 83.11.

91. *Id.* § 83.11(e)(4).

*Table I. The Federal Criteria for Acknowledgment*

1978 Regulations	1994 Regulations	
	Previous federal acknowledgment under 25 CFR § 83.8(d)?	
	YES	NO
Identification from historical times until the present on a substantially continuous basis as "American Indian." 25 CFR § 83.7(a).	Identification as an American Indian entity on a substantially continuous basis since the point of last Federal acknowledgment. 25 CFR § 83.8(d)(1).	Identification as an American Indian entity on a substantially continuous basis since 1900. 25 CFR § 83.7(a).
A substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian . . . and that its members are descendants of an Indian tribe which historically inhabited a specific area. 25 CFR § 83.7(b).	The petitioning group comprises a distinct community at present. 25 CFR § 83.8(d)(2).	A predominant portion of the petitioning group is a distinct community and has existed as a community from historical times until the present. 25 CFR § 83.7(b).
Petitioner has maintained tribal political influence . . . over its members as an autonomous entity throughout history until the present. 25 CFR § 83.7(c).	Petitioner maintains political influence or authority as an autonomous entity over its members at present. Petitioner has maintained political authority over its members from the point of last Federal acknowledgment until the present. Less evidence of past political authority is required than under 25 CFR § 83.7(c). 25 CFR § 83.8(d)(3).	Petitioner has maintained political influence or authority as an autonomous entity over its members from historical times until the present. 25 CFR § 83.7(c).
A copy of petitioner's governing document. 25 CFR § 83.7(d).	A copy of petitioner's governing document. 25 CFR § 83.7(d). 25 CFR § 83.8(d)(4).	A copy of petitioner's governing document. 25 CFR § 83.7(d).

<p>The membership must consist of individuals who have established . . . descendency from a tribe which existed historically. 25 CFR § 83.7(e).</p>	<p>The petitioner's membership consists of individuals who descend from a historical Indian tribe. 25 CFR § 83.7(e). 25 CFR § 83.8(d)(4).</p>	<p>The petitioner's membership consists of individuals who descend from a historical Indian tribe. 25 CFR § 83.7(e).</p>
<p>The petitioner's membership is primarily composed principally of persons who are not members of any other North American Indian Tribe. 25 CFR § 83.7(f).</p>	<p>The membership of the petitioning group is composed principally of persons who are not members of any other acknowledged tribe. 25 CFR § 83.7(f). 25 CFR § 83.8(d)(4).</p>	<p>The membership of the petitioning group is composed principally of persons who are not members of any other acknowledged tribe. 25 CFR § 83.7(f).</p>
<p>The petitioner is not, nor are its members, the subject of Congressional legislation which has expressly terminated or forbidden the Federal relationship. 25 CFR § 83.7(g).</p>	<p>Neither the petitioner, nor its members are the subject of Congressional legislation that has expressly terminated or forbidden the Federal relationship. 25 CFR § 83.7(g). 25 CFR § 83.8(d)(4).</p>	<p>Neither the petitioner, nor its members are the subject of Congressional legislation that has expressly terminated or forbidden the Federal relationship. 25 CFR § 83.7(g).</p>
	<p>If the petitioner cannot meet the requirements of 25 CFR § 83.8(d)(1) and (3), it may alternatively demonstrate it meets the requirements of 25 CFR § 83.7(a) and (c) from the time of last Federal acknowledgment until the present.</p>	

The Branch of Acknowledgment and Research (BAR) of the BIA evaluates acknowledgment petitions and issues guidelines for preparing petitions.<sup>92</sup> The criteria most often not met by petitioning tribes are 25 C.F.R. § 83.7(a), (b), (c), and, less frequently, (e).<sup>93</sup> With respect to 25 C.F.R. § 83.7(e), the BAR sets no minimum blood quantum requirement for tribal members for acknowledgment purposes; it requires only that tribal members be descended from a historic tribe.<sup>94</sup> With respect to 25 C.F.R. § 83.7(a), BAR requires evidence showing that outsiders knew that a group of

92. Official Guidelines to the Federal Acknowledgment Regulations, 25 C.F.R. § 83 (2001) [hereinafter Guidelines].

93. *Id.* at 58.

94. *Id.* at 38.

Indians, not a single Indian or one family, lived in a particular area.<sup>95</sup> BAR is vague on the meaning of "substantially continuous" with respect to this criterion.<sup>96</sup> With respect to 25 C.F.R. § 83.7(b), BAR defines historical times as those when the tribe in question first had sustained contact with non-Indians.<sup>97</sup> For Northwest tribes, this might be somewhere between 1820 and 1850. A showing of a geographical settlement in which more than half the tribe lived, of the maintenance of a language, or of extensive marriage within the tribe is relevant.<sup>98</sup> This last element is somewhat out of line with the historic practice of Salish tribes, which was to marry outside the tribe if possible.<sup>99</sup> Thus, this element tends to favor tribes not conforming with historic custom. A tribe can also satisfy this criterion by showing extensive interaction among tribal members such as social interactions.<sup>100</sup> Of course, it is quite intrusive on the privacy of tribal members to collect such data. With respect to 25 C.F.R. § 83.7(c), BAR states that no evidence of formal political structure is required, although it is acceptable, presumably even if formal leadership did not exist in the historic tribe. If such evidence does not exist, evidence of informal leadership must be offered. This includes evidence that conflicts have been resolved, that group efforts such as building or fundraising have occurred, or that mediation has occurred between the tribe and an outside group.<sup>101</sup> With respect to 25 C.F.R. § 83.7(e), marriage to non-Indians does not constitute a reason to deny acknowledgment as long as the Indian spouse and the children have maintained contact with the tribe. Only if the Indian spouse left the tribe will it present a problem for the tribe.<sup>102</sup> Thus, a low blood quantum among tribal members does not mean that 25 C.F.R. § 83.7(e) is not satisfied.

### *The Samish Experience*

The Samish started their twenty-four-year journey towards federal acknowledgment in 1972 with a petition for acknowledgment to the BIA.<sup>103</sup> At this time, Congress had begun to cut off federal programs for Indian tribes not recognized by the federal government.<sup>104</sup> Because the Samish

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95. *Id.* at 42.

96. *Id.*

97. *Id.* at 44.

98. *Id.* at 46.

99. Margaret Greene, No. Indian 93-1, app. B at 7 (Dep't of Interior, Aug. 31, 1995).

100. Guidelines, *supra* note 92, at 46-47. For examples of actual data used by the Duwamish Tribe, see Tollefson et al., *Tribal Estates*, *supra* note 30, and Tollefson, *Political Survival*, *supra* note 52.

101. Guidelines, *supra* note 92, at 48.

102. *Id.* at 37.

103. *Greene v. Babbitt*, 943 F. Supp. 1278, 1281 (W.D. Wash. 1996).

104. *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995) (citing 25 U.S.C. §§ 450-450n (2000)).

were dropped from a BIA list of tribes in the late 1960s,<sup>105</sup> their continued access to federal benefits depended on obtaining federal acknowledgment. As a result of the passage of the Indian Self-Determination Act, all benefits for unacknowledged tribes were legislatively cut off in 1975.<sup>106</sup> After this, Samish tribal members began to lose government benefits because of their lack of recognition.<sup>107</sup> As discussed above, at this time the BIA had no standards for determining federal recognition, and it therefore deferred consideration of the petition until 1979, when standards were in place.<sup>108</sup> In 1982, the Assistant Secretary of Indian Affairs published a proposed finding that the Samish should not be acknowledged.<sup>109</sup> A final decision denying acknowledgment was published in 1987.<sup>110</sup> The BIA found that the Samish failed to meet criteria under 25 C.F.R. §§ 83.7(b), (c), and (e) under the pre-1994 regulations.

At this juncture, the Samish could have appealed this finding to the federal courts under the Administrative Procedures Act;<sup>111</sup> but if they had, the BIA's decision would have been reviewed under the highly deferential standard accorded agency findings appealed by this route.<sup>112</sup> Because their petition was under the pre-1994 regulations,<sup>113</sup> the Samish were unable to appeal to the IBIA as could be done under the present 25 C.F.R. § 83.11. Instead, in 1989 the Samish filed suit in federal court, successfully arguing that their previous receipt of federal benefits created a property right that could not be taken from them without due process under the Fifth Amendment.<sup>114</sup> Because due process under the Administrative Procedures Act includes the right to present evidence and cross-examine experts before a neutral judge,<sup>115</sup> Judge Zilly remanded the case to the Office of Hearings and Appeals, a section of the Department of the Interior, for a hearing before an Administrative Law Judge on the question of whether the Samish were entitled to federal acknowledgment. In 1994, Judge David Torbett heard and evaluated evidence presented by the parties, essentially providing a *de novo* reconsideration of the agency decision with the benefit of live testimony

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105. See *supra* note 76 and accompanying text.

106. 25 U.S.C. 450b(e) (2000); see *Greene v. Lujan*, No.C89-6452, 1992 WL 533059, at \*7 (W.D. Wash. Feb. 25, 1992).

107. *Lujan*, 1992 WL 533059 at \*7.

108. *Greene v. Babbitt*, 943 F. Supp. 1278, 1281 (W.D. Wash. 1996); 25 C.F.R. § 83.1-83.13 (2001).

109. 47 Fed. Reg. 50,110 (1982).

110. 52 Fed. Reg. 3709 (1987). BAR's Summary under the Criteria and Evidence supporting this finding was one of the many documents that BAR told me it was too busy to send. Therefore, I am unable to give any details about their reasons for this decision.

111. 5 U.S.C. § 702 (2000).

112. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

113. 61 Fed. Reg. 15,825 (1996).

114. *Greene v. Lujan*, No. C89-6452, 1992 WL 533059, at \*1 (W.D. Wash. Feb. 25, 1992).

115. *Id.* at \*8; see also 5 U.S.C. § 554 (2000).

from the experts who wrote and evaluated the petition. He issued an exhaustive opinion, making numerous findings of fact and law, and ultimately found that the Samish should be acknowledged.<sup>116</sup> In issuing a final finding of acknowledgment in 1996, the Assistant Secretary of the BIA essentially affirmed Judge Torbett's finding.<sup>117</sup>

Judge Torbett made two major legal findings. First, he found that a petitioning tribe bears the burden of showing that they are a tribe under the criteria of 25 C.F.R. § 83.7.<sup>118</sup> Second, he found that this showing must be made by a preponderance of the evidence, taking into consideration both the quantity and quality of evidence.<sup>119</sup> He further comments that this standard is clearly embraced by the BIA's "reasonable likelihood of validity" standard.<sup>120</sup> That is, the evidence must show that it is more likely than not that the tribe actually meets the criterion in question.<sup>121</sup> This finding stood in contrast to the essentially standardless agency practice, as summarized in the testimony of Dr. George Roth during the hearing: "I'm afraid we just go on our — I'd say we would go on our professional judgment, within this strong and weak end of the scale. I suspect we have to some extent evolved — have some kind of evolving standard as we work on cases that are, if you will, somewhat towards the middle."<sup>122</sup>

Judge Torbett also came to a number of conclusions concerning how specific kinds of evidence should be evaluated in relation to the criteria for acknowledgment. For example, unlike BAR, he found that tribal pursuit of claims for government benefits or fishing rights evidenced a tribe's continued existence and political influence and authority over its members, which are required showings under 25 C.F.R. § 83.7(b), (c).<sup>123</sup> Furthermore, he found that, even though some Samish lived on reservations of other tribes, such as the Lummi and the Swinomish, significant evidence supported the "proposition that certain off reservation Samish continued to be a part of the Samish community."<sup>124</sup> Thus, he found it possible for a tribe with no geographic land base to satisfy the criteria for federal acknowledgment. He furthermore found that being a member of a tribe was a political affiliation and essentially a matter of intention on the part of the individual tribal member.<sup>125</sup>

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116. Margaret Greene, No. Indian 93-1, at 22 (Dep't of Interior, Aug. 31, 1995).

117. 61 Fed. Reg. 15,825 (1996).

118. Margaret Greene, No. Indian 93-1, at 3.

119. *Id.* at 3, app. A at 41-49.

120. *Id.* app. A at 49.

121. *Id.* app. A at 43.

122. *Id.* at 17.

123. *Id.* at 21-22.

124. *Id.* at 21.

125. *Id.* at 22.

Judge Torbett's findings of fact illuminate ethnological and historical facts. Dr. Sturtevant, one of the experts testifying on behalf of the Samish and the curator of North American ethnology at the Smithsonian Institution, "observed that no real Indian tribe would display all of the attributes of a "community" listed in 25 C.F.R. Part 83, as amended, particularly in modern times, and welcomed the fact that the amended regulations do not require this."<sup>126</sup> He also stressed the importance of interpreting the available evidence in light of the particular group's history, geography, culture, and social organization.<sup>127</sup> Dr. Hajda, another Samish expert witness, testified that marriages between white settlers and Salish Indians began almost as soon as the settlers arrived and that, because of racial prejudice, the children of such marriages had little choice but to consider themselves Indians.<sup>128</sup> This finding tends to rebut the assumption of BAR that children of mixed blood are more likely to dissociate from the tribe.<sup>129</sup>

Judge Torbett's decision also offered a rare and disturbing look into the kinds of research that BAR does in the course of evaluating a petition for acknowledgment. Dr. Sturtevant summarized his impression of BAR's research with respect to the Samish petition: "I think most of it would have trouble passing muster in a Ph.D. orals exam. How did you get to these results. Or a preliminary, before you go out to do the research on which your Ph.D. is based, how do you propose to get these results . . . I think most of these things would have difficulty in passing that kind of standard . . . (I)'s kind of sloppy and unprofessional research . . . ."<sup>130</sup> More specifically, he mentions that BAR's researchers didn't spend enough time in the field to overcome the Samish bias against government.<sup>131</sup> He also felt that BAR relied too heavily on telephone research, which he feels is less accurate than face-to-face research.<sup>132</sup> He also took issue with the fact that BAR's researchers tended to go straight to direct questions. He felt that this approach tends to produce biased answers. A better approach is to start with general questions and work in the direct questions later in the interview.<sup>133</sup> Given its limited resources and large workload, it is understandable that BAR tries to find out what it needs to know through phone calls. However, this practice

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126. *Id.* app. B at 26.

127. *Id.*

128. *Id.* app. B at 10.

129. *See, e.g.*, BUREAU OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF THE DUWAMISH TRIBAL ORGANIZATION 11-12 (1996), at <http://www.doi.gov/bia/bar/duwasum.htm> [hereinafter DUWAMISH SUMMARY] (on file with author).

130. Margaret Greene, No. Indian 93-1, at 7-8 (Dep't of Interior, Aug. 31, 1995).

131. *Id.* at 8.

132. *Id.*

133. *Id.*

apparently led, at least in the Samish case, to a decision based on inadequate information.

Judge Torbett's decision has no authoritative value with respect to the disposition of this particular case.<sup>134</sup> Regardless of his determination, the final decision as to whether the Samish are a tribe belongs to the Assistant Secretary for Indian Affairs of the Department of Interior.<sup>135</sup> However, the Assistant Secretary must explain his decision if it does not conform to norms,<sup>136</sup> and completely arbitrary decisions by the Assistant Secretary might be overturned on appeal by the federal courts.<sup>137</sup> Given the extensive support for Judge Torbett's decision in his opinion, it would have been difficult to adequately explain a reversal, and the Assistant Secretary did ultimately issue a finding that the Samish should be acknowledged.<sup>138</sup>

Will Judge Torbett's legal findings affect evaluation of future petitions at BAR? In general, the government is not precluded from relitigating a question of law, decided against it in one case, in a second case with another party.<sup>139</sup> In this situation, BAR may continue to make its decisions with no evidentiary standard until it is challenged. However, an agency is constrained by its duty to make decisions controlled by stable norms.<sup>140</sup> An agency has a "duty to explain its departure from prior norms. The agency may flatly repudiate those norms . . . whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."<sup>141</sup> At the time of this decision, the BAR had no clearly enunciated evidentiary standard;<sup>142</sup> thus they had no norm to direct their decisions. Judge Torbett corrected this situation by finding that petitioning tribes must show that they meet the criteria by a preponderance of evidence,<sup>143</sup> a showing commonly required in agency decision making.<sup>144</sup> Thus, it would seem that Torbett's finding with respect

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134. *Sokoloff v. Saxbe*, 501 F.2d 571, 576 (2d Cir. 1974); *see also* 61 Fed. Reg. 26,922 (1996).

135. *See* 61 Fed. Reg. 26,922 (1996).

136. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

137. *See* 5 U.S.C. § 702 (2000).

138. 61 Fed. Reg. 26,922 (1996).

139. 2 KENNETH DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 267 (3d ed. 1994).

140. *Nat'l Labor Relations Bd. v. Sunnyland Packing Co.*, 557 F.2d 1157, 1160 (5th Cir. 1977).

141. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

142. *See supra* note 122 and accompanying text.

143. Margaret Greene, No. Indian 93-1, app. A at 47-49 (Dep't of Interior, Aug. 31, 1995).

144. *See Sea Island Broad. Corp. of S.C. v. F.C.C.*, 627 F.2d 240, 243 (D.C. Cir. 1980).

to the required evidentiary showing should be adopted by BAR unless they wish to replace it with some other clear standard.

Findings of fact determined in administrative courts with adequate opportunity to litigate are accorded high deference when such decisions are appealed to federal courts.<sup>145</sup> This application of the doctrine of *res judicata* to proceedings in administrative courts has been applied to administrative proceedings supplying a hearing and procedural protections, but not to administrative decisions made without a hearing.<sup>146</sup> Because Torbett's opinion indicates that extensive testimony was heard in this case, it is likely that *res judicata* would apply to Judge Torbett's findings of fact. In most cases, facts are unique to the case. This case presents an unusual situation where many of the factual findings in the case are historical facts, the establishment of which might be useful to other tribes in the future, particularly Salish tribes. For example, the many Salish tribes often intermarried, and intertribal marriages had both political and economic advantages.<sup>147</sup> Such a factual finding might rebut a BIA finding that a low percentage of Indian ancestry meant an abandonment of a tribal way of life. Although there were wealthy and prominent individuals and special leaders whose influence was based on knowledge in a certain field or ownership of equipment used for certain purposes, such as a deer net or fish weir, there was an absence of formal leadership in Salish tribes.<sup>148</sup> Such a finding tends to rebut an assertion that a lack of formal leadership means that a tribe did not exist. Furthermore, these findings highlight how the criteria are in some cases inconsistent with customs of historic tribes. For example, evidence of formal leadership weighs towards satisfying 25 C.F.R. § 83.7(c), even though leadership was often informal in Salish tribes. Whether factual findings in one administrative determination can be applied to another depends on whether the same claim is involved in both cases, a difficult determination to make.<sup>149</sup> The doctrine of collateral estoppel is also invoked to block relitigation of factual findings in a variety of contexts<sup>150</sup> and might also be employed here.

### *The Cowlitz Experience*

The Cowlitz Indian Tribe is a combination of several groups that in the past lived as separate bands along the Cowlitz River from near its mouth to as far north as Randle, Washington.<sup>151</sup> When Lewis and Clark came to the

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145. *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 421-22 (1966).

146. 2 DAVIS & PIERCE, *supra* note 139, at 249.

147. Margaret Greene, No. Indian 93-1, app. B at 7-8.

148. *Id.* app. B at 9-10.

149. 2 DAVIS & PIERCE, *supra* note 139, at 254-58.

150. 2 *id.* at 259-64.

151. BUREAU OF INDIAN AFFAIRS, HISTORICAL TECHNICAL REPORT, COWLITZ INDIAN TRIBE

Pacific Northwest in 1805, the Cowlitz Indians consisted of four groups that lived along the banks of the Cowlitz River as it flowed from its origin at Mount Rainier to where it empties into the Columbia River sixty miles inland from the Pacific Ocean.<sup>152</sup> The Lewis River Cowlitz lived in the area between the Cascade Mountains and the lower part of the Cowlitz River.<sup>153</sup> They were a band of hunters and spoke a Salish language similar to their neighbors across the river, the Lower Cowlitz. The Lower Cowlitz were the largest of the four groups and lived in the lowland foothills on the west banks of the Cowlitz River.<sup>154</sup> The Mountain Cowlitz, a third group, lived west of the Lower Cowlitz and spoke a similar language.<sup>155</sup> Although the Mountain Cowlitz relied more heavily on seafood for sustenance, their culture was very similar to that of their neighbors, the Lower Cowlitz.<sup>156</sup> The fourth group was the Upper Cowlitz, who lived along the upper reaches of the Cowlitz River, extending into the Cascade Mountains between Mount Rainier and Mount Adams.<sup>157</sup> The Upper Cowlitz spoke the Salish language of the Lower Cowlitz as well as their own Sahaptin language.<sup>158</sup> Many of them also spoke the Chinook jargon that was used for trade throughout the Pacific Northwest.<sup>159</sup>

An early explorer described the Upper Cowlitz as an extremely contented people given to "incessant gaiety."<sup>160</sup> However, by the end of the nineteenth century the interaction of the Upper Cowlitz with the European settlers left them little cause for gaiety. Disease decimated this band, leaving less than thirty-eight members by 1880.<sup>161</sup> Previously they numbered between 300 and 600 people in the mid-nineteenth century.<sup>162</sup> The growing dependence of the Upper Cowlitz on the help and manufactured goods of the European settlers led to an undermining of traditional values and lifestyles.<sup>163</sup> This led to many deaths among the Upper Cowlitz during the exceptionally harsh winter of 1861. Not all of the Upper Cowlitz prepared for this winter in the

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1, at <http://www.doi.gov/bia/bar/cowhist.htm> (last visited Nov. 21, 2000) [hereinafter COWLITZ HISTORICAL] (on file with author).

152. Wendy Ellen Williams, *The Cowlitz River Hydroelectric Project and Its Effect on the Upper Cowlitz Indians* 19 (1983) (M.A. Thesis, Dep't of History, University of Washington).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (citing VERNE R. RAY, *HANDBOOK OF COWLITZ INDIANS* 252 (1974)).

158. *Id.* at 21.

159. *Id.*

160. *Id.* at 23 (citing *Diary of Lt. Wilkes in the Northwest*, 16 WASH. HIST. Q. 206-07 (1925)).

161. *Id.* at 24.

162. *Id.* at 30 n.4 (citing MORTON J. (Oct. 21, 1982)).

163. *Id.* at 23.

traditional way by preparing dried roots and meats to sustain them.<sup>164</sup> In addition, alcoholism began to erode the traditional lifestyle of the Upper Cowlitz, leading to the conversion of many to the Indian Shaker religion.<sup>165</sup>

Between 1812 and 1855, frequent intermarriage between Cowlitz women and French Canadian fur traders gave rise to a substantial group of so-called "metis" families.<sup>166</sup> For example, Simon Plamondon, Sr., a French-Canadian employee of the North West Company married the daughter of the Lower Cowlitz Chief Scanewa, Thas-e-muth.<sup>167</sup> Although his Cowlitz wife died young, Plamondon remained there in the Cowlitz valley, raising his four children by Thas-e-muth.<sup>168</sup> During the nineteenth and early twentieth centuries, these metis families intermarried among one another, with European settlers, or with Cowlitz families.<sup>169</sup> Many descendants of Cowlitz metis families continued to live in Lewis and Cowlitz Counties in Washington and remained active in the Cowlitz tribal organization until 1974, when the Cowlitz adopted a blood quantum of 1/16, which many metis descendants could not meet.

In the mid-nineteenth century, the U.S. government made several unsuccessful attempts to induce all the Cowlitz groups to give up their traditional homelands and go to live on a reservation. In 1848, the superintendent of Indian affairs for Oregon Territory set aside 640 acres on the west side of the Cowlitz River in Lower Cowlitz territory for use by all Indians living anywhere along the length of the river.<sup>170</sup> Rather than moving to this reservation as the government had hoped, all of the Cowlitz groups stayed on their homelands.<sup>171</sup> In 1855, 144 representatives of all four Cowlitz groups attended a treaty council with Territorial Governor Isaac Stevens on the Chehalis River, just northwest of the Cowlitz territory.<sup>172</sup> Stevens proposed that the Cowlitz should sign a treaty ceding all their land to the U.S. government in exchange for a cash payment and a reservation on the Pacific Coast of the present-day state of Washington. The Cowlitz, like the Chinook, who also attended the council, refused to sign the treaty because they did not want to leave their homelands to live in a distant reservation along with other tribes, such as the Quinault, with whom they did

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164. *Id.* at 23-24.

165. *Id.* at 24-25.

166. BUREAU OF INDIAN AFFAIRS, GENEALOGICAL TECHNICAL REPORT, COWLITZ INDIAN TRIBE 6, at <http://www.doi.gov/bia/bar/cowhist.htm> (last visited Nov. 21, 2000) [hereinafter COWLITZ GENEALOGICAL] (on file with author).

167. COWLITZ HISTORICAL, *supra* note 151, at 18; COWLITZ GENEALOGICAL, *supra* note 166, at 6.

168. COWLITZ GENEALOGICAL, *supra* note 166, at 6-7.

169. *Id.* at 7.

170. *Id.*

171. *Id.* at 27.

172. *Id.*

not get along and with whom they could not communicate because of language differences.<sup>173</sup> The Quinault eventually signed the treaty.<sup>174</sup> Thus, the Cowlitz became one of many landless tribes in the state of Washington.<sup>175</sup> The refusal of the Cowlitz to sign Stevens' treaty, which might be taken as an indication that they were a strong and independent people, led to problems for the Cowlitz when they tried to obtain federal acknowledgment of their existence as an Indian tribe in the twentieth century. A land base, although not required, is an advantage in demonstrating some of the criteria.

The Cowlitz began a very recently completed effort to obtain federal acknowledgment with the submission of their petition for acknowledgment in 1975.<sup>176</sup> Because the BIA was then engaged in considering applying uniform standards to such petitions, it deferred consideration of the petition until 1978, when the petition was assigned a priority number.<sup>177</sup> In 1983 the Cowlitz submitted a new petition, which the BAR responded to with an obvious deficiency letter.<sup>178</sup> In response to the obvious deficiency letter, the Cowlitz withdrew the 1983 petition and submitted a third petition in 1987. BAR responded with a second obvious deficiency letter.<sup>179</sup> The Cowlitz submitted a response in 1994, and the BAR finally began active consideration of their petition. The Assistant Secretary issued a proposed finding for federal acknowledgment in 1997.<sup>180</sup> Although the Quinault Tribe opposed the federal acknowledgement of the Cowlitz Tribe under 25 C.F.R. § 83.11, the Cowlitz currently have received federal acknowledgement.<sup>181</sup>

The Quinault opposition to the Cowlitz petition for acknowledgment may stem from the fact that Cowlitz tribal members were permitted to take allotments on the Quinault reservation.<sup>182</sup> This could pose a problem for the Cowlitz under 25 C.F.R. § 83.7(f) or § 83.8(d)(4) because the Quinault could argue that these Cowlitz members are actually Quinault members, meaning that the Cowlitz may fail to meet these criteria. The Cowlitz received a letter prior to the Quinault opposition suggesting that the Quinault would not oppose the Cowlitz petition if all the Cowlitz members having allotments on the Quinault reservation gave them up.<sup>183</sup>

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173. *Id.* at 28-29.

174. *Id.*

175. *Id.*

176. BUREAU OF INDIAN AFFAIRS, DEPT OF INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING COWLITZ TRIBE OF INDIANS 5, at <http://www.doi.gov/bia/bar/cowsum.htm> [hereinafter COWLITZ SUMMARY] (on file with author).

177. *Id.*

178. *Id.*

179. *Id.*

180. 62 Fed. Reg. 8983 (1997).

181. 67 Fed. Reg. 607-08 (2002).

182. See *Halbert v. United States*, 283 U.S. 753, 759 (1931).

183. See Paul Shukovsky, *Quinalts, Chinooks Wage Legal Battle Over Recognition*,

The BIA's Summary of Criteria and Evidence<sup>184</sup> in support of its 1997 proposed finding for acknowledgment of the Cowlitz provides a view into the evaluation of evidence at BAR in the wake of the Samish case. Because BAR found that the Cowlitz participation in the treaty council of Chehalis River qualified as "previous Federal acknowledgment," the Cowlitz were allowed to be considered under the arguably more generous standards afforded previously acknowledged tribes.<sup>185</sup> Table II tabulates the kind of data that the BIA found relevant to 25 C.F.R. § 83.8(d)(1)-(3) and 25 C.F.R. § 83.7(e), criteria that petitioning tribes often fail to meet.

*Table II. Tabulation of Selected Portions  
of BAR's Summary of the Cowlitz Petition*

Criteria	Evidence found relevant
25 CFR § 83.8(d)(1)	<ol style="list-style-type: none"> <li>1. Historically, the Cowlitz were scattered bands living along the length of the Cowlitz River. Therefore, individual observers in the late nineteenth and early twentieth century were more likely to encounter small groups of Cowlitz rather than something that could be identified as a Cowlitz entity.</li> <li>2. Repeated identification of both Upper and Lower Cowlitz Bands as distinct entities by the BIA throughout the latter half of the nineteenth century.</li> <li>3. BIA correspondence with the Cowlitz from 1922-1932.</li> <li>4. Identification of the Cowlitz as an entity by the BIA and by scholars since the 1970s.</li> <li>5. External identifications by nongovernmental observers of Cowlitz individuals or families were frequent but without description of the Cowlitz Tribe as an entity.</li> <li>6. Obituaries of Cowlitz chiefs published in newspapers, which failed to describe the Cowlitz Tribe.</li> <li>7. Feature articles from newspapers from the early 1900s to the 1930s describing Cowlitz individuals or families, which did not describe the Cowlitz Tribe.</li> <li>8. Early twentieth century ethnographies discussing Cowlitz culture without discussing the Cowlitz as an organized social entity.</li> <li>9. Later studies that did identify the Cowlitz as an entity.</li> <li>10. Local histories written since 1950 discussing specific Cowlitz residential settlements.</li> <li>11. A local history based on extensive personal contact with several Cowlitz families for more than twenty-five years starting in the 1970's.</li> </ol>

*Resources*, SEATTLE POST-INTELLIGENCER, Apr. 7, 2001, at A1, A8.

184. COWLITZ SUMMARY, *supra* note 176.

185. See tbl. I; compare 25 C.F.R. § 83.7(a)-(g) (2001) to *id.* § 83.8(d)(1)-(5).

Criteria	Evidence found relevant
25 CFR § 83.8(d)(2)	<ol style="list-style-type: none"> <li>1. Although the modern Cowlitz Tribe is geographically dispersed, the pattern of dispersal is very similar to that observed by Charles Roblin in his 1919 census.</li> <li>2. The modern Cowlitz Tribe is composed of subgroups with relatively close interactions.</li> <li>3. The subgroups see themselves as sharing features that distinguish them from non-Indians and other tribes living in the same area.</li> <li>4. There is substantial social interaction within subgroups and primarily political interactions between subgroups.</li> <li>5. The subgroups maintain grave sites and hold extended family reunions.</li> <li>6. The General Council sued the City of Tacoma in 1955 to prevent the damming of the Cowlitz River in order to protect grave sites and subsistence fishing sites of Cowlitz families.</li> </ol>
25 CFR § 83.8(d)(3)	<ol style="list-style-type: none"> <li>1. Unbroken chain of named Cowlitz leaders since the treaty negotiation in 1855 until the present.</li> <li>2. Religious activities, kinship ties, and the existence of BIA-appointed leaders are evidence of informal leadership in the late 19th and early 20th centuries.</li> <li>3. In the 1920s and 1930s, Cowlitz leaders helped the BIA to track the progress of Cowlitz students at schools and to clarify issues of inheritance for various families and complained to the BIA about penalties for alleged fishing violations.</li> <li>4. Cowlitz Tribal Organization passed a resolution protesting increased regulation of fishing by the State of Washington in 1934.</li> <li>5. Evidence of informal leadership by non-elected tribal elders, continuation of claims-related and non-claims-related advocacy, and numbers of members attending meetings.</li> <li>6. From 1934 to the 1950s, Cowlitz leaders have responded to members' concerns about fishing rights and grave sites.</li> <li>7. From the 1950s to the present, the General Council resolved conflicts about membership, religious expression, land use on the Quinalt reservation, and adoption.</li> </ol>
25 CFR § 83.7(e)	<ol style="list-style-type: none"> <li>1. Federal censuses of 1900 and 1910.</li> <li>2. The 1919 Roblin Roll.</li> <li>3. Pre-1855 Roman Catholic Church records.</li> <li>4. Public vital records.</li> <li>5. Affidavits filed in the BIA in connection with adoptions and allotments.</li> <li>6. The fact that many Cowlitz families were of mixed blood did not mean the Cowlitz did not meet this criterion since these families had consistently lived among the Cowlitz.</li> </ol>

With respect to 25 C.F.R. § 83.8(d)(1), BAR found most evidence submitted, such as local histories or newspaper articles, unconvincing because they did not "describe how the particular Cowlitz families or

settlements were participating in the incorporated tribal organization.<sup>1186</sup> The most useful piece of evidence for one time period was a work of Judith Irwin based on academic research plus extensive personal contact with several Cowlitz families for more than twenty-five years.<sup>187</sup> Of course, the existence of such a detailed account of tribal interaction and operations is more or less a matter of chance and is a very high standard of evidence. However, the fact that such evidence did not exist for the whole time period did not mean that the Cowlitz failed this criterion. Nowhere in the evaluation of this criterion does BAR refer to a preponderance of evidence.

With respect to 25 C.F.R. § 83.8(d)(2), which requires a showing of the existence of a present-day community, BAR discussed both present and past data, even though it indicates that past data is irrelevant to the criterion.<sup>188</sup> It found clear evidence of the existence of subgroups that had abundant social interactions and engaged in activities such as extended family reunions, maintenance of grave sites, and religious activities.<sup>189</sup> Extended family reunions, as such, were not taken as evidence relevant to this criterion. However, because it was usual for such reunions to occur in close association with General Council meetings and to include Cowlitz members who were not members of the sponsoring extended family, these reunions were considered relevant.<sup>190</sup> BAR also mentions with approval the fact that the subgroups see themselves as sharing features that distinguish them from non-Indians living in the same area and other Indian tribes.<sup>191</sup> The subgroups are united primarily by political ties, although many families from different subgroups are related. Members of subgroups had extensive knowledge of group subsistence activities, religious differences, and political activities of members of other subgroups. Moreover, members of subgroups made efforts to ensure that their voting, membership, Indian Claims Commission status, and other interests were adequately represented at the tribal level.<sup>192</sup> Together, this evidence was found sufficient to show the existence of a present-day community sufficient to satisfy 25 C.F.R. § 83.8(d)(2).

Criterion 25 C.F.R. § 83.8(d)(3) requires the demonstration of continuous political influence over members from the point of last federal acknowledgment until the present. First, BAR found it relevant that an unbroken line of leaders could be named from 1855 until the present,<sup>193</sup> and evidence shows that these leaders did exert some political influence. For

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186. COWLITZ SUMMARY, *supra* note 176, at 10.

187. *Id.*

188. *See id.* at 13-21.

189. *Id.* at 17-18.

190. *Id.* at 18.

191. *Id.* at 16.

192. *Id.* at 21.

193. *Id.*

example, Lower Cowlitz leaders present at the Chehalis River Treaty Council of 1855 refused to sign the treaty or to agree to move to a reservation on behalf of the Cowlitz. Moreover, BIA-appointed Cowlitz leaders in the late nineteenth and early twentieth centuries were often bound by kinship ties to Upper and Lower Cowlitz, as well as the metis families,<sup>194</sup> suggesting to BAR that they might therefore be credible leaders of these somewhat diverse groups.<sup>195</sup> After the formation of the Cowlitz Tribal Organization in 1912, leaders were elected and widely attended meetings were held.<sup>196</sup> Through the twentieth century, the Cowlitz dealt with issues such as progress of Cowlitz students in schools, inheritance issues, alleged violations of state fishing regulations, protection of family burial plots, attorney contracts, pursuit of legal claims, enrollment qualifications, religious expression, land use planning on the Quinalt reservation (where some Cowlitz hold allotments), and adoption.<sup>197</sup> Such activities by tribal leaders led BAR to find that the Cowlitz Tribe was more than a claims organization and thus fulfilled the requirements of 25 C.F.R. § 83.8(d)(3).<sup>198</sup> This disparagement of claims activity as being of little relevance to any criterion stands in some tension, although probably not in direct conflict, with the findings of Judge Torbett in the Samish case discussed above.

Because many members of the Cowlitz are of mixed blood, it could be imagined that they might encounter some difficulty in meeting 25 C.F.R. § 83.8(e), which requires that the majority of a tribe's members be descended from a historical Indian tribe or tribes. Because the regulation does not specify that members must have any particular proportion of Indian ancestry, being of mixed blood should not matter unless the families involved were not consistently associated with the tribe throughout the relevant time period. Unlike in the Duwamish petition discussed below, mixed blood was no barrier to BAR's finding that the Cowlitz are descended from historic tribes. The evidence supporting the finding came from census data, public and church records, and affidavits submitted to the BIA.<sup>199</sup>

### *The Duwamish Experience*

The traditional homelands of the Duwamish included a region at the confluence of the Black, Cedar, and Duwamish Rivers south of Lake Washington, as well as areas along the Green and White Rivers and along the eastern shore of Puget Sound at Elliot Bay.<sup>200</sup> This last location is

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194. *Id.* at 23.

195. *Id.*

196. *Id.* at 23-24.

197. *Id.* at 25-29.

198. *Id.* at 29.

199. *Id.* at 29-30.

200. 61 Fed. Reg. 33,762 (1996).

where the city of Seattle is currently situated. Like other tribes,<sup>201</sup> the Duwamish suffered a decrease in population in the first half of the nineteenth century due to disease imported to the area by Caucasian settlers.<sup>202</sup> In 1850, the federal government offered "title donation claims" to attract more settlers to the Puget Sound Region.<sup>203</sup> White farmers seized Indian lands, burned their homes, drove them from their fisheries, shot some, and hung others.<sup>204</sup> In 1855, the Duwamish were lumped with other bands by Issac Stevens to form a "treaty tribe," appointing Sealth, a Suquamish man well liked by Caucasian settlers, as their "chief."<sup>205</sup> Although the Duwamish were promised a reservation within their traditional homelands, this never materialized.<sup>206</sup> A few Duwamish took allotments on established reservations but most did not because life on reservations meant government regulation, forced acculturation, loss of traditional resources, and suppression of traditional language, culture, and religion.<sup>207</sup> Nonetheless, there is some evidence of off-reservation Duwamish settlements persisting until at least 1896.<sup>208</sup> In 1915 the Duwamish produced a membership list that included the names of many full-blood Indians who lived in settlements in historic Duwamish lands between 1855 and 1900.<sup>209</sup> In 1925, the Duwamish formed the Duwamish Tribal Organization and prepared a constitution and bylaws.<sup>210</sup> Associated with the constitution was a 1926 membership list.<sup>211</sup>

Some off-reservation Duwamish continued to live in communities such as the Sackman and Dewatto Duwamish communities.<sup>212</sup> Because of racial prejudice, it was difficult for Indians to integrate into the growing white community in the late nineteenth and early twentieth centuries.<sup>213</sup> The Sackman Duwamish community near Bremerton supported itself by logging and engaging in traditional subsistence activities such as fishing, hunting, shellfish gathering, and berry picking. About twenty to thirty Duwamish usually resided in the Sackman community.<sup>214</sup> World War II opened up new job possibilities for the Sackman residents allowing some to purchase

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201. Following contact with Europeans, it is estimated that, due to diseases that the Europeans brought with them, Puget Sound Indians suffered a population decline of 85-95%. Visscher, *supra* note 37, at 10.

202. *Id.*

203. Tollefson, *Political Survival*, *supra* note 52, at 213-14.

204. *Id.* at 214.

205. Visscher, *supra* note 37, at 11.

206. *Id.* at 12.

207. *Id.* (citing Tollefson, *Political Survival*, *supra* note 52, at 222).

208. DUWAMISH SUMMARY, *supra* note 129, at 11-12.

209. *Id.* at 7-8.

210. *Id.* at 9.

211. *Id.*

212. Tollefson, *Political Survival*, *supra* note 52, at 214-17.

213. *Id.* at 214.

214. *Id.*

homes or install running water and electricity.<sup>215</sup> The Dewatto Duwamish community originated from the marriage of Asa Fowler (1837-1916) to Sclochsted, the youngest daughter of Chief Seattle.<sup>216</sup> This couple moved to Bainbridge Island to avoid discrimination from white settlers.<sup>217</sup> Later, their children fled to a remote area near Joseph, and the community they formed served as a focus of Duwamish fishing and hunting activities from 1935 to 1955.<sup>218</sup> After this, stepped-up pressure by the State Fish and Game Department forced the Duwamish to move their fishing and hunting activities elsewhere.<sup>219</sup> They continued to fish and hunt together at least into the 1990s.<sup>220</sup> Thus, even though the Duwamish lacked tribal land, some tribal members continued to associate and carry on traditional economic activities such as fishing and hunting.

In 1962, the Duwamish won \$64,000 from the United States government for a suit filed in 1927 to obtain money owed them since 1855.<sup>221</sup> This sum was promised as payment to the Duwamish for the land they surrendered in the Point Elliot Treaty in 1855, but the U.S. government never paid the promised money. Unlike in a tort or contract case,<sup>222</sup> no prejudgment interest was awarded to cover the period between 1855 and 1962 while the Duwamish were awaiting payment. Tribal membership, which was based at that time on participation in tribal activities, stood at 272 in 1963. Before payment was actually made, however, the BIA opened the rolls of the Duwamish Tribe to anyone who could demonstrate that they had Duwamish ancestors.<sup>223</sup> Because the payment of a judgment was imminent, there was, of course, a financial incentive to seek tribal membership. The membership swelled to 1,148, after which the judgment was dispersed, yielding a payment of \$56 per tribal member.<sup>224</sup> The notion that some members joined only to obtain their share of the judgment is given some credence by the fact that membership was back down to 240 by 1980.<sup>225</sup>

The Duwamish have struggled for over twenty years to obtain federal acknowledgment, and, although they have won victories in this struggle, the war is not yet over. Their first petition for federal acknowledgment was

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215. *Id.* at 215.

216. *Id.* at 216.

217. *Id.*

218. *Id.* at 216-17.

219. *Id.* at 217.

220. *Id.*

221. Visscher, *supra* note 37, at 13; Tollefson et al., *Tribal Estates*, *supra* note 30, at 328.

222. See JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 523 (1994) (citing NEV. REV. STAT. ANN. § 17.130 (Michie 1986); NEV. REV. STAT. ANN. §§ 524:1-a, 524:1-b (Michie 1983); FIRST RESTATEMENT OF CONTRACTS § 337 (1997)).

223. Visscher, *supra* note 37, at 13.

224. *Id.*

225. *Id.*

submitted in 1970s, before any regulations were in place.<sup>226</sup> A later petition was submitted in 1986<sup>227</sup> and was under review in 1994 when the new regulations were promulgated. The Duwamish therefore had the choice of being evaluated under the new or the old regulations. They chose the old regulations.<sup>228</sup> The BIA made a proposed finding against acknowledgment in 1996.<sup>229</sup> Thereafter, the Duwamish submitted additional arguments and historical materials, and the BIA ultimately reversed itself, making a proposed finding for acknowledgment just before President Clinton left office in January 2001.<sup>230</sup> Unfortunately for tribes facing the same hurdles in the future, the reasons for this reversal are not clear because documentation on the BIA's decision is not readily available.<sup>231</sup> The footnote to this Duwamish victory is that, upon assuming power, the Bush administration subjected this finding to "a hard and thorough look."<sup>232</sup> Ultimately, the BIA denied the Duwamish petition.<sup>233</sup>

In 1996 BAR found that the Duwamish failed to meet 25 C.F.R. § 83.7(a), (b), and (c). With respect to 25 C.F.R. § 83.7(a), BAR did not question that the Duwamish were a tribe at the time of first contact with white settlers or in 1855, when they signed the Point Elliot Treaty.<sup>234</sup> However, in spite of the evidence submitted describing small settlements of Duwamish,<sup>235</sup> BAR found that after 1855, the Duwamish were scattered, living separate from each other, and did not form a social group.<sup>236</sup> The primary evidence submitted by the Duwamish to satisfy this criterion focused on identification of the Duwamish as an entity by federal officials and

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226. Interview with Cecile Hansen, Chairwoman, Duwamish Tribe (Mar. 2001).

227. Tollefson et al., *Tribal Estates*, *supra* note 30, at 328.

228. DUWAMISH SUMMARY, *supra* note 129, at 3.

229. 61 Fed. Reg. 33,762 (1996).

230. Hector Castro & Mike Barber, *After Decades, Duwamish Tribe Wins Federal Recognition*, SEATTLE POST-INTELLIGENCER, Jan. 20, 2001, at B1.

231. I was initially informed by BAR that my requests for these and other documents that should be of public record would be answered. After numerous phone calls subsequent to not receiving the requested documents, BAR simply told me they were too busy to send these documents. Of course, I could have submitted a Freedom of Information Act request. However, I am certain that the documents that they would be forced to produce would not arrive in time for me to use them.

232. Sean P. Murphy, *Decisions on Status of Tribes Draw Fire: Bush Administration Reviews Parting Actions by Clinton Administration*, BOSTON GLOBE, Mar. 27, 2001, at A2, available in 2001 WL 3926281; see also *Ex-BIA Head's Tribal Business Deals Examined*, SEATTLE TIMES, Mar. 30, 2001, at B2, available in 2001 WL 3504449.

233. Paul Shukovshy, *Death Knell for Duwamish, Bush Administration Reaffirms Earlier Ruling That Tribe is Extinct*, SEATTLE POST-INTELLIGENCER, May 11, 2002, at B1.

234. DUWAMISH SUMMARY, *supra* note 129, at 4-5.

235. Tollefson et al., *Tribal Estates*, *supra* note 30, at 326-27; Tollefson, *Political Survival*, *supra* note 52. In a conversation in 2001, Ken Tollefson said that most of what he contributed to the Duwamish petition was contained in these two articles.

236. DUWAMISH SUMMARY, *supra* note 129, at 5.

documents.<sup>237</sup> However, BAR's guidelines emphasize that historical circumstances must be taken into consideration in making evaluations under the criteria.<sup>238</sup> The Duwamish submitted evidence showing that they were repeatedly driven, starved, and burned off land by white settlers and the U.S. military.<sup>239</sup> Moreover, in view of this, it is not surprising that the remaining Duwamish settlements, such as the Sackman and Dewatto settlements, were in isolated areas as far as possible from outside observers. It is thus not surprising that outside identification of such settlements were few.

With respect to 25 C.F.R. § 83.7(b), BAR found that the Duwamish failed to meet this criterion because it believed that the present-day Duwamish were not descendants of an Indian tribe that historically inhabited a specific area.<sup>240</sup> In support of its opinion, BAR cited the fact that the present-day Duwamish Tribal organization originated in 1925 and has existed ever since and that the tribe's members are "almost entirely of descendants from the families of marriages between Duwamish Indians and pioneer settlers."<sup>241</sup> This should be irrelevant because BAR sets no minimum blood quantum.<sup>242</sup> BAR further asserts that there is no evidence that these families were cohesive amongst each other or with the historic Duwamish tribe.<sup>243</sup> Such logic assumes that people of mixed blood are more likely to dissociate from the tribe than full-blooded Indians, an assumption that was vigorously contested by Dr. Sturtevant in the Samish proceeding with the following words: "I think one should be careful about making generalizations purely on the basis of blood. Partly because there's a tendency in this society and maybe many societies to overemphasize the importance of biology. It's what we call racism."<sup>244</sup> Judge Torbett, who presided over the Samish proceeding, specifically rejected inferences made on the basis of blood quantum.<sup>245</sup> Moreover, he found that cultural affiliation is largely a matter of the upbringing and social relations of the individuals involved.<sup>246</sup> It was problematic in BAR's view of the Duwamish petition that only 19% of the members of the 1925 Duwamish organization were also included in the 1919 list.<sup>247</sup> The Duwamish submitted extensive evidence of social interactions within their tribe.<sup>248</sup> However, BAR found that the Duwamish failed to

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237. *Id.* at 6.

238. Guidelines, *supra* note 92, at 36.

239. Tollefson et al., *Tribal Estates*, *supra* note 30, at 327-28.

240. DUWAMISH SUMMARY, *supra* note 129, at 6.

241. *Id.* at 6-7.

242. Guidelines, *supra* note 92, at 38.

243. DUWAMISH SUMMARY, *supra* note 129, at 7.

244. Margaret Greene, No. Indian 93-1, app. B at 30 (Dep't of Interior, Aug. 31, 1995).

245. *Id.* app. B at 32-33.

246. *Id.* app. B. at 30.

247. *Id.* at 9.

248. Tollefson et al., *Tribal Estates*, *supra* note 30, at 334.

meet the requirements of 25 C.F.R. § 83.7(b) for the following reasons : (1) there was no evidence of continuous social interaction; (2) most present members are of mixed blood; (3) the only group activities the membership has pursued are the pursuit of claims and federal acknowledgment; and (4) the Duwamish did not form a community distinct from surrounding non-Indians.

With respect to 25 C.F.R. § 83.7(c), BAR found that there was no evidence that the Duwamish tribe exerted political influence over its members at any time since 1925.<sup>249</sup> In support of this finding, BAR pointed to a lack of evidence that the Duwamish pursued any group activities other than pursuing claims and federal acknowledgment.<sup>250</sup> Moreover, BAR finds that they cannot consider the 1925 organization to be a continuation of the 1915 organization because the membership lists are different.<sup>251</sup> BAR's findings are problematic because they confuse blood quantum with community membership, ignore some historical circumstances, and insist, contrary to Judge Torbett's finding, that pursuing claims is not evidence of political activity.

### *Conclusion*

The process of obtaining federal acknowledgment is a long, expensive, and onerous task for tribes. The criteria under which petitions are evaluated are ones that a real Indian tribe, either modern or historic, might well fail to meet. A lack of evidence on things such as social interactions among members as much as a hundred years ago is interpreted to mean that no interactions took place, in spite of the fact that evidence of such things may be unobtainable. Standards are not uniformly applied. History is often not taken into account in a meaningful way, even though the regulations specify that it should be. BAR lacks the resources to adequately research the petitions and is forced to make decisions based upon limited information. Because there is no doubt that Caucasian encroachment on Indian land forced many tribes to disperse, that the Indians' loss was huge, and that the federal government failed to meet its treaty obligations, different criteria for acknowledgment or a more generous and predictable interpretation of existing criteria is clearly in order.

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249. DUWAMISH SUMMARY, *supra* note 129, at 16.

250. *Id.* at 14-16.

251. *Id.* at 14.

