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Acknowledging the Repatriation Claims of Unacknowledged California Tribes

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This paper focuses on the access of unacknowledged or unrecognized tribes, especially those in California, to legal rights of repatriation—that is, rights founded in statutes or administrative rules that are enforceable through the courts. Some tribes have been able to secure repatriation through negotiation even where legal rights have been uncertain or nonexistent by persuading a state or federal agency to cooperate in the return of skeletal remains or objects. Such negotiations have spared all interested parties the cost and distress of litigation. Often, however, it is difficult for tribes to conduct such negotiations unless they can make at least a colorable claim of legal entitlement to repatriation.

For the many federally unacknowledged tribes in California, therefore, it is important to know whether they can invoke legal rights of repatriation. Initially, it is worth clarifying exactly what it means to be an unacknowledged or unrecognized tribe. I want to underscore that a Native American group does not need to be acknowledged or recognized by the federal government to be a tribe. Federal recognition is merely an affirmative act by the federal government to acknowledge its trust respon-

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sibility and its statutory and other obligations to provide services and programs to Indian groups. The fact that the federal government has not provided this recognition or acknowledgment does not mean that an Indian group is not a tribe. But certain consequences flow from this recognition, the most important being the many services and programs in education, health, and welfare that the federal government provides to Indian people.

How does a tribe become acknowledged or recognized? The easiest way is to point to a treaty, statute, or presidential executive order that creates a reservation or indicates the tribe's existence. Outside of those easiest cases, however, tribes have no sure guides. For a long time there were court decisions and federal regulations that touched obliquely on what was required to be recognized as an Indian tribe. The whole process became much more systematic in 1978 when the Secretary of the Interior issued an official list of federally recognized tribes and promulgated regulations that were designed to create a process whereby tribes could apply for recognition or acknowledgment.[1] Those regulations made it exceedingly difficult for tribes to satisfy the requirements for acknowledgment if they could not locate a decisive treaty, statute, or executive order.

One of the most serious difficulties created for tribes seeking federal recognition under these regulations is that the regulations require proof of continuity in long historical sequence for Indian groups. Furthermore, Indian groups must show continuity of certain kinds of political organization and authority, and they must demonstrate continuity of general community understanding of the group as a Native American tribe. It has been very difficult for tribes, with limited funds and access to research materials, to establish recognition under this process. The regulations were relaxed a bit a few years ago, but the process is still extraordinarily slow and burdensome.

The burden of these recognition criteria and the process for satisfying them have been particularly onerous for California tribes. The reason goes back to the history of the failure of the federal government to ratify treaties that were made with California tribes in the early 1850s. These eighteen separate treaties were negotiated and signed, and the Indian people thought they meant something. As a consequence, members of California tribes moved from their ancestral lands to what they thought were the eight million acres of reservation lands that had been set aside for them. In fact, because the treaties were

never ratified, these lands were never set aside for them, and the lands they had left behind weren't protected either. Congress passed laws demanding that claimants to California lands file their claims through a special process, a process that was unknown to the tribes at that time. Furthermore, the Indians did not think they needed to assert land claims at all because they had been promised reservations. In the end, the tribes not only were unable to secure the reservations named in the treaties, but also lost the ancestral lands they had left behind.[2] So the most established and potent indicators of recognition, a treaty and reservation, were denied to California tribes. What followed from their landless state was dispersion, homelessness, starvation, and, on the part of the non-Indians residing in California at that time, systematic attempts at extermination. It is a horrible and tragic chapter in the history of this state.

Beginning around 1870, the federal government set aside some areas—usually by presidential executive order, sometimes by congressional statute—for what were described as the homeless Indians of California. These areas were often arid, steeply graded, and highly inaccessible. Consequently, large numbers of California Indians chose not to settle on these plots. Those areas became rancherias and reservations that did eventually achieve federally recognized status—and there are more than one hundred recognized tribes in California today, more than in any other state. But there were still many bands, groups, and individuals that did not acquire status by occupying these lands because they chose to live elsewhere. Not surprisingly, in California there are larger numbers of unacknowledged Indian people and more groups seeking to apply for federal acknowledgment than in any other part of the United States.[3]

What is especially unsettling about this state of affairs is that many of the individual Indians who belong to these groups seeking acknowledgment have other means of demonstrating very clearly to the federal government, indeed from the federal government, that they are Indian people. In the 1920s and again in the 1940s to 1960s, Congress authorized California Indians to pursue land claims litigation to achieve compensation for the lands that were lost when those eighteen treaties were not ratified by the Congress. This litigation was authorized for the entire group of California Indians as defined by ancestry, not just particular tribal groups. Large sums of money, although not nearly all that was owed, were distributed as a result of these lawsuits. In order to distribute that money,

however, lists or rolls had to be prepared of all the individuals who were entitled to receive the proceeds. People had to come forward and demonstrate their descendance from the people who were members of the groups that had entered into the unratified treaties back in the 1850s. Consequently, although there are official federal lists of people who are entitled to these distributions, many of the people on these rolls are not members of tribes that currently receive acknowledgment from the federal government. Here, in other words, is a federal indication that individuals are members of California Indian groups, and yet those same groups may not be able to satisfy the stringent criteria for federal recognition.

A second inexplicable aspect of the lack of recognition for California groups is that quite a few Indian people in this state possess allotments that were carved from the public domain rather than from reservations. These public domain lands were federal property, often forest lands, that were frequently located where reservations were supposed to have been created under the unratified treaties. Remarkably, many of the holders of these public domain allotments are members of groups that have not received federal acknowledgment. In the case of these allottees, the federal government is evidently denying a trust responsibility to them even though the federal government holds their allotments in trust and is responsible for managing those lands.

Both the existence of judgment fund rolls and the existence of public domain allotments mean that in California you do not have to guess who the Indian people are or put them through some elaborate process to demonstrate that they are genuinely Indian. And yet because these individuals have difficulty proving the kinds of continuity that the federal acknowledgment process demands—precisely because of the history of federal dislocation of California tribal groups—these individuals are not deemed members of federally recognized tribes, and they are denied the benefit of most federal Indian statutes and programs.

Recent developments in the Congress and the courts have given new benefits and new status to these California tribal groups. I will mention two. One is the Indian Health Care Improvement Act of 1988 (IHCIA),[4] which establishes eligibility for federal services provided by the Indian Health Service (IHS). The IHS is part of the Department of Health and Human Services, not the Department of the Interior (which administers the acknowledgment regulations). Importantly, the eligibility

standards of the IHCIA for California do not turn on whether a tribe is recognized by the Department of the Interior and placed on the official list maintained by that department. For California Indians in particular, an individual may establish eligibility for Indian Health Service benefits if he or she: (1) is descended from an Indian who was residing in California on June 1, 1852, if that individual lives in California, belongs to a community served by an IHS program, and is viewed as an Indian by the community in which she or he lives; (2) holds a public domain, national forest, or reservation allotment; or (3) is, or is descended from, an Indian who was identified as such pursuant to the termination acts of the 1950s. Thus, almost every California Indian is eligible for IHCIA services according to these standards, regardless whether his or her tribe is acknowledged by the Department of the Interior. Most significantly, the IHCIA was an amendment to the Snyder Act, the basic federal statute that the Secretary of the Interior uses as authority to deliver education, welfare, and many other benefits to tribes.

Several other federal statutes of the past fifteen years do not specifically mention California tribes, but more generally include tribes lacking Department of the Interior acknowledgment in classes of federal benefits. For example, the Job Training Partnership Act of 1982 has a subchapter establishing comprehensive training and employment programs for Native American communities. It specifies that its programs "shall be available to federally recognized Indian tribes...and to other groups and individuals of Native American descent."[5] Likewise, the Community Services Block Grant Program authorizes diversion of state block grant funds to Indian tribes, and defines such tribes as "those tribes, bands, or other organized groups of Indians recognized in the State in which they reside or considered by the Secretary of the Interior to be an Indian tribe or an Indian organization for any purpose."[6] Thus unrecognized California groups that do not appear on the Secretary's list are receiving federal benefits and a form of acknowledgment, at least if they are recognized by the state. In 1994, for example, California recognized the Gabrieleno/Tongva Tribe as the aboriginal tribe of the Los Angeles Basin.[7]

In the courts, unrecognized California groups have received noteworthy support. An important case decided by the United States Court of Appeals for the Ninth Circuit in 1994, *Malone v. Bureau of Indian Affairs*,[8] directly involved benefits provided by

the Department of the Interior under the Snyder Act. The benefits involved were higher education grants and loans. Under regulations set forth by the department, these benefits were limited to enrolled members of federally recognized tribes. What the Ninth Circuit said when a member of an unacknowledged tribe challenged this restriction was that the Department of the Interior had not followed proper procedures in promulgating the requirement. Furthermore, the department had erred in its interpretation of an earlier Ninth Circuit decision, and mistakenly thought it was required to impose an eligibility standard based on tribal recognition. According to the court, the department needed to go back, rethink its regulation, and follow proper procedures. Offering its advice, the court suggested that the department try to adopt criteria "consistent with the broad language of the Snyder Act," which simply says that benefits are available to Indians in the United States. It went on to "encourage the Bureau [of Indian Affairs] to look to eligibility criteria used in other Snyder Act programs such as those set forth in the 1988 Amendments to the Indian Health Care Improvement Act." In other words, the department and bureau were given strong indications that the IHCIA is not limited in its application to health benefits administered by the IHS. As a most recent expression of congressional intent, the IHCIA should be broadly interpreted to allow all benefits for California Indians, such as higher education grants, regardless whether they belong to federally acknowledged tribes.

An even stronger decision for unacknowledged California groups, although one from a lower federal court, is *Laughing Coyote v. United States Fish and Wildlife Service,* decided in 1994 in an unpublished opinion.[9] There the United States District Court for the Eastern District of California invalidated a Department of Interior, Fish and Wildlife Service regulation implementing the Eagle Protection Act[10] because it excluded unacknowledged tribes. This particular legislation permitted the taking of eagle parts for the religious purposes of Indian tribes where that was consistent with preserving the eagle population. A California Indian, whose descent from aboriginal California tribes was uncontested, was nonetheless denied a permit to take some eagle parts by the Fish and Wildlife Service. The basis for this denial was a regulation requiring that permittees be members of tribes on the Department of the Interior's list of recognized tribes. The federal court found this restriction "arbitrary and

capricious" in relation to the language and intent of the Eagle Protection Act, and struck it down.

In my view, the federal trust responsibility means that federal statutes are to be interpreted, when they are ambiguous, so as to benefit the Indian people. According to the Native American Graves Protection and Repatriation Act (NAGPRA), an Indian tribe is defined as any group that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[11] In California, it is plain that you do not have to be on the Department of the Interior's list of federally acknowledged tribes in order to be eligible for many types of Indian program benefits. So if the NAGPRA regulations restrict repatriation to tribes on that list, they misconstrue the statute. Of course, like all implementing regulations, those implementing NAGPRA will be entitled to some deference from the courts. But even that deference did not save the regulation in *Laughing Coyote*. The fact that the NAGPRA regulations exclude unacknowledged tribes does not make them right, and will not save them from litigation.

In thinking about eligibility to make claims for repatriation, it is important not to view NAGPRA as the only governing law. It is not. For example, the University of California system and UCLA have both established rules according to which Indian groups are entitled to seek repatriation if they are recognized by the federal government, but also if they are recognized by the state of California for any purpose. What does that mean?

The state of California does not have an official process, like the one the federal government administers, in which a tribal group applies to a federal agency or is placed on an official list of recognized tribes. There are some states on the East Coast that actually have state reservations, but California has none of these either. However, there are state laws that grant rights and benefits to tribes because of their status as Indians, and some of these are not restricted to federally acknowledged groups. For example, the Public Resources Code creates within the state government the Native American Heritage Commission, at least five of whose members are to be "elders, traditional people, or spiritual leaders of California Native American tribes, nominated by Native American organizations, tribes, or groups within the state." There is no limiting language at all restricting participation to federally recognized tribes. Furthermore, if one examines the process that occurs under the

California Environmental Quality Act, in which Indian groups must monitor and review excavations in their ancestral territories, it becomes apparent that tribes need not be federally recognized in order to participate.

Based on this survey of state law, it seems that in dealing with the University of California, one should not assume that the NAGPRA eligibility rules apply. They apparently do not. And there may be other agencies and operations besides the University of California where that is true as well. It is important for unrecognized groups to test the limits and legitimacy of any restrictive practices.

In the meantime, the Advisory Council on California Indian Policy, established by Congress in 1992, is recommending new federal legislation that will make it easier for California tribes to establish federally recognized status. The change in Congress since then has made prospects for enactment of this legislation dim. Nevertheless, one of the most gratifying things I've seen working with the Advisory Council is that recognized and unrecognized tribes are beginning to work together more effectively. With combined efforts, they may find they can successfully challenge the limiting language of the NAGPRA regulations.

NOTES

1. See 25 C.F.R. Part 83.
2. See Bruce S. Flushman and Joe Barbieri, "Aboriginal Title: The Special Case of California," 17 *Pacific Law Journal* 391 (1986).
3. See Carole Goldberg-Ambrose and Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes* (Report prepared for the Advisory Council on California Indian Policy, 1995).
4. 25 U.S.C. sec. 1679(b).
5. 29 U.S.C. sec. 1671.
6. 42 U.S.C. sec. 9903(d)(5).
7. California Assembly Joint Resolution No. 96, adopted August 31, 1994, Resolution Chapter 146.
8. 38 F.3d 433 (9th Cir. 1994).
9. A copy is on file with the author.
10. 16 U.S.C. secs. 668 et seq., implementing regulations at 50 C.F.R. secs. 22.1 et seq.
11. 25 U.S.C. sec. 3001(7).