Patrick O'Brien
General Manager
East Bay Regional Park District

Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on the Draft Legislation regarding
Indian Gaming and its Need and Effects in Northern California
June 6, 2005

Chairman Pombo and members of the Committee, thank you for the opportunity to appear before you today.

The East Bay Regional Park District (District) preserves for present and future generations a priceless heritage of natural and cultural resources near San Francisco Bay in Alameda and Contra Costa Counties, California.

Today, the District manages over 95,000 acres of land consisting of 65 regional parks, recreation areas, wilderness, shorelines, preserves and land bank areas. These areas are linked by 29 regional inter-park trials which connect to 1,150 miles of trails within our parklands. Ninety percent of the District's lands are protected and operated as natural parklands. We provide recreational and educational opportunities for millions of Bay Area residents, as well as visitors from across the United States and around the world.

The District is committed to maintaining a high quality, diverse system of interconnected parks which balances public usage and education programs with protection and preservation of our cultural and natural resources. More than 80 percent of District funding comes from property tax and assessment district levies in the two counties, park user fees, and park memberships.

Our commitment to cultural resources protection is strong and ongoing. Just last December the District acquired 617 acres that creates a permanent buffer for one of the most important Native American cultural resource sites in the East Bay, the Vasco Caves.

My testimony today addresses two topics:

(1) the direct and adverse impact of Indian reservation "shopping" by gaming developers on one of the crown jewels of our District parks, the Martin Luther King Jr. Regional Shoreline Park in Oakland, and a proposed new park unit at Point Molate in Richmond; and

(2) the discovery of unlawful administrative actions in the Department of the Interior that conferred Indian sovereignty on

the Lower Lake Rancheria over the objections of BIA officials and contrary to Federal law and Interior Department regulations.

A third topic, the draft legislation you have prepared to address off-reservation Indian gaming development, is the subject of separate correspondence which we will be forwarding to you shortly.

1. Impacts Of Reservation Shopping On The East Bay Regional Park District

a. Martin Luther King Jr. Regional Shoreline Park

The Martin Luther King Jr. Regional Shoreline Park is a 1,220-acre park visited by more than 300,000 people annually. It protects the remainder of a once-extensive marshland at San Leandro Bay, and is one of the last salt marshes in Oakland.

By notice of November 26, 2004, (69 Fed. Reg. 68970) the Interior Department announced that the Bureau of Indian Affairs (BIA) would prepare an environmental impact statement (EIS) on the proposed acquisition of land in trust for the purpose of constructing and operating a tribal casino on 35.45 acres of land within the City of Oakland and adjacent to the Martin Luther King Jr. Regional Shoreline Park. The District, the Cities of Oakland, Alameda, and San Leandro all oppose the casino development proposal. The Bureau of Indian Affairs reported that as of April 8, 2005, more than 400 letters had been received in opposition to the casino development proposal. We know of no local jurisdiction that supports it. Moreover on May 18, 2005, Governor Schwarzenegger issued a proclamation stating that he will "oppose proposals for the federal acquisition of lands within any urbanized area where the lands sought to be acquired in trust are to be used to conduct or facilitate gaming activities." Oakland is one such "urbanized area."

The District has expended tens of thousands of dollars and considerable time in addressing the environmental impacts of the casino proposal on the Martin Luther King Jr. Regional Shoreline Park. The burdens of the proposal are tantamount to an unfunded mandate, or hidden federal tax, on Alameda and Contra Costa County taxpayers. Moreover, the future acquisition in trust, if it occurs, will permanently withdraw real property from Alameda County's tax base.

Considerable preliminary evidence has been assembled and submitted to the Department of the Interior highlighting the potential adverse impacts that a 24-hour, 7-day per week gaming operation would have on the security of the Port of Oakland, the safety of flight operations at Oakland International Airport, traffic circulation, and existing commercial development. The anticipated environmental impacts associated with water and air quality, increased noise and light pollution, disruptive impacts on the Martin Luther King Jr. Regional Shoreline Park, and its wetlands, migratory birds, and shorebirds will require considerable additional time and resources to make a full assessment of the proposed casino's impacts. It is significant that the soils of the casino site are so polluted that the

site is subject to a deed restriction prohibiting the development of the land for human habitation. The site is also subject to a federal consent decree agreed to by the U.S. Army Corps of Engineers restricting development to uses that would be compatible to the purpose of preserving the Martin Luther King Jr. Regional Shoreline Park as habitat for migratory birds and waterfowl.

b. Proposed Gaming Casino at Point Molate, Richmond, CA

The former Naval Fuel Depot Point Molate (Point Molate) is a remarkable property. Despite many years of use by the Navy, Point Molate is principally comprised of hillside and shoreline open space, with rich natural, cultural, scenic and recreational resources. Pursuant to Federal Base Closure actions, the Fuel Depot ceased operation in 1995. A community process through the City of Richmond created a Base Re-use Plan that selected as the preferred alternative a mixed-use historical village centered around a winery, with a retreat center, education and job training facilities, housing and light industrial land uses. The District has worked closely with the City of Richmond on the Plan, including preservation and enhancement of the historic shoreline, with the understanding that the public benefits from the reuse would be clear and guaranteed.

The Plan was adopted by the Richmond City Council in April 1997. The Navy processed and completed a detailed "Reuse EIS/EIR" for such uses and adopted a Record of Decision approving the document under Federal National Environmental Policy Act (NEPA) in 2002.

In 2003, contrary to any prior planning or approvals, the City of Richmond began a process and in fact sold the land to interests representing the Guidiville Rancheria Tribe of Pomo Indians. The purpose was to create a major urban gambling casino through an Indian Tribe with no apparent ties to the specific land or Richmond area. The Guidiville Band has now proposed an "off reservation" casino with some 1,100 hotel rooms, 150,000 square feet of gaming and related facilities.

The prior community approved plan, and the accompanying NEPA document have apparently been discarded, and the proposed casino located on top of a 40 acre public park site.

Point Molate has been a part of the District's Master Plan for decades and the recent ballot measure approved by over two-thirds of the voters in November 2004 contains funding for Point Molate projects. Moreover, as long ago as 1988, the citizens of the District voted, also by more than a two-thirds majority, to tax themselves to raise funds that would be used in part to acquire land and develop facilities for public use at Point Molate.

Opposition to build an "off reservation" casino at Point Molate includes community groups, environmental organizations, and the Contra Costa County Board of Supervisors. The District, along with local community groups, has filed suit under California's California Environmental Quality Act in order to require an open and public review of

the project, which by law, should have occurred prior to approval by the City. The California Attorney General has recently joined the lawsuit on the side of our District arguing that California law has, in fact, been violated by the actions to date allowing the casino project to proceed. We are grateful also for the Governor's May 18, 2005, proclamation regarding urban gaming, which reflects a policy consistent with our community values.

Nonetheless, current federal law and regulations severely limit our ability to have a voice in this new casino project.

2. Unlawful Administrative Actions In The Department Of The Interior That Conferred Indian Sovereignty On The Lower Lake Rancheria

In the course of reviewing the trust acquisition and casino development proposal at the Port of Oakland site adjacent to the Martin Luther King Jr. Regional Shoreline Park, we discovered evidence from Department of the Interior and Bureau of Indian Affairs documents and other materials that call into question the Lower Lake Rancheria's status as a federally recognized Indian tribe. The results of our research to date are set forth in the June 2, 2005, correspondence to the Secretary of the Interior that is attached to our written testimony.

In the Federally Recognized Indian Tribe List Act of 1994, Congress specifically limited the means by which Indian tribes may receive Federal recognition:

(1) By an Act of Congress;
(2) Pursuant to Interior Department and Bureau of Indian Affairs Administrative procedures in 25 CFR Part 83 (the regulations are not applicable to tribes terminated by an act of Congress); or
(3) By a decision of a United States court.

In 1956, Congress terminated the Lower Lake Rancheria by disposing of the Rancheria land in fee simple and effectively terminating Federal relations with the reservation's lone Indian occupant. There is no record of any Indian tribe having ever been associated with the Rancheria.

In the half century since Congress terminated the Rancheria, no court has ruled that the congressional termination was unlawful. Under the circumstances, the only way that Lower Lake Rancheria could be restored to recognition was by an act of Congress. Congress has not done so.

Nonetheless, in December 2000, at the end of the last administration, the Assistant Secretary for Indian Affairs issued a letter that purported to grant administrative federal recognition to the Lower Lake Rancheria. The Bureau of Indian Affairs experts on tribal status in the Branch of Acknowledgment and Research vigorously objected to the Assistant Secretary's intended decision. They wrote: "Unless the Assistant Secretary-Indian Affairs (AS-IA) has clear authority to act outside the acknowledgment regulations,

and has conducted a competent, neutral study of the facts in those cases, the Department's credibility as an unbiased agency asked with acknowledging tribes will be damaged by arbitrary acknowledgment . . .." The experts were overruled and Lower Lake was recognized.

A subsequent Inspector General's investigation into other questionable tribal recognition decisions at the end of the last administration found evidence of a politicized administrative process and apparent criminal conduct.

Had the last administration followed federal law and its own agency regulations, we would today not have to bear the burden of an unfunded mandate costing the District tens of thousands of dollars to participate in a process that is the result of an illegal act. Instead, the Martin Luther King Jr. Shoreline, which was thirty years in the making, is now threatened and our confidence in the commitment of federal officials to act within the limits of their authority is shaken.

We request that the Committee review the attached information regarding the Lower Lake Rancheria, and include it in the record of this proceeding. Upon completion of that review, we ask that you join is in requesting the Secretary to retract the invalid recognition of the Lower Lake Rancheria, suspend the pending trust land acquisition, and remove the Lower Lake Rancheria from the list of recognized tribes, unless and until Congress restores it to Federal recognition.

The record we have examined is not complete. The District has a Freedom of Information Act request pending in the Department of the Interior. Accordingly, our testimony is based on the record that is available at this time.

Thank you for the opportunity to present this testimony: I will be happy to address any questions you may have about it.

Attachments:

Disclosure Requirement
Letter to Secretary of the Interior Gale Norton, dated June 2, 2005

DISCLOSURE REQUIREMENT
Required by House Rule XI, clause 2(g)
and Rules of the Committee on Resources

A. This part is to be completed by all witnesses:

1. Name: ***Pat O'Brien***

2. Business Address: ***2950 Peralta Oaks Court, Oakland, CA 94605-0381***

3. Business Phone Number: ***510-544-2001***

4. Organization you are representing: ***East Bay Regional Park District***

5. Any training or educational certificates, diplomas or degrees or other educational experiences which add to your qualifications to testify on or knowledge of the subject matter of the hearing:

   BA & Masters Degree; over 30 years in Public Administration

6. Any professional licenses, certifications, or affiliations held which are relevant to your qualifications to testify on or knowledge of the subject matter of the hearing:

   Chair of Legislative Committees for California Park & Recreation Society and California Association of Recreation & Park Districts for over 10 years

7. Any employment, occupation, ownership in a firm or business, or work-related experiences which relate to your qualifications to testify on or knowledge of the subject matter of the hearing:

   General Manager for the East Bay Regional Park District; Extensive experience in Public Facility and Park Planning

8. Any offices, elected positions, or representational capacity held in the organization on whose behalf you are testifying:

   General Manager for the East Bay Regional Park District, serving since 1988

B. To be completed by nongovernmental witnesses only:

1. Any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 2000, from the **Department of the Interior**, the source and the amount of each grant or contract:

2. Any federal grants or contracts (including subgrants or subcontracts) which were received since October 1, 2000, from the **Department of the Interior** by the organization(s) which you represent at this hearing, including the source and amount of each grant or contract:

3. Any other information you wish to convey which might aid the members of the Committee to better understand the context of your testimony:

EAST BAY REGIONAL PARK DISTRICT

Via Federal Express Mail and Facsimile

June 2, 2005

The Honorable Gale Norton
Secretary of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Request for Meeting and for Retraction of December 29, 2000, Federal Acknowledgment of The Lower Lake Rancheria (Also Known As The Koi Nation)

Dear Secretary Norton:

By Federal Register Notice of November 26, 2004 (69 Fed. Reg. 68970), the Acting Principal Deputy Assistant Secretary-Indian Affairs announced that the Bureau of Indian Affairs (BIA), with the Lower Lake Rancheria (Lower Lake), as a cooperating agency, would prepare an Environmental Impact Statement (EIS) on the proposed acquisition of land in trust for the purpose of constructing and operating a tribal casino on 35.45 acres of land within the City of Oakland and adjacent to the Martin Luther King Jr. Regional Shoreline unit of the East Bay Regional Park District (District).

We have separately registered our opposition to the trust acquisition and casino development. The purpose of this letter is to bring to your attention evidence from Department of the Interior and Bureau of Indian Affairs documents, and other materials, that demonstrate that Lower Lake is not entitled to status as a Federally recognized Indian tribe. The results of our research to date are set forth in the attached Briefing Paper.

Briefly, in 1956, the Lower Lake Rancheria was terminated by an act of Congress and federal relations with the reservation's lone Indian occupant were terminated as well. As a result, the Assistant Secretary-Indian Affairs in December 2000 had no administrative authority to reaffirm or otherwise reestablish Federal recognition of the Lower Lake Rancheria. Indeed, the evidence reveals that the experts on tribal status in the BIA's Branch of Acknowledgment and Research (BAR), which has since been reorganized as the Office of Federal Acknowledgment in the Office of the Secretary, vigorously objected to the Assistant Secretary's actions.

Absent a validly recognized federal Indian tribe, there would be no federal action associated with the casino proposal to serve as a basis for an EIS. However, the unauthorized recognition of Lower Lake unleashed a series of events and actions that are causing a costly expenditure of time and resources by elected officials and our staff. Given the California budget crisis -- for example, East Bay Parks had its budget, in the current fiscal year, reduced by more than $5 million – the financial burdens of the federal actions associated with the trust acquisition and casino proposal are tantamount to an unfunded mandate, or hidden federal tax, on our financially strapped communities.

Moreover, trust acquisition of the Port of Oakland casino site would result in setting aside lawful, responsible, locally established deed restrictions regarding toxic materials in the soil,

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as well as judicially established environmental protections for the adjacent Martin Luther King Jr. Regional Shoreline. Those restrictions were established in the interest of protecting the health and welfare of the Bay Area public. As written, they would prohibit the proposed casino development.

According to the Office of Federal Acknowledgment, as of February 4, 2005, there were 67 unrecognized tribes in California that had filed petitions for Federal recognition. (Lower Lake never filed such a petition.) Those petitioners are in addition to the more than 100 presently recognized California Indian tribes. To balance the protection of local property rights and the public interest with the integrity of the Federal-tribal relationship requires strict adherence to the laws of Congress and the Department's own regulatory process regarding tribal recognition.

In 1994, Congress established a standard that the BIA cannot act "unilaterally," "precipitously," or "with no more than a cursory post facto notification" in making decisions that affect tribal status. Those words are an apt description of the Assistant Secretary's actions leading to the December 19, 2000, decision to recognize Lower Lake.

The complete record of the December 2000, decision is not yet fully available (we have had a partial response to our pending Freedom of Information Act request). Based on research and material obtained from your Department to date, there is strong evidence that the Assistant Secretary acted unilaterally, precipitously, and illegally in conferring Federal status on Lower Lake, with the result that Lower Lake's Federal recognition is void.

Accordingly, we request you to:

(1) suspend the EIS process;

(2) retract the decision of the Assistant Secretary-Indian Affairs that "reaffirmed" the federal status of the Lower Lake (Letter to Daniel D. Beltran from Kevin Gover, Assistant Secretary-Indian Affairs, December 29, 2000 (December 29, 2000, decision)); and

(3) remove Lower Lake from the list of federally recognized tribes published pursuant to 25 U.S.C. §479a-1.

We request a meeting with you as soon as possible to address this matter in further detail. I can be contacted at 510-544-2001.

Sincerely,

Pat O'Brien
General Manager

Enc: Briefing Paper, Congressional Termination of the Lower Lake Rancheria (May 2005)

cc: Senator Dianne Feinstein
Senator Barbara Boxer
Rep. Pete Stark
Rep. Barbara Lee
Rep George Miller
Rep. Ellen Tauscher
Rep. Richard Pombo, Chair, Committee on Resources
Rep. Nick Joe Rahall, Ranking Member, Committee on Resources
Senator John McCain, Chair, Select Committee on Indian Affairs
Senator Byron Dorgan, Ranking Member, Select Committee on Indian Affairs
James Cason, Acting Assistant Secretary of the Interior, Indian Affairs
F. Patrick Ragsdale, Director, Bureau of Indian Affairs
Clay Gregory, Regional Director, BIA, Sacramento
Governor Arnold Schwarznegger
State Attorney General Bill Lockyer
State Senator Tom Torlakson
State Senator Liz Figueroa
State Senator Don Perata
Assembly Member Loni Hancock
Assembly Member Guy Houston
Assembly Member Joe Canciamilla
Assembly Member Wilma Chan
Assembly Member Johan Klehs
Assembly Member Alberto Torrico

Mayor Beverly Johnson, City of Alameda
Mayor Sheila Young, City of San Leandro
Mayor Jerry Brown, City of Oakland
Oakland City Council
East Bay Regional Park District Board of Directors

Alameda County Board of Supervisors
Contra Costa County Board of Supervisors
Port of Oakland

Briefing Paper
Congressional Termination of the Lower Lake Rancheria
May 2005

Prepared by the East Bay Regional Park District

This Briefing Paper examines the establishment of the Lower Lake Rancheria, its termination by Act of Congress, and subsequent Interior Department administrative actions,[1] purporting to reestablish Federal recognition of the Lower Lake Rancheria (also known as the Koi Nation) over the objections of BIA officials and contrary to Federal law and Interior Department regulations.

Background
History of the Lower Lake Rancheria[2]

The origins of the Lower Lake Rancheria are found in legislation dating from 1914. In that year, Congress appropriated funds "[f]or the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians, $10,000, to be immediately available and to remain available until expended . . . .[3]" A portion of those funds was used to purchase 140.45 acres that became known as the Lower Lake Rancheria.

There is no evidence that any Indian tribe was ever associated with the Lower Lake Rancheria. According to 1910 Smithsonian Institution records regarding the Pomo Indians in California, some of whom lived in the vicinity of the Lower Lake Rancheria:

> the majority are living free from governmental control in or near their old homes, supporting themselves by civilized pursuits, especially farming. Their number at present is about 800. As throughout the greater part of California, true tribes do not exist among the Pomo, their largest political and geographical division

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1 Full access to the Administrative Record is dependent upon response to pending Freedom of Information Act requests.

2 Sources of information bearing on the Lower Lake Rancheria reviewed to prepare this letter include: Bureau of American Ethnology Bulletin No. 30, Handbook of American Indians Part 2 (1910) (Handbook); federal legislation and associated legislative history regarding acquisition and disposal of lands of the Lower Lake Rancheria; an August 1, 1960, Opinion of the Solicitor; F. Cohen, Handbook of Federal Indian Law (1982 ed.); a December 27, 2000, Memorandum to the Deputy Commissioner for Indian Affairs from the Chief, Branch of Acknowledgment and Research (BAR), Lee Fleming (BAR/BIA memo); and the December 29, 2000, letter from Assistant Secretary Kevin Gover to Daniel Beltran (December 29, 2000, decision); among others.

3 Act of August 1, 1914, 38 Stat. 582, 589, IV Kappler Indian Affairs Laws and Treaties 14.

being the village and the surrounding land controlled by it.[4]

Fifty years later the Solicitor of the Department of the Interior expressed a substantially similar view.

> The Indians of Central California had not at first been regarded as subject to federal guardianship because they were not members of a tribe having treaty relations with the United States, did not live on reservations, and held no restricted allotments. In 1933 the problem of placing these Indians on lands acquired for them was reconsidered, since very few had moved to these rancherias or had remained there.[5]

The Interior Solicitor referred to the Committee Report on the 1958 Rancheria Act, which is unrelated to the Lower Lake Rancheria, that stated that the rancheria lands were for the most part acquired or set aside by the United States for Indians in California, generally, rather than for a specific group of Indians, and the consistent practice has been to select by administrative action the individual Indians who may use the land.[6]

The BIA's Director of Tribal Services reiterated that view of California rancherias to Congress in 1992:

> Prior to termination, most of these rancherias did not function as self-governing entities. They were not considered tribes by the Federal Government and they received no Federal services other than those associated with holding land in trust. The rancherias were merely used as homesites. With termination, the assets of the rancherias were distributed to those individuals determined to have an interest in the rancheria who were termed "distributees." Some of the rancherias had only one or two distributees.[7]

The BAR/BIA memo, in December, 2000, reviewed the history of the Lower Lake Rancheria. It

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4 Handbook of American Indians, Part 2, 1910, at page 277.

5 "Request for opinion on `Rancheria Act' of August 18, 1958 (72 Stat. 619)", August 1, 1960, Volume II Op. Sol. On Indian Affairs 1882, 1883 (U.S.D.I. 1979).

6 Sen. Report No. 1874, July 22, 1958.

7 California Tribal Status Act: Hearing on H.R. 2144 Before the House Committee on Interior and Insular Affairs, 102nd Cong., 2nd Sess. 50 (1992), referred to in United Auburn Rancheria v. Sacramento Area Director, 24 IBIA 33, 41 note 10 (May 28, 1993).

reported that between its purchase in 1916 and 1944, there was no record or evidence that any Indian, let alone an Indian tribe, occupied the rancheria land. According to that memo,

> BAR has no record of a vote being taken concerning acceptance of the Indian Reorganization Act in the 1930's, further indicating the rancheria was not occupied after it was purchased. According to a 1944 Report (Rockwell), the Lower Lake rancheria at that time had never been occupied.[8]

The United States Indian Service published a report in 1947,[9] that includes a record of the vote of 258 Indian tribes or groups whether to reorganize themselves as tribal governments according to the terms of the Indian Reorganization Act of 1934. Neither the Lower Lake Rancheria nor the Koi Nation is listed as having held an IRA election. The IRA votes were conducted from 1934 to 1936 during the 31-year period when the rancheria was uninhabited.

According to a June 30, 1955, letter from the Secretary of the Interior to the Chairman of the House Interior and Insular Affairs Committee[10] the first, and apparently only inhabitant of the rancheria settled there in 1947. According to the Secretary:

> on October 9, 1947, the rancheria was assigned to Harry Johnson and another California Indian. Mr. Johnson alone moved onto the property. He constructed a small house on the rancheria, but has been using only the 41-acre tract.[11]

Department of the Interior
Termination – Lower Lake Rancheria

By 1956, the Federal Government decided to terminate the federal relationship to the rancheria. The Secretary of the Interior pointed out that the:

> rancheria is one of several tracts acquired for Indian use and occupancy with funds appropriated by Congress . . . The Bureau of Indian Affairs in administering the tracts, has generally made small parcels available to needy individual Indians through assignments.

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8 BAR/BIA memo, page 5

9 Ten Years of Tribal Government Under the I.R.A., Theodore H. Haas, Chief Counsel, United States Indian Service, 1947.

10 Reprinted in Senate Report No. 1645, 84th Cong., 2d Sess., 2, March 9, 1956

11 Id.

(Emphasis added).[12]

As to the Lower Lake Rancheria, the government decided to issue a patent in fee or unrestricted conveyance for forty-one acres to the lone Indian occupant and sell off the rest of the land for a county airport. The Secretary then stated:

> The proposed sale of the land in excess of the needs of the Indian occupant and the vesting of title to the 41-acre tract in Mr. Johnson, the present Indian assignee, is in line with the present policy of termination of Federal supervision over the property and activities of the Indians of the State of California (Emphasis added).[13]

The Committee on Interior and Insular Affairs endorsed the Secretary's conclusion:

> Both the sale of the land and the vesting of the title to the 41-acre tract is in accordance with the present policy of termination of Federal supervision over the property and activities of the Indians of California. 14

Congressional Termination
Lower Lake Rancheria

The legislation disposing of the rancheria and deeding land in fee to its Indian occupant was enacted on March 29, 1956.[15] Thus, between 1916 and its termination in 1956, there is no evidence that an Indian tribe used and occupied the Lower Lake Rancheria or that the Federal Government ever considered the Lower Lake Rancheria to be a Federally recognized tribe.

Various reports and documents contemporaneously affirm these actions. The Handbook of Federal Indian Law, the preeminent treatise on Indian law, records that Congress terminated the Lower Lake Rancheria as follows:

> On August 1, 1953, House Concurrent Resolution 108 was adopted, declaring termination to be official congressional policy.

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12 Id.

13 Id.

14 Id. at 1.

15 Public Law 84-443, 70 Stat. 58. That Act was amended shortly thereafter to correct the property description. Public Law 84-751, 70 Stat. 595 (July 20, 1956).

Individual acts covering specific tribes were then passed to implement the general policy. These acts delegated broad authority to the Department of the Interior to carry out the details of the termination process. The following table shows the individual acts in chronological order: [16]

Group	Number	Acres	State	Authorizing Statute	Effective Date
Lower Lake Rancheria	unk.	unk.	Cal.	70 Stat. 58	1956

Since then, the Department of Health and Human Services has formally recognized that the rancheria was terminated by the 1956 legislation in its Indian Health Service Manual:[17]

2-1.7 TERMINATED TRIBES

During the past few years Congress; (sic) has enacted legislation providing for termination of Federal trust relationships and responsibilities to certain Indian tribal groups. Federal services to members of the Indian Tribes listed below having been terminated, such members are no longer within the scope of the Indian Health program and there is no authority to provide them with health services.

Public Law	Tribal Group	Termination Date
84-443	Lower Lake Rancheria, California	March 29, 1956

16 F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 811.

17 Health and Human Services (HHS) Indian Health Manual Part 2, Chapter 1-Services to Indians and Others available at http://www.ihs.gov/PublicInfo/Publications/IHSManual/Part2/pt2chapt1/pt2chpt1.htm#2 (last visited May 26, 2005).

Federal Law Governing Status Determination
Lower Lake Rancheria

The Federally Recognized Indian Tribe List Act of 1994 (List Act)[18] includes findings[19] that state, among other things, that The findings that accompany the List Act state among other things that Indian tribes presently may be recognized in one of three ways:

(1) By an Act of Congress;

(2) Pursuant to Interior Department and Bureau of Indian Affairs Administrative procedures in 25 CFR Part 83;

(3) By a decision of a United States court.

The List Act, by judicial ruling, has been determined to be a binding limitation on the Secretary's authority to recognize an Indian tribe.[20]

No act of Congress has recognized the Lower Lake Rancheria. Nor has any judicial decree done so. The BAR/BIA memo states that the Lower Lake Rancheria was "not a petitioning group under 25 CFR Part 83." Thus, the Lower Lake Rancheria has used none of the three exclusive means of obtaining recognition identified in the List Act. Moreover, even if it had pursued recognition pursuant to the administrative process under the regulations at 25 CFR Part 83, the Lower Lake Rancheria was not eligible to obtain recognition by that means. Those regulations state:

> groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.[21]

Furthermore, even if the Lower Lake Rancheria believed it could somehow demonstrate that it had been previously recognized by the Federal Government and had not been terminated, it was

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18 Public Law 103-454, 25 U.S.C. §479a.

19 Public Law 103-454 §103, findings reprinted in Historical and Statutory Notes 25 U.S.C. §479a.

20 Cherokee Nation of Oklahoma v. Norton, 389 F.3d 1074, 1087 (10th Cir. 2004). ("The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian tribes may be recognized by: (1) an `Act of Congress;' (2) `the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]' or (3) `a decision of a United States court.'" Pub. L. No. 103-454, § 103(3), 108 Stat. 4791.")

21 See 25 CFR 83.3(e).

obligated by the List Act to comply with the Part 83 procedures and meet certain standards[22] that are designed to elicit evidence of "[u]nambiguous previous Federal acknowledgment." The Assistant Secretary and the Lower Lake Rancheria ignored this process.[23]

Recognition Administratively Granted
Lower Lake Rancheria

On December 29, 2000, Assistant Secretary of the Interior-Indian Affairs, Kevin Gover, signed a one-page letter to Daniel Beltran announcing that the Lower Lake Rancheria (Koi Nation) was henceforth granted Federal recognition.[24] That letter gave no indication of the extraordinary controversy surrounding not only to the Lower Lake Rancheria but other actions by the Assistant Secretary purporting to confer Federal recognition.

Two days prior to the issuance of the recognition approval letter, on December 27, 2000, R. Lee Fleming, Chief, Branch of Acknowledgment and Research prepared and signed a detailed memorandum[25] to the Deputy Commissioner of Indian Affairs regarding "Reaffirmation." (BAR/BIA memo). The memo stated that the BAR and BIA were "troubled" by "rumored" actions to confer federal recognition on the Lower Lake Rancheria and raised numerous objections to and concerns about the Assistant Secretary's anticipated action.

> The Branch of Acknowledgment and Research (BAR) and the Office of Tribal Services are greatly concerned with the rumored "reaffirmation" of several groups as federally recognized tribes. We are troubled by the possibility that the Department is about to take the action of "reaffirmation" rather than resolving the status of these groups through 25 CFR Part 83 regulations. We are also concerned that this action may be taken without a thorough factual and legal review.

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22 See 25 CFR §83.8 entitled "Previous Federal Acknowledgment."

23 See United Auburn Rancheria, supra note 7. The United Auburn Rancheria was terminated by Congress. IBIA concluded that an act of Congress was required to achieve reinstatement. In so doing, it ruled that the Department of the Interior lacked authority to restore a terminated tribe. Tribal recognition was eventually restored by Act of Congress, Pub. L. 103-434, 108 Stat. 4533, October 31, 1994.

24 Letter from Assistant Secretary of the Interior Kevin Gover to Daniel D. Beltran (December 29, 2000).

25 The BAR/BIA memo addresses three other entities besides the Lower Lake Rancheria: Burt Lake in Michigan, Shoonaq' in Alaska, and King Salmon in Alaska. BAR/BIA memo at 1, footnote 2, supra. We have not seen the complete BAR/BIA memo, but have obtained three-pages of it that address the Lower Lake Rancheria.

Further, the BAR/BIA memo indicates the Lower Lake "is not on the list of petitioners" applying for recognition pursuant to Part 83 regulatory process. In other words, the Lower Lake had not formally petitioned the Secretary for recognition through the established and required administrative procedures. Instead, the Assistant Secretary acted entirely outside the policy, legal and regulatory framework to recognize the Lower Lake Rancheria.

Lower Lake Rancheria Recognition Violated Federal Law and Departmental Regulation

The BAR/BIA memo expressly warned against administrative reaffirmation of the Lower Lake Rancheria.

> Unless the Assistant Secretary-Indian Affairs (AS-IA) has clear authority to act outside the acknowledgment regulations, and has conducted a competent, neutral study of the facts in those cases, the Department's credibility as an unbiased agency tasked with acknowledging tribes will be damaged by an arbitrary acknowledgment of these select groups.
>
> To our knowledge, there has never been a formal opinion from the Department's Solicitor as to whether the Department's authority to acknowledge tribes can be exercised by the AS-IA outside of the regulations, or whether the establishment of the regulations precludes acknowledgment by simple administrative action. There presumably has been no opportunity by third parties to comment on any of these proposed "reaffirmations", which likely would constitute a violation of the Administrative Procedures Act (APA).

Nonetheless, two days later, the Assistant Secretary of the Interior-Indian Affairs, as one of his last officials acts prior to leaving government service, signed the one-page letter granting recognition.

Inspector General Investigates Interior Department's Tribal Recognition Activities

The Department of the Interior's Inspector General conducted an investigation entitled: "Allegations Involving Irregularities in the Tribal Recognition Process and Concerns Relating to Indian Gaming (IG Report).[26] The IG Report was initiated by Secretary Norton and Congressman Frank Wolf. The IG Report investigated six recommendations by the BAR against federal recognition all of which were reversed by the Assistant Secretary or Acting Assistant Secretary for Indian Affairs. Although the IG Report did not address the Lower Lake Rancheria, it provides

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[26] Office of the Inspector General, Department of the Interior, Report No. 01-I-00329 (February 2002)

important insight into the highly charged and contentious relationship between the Assistant Secretary and the BAR staff at the time the Lower Lake Rancheria recognition was formulated and adopted by the Assistant Secretary. At page 4, the IG Report states:

> The relationship between [Assistant Secretary] Gover and the BAR staff was strained from the beginning. Shortly after being appointed, Gover had a meeting with the BAR staff in which he stated `acknowledgment decisions are political.' BAR staff considered this to be an indication on how the Assistant Secretary would rule on their findings. BAR and the Solicitor who advises them were convinced that Gover did not like the regulatory process set forth in 25 C.F.R. Part 83 and, as a result, would base his acknowledgment decisions on his personal interpretation of the regulations. * * * *
>
> The relationship between [Acting Assistant Secretary] was even more troubled. The BAR collectively described the last seventeen days of the Clinton Administration as pure hell.

The decision-making environment in the Department of the Interior at the time of the December 29, 2000, decision thus was deeply flawed and biased. In contrast to the other decisions on which the Inspector General reported, which at best gave lip service to the Part 83 regulations, the Assistant Secretary essentially initiated and directed his own recognition process for the Lower Lake Rancheria. He did not seek input by the BAR and when the BAR proffered its views, the Assistant Secretary ignored or rejected them.

Federal Courts Affirm Recognition Process

The Federal Court in Cherokee Nation of Oklahoma v. Norton, supra, concluded that by virtue of the List Act, the Department had no authority to recognize an Indian tribe by a means other than the Part 83 regulatory process.

> The D[epartment] O[f the] I[nterior]'s recognition of the Delawares in this case ... violated § 103(3) of the Federally Recognized Indian Tribe List Act.
>
> Agencies, moreover, must follow their own rules and regulations. The DOI used a procedure heretofore unknown to the law — "retract and declare" — to purportedly re-recognize the Delawares. In so doing, the DOI's actions were arbitrary and capricious. The agency simply elected not to follow the Part 83 procedures for recognizing an Indian tribe and, furthermore, did not even properly waive application of those procedures. See 25 C.F.R. § 1.2. We

> accordingly hold unlawful and set aside the DOI's 1996 final decision. 5 U.S.C. § 706(2)(A). *Any action taken by the agency on its 1996 final decision is void.* "Further comment on this case is unnecessary."[27]

In circumventing the Part 83 regulations, the Assistant Secretary's December 29, 2000, decision assumed the issue of tribal existence that the Part 83 regulations require the Secretary to examine. The Assistant Secretary effectively construed the absence of a statement in the record by Congress or the Secretary terminating tribal relations under these circumstances as unambiguous evidence of (1) tribal existence, and (2) previous federal acknowledgment of that tribal existence. In fact, there was no, and never had been, any Lower Lake Rancheria tribe to terminate.

The Congressional Standard
Recognition is More than "Simple Adjective"

Congress recognized the broad consequences, for Indian and non-Indian communities alike, when Federal recognition is granted to an Indian tribe:

> The question of whether a Native American Group constitutes an Indian tribe is one of immense significance in federal Indian law. Because Congress' power to legislate for the benefit of Indians is limited by the Constitution to Indian tribes, for most federal purposes it is not enough that an individual simply be an Indian to receive the protections, services, and benefits offered to Indians; rather the individual must also be a member of an Indian tribe. "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the power accompanying that status such as the power to tax, and to establish a separate judiciary.[28]

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[27] 389 F.3d 1074, 1087, citations omitted, italics added. By order of February 16, 2005, the italicized sentence was substituted for the following sentence in the published decision: "Any action taken on the agency's 1996 final decision is void."

[28] House Report No. 781, 103rd Congress. 2-3, October 3 (1994), 1994 U.S. Code, Cong. and Administrative News 3768-69.

Accordingly, decisions on recognition need to be made with strict adherence to the means that Congress has established.

Summary

a) The Lower Lake Rancheria was terminated by statute and can be reestablished only by Act of Congress. Neither the Part 83 regulations nor any other improvised administrative action, such as was employed by Assistant Secretary Gover, is authorized to be used in this case. Even if a statutory termination of the Lower Lake Rancheria had not occurred, the Department nonetheless was bound to adhere to the Part 83 regulations to redetermine the Lower Lake Rancheria's status.

b) Serious questions of fact and law about the Lower Lake Rancheria have been raised by the BAR/BIA memo and need to be addressed.

c) Documentary evidence demonstrates that there never was a Lower Lake Rancheria or Koi Nation recognized by the United States. Rather, the Congress authorized the acquisition of rancheria land for homeless California Indians. Only one such Indian ever occupied the Lower Lake Rancheria prior to its termination.

d) The federal government terminated both its relationship to the rancheria land and its Indian occupant by act of Congress in 1956.

e) The Assistant Secretary failed or refused to consider the entire relevant legal record, including the pertinent statutes and administrative history of the Lower Lake Rancheria or construe it accurately.

f) The interests of fairness and administrative economy for both the federal government and those jurisdictions affected by the gaming proposal require the Secretary to suspend the costly and time-consuming trust land acquisition process and associated environmental and gaming reviews until the "reaffirmation" of the Federal status of the Lower Lake Reservation has been reviewed.

Conclusion

The available record of the December 29, 2000, decision to recognize the Lower Lake Rancheria provides prima facie evidence that the Assistant Secretary acted unilaterally, precipitously and illegally in doing so.

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