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1300 Pennsylvania Ave., NW (Mint Annex)
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Jacqueline Johnson
Tlingit

NCAI HEADQUARTERS
1301 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
202.466.7767
202.466.7797 fax
www.ncai.org

Re: Docket # USCBP-2007-0061
National Congress of American Indians (NCAI) Comments to Notice of Proposed Rulemaking (NPRM): Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere (WHTI-Land Regs)

To Whom It May Concern:

The National Congress of American Indians (NCAI), the largest and oldest national organization representing American Indians and Alaska Natives, respectfully submits comments to the Notice of Proposed Rulemaking, published in the Federal Register on June 26, 2007 "Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere" (WHTI-NPRM).

First, we want to thank the Department of Homeland Security (DHS) and the State Department (DOS) staff for hearing the Tribal perspective on this very important issue and attempting to include an option for Tribal identification. While NCAI will recommend a number of changes to the proposal, and while we have great concern about the lack thus far of formal Tribal government-to-government consultation, we are mindful that the DHS team working on the WHTI regulations listened to a number of Tribal leaders, and that this proposal is a vast improvement from the Tribal provisions included in the REAL-ID NPRM.

Each Tribe is a sovereign government and will speak for itself. However, NCAI has attempted to collect input from as many Tribes as possible in order to pull together some collective responses and ideas. We have held a series of meetings with Tribal leaders over the past year, and most recently held a meeting with the leadership of approximately twenty U.S. border Tribes, and NCAI's Canadian counterpart the Assembly of First Nations (AFN), to discuss our specific response to this NPRM ("San Diego Tribal WHTI Meeting").

Tribes have passed a number of NCAI resolutions on these issues, including the use of Tribal ID cards as a form of basic governmental sovereignty. NCAI recently passed a resolution in 2006 requesting the Secretary of the Department of Homeland Security (DHS) to consult and collaborate with Tribal leaders on the Western Hemisphere Travel Initiative (#MIC-06-16C).

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Good Pilot Project Proposal. In general the NPRM regarding treatment of Members of United States Native American Tribes is a very good start, particularly if it were to be considered a pilot program. From a practical perspective it addresses many Tribal members most immediately in need. The NPRM proposes to allow Tribal ID cards, which meet the necessary security requirements, to be acceptable from border Tribes, with traditional border crossing patterns, at specific traditional Points of Entry [POEs]. NCAI thinks this is a good model for a pilot transitioning to the acceptance of all Tribal IDs which qualify.

All Tribes Should Eventually Be Eligible. Tribal leaders felt very strongly that while the Tribes located closest to the current international border have the most frequent crossing needs, the right of indigenous migration is not limited to those who happen to have been closest to the lines when they were drawn by the external governments. In the end only a handful of Tribes may actually find it necessary to submit their Tribal ID to DHS' rigorous security standards, but all indigenous people have the right to travel, and all indigenous people have the inherent right to be identified by their own community, their own government, their own Tribal identification; therefore, all Tribes should have the opportunity to submit their ID to the process for border crossing use if they so choose.

Rights Reserved for All Tribes to Participate. In addition, NCAI had several specific concerns with the NPRM. First the NPRM seems to imply that if a Tribe does not respond to this NPRM, they will have forfeited their right to use their Tribal ID cards for border crossing at any future date. Not only is this unreasonable, it is counter to the basic foundation of an on-going government-to-government relationship (which includes consultation requirements mandated by Executive Order 13175).¹ Many Tribes do not currently have the capacity, or counsel, to monitor and participate in this process, but they may very well have the interest and the future capacity. DHS should consider these comments an official reply on behalf of every single Tribal government to reserve their right for future inclusion of their Tribal IDs in the list of WHTI accepted border-crossing documentation.

Inappropriate Confidential Information Requested. The Notice of Proposed Rulemaking (NPRM) requests confidential religious and cultural information for border crossing purposes that is not only inappropriate to ask for in a public forum, but also inappropriate in that it is not asked of any other government. For example, the State of Washington is currently piloting the use of its driver's license for border crossing. At no time was the State of Washington asked for detailed information about where and when its citizens would be traveling. In general the Tribes are very open to providing all of the security information required of any other government, but not detailed confidential religious and cultural information. This issue is also addressed in the Tribal Concerns section below.

And finally, NCAI has great concerns on the limitations on communications imposed on Tribes and lack of official consultation by DHS. NCAI feels its comments and the comments of the Tribes are unable to provide the most helpful comments because of the lack of dialogue.

¹ Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249, Section 3(c)(3) (Nov. 6, 2000).

HISTORICAL BACKGROUND

The creation of the international boundaries of Mexico and Canada has complicated a number of matters for indigenous people whose homelands traverse what are now transnational areas. Over forty Tribes are now located on near the U.S. international borders. The Mexican and Canadian international borders divided many of our Tribal communities; families were split, for instance with one brother now being declared American and the other now Canadian. Many Tribes not only have families on the other side of the border, but have burial grounds and sacred sites on the other side of the border as well. Each Tribe submitting comments will supply DHS with more detailed information about their experience and history in this regard.

International framework. While 9/11 has changed the current face of policy in the United States, it is clearly important to frame and maintain these issues within historical and global perspective. Indigenous trans-border issues are not unique to the United States. Numerous other colonizing governments have to grapple with the rights of their indigenous populations, particularly with inherent indigenous rights of movement and access. As such, the United Nations has held numerous conferences and conventions on indigenous migration rights. In fact, the Indigenous and Tribal Peoples Convention of 1989 specifically states that:

“Governments shall take appropriate measures...to facilitate contacts and co-operation between indigenous and Tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.”²

As sovereign governments, Tribes have a great need to protect their borders from unnecessary and illegal intrusion while providing Tribal citizens the right of free passage based on international law and doctrine and treaty rights. Like U.S. citizenship, Tribal citizenship is a birthright and must be afforded protection by Tribal governments.

Crossing patterns. The inherent right to free movement includes the right to pass freely for: religious ceremonies, spiritual purposes, to maintain family bonds and unification, receipt of Tribal services, Tribal governmental participation and voting, Tribal employment, obtainment of traditional foods and game, gathering of traditional items and medicines, and to exercise indigenous rights of self-sufficiency through trade and commerce. Each Tribe will detail its specific crossing concerns.

Many Tribal members need to cross that are not directly on the border. For example, there are a limited number of people who have the talent and traditional knowledge to drum, sing, and dance Indian dance, religious celebrations, and powwows that occur year round. Often nearly half of the song and drum groups at a given powwow are from Canada. By example, at the National Powwow recently hosted by the National Museum of the American Indian in Washington, DC, several Canadian drum group members drove 14 hours to cross the U.S. border and catch a plane in a U.S. in order to fly to DC because none of them had passports.

² Indigenous and Tribal Peoples Convention, 1989. Part VII. Contacts and Co-Operation Across Borders, Article 23.

Pre-existing Treaty Rights. In addition to the Jay Treaty which addresses general indigenous crossing rights on the Canadian border, which will be discussed in more detail, a number of Tribes have other treaties which need to be considered. For example, the Tulalip Tribes have a treaty preserving rights to hunt and fish in their aboriginal “usual and accustomed areas” which extends throughout Canada, as recognized by the U.S. courts.³

Unintended Consequences. Tribes understand and respect America’s need to protect its border. In fact, they are strong partners and allies in that fight and have dedicated millions of dollars in resources. However, America is always facing some historical challenge whether it be the westward expansion, the civil war, or this new fight against terrorism.

Each time America faces a national challenge it often passes new laws that have very negative often unintended long term consequences for its first and indigenous peoples. For example, during the early 20th Century American farmers sought more arable land. The U.S. government decided to open up “surplus” lands in the West and within Indian reservations. This resulted in a forced integration in many Indian communities, and extensive damage to Tribal governmental and familial structures. Following WWI the government realized it could not draft Native Americans because they were not U.S. citizens, so they unilaterally, and against the will of many Natives, granted all Indians U.S. citizenship.

The point being that the U.S. government has a history of making hasty decisions that have long term irreversible effects on Native peoples, often with very negative unintended consequences. If these regulations are not implemented in a thoughtful way, they too will have long term negative impact on our ability to keep our families and traditions in tact.

We hope that DHS takes heed of the Indigenous and Tribal People Convention of 1989 and uses this opportunity to take appropriate measures to facilitate this cross-border communication and movements for North America’s indigenous population.

³ *U.S. v. Washington*, 625 F.Supp 1405, 1529 (1983).

NCAI INTERIM PROPOSAL: BORDER TRIBE PILOT PROJECT

A. Border Tribes—Pilot Project

The NPRM proposal to accept Tribal IDs from “Border Tribes”, or Tribes whose members “continue to cross the land border of the United States for a historic, religious or other cultural purpose,” is a good proposal for a pilot project on Tribal IDs. Representatives from the twenty plus border Tribes who met to discuss their response to this NPRM, however, all felt very strongly that this was a broader Tribal right and all Tribes meeting the security requirements should eventually be eligible to use their IDs. In practice not every Tribe will want to submit its ID for acceptance, and understandably DHS needs a smaller subset of Tribes to begin the pilot project.

NCAI strongly recommends that the final rule should not list out specific Tribal IDs that are acceptable, but should instead outline the basic guidelines that Tribal must meet in order to qualify, and it should create an ongoing application process for the Pilot Project and eventually full Tribal participation.

B. Extension of Implementation for Tribal Crossing/Two-Year Grandfather Clause

While the ultimate goal is that all Border Tribal IDs and all Tribal ID cards meet the necessary security requirements and are acceptable forms of ID for border crossing, we understand that even with the best intentions from both Tribes and DHS it will take some time before all of those changes are implemented. Certainly those changes will not be in place before the January 2008 deadline.

In the interim, to prevent the interruption of necessary indigenous migration, NCAI proposes that DHS recognize the statutory extension granted and maintain a grandfather time period until at least June 1, 2009 until which time the status quo is maintained with regard to indigenous Tribal crossing.⁴

This would mean that all of the formal and informal relationships and agreements currently being recognized both at the national level and at the local POE level continue to be honored until that time. There are a number of very effective informal agreements at the local level, particularly with the Kumeyaay Bands in California and the Tohono O’odham Nation in Arizona, that have been implemented in a manner effectively protecting America’s borders.

This extension will also provide DHS and DOS adequate time to meet their Executive Order responsibilities to consult with Tribal governments.

⁴ The Intelligence Reform and Terrorism Prevention Act of 2004, which initiated WHTI, required the Departments to implement regulations governing land and sea travel requirements by January 1, 2008. However, Congress extended the deadline through the Department of Homeland Security Appropriations Act of 2007, Pub.L.No. 109-295 (October 4, 2006).

C. Federal Tribal ID Card Option

It was overwhelmingly the opinion of the Tribes attending the San Diego Tribal WHTI Meeting that they will be opting to exercise their sovereign rights and use their own Tribal ID cards. However, they were sensitive to the fact that some Tribes do not have Tribal ID cards and many may not be able to absorb the cost of improving their existing cards to meet DHS standards. Therefore it was agreed that a federal Tribal ID option should be available to those Tribes, or individual Tribal members, who would like to use it; rather than being forced to obtain a non-Indigenous specific identification.

It was noted that the Canadian Tribes, who also attended the San Diego Tribal WHTI Meeting, have a federal indigenous identification card currently being evaluated by DHS for acceptance. In addition, the Kickapoo Tribal card referenced in the NPRM could be utilized as a model.

However, the Tribal leaders made it very clear that a federal indigenous identification card was not an acceptable substitute for the use of their own Tribal ID, but only should be offered as an alternative in addition to Tribal ID cards. We have yet to speak with a Tribe that after deliberation has decided in its final comment that it would accept a federal indigenous card as an option.

D. No-Fee U.S. Passports for Indigenous Applicants

If the U.S. government chooses to require that indigenous Tribal citizens obtain a U.S. government identification to exercise its inherent rights, it should absorb the costs. Indigenous Americans should not be required to pay a fee for a document that permits them to pass a border that is not of their making. Most Tribal members will choose to obtain a Tribal ID card, but in instances where that is not yet an option, they should not have to pay for a document from the U.S. government that they are being forced to obtain in order to exercise their inherent indigenous migration rights. There is precedent for this fee-waiver in the NPRM itself:

“United States citizen Merchant Mariners serving on U.S. flag vessels are eligible for no-fee U.S. passports upon presentation of a letter from the employer and an MMD, in addition to the standard evidence of citizenship and identity.”

F. Accept Tribal Enrollment for Obtaining Federal Identification

Concerns with REAL ID and other federal regulations that propose not to accept Tribal ID cards were raised again at the San Diego Tribal WHTI Meeting. Tribal leaders and NCAI would like to reiterate the importance of accepting Tribal enrollment information and identification as proof of identity, and where appropriate proof of citizenship, and for obtaining federal documents, especially DHS and DOS documents (passports, etc.).

NCAI LONG TERM PROPOSAL: ANY TRIBAL ID, ANY PORT-OF-ENTRY

While NCAI appreciates that DHS has likely identified those Tribal members most immediately in need of using their Tribal ID for crossing the border, the right to freely traverse the border and to be identified by one's own government is inherent to all Tribal governments and citizens of Federally recognized Tribes.

Tribal leaders have made it very clear and are unyielding that all indigenous communities have the right to unrestricted "border" crossing, to visit, live, and work. The inherent right to free movement encompasses not only the right to pass freely for religious ceremonies, spiritual purposes, but other reasons including to maintain family bonds and unification, for receipt of Tribal services, Tribal governmental participation and voting, Tribal employment, obtainment of traditional foods and game, gathering of traditional items and medicines, and to exercise indigenous rights of self-sufficiency through trade and commerce.

In an ideal world, all individuals indigenous to North America would have unrestricted border access. These ideals are not without precedent, they are already in place with the Jay Treaty. Under the Jay Treaty, and subsequent statutes, Tribal members can move freely, not only for travel but also for work (for Canadian Indians), back and forth between the U.S. and Canada.

In a post 9/11 world the Tribal governments are mindful of the limitations and only ask that any Tribe who is willing and able to meet DHS's security standards should be allowed to utilize their IDs for border crossing purposes.⁵

⁵ The argument that there are too many Tribes is no excuse. There are nearly 200 countries in the world. It would be unacceptable for the United States to suggest consolidation of their governmental identification. By simply standardizing the security requirements this number is easily manageable.

DIRECT RESPONSE TO POSSIBLE ALTERNATIVE TREATMENT OF NATIVE AMERICANS PROPOSED BY DHS

The NPRM listed four alternatives that DHS and DOS note that they are also considering, and ask for specific responses to those proposals.

A. No Special Provision For U.S. Native Americans Because They Have An Equal Opportunity To Obtain The Same Documents That Are Available To All Other U.S. Citizens

The Departments' first alternative, no special provision, is a wholly an acceptable alternative to Tribal leaders. It fails to take into account the government-to-government relationship with the United States, and that there is a trust relationship between the United States and federal recognized Indian Tribes. The unique posture of Tribes, and its members, in relation to the federal government is rooted in the U.S. Constitution, Treaties, statutes, case law and executive pronouncements, and therefore requires special consideration by the Departments.

NCAI suspects that the root of this proposal comes somewhat from comments in the REAL ID proposed regulations that were based supposedly on information from the Department of Interior to this effect. NCAI and Tribal leaders have been unable to locate anyone at the DOI or the Bureau of Indian Affairs who officially concurs with this analysis. In fact, it is our understanding that DOI supports the use of Tribal ID cards for all purposes and we have been informed that DOI may be contacting DHS to clarify any misunderstandings.

B. Broader Issuance Of The American Indian Card Now Issued To Members Of The Federally Recognized Kickapoo Tribes Or A Similar Card.

NCAI has yet to speak with a Tribe that prefers this option, and most are vehemently opposed. Many Tribes, however, thought should be included as an alternative to Tribal ID cards in case there was a Tribe that had not yet spoken, or that would be unable to afford the costs of higher security cards, that would prefer this option. For more details, See, *NCAI Interim Proposal: Border Tribes Pilot Project, C. Federal Tribal ID Card Option.*

C. Accept Tribal Enrollment Cards From Tribes Whose Members Continue Traditional Border Crossings Without Any Limitation On The Border Crossing Point Or Points Where Each Such Tribal Enrollment Card Is Accepted.

NCAI does not believe that acceptance of Tribal ID cards should be limited to specific border crossing points. We do not believe that is a limitation imposed on any other form of accepted identification. However, limitation to specific border crossing points during the pilot program seemed widely palatable. Furthermore, if a sacrifice needs to be made somewhere, Tribal leaders seemed much more willing to negotiate on the number of POEs allowed rather than limit the number of Tribes allowed to utilize their ID cards.

D. Accept All Tribal Enrollment Cards From All Federally Recognized Native American Tribes At Some Or All Border Crossing Points.

NCAI believes that DHS and DOS should accept all Tribal enrollment cards from all federally recognized Native American Tribes at all border crossing points. Our right to free passage should not be limited to certain cards, certain Tribes, or certain border crossing points. However, we agree that such Tribes should meet the necessary minimum security requirements.

CONCERNS: DHS CONCERNS & ANSWERS

A. Proof of Citizenship

There is unlikely a more secure process in the United States that documents an individual's lineage and citizenship than the Tribal enrollment process. Each Tribe's constitution, by-laws, and statutes set their own citizenship guidelines. However, each of those guidelines is based on indigenous genealogy and some form of historical lineage.⁶ The Tribal constitutions, including the membership provisions, are approved by the Department of Interior.

Documentation of eligibility for membership can be obtained through birth certificates, but also through extensive genealogy charts dating back to original Tribal membership rolls established by treaty or pursuant to federal statutes. Tribal standards for Tribal membership eligibility pre-date the use of state drivers license and state ID cards.

Citizenship is Already Indicated on all Tribal IDs, Tribal Citizenship

The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub.L.No. 108-458, the basis for the Western Hemisphere Travel Initiative and these NPRM, does require that acceptable IDs indicate citizenship. While we understand that DHS' inclination is to require Tribes to indicate U.S. vs non-U.S. citizenship on their IDs, all Tribal IDs do in fact already indicate the bearer's citizenship; it indicates that they are a citizen of that Indian Nation. This delineation is no different that a German passport indicates that the holder is a German citizen. Arguably there is no need for a Tribal ID to indicate any other citizenship.

Being a member of an indigenous Tribe, regardless of whether they are also U.S. or Canadian for certain (and arguably Mexican) citizens, confers upon the individual all the same rights to pass and repass the border.

Through this NPRM the card is not being presented for any other purposes, such as work permits, visas, social services etc., but simply for border crossing. Therefore the only relevant citizenship is their indigenous Tribal citizenship. Members of indigenous U.S. and Canadian Tribes have the right to pass freely back and forth across the border. Their IDs all indicate their citizenship, they are citizens of their respective Tribe.

During the San Diego Tribal WHTI Meeting most Tribal leaders made it very clear they oppose a requirement to force them to indicate Mexican or Canadian nationality on their ID cards. DHS seems most concerned with terrorists committing fraud to obtain a Tribal ID for passage, and/or non-Indians becoming "adopted." If this is the case, Tribal leaders may be open to indicating on

⁶ There is one well-known exception to this. Provisions were placed in the U.S.'s treaties with the Five Civilized Tribes of Oklahoma requiring them to provide Tribal citizenship protections to non-Indian white and African-Americans living within their Tribal territories. This was done during a time in which it was assumed that Oklahoma would remain administered by the Tribal governments and not become a U.S. state, in order to ensure all people living in the Indian Territory would receive governmental protections. However, even in this very unusual circumstance, each non-Indian's lineage is traceable back to a U.S. government roll of names issued in the early 20th Century.

cards whether a person is non-Indigenous and therefore does not obtain all of the rights of pass and repass of Native. (Although NCAI has not consulted with Tribes on this idea, it is simply an idea for further discussion). This may be more likely than trying to make them delineate between brother and sisters, aunts and uncles because of an arbitrary external line drawn between their communities, not of their choosing. Their Tribal members are citizens of their Tribal nation.

Despite objections to discussing these other citizenship delineations, NCAI will explore some of them to facilitate thought and discussion with DHS and DOS.

U.S. Citizens on U.S. Tribal Rolls with Difficulty in Proving U.S. Citizenship

High Rate of Home Deliveries. Many Native Americans are born outside of a modern hospital system. Because they are born at home, and because there is not a strong relationship with the state or county government, many never receive a birth certificate. However, in many instances there will be documentation and birth records available through Tribal genealogy records and Tribal identification. Most Tribal leaders at the San Diego Tribal WHTI Meeting estimate that percentage of their Tribal population without state issues birth certificates is approximately twenty-percent (20%).

By example, the Tohono O’odham Nation in Arizona estimates that approximately 7,000 members (of their 28,000 members) were born at home, not in a hospital, and are unable to meet the statutory requirements to obtain a birth certificate.

Indian Boy/Girl on Birth Certificate. In addition, of those Native children who were born in Indian hospitals, there were long periods of time for many states in which “Indian Boy” or “Indian Girl” was simply entered on a birth certificate, therefore rendering the birth certificate largely useless for the purposes at hand.

One such example includes an elder in Washington State. Her name was incorrectly listed on her delayed birth record. She sought to have it rectified in order to obtain a passport, only to be told “she did not exist.” It required lengthy court proceedings to try and rectify this. She has since passed away. She always had sufficient Tribal documentation. However, this is not an ancient practice only effecting the elderly. A 30-year-old NCAI staffer from the Navajo reservation just spent two years and nearly \$2,000 in order to fix his “Indian Boy” birth certificate.

Waiver of Birth Certificates for Military Service. American Indians and Alaska Natives throughout the history of this country have served in the military at a higher per capita rate than any other ethnic group. The reasons are many including culturally-based warrior traditions and a dedication to the treaty obligations made to the U.S. government. A significant number of Tribal members were allowed to enlist in the military without birth certificates prior to and during World War I, World II and the Korean War. These veterans served with distinction and many were decorated, including those serving as Code Talkers in World War I and World War II. Upon returning home, many of these veterans who did not have birth certificates were unable to travel freely across the international borders of Mexico and Canada because they did not have birth certificates for identification purposes. The U.S. government conveniently waived birth certificate requirements when they were needed in service to the country.

Tribal Birth Certificates

Because of this very prevalent trend in Indian Country, Tribal leaders have been discussing the creation of a Tribal birth certification process, much like that of state governments. Tribes that create these processes hope DHS and DOS will be open to accepting these proofs of birth as any birth certificate.

Non-U.S. Citizens on U.S. Tribal Rolls in General

As previously indicated, there are a handful of Tribes whose communities were intersected by what are now the international borders that have Tribal members on their rolls that are also now Mexican or Canadian citizens. (NCAI estimates this number to be between 8-15 U.S. Tribes.) All of those non-U.S. citizen Tribal members, however, are indigenous Tribal family members.

Indians with Canadian Citizenship on U.S. Tribal Rolls

For those northern border Tribes that have Canadian citizens on their citizenship rolls, the distinction between U.S. and Canadian citizenship seems unimportant because indigenous Canadians have the same if not more border crossing rights as indigenous Americans.

Under the Jay Treaty, U.S. and Canadian Tribal members can move freely, not only for travel but also for work, back and forth between the U.S. and Canada. Under the current NPRM, Canadian Tribal members may apply for approval of their own Tribal documentation under the same terms as members of Tribes based solely in the US (and may also be allowed to use the enhanced Indian Status Card under development by the Government of Canada).

NCAI applauds the proposal's essentially identical treatment of Canadian and U.S.-based native peoples, particularly because these nations and Tribes preexisted the border that has been drawn across their communities. DHS's willingness to treat Canadian and U.S.-based native peoples identically rightly suggests, in our view, that explicit delineation of U.S. vs. Canadian citizenship is not critical for border crossing purposes. The only relevant citizenship indicator is Tribal or indigenous citizenship.

Indians with Canadian Citizenship on Canadian Tribal Rolls

In 1794, the United States and Great Britain entered into the Treaty of Amity, Commerce and Navigation (commonly known as the "Jay Treaty") in order to resolve outstanding diplomatic issues resulting from the Revolutionary War. While no Indian nations were party to the treaty, it recognized by its terms the right of all Indians to pass freely across the U.S.-Canada border based solely on their Tribal citizenship, without regard to border crossing location or purpose. The U.S. courts, Congress, and the Executive Branch have recognized the border crossing rights defined by the Jay Treaty for over 200 years and Tribal members have long exercised their rights under the treaty. Any final rule should preserve these rights in their fullest form.

It is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into

the respective territories and countries of the two parties, on the continent of America . . . and freely to carry on trade and commerce with each other. . . . [N]or shall the Indians passing or repassing with their own proper goods and effect of whatever nature, pay for the same any impost or duty whatever.

As referenced by the NPRM, this provision for Canadian born Indians to enter the U.S. without inspection under immigration laws that was recognized by the U.S. courts in the *McCandless* and *Karnuth* decisions is embodied, with slight modification, in immigration laws currently in effect. Section 289 of the Immigration and Naturalization Act of June 27, 1952 (66 Stat. 234; 8 U.S.C. 1359) provides:

Nothing in this subchapter shall be construed to affect the right of Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

We applaud the current NPRM for respecting the purposes of the Jay Treaty and essentially treating U.S. and Canadian Tribes the same. We also applaud the NPRM for removing the statutory blood quantum and deferring rightly to Tribal citizenship.

Assembly of First Nations representatives attended the San Diego Tribal WHTI Meeting with U.S. Tribal leaders and will submit more comprehensive comments.

Indians with Mexican Citizenship on U.S. Tribal Rolls

Like their Canadian border counterparts, some U.S. Tribes along the U.S.-Mexican border have members who are Indians, but are also citizens of Mexico. Some examples include the Tohono O'odham Nation and the Kickapoo Tribe of Texas and Oklahoma.

Per the previous discussion, being an indigenous person who is a citizen of a federally recognized U.S. Tribe is what confers upon the individual the inherent right to pass and repass the border. No other rights are under discussion in this NPRM. These Tribal ID cards do not claim U.S. citizenship, do not confer a right to work or stay, and not does this NPRM propose to accept them for any other purpose than indicating an indigenous right to pass and repass.

In the alternative, it is NCAI's recommendation based on strongly held beliefs premised on international law and treaty rights that exceptions to the citizenship requirement must be afforded to a small number of Tribal citizens without U.S. citizenship for border crossing purposes. Implementation of a final rule will require government to government consultation with impacted Tribes to ensure a process that will enable Tribes to provide "recognized" Tribal membership in Mexico Tribal documentation for border-crossing purposes.

Of all the questions presented to Tribal leaders by DHS and DOS, this is perhaps the one most in need of additional consultation.

Indians with Mexican Citizenship not on U.S. Tribal Rolls

Because the Mexican government does not recognize Tribal governments in exactly the same way that the Canadian and U.S. governments do, U.S. Tribes have had the most difficulty in migration rights for their Mexican citizen Indian relatives.

In general DHS seems to state that the NPRM had little effect on Mexican nationals, they are still required to have either a Mexican passport or a Border Crossing Card to cross. However the few changes made will have a disproportionate effect on the Native American community.

Prohibition on Obtaining Mexican Passports in the U.S. One major change proposed in the NPRM is to no longer allow Mexican nationals to cross the border to get a Mexican passport in the US. This is a big concern for some of the U.S. Border Tribes, such as the Kumeyaay in California. The Kumeyaay Bands, who having exhausted all other alternatives to help facilitate travel by their Indian family members of Mexican citizenship, have set up a process whereby Mexican band members travel to the U.S. to obtain Mexican passports, because the in-country Mexican system is unmanageable, and then apply for various U.S. cultural visas. The Kumeyaay Bands will provide more detailed information in the comments.

U.S. Tribal “Recognition” of Mexico-based Tribes and Tribal Censuses. Another concern is ensuring that tribal peoples, who are Indians as well as Mexican citizens, have the right to pass, particularly those related to the U.S. Tribes. The Tribal leaders have begun a discussion of a number of different options that may make this manageable.

First, Mexico has a Bureau of Indian Affairs (“BIA”) type organization that tracks its indigenous population. Perhaps they have a “roll” of their natives that was reliable enough to be used for identifying Mexican Indian similarly to the federal rolls used in Canada.

Second, Tribes are also considering passing Tribal resolutions or constitutional amendments recognizing either specific bands in Mexico (or Canada) as being a part of their Tribe or band structure, or specific lists or censuses of individuals. Thereby “recognizing” their Mexican (or Canadian) counterparts and conferring a certain official status on them not unlike when the US government/BIA “recognizes” US Tribes and confers status on them. This option is not without precedent. The Kumeyaay conducted a comprehensive census of their Indian relatives in the Kumeyaay bands on the Mexican side and have provided that list to DHS. A more comprehensive discussion of this program can be found in the Kumeyaay comments.

B. ID Fraud Concerns***Fraudulent Membership: “Adoption”/Selling Tribal Membership***

DHS clearly has a concern with non-U.S. citizens becoming listed on Tribal membership rolls and therefore having access to a Tribal ID card which would grant them border crossing privileges. Specifically they seemed to be concerned with bad actors having access to membership. Two questions that DHS raised were how do Tribes “adopt” into the Tribe, and what about the recent scandals regarding fake Tribes selling Tribal membership.

Tribal “Adoption”

Each Tribe can speak specifically to their own adoption practices, but in general official actual Tribal governmental adoption whereby someone is placed on Tribal membership rolls is extremely limited. Every Tribe that NCAI is aware of, with the exception of the Five Civilized Tribes already discussed, has a constitutional requirement of either a specific blood quantum or at a minimum direct Tribal descendency in order to qualify for Tribal Membership.

Non-Indians are often confused when they hear that a non-Indian was “adopted” by a Tribe. Usually these are cultural “adoptions” whereby a Tribal family holds a traditional ceremony to indicate they have all of the same responsibilities of a family member to this person. These are not, however, official Tribal governmental adoptions whereby actual citizenship is conferred on the individual. They are family relationship building ceremonies, just as calling your best friend from Brazil your “brother” does not confer upon him U.S. citizenship.

Additionally, a non-Indian does not become “adopted” or placed on the Tribal membership rolls by means of marriage. For example, unlike U.S. citizenship, if a Tribal member married a non-Member that non-Member does not qualify for membership by means of marriage.

In addition, unlike with U.S. citizenship, a non-Indian does not necessarily become “adopted” or placed on the Tribal membership rolls by being a non-Indian child officially and legally adopted by a Tribal member. Such a child would likely not qualify for membership because they would not meet the Tribe’s blood quantum or blood decendency requirements. In fact, in many Tribes a Tribal member’s own biological child may not qualify for Tribal membership if that child was conceived with a non-Member and does not meet the minimum blood quantum requirements themselves.

Actual “adoption” into a Tribe whereby you actually get placed on the Tribal membership rolls is very rare. In fact, NCAI could not find an example of it actually happening in all of our inquiries to Tribal leaders. If it were to happen, it is most often because of a technical oversight regarding someone’s membership application, (i.e., they are just short of the blood quantum requirement or records regarding a parent could not be located), or they were a long standing, integrated member of the community.

Criminals Selling Tribal “Membership”

No Tribe sells their Membership. Just as you cannot buy U.S. Citizenship, you cannot buy Tribal citizenship. In fact, as previously discussed, it is extremely difficult to become a Tribal member. The recently publicized stories about illegal “Tribes” selling Membership to illegal aliens are not stories about Tribes. They are criminals who have been selling fake IDs to illegal aliens. They have been fraudulently posing as “Tribes” in order to effectuate their scams. As unfortunate as this situation is, it is no different than a scam to sell fake state driver’s licenses or fake green cards. There are federal and state laws to prevent this type of fraud and the FBI is already enforcing those laws.

Fraudulent ID Cards. Tribal ID cards have no more or less likelihood of being fraudulently copied or accessed than any other government ID, they need to be protected equally. Tribal ID cards are closely guarded by Tribes in general. Not necessarily because of this border crossing discussion, but

because with those cards comes a number of Tribal governmental benefits as well, including housing and health care. Tribal ID safety and fraud is not taken lightly and there are already federal and Tribal criminal laws in place regarding document fraud.

In our conversations with the Tribes, it is clear that the Tribes respect the governmental responsibility and importance of ID card security and are willing to meet all the same fraud protection and safety standards required of other official government ID cards. However, it is equally clear that it is unreasonable to require a higher standard of Tribal ID cards than are reasonably required of other government ID cards.

C. Level of Security Information Provided to Protect from Fraud/Access to Tribal Information

Tribal governments understand the new scrutiny and limitations DHS finds itself under, and the motivations behind the WHTI. Thus, most are willing to subject their identification process to the same level of security and scrutiny as other governments, and to permit limited, secure, access to Tribal enrollment information. Each Tribe will provide their specific response to this inquiry.

CONCERNS: TRIBAL CONCERNS**A. Inappropriate and Unnecessary Confidential and Religious Information Requested By DHS**

The NPRM asks a series of very specific questions regarding Tribal border crossing patterns, including religious destinations and crossing calendars. The specific information being requested in the NPRM is:

- Indicate the traditional destination or destinations across the border that are visited by members of the Tribe;
- Explain in detail the purpose or purposes of all such travel;
- Relate all such travel to traditional ethnic, religious, cultural or other activities of the Tribe;
- Indicate the frequency of the travel;
- Specify the border crossing point or points that are generally utilized to travel to each destination.

First, this request is inappropriate and unnecessary, it is not being asked of any other government in order to utilize their IDs for entry and exit, and was not asked of Washington State in their pilot program. We cannot imagine Washington State being asked to list where its residents will be going once they cross the border, for what purpose, and when.

Second, even if it were an appropriate question, a publicly available response to a NPRM is an inappropriate forum to ask for this information. In traditional Indian religions, it is often forbidden to reveal certain details about the religions and about sacred and ceremonial places associated with those religions. Federal land management policies reflect these cultural concerns. Thus, National Register Bulletin 38 issued by the National Park Service, which provides guidance for how agencies should deal with traditional cultural property, recognizes (at page 17) that

Particularly where a property has supernatural connotations in the minds of those who ascribe significance to it, or where it is used in ongoing cultural activities not readily shared with outsiders, it may be strongly desired that both the nature and the precise locations of the property be kept secret...However concerned one may be about the impacts of...a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one's cultural system provides no acceptable mechanism for doing so.

Moreover, even in those circumstances where some information is revealed by Tribal governments or traditional practitioners, federal statutes authorize that this information be maintained by the government confidentially. For example, Section 304 of the National Historic Preservation Act authorizes federal agencies to

withhold from disclosure to the public, information about the location, character or ownership of a historic resource if the Secretary and the agency determine that disclosure may—

- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resources; or
- (3) impede the use of a traditional religious site by practitioners.

Here, to the contrary, all of this sensitive information would be accessible to the public.

We would note that requiring this information as a prerequisite for exercising indigenous border crossing rights might violate the Religious Freedom Restoration Act (42 U.S.C. 2000bb-1 et seq.) That Act provides that government activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Government actions that put substantial pressure upon a practitioner to violate his beliefs have been found to constitute a substantial burden upon a practitioner's right to practice his or her religion. While the government undoubtedly has a compelling interest in homeland security, we are doubtful that requiring this confidential religious information as part of the rulemaking process is the least restrictive manner of furthering that interest.

NCAI reached out to DHS on a number of occasions to try and obtain clarification on this request. Unfortunately, without further clarification, NCAI has strongly advised Tribes not to provide any sensitive information through the NPRM process. We have provided this advice reluctantly considering the following language in the NPRM:

“Tribes will only have the opportunity to participate in the shaping of the standards for Tribal documents through this rulemaking. Therefore any Tribe that is considering submitting the information outlined above must do so through this rulemaking process, as outlined in this NPRM.”

NCAI is concerned that by not providing this requested inappropriate information DHS will use it as an excuse to exclude Tribes from participation as being “non-responsive.” We sincerely hope this is not true, and want to reemphasize that NCAI and individual Tribes have tried numerous times to get some clarification in order to be helpful on these questions.

B. Lack of Formal Tribal Consultation

In general we are very pleased that DHS took a step in the right direction of recognizing not only Tribal sovereignty, but basic indigenous human rights of migration. We are grateful for the tribal outreach effort to conduct a few meetings with Tribal leaders. These meetings were informative and productive. However, the meetings primarily just provided background information. They were not formal consultations in the sense that there was no Tribal-wide DHS notice, nor were they interactive discussions on the details of a final policy.

Tribal officials have expressed that DHS has as of yet refused to hold more formal consultations or conversations with Tribes.⁷

NCAI has been calling on DHS formally since 2006 to consult with Tribe (Tribal leaders passed an NCAI resolution in 2006 requesting the Secretary of the Department of Homeland Security (DHS) to consult and collaborate with Tribal leaders on the Western Hemisphere Travel Initiative (#MIC-06-16C), and another requesting the DHS Secretary to consult and collaborate with Tribal leaders on the research and development of the possibility of an “Indigenous Identification Card” for international border crossing (#MIC-06-17C)).

This lack on conversation during the NPRM is particularly disconcerting considering that before the publication of the proposed rule, Tribes were told DHS couldn’t have a two-way conversation with them or hold consultation until after the proposed rule was published. During this time period, therefore, DHS attended some Tribal meetings and “listened” to Tribal concerns but would not officially interact or conduct a dialogue. Now that the proposed rule has been published DHS claims that they cannot consult or even answer Tribal questions while the NPRM is pending.⁸

The NPRM further seems to indicate that these written comments to the NPRM are the only allowed form of communications with DHS on WHTI, despite there having been no consultation, and despite the fact that very confidential information is being requested that should not be provided in such a public forum.

C. Opt-in With a Cut-Off Date

The proposed regulations have a very disturbing passage, referenced earlier, that seems to assert that this is the only chance every Tribe will have to opt-in to using their Tribal ID card.

“Tribes will only have the opportunity to participate in the shaping of the standards for Tribal documents through this rulemaking. Therefore any Tribe that is considering submitting the information outlined above must do so through this rulemaking process, as outlined in this NPRM.”

Such a cut-off is arbitrary and unnecessary. If DHS is to accept tribal ID cards it can set the standards and accept applications over time.

NCAI was created by the Tribal governments in 1944 with the mission to protect Tribal sovereignty. As such, NCAI officially submits this portion of our comments on behalf of all NCAI member

⁷ Finally, there are at least two Executive Orders that require agencies to utilize maximum agency flexible to seek the views of state, local and Tribal informal contacts and discussion.

<http://www.law.fsu.edu/library/admin/acus/305773.html>

http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866_amended_01-2007.pdf

<http://ceq.eh.doe.gov/nepa/regs/eos/eo13175.html>

⁸ The Administrative Conference of the United States encourages informal contacts and discussion. See, <http://www.law.fsu.edu/library/admin/acus/305773.html>

Tribes. NCAI submits this portion of our comment as an official notice that all NCAI member Tribes intend to submit their Tribal ID for approval, thus retaining the rights of all Tribes.

In addition, we are concerned for our relatives in Canada. We are grateful of DHS' proposal to rightfully recognize them and their government identification in the same way they are proposing to recognize U.S. Tribal identification. However, we do not believe they have been given sufficient notice to have fully participated in this conversation as well.

CONCLUSION

The National Congress of American Indians is pleased to provide the Department of Homeland Security and the Department of State with these comments to the Proposed Rule on Documents required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere. Tribal government and Tribal border communities have a vested interest in protecting their community members from outside encroachment by illegal immigrants and potential terrorist threats. Tribes want to ensure national homeland security needs are met and are willing to share the difficult task of border protection and border passage with the U.S. government. But at the same time they must protect their Tribal citizen's inherent border-crossing rights and privileges. The NCAI believes that the national security goals can be met and tribal integrity maintained through incorporation of the comments we submit in this document, and continued Tribal consultation.

If further information is requested regarding these comments please contact Heather Dawn Thompson at NCAI., 202.466.7767, or hthompson@ncai.org

Sincerely,



Joe Garcia
President,
National Congress of American Indians