

August 21, 2007

U.S. Customs and Border Protection  
Office of International Trade  
Office of Regulations and Rulings  
Border Security Regulations Branch  
1300 Pennsylvania Avenue, NW. (Mint Annex)  
Washington, DC 20229

RE: Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere, Notice of Proposed Rulemaking, 72 Fed. Reg. 122 (June 26, 2007); U.S. Customs and Border Protection, docket number USCBP-2007-0061.

Dear Sir or Madam:

I am writing on behalf of the Pokagon Band of Potawatomi Indians to comment on the proposed rulemaking described above at § IV(G)(1)-(2), which will implement requirements under the Intelligence Reform And Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638, enacted on December 17, 2004. The Pokagon Band is a federally-recognized Indian tribe, see "An Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians" ("Pokagon Restoration Act"), 25 U.S.C. § 1300j (Pub.L. 103-323, 108 Stat. 2153), as amended. As a constituent band and political successor to the Potawatomi Nation, the Pokagon Band was a signatory to at least eleven treaties with the United States dating back to the Treaty of Greenville 1795 (7 Stat. 49).

I. Introduction.

Beginning in the 1830's, Segments of the Potawatomi Tribe escaped forcible removal from Michigan and Illinois to Kansas and Oklahoma by fleeing to Ontario, Canada. Canada listed 290 Potawatomi residing in Ontario in 1890. There are presently more than 2,000 Native Americans of Potawatomi descent residing in Canada. See <http://www.tolatsga.org/pota.html> (last viewed on August 21, 2007). In recognizing the close affiliation between the Canadian Potawatomi Bands and the Potawatomi Bands in the United States, including the Pokagon Band, the United States Court of Claims stated:

Most of those who had resided on the lands ceded by the Articles Supplementary remained in southern Michigan and largely assimilated themselves into the white man's society there. They became known as the Potawatomie of Michigan and Indiana. Those who had resided in northern Wisconsin adopted an essentially nomadic existence, surviving by hunting, fishing, berry-picking and occasionally working in the lumbering industry. Some of that contingent emigrated to Canada and are not involved in this proceeding. The remainder of the former inhabitants of the treaty lands scattered about Michigan, successfully evading the efforts of Federal troops to forcibly remove them to the West.

*Hannahville Indian Community v. U.S.*, 4 Cl.Ct. 445, 456 (Cl.Ct., 1983). *See also Pottawatomi Nation in Canada v. U.S.*, 27 Fed.Cl. 388 (Fed.Cl., 1992).

## II. Annual Potawatomi Gathering.

The present day Potawatomi Nation is comprised of nine Potawatomi Bands located in the United States and Canada with a collective membership in excess of 50,000. Significant numbers of Potawatomi Indians residing in Canada travel to the United States each year for various tribal events, including an annual Potawatomi meeting called the Gathering. The Gathering is a well-organized annual celebration of Potawatomi culture and traditions and provides an important opportunity for Potawatomi Indians and their elected leaders to meet face-to-face to address social and political concerns common to the Potawatomi Tribe. The next Potawatomi Gathering is scheduled for July of 2008 on Walpole Island, Ontario, Canada.

## III. The Jay Treaty of 1795.

Indians who are members the Potawatomi Bands located in Canada have for many, many years freely passed through the U.S. border based on rights recognized under the Jay Treaty of 1795 and, more recently, federal statutory law.

After the American Revolutionary War, a number of Indian nations were bisected by the newly-established U.S.-Canadian border. Great Britain and the United States addressed the problem by including the following provision in the Jay Treaty of 1795:

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. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

Article III, Treaty of Amity, Commerce, and Navigation, Between His Britannick Majesty;—and the United States of America, By Their President, with the Advice and Consent of Their Senate, Nov. 19, 1794, U.S.-U.K., T.S. No. 105 (hereinafter “Jay Treaty”). Following the War of 1812, the U.S. and Great Britain reaffirmed the agreements reached in the Jay Treaty regarding the rights of Indian tribes in the Treaty of Ghent. Treaty of Peace and Amity, art. 9, Dec. 24, 1814, U.S.-U.K., T.S. No. 109.

## IV. Jay Treaty Rights Recognized by the U.S. Courts.

One of the earliest immigration laws enacted by Congress, the Immigration Act of 1924 (43 Stat. 152), contained no reference to the rights of Indians under the Jay Treaty. The United States Court of Appeals for the Third Circuit discussed this omission in *United States ex Rel. Diablo v. McCandless*, 18 F.2d 282 (D.C. Pa. 1927), *aff'd* 25 F.2d 71 (3<sup>rd</sup> Cir. 1928), in which it found that a full-blooded Iroquois Indian resident of Canada was not subject to deportation for failure to comply with the 1924 Act because Article III of the Jay Treaty had exempted American Indians from the operation of the immigration laws of the United States. The holding in *McCandless* was codified into law by the Act of April 2, 1928 (45 Stat. 401; formerly 8 U.S.C. 226a), which states:

That the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, that this right shall not extend to persons whose membership in Indian Tribes or families is created by adoption.

After the *McCandless* decision, Indians born in Canada were permitted to enter the United States without inspection under the immigration laws. The holding in *McCandless* was clarified in *United States ex Rel. Goodwin v. Karnuth*, 74 F. Supp. 660 (D.C.N.Y. 1947), in which the Court stated that the exemption of “American Indians born in Canada” was applicable to persons of Indian blood generally and not just to members of a tribe, since it was premised on racial and not political considerations.

#### V. Jay Treaty Rights Codified in Federal Statutory Law.

The exemption 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.

Therefore, the provision made in Article III of the Jay Treaty for the free passage of Indians from Canada into the United States has been reaffirmed by Congress and remains as a right recognized and preserved by federal law.

#### VI. Potential Impact of IRTPA on Jay Treaty Rights.

Section 7209 of IRTPA mandates that U.S. citizens and non-immigrant aliens who are presently exempted from the requirement to produce a passport to enter the United States must produce a passport or other approved documentation that establishes identity and citizenship as of December 31, 2006 if traveling by sea or air and by December 31, 2007 for land crossings. The new document requirements may only be waived under

three circumstances: (1) when the Secretary of Homeland Security determines that “alternative documentation” different from that then being required under Section 7209 is sufficient; (2) in an individual case of an unforeseen emergency; and (3) in an individual case based on “humanitarian or national interest reasons”. It would appear that the only viable means of preserving the rights of Indians under Article III of the Jay Treaty and other federal law following the passage of IRTPA is for the Secretary of Homeland Security to provide a waiver that accepts “alternative documentation” from Indians seeking entry into the United States.

## VII. Comments and Proposals from the Pokagon Band Regarding the Proposed Rules for Implementing IRTPA.

The Pokagon Band considers the possible implementation of IRTPA requirements that would require a passport or other similarly rigid documentation to establish identity and citizenship as an unwarranted abrogation of the rights of Indians under the Jay Treaty. The Pokagon Band urges the Secretary to preserve long-standing Jay Treaty rights of Indians through a waiver that would accept alternative documentation. Among the alternative types of documents that should be considered acceptable are identity (membership) cards issued by Indian tribes located in the U.S. and Canada.

The Pokagon Band membership card should be an acceptable alternative document because the qualifications and issuance of the membership card is done through a secure procedure. All Pokagon Band members are issued membership cards and, if such alternative documentation is determined to be acceptable, our members would not be required to incur the significant and unnecessary additional expense and difficulty of obtaining a U.S. passport in order to cross the U.S.-Canada border in order to participate in religious and cultural activities.

### *a. Traditional Border Crossings*

As previously stated in Section I, the Pokagon Band of Potawatomi Indians settled in Southern Michigan and Indiana but remained culturally tied to the other Potawatomi Bands located throughout the U.S. and Canada, particularly the province of Ontario. Every year Pokagon Band members attend the Potawatomi Gathering as well as pow wows and other traditional and cultural activities throughout the Great Lakes area and Canada, which are attended by many members of Potawatomi Bands. Pokagon Band members also travel to Canada to visit family and friends. Generally, Potawatomi members cross from Michigan to Ontario, Canada using Ambassador Bridge at Detroit or the Blue Water Bridge at Port Huron.

### *b. Pokagon Band Enrollment Qualifications and Procedure*

The Pokagon Band passed the Pokagon Band Enrollment Ordinance (“Enrollment Ordinance”) in 1996. See <http://www.pokagon.com/codes/EnrollOrdinance.pdf> (last visited August 22, 2007). The Enrollment Ordinance is a comprehensive statute that sets forth the procedure and requirements for Pokagon Band citizenship. It is a secure

procedure that meets or exceeds the criteria in the proposed regulations as an acceptable alternative document under the Intelligence Reform and Terrorism Prevention Act (“IRTPA”). In order to be eligible for membership in the Pokagon Band of Potawatomi Indians, a person must be a lineal descendant of a person listed on one of the membership rolls enumerated in the Pokagon Band Constitution. There is no exception to this requirement.

The Pokagon Band Enrollment Department maintains its enrollment records in compliance with federal record retention requirements. All files are kept in a locked, fireproof, filing cabinet. The office in which these filing cabinets are housed is locked at all times, unless the Enrollment Coordinator is in the office. The Enrollment Coordinator is the only person with keys to the office. The office is also protected by an electronic security system.

Upon enrollment with the Band, a member aged 14 years or older is issued a membership card. See section 13 of the Enrollment Ordinance and the Resolution. After October 20, 2001, all membership cards contain the member’s picture. Members who live within the Band’s service area may visit Enrollment Office to obtain their photo membership card. Those members that do not live within the Band’s service area must submit a picture and their signature along with a notarized statement that the picture and signature is their own.

The information contained in an individual member’s folder is considered confidential and access to a folder is limited. See Enrollment Ordinance Section 9(B). A member (or his duly authorized agent) may access his file only, not the files of others. Specified Band Officials or Bureau of Indian Affairs Officials may access an individual member’s file only when it is necessary for enrollment decisions. All documents submitted as part of a membership application must be signed under oath or must be government issued documents, such as a birth certificate or marriage license.

The Tribal Enrollment Application Management Software (“TEAMS”) that is used to create the membership cards is on a password-protected computer and access to the TEAMS program itself is password protected. The Enrollment Coordinator is the only person who has access to the computer and the software. The Pokagon membership card includes as a security feature a requirement that it must be signed by the Chairman and the member.

Replacement cards can only be obtained from the Enrollment Office. To replace a lost or stolen membership card, a member must present identification, such as a driver’s license or other sufficient identification. A member must surrender their existing card if the member is replacing it with a photo membership card.

*c. Willingness to Cooperate with Customs and Border Protection.*

The Pokagon Band is willing to cooperate fully on an ongoing basis with the U.S. Customs and Border Protection (“CBP”) and provide them with an electronic copy of current relevant information needed to verify and validate tribal enrollment documents. The Pokagon Band is also willing to cooperate with CBP on the enhancement of the

enrollment document if it is shown that the current document is not adequate to meet the security requirements of IRTPA.

*d. Possible Alternative Treatment of United States Native Americans.*

The Pokagon Band strongly urges that the DHS and DOS reject the approach to make no special provisions for U.S. Native Americans. U.S. policy has resulted in incalculable harm to tribal communities throughout the last two centuries. As indicated above, the U.S. policy to forcibly relocate the Potawatomi Tribe resulted in the several Potawatomi Bands being scattered throughout the United States and Canada. The efforts of Indian tribes to overcome the historic harm of these policies would be severely hampered if the Secretary declines to honor long-standing Jay Treaty rights of Indians.

An alternative to address the unique relationship between the federal government and Indian tribes is to waive the fee for the U.S. Passport for tribal members. Individual Indians will likely incur increased costs to acquire passports and other documents that could be required for border crossings. Indian people are among the poorest groups of people in both the United States and Canada. While the cost of obtaining a passport or other approved documentation may not be significant for many people, this seemingly modest economic burden will weigh more heavily on Indian people. Many Indian people will face a choice of foregoing critical money needed for food, shelter, and healthcare in order to pay the cost of acquiring a passport or other documentation. Most Indian communities are located in rural areas and at significant distance from government offices that issues passports. Moreover, Indian people often lack adequate healthcare and suffer from debilitating medical conditions that make travel to such distant locations more difficult. As a result, if Indian people are required to obtain a passport to cross the U.S.-Canadian border, many Indian people will be unable or unwilling to make the sacrifices necessary to do so. Ultimately, by creating additional, unwarranted barriers to international travel for Indian people, many Indian tribes, including the Pokagon Band, will find their efforts to protect and preserve their cultural identity and political autonomy more difficult.

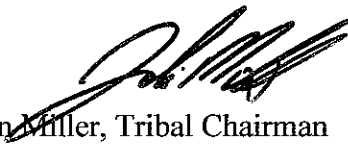
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Among the alternative types of documents that should be considered acceptable are identify (membership) cards issued by Indian tribes located in the U.S. and Canada. Most tribes have particularly rigid standards and procedures that must be met before a membership card will be issued, including specific requirements regarding identity and ancestry. The Pokagon Band and most other tribes also have laws in place to protect against fraud and forgery in enrollment matters.

The Pokagon Band understands and fully agrees with the importance of improving security and U.S. borders to protect U.S. Citizens and property. It is not necessary, however, in pursuing these objectives to implement IRTPA in a manner that would abrogate or diminish the rights of Indians under the Jay Treaty and other federal law. The Pokagon Band urges the Secretary to consider a waiver for Native Americans regarding the proposed requirement for a U.S. passport at U.S.-Canadian border crossings. As an alternative, we urge the Secretary to consider approving the use of tribal membership cards issued by the Pokagon Band and other tribal governments.

Please do not hesitate to contact me if we can be of further assistance in your effort to develop appropriate approaches for implementing the requirements of the Intelligence Reform and Terrorism Prevention Act of 2004.

Sincerely yours,



John Miller, Tribal Chairman