



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUN 24, 2020

Ms. Irenne Zwierlein
789 Canada Road
Woodside, California 94062

Dear Ms. Zwierlein:

For 20 years, the United States Department of the Interior (Department) has corresponded with two groups claiming to be the duly authorized governing body of Petitioner #120, the “Amah Mutsun Band of Ohlone/Costanoan Indians” of California. The purpose of this letter is to inform both groups that the Assistant Secretary–Indian Affairs (AS–IA) will continue to suspend Petitioner #120 from active consideration because the petition is still not ready for evaluation, as first directed in the May 15, 2018, letter. This letter discusses the relevant governing procedures, administrative history, OFA’s analysis of the evidence resulting in the AS–IA’s decision, and the Department’s consequent determinations. This letter then presents both governing bodies with options for resolving their leadership dispute and for pursuing Federal acknowledgment.

Governing Procedures

In 2008, the AS–IA issued “Guidance and Direction Regarding Internal Procedures” (2008 Guidance), clarifying how OFA should handle the emergence of splinter groups within petitioners (73 FR 30146). The 2008 Guidance instructed OFA to “continue to avoid becoming involved in the internal conflicts of a petitioning group.”

When a split in a petitioner’s leadership “interfere[s] with [OFA’s] ability to conduct its business with the group” and “[i]n order to be able to work with the one duly authorized governing body of a petitioner,” OFA may request additional information, including current and past governing documents, membership lists, meeting minutes, and election results, as well as signed consent forms from each current member. Upon receiving any such submissions, OFA will determine whether “the submitted information identifies a governing body agreed upon by the group’s members[.]”

Regarding splinter groups that exist after the Department determines that a petitioner is “Ready, Waiting for Active Consideration,” OFA should “recommend that the group resolve its disputes in a timely manner” (73 FR 30147). If the dispute is not resolved in a timely manner, OFA “may decide not to move the group to active consideration or may decide to remove it from the ‘Ready’ list because it is no longer ready for evaluation.” The 2008 Guidance gives OFA the discretion to determine “[w]hen and how OFA will respond to a group’s leadership disputes and emergence of splinter groups and its submissions,” depending “entirely on the facts of the situation, availability of OFA’s professional staff members, their recommendations, and OFA’s pending workload priorities.”

The 2008 Guidance remains in effect today. The preamble of the 2015 Final Rule promulgating the most recent revisions to the Federal acknowledgment regulations states, “The final rule does not change the way the Department has handled ‘splinter groups’” (80 FR 37862, 37874). Pursuant to the 2008 Guidance, in

response to a leadership dispute, “the Department may request additional information from the petitioner to clarify the situation and OFA may suspend its review of the petition. OFA’s suspension would be based on the leadership dispute qualifying as an ‘administrative problem.’” *Id.* (citation omitted).

The 1994 version of the Federal acknowledgment regulations similarly allows the AS–IA to suspend active consideration of a documented petition “either conditionally or for a stated period of time” as a result of “technical problems with the documented petition or administrative problems” (25 CFR § 83.10(g) (1994)).¹

The 2015 version of the Federal acknowledgment regulations envisions that the Department can evaluate “a splinter group, political faction, community, or entity of any character that separates from the main body of a currently federally recognized Indian tribe, petitioner, or previous petitioner.” However, the Department cannot acknowledge such a petitioner “unless the entity can clearly demonstrate it has functioned from 1900 until the present as a politically autonomous community” (25 CFR § 83.4(b) (2015)).

Administrative History

On September 18, 1990, the Branch of Acknowledgment and Research (BAR)² received a formal resolution, dated September 1, 1990, from “the Amah Band Tribe Council” notifying the Department that it was “hereby petitioning for federal acknowledgement.” By letter dated November 6, 1990, the Department designated the group Petitioner #120 and provided guidelines for preparing and submitting a documented petition.

On January 25, 1995, the “Amah Mutsun Tribe Band Ohlone/Costanoan Indian of California” (AMTB) submitted a partial petition, called a “Reinstatement Request Document,” including a membership list with 537 individual members, representing the original claimed membership of Petitioner #120. BAR sent the petitioner a preliminary technical assistance (TA) review letter on May 22, 1996, identifying multiple deficiencies in the partial petition. On February 16, 1999, BAR provided the petitioner with a full TA review letter under 25 CFR § 83.10(c) (1994), describing “obvious deficiencies or significant omissions apparent in the AMTB documented petition.”

Between March and August 2000, it became clear, through several letters sent to BAR, that a dispute had arisen within the leadership of Petitioner #120, with both Ms. Irenne Zwierlein and Mr. Charlie Higuera claiming to be Chairperson of the petitioning group, heading different “Tribal Councils.” On September 26, 2000, the Department responded to these letters, informing both parties that the Department would not take sides in internal conflicts within petitioning groups. The Director also stated that the Department would “continue to consider the submissions of both groups as in support of one petition and continue to communicate with both governing bodies” until they resolved the leadership dispute.

OFA received additional petition submissions on May 20, 2002, August 15, 2002, and September 15, 2003. These petition submissions enabled OFA to declare on September 15, 2003, that Petitioner #120 was “Ready, Waiting for Active Consideration.” While Petitioner #120 waited for OFA to place it on active consideration, the AS–IA issued the 2008 Guidance. As discussed in the preceding section, the 2008

¹ On July 1, 2015, the Department issued a final rule revising the Federal acknowledgment regulations. This revision of 25 CFR Part 83 became effective on July 31, 2015 (“2015 Regulations”).

² BAR, within the Bureau of Indian Affairs, was previously charged with the responsibility of petition analysis. Effective July 27, 2003, BAR was renamed OFA and relocated administratively under the Office of the AS–IA.

Guidance provided the Department a framework for addressing leadership disputes within groups like Petitioner #120 listed as “Ready, Waiting for Active Consideration.”

Following this guidance, OFA requested information on September 27, 2012, from both Ms. Zwierlein and Mr. Valentin Lopez (who was elected to the position formerly held by Mr. Higuera) in order to address the dispute. The OFA received responses to this request from the Zwierlein-headed group on December 21, 2012, and May 3, 2013, and from the Lopez-headed group on December 31, 2012.

On May 31, 2013, OFA notified both Mr. Lopez and Ms. Zwierlein that it had determined that there were “two separate groups: 1) Petitioner #120 represented by Ms. Irenne Zwierlein and 2) a group represented by Mr. Valentin Lopez.” This determination (2013 Determination) reflected the Department’s decision to work with the governing body of Ms. Zwierlein’s group while evaluating the petition. On October 22, 2013, the Department notified Ms. Zwierlein that active consideration on the petition would begin on November 1, 2013. That evaluation proceeded under the 1994 version of the Part 83 regulations, with administrative extensions lengthening the review period into May 2018.

On May 15, 2018, OFA notified both Mr. Lopez and Ms. Zwierlein of the Department’s finding that the 2013 Determination “was conclusory and [did] not appear to reflect a considered analysis of the materials submitted by the parties for Department review.” The two competing governing bodies had not, by that point, reconciled their leadership dispute. The OFA decided to “suspend[] active consideration due to technical problems with the AMB’s documented petition” and to “withdra[w] the 2013 Determination and retur[n] to the status quo which existed prior to the decision,” treating the two groups as “splinter groups” that were not ready for evaluation. Pursuant to the 2008 Guidance, the May 15, 2018, letter also requested updated information from each of the two groups, with the aim of determining which group was the duly authorized governing body of Petitioner #120.

The OFA received documents from both Mr. Lopez and Ms. Zwierlein in response to the request. Upon review of this material, OFA discovered several evidentiary deficiencies. As a result, on September 3, 2019, OFA sent a second letter requesting additional documentation to remedy these deficiencies. Both groups responded to this request by sending additional documents.

On January 15, 2020, OFA sent a letter to Mr. Lopez and Ms. Zwierlein stating that both groups had submitted incomplete materials and that OFA therefore could not determine which group was the duly authorized governing body of Petitioner #120. This letter also notified both groups that active consideration of Petitioner #120 would remain suspended. Finally, OFA stated in the letter that it would formulate a plan to address the leadership dispute and contact the groups in the next 60 days (while retaining the discretion to extend its 60-day review period in light of competing demands on its resources).

OFA’s Analysis of the Evidence Resulting in the AS-IA’s Decision

In the May 15, 2018, letter, OFA requested several items of evidence from both of the groups under the authority of the 2008 Guidance. Both groups submitted responses on September 3, 2019, and in December 2019. These 2019 submissions included past and current membership lists from each governing body, together with membership consent forms submitted by each governing body. OFA compared these 2019 submissions with the membership list that Petitioner #120 submitted in 1995, before the leadership dispute arose. It also compared the 2019 materials and the 1995 membership list with membership lists submitted in 2002 and 2013 by Ms. Zwierlein’s governing body, as well as a membership list submitted in 2003 by Mr. Lopez’s governing body (then headed by Mr. Charles Higuera). A summary of OFA’s analysis of this evidence follows.

As discussed above, the leadership dispute arising in 2000 continues to exist and has resulted in the emergence of two “splinter groups.” One group recognizes Mr. Lopez as its Chairperson, and another group recognizes Ms. Zwierlein as its Chairperson. Based on a December 31, 2019, certified membership list, Mr. Lopez’s group identifies 898 members, 492 of whom “have been approved as members of our historic Tribe” and 406 “who were members of our Tribe when Zwierlein was our Chair.” Based on a December 8, 2019, certified membership list, Ms. Zwierlein’s group identifies 650 members.

Neither group submitted consent forms for all of its claimed members. Despite claiming 492 “approved” members (see previous paragraph), Mr. Lopez’s group submitted only “244 notarized [membership consent] forms.” This is a deficiency of 248 membership consent forms. And despite claiming 650 members, Ms. Zwierlein’s group submitted “[s]igned, notarized [membership] consent forms from 414[.]” This is a deficiency of 236 membership consent forms. Given the nature of this leadership dispute, the lack of consent forms is a significant concern. The 1994 version of the regulations define “Member of an Indian group” as “an individual who is recognized by an Indian group as meeting its membership criteria and who *consents* to being listed as a member of that group” (25 CFR § 83.1 (1994), *emphasis added*). The lack of consent forms for all members does not allow OFA to confirm the accuracy of the membership list for either group.

Both splinter groups contain significant numbers of members of the original Petitioner #120. OFA compared membership lists dated after 2000 with the 1995 membership list, the only list prior to the 2000 dispute received by OFA from either group, containing 537 members. Specifically, the Lopez group includes more than 250 members on its December 2019 membership list that also appear on the 1995 membership list but do not appear on the membership list of the Zwierlein group. Likewise, the Zwierlein group includes more than 100 members on its December 2019 membership list that also appear on the 1995 membership list but do not appear on the membership list of the Lopez group.

Both groups have continued to add members independently since 2000. The analysis in the preceding paragraph also shows that, the majority of each group’s current membership consists of members who did not appear on the 1995 membership.

Analysis of membership lists from shortly after the leadership dispute arose demonstrate that the two splinter groups began, at that time, to operate independently from each other. A membership list dated 2002, submitted by Ms. Zwierlein, identifies 470 members. A membership list dated 2003, submitted by Mr. Higuera, identifies 459 members. Only 58 individuals appear on both lists at this time: just 12% of either group. None of these 58 individuals continued to be associated with Ms. Zwierlein’s group at the time of the next complete membership list submitted by her in 2013.

Department’s Determinations

Based on the analysis above, and pursuant to the regulatory authority and 2008 Guidance discussed above, the Department has made the following determinations relating to this petition:

- Based on a review of the available evidence, including the evidence submitted in response to its most recent requests, the AS-IA, on OFA’s recommendation, has decided to continue to suspend Petitioner #120 from active consideration because the petition is still not ready for evaluation.
- Analysis discussed above does not lead to the conclusion that either governing body is the duly authorized governing body of Petitioner #120.

- Since 2000, OFA has accepted material from both groups as part of the administrative record for Petitioner #120, pending internal resolution of the leadership dispute. However, the groups have not resolved the leadership dispute and OFA cannot identify Petitioner #120's duly authorized governing body. Under § 83.6(b), all submissions must be certified by a petitioner's governing body. Although the materials submitted since 2000 are not certified as part of Petitioner #120's "official documented petition," they will remain part of the administrative record.
- Evidence discussed above suggests that the two governing bodies might represent two separate entities.

Therefore, given the longstanding, unresolved nature of the leadership dispute and the associated analysis and determinations above, the governing bodies have the following options as to how they might pursue acknowledgment under Part 83.

Options for Resolving Leadership Dispute

If the two governing bodies wish to unify and pursue Federal acknowledgment together as Petitioner #120 under the 1994 version of the Part 83 regulations, then the governing bodies must first resolve the leadership dispute in such a way that OFA is able to identify a single, duly authorized governing body. The Department will then resume communication with the unified governing body concerning this petition.

However, given the analysis and determinations above, as well as the particular administrative history of Petitioner #120, it is possible that the two governing bodies represent two separate entities. If the governing bodies do not choose to unify, then they may choose to petition separately for Federal acknowledgment under the 2015 revision of the acknowledgment regulations. Section 83.4(b) of these regulations allows an "entity of any character that separates from the main body of a . . . petitioner, or previous petitioner" to petition for Federal acknowledgment *provided* that "the entity can clearly demonstrate that it has functioned from 1900 until the present as a politically autonomous community and meets § 83.11(f)." The governing body may then prepare its petition for Federal acknowledgment under the 2015 regulations and submit it to OFA at a time of its choosing. If the two governing bodies do not resolve their leadership dispute, then Petitioner #120 will remain suspended from active consideration because the petitioner does not have a duly authorized governing body and the petition is otherwise not ready for evaluation.

Options for Pursuing Federal Acknowledgment If the Leadership Dispute Is Resolved

If the leadership dispute is resolved in such a way that Petitioner #120 is represented by a single, duly authorized governing body, then this governing body would have the responsibility to ensure that its petition materials are ready for evaluation. Pursuant to §83.10 (1994), prior to moving the petition to active consideration, the OFA would provide an additional technical assistance review letter to the single duly authorized governing body upon request. In preparing its supplementary petition materials, the governing body should consider addressing deficiencies reported in the 1996 and 1999 TA review letters, as well as any additional evidentiary, technical, or administrative deficiencies that prevent its petition from being ready for evaluation. The petition would then move forward to evaluation pursuant to § 83.10 (1994).

If a governing body chooses to submit a petition under the 2015 revision of the acknowledgment regulations, it must submit, *de novo*, a complete documented petition as required in § 83.21 of the acknowledgment regulations. A complete documented petition requires: (1) a certification signed and dated by the governing body; (2) a concise written narrative with citations to supporting documentation thoroughly explaining how the petitioner meets each of the criteria listed in 25 C.F.R. § 83.11 (2015);

(3) supporting documentation; and (4) membership lists and explanations. In addition to the complete original petition, please also submit those pages where you redact or remove privacy material from your petition. A governing body wishing to proceed as a separate petitioner under § 83.4(b) would receive a new petitioner number upon successfully filing a documented petition. If the new petitioner wished to rely on documents previously submitted in furtherance of Petitioner #120, the new petitioner would have to resubmit those documents in furtherance of its new, standalone petition and certify those documents by the group's governing body.

Enclosed for your review please find a copy of the 2015 version of the Part 83 regulations.

Should you have any questions, please contact the Office of Federal Acknowledgment, 1849 C Street NW, MS-4071 MIB, Washington, DC 20240, or by telephone at (202) 513-7650.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Lee Fleming". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Director, Office of Federal Acknowledgment

Enclosure

Similar letter sent to Mr. Valentin Lopez