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1076-AF18

1 message

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To: consultation@bia.gov

To Whom it May Concern,

1. Regarding these criterion, I appreciate that a "preponderance of the evidence" standard has been stated and defined in the new regulations, and that the evidence must be viewed in the light most favorable to the petitioner. However, the wording of the burden of proof, I think, needs to be changed.

Specifically, section 83.6(d)(1)(ii) should be restated as: "The facts establish that it is more likely than not that the criterion is met." This is a more plain English rendering of the "preponderance of the evidence" standard and complies with various federal case law holdings.

It is my concern, however, that oral history will not be given the respect and evidentiary weight that numerous Indian persons give it. It is the hallmark of our American evidentiary system that written evidence is more credible (and authentic) than hearsay, which Native American oral history ultimately falls under. I would highly suggest that 25 C.F.R. Part 83 take into account language from section 7, sub-section (4) of the Native American Graves Protection Act, which allows for the return of Indian remains to a tribe which shows a cultural affiliation by way of oral tradition.

2. Regarding the mandatory criteria in section 83.7(b), I would suggest that the percentage read "75 percent, or three-fourths of the petitioning group" is appropriate. (I also appreciate the language in subsection (b) because the reviewing panel or parties need to take into account the numerous gaps in non-Indian records that were inherently bias and/or hostile to Native American existence, which eschewed credibility and accuracy in favor of rote completion of the task, regardless of the consequences.)
3. Stop making all six criteria mandatory. There are certain Indians, such as California Mission Indians, that would find meeting all criteria virtually impossible to meet because European colonial powers thoroughly disrupted and eradicated any form of tribal community in the area, thus making certain criteria impossible to meet. Therefore, either: (1) require that petitioning tribes be able to meet three to four of the criteria; OR (2) consider the criteria as guiding factors in an overall balancing analysis in which the petitioning tribe, as it pertains to the totality of the circumstances, can prove that they are a cohesive tribal community.
4. Liberal construction of all regulations under 25 C.F.R. Part 83, and not just the 6-point criteria. The overall problem with these criteria, regardless of the proposed changes, is that they measure tribal identity according to American/Eurocentric rules and, even though the burden of proof is tilted in favor of the petition tribe, the tribes do not fully benefit from having to go through this process. This is why, if there must be some form of written agency guidance, not only should the evidentiary standard be based on a preponderance of the evidence, but the overall regulatory scheme should be liberally construed to favor Indian petitions.
5. Higher burdens of proof on contentious evidence submitted by "interested parties or informed parties." Oftentimes, competing federally recognized tribes, private corporations, or local governments will attempt to thwart the petitioning tribe's progress because they seek access to mineral resources, gaming market share, or real property that these parties would like first to obtain or exploit. It should be clarified somewhere, once the petition begins processing under section 83.10, that evidence submitted by these parties which contends to disprove, invalidate, or discredit any petitioning tribe's claims or arguments meet a "clear and convincing" burden of proof in making their claims and require all supporting documentation that backs up their counter-

arguments. Or that when weighing the contentious evidence against the petitioner's evidence, that the overall evidence be viewed in light most favorable to the petitioning tribe. (However, I understand that this may complicate matters and give additional administrative burdens to the reviewing panel; however, this suggestion is made in the spirit of instances where, for example, an oil corporation seeks to stop a petition tribe from gaining a land base in a certain area because that area sits on an untapped oil reserve that the company will exploit.) I recommend that evidence submitted by "interested" and "informed" parties be explicitly stated in the regulations to be taken into consideration in light of the context surrounding these parties and their motives.

6. Whatever the page limit on petitions (see 83.6(a)) will be, this limit should not include supporting exhibits or documentation which underlies the proof and arguments contained within the petition itself.

Thank you for your consideration,

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