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Sent Via Email to: consultation@bia.gov

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action – Indian Affairs
1849 C Street, NW
MS 4141-MIB
Washington, DC 20240

RE: Proposed Changes to the Federal Acknowledgment Process

Dear Ms. Appel:

Kwangomel [Greetings]! I truly appreciate what you, Assistant Secretary Washburn, Deputy Assistant Secretary Roberts, Ms. Chinn, and others are doing to help make long overdue changes to the federal acknowledgement process. It was a pleasure speaking with you and Ms. Chinn, and then meeting you both at the consultation in Maine.

As a tribal Councilman and Principal Justice of the Nanticoke Lenni-Lenape Tribal Nation, Co-Chair of the NCAI Task Force on Federal Acknowledgment, and General Secretary of the Alliance of Colonial Era Tribes (ACET), I have attempted to bring many tribal leaders, experts in Federal Indian Law, and Indian activists together in reviewing the proposed changes in order to provide perspectives and recommendations to tribal leaders around the country. The summaries of our discussions were then circulated to participants and friends of the Task Force and ACET. Some have indicated that they will be incorporating, “cutting and pasting” portions, or including all of the suggestions into their own statements to be forwarded to your attention. I have stressed the importance of a unified voice from among our allies. You may hear a varied “chorus” of the following comments from many different sources over the next week or so; however, the chorus represents more than a month and a half of study, deliberation, critique, debate, and review from many stakeholders.

What has been produced, I believe, is in the best interest of all of Indian Country and provides suggestions to create a fair, concise, and sufficiently rigorous process for federal acknowledgment. I hope that you will agree.

There is a new marginalization of non-federally recognized historically documented tribes through federal regulations that have begun to exclusively define “Indian” as a member of a federally recognized tribe. This policy is becoming pervasive and is influencing even non-governmental charitable organizations. This is an increasing problem for many American Indians who are now treated as though they are not American Indian at all. It is the denial of indigenous identity through administrative reclassification. It is a form of tribal termination. This trend of increasingly having “indigenous” and “American Indian” be redefined as “federally recognized” based upon a history and process of recognition that is known to be hostile is unreasonable, unfair, racially biased, and demeaning to non-federally recognized historically

documented tribes. This increasing denial of identity equates to a process of administrative genocide, in which non-federally recognized tribal citizens are being systematically wiped from the political landscape. The recent addendum on the situation of indigenous peoples in the United States of America in the Report of the Special Rapporteur, James Anaya, on the rights of indigenous peoples to the United Nations General Assembly mentions the inequities of the federal acknowledgment process and how it has left many tribes “especially disadvantaged.” It is unconscionable that in the thirty-six years since the American Indian Policy Review Commission Report of 1977, little has changed...

The results of "non-recognition" upon Indian communities and individuals have been devastating, and highly similar to the results of termination. The continued erosion of tribal lands with a complete loss thereof; the deterioration of, cohesive, effective tribal governments and social organizations; and the elimination of special federal services through the continued denial of such services which Indian communities in general appear to need desperately. Further, the Indians are uniformly perplexed by the current usage of "federal recognition" and cannot understand why the federal government has continually ignored their existence as Indians. Characteristically, Indians have reviewed their lack of recognition as Indians by the federal government in our disbelief and complete dismay and feel classification as non-federally recognized is both degrading and wholly unjustified. (American Indian Policy Review Commission 1977, 463)

The proposed changes are a welcomed bold response to years of critiques of the federal acknowledgment process. Proposed changes that have been enthusiastically received include, but are not limited to: 1) The eliminating of the requirement for a letter of intent; 2) The elimination of criteria (a), which required evidence from outside observers of the petitioning community's continuing existence; 3) The establishment of 1934 as the year from which a community must prove continued distinct existence; 4) The inclusion of potential “expedited positive” determinations; 5) The potential inclusion of the Office of Hearings and Appeals (OHA), or perhaps another objective entity in the rendering of the final determinations and/or hearing appeals... so long as that entity possesses the requisite familiarity with Indian Law, history, culture, and the history of the acknowledgment of American Indian Tribes; and, 6) The ability for tribes that had previously received negative findings to reapply under the new rules.

I submit the following suggestions to the proposed changes...

1. **A Preamble needs to be added stressing that the goal of the changes is to make the regulations more consistent with the way in which early petitions received favorable determinations.** The Preamble should also include an analysis of why the year of the Indian Reorganization Act of 1934, which marked a new relationship between the Federal Government and American Indian tribes, is the starting point instead of a much older date relating historic “first contact.” Requiring tribes to demonstrate sustained community from a starting point that is hundreds of years in the past, places an unnecessary burden on tribes. The preamble should also clearly state that the Department of Interior's aim is for the process to be predictable, policy-based instead of an overly rigorous scientific evaluation, and less unreasonably cumbersome for petitioners. It

should be emphasized that the reason there is a recognition process is because the United States made mistakes in not recognizing tribes and needs to correct those mistakes.

2. **A “presumption” statement should be added, clearly indicating that it should be presumed that the burden of proof is on the Department of the Interior instead of the tribe when evaluating evidence provided by the tribe. Evidence should always be viewed in the light most favorable to the petitioner,** with conclusions made on a “more likely than not” basis to the benefit of the petitioner. A model for evaluating evidence could reflect the language in the NAGPRA regulations, namely that the decision should be based upon an overall evaluation of the totality of the evidence and should not be precluded solely because of some gaps in the record or evidence provided. Petitioners should not have to establish their status with scientific certainty.
3. **There should also be the stated presumption that if a tribe existed in 1934, that tribe descended from an historical tribe at the time of contact with non-Indians,** shifting the meaning of “historic” in the regulations to refer to distinct communities identified as such by 1934.
4. **In the 83.1 definitions subsection, the meaning of “historic” being a distinct community identified by 1934** and that the terms “continuous” and “continuously,” as pertaining to the community’s history and descent, should clearly state that it is required to be traced from 1934. Guidelines should be given to establish that if a community is identified as distinct by 1934, it should still meet the definition as a “historic tribe” so long as that identification is deemed to have been “Indian” by 1978. It should also be recognized that some Eastern communities identified as “distinct” in various documents by 1934 were not specifically identified as “Indian” at that time, often due to racial bias. For the purposes of identifying a community as Indian (as opposed to identifying the actual existence of the community itself), that any document that was prepared prior to the beginning of the FAP process (1978) ought to suffice. The reason for this is that there are historic tribes that were identified as “distinct,” but racially misidentified, or identified with non-historic nomenclature by third parties, and then were subsequently shown to have been an American Indian tribal community in subsequent reports, studies, lists, or governmental actions. No petitioner should suffer from historic mislabeling by third parties which may have been motivated by racist influences.
5. **The Assistant Secretary should have greater control** over preliminary and final decisions, with the Office of Federal Acknowledgment (OFA) playing more of an advisory and supportive role and not making either preliminary or final determinations, leaving such preliminary and final decisions to the Assistant Secretary. The new regulations, in 83.5 and similar sections, appear to give too large a role to OFA, whose application of the regulations to this point has been resoundingly critiqued by tribal, academic, and governmental entities. The absurdity and injustice of the current

application of the federal recognition process is further proven in that the last two tribes to successfully go through the process required the intervention of the federal courts, one of which produced a study showing that 72% of currently recognized tribes could not successfully navigate the process as it is currently administered. The OFA should be held to an objective standard of accountability with the regulations clarifying timelines in which OFA must complete its tasks and provide for consequences when those timelines are not met. OFA's role should be merely supportive with the preliminary and final determinations to be made by the Assistant Secretary, with a petitioner having the right to have a negative preliminary or final decision by the Assistant Secretary appealed to OHA and/or the IBIA (or perhaps another objective entity in the rendering of the final determinations and/or hearing appeals... so long as that entity possesses the requisite familiarity with Indian Law, history, culture, and the history of the acknowledgment of American Indian Tribes), with the petitioner also having the ability to provide additional evidence to further strengthen their petition, and with a time limit on the duration of the ruling on an appeal. OFA should be restricted to collating information and providing a consistent document to the Assistant Secretary, summarizing how a petitioner may have met the criteria, with a “more likely than not” standard granting preference to the petitioner, ensuring that the strengths of a petition are emphasized over any weaknesses. Also, in 83.3(f) and 83.10(r), it should be made clear that the Assistant Secretary should have the authority to reconsider and reverse previous negative decisions and consider new information that may provide greater support for a positive decision. However, it should be made clear in section 83.4 and other similar sections that such reconsideration should not entail that a tribe must resubmit documentation previously submitting to the BIA.

6. **Tribes should have a choice if the preliminary decision by the Assistant Secretary is negative. Petitioners should be permitted to submit new information/argument to the Assistant Secretary and have the Assistant Secretary make the final decision or they can choose for a hearing before the Office of Hearings and Appeals.** In either case, third parties which may be allowed to submit information following a preliminary determination (whether positive or negative), but should never be allowed to be a party to the appeal.
7. **The new regulations should directly overrule past OFA precedents in negative findings** because they will be inconsistent with the new regulations.
8. **It should be clearly stated that the types of evidence previously used to meet the now deleted criteria (a) may be used,** when applicable, to meet criteria 83.7(b) and (c).
9. **Gaps of less than 20 years should not be negatively interpreted** when the strength of the evidence prior to and after such gaps demonstrate community continuity. Gaps of up

to 25 years should be taken into consideration, with reasonable explanation, if the weight of the evidence can demonstrate community continuity.

10. **Petitions for acknowledgement should not need to exceed 50 pages**, excluding supportive documentation. Petitions should be able to be submitted in electronic format.
11. **Historic or modern third party nomenclature racially misidentifying or mislabeling a tribe should not be weighed against a tribe**, but may be considered as evidence supporting the petitioner's claim of being a "distinct" community.
12. **Regional history that may impact the evidence a petitioner can provide should be considered when evaluating a petition** so that a petition is not penalized by the manner in which a petitioner may have been affected by such historical situations. This principal should be applied to all criteria with evidence being viewed in the light most favorable to the petitioner, with conclusions made on a "more likely than not" basis to the benefit of the petitioner.
13. **Greater weight should be given to the supportive testimony of federally recognized tribes which have viewed the petitioner as a historic tribe.** However, the lack of supportive testimony or the submission of negative testimony from any entity should not be weighed against the petitioner in the application process, as it could be politically motivated and not reflective of the history of a petitioner or worthiness of a petition. A relationship between tribal communities, whether formal or informal, should also be viewed as evidence of continuing tribal community.
14. **Greater evidentiary weight should be given to communities that have maintained their indigenous language in a continuous fashion** in proving Indian identity and continuous community.
15. **The continuance of distinct cultural patterns and practices, as defined by the petitioner, should be considered evidence of community** and potentially as a form of governance. Because of the subjective nature of such practices, they should be described and defined by the petitioner instead of having definitions imposed by the reviewers. Such evidence of governance should also include religious, educational, political, or cultural practices or entities. Tribal control over schools, churches, clubs, or similar entities should be viewed as governance. "Bilateral" relationships in regard to internal authority or influence should be viewed as evidentiary, but not as required... as internal divisions and political struggles between clans or families still demonstrate the existence of a tribal entity, however informal. Rejecting a particular leader can be evidence of continuing community, so a bilateral relationship should not be a required characteristic.

16. **A high rate of endogamy within the petitioning group, or with other American Indian Tribes, should be viewed as a form of political control** by the community upon individual members, meeting 83.7(b)(2). Such a rate need not exceed 50% to be considered “substantial” and should be measured in a fashion favorable to the petitioner. The need to count marriages to other tribal populations must be included in order not to penalize smaller tribal populations for which a high rate of internal marriages could produce, or further enhance, genetic disorders.
17. **For criterion (e), a petitioner should be able to meet the requirement if a substantial percentage (with the measure of “substantial” not needing to exceed 50%) of their membership as submitted in the petition consists of individuals who descend from a historical Indian tribe.** The terms “historic” or “historical” in criteria (e) and elsewhere should be clearly defined (and possibly changed) so that the regulations instead use the designation “identifiable tribe in a distinct community,” meaning a distinct community identified by 1934 and specifically identified as an American Indian community by 1978 or from such historical Indian tribes which combined and functioned as a single autonomous political entity or functioned as closely interrelated political entities. Identifying evidence may include (but not be limited to) citation by historians, anthropologists, ethnologists, citations in government reports and correspondences, studies and correspondences by agencies such as the Smithsonian and the Bureau of Ethnology and others serving as “arms of the government,” those receiving or determined eligible for government services while also being identified as a community, and actions of a colonial, state, or federal agency segregating or distinguishing the community (i.e.: by designated reservations, identified geographic areas, or segregated schools). However, if a tribe could not establish identity as an distinct community by such evidence in 1934, but could establish identity from an earlier point in time, it could choose to trace from the earlier date. It should also be recognized that some Eastern communities identified as “distinct” in various documents by 1934 were not specifically identified as Indian at that time. For the purposes of identifying a community as Indian (as opposed to identifying the actual distinct existence of the community itself), any document from the examples above that was prepared prior to the beginning of the FAP process (1978) ought to suffice.
18. **Ensure that OFA staff is trained, certified, and adheres to Genealogical Proof Standards to mitigate unfair and unreasonable negative findings related to an application.** OFA staff should operate with the understanding that the “benefit of the doubt” should always be in favor of the petitioner in reviewing such material.
19. **An evidentiary list should be added to the regulations so Tribes which can produce this evidence are presumed to have met evidentiary standard to be a tribe, including but not limited to:** A community of Indians with individual members having attended

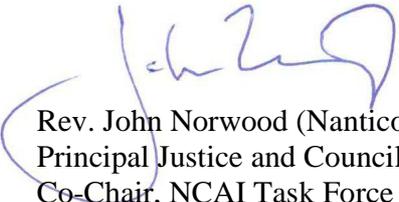
federal, or closely related mission, Indian boarding schools; Attorney contract approved by DOI; Claims; Court filings and decisions.

20. **An optional standard form would only be helpful if it allowed for the expression of unique situations and circumstances** of the petitioner. If such an optional form is offered, it should be able to be submitted in electronic format as should be an option for the submission of all evidence.
21. **Expedited positive decisions should also allow an additional criterion beyond a finding of a state reservation or land held in trust for the tribe by the United States. There are examples of official state actions where a state legislature provided specific and unique benefits to designated Indian communities (for example, special schools). Such State benefits are tied to the de facto recognition of the existence of the Indian community and should qualify for an expedited positive.** This should include petitioners with a continued presence of an identified community in an established “Indian Town,” former reservation, or similarly historically designated geographic area, even in the absence of an official state reservation. To not allow for this historical reality is to penalize a petitioner for the action or inaction of a government. This expansion of the expedited positive category allows for colonial practices that resulted in continuing tribal communities on land previously designated for their use. When seeking such an expedited positive, demonstrating the continued presence of any portion of the petitioner’s population in its historic area or areas should be included as a qualifying characteristic.
22. **Tribes should not have to supply additional evidence after submission** if OFA does not review the application in a timely manner.
23. **Previous acknowledgement should not require a “government-to-government” relationship, but mere acknowledgment of the existence of an Indian community** through listing as a distinct Indian community in a report or study conducted by an agent or agency serving as an “arm of the government” prior to 1978, or receiving services as an Indian community or having individual members receiving services because of their connection with the Indian community, by 1978, which is when the federal acknowledgment process was established. Treaty negotiations should also suffice as proof of such acknowledgment, whether or not the treaty was ratified. A petitioner should not be penalized for the lack of action, error, or irresponsible conduct of the government. An Indian community should only have to establish continuance from the point of such identification to meet the standard for previous acknowledgment. Such proof should be sufficient to have the Assistant Secretary restore recognition or correct the error of the tribe not being listed by the BIA as a federally recognized tribe. Additionally, tribes acknowledged by an act of Congress, actions of the Executive Branch, or a Federal Court should all be considered federally acknowledged by the BIA.

24. **Third parties should not be able to derail a positive final decision** unless fraud is being alleged against the petitioner's claims and there is evidence to substantiate the need for further investigation. Petitioners should be given the opportunity to respond to specific allegations that may jeopardize a favorable final decision.

I submit this letter in the hope that these suggestions be including in the changes to the Federal Acknowledgment Process. I am also prepared to provide further information on the suggestions if required.

Ketemakonkuntewakan ok Welankuntewakan [Grace and Peace]



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