

## **Comments on Discussion Draft Proposal for Revision of the Acknowledgment Regulations (25 CFR 83)**

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### Commentor's Qualifications

I offer the following comments on the discussion draft for revision of the acknowledgment regulations. I write on the basis of 33 years with the Office of Federal Acknowledgment (OFA) I was one of the original staff members, beginning in 1978, when the first regulations were published. I contributed major portions of the 1991 proposed revision and was the lead drafter of the revised regulations published in 1994. In addition, I participated in the extensive discussions at OFA in 2010 and 2011 concerning revisions to the regulations. The resulting draft proposed revised regulations (referred to here as the "OFA Draft"), were prepared at the request of the then Deputy Assistant Secretary - Indian Affairs (ASIA) George Skibine.<sup>1</sup>

### General Comment

The proposed revisions are presented as a method of streamlining the Federal acknowledgment process and making it more transparent. Numerous changes instead greatly weaken the requirements in the regulations. They are a complete abandonment of any reasonable standard for showing continuous tribal existence and thus eligibility for acknowledgment as a sovereign Indian tribe.

### Start Date for Tracing Tribal Existence (83.3(d), 83.7)

The idea that tribal existence need only be traced to 1934 was among the comments on the 1991 proposed revised regulations that were reviewed and rejected in preparing the 1994 final regulations. The same rationale was offered then as now, that this was the date of the Indian Reorganization Act and the major changes in Federal Indian policy towards supporting tribes.

The Department's 1994 comments in rejecting this idea apply equally here:

The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians. Acknowledgment as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time (59 FR 9280, 2/25/1994).

The use of 1934 has no meaningful rationale or any substantial evidentiary basis. The changes in Federal Indian policy then per se provided no evidence for or against tribal existence. Some investigations made in this era concluded certain groups no longer existed as tribes. In other

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<sup>1</sup>While I have referred to this draft here, I do not have a copy nor did I consult with Interior employees in preparing these comments.

cases, the Department concluded that some groups were tribes but that the Department had no authority to recognize them.

Such an extreme change also raises the question whether the Department, absent specific legislation, has legal authority to implement revised regulations using a 1934 start date.

Instead of 1934, revised regulations should incorporate the language of the “Directive” of 2008, which provided a revised interpretation of the present regulations (Federal Register Vol. 73, No. 101, May 23, 2008). Under the directive’s interpretation, tribal existence only need be traced from the formation of the United States or first sustained contact, whichever is later, rather than from first sustained contact, which often greatly predated the establishment of the United States government . This provision was utilized in acknowledging the Shinnecock Tribe.

The reasoning was stated in part,

The purpose of the evaluation under the regulations is that an Indian tribe has existed continuously and is entitled to a government-to-government relationship with the United States. In order to reduce the evidentiary responsibilities of the petitioner, it is reasonable to interpret the regulations as requiring the petitioner to document its claim of continuous tribal existence only since the formation of the United States, the sovereign with which it wishes to establish a government-to-government relationship. . . .

Therefore, if the petitioner was an Indian tribe at that time the Constitution was ratified, its prior colonial history need not be reviewed. The date of the period of earliest sustained non-Indian settlement and/or governmental presence in the local area, thus, should be on or after March 4, 1789.

#### Expedited Favorable Determination (83.6(c))

The draft proposes two criteria for an expedited positive determination (if the petitioner has shown historical tribal ancestry under 83.7(e)). These criteria are proposed to be, in themselves, determinative for acknowledgment, without more evidence demonstrating community and political processes. Neither proposed criterion is valid or appropriate as automatically acknowledging a petitioner.

The first expedited favorable criterion is “The petitioner has maintained since 1934 a reservation recognized by the State and continues to hold a reservation recognized by the State (83.10(g)(i)).”

State recognition with a reservation, when only traced to 1934, does not merit the extreme weight the proposal gives it, that it is determinative of tribal existence by itself. The Department in proposed and final determinations on Eastern Pequot and Schaghticoke did give state recognition some weight as evidence for criteria b and c (thus not giving it the extreme weight proposed here), but only on the basis that a state relationship, including a reservation, from colonial times

provided evidence of continuous existence. Tracing only to 1934 does not show the long continuity which was the basis for these conclusions.<sup>2</sup>

The many sections of the proposed rule that reflect the use of the 1934 date should be revised to restore the requirement of continuity from the establishment of the United States. More specific comments concerning modifications of language are not provided here.

The second criterion for an expedited positive finding, at 83.10(g)(ii), is “The United States has held land for the group at any point in time since 1934.” Without further qualification of the term “held land” and basis for it, it doesn’t provide evidence of tribal existence or, the implied Federal recognition. Where land was clearly purchased based on tribal existence and recognized status, this would equate with previous Federal recognition, and should be included in 83.8.

Land that was purchased might not have been held in trust for a tribe. Land might have been purchased for a group or community, by any Federal agency, for whatever purpose, in the same manner as for any organization. For example, purchase of land for some Lumbee in the 1930's by the Agriculture Department was not an indication that this was done because they were an Indian tribe or that a Federal relationship was being established. (See also Little Shell PF where a Federal land purchase originally intended for some of the landless Indians now known as Little Shell, was never made put in the name of the group, and further did not indicate a Federal relationship had been established (Little Shell Proposed Finding, 2000, Technical Report).

#### Decision Maker

The discussion draft moves the acknowledgment proposed finding decision to OFA from the Assistant Secretary, with the final determination to be made either by the ASIA or the Office of Hearings and Appeals (OHA) (the choice is offered for comment). (At page 19, the proposed rule states that the Assistant Secretary is bound by final determinations decision, presumably if made by OHA). Based on the history of the IBIA appeal process in the current regulations, and consultations with that office in working on the OFA draft, it is unlikely that the IBIA would accept such a role, nor does it have the expertise to do so.

This change inappropriately separates the ASIA from his staff, the OFA, and may create an adversarial situation. The ASIA should be the decision maker for the proposed finding as well as the final determination. And the ASIA’s final determination should be made with the advice, and consultation of his staff, OFA. The proposed separation could make it easier for the ASIA to change decisions proposed by OFA without any stated procedures or standards, which is a very undesirable change, exposing acknowledgment decisions to political influence.

#### Elimination of Criterion 83.7(a)

The elimination of criterion a was seriously considered in preparing the 1994 regulations, but

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<sup>2</sup>Notably, this use of the continuous state reservation as evidence was overturned on appeal by the Interior Board of Indian Appeals.

instead it was changed to limit the requirement to after 1900, to avoid problems of 19th century identifications. In practice, no petitioner has been denied solely on the basis of not meeting this criterion. However, analyses of criterion a in various findings have consumed considerable petitioner and OFA time, while of limited value to the actual finding. Thus it is appropriate to remove this criterion.

Although the suggestion is made in the cover notice concerning the draft regs that it is demeaning to depend on external identifications, positive external identifications are equally or more unreliable, as outsiders uncritically agree with a group's unmerited claims (see Mowa Choctaw and Machis Creek findings). It should be noted, however, that the presence or absence of identifications may provide evidence whether a group even exists at a particular point in time. Evidence about external views of a group can be useful evidence for criterion b.

#### Modifications of Criterion 83.7(b)

The draft proposes that specification in this criterion to show that "a predominant portion of the petitioning group" comprise a community be changed to specify a percentage, with requested comment on what percentage. "Predominant" technically only means more than half. It is undesirable to reduce this reasonable standard, if this is what is intended, and thus weaken the requirements.

The regulations at 83.7(b)(2) describe levels of evidence strong enough in themselves, without more, to demonstrate community. The proposal requests comment whether these, which now specify 50 percent. These should not be change, as the purpose of this section is to identify communities where the level of social integration is high enough that a single measurement of social connection is sufficient as to not require a more detailed inquiry. Reduction in the percentage means that this reasoning would not be valid.

#### Addition to Evidence for Criterion 83(c)

The proposal adds to evidence for criterion c, as evidence sufficient in itself, without any supporting evidence, to "Show a continuous line of group leaders and a means of selection or acquiescence by a majority of the group's members" (83.7(c)(2)(v)).

The fact that a petitioner may have had a continuous string of elected leaders and formal organization over a long period of time does not distinguish it from a club or voluntary association whose members have no other connection and whose "political function" does not meet the requirements of the definition of political. Thus this is evidence of only minimal value, and certainly not sufficient in itself to show the criterion is met. The existence of continuous organizations with elected leaders has not treated as useful evidence in previous acknowledgment decisions to date, including notably Indiana Miami, which was upheld in 2001 by the U.S. Circuit Court of Appeals.

#### Modification of Criterion 83.7(e)

The draft proposal leaves open, for comments, the percentage of a petitioner's membership that

needs to show historical tribal ancestry. The criterion as established in the original 1978 regulations and continued in 1994 said simply that the members must be descended from an historical tribe, without qualification as to percentage. The Department's precedent in interpreting this criterion has been that it was reasonable to allow some small portion of the membership to not have made this demonstration of tribal ancestry. The Department in preparing the 1994 regulations declined recommendations that it specify a minimum percentage to meet this criterion, preferring to continue its precedent, but allow some flexibility. It is preferable to continue this. Alternatively, the figure of 80 percent should be used, which matches precedent. Lesser percentages to a significant degree tend to correlate with questions about the history and character of the petitioning group. It would not be appropriate to specify a higher percentage..

The proposal adds to the list of evidence for ancestry, "Historians' and anthropologists' conclusions drawn from historical records, and historical records created by historians and anthropologists" (83.7(e)(1)). This should be omitted. Source identifications of ancestry need to be contemporary, and essentially be primary evidence. As presented in the draft, any book or article, referring to any period of time, but created much later, could be used, basically circumventing any actual review process. Such are already usable as evidence). Note that "scholarly" literature which might deny the tribal ancestry of a petitioning group, and have not been used in past decisions.

#### Repetitioning 83.10(r)

It is expectable that many of the previously denied petitioners will seek to repetition, if the proposed changes are made, because of the severely weakened standard. Repetitioning should not be permitted under the proposed changes. If current standards were maintained, some form of repetitioning, after the passage of substantial number of years, might be of some value.

#### Expedited Negative Findings

The proposal moved the present language for expedited negative findings into the main process of consideration instead of coming before active consideration. This is an is appropriate change. However, the rule should go further by allowing a negative proposed finding on any single criterion, not just e, f and g. The 2008 Directive stated that since under the regulations a petitioner must meet all seven criteria, the failure to meet any one criterion would result in a negative determination. This allowed a negative finding on a single criterion negative, a very efficient use of staff resources, for cases which have little or no evidence for tribal existence. It has already been used in decisions in the past several years (e.g., 2011, Florida Band of Choctaw). The revised regulations should put the relevant language from the 2008 Directive, into the regulations in place of the present "expedited negative finding" language.

#### Previous Federal Recognition 83.8

Language developed for the OFA draft should be substituted for the proposed 83.8. This language, subject of extensive review and analysis, makes this part less cumbersome, takes out some of the unnecessary complications and provides a clearer view of the kind of evidence necessary. However, this revised 83.8 continued the present regulations's requirement of a

stronger form of external identification than in criterion 83.7(a), to ensure that the petitioner was the same group as previously acknowledged. Since this has not previously presented serious questions, where the history of the petitioning group is well documented, it may be safely omitted from the OFA draft.

However, the OFA proposal made clear the meaning of and application of 83.8, that continuous political existence from the point of last Federal recognition needed to be demonstrated. (Past decisions did not require continuous historical community, despite the present regulations' language (at 83.8(d)(5) (see for example, the Snoqualmie Tribe Final Determination of 1999). The proposal eliminates this vital element for demonstrating historical existence as a political entity, requiring only a demonstration for the present-day group, thus substantially weakening this provision of the regulations.

#### Role of Interested and Other Third Parties

The proposal substantially reduces the role interested parties in the acknowledgment process p. 17 (m). It does so by limiting the third parties that can respond to a proposed finding to the state and local government where the petitioner has its office and recognized tribes within the state. This is narrower than the definition of "interested party" in 83.1,. This would for example eliminate other unrecognized groups, or recognized tribes or local governments not in the home state of the petitioner from commenting, even if the proposed decision would materially affect them. The original definition of interested party, which is retained in the proposals should apply at this major stage of consideration. The role of interested third parties is part of the strength of the process, and helps limit the possibilities of post decision litigation of favorable decisions, because parties had ample opportunity to respond during the administrative process. Limiting the ability to respond to proposed decisions, a critical weakening of the process, without justification.

#### Definitions, 83.1.

The revision incorrectly removes the definition of "indigenous" on the stated ground that it is already incorporated into the definition of "Indian group." "Indigenous" refers to the requirement that a petitioner have been within what became the present boundaries of the continental United States at the time of sustained contact, that is from the beginning point for tracing tribal existence. The definition of "Indian group" does not contain this requirement, hence Indians migrating into the U.S. in historical times would be eligible for recognition. Congress has almost always avoided this type of action in recognition legislation, characterizing, in recognition legislation, even the Pasqua Yaqui of Mexico and Maine Micmacs (from Canada) as having been at least in part within the United States throughout the relevant history, though the evidence for this was limited or questionable. Thus the definition of indigenous should be restored as well as the language in 83.3 (a) (Scope) specifying the limitation of application of the regulations to indigenous Indian tribes.

#### Base Tribal Roll 83.12

The language in 83.12 (b) defining the base roll of a tribe that becomes acknowledged has not been modified. The OFA draft made major clarifications of language and improvements of the

process of establishing a base roll, an important part of the acknowledgment process. Revised regulations should adopt the revised language of this section from the OFA draft. This will establish clearly the newly acknowledged tribe's membership while allowing for appropriate modifications and changes.

#### Criterion 83.d

The OFA draft regulations shifted the requirements stated in criterion d from being a specific criterion to a requirement for the submitted documented petition in order for it to be considered. This approach should be taken here, to make the consideration process more efficient. Also, evaluation of criterion e and sometimes f and g require knowledge of how memberships lists were compiled, and are needed at the beginning of any evaluation.

#### Letter of Intent

The discussion draft eliminates the letter of intent from the process, which follows the OFA draft proposal and is an appropriate simplification of the process.

#### Splintering of Petitioning Groups

The 2008 Directive contains extensive language establishing procedures for dealing with the problem of "splintering" petitioners. This problem has occupied large amounts of OFA staff time, diverting scarce resources from processing petitions. The basic outlines of the procedures in this directive should be incorporated into the regulations.

#### IBIA Appeal Process

The discussion draft removes the IBIA appeal process and doesn't offer an alternative. The present process is cumbersome and lengthy. While an appeal process appears to have some merits, devising a suitable approach, and one that does not unduly lengthen the consideration process, has not been developed. The discussions for the OFA draft, in consultation with the Interior Board of Indian Appeals, drafted a more streamlined and focused procedure for appeal to IBIA than in the present regulations. The Deputy ASIA however concluded to not have any IBIA process and it was not included in the final OFA draft. It is not clear that such an appeal process would necessarily reduce litigation of completed decisions.

#### 83.10(e) Withdrawal from Consideration

The proposed revision allows a petitioner to withdraw from consideration after active consideration has begun. Language was added in the 1994 regulations to prevent withdrawals without the ASIA's consent. In reviewing comments on this for the 1994 regulations, the Department cited concern with the waste of staff time and resources and with potential withdrawals simply to avoid a negative finding. These arguments are still valid, hence the language of the 1994 regulations should be retained.