

**The PMT Tribe's Comment Regarding the Preliminary Discussion Draft**  
**Proposing Revisions to 25 C.F.R. Part 83**

The following comment is submitted on behalf of our client, the Piro-Manso-Tiwa Indian Tribe, Pueblo of San Juan Guadalupe ("PMT" or "the Tribe").

**A. Background.**

PMT is a vibrant, present-day Native American tribal community. The Tribe traces its roots and ancestry to the Piro, Manso and Tiwa Indians who inhabited the region in and around the Mesilla Valley in the historic area of Las Cruces, New Mexico and El Paso, Texas. The members of PMT and their ancestors have maintained their community, culture and tradition for hundreds of years, overcoming many challenges and hardships. That they have done so with no Indian reservation or secure land base, limited economic and financial resources, and in the face of numerous encroachments and depredations by outside forces is a testament to the strength and depth of the Tribe's societal and cultural bonds and identity.

PMT's efforts to achieve federal recognition date back to January 1971 when the Tribe submitted a letter of intent.<sup>1</sup> Thoroughly documented petitions were submitted in 1992 and 1996, and further supplemented by the Tribe's 245-page filing (together with six additional boxes of supporting materials) on May 3, 2010. After active consideration of the Tribe's petition commenced, however, further consideration was suspended on October 17, 2011 "to allow ASIA review." That remains the situation today. As a consequence, after the passage of more than 40 years, PMT has yet to receive even a preliminary finding as to whether its status as a sovereign tribal entity is to be recognized.

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<sup>1</sup> The Tribe's "letter of intent" was actually a fully documented request to BIA for federal recognition. Supporting historical documentation was submitted, and legal arguments for recognizing PMT's sovereign status were presented. And PMT's 1971 submission was preceded by communications on the subject of recognition with the Bureau's area office in Albuquerque, New Mexico dating back to the late 1960's.

**B. The Department's Proposed Changes to the Part 83 Process Represent a Positive Step Forward.**

As the foregoing reflects, PMT has experienced first-hand the problem of undue delay associated with the Part 83 process. Moreover, while PMT is confident that the submissions made in support of its petition for recognition satisfy the mandatory criteria of 25 C.F.R. § 83.7(a)-(g), there unquestionably are serious “weaknesses” in Part 83 which have prevented the regulatory process from “fulfilling its promise as a uniform approach to tribal recognition.”<sup>2</sup>

We therefore commend the Department of the Interior for proposing to reform Part 83. Among the changes set forth in the Department's preliminary discussion draft, several of them appear to offer the prospect for significant improvements in a regulatory process that has been justifiably criticized as “expensive, inefficient, burdensome, intrusive, less than transparent and unpredictable.”<sup>3</sup> Those changes are identified and briefly discussed below.

**1. Clarifying the standard of proof requirement.**

The lack of a clearly delineated standard of proof has been a problem of long-standing in the Part 83 process. Indeed, the Department acknowledged nearly twenty years ago that the primary question in recognition cases is frequently not how to weigh evidence for and against a position, “but whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion.”<sup>4</sup> Yet, prior to the proposed revision outlined in the discussion draft, this glaring omission in Part 83 had gone unaddressed.<sup>5</sup>

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<sup>2</sup> See United States General Accounting Office, “Indian Issues – Improvements Needed in Tribal Recognition Process” (hereinafter, “GAO Report”) at p. 19 (Nov. 2001).

<sup>3</sup> See Assistant Secretary-Indian Affairs Kevin Washburn's March 19, 2013 Testimony to the House Subcommittee on Indian and Alaska Native Affairs, at p. 3.

<sup>4</sup> See GAO Report, *supra*, at p. 12 (emphasis added).

<sup>5</sup> Indeed, the version of § 83.6(d) currently in effect addresses the standard of proof issue only indirectly by stating what it is not (*i.e.*, “Conclusive proof . . . shall not be required”).

Proposed § 83.6(d)(1)(i) would squarely address the issue by providing that the mandatory criteria for recognition in Part 83 “shall be considered met” if “[a] preponderance of the evidence supports the validity of the facts claimed when viewed in the light most favorable to petitioner.” (emphasis added).

Adopting the preponderance/“more likely than not” standard for weighing petitioner’s evidence, together with the requirement that such evidence be viewed “in the light most favorable to petitioner, should significantly improve the Part 83 process. Without such regulatory guidance, conflicting and inconsistent findings will continue to be made regarding key recognition issues, calling into question the very integrity of the Part 83 process.<sup>6</sup>

Adopting such a standard also is entirely justifiable as a matter of policy. Tribal groups that have had to overcome generations of discrimination and mistreatment at the hands of the Federal Government deserve to know -- at a minimum -- what standard of proof is to be applied in deciding their petitions for recognition. So too, the evidence presented in support of a tribe’s petition should be examined “in the light most favorable to petitioner,” given the substantial burden and expense that the petitioner faces when challenged to satisfy § 83.7’s mandatory criteria for recognition.<sup>7</sup>

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<sup>6</sup> The United States General Accounting Office alluded to this concern when it examined the Part 83 process a dozen years ago: “A lack of clear and transparent explanation of decisions reached may cast doubt on the objectivity of decisionmakers, making it difficult for parties on all sides to understand and accept decisions . . . . See GAO Report at p. 14.

<sup>7</sup> Indeed, in recognition of what tribal groups seeking recognition have had to overcome to survive as Native American communities, the Indian Policy Commission went a step further 35 years ago and recommended that the burden of proof be placed on the United States to “establish through hearings and investigations that the [petitioning] group does not meet any of the [enumerated] definitional factors.” See Indian Policy Commission, “Recognition Policy, A Catch-22,” 476, 482 (1977).

**2. Establishing 1934 as the Year from which the Petitioning Tribe Must Prove Its Distinct Existence and Political Autonomy.**

This too is a significant change in Part 83, which should help to alleviate the onerous burden the regulatory process currently places on petitioning tribes. In meeting the mandatory criteria of §§ 83.7(b) and 83.7(c), it would no longer be necessary to demonstrate the tribe's continued existence as a distinct community with its own political autonomy dating back hundreds of years to its "first contact" with Europeans. Instead, under changes proposed in the draft version of §§ 83.7(b) and 83.7(c), such a showing will only need to be made by a petitioner from 1934 to the present.

We understand the Department's rationale for proposing the change is that with the advent of the Indian Reorganization Act of 1934, there occurred a profound shift in the relationship between the Federal Government and American Indian tribes which justifies the selection of 1934 as the starting point for applying § 83.7's mandatory criteria. Even if such a change is implemented, it will continue to be necessary for a tribe seeking federal recognition to satisfy Part 83's community and political autonomy requirements notwithstanding the forces that have worked for generations to destroy tribal culture and societal bonds. But as with the adoption of the new standard of proof requirement for Part 83, this is a significant revision which PMT fully supports.

**3. Eliminating § 83.7(a) as a Criterion for Federal Recognition.**

This is yet another positive change. It would serve to eliminate at least some of the duplication and overlap that exist among the mandatory criteria contained in § 83.7.

In current Part 83, criterion (a) requires that the petitioner show it has been "identified as an American Indian entity" – by Federal, State or local, governments and/or other outside

sources – “on a substantially continuous basis since 1900.” The preliminary discussion draft would eliminate this criterion altogether, while retaining the requirements that a petitioning tribe demonstrate its continued existence as a distinct community possessing an autonomous political identity. *See* proposed §§ 83.7(b) and 83.7(c).

This is another change which, if implemented, should make the Part 83 process more efficient by reducing the burden imposed on petitioner and agency decision-maker alike. Eliminating criterion (a) as a mandatory requirement for recognition also recognizes that an outsider’s views with respect to tribal identity should be entitled to less significance than what the petitioning tribe is itself able to demonstrate with respect to its continued existence as a distinct Native American community possessing political autonomy. An otherwise deserving tribe should not be denied recognition based on its inability to satisfy current criterion (a) if it is able to meet these other criteria.

**4. Quantifying the Descent Requirement of Criterion (e).**

The preliminary discussion draft is incomplete here (“XX”), but it appears to contemplate the addition of a specific percentage figure to the requirement of § 83.7(e) that tribal membership must be shown to consist of at least a certain percentage of individuals who can trace their descent back to an “historical Indian tribe” (or to a combination of such tribes that are shown to function autonomously).

This is an issue that has generated considerable controversy and produced more than its share of inconsistent results in the past. The current version of § 83.7(e) states only that a petitioner’s members must “consist[] of individuals who descend from a[n] historical Indian tribe. . . .” No minimum percentage or quantifying term such as “most” or “some” is used.

When GAO examined the Part 83 process in its 2001 report to Congress, however, it concluded that leaving this aspect of criterion (e) open to interpretation by not assigning a specific percentage figure “increases the risk that the criteria may be applied inconsistently to different petitioners.”<sup>8</sup> In support of GAO’s conclusion, a case was cited in which the technical staff had recommended that a petitioner not be recognized because it could only demonstrate that 48% of its members descended from an historical Indian tribe.<sup>9</sup> However, in the proposed findings in the same matter, the Assistant Secretary found the petitioner had satisfied criterion (e). He also criticized the Department’s previous denials requiring a higher percentage than the 48% figure as “unfairly high.”<sup>10</sup>

Because clear guidance is clearly needed on this subject to avoid similar inconsistency in the future, PMT supports the proposed revision of criterion (e). We further suggest that the percentage figure for members able to trace their descent back to an historic Indian tribe be selected as “at least 50 percent.” Given the perspective on the issue offered by the Assistant Secretary as conveyed in the GAO Report, this would seem to represent a reasonable threshold showing for a petitioning tribe to make to satisfy criterion (e). Certainly no higher percentage than 50% would appear to be warranted based on the GAO examination and its 2001 findings on the subject.

### **C. Additional Changes Proposed to Achieve Meaningful Improvement in Part 83.**

The changes addressed in Section B above, if implemented, should help to improve the Rule 83 process and reduce the risk of inconsistent or unjust results. However, the revisions outlined in the preliminary discussion draft appear to do little, if anything, to alleviate the serious

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<sup>8</sup> See GAO Report, *supra* at p. 14.

<sup>9</sup> See GAO Report, *supra* at p. 13.

<sup>10</sup> See *id.*

timeliness concern that has plagued the Part 83 process since its inception and that continues to do so. Without that concern being satisfactorily addressed, other improvements in the regulatory process may be of little value to petitioners required to wait decades (or even longer) for their petitions for recognition to be addressed.

Accordingly, we propose the following additional revisions to Part 83, primarily in an effort to address the serious problem with the untimeliness of this regulatory process:

**1. Incorporate Additional Deadlines for Taking Action.**

Part of the problem with timeliness is that, as GAO concluded in its 2001 Report, “[t]he process lacks any real timelines that impose a sense of urgency on the process.”<sup>11</sup> Even when a fully documented petition for recognition is submitted, there are no time frames for its review or for OFA’s provision of the technical assistance it is responsible for rendering.

So too, after such technical assistance has been provided and a revised/supplemented petition has been submitted, there is no set schedule for the initiation of active consideration by the Department.<sup>12</sup> This is a serious problem – a petitioning tribe may wind up waiting a decade or more for its completed petition to be declared “ready” for further review and consideration of the petition’s merits. Indeed, that has been PMT’s experience.<sup>13</sup>

Once active consideration begins, Part 83 does establish guidelines which, if met, would produce a final decision in approximately two years’ time. However, as GAO found a dozen

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<sup>11</sup> See GAO Report, *supra*, at p. 17.

<sup>12</sup> See *id.*

<sup>13</sup> PMT’s petition was “ready for active consideration” *for more than ten years* before OFA finally began to review it. Then after that review had finally commenced, the Tribe was asked to provide a further “update” of its petition to address the “gap” in documentation created by the passage of so much time while the petition had been awaiting OFA’s attention.

years ago, “these timelines for processing petitions are routinely extended because of BIA resource constraints and at the request of petitioners and third parties.”<sup>14</sup>

GAO thus concluded its 2001 examination of the timeliness issue with the following prediction: “Without any effective schedule for the process from the beginning to the end, it will become increasingly difficult for BIA to complete its assigned duties in evaluating petitions in a timely manner.”<sup>15</sup> Unfortunately, PMT’s experience in the Part 83 process in the years since serves to demonstrate that the GAO prediction has come true. To make meaningful progress in rectifying this problem, hard and fast deadlines for the Department to take timely action regarding tribal petitions must be incorporated.<sup>16</sup>

## **2. Limit OFA’s Responsibility in the Recognition Process Going Forward**

There is another major contributing factor to the timeliness problem – OFA has been given far too much to do. The proposed revisions to Part 83 in the discussion draft do not address this concern. In fact, they appear to make it worse by delegating OFA responsibility not only for providing guidance and technical assistance to petitioners, but also for proposing the preliminary findings and providing written summaries of the reasons for or against recognition.

Simply put, OFA is wearing too many hats to effectively and timely discharge its duties under the Part 83 process. Moreover, adding personnel to OFA’s staff is not a realistic solution. Indeed, OFA has fewer staff members today (14) than it did twenty years ago (17); and less than

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<sup>14</sup> See GAO Report, *supra*, at p. 17.

<sup>15</sup> See *id.*

<sup>16</sup> To illustrate just how far short of the mark the Part 83 process has fallen in terms of its untimeliness, the Indian Policy Commission envisioned the formation of a regulatory process that would produce a decision regarding federal recognition “*no later than 1 year after receipt of a tribe’s petition . . .*” See 1977 Indian Policy Commission, *supra*, at p. 481 (emphasis added).

half the number the then Assistant Secretary-Indian Affairs recommended (33) in response to the 2001 Report in which GAO identified “untimeliness” as a serious concern.<sup>17</sup>

It is also inherently problematic when the same technical staff members charged with providing technical support and guidance to a petitioning tribe are later expected to pass judgment on whether the mandatory criteria of § 83.7 have been satisfied. No doubt at least some of the criticism levied against OFA for its involvement in producing inconsistent (and untimely) recognition decisions is due to the dual roles which OFA has been required to play in the regulatory process.

Going forward, revised Part 83 should significantly limit what OFA is responsible for accomplishing. Ideally, OFA’s role should be to develop guidance and offer technical reviews to a petitioning tribe, drawing upon that staff’s expertise in such matters. *See* §§ 83.5(b) and 83.5(c). The Assistant Secretary-Indian Affairs should in turn be making all proposed, preliminary and final findings regarding recognition without OFA’s involvement. Such a division of responsibility will bring an end to the “bottle-neck” that OFA has become in the regulatory process.<sup>18</sup> And the sense of fairness in the process will benefit going forward.

**3. Take Further Steps to Reduce the Confusion and Overlap in the §§ 83.7(b) and 83.7(c) Criteria.**

Eliminating criterion (a) is a positive step, but more needs to be done to truly make the process the “clear, uniform and objective approach” for determining federal recognition that the Department intended for it to be.<sup>19</sup> There’s obvious overlap in criterion (b) and criterion (c). It serves no purpose but to confuse. We therefore suggest that §§ 83.7(b) and 83.7(c) be revised

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<sup>17</sup> *See* Interior’s Strategic Plan – Response to the November 2001 GAO Report (Sept. 2002) at p. 10.

<sup>18</sup> Notably, the Indian Policy Commission urged in 1977 that such decisionmaking be delegated to a “special office . . . independent from the present Bureau of Indian Affairs.” *See* 1977 Indian Policy Commission, *supra*, at p. 480.

<sup>19</sup> *See* GAO Report, *supra*, at p. 19.

with a much simpler expression of the community and political authority criteria. An example of how this may be accomplished can be found in Assistant Secretary Washburn's succinct recitation of the § 83.7 criteria in his March 19, 2013 testimony on the subject of recognition to the House Subcommittee on Indian and Alaska Native Affairs.<sup>20</sup>

Alternatively, the Department may want to consider whether a petitioner meeting either one of these two key criteria for recognition would be sufficient – rather than requiring that both of them be satisfied. This is what the 1977 Indian Policy Commission advocated,<sup>21</sup> and it would serve to benefit petitioner and federal regulator alike by making Part 83 a far more efficient, substantially less burdensome process than it has been up to this point.

**4. Protect Tribes Like PMT from Having to Needlessly Re-Do Submissions After Revised Part 83 Takes Effect.**

As indicated above, our client's involvement in the recognition process has been fraught with delay. Even after four decades, no preliminary finding on PMT's petition has yet been made. Instead, the Assistant Secretary's Office suspended active consideration of the Tribe's petition nearly two years ago, and it had not resumed consideration as of June 21, 2013 when the preliminary discussion draft issued.

Assuming that PMT chooses to have its petition considered under revised Part 83, there is nothing about the proposed changes that would necessitate any further submission by the Tribe. To the contrary, what has been previously submitted more than covers what would be required to be shown under the revised criteria of §§ 83.7(b) and 83.7(c) (requiring petitioner to demonstrate it has maintained a distinct community and political autonomy since 1934 rather than from "historical times").

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<sup>20</sup> See Assistant Secretary Washburn's March 19, 2013 Testimony, *supra*, at pp. 1-2.

<sup>21</sup> See 1977 Indian Policy Commission, *supra*, at p. 483.

Nevertheless, proposed § 83.3(g)(2) would appear to provide that if a petitioning tribe's documented petition has been under active consideration as of the effective date of revised Part 83, it might be necessary to "file a new documented petition under these regulations." To spare our client and others similarly situated from having to make any further (completely unnecessary) submissions at this late stage, we urge that § 83.3(g)(2) be re-worded to make it clear that at the election of the petitioner, its previously submitted petition for recognition may be relied upon as satisfying revised Part 83 without requiring a further submission. So too, petitioners that have literally waited decades for a decision on their petition for recognition should not risk losing their place in the order of consideration by the Department as a result of any such regulatory changes that are adopted.<sup>22</sup>

#### **5. Prevent Third Parties from Being Able to Derail a Positive Final Decision**

Under both current Part 83 and the revised version that's been proposed, it is too easy for third-parties with their own agendas and/or self-interest to initiate challenges to petitioners which, however meritless, may further delay a regulatory process that is already far too protracted. We therefore suggest deleting "Informed Parties" from participation in the recognition process because Part 83 already allows for the involvement of "Interested Parties."<sup>23</sup> While third parties should not be precluded altogether from having a voice in what is intended to be a public process, there need to be limits imposed on third-party rights of participation in order to protect petitioner interests.

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<sup>22</sup> PMT has been designed as "petition 5" for purposes of determining the order of its consideration in the Part 83 process.

<sup>23</sup> "Interested Parties" are required to demonstrate a "legal, factual or property interest in an acknowledgment determination" in order to justify their participation in the Part 83 process. However, no such requirement is imposed under the current definition of the term "Informed Parties." See § 83.1. As a result, an "Informed Party" can include literally anyone who desires to submit a comment or evidence at any point in the recognition process – regardless of their own lack of any legitimate interest in the subject matter. The potential for delay and abuse is thus evident.

We also propose that going forward, third parties not be able to derail a positive final decision unless petitioner's fraud is alleged and there is clear evidence to substantiate the need for further investigation. In the event of any such challenge, petitioner should be given the opportunity to respond to any specific allegations that could jeopardize a favorable final decision. And under no circumstances should a third party be permitted to participate as a party on appeal.

**D. Conclusion.**

We would welcome the chance to answer any questions the Department may have regarding the foregoing points. PMT also looks forward to participating in the rule-making process and to commenting further on any later version of proposed Part 83 that is circulated for review and input.

Respectfully submitted this 20<sup>th</sup> day of August, 2013



Keith M. Harper  
G. William Austin  
Catherine F. Munson  
Mark H. Reeves  
April Day

Kilpatrick Townsend & Stockton LLP  
607 14<sup>th</sup> Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
(202) 508-5800

Counsel for the Piro-Manso-Tiwa  
Indian Tribe, Pueblo of San Juan Guadalupe