

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

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### Introduction

These comments are in addition to comments submitted August 14, 2013, and should be read together with that document.

### Treatment of Evidence and Standards of Proof

The draft proposal changes the standards of proof outlined in 83.6(d) of the present regulations (Though it apparently adopts some of the refinements of 83.6(d) done for the OFA draft). Crucially, the draft adds new language which states that a criterion 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 the petitioner” (emphasis added) (83.6(d)(1)). Depending on how this clause is interpreted, it could result in no real weighing of evidence or investigation of a case.

This added clause conflicts with the rest of the language concerning standards and much of the rest of the consideration process in the regulations. That process envisions a gathering of evidence and judicious weighing of it to produce the conclusions most supportable by the overall body of evidence, irrespective of whether this would support or deny a petitioner. The added language could easily be interpreted to mean that if there is any “positive” evidence, then the most favorable interpretation is to disregard any evidence to the contrary.

A further indication of this change in standard is that the proposed draft omits the language in the present regulations which states that “a petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria (83.6(d))”(emphasis added). This removes a key part of the balanced process of weighing evidence.

### Bilateral Political Relationship

The “presentation” concerning the draft proposal, as posted on the web, includes the question whether a “bilateral political relationship” needs to be demonstrated. Nothing could be more central to demonstrating tribal existence than that its members are in a political relationship with the tribe and that the tribe exercises influence or authority over its members.

“Bilateral” expresses the requirement that the members are in “tribal relations,” which is defined in the regulations as “participation by an individual in a political and social relationship with an Indian tribe.” Without this participation (which must be in more than a limited or trivial sense) the petitioning “tribe” is no better than a club. The Federal court decision upholding the Indiana Miami final decision concluded that the regulations, in providing criteria and reasoning for determining whether a tribe no longer existed, incorporated the idea of “abandonment of tribal

relations" (Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, 255 F.3d 342, 350 (7th Cir. 2001)).

#### Additional Comment on the Proposal to Use 1934 as the Start Date

A second argument for using 1934 as a start date for measuring tribal existence is that if a tribe existed then, this showed it had survived since first sustained contact, and the earlier history need not be examined. However, this assumption of continuous historical existence is undermined by the fact that a group may have formed during historical times and not be a continuation of a historical tribe. For example, the acknowledgment findings in Ramapough Mountain Indians petitioning group and United Houma Nation (proposed finding, not finalized) indicate the present groups came into existence in the 19th century (leaving aside other reasons cited in the findings that the regulatory criteria were not met). It is unlikely these are the only such groups in the country.