



OFA proposed changes

Brian Klopotek <klopotek@uoregon.edu>

Tue, Sep 24, 2013 at 8:11 PM

To: consultation@bia.gov

Cc: elizabeth.appel@bia.gov

September 24, 2013

To whom it may concern,

I am writing to comment on the proposed changes to 25CFR Part 83, "Procedures for establishing that an American Indian Group exists as an Indian Tribe."

I am an Associate Professor of Ethnic Studies at the University of Oregon, and director of the Native American studies program at the University of Oregon. I have studied federal recognition policy extensively, focusing the ways it has impacted tribes in Louisiana in particular. My book, *Recognition Odysseys: Indigeneity, Race, and Federal Tribal Recognition Policy in Three Louisiana Indian Communities* (Duke University Press, 2011), examines the experiences of the Tunica-Biloxi Tribe (recognized 1981), the Jena Band of Choctaws (recognized 1995), and the Clifton-Choctaws (state recognized and petitioning for federal acknowledgment). My comments on the process are informed by much research and reflection over the last 15 years, as well as discussions with other scholars and with many people who have been deeply involved in the process as tribal leaders.

I would like to add my support to the suggestions made by the Choctaw-Apache Tribe at the Marksville, Louisiana, meeting on August 6, 2013, and would also like to request clarification on several components of the proposed changes. My comments are laid out in the attached file (Klopotek-OFA comments.doc).

I am gratified to see that the BIA is revisiting the federal acknowledgment procedures. It is a challenging but critical task, and I'm glad this administration is brave enough to propose changes that will make the regulations more closely match federal obligations to tribes.

Sincerely,

Brian Klopotek

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Brian Klopotek
Associate Professor
Department of Ethnic Studies
205 Alder Building
5268 University of Oregon

Eugene, OR 97403-5268

Tel: (541)346-0903

Fax: (541)346-0904

klopotek@uoregon.edu



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Brian Klopotek
Associate Professor of Ethnic Studies
University of Oregon
205 Alder Building
5268 University of Oregon
Eugene, Oregon 97405
klopotek@uoregon.edu
tel. 541-346-0903

Office of Regulatory Affairs and Collaborative Action—Indian Affairs
1849 C Street NW
MS 4141-MIB
Washington, DC 20240
consultation@bia.gov

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I would like to add my support to the suggestions made by the Choctaw-Apache Tribe at the Marksville, Louisiana, meeting on August 6, 2013, and would also like to request clarification on several components of the proposed changes. To wit:

1. I endorse the idea espoused in 83.6(d)(1) which says that evidence should be viewed "in a light most favorable to the petitioner"

With so many competing definitions of tribal existence, there is not a bright line between groups that are tribes and groups that are not tribes, but OFA policy gives that illusion. Critics have suggested that OFA caters to the most restrictive definitions of tribal existence, a practice that seems to be rooted in fear of criticism more than sound conclusions. Given the

canon of construction of Indian law that says ambiguities ought to be resolved in favor of tribes, it seems reasonable to suggest that OFA ought to be more generous in interpreting the regulations. In that light, I appreciate the wording in 83.6(d)(1) reading that evidence should be viewed "in a light most favorable to the petitioner."

2. OFA interpretations of "tribes which combined and functioned as a single autonomous political entity" have been overly stringent.

- a. The Houma (and related groups) case is illustrative. OFA suggests that Houma founding ancestors were a group of accidental neighbors who happened to be Indian rather than a group who chose to live with each other because they could live as Indians together. The fact that they and their descendants stayed together and maintained an Indian identity is certainly evidence of their intention to form a political and cultural community with one another. Every tribe would prefer to have had a Constitution and a Declaration of Independence written up to provide proof, but such evidence will be lacking in most cases.
- b. Previous OFA interpretations have not accepted documentation that a person or group of people is "Indian" as evidence of descent from a historical tribe or tribes. How can a group be Indian and not be descended from a tribe or tribes? I understand that federal recognition is rooted in the idea of indigenous political primacy, but Indian communities all over the US were comprised of individuals from a variety of tribes, people for whom the idea of "tribe" did not always have the same significance as contemporary people imagine (e.g. Catawbas [see James Merrill, *Indians New World*], "little republics" of the pays d'en haut [see Richard White, *The Middle Ground*], Puget Sound tribes [see Alexandra Harmon, *Indians in the Making*]). The regulations must reflect real Indian history, not an imagined history of purity and inflexibility.

3. Tribal recognition is a federal obligation, not an entitlement program.

- a. As former head of the BIA Michael Anderson has said, tribal recognition is a federal obligation, not an entitlement program. In the Supreme Court's 1832 decision in *Worcester v. Georgia*, Chief Justice John Marshall wrote that tribal sovereignty is "not only acknowledged, but guaranteed by the United States...." Given this *fiduciary responsibility to guarantee tribal sovereignty*, the United States government is legally and morally obliged to take a more active role in finding out whose sovereignty is currently being violated under non-recognition. The regulations as they are currently administered passively wait for tribes to conduct the extensive research required to petition for acknowledgment on their own (or worse—actively prevent tribes from attaining acknowledgment).
- b. OFA employees have been ordered as official policy to do no research work to assist petitioning tribes. This might speed up the notoriously slow

rate at which they process petitions, but it has the opposite effect of what criticisms of their speed intended. Rather than attaining more attention for each petitioner's case from the federal government, this regulation results in less attention to each case.

- c. Research support and advice should be an ongoing obligation of the federal government for groups showing evidence of Indian ancestry, up until the moment of a final decision. Ongoing eligibility for such support could be tied to various progress markers, as grants typically are, in order to prevent abuse and waste while delivering much-needed support to tribes. The need is certainly there. ANA grants have been helpful, but inadequate, given the enormous requirements of the petitioning process and the otherwise limited tribal resources and research capacities of most nonfederal tribes.

4. **Too much reliance on outside characterization of groups relies heavily on racial and racist thinking of others and rigid conceptions of authenticity.**

History has shown that people with African and Indian ancestry, for example, are less likely to be regarded as Indian than Indian people with equal amounts of white ancestry (see Circe Sturm, *Blood Politics*, for evidence). Similarly, being a Spanish-speaking community can lead to a group being racialized as Mexican, regardless of how much Indian ancestry they might have. While many Choctaw-Apache tribal members have been identified as Indian in various records in the 18th, 19th, and 20th centuries, including the US census of 1900, for example, many of the community members were identified as Mexican in the 1930 census and at other times. Are we to understand from the elimination of 83.7(a) that outside mischaracterizations of the group would no longer be taken into account? I agree with the Choctaw-Apache tribe's assertion that outside misrepresentation of a tribe ought not be weighed against them, but ought to validate their assertion of a distinct identity.

5. **"Interested parties" have too much power in the process.**

People with property interest, legal interest, or political interest in ensuring that a tribe does not get recognized should not have a larger role than people who know about the tribe's history and culture in the federal acknowledgment process. If OFA is supposed to be a process for making an ethnohistorical determination of whether a tribe exists or not, then there is not justification for elevating the status of property interests to such heights. "Interested parties" currently have the power to appeal recognition decisions, based not on their knowledge but on their supposed property interest. Putting property interests on an equal par with tribal rights is a recipe for disaster where Indians are concerned, as it always has been. For this reason, the tribes and the public need to hear more about the deletion of 83.11 "Independent review, reconsideration, and final

action." Would this deletion mean that "interested parties" can no longer contest AS-IA recognition decisions?

6. Transition to recognition

A process should be initiated at the moment of a proposed positive finding that will begin setting up services for the tribe and transition them into federal status, rather than waiting up to six months, as stated in 83.12(d). Navigating the federal bureaucracy and federal Indian policy is no easy task, and the formalized process of advising and needs assessment ought to be in place immediately to make it easier and faster for newly recognized tribes to access available services and protections. For this reason, 83.12(c) seems unnecessary and against the spirit of acknowledgment and the trust responsibility.

7. OFA decisions too often read like "a prosecutor's brief," as historian Francis Jennings wrote of the initial negative proposed finding in the case of the Gayhead Wampanoags.

In responses to petitioners, OFA's language has occasionally been unrealistic and unbalanced, saying there is "no evidence" of Indian ancestry in communities, when there is at the very least some evidence, even if it is not the kind that OFA accepts as proof (censuses, voting records, attendance at Indian schools, living on a state reservation, oral histories, consistent identification as a "tri-racial isolate"). The change in wording in 83.6(d) is appreciated in this spirit (that evidence should be viewed "in a light most favorable to the petitioner").

8. It would be helpful to have some clarity about the reasons for the various proposed changes, rather than just having the proposed wording itself.

- a. What are the implications of the decision to replace "letter of intent" with "documented petition" as the requirement for becoming a "petitioner," for example? How will that change affect eligibility for ANA grants? And what are the implications of the shift from 1900 to 1934 as a threshold date for tribal existence? These might be decisions tribes would support, but all of the justifications and implications ought to be made transparent.
- b. In the 1994 revisions, for example, 83.7(a) was changed to 1900 to ease the burden on the petitioner, but the rest of the regulations still required evidence be provided from historical times to the present. In the proposed revisions, is this still the case, that the petitioners must present evidence from historical times to present to meet 83.7(e) despite the changes elsewhere in the criteria?

9. What is the justification for limiting the number of pages of a petition in 83.6(a)?

The proposal says in 83.6a, "not to exceed XX pages." Is this the narrative portion of the petition or the total petition with all supporting

documentation? A large tribe and a small tribe, for example, would have widely divergent amounts of paperwork to submit based on genealogy alone. There is certainly a benefit to keeping petitions brief, but it seems odd to place a page limit on such an important document.

10. I support the proposal to add expedited favorable findings for tribes mentioned in 83.10

This proposal makes sense. It would correct an historical injustice and an absolute farce on the part of the state of Connecticut, in particular. It would help clear the backlog and direct OFA resources to other petitioners.

11. Will the AS-IA position itself more clearly as judge in acknowledgment cases?

Are we to understand from 83.10(n)2(i) that AS-IA is positioning itself more clearly as judge in these cases, when OFA is adversarial to petitioners? The Office needs to be transparent about the implications of the decision to use OHA or AS-IA to appeal decisions rather than the IBIA. The impression seems to be that IBIA has been unfavorable to petitioners, having vacated positive decisions but never vacated negative decisions. While the current AS-IA seems favorable to petitioners, there is some concern that a less favorable administration could be damaging to petitioning groups. What are the differences between the OHA and the IBIA? Furthermore, if both OFA and AS-IA decline to acknowledge a group, will the next step be to appeal to US District Court, considering the deletion of 83.11? These steps need to be made clear.

12. Indigenous groups have survived in many forms, and it is important to nurture them where they persist.

It bears repeating that tribes that have not been federally recognized are not always going to look exactly like tribes that have been federally recognized for hundreds of years, for a variety of reasons. Even federally recognized tribes often look very different from one another. One is not better or worse than the other; they are just different. The Choctaw-Apaches and many other petitioners cherish their indigenous communities, though, and deserve federal recognition of their status as indigenous polities that have survived hundreds of years of assimilationist pressures (or worse).

I am gratified to see that the BIA is revisiting the federal acknowledgment procedures. It is a challenging but critical task, and I'm glad this administration is brave enough to propose changes that will make the regulations more closely match federal obligations to tribes.

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