



# Ysleta del Sur Pueblo

Tribal Council  
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September 25, 2013

The Honorable Kevin Washburn  
Assistant Secretary  
United States Department of the Interior  
Washington, DC 20240

Re: Tribal Comment on Preliminary Discussion Draft Concerning the Federal Acknowledgment Regulations; 1076-8F 18

Dear Assistant Secretary Washburn:

As Governor of Ysleta del Sur Pueblo, I write to express my appreciation for the “early opportunity to provide input on potential improvements to the Part 83 process.” I also salute the Department for selecting transparency, timeliness, efficiency, and flexibility as guiding principles for improving the Part 83 process. The Pueblo, however, does not believe that the proposed modifications satisfy the guiding principles, nor would they withstand legal scrutiny.

The Pueblo finds much merit in the September 16 comments of the Puyallup Tribe of Indians, the September 20 comments of the Tulalip Tribes, and the September 24 comments of the Squamish Tribe. The tribes have done a great service to Indian country by their obvious detailed analysis of the Preliminary Discussion Draft and their careful attention to the critical role that sovereignty – that it may not be presumed but must be traced in an unbroken line to a historic Indian tribe. The Pueblo adopts the comments of these three tribes as its own.

It is not the Pueblo’s purpose to oppose the Discussion Draft, which is only “Preliminary,” but to propose a different path, one which better secures the future of all Indian tribes whether they presently enjoy a government to government relationship with the federal government or not. You note in your March 19, 2013 testimony before the House Subcommittee on Human and Alaska Native Affairs that some have criticized the Part 83 process as being expensive, inefficient, burdensome, intrusive, less than transparent, and unpredictable. That is putting it mildly.

The most damning indictment of the Part 83 process, however, is set out in the Rev. John R Norwood, Jr.’s August 7, 2013 comments on the Preliminary Discussion Draft, as well as in his July 12, 2012 testimony before the Senate Committee on American Indian Affairs, to wit: tribal termination via administrative reclassification. Rev. Norwood’s concern with the Part 83 process not only encompasses the substantive content of the regulations, but also the increasingly burdensome administrative application of them. He

describes the transmogrification of the Part 83 process as one from opportunity to obstacle.

Key to tribal termination via administrative reclassification is the definition of “Indian tribe” in the regulations which the Preliminary Discussion Draft leaves unchanged: any Indian or Alaska native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior *presently acknowledges* to exist as an Indian tribe.” (incredulous emphasis added).

At least two problems exist with a definition that an Indian tribe is an Indian tribe only if federally acknowledged: (1) “an Indian tribe is an Indian tribe” is not a definition unless the words “Indian” and “tribe” are defined, which they are not; and (2) the “definition” contravenes federal law. Acknowledgment is a confession of an Indian tribe’s existence, not the creation of one.

In 1975, three years before the establishment of the Part 83 process, a federal appeals court held that acknowledgment is neither a prerequisite for the existence of an Indian tribe nor the extension of the federal trust relationship by general legislation benefitting tribes as a whole. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). The Court relied upon the Indian Non-Intercourse Act in its analysis of the extension of the trust relationship, but Chief justice John Marshall had much earlier noted that the federal government was obligated to protect Indian tribes in the possession their lands. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

The regulations need an apt description of “Indian tribe,” one that satisfies the judiciary’s bedrock determinations of the constituent elements of an Indian tribe in order to survive legal challenge. The definition must also serve to thwart the race based equal protection attacks being waged against Congressional efforts to treat favorably with Indian tribes.

The description of the legal status of Indian tribes is well-defined. Chief Justice John Marshall referred to them as “dependent domestic nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). These “dependent domestic nations” are “quasi-sovereign entities”, *Morton v. Mancari*, 417 U.S. 535, 554 (1974), exercising all the powers of a sovereign except as limited by Congress, *National Farmers Union Insurance Co.s v. Crow Tribe*, 471 U.S. 845, 852-53 (1985), or their status as dependent domestic nations, *Oliphant v. Squamish*, 435 U.S. 191 (1978).

The legal definition hints that the constituent elements of an Indian tribe. Traditionally, nations have been defined as a sovereign entity comprised of a common people subject to their own government with in a defined territory. Domestic means within the continental United States or within the territories over which the United States extended its jurisdiction and later became part of the Union. Dependent means having attributes of sovereignty but not complete.

In 1901 the Supreme Court explicitly identified the same necessary minimum elements as constituting an Indian tribe: “By a ‘tribe’ we understand a body of Indians of the same or

a similar race, united in a community under one leadership or government and inhabiting a particular though sometimes ill defined territory[.]” *Montoya v. U.S.*, 180 U.S. 261, 266 (1901).

That Indian tribes existed as sovereign political entities within the lands which became the United States undergirds the legal reasoning of not only the cases mentioned but the entire corpus of federal Indian law, and as imperfect as it may be by failing to give due regard to the human rights of indigenous people, forces are at work – most often seen in recent judicial decisions and Congressional inaction – to reduce this body of law to a corpse. All changes to the Part 83 process should be made with these trends in mind.

The Pueblo’s path to obviate tribal termination by administrative classification is to offer a new definition of “Indian tribe”.

It is suggested that a definition of Indian tribe similar to the following be included in the regulations: *Indian tribe* means a politically autonomous, historic indigenous community.

Community retains the same definition. Indigenous means that a predominant portion of the community’s members must be descended from a historic Indian tribe. It also means its cultural norms and organizations must be derived from those of the historic Indian tribe. Autonomous retains the same meaning. Politically should be interpreted in light of the definition of political influence. The word historic should have the meaning suggested by George Roth in his comments of August 14, 2013.

In connection therewith, the term “Indian group or group” should be deleted. The present definition presumes matters to be proved in the Part 83 process, that the petitioning group actually comprises Indians; further, more often than not the terms are used simply as placeholders for the more appropriate word “Petitioner.”

The word indigenous should not be deleted given the new definition of Indian tribe. Even if the term Indian tribe is not amended, the definition of indigenous should remain for any number of reasons. The concept is not, as advertised, contained within the term Indian group (which, as mentioned, should be deleted) in that the historic element is eliminated. Given the recent approval of the United Nations Declaration on the rights of indigenous people, any elimination of the term is a step backward in moving Indian tribes out of the category of “dependent domestic nations” to one based of recognition of the inherent human rights of native people.

Regardless of any minor modification or complete overhaul of the Part 83 process, the adoption of the Pueblo’s suggestions on definitions will help obviate tribal termination by administrative classification and establish a foundation for simplifying the Part 83 process in a manner that will withstand judicial scrutiny.

The Pueblo has two other comments. The first involves the proposed § 83.9(m) which limits challenges of certain actions to “any federally recognized Indian tribe within the state.” The Pueblo strongly opposes the change. First, it appears to violate the due

process rights of any person which meets the definition of interested party. Moreover, the phrase “within the state” is arbitrary and capricious. The OFA has before it under almost-active consideration a petition from a group located in Las Cruces New Mexico. The Pueblo, which is an interested party in the matter, is located less than 50 miles away in El Paso, Texas. There are 20 Pueblos in New Mexico, two Apache tribes, and the Navajo nation, all of whom would be allowed to file a challenge. Yet the Pueblo would not. The language should be changed to include any interested party.

The Pueblo also objects to the lack of any appeal to IBIA. Absent such appeal, all challenges will be heard by the federal district court pursuant to the Administrative Procedures Act. Normally a court will apply the arbitrary and capricious standard of review to analyze the connection between the evidence and the agency’s decision. An agency’s action may be held arbitrary and capricious if the agency used incorrect legal standards in weighing the evidence. Furthermore most administrative decisions usually are upheld if supported by substantial evidence, but the APA permits the district court to engage in its own fact-finding if it finds the agency’s actions were inadequate. Review by the IBIA serves as a “quality control” check on the decision making process. While IBIA procedures may need to be modified and streamlined, as suggested by George Roth, such appellate review should be retained.

Respectfully

Governor Frank Paiz

