

September 25, 2013

Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action
U.S. Department of the Interior
1849 C Street, N.W., MS-4141-M1B, Washington, D.C. 20240
consultation@bia.gov

Re: 1076-AF18 Federal Acknowledgment of Indian Tribes, Comments on Discussion Draft

Dear Ms. Appel,

On behalf of the Indian Legal Clinic (“ILC”) at the Sandra Day O’Connor College of Law at Arizona State University, we wish to thank you for considering changes to the Federal Acknowledgment Process and for the opportunity to submit comments on the Discussion Draft.

The Indian Legal Clinic serves Indian Country and the nation’s urban Indian populations by providing high quality legal services, with attention to the special legal and cultural needs of native peoples. The ILC works with tribal courts handling criminal prosecutions and defense actions, undertakes tribal legal development projects, such as drafting tribal code provisions and court rules for Indian tribes, represents individuals in civil actions, and works on federal policy issues affecting Native people, such as federal recognition.

In 2009, the Indian Legal Clinic provided Testimony before the Senate Committee on Indian Affairs on revising the Federal Acknowledgment Process.¹ The written testimony presented an overview of the history of the Federal Acknowledgment Process, highlighting the difficulties in the process since its establishment and making recommendations for revision. In particular, the testimony focused on four issues: 1) increased burden on petitioners, 2) lack of timeliness, 3) lack of resources and 4) lack of transparency. Since the time when those issues were raised, the process has not changed substantially to address those issues. The Discussion Draft seeks to address these issues of transparency, costs, burden of proof, efficiency, flexibility and integrity.

The Indian Legal Clinic² submits the attached comments to the Discussion Draft for review and consideration.

Sincerely,



Patty Ferguson-Bohnee
Director, Indian Legal Clinic

¹ Patty Ferguson-Bohnee, Testimony before the Senate Committee on Indian Affairs Oversight Hearing on Fixing the Federal Acknowledgment Process, Indian Legal Clinic, Sandra Day O’Connor College of Law, Arizona State University (Nov. 4, 2009) available online at: <http://www.law.asu.edu/News/CollegeofLawNews.aspx?NewsId=3841>.

² Student attorneys who worked on the comment include Colin Bradley, Jennifer Markley, Natali Segovia and Benjamin Rundall.

Indian Legal Clinic Comments on Discussion Draft

A. GENERAL OBSERVATIONS

1. There is a need for a prefatory comment, expanded statement of purpose or accompanying press release to indicate how the proposed changes will affect tribes that are not yet federally recognized. The unstated goal seems to be to allow for federal recognition of tribes that can show historical organization since at least 1934, but it does not seek to explicitly state that it intends to facilitate or provide a streamlined process for tribes to attain federal recognition.
2. The Federal Acknowledgment Process should automatically provide tribes access to the documentation and information submitted in their petitions without requiring a FOIA request.
3. The proposed regulations should refer to the current regulations as “revised regulations” and previous iterations of the regulations as “previous regulations” to avoid confusion.
4. There should be no page limitation for the documented petition. Each tribe has unique circumstances, resources and access to information and documentation. If a page limit is set however, such a page limit should clearly **exclude** supporting documentation.
5. A standard form for petitions would be helpful to clarify the standards and objective information sought by the Federal Acknowledgment Process, but any standard form should be optional to use.
6. The changes in the Discussion Draft serve to reduce costs borne by petitioners. Eliminating criterion §83.7(a) would logically reduce some of the financial burden because resources could be shifted to addressing the other criteria. Further, changing the time period from historical times (1789) to 1934 in establishing criteria §83.7(b) and §83.7(c) will reduce the petitioner’s financial burden in addressing criteria (b) and (c).
7. The Clinic observes that the difficulty of achieving federal recognition under the Federal Acknowledgment Process has served as a barrier to the rights of self-determination guaranteed under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The United States has issued its support for and agreed to comply with the concept that “[i]ndigenous peoples have the right to self-determination.”³ Therefore, the length of time, cost, and difficulty associated with the current process has served to hinder the declared rights of Indian tribes not yet federally recognized.

³ Art. 3, United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Oct. 2, 2007) available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf; see also Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, U.S. Department of State, (Dec. 9, 2010) available at www.state.gov/documents/organization/153223.pdf.

B. SPECIFIC RECOMMENDATIONS

1. The Indian Legal Clinic supports the proposed change in §83.1 (Definitions) and in §83.7 criteria (b) and (c) to change from “first sustained contact” to 1934.

The change in time frames is beneficial from practical, historical, and legal perspectives. Logistically, a 1934 start date lessens the evidentiary burden on petitioners who have struggled to find documents supporting tribal existence as far back as 1900. Such documents were often lost, destroyed by fire or simply did not exist.⁴

Historically, 1934 is an appropriate starting point for demonstrating that a group has functioned as an autonomous tribal entity because it coincides with the year of the Indian Reorganization Act (“IRA”), an act that marked a Congressional turning point in Indian policy. Recognizing the failure of the allotment program, Congress enacted the IRA to ensure the survival of tribes, triggering the rapid effort by John Collier, Commissioner of Indian Affairs, to identify tribes for federal recognition.⁵ The federal government compiled its first official list of 258 recognized tribes in 1934. As the historical starting point of the federal recognition process, 1934 is a logical place for petitioners to begin tracing their existence as a tribe. The year of 1934 was significant regarding federal-tribal relations because for the first time, it was highly attractive for Indian tribes to establish cordial relations with the federal government.⁶

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Narragansett Tribe brought suit to determine whether the Secretary of the Interior could take a 31-acre parcel purchased in 1991 into trust. The central issue was whether the IRA’s definition of Indians as “members of any recognized tribe now under federal jurisdiction” included Indians from tribes that were not federally recognized at the time.⁷

The Supreme Court held that under the IRA, the Secretary’s authority to take land into trust for the Indians was limited to tribes under federal jurisdiction in 1934.⁸ Because the Secretary did not establish that it had federal jurisdiction over the Narragansett in 1934, the Secretary could not

⁴ Michael Melia, *US Overhauls Process for Recognizing Indian Tribes*, Associated Press, Aug. 25, 2013, available at <http://www.app.com/viewart/20130825/NJNEWS18/308250103/US-overhauls-process-recognizing-Indian-tribes>; For example, in the petition of Little Shell Tribe of Chippewa Indians of Montana, Little Shell had no available evidence that external observers identified the petitioner’s ancestors as an American Indian entity from 1900 to 1935. See Summary Under the Criteria and Evidence for Final Determination Against the Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, at 5 (Oct. 27, 2009). The criterion for identification, which the proposed regulations would remove, was one of three that Little Shell failed to meet when the Department denied its petition for federal acknowledgment.

⁵ Sarah Washburn, *Distinguishing Carcieri v. Salazar: Why the Supreme Court Got it Wrong and How Congress and the Courts Should Respond to Preserve Tribal and Federal Interests in the IRA’s Trust-Land Provisions*, 85 Wash. L. Rev. 603, 624-26 (2010).

⁶ John Collier, the commissioner of Indian Affairs stated in 1934 that “if there ever will be a time when the Indians of the United States can get what they need, now is the time.” A Fateful Time, Elmer Rusco, pp. 191, chapter 7, n. 31 (2009).

⁷ Indian Reorganization Act, 25 U.S.C. 465.

⁸ *Carcieri*, 555 U.S. at 395-96.

later take the tribe's parcel into trust. The Narragansett Tribe did not obtain federal recognition through the Federal Acknowledgment Process until 1983.

Carcieri for the first time decoupled the concepts of federal recognition and federal jurisdiction, asserting that federal recognition does not automatically convey federal jurisdiction.⁹ While the holding may signal future legal hurdles for tribes federally recognized after 1934, it reinforces the importance of that year when determining the legal status of tribes. By starting the time frame for evidence at 1934, federal recognition regulations might help tribes demonstrate that they were under federal jurisdiction in 1934.

2. "Historically, Historical or History" should be clarified.

The terms "historically, historical or history" is defined on page 2 of the as date from the first sustained contact with non-Indians. This should be clarified. In the Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures Notice dated May 20, 2008, Part V clarified that first sustained contact should begin in 1789, the date the Constitution was signed. 73 Fed. Reg. 30147. Tribes should not have to prove documented history prior to when the US was established because the purpose is to recognize the tribal-federal relationship and there could be no federal relationship prior to the US existing. Further, first sustained contact should not begin prior to when the state in which the Tribe is located became part of the United States.

3. The Indian Legal Clinic supports the proposed change in §83.6(d) (General provisions for the documented petition) to incorporate the legal standard of "preponderance of the evidence" to facilitate petitioners' understanding of the burden of proof required for documentation.

Preponderance of the evidence is defined by Black's Law Dictionary as follows:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (9th ed. 2009).

It makes sense both legally and practically for the Department to adopt a form of this universal definition. Draft language that could be used for this standard and added to §83.6 regulations is: "***Preponderance of the Evidence*** shall mean a demonstration of evidence which tends to incline a fair and impartial mind to one side of an issue rather than the other." Such demonstrations need not free a fair and impartial mind from all reasonable doubt.

⁹ Washburn, *Distinguishing Carcieri v. Salazar*, at 636-37.

4. **The Indian Legal Clinic notes there is no change to the statement of purpose in §83.2. Notably absent from the statement contained therein is any indication of a presumption favorable to recognition of tribes. We recommend the language be expanded to address this.**
5. **The Indian Legal Clinic recommends that the language in §83.3(f) be re-phrased to state that petitioners that were denied under previous regulations may resubmit their applications under the new regulations as provided in §83.10(r). The new regulations alter the criteria and therefore, should overrule past OFA negative findings because they would be inconsistent with the new regulations.**
6. **The Indian Legal Clinic supports the proposed change in §83.3(g)(2) to allow tribes under active consideration to choose to either continue their pending application under the “previous acknowledgement process,” or under the amended regulations. However, we recommend the deadline to make this choice be extended from 60 days after the publication deadline to 120 days or longer, due to the cost, time, and high stakes associated with the application process.**

It would be wise to give tribes more time to decide their course of action once the new regulations are released because of the hardship this situation will cause. First, a tribe is likely to rely on attorneys and/or consultants to seriously evaluate which course of action is better for its interests. Second, if a tribe decides to change its mind, it may require the vote of a tribal council or other governmental entity, which may not be able to assemble, debate, and vote in only 60 days. Should a tribe decide to file under the new regulations, it will have to amend its application by assembling all the required materials in order to file them properly. Any of these constraints alone could be 60 days, and therefore the new deadline should be at minimum 120 days.

7. **The Indian Legal Clinic recommends that the language in §83.6(a) be clarified to state that documents may be submitted in any readable form. The revised regulation should specify that electronic submissions are allowed.**

The Paperwork Reduction Act (44 U.S.C. § 3501) states that the “purposes of this subchapter are to . . . minimize the paperwork burden for . . . tribal governments, and other persons resulting from the collection of information by or for the Federal Government . . .” 44 U.S.C. § 3501 (2013). Applying this section of the federal code, it would be in the best interest of all parties that petitioners be allowed to submit their documents in an electronic format.

8. **The Indian Legal Clinic supports elimination of §83.7 criteria (a) under the proposed changes.**

Outside recognition of a tribe could be used to support social and political community. This includes 1) identification as an Indian entity by Federal authorities, 2) relationships with State governments, 3) dealings with local government in a relationship based on the tribe’s Indian identity, 4) identification as an Indian entity by anthropologists, historians and/or other scholars, 5) identification as an Indian entity in newspapers and books, 6) identification as an Indian entity in relationships with Indian tribes or with national, regional or state Indian organizations.

- 9. The Indian Legal Clinic recommends that the language in criteria §83.7(b)(1)(i) be changed from “significant rates of marriage within the group,” to “rates of marriage by *individual members* within the group.”**

This should be clarified to adequately describe how endogamy rates are used. For example, if within a sample twelve-member tribe, six individuals marry within the group and six marry outside the group, OFA might determine that 3 marriages are within the group and 6 marriages are outside the group, while another researcher would determine that 6 marriages were within and 6 marriages outside. Therefore, this language should be clarified so that it reflects marriages by the individual members within the group, and not the group as a whole.

- 10. The Indian Legal Clinic recommends that §83.7(b)(1)(viii) re-incorporate “religious beliefs and practices” to this section.**

The proposed regulations delete this language and should not do so. Religion is often what sets apart one tribe (i.e., Navajo) from others. Native religions are difficult to reconcile with European religions because Native religions may involve sacred sites, rituals, concepts, stories and a shared culture.

- 11. The Indian Legal Clinic supports the proposed change in §83.10(n)(2) for a hearing prior to the issuance of a final determination.** In addition, the Clinic recommends the following:

- a. The hearing should be conducted in a regional location proximate to the tribe so that the fact finders, evidence, and interested parties can be more readily accessed.** Such a change would also foster openness and transparency, as tribes would have the greatest opportunity to present evidence to dispute contested findings by the OFA.
- b. The Clinic supports the change in §83.10(n) providing for an on-the-record hearing and cross-examination of OFA experts.** In order to facilitate the hearing process, the documents relied on by the experts and their notes should be automatically provided to the petitioner.
- c. The hearing should be conducted by an independent body.** AS-IA and OHA are both acceptable choices. By adding an independent fact finder, it can be assured that every fact has been considered before issuing any final determination. This creates more transparency and provides openness.
- d. Once a final decision is rendered by the independent fact finder, the tribe should have a right to appeal the process (as laid out below).** This appeal should go to an independent arbiter, such as an administrative law judge at the OHA. The judge should apply the preponderance of evidence standard, as defined in the regulations, to review contested findings.

- 12. In addition to the Independent Review in §83.11 of the proposed changes, the Indian Legal Clinic recommends the establishment of an Appeals Process independent from the OFA and AS-IA.**

Determinations issued by the OFA are legal decisions relying on legal standards, and the agency is given great deference in interpreting and applying the regulations to each petitioner. The Clinic supports removing the current OHA reconsideration process. The reconsideration process does not provide for review based on the misapplication of the facts to the law/criteria or the misapplication of the standard of review. No tribe receiving a negative final determination has successfully reversed a decision through the reconsideration process.

The Clinic supports replacing the OHA reconsideration process with meaningful review instead of no review. There should be a meaningful review process to challenge the application of the criteria. The review process could be done by an Administrative Law Judge or some other independent body.

The Procedures for Establishing that an American Indian Group Exists as an Indian Tribe currently lacks an administrative process for use in determining close disputes. Under the current procedures, the OFA acts as the sole fact finder. This is true, even where the facts surrounding federal recognition are hotly contested by the tribe. One way to resolve factual disputes over what makes a group of people Indian according to the OFA would be to implement an administrative review process into the procedures.

This appeal process could match that of other administrative bodies. For example, in the SSI/SSD realm of government benefits, petitioners for state and federal benefits are allowed to appeal the findings of a state agency to an independent judiciary. The same process could be employed here to ensure quality, fairness, and transparency in their decision-making process.

Currently, the only route to the courts for tribes who dispute factual findings of the OFA comes in the form of the Administrative Procedures Act (“APA”). The relevant part of the APA comes from 5 U.S.C. § 706, provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*

5 U.S.C. § 706 (emphasis added).

This language, cited directly from the APA, is a high burden for tribes to meet, especially when the facts considered at the APA level are exclusively those determined by the OFA. Under this scenario there is likely never a situation in which the OFA could be found to have arbitrarily or capriciously ruled against the tribes.

A separate fact finder, therefore, is essential to the success of the Federal Acknowledgment Process. It is critical to shift the fact-finding role currently held by the OFA, to a separate judicial intermediary, so that genuine disputes of fact between the OFA and the tribes can be decided independently. Without such a mechanism, the tribes will simply always be wrong should the OFA reach a different conclusion in regards to a disputed fact.

Below is an example regulation that could be adopted and employed in the future:

A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues. The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The administrative law judge may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

20 C.F.R. § 404.944. This federal regulation allows the Office of Disability Adjudication and Review, the administrative law judges for social security disability benefits, to review the initial determinations regarding disability benefits made by the Social Security Administration. The review performed by these administrative law judges ensures an impartial review of the facts presented at the initial social security determination then an impartial determination on the facts is made without being restrained by the almost insurmountable standard set forth in the APA.

The Federal Acknowledgment Process would benefit highly from the inclusion of an ALJ review process. The ALJ review process is the essential cog currently missing between the final agency determination, and the federal courts, which are limited in their scope of review regarding an agency determination under the APA.

C. CONCLUSION

The Discussion Draft addresses important issues that have unduly burdened petitioners and relieves some of the difficulties inherent in the Federal Acknowledgment Process. Thank you for your consideration of our comments. The Clinic looks forward to reviewing the proposed criteria.