



From the Office of Certified Genealogist & Researcher

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To: Elizabeth Appel, Acting Director, Office of Regulatory Affairs & Collaborative Action

From: Lorraine Escobar, CG/NAL

RE: Proposed revisions to 25 CFR 83

I, Lorraine Escobar, Certified Genealogist/Native American Lineages, make comment regarding two facets of the revised proposed regulations for 25 CFR 83.7. The first deals with the need for transparency within the process, and the other deals with the need to protect the process of genealogical verification which will, in turn, protect authentic California Indians. It is my humble hope that this office will seriously consider the issues raised here along with the proposed resolutions.

The Need for Transparency within the Process (83.7 (e))

The language of the proposed revisions, coupled with the AS-IA responses, appears to reformulate the acknowledgement process from:

1) Proposed Finding—2) TA meeting—3) Final Determination—4) IBIA Appeal, to:

1) Proposed Finding—2) OHA Appeal—3) Final Determination—4) District Court Appeal.

This proposition is tantamount to pouring new wine into old wine skins. Here’s why – First, considering the cost of launching an appeal when OFA makes mistakes, the two appeal processes potentially double the financial burden of the petitioner. But more importantly, this proposed rearrangement appears to eliminate OFA’s obligation to explain its decisions to a petitioner or to assist the petitioner in understanding what it needs to produce a successful and timely response before a final determination is reached. ***Eliminating this obligation only exacerbates the real problem – a lack of transparency in how OFA has historically assessed genealogical evidence.***

As was demonstrated by the FD of the Juaneño Band of Mission Indians (84A), between the TA meetings and the FD, OFA has been anything but transparent:

1. Out of the purview of any objective authority or adequate peer review, OFA genealogical staff ***attempted to poke unsubstantiated holes*** in the genealogy through

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- illogical reasoning thus reducing the passing percentage to well below the 80% precedence for passing 83.7(e);¹
2. Other than the case of Jose Uriol Mireles, OFA **did not disclose** why it had decided against a number of large groups of otherwise documented tribal members; and,
 3. OFA did **not disclose why it reversed** previous decisions made in the PF.²

Between the FD and the IBIA appeal:

4. OFA **deliberately delayed** delivering genealogical worksheets to the tribe until very shortly before the appeal was due nearly crippling the tribe's effort to prepare a thorough appeal.³

After the appeal was delivered from the IBA to OFA:

5. OFA only admitted to **making a single mistake** impacting the passing of 249 tribal members' passing status;⁴ and,
6. **Without any explanation**, OFA **ignored all of the other mistakes** enumerated in the appeal although these errors were equally documented and argued.⁵

In view of these events, the attempt to eliminate OFA's obligation to explain itself does nothing more than encourage a bad system to become worse.

Considering the proposed process of an *Expedited Negative Finding* is still in place in the proposed revisions, the emphasis yet remains on 83.7(e) (descent) as a means to save time for OFA staff in processing petitions. Attempting to fortify the OFA staff's ability to correctly assess genealogical documentation, the AS-IA stated,

¹ The JBMI (84A) appeal lists all of the errors OFA made in its claimed evaluation of the genealogical evidence and generously provided evidence to substantiate the original record as submitted.

² Unexplained Mistakes and Reversals – From the PF to the FD, OFA made many unsubstantiated errors and reversed its previous conclusions regarding several individuals, impacting a significant number of members: As was addressed in the appeal, in the case of two Atencio children, where one was born in January and the other was born in December of the same calendar year, OFA decided these children were “adopted” despite the obvious congruence with proper gestation and abstinence periods, after birth, and despite no unusual notations, or late filing dates, on the submitted birth records. ***This decision was not addressed nor was there any sufficient or adequate oversight process to prevent such a glaring mistake in the first place.*** In the case of Paula Angelina Ricardes-Ross, OFA also reversed its previous assessment she was descended from a Juaneño Indian but did not provide any explanation as to why they changed their mind. ***This reversal was not addressed nor was any process in place to allow the petitioner to obtain a timely explanation to properly prepare for the appeal to IBIA.***

³ Deliberate delays – In preparing for the IBIA appeal, the tribe's request to OFA for additional explanations for the negative FD was met with flagrantly late responses of ambiguous genealogical worksheets which did nothing more than hint at the rationale for the negative FD. This unfairly left the tribe with little time to second-guess what really happened at OFA in order to address each item with thoroughness and evidence.

⁴ US DOI Office of Hearing & Appeals, Docket IBIA 11-24, 30 Sep 2011, p. 2

⁵ Unexamined Errors – Several errors in OFA's genealogical evidentiary assessment were analyzed and rebutted in the tribe's appeal to the IBIA; among them, the case of Jose Uriol Mireles, but only one was acknowledged by OFA; Upon OFA's receipt and process of a copy of this appeal, Barbara Cohen, Esq., from the Office of the Solicitor, Division of Indian Affairs, directly admitted a ***single “error”*** in the OFA's preparation of the FD regarding Jose Uriol Mireles which caused the OFA to reverse its FD, in meeting 83.7(e), for 249 members [US DOI Office of Hearing & Appeals, Docket IBIA 11-24, 30 Sep 2011, p. 2]. Despite this lone reversal, it did not increase the passing percentage to above the 80% needed to pass (e). ***Had the OFA treated all of the deliberated errors with equal objectivity and honesty***, it would have corrected OFA's conclusion in the FD for enough members to reach an 86% passing rate. Yet, ***none of the other errors were considered.***

While the proposed rule would not require OFA staff to have certain qualifications, the current OFA staff members met the knowledge, skill, and abilities requirements applicable to their positions, as future staff members will be required to. [AS-IA C & R, p. 8]

In reviewing the PF and FD, and all associated OFA-associated paperwork, in the case of the Juaneño Tribe, only two conclusions are possible – 1) either OFA genealogical staff is highly incompetent or, 2) OFA genealogical staff covertly executed a hidden agenda to deliberately sabotage the tribe in what could have been a successful meeting of 83.7(e). Considering the AS-IA's assurance that the OFA staff is adequately equipped for its purposes, I ask you to, please, consider the possible answers to these questions:

1. If OFA genealogical staff did not feel obligated to consider all arguments and evidence presented in an appeal process, what in the proposed revisions guarantees they will do so if the OHA orders reconsideration?
2. If the OFA genealogical staff is deemed as possessing sufficient credentials and yet continues to commit grave errors in evidentiary assessment, what in the proposed revisions guarantees these errors will be caught before the process is foisted into a lengthy court process before OHA and a District Court appeal?
3. If OFA is not required to submit their genealogical assessment to an objective and competent third-party and there is no means to have an open discussion regarding OFS's decisions, what in the proposed revisions guarantees a hidden agenda cannot be executed behind closed doors?

In all that the proposed revisions present, there is no real concrete means to ensure real transparency without some sort of oversight process by an objective and peer-type oversight committee. In response to the idea of introducing a third-party of oversight, the AS-IA acquiesced:

It is questionable whether the Department has the authority to vest decision-making authority in an outside panel. [AS-IA C & R, p. 16]

This commenter recognizes this sentiment is directly referring to the AS-IA's authority to make a final decision. However, rather than focus on a remedy to resolve the problem after it happens (referring to when the final decision is made), perhaps it is more prudent and wise to focus on a remedy to prevent the problem in the first place. Since no tribe can pass the process without meeting (e), the assessment of the genealogical evidence is now more critical to the entire process. It cannot be left to a process that has no outside, objective, oversight. It must be guaranteed a transparently open, just, and fair process that is no longer subjected to covert action.

Why not consider employing a separate, non-attached, committee for this purpose alone which will more than likely prevent a higher cost of time and resources to the DOI, OFA, OHA and the petitioner?

- ✓ Any certified genealogist should be able to independently and properly evaluate the evidence; Two or more certified genealogists can increase the objectivity of the evaluation process.

- ✓ If there is no attachment to the outcome which would affect the committee, there would be no pressure to covertly poke holes in what might otherwise be a reliable genealogical record; Conversely, there would be no pressure to pass evidence that does not make its case;
- ✓ The committee can be appointed with the responsibility of explaining why certain conclusions can or cannot be reached and OFA can make that written explanation a part of their response to tribes who are contending a negative proposed finding;
- ✓ In the event the committee has different conclusions than OFA, then OFA and the committee could meet to discuss the standards applied to the evaluation in order to reach a more informed and logical conclusion.

The Benefits:

If a petitioner is deemed as not meeting (e) and the separate committee agrees with OFA findings:

- ✓ The need for an OHA hearing is eliminated, thus reducing the burden of OHA;
- ✓ The committee could possibly take on the responsibility of discussing the failure of genealogical evidence with the petitioner, further reducing the burden on OFA;
- ✓ Further, the need to review the rest of that petition is also eliminated thus reducing the burden of OFA; and,
- ✓ The petitioner will be left with no other recourse except to find a better genealogist or to pursue their genealogical record with more diligence.

In other words, in face of the emphasis on (e), this separate committee can replace a technical assistance meeting and dispel the need for an OHA hearing to deal with this issue. ***By employing a committee such as recommended here and incorporating it into the proposed revisions, the process can guarantee that presently illusive transparency and save time and resources for everyone involved.***

The Need to Protect the Process (83.7(e)), which Protects Authentic Indians

OFA has already established the 1928 California Indian Jurisdictional Act paperwork is faulty and unreliable. Yet, another federal agency, an arm of the DOI, the Bureau of Indians Affairs continues to issue certificates of degree of Indian blood [CDIB] based on this faulty data. This inequity cannot be resolved by lowering the standards by which this evidence must be sought and measured. As any genealogist should know, one of the most important elements of good genealogy is to conduct an exhaustive search – only then can one be certain of the claims that were made. ***To limit the scope of required evidence to a period just before the 1900's would not only hurt the real California Indians, it will undo the needed progress toward establishing a better means to prove one's heritage.*** [AS-IA C & R, p. 7]

This reduced requirement would not produce sufficient evidence to disprove some of the standing but erroneously-issued CDIB's yet generated by the two California-based BIA agencies, which are still based on the 1928 data. ***It would not go back far enough.*** And, if it does not go back far enough and expose the error made in that CIJA paperwork, these CDIB's empower the frauds to continue in their attempts to pursue federal acknowledgment which wastes the time and resources of OFA. And, by not going back far enough, these

CDIB's also empower frauds to usurp the rights of the authentic California Indian tribes and individuals in matters of repatriation.

The specific claim of descent needs corroborative evidence, and, in general, as many genealogists, and no doubt OFA, will attest, it takes going beyond 1900; in some cases, well-beyond 1900. [i.e. Robert Dorame's CDIB claims he was descended from a Diegueño Indian but his lineage was found to be Indian from Baja, Mexico, which evidence from the 1850's & 1860's; and, David Belardes' CDIB piggy-backed from his great aunt's 1928 CIJA application and her lineage was found to be of Mexican origin which required looking at evidence from the 1700's.]

From working with several California tribes, I have a working understanding of the true burden created by a thoroughly documented lineage. But, a successful documentation effort serves as a protection for those who are truly California Indian. For those petitioners, whom OFA has properly assessed genealogical evidence, the thorough evidentiary effort allows them to proceed through the acknowledgment process. For those California Indian tribes, and individuals, who can prove their heritage with reliable evidence, it allows them to protect their rights.

It is true I cannot speak to the lack of documentation that may exist for areas outside of California, but such a sweeping removal of vigorous investigation opens a virtual door of problems in California – particularly in view of the list of *evidence acceptable to the Secretary*, i.e. the *rolls prepared by the Secretary*, ... [25 CFR 83.7 (e) (1)] Perhaps, for those petitioners, who demonstrate the genealogical record is not as complete as it might be for those in California, it might be useful to reconsider the application of a “reasonable likelihood” assessment, specifically phrased to fit the need for genealogical evaluation in cases where the evidence is demonstrably unavailable. But, ***for California, to lift this requirement is to empower the frauds to keep cheating the authentic Indian who can prove his or her Indian lineage.***