Bryan Newland,
Principal Deputy Assistant Secretary - Indian Affairs
US Department of the Interior
1849 C Street, NW
Washington, DC 20240

March 19, 2021

Re: Tribal Consultation on re-petitioning provision in Acknowledgment Regulations, 25 CFR Part 83

Dear PDAS Newland:

On February 25, 2021, the Bureau of Indian Affairs ("BIA") conducted a formal consultation with federally recognized Indian tribes. The consultation was conducted in response to two federal district court decisions, both of which held that the BIA's elimination of the re-petitioning provision from the final revisions to the acknowledgment regulations in 2015 was arbitrary and capricious under the Administrative Procedures Act ("APA"). *See Chinook Indian Nation v. Bernhardt*, 2020 WL 128563 (W.D. Wash.); *Burt Lake Band v. Bernhardt,* Civil Action No. 17-0038 (ABJ) (D.D.C. Mar. 25, 2020). Both courts noted that the 2015 revisions to the regulation were substantive and ruled that the BIA had failed to articulate a rational basis for its decision to drop from the final rule a provision that would have allowed petitioners who had failed under the previous regulations to re-petition under certain limited circumstances. *See* 80 Fed. Reg. 37862, 37875 (July 1, 2015). The courts remanded the issue to the Department for reconsideration and the Department declined to appeal from either case. As a result, the BIA is obliged to consider an administrative fix. This was the purpose of the consultation conducted on February 25 - to hear from the tribes on the range of possible administrative corrective actions.

The Miami Nation of Indiana ("Nation") is in a unique position to offer insight into this

issue. The BIA admits that the Nation was previously recognized and illegally terminated by the BIA in 1897. Yet, when the Nation first petitioned under the pre-2015 regulation, the BIA declined to acknowledge the Nation on very narrow grounds - the alleged absence of sufficient proof of community interaction and bi-lateral political relations for the period 1940's to 1970. *See* 55 Fed. Reg. 29423 (July 19, 1990); Proposed Finding, pp. 43-44. Even though these factors are no longer relevant for previously recognized tribes under the revised regulations, the BIA's arbitrary and capricious elimination of the re-petitioning provision precludes the Nation from re-petitioning. Thus, the Nation has a direct and profound interest in the BIA's deliberations on this issue.

The Nation's representative appeared at the February 25, 2021, consultation but was not allowed to speak since the Nation is not a federally recognized tribe. Nonetheless, the Nation makes this written comment for the record, since the federal representatives indicated that the record would be held open for that purpose until March 31, 2021. The Nation makes two comments here: the first is a procedural one regarding the consultation and the second is a substantive one regarding administrative options available to cure the arbitrary and capricious action found by the courts in the *Burt Lake* and *Chinook* decisions cited above.

I. As a directly impacted native community, the Nation's views on the available administrative options must be taken into account by the BIA.

The BIA should allow directly impacted native communities like the Nation to participate in the formal consultation process on this issue. The formal consultation process may officially be limited to federally recognized tribes, there are means by which the BIA can provide for the participation of the Nation and similarly situated tribes consistently with the formal consultation

process. Fundamental fairness, even basic due process considerations, compel the BIA to make every effort to do so.

There is a range of possible actions available to the BIA at this point: it can simply repromulgate the Part 83 regulations and restore the re-petitioning provision, the deletion of which violated the APA's arbitrary and capricious standard; or, the BIA can attempt to comply with the APA by issuing a more complete and rational explanation for its decision to delete the re-petitioning provision, thereby giving tribes another opportunity to test the sufficiency of the explanation in court. Whatever action the BIA takes, it will have an immediate and direct impact on tribes like the Nation who stand to gain the possibility of re-petitioning for federal acknowledgment.

Conversely, whatever action the BIA takes, it will have no direct impact upon the existence or well-being of recognized tribes. Any interest claimed by those tribes is indirect and indistinct from the general interest of the BIA itself. Under these circumstances, basic fairness dictates that representatives of the directly affected native communities, like the Nation, be given an opportunity to participate directly in the tribal consultation process.

This is particularly important since so often comments upon this and similar issues involving non-federally recognized native communities are based upon misinformation or ignorance. For example, at the February 25 consultation, it was proposed that the acknowledgment regulations should be limited to terminated tribes only. Of course, this is not possible, since the BIA cannot overturn an act of Congress that terminated those tribes; the acknowledgment regulations state this limitation directly in the scope of the regulations. 25 CFR § 83.4. Similarly, another recognized tribe commented that reinstating the re-petitioning

provision would open the "floodgates" to numerous frivolous petitions. But this commentor seemed unaware of the limitations in the rejected re-petitioning provision that were intended to avoid this very concern.

In light of the marked imbalance in interests between the recognized tribes and communities like the Nation on this issue, the Nation proposes that any further consultations on this important issue be conducted as was done in 2014 when the BIA held consultations on the revisions to the acknowledgment regulations. In those meetings, the BIA received comments first from federally recognized tribes. In every case, the BIA then opened the floor to representatives of non-federally recognized tribes for the remaining allotted time. The Nation understands that this is a minor departure from the usual rules of consultation. But it is one that is consistent with the spirit of formal consultation - it provides every recognized tribe the opportunity to comment fully and first - and yet is consistent with fundamental fairness - it gives those native communities directly affected by the BIA's action an opportunity to express their views.

II. In light of the substantive changes made to the regulations in 2015, the BIA should restore the re-petitioning provision in the interest of extending equal treatment to similarly situated tribes.

In federal Indian policy, equal treatment of similarly situated tribes is an important, over-arching value. Its clearest expression is in the 1994 amendments to the Indian Reorganization Act, now codified at 25 U.S.C. § 5123(f) & (g). While the provision is not directly on point here because the Nation is not federally recognized, due to the BIA's illegal action in 1897 effectively terminating the Nation's federal relationship, the value of equal treatment it reflects should nevertheless imbue treatment of all native communities, particularly under federal regulations

intended to benefit native communities.

There is no question that the Nation has been treated substantially different, to its extreme prejudice, from previously recognized tribes considered under the revised regulations. These differences - the more limited time inquiry and the elimination of bi-lateral political relations as a requirement - are detailed in the statement that the Nation made in 2014 in support of the re-petitioning provision. That statement is attached and incorporated by reference herein.

In the end, the only fair thing - particularly for those tribes like the Nation that once enjoyed a federal relationship that was erroneously terminated by the BIA - is to reinstate the re-petitioning provision to the acknowledgment regulations. Doing so would least extend equal treatment to tribes like the Nation as compared to previously recognized tribes petitioning for the first time. The re-petitioning provision does not guarantee federal acknowledgment; it merely gives those tribes an opportunity make their case. This is the very least that the BIA can do for the Miami Nation of Indiana at this point in its history, having suffered without federal protection for 120 years now.

Sincerely,

Chief Brian Buchanan

Chief Brian Buchanan, Miami Nation of Indiana

Miami Nation of Indians of the State of Indiana, Inc.

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Honorable Kevin Washburn Assistant
Secretary - Indian Affairs United States
Department of the Interior 1849 C Street,
NW Washington, DC 20240

Dear Assistant Secretary Washburn:

These are comments on the Department's Proposed Rule on Federal Acknowledgment of Indian Tribes. These comments are made in my official capacity as Chief of the Miami Nation of Indiana ("Miami Nation"), formally known to the Department as Petitioner #66, and on the Nation's behalf.

The experience of the Miami Nation with the administrative acknowledgment process illustrates the urgent need for reform of the administrative process. The experience of the Miami Nation also demonstrates that the Proposed Rule would make necessary and helpful changes to the administrative process. For the reasons set out herein, the Miami Nation urges quick adoption of the Proposed Rule.

The Miami Nation experience

The Miami Nation was not always known to the Department of the Interior as petitioner #66. In fact, the Miami Nation historically had a government-to-government relationship with the United States grounded in federal treaties. The United States treated with the Miami Indians in 1854 and, for the first time, made separate provisions for the Miamis remaining in Indiana and distinguishing them from the Miamis who removed to Oklahoma. Treaty with the Miami, June 5, 1854, ratified Aug. 4, 1854, 10 Stat. 1093. As a consequence, the Miami Nation became a

separately recognized Indian tribe. Proposed Finding ("PF"), Department of the Interior, p. 2. This relationship continued until 1897, when the Assistant Attorney General opined that the Nation could no longer be considered tribal Indians since tribal lands had been allotted and tribal members had been made citizens. *Id.* The Department admitted that this legal conclusion was erroneous, that the Supreme Court had made clear that neither citizenship nor allotment was inconsistent with continuing tribal status. *Id.* But this erroneous legal conclusion was sufficient to effectively terminate the Nation, requiring that it seek acknowledgment under 25 CRF Part 83 to re-establish a relationship that had been established by Congress and never terminated.

The Nation submitted its petition under the acknowledgment regulations in 1980. Twelve years later, the Department issued its final determination against federal acknowledgment of the Nation. 57 Fed. Reg. No. 118, June 18, 1992. But it was a very narrow decision against the Nation. The Office of Federal Acknowledgment ("OFA") found that the Nation had established that 98% of its members descended from the treaty recognized Indiana Miamis, that the federal relationship had been terminated for invalid legal reasons, and that the Nation had been continuously identified as an Indian entity. However, OFA found that the Nation had failed to adequately demonstrate community and political authority for the limited period of the 1940's until 1970. Even though OFA found "some degree of social contact" during this period as well as "some form of leadership," it concluded that the evidence did not meet the unspecified level of proof required by the regulations. Final Determination, p. 3. OFA also acknowledged that the Nation's ability to maintain social contact and political relations was made much more difficult by the erroneous 1897 decision. After that decision, the Nation's allotments became taxable and were eventually lost to us, resulting in dispersion of tribal members and extreme hardship on

tribal members and continuing tribal existence. But the fact that the Nation's difficulties were caused directly by the United States made no difference to OFA.

Our experience with the administrative acknowledgment process reveals serious flaws. There is no conceivable justification for the extreme time depth and detail of the mandatory criteria and the resulting lengthy time to process a petition. The twelve years necessary to process the Nation's petition is, on its face, a serious problem. But make no mistake, its takes so long to process a petition mostly because the mandatory criteria are so burdensome and require such detailed proof for such a long period of time, i.e., since 1789. What sense does it make, for example, to require proof and do a detailed examination of 150 years of history of the Nation before the Nation was recognized in 1854?[1] And how can a tribe the size of the Nation, with approximately 4400 members at the time of the petition, ever expect to prove actual interaction, either socially or politically, among a majority of its members? This would require proof of literally millions of relationships, something no tribe can do.

These flaws and others are corrected by the Proposed Rule. All and all, the Proposed Rule is a more reasonable and transparent process and the Nation supports its adoption. Some of these changes, though, are absolutely vital to a fair and just acknowledgment process. The Nation wishes to express its support for these changes in particular.

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[1] The regulations were amended in 1994 to change this so that previously recognized tribes did not have to detail their history before they were recognized by the United States. *See* 25 C.F.R. § 83.8. The Nation sought reconsideration of its petition under this provision but was told that it would have made no difference. Again, this shows how disconnected OFA is from the real world. Petitioning tribes do not have unlimited resources. When a tribe is required to stretch its limited resources over a much longer historical period, it has fewer resources to focus on the determinative periods.

Important changes supported by the Nation

These important changes are discussed in the order in which they appear in the Proposed Rule. These provisions in particular must be carried forward into the final rule.

1. Section 83.4

A basic premise of this Proposed Rule is that the previous regulations were too restrictive with too little flexibility. This being so, fundamental fairness requires that tribes which had been subjected to previous, overly restrictive regulations be given another opportunity to make their case. This section provides that opportunity, if a tribe can demonstrate by a preponderance of the evidence that a change in the regulations warrants reconsideration or the burden of proof standard was misapplied in the earlier final determination. The Miami Nation strongly believes that it can prove there would be a different outcome on its petition under the Proposed Rule. The earlier final determination against the Nation was very narrow and with the more flexible interpretation of the community and political authority criteria, the outcome would now be different. The Proposed Rule does the fair thing by giving the Nation this opportunity.[2]

2. Section 83.11 (b)

The Proposed Rule gives greater flexibility in proof of interaction among tribal members

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[2] The Nation notes that this opportunity does not exist for tribes if the administrative determination and court deliberations afterwards included the participation of a third party, at least unless the that third party consents to re-petitioning. This does not affect the Nation since no third party participated in administrative deliberations on its original petition or on the court challenge to the adverse determination. *See Miami Nation of Indians of Indiana v. US Department of the Interior*, 255 F.3d 342 (7th Cir. 2001). But it does seem unduly harsh to effectively preclude such tribes from re-petitioning altogether by giving their opponents a veto over this opportunity. The Nation urges the Department to find some middle ground on this issue.

to prove community. As indicated above, this is particularly important for larger tribes since the sheer number of relationships that must be proved under the present regulation is simply prohibitive. And the use of statistical sampling will be very useful in this same regard. The importance of this flexibility cannot be overestimated. Virtually every tribe that failed to prove tribal existence under the present regulations did so on this criterion because of the difficulty of proving actual interaction. For instance, the Nation has had an annual tribal reunion every since 1903. And yet, OFA thought this was only indirect evidence of interaction since the Nation didn't have detailed records on all members who attended each reunion. It was deemed insufficient that this annual event actually took place. The Proposed Rule would make the tribal existence inquiry fit the real world better by providing random, statistically significant samples.

3. Section 83.11 c)

The Proposed Rule eliminates the requirement for proof of bilateral political relations. The regulations never explicitly required this proof and yet OFA has read this requirement into the regulations. And tribes, including the Nation, have failed on the political authority criterion for too little proof of bilateral political relations. This is another change that reflects the real world, including that of already recognized tribes, where participation in elected tribal governments can be low statistically.

4. Section 83.12

The Proposed Rule modified the burden of proof for previously recognized tribes. This is an important change that gives due regard to a pre-existing federal relationship. It requires such tribes to prove community at present and political authority since last recognition. This is

consistent with the case law governing previously recognized tribe, which has suggested that contemporary community and a continuous line of political leaders are sufficient to prove continuing tribal existence.[3]

5. Section 83.38

This section provides for an evidentiary hearing at which OFA staff will be subject to examination in the event of a negative proposed finding. This is vital to transparent decision-making. No longer will staff be able to go behind closed doors to weigh and assess the evidence for a final determination. As we all know, once a final decision is made, the courts will defer to the Department's assessment of the evidence and will not look behind factual conclusions. As a result, this will give petitioning tribes an opportunity for the first time to actually probe the Department's assessment of the facts.

Conclusion

This Proposed Rule represents a meaningful opportunity to finally fix a broken and unfair administrative acknowledgment process. The Miami Nation of Indiana applauds the

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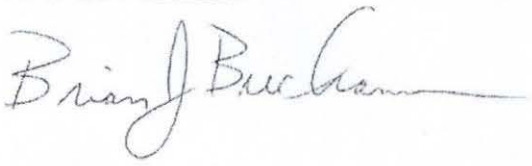
[3] Read carefully, even the Department's own experts have indicated that only political authority (and not community) must be established by some evidence of continuity since last recognition of previously recognized tribes. *See* B. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment,* 37 New England L. Rev. 491, 497 (2003), citing Dec. 7, 1938, Solicitor's Opinion of Nathan R. Margold ("There must be a *currently* existing group distinct and functioning as a group in certain respects and recognition of such activity...") I. Sol. Op., p. 864.

Department for undertaking this difficult task. In considering all comments on the Proposed Rule, the Nation urges the Department to keep uppermost in its deliberations the need to recognize all legitimate Indian tribes, without regard to fiscal considerations or controversies relating to Indian gaming or land into trust. This may be the only chance for getting it right for those Indian communities that have long been ignored, or worse yet as in the case of the Nation, abused by the federal government. We look forward to the promulgation of this Proposed Rule.

Respectfully submitted,



Chief Brian Buchanan, Miami Nation of Indians

Dated: September 30, 2014

Re: BIA-2013-0007