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**Attn: Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action**  
**RE: COMMENTS ON FEDERAL ACKNOWLEDGMENT RE-PETITIONING**

March 31, 2021

Thank you for the opportunity to comment on the Interior Department's Consideration of whether to amend its regulations, at 25 C.F.R. Part 83, to permit re-petitioning to take advantage of the 2015 reforms to the federal acknowledgment process.

#### **INTRODUCTION**

I serve as the General Secretary of the Alliance of Colonial Era Tribes (ACET),<sup>1</sup> an inter-tribal organization of sovereign tribal governments from the Eastern Southern seaboard of the United States – all of whom trace their recorded history to early contact with colonizing powers. ACET membership includes three federally recognized tribes and nine state recognized tribes, and we have previously provided consultation comments pursuant to Section 1(d) of Executive Order 13175, which expressly includes intertribal organizations in the tribal consultation process.

ACET members have a range of experience with the Federal Acknowledgment Process, from successful conclusion to current petition preparation. All ACET members are committed to assisting the United States to conduct the fairest and most transparent process to ensure that all sovereign tribal entities, having with the requisite record of governmental and community existence from historic times, are afforded a full and fair opportunity to attain federal recognition

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<sup>1</sup> I also serve as Co-Chair of the Federal Acknowledgment Task Force of the National Congress of American Indians.

of their governmental status. Like other Native Nations, we support a process that validates tribal entities, rather than social groups. In light of our accumulated experience, we know the process must serve, to the fullest extent possible, the goal of validating the status of genuine tribal entities whose identities the government has long ignored.

**THIS CONSULTATION MUST INCLUDE PARTICIPATION BY NON-FEDERAL TRIBES.**

We commend the Interior Department for undertaking this listening process, but have concerns with its format and limitations. On February 25, 2021, the Department opened its telephonic listening session by announcing that participation was limited to representatives of federally recognized tribes. Those most affected by the subject matter – parties seeking federal acknowledgment – were barred from participation. Only one person, the Chair of a federally acknowledged tribe, provided oral comments, although approximately seventy persons were present on the telephone line. In a consultation session timed to coincide with a meeting of the National Congress of American Indians, the Interior Department forbade participation by the NCAI members who have State, but not federal recognition status. This discrimination must be corrected. ACET urges that the Department pause this consultation process, reopen it, and extend participation to tribes not on the list of federally recognized tribes. The consideration of whether to permit those harmed by the previous – and acknowledged – flaws of the process to re-petition under the reformed rules should not exclude input from the class of directly affected entities.

**THE INTERIOR DEPARTMENT SHOULD PERMIT RE-PETITIONING BY TRIBES UPON A SHOWING OF HARM RESULTING FROM FLAWS IN THE PREVIOUS ACKNOWLEDGMENT PROCESS.**

Having recognized that prior rules harmed petitioners, the Interior Department must grant the benefits of the reformed process to those who can show a substantial harm from a negative determination under the former rules. Denying petitioners who were harmed by BIA regulatory errors the right to the remedy created for those errors impermissibly violates the federal trust relationship.

The Federal Acknowledgment process was instituted by the Department of the Interior in 1978 in response to a specific problem: while the United States Government deals with tribal entities only on a government-to-government basis, the vagaries of the federal relationship with tribes from the beginning of the Republic created lacunae in the federal awareness of tribes to whom it owed a duty of trust. Many of the lost relationships can be traced to pressures of early colonization, and to the pre-Constitutional domination of the original colonies over tribes within their borders. Since then, many of the Eastern and Southern Seaboard Tribes have been fully acknowledged, either through Congress or the Federal Acknowledgment process in the past forty years.<sup>2</sup> Other tribes were displaced from previous federal status by frank administrative error. In drawing up a preliminary list of “recognized tribes,” some bureaucrat simply left off a number of tribes having verifiable treaty relationships with the United States – who have since had to petition for acknowledgment (*e.g.*, Match-E-Be-Nash-She-Wish (Gun Lake)), and/or seek Congressional affirmation of their tribal status. (*e.g.*, Little Traverse Bay Bands of Odawa Indians, Little Shell). Other tribes, particularly in California, have negotiated detailed treaties, but because Congress never ratified those treaties, their tribal status remains unfairly in doubt. All of those tribes have one thing in common. Like all tribal entities within the United States, their original territories have been incorporated into the United States. They may have entered into agreements with colonial powers or with the United States through treaties, ratified or not. Many tribes lost land through encroachment, theft, and fraud. The United States now exercises sovereignty over those tribal lands; it must also fulfill its trust responsibility to the original inhabitants. That responsibility, derived from the wholesale appropriation and transfer of billions of acres, applies to all tribal nations, not just the ones the United States has kept track of.

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<sup>2</sup> Three of those tribes are ACET members.

All these years later, some tribes may no longer exist. It is not the job of the United States to find all original landowners who have vanished from the historical record, but it is certainly not permissible for the United States to hide from them when they come forward.<sup>3</sup>

Federal Acknowledgment has always been a flawed process. At heart, it requires a tribal entity to undertake a massive research project designed to accumulate all possible record of its existence – as viewed by outsiders. The tribe’s own oral history and tradition are not sufficient. As usual, the rules are made by the conqueror, and even those rules have been uncertain. Over decades of application, fixed rules have had varying application. The petitioners’ burdens have increased and changed. By 2004, positive decisions were summarily reversed based on arbitrary reinterpretation and application of evidentiary standards. NCAI Federal Acknowledgment Task Force Co-Chair Frank Ettawageshik testified about such concerns in 2009.<sup>4</sup>

After much public discussion and critique, *see, e.g.*, Brian Newland testimony, 2012;<sup>5</sup> John Norwood Testimony, 2012)<sup>6</sup>, the Interior Department began a regulatory reform proceeding in 2013. The National Congress of American Indians supported the reform process, calling on the BIA “to ensure that the reform of the Part 83 regulations results in a fair and just

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<sup>3</sup> Federal blindness to tribal existence has broad implications. The Interior Department continues to struggle with Justice Breyer’s admonition that “a tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time.” *Carciere v. Salazar*, 555 U.S. 379 (2009) (Breyer, J. concurring, 555 U.S., at 397). That struggle is reflected in conflicting M-Opinions, litigation, and vigorous debate about the Department’s obligation to acquire trust land for a tribe whose federal status was unjustly delayed. *See, e.g.*, *Mashpee Wampanoag Tribe v. Bernhardt*, Civil Action No. 18-2242 (PLF) (D.D.C. Jun. 5, 2020) (enjoining Interior from utilizing arbitrary M-Opinion to reject trust land eligibility).

<sup>4</sup> [Fixing the Federal Acknowledgment Process: Hearing Before the Committee on ... - United States. Congress. Senate. Committee on Indian Affairs \(1993- \) - Google Books](#) (testimony of Frank Ettawageshik) (last accessed, March 30, 2021) Mr. Ettawageshik serves as an Advisory Member of ACET.

<sup>5</sup> [https://www.doi.gov/ocl/hearings/112/FederalTribalRecognition\\_071212](https://www.doi.gov/ocl/hearings/112/FederalTribalRecognition_071212) (last accessed, March 30, 2021).

<sup>6</sup> <https://www.indian.senate.gov/sites/default/files/upload/files/John-Norwood-UPDATED-testimony-071212.pdf> (last accessed, March 30, 2021).

process for the acknowledgment of Indian tribes unjustly left off of the list of federally recognized tribes.”<sup>7</sup> Following extensive consultation and a robust comment process – *including the opportunity for input from the non-recognized tribes* – the new rules, adopted in 2015, stated a goal of increasing “fairness,” including a new requirement for consistency in evaluation of evidence and a few, but significant, rule changes. 80 Fed. Reg. 37861, July 1, 2015. In essence, the rulemaking admitted that the process had gone off the rails, and that improvements were both necessary and appropriate. Some new provisions were explicit corrections of previous error (25 C.F.R. 83.10) (clarifying application of substantive and evidentiary standards) or relief from needlessly oppressive historical documentary burdens. 25 C.F.R. § 83.11 (burden of proof to show continuity from 1900, rather than from 1789).

Even though previous petitioners had been denied acknowledgment as a result of prior inconsistencies and unfairness, the Department refused to permit them the opportunity to show that the updated rules would have resulted in a different outcome.

Two separate federal courts have now determined the Department to have acted improperly in refusing to permit reconsideration. In January, 2020, the United States District Court for the Western District of Washington granted summary Judgment to the Chinook Indian Nation, finding that the Department’s barrier to re-petition in light of its goal of a fair and uniform process was arbitrary, capricious, and contrary to law. *Chinook Indian Nation v. Bernhardt*, CASE NO. 3:17-cv-05668-RBL (W.D. Wash. Jan. 10, 2020). On March 25, 2020, the United States District Court for the District of Columbia similarly struck down the ban, finding no rational basis for the rule. *Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, Civil Action No. 17-0038 (ABJ) (D.D.C. Mar. 25, 2020). Almost ten months later, Tara Sweeney,

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<sup>7</sup> <https://www.ncai.org/resources/resolutions/supporting-the-bureau-of-indian-affairs-proposed-reform-of-the-federal-recognition-process> (last accessed, March 30, 2021)

then Assistant Secretary for Indian Affairs, announced a listening session to consider whether to reconsider the ban. When that listening session was convened, participation was arbitrarily limited to Federally recognized tribes – excluding those having the most direct interest in the process.

**INTERIOR MUST EXTEND ITS 2015 REFORMS OF THE FEDERAL ACKNOWLEDGMENT PROCESS TO THOSE HARMED BY ITS PREVIOUS ERRORS.**

Federal agency Consultation with tribes, still developing in process and scope in the new Biden Administration, is an expression of the United States' trust relationship with tribes – an acknowledgment of tribal sovereignty predating the Constitution, and of the debt the United States will always owe to the Nations from whom the United States derived its present land base. While the Interior Department defines the heart of its customary responsibility as a government-to-government relationship with those tribes on the List of Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs,<sup>8</sup> that relationship is not immutable. In past years, Congress has exercised power to terminate such relationship (the Termination Period), or to revive a previously terminated relationship, including re-affirming relationships suspended through administrative error. The administrative process is one by which a tribe may be “acknowledged” – not created, and not thereby fundamentally changed, except insofar as the United States affirms its existence. For those ACET members that have passed that threshold into federal acknowledgment, their inherent sovereignty was present before, during, and after that process. Those that have prevailed in the process did so by persuading Interior officials of the continuous truth of that existence, leading to official removal of impediments to the Tribe's full exercise of that sovereignty.

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<sup>8</sup> most recently published at 85 Fed. Reg. 5462 (Jan. 30, 2021).

Interior undertakes the burden of evaluating a tribe's petition for acknowledgment as part of its trust responsibility. The acknowledgment process must regularize that evaluation, and carry it out fairly. Failing to do so deepens historic wrong.

The Trust responsibility to tribes is continuous, preceding acknowledgment. Just as federal acknowledgment does not create a tribe, neither does it create a federal relationship, but rather confirms that one has always been in existence, albeit one not currently "recognized" by the federal government. The federal trust responsibility to Indian tribes cannot lightly be avoided, and the federal government cannot rely on its own ignorance of a tribe to disclaim that responsibility. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the United States Court of Appeals for the First Circuit held that the United States could not summarily reject that Tribe's request of assistance in bringing suit to recover lands protected under the Nonintercourse Act during a time when the Tribe's federal recognition had lapsed. 528 F.2d 370 (1<sup>st</sup> Cir. 1975). Instead, the court found that the United States had, through the Nonintercourse Act, assumed a fiduciary relationship with tribes, a relationship that could be terminated only by Congress. *Id.* at 379. The court ruled that the United States has, at least, an inchoate responsibility to such unrecognized tribes, which responsibility fully vests upon federal acknowledgment.<sup>9</sup>

After *Passamaquoddy*, tribes seeking federal assistance with non-intercourse act litigation were diverted to the new Federal Acknowledgment process, and their requests for

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<sup>9</sup> The District Court had required the federal filing to preserve the Tribe's rights. *See Passamaquoddy*, 528 F.2d at 373. The Tribe's claim was thereafter resolved, through federal legislation that provided the Maine Tribes with some restored land base and several million dollars in settlement. Maine Land Claims Settlement Act. Pub. L. 96-420; 25 U.S.C. §§ 1721 *et seq.* (1980).

federal assistance were deemed an intent to petition in that new process.<sup>10</sup> This diversion evaded the burden of judicially mandated intervention in further land claims, but did not eliminate the responsibility the *Passamaquoddy* court found that the government owed to non-federal tribes. By converting litigation requests into requests for administrative acknowledgment, the Interior Department cannot evade the judicially determined trust responsibility. That responsibility survives into the new process. At best, the federal acknowledgment process, if fairly implemented, is an expression of continuing fiduciary responsibility to those tribes. A fair construction of that responsibility requires including non-recognized tribes in consultation on that process.<sup>11</sup>

The United States is now revisiting its 2015 determination to withhold the benefit of remedial regulations from the very parties who had been harmed by the unfairness of the previous process, following rulings by two federal district courts that determination had been arbitrary and capricious. The Interior Department cannot rationally exclude those plaintiffs, and others similarly situated, from the consultation to improve the previous rules.

The 2015 reform was, itself, the product of a much broader consultation, which included State recognized tribes alongside the federal tribe commentators. In similar fashion, this consultation process must be reconfigured to include non-federally recognized tribes, to the fullest extent possible, in recognition of their inherent sovereignty, the federal trust

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<sup>10</sup> See, e.g., Shinnecock, Petitioner No.4, litigation request posted by OFA as Letter of Intent. [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/004\\_shinne\\_NY/004\\_loi.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/004_shinne_NY/004_loi.pdf), last accessed March 30, 2021.)

<sup>11</sup> State tribes' participation in consultation should not be limited to the federal acknowledgment process, but this submission is intended to illuminate the most glaring trust violation. Tribes throughout the acknowledgment process participate in some federal programs already, and have expectations of access to the broad range of tribal government programs upon achieving federal status. They share interest in the government's operation of those programs. Thus, federal tribal consultation should, universally, include participation by sovereign tribal entities, regardless of recognition status.



responsibility, and the rights of all indigenous peoples as set forth in the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP).

The federal obligation to the rights of Indigenous people transcends the general trust responsibility, and should also conform to international law. In endorsing the United Nations Declaration of Rights of Indigenous Peoples, the United States undertook a moral responsibility to protect inherent rights of all indigenous peoples within its borders, including:

- The right to freely determine their political status and freely pursue their economic, social and cultural development, Article 3:
- The right to autonomy or self-government in matters relating to their internal and local affairs, Article 4;
- The right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, Article 5; and
- The right to lands, territories, and resources they have traditionally owned, occupied, or otherwise used and acquired – and requires that states give legal recognition to those territories. Article 26.

All of those rights are implicated in the determination to grant or withhold federal acknowledgement. While UNDRIP rights are not conditioned upon status accorded by the dominant government (and such requirement would be inconsistent with the terms of UNDRIP), the United States has failed to accord those rights to state-recognized tribes – even though such tribes are sometimes treated as governmental entities by the BIA (under Indian Arts and Craft Act) and by other federal agencies for certain programs (*e.g.*, 8(a) minority business preference in contracting, and HUD housing assistance). This inconsistency highlights, on an international scale, the historic and continuing failure of the United States towards indigenous peoples within its borders.

Implementing reform to the Federal Acknowledgment process is an important step toward repairing these injustices. Such reform should be available to those who have suffered

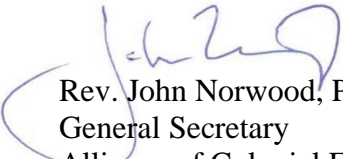
from previous failures of the process. Immediately relevant, the United States must listen to those seeking the remedies that the reform promised – which means that it must include non-federal tribes in the current consultation process.

### **CONCLUSION**

The Federal Acknowledgment Process is an expression of the federal fiduciary obligation towards tribes whose lands now comprise the United States. The Government owes a duty of care to those whose tribal identity it has misplaced, and must implement that duty to the highest degree of fairness and transparency. It may not ignore those petitioners who have been harmed by the flaws that Interior itself determined to be harmful to such an existential determination. Tribes that were wronged by past mistakes deserve the opportunity to establish their identities as fairly and completely as possible. And all tribes seeking participation in the process must be permitted to consult on how that process is implemented.

For the reasons set forth above, we respectfully request that the Department grant the right to re-petition under the 2015 Acknowledgment Regulations, permitting tribes to demonstrate that they meet the requirements of the reformed process, through consistent application of prior precedent and an evidentiary burden that is alleviated by the shortened historical timeline.

Further, we urge that this Consultation process be suspended until the Department has structured a method to ensure that all tribal interests can be heard and evaluated, including those of non-recognized tribes, and that the ultimate decision be responsive to the need for a fair, transparent and non-arbitrary result.

  
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General Secretary  
Alliance of Colonial Era Tribes