MESCALERO Apache TRIBE

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August 13, 2024

Department of the Interior
Office of the Assistant Secretary-Indian Affairs
Attn: Office of Federal Acknowledgment (OFA)
Mail Stop 4071 MIB
1849 C Street, N.W.
Washington, D.C., 20240

RE: Comment Opposing the Petition of the "Chihene Nde Nation of New Mexico"

Dear K. Denize Litz, Acting Director, OFA:

On behalf of the Mescalero Apache Tribe ("Mescalero"), in accordance with Part 83.22(b)(1)(iv) of Title 25 of the *Code of Federal Regulations* (25 CFR 83.22(b)(1)(iv)), I submit the enclosed comment on the Federal acknowledgment petition of the "Chihene Nde Nation of New Mexico" ("CNN") (Petition #404). Mescalero strongly opposes the CNN petition for the following reasons.

As our comment indicates in detail, the CNN is not worthy of federal acknowledgment because it does not meet the mandatory criteria as established in 25 CFR 83.11. There is a lack of external sources of evidence to corroborate many of their claims. In addition, they fail to address the requirements of 25 CFR 83.11 adequately; for example, they do not provide evidence of Indian entity identification for almost the entirety of the 20th century. In summary, they cannot prove their continuous existence as a separate and distinct sovereign government.

Furthermore, CNN erroneously claims to represent the descendants of the Chiricahua Apache that were parties to treaties with the United States in 1852, 1853, and 1855. The Chihene, Tcihene, Coppermine Apache, Gila Apache, Warm Springs Apache, Mogollon Apache, and Mimbres Apache were names used to identify the Chiricahua Apache who came to live on the Mescalero Apache Indian Reservation after their release as prisoners of war. Therefore, any reference to these groups in the historical record is a reference to the ancestors of Mescalero, not CNN.

The descendants of the Chiricahua Apache live in Mescalero and are enrolled Mescalero Apache Tribal members. We have maintained our sovereign status and cultural traditions since time immemorial. As the sovereign successor of the Chiricahua Apache, it is our position that any documented descendants of the Apache treaty bands in New Mexico should only be federally recognized through membership in Mescalero (if found eligible for membership).

A copy of our comment is also being provided to the CNN. Please direct any questions or concerns related to this comment to Mescalero's General Counsel. Nelva L. Cervantes at ncervantes@mescaleroapachetribe.com.

Sincerely,

Thora Padilla

Thora Padilla
President

COMMENTS ON THE DOCUMENTED PETITION FOR FEDERAL ACKNOWLEDGMENT PRESENTED BY THE CHIHENE NDE NATION OF NEW MEXICO

by

Michael L. Lawson
and
Alex Sanders

Submitted to the
U.S. Department of the Interior
Office of Federal Acknowledgment

by

The Mescalero Apache Tribe
Mescalero, New Mexico

August 13, 2024

Michael L. Lawson is the President of MLL Consulting, LLC, in Annandale, Virginia. He has forty years' experience in working on issues related to the Department of the Interior's Federal Acknowledgment process. This experience included ten years serving as an historian with what is now the Office of Federal Acknowledgment (OFA). Since leaving Government service, Dr. Lawson has provided consultation and research for petitioners in the Acknowledgment process (including two, the Shinnecock Indian Nation and the Pamunkey Indian Tribe, which were successful in gaining Acknowledgment), as well as for interested parties in the process. He also has had a long career providing applied research services for federally recognized Tribes seeking to preserve Tribal land, water, and property rights, most recently for the Cheyenne River Sioux Tribe in South Dakota. Dr. Lawson earned a Ph.D. in American History at The University of New Mexico.

Alex Sanders is the owner of Verde Consulting in Arlington, Virginia. An historian by training, he has over twenty-five years of experience in applied historical research, writing, and project management. This work has included analysis and research for petitioners seeking Federal acknowledgement as a Native American tribe, as well for interested parties in the Acknowledgment process. Mr. Sanders has often collaborated with Dr. Lawson on projects involving Tribal rights, most recently for the Mandan, Hidatsa, Arikara (MHA) Nation in North Dakota. He also has worked as a research historian for the National Archives of Singapore and has consulted with government entities on matters involving natural resources management. Mr. Sanders earned a master's degree in History from George Mason University, as well as a master's of Natural Resources from Virginia Tech.

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EXECUTIVE SUMMARY

This document contains our comments regarding the evidence the Chihene Nde Nation of New Mexico (CNN) has presented to the U.S. Department of the Interior (DOI) for Federal acknowledgment as a tribe in accordance with Part 83 of Title 25 of the *Code of Federal Regulations* (25 CFR 83). Our comments address and evaluate the evidence presented by the petitioner in its 2024 submission as Petition #404. The DOI will evaluate this evidence under the revised regulations published by the Assistant Secretary of the Interior for Indian Affairs (AS-IA) as a Final Rule in the *Federal Register* on July 1, 2015.

We have concluded that the Chihene Nde Nation petitioner does not appear to have sufficient evidence at present to meet three of the seven mandatory criteria for Federal acknowledgment under the 2015 regulations. For reasons explained herein, we could not determine whether the petitioner meets criterion § 83.11(e), descent from an historical tribe. Failure to meet this criterion would result in the DOI's Office of Federal Acknowledgment (OFA) issuing a Phase I negative proposed finding to deny Federal acknowledgment.

In our opinion, the petitioner does not currently have adequate evidence to meet criteria § 83.11(a), identification as an American Indian entity since 1900; § 83.11(b), social relations within a distinct community; and § 83.11(c), political influence or authority within a distinct entity since 1900. The petitioner does appear to meet criteria § 83.11(d), having a governing document that defines its membership criteria, § 83.11(f), not being comprised principally of members of federally recognized tribes, and § 83.11(g), never having had a Federal relationship terminated by Congressional legislation.

The Chihene Nde Nation petitioner claims that it meets criterion § 83.12, unambiguous previous Federal acknowledgement, which substantially lowers the burden of proof for meeting criteria 83.11 (b), community, and potentially does so for § 83.11 (a), external identification of an American Indian entity, and § 83.11 (c), political influence or authority, for those petitioners that can evince having a previous government-to-government relationship with the United States. The petitioner maintains that it was previously acknowledged through a series of treaties signed in the 1850s and suggests that this relationship has formally continued to the present day. Our evaluation concludes that while the petitioner may have met part of the criterion through the treaties, the CNN must also demonstrate that most of its current membership descends from the Apache bands or specific tribal members who were parties to the treaties of the 1850s. Interested parties cannot evaluate this information because the petitioner's genealogical data is restricted from public access. We have assumed that the petitioner will meet criterion § 83.12 for the purposes of the evaluation. If it cannot, then the petitioner

will also fail to meet criterion § 83.11(e) and will be subject to a Phase I negative proposed finding declining Federal acknowledgment.

If we assume that the petitioner has met § 83.12(a), it must then meet the requirements within § 83.12(b), including "at present, the Community Criterion," and "since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion." However, we have also concluded that, should the petitioner demonstrate that most of its current membership descend from the Apache bands or specific tribal members who were parties to the treaties of the 1850s, the last date of unambiguous previous Federal acknowledgment of those ancestors was probably 1877. Therefore, the petitioner does not gain a reduction of the burden of proof for criteria (a) and (c), since the later date is 1900.

The Chihene Nde Nation petitioner has failed to present sufficient evidence to meet criterion § 83.11(a), identification as an American Indian entity since 1900, for the entire twentieth century. Furthermore, its evidence for the first twenty-four years of the 21st century is minimal, though it could likely be augmented in supplemental submissions. As explained earlier, we have concluded that the petitioner's assertion of previous Federal acknowledgement ended by 1877; therefore, the petitioner must demonstrate that it meets criterion § 83.11(a) since 1900. It has not. If the petitioner chooses to proceed in the acknowledgment process with its existing evidence, this lack of documentation alone would be fatal to its case.

The petitioner's existing evidence for criteria § 83.11(b), community, does not sufficiently document the existence of a distinct Chihene Nde Nation entity. Despite the fact that the petitioner may enjoy a much-reduced evidentiary burden to meet § 83.11(b), Community, thanks to its possible status as a previously acknowledged Indian entity, it has failed to meet any of the categories of evidence within criterion (b). The petitioner has produced almost no evidence of an existing community, even though it needs only to do so in the present day. There are no quotes from oral interviews, no articles, no tribal records, and very few images documenting activity or interaction among the alleged tribal community. The petitioner has not met criterion § 83.11(b), community, "at present."

The petitioner has also failed to provide sufficient evidence to meet criterion § 83.11(c), Political Influence and Authority. As explained earlier, we have concluded that the petitioner's assertion of previous Federal acknowledgement will end by 1877; therefore, the petitioner must demonstrate that it meets criterion § 83.11(c) since 1900. However, the petitioner has failed to provide almost any evidence demonstrating that it had political influence or authority over its members as an autonomous entity since 1900. Even in the rare cases where it provides some documentation for a category of evidence, it neglects to include material dating back

to 1900. There are no quotes from oral interviews, no articles, no tribal records or newsletters, and very few images documenting the maintenance of political influence or authority over its members as an autonomous entity. The petitioner has not met criterion § 83.11(c), Political Influence or Authority, since 1900.

In order to meet criterion (d), a petitioner must have a governing document or some other written document that defines its membership criteria. Criterion (d) is required primarily so that the DOI can adequately measure a petitioner's membership to determine if the current members meet the membership criteria. The petitioner submitted copies of its governing document and membership criteria in its supporting documents. This submission was not available to the public for review. Assuming that the governing document and membership criteria are adequate, the petitioner is likely to meet criterion § 83.11(d). No previous Federal acknowledgment petitioner has ever failed to meet this criterion.

Criterion § 83.11(e) of the 2015 regulations requires proof that a petitioner's current membership descends from an historical tribe or from two or more tribes that have joined together and acted politically as a single entity. This criterion requires a petitioner to provide a list of its current members, any and all previous membership lists, and ancestry charts and vital records that demonstrate how current members descend from ancestors who were members of an historical tribe. Under the 2015 regulations, "historical" is interpreted as meaning "before 1900."

The petitioner's evidence concerned with documenting descent for criterion § 83.11(e) could not be adequately evaluated because neither its genealogical data and records nor membership lists are accessible. These records are, at least in part, protected from public disclosure under provisions of the Privacy Act and the Freedom of Information Act.

If the present evidence does not meet criterion § 83.11(e), the petitioner is subject to a Phase I proposed finding declining Federal acknowledgment. Under § 83.26(a)(3) of the 2015 regulations, the OFA can issue a negative proposed finding if a petitioner does not meet criteria § 83.11(d), (e), (f), or (g) during a Phase I evaluation.

Criterion § 83.11(f) of the 2015 regulations requires proof that a petitioner's membership is not composed principally of members of any federally acknowledged tribe. This criterion is required because the DOI seeks to prevent federally recognized tribal components or factions from being able to use the Federal acknowledgment process to break up acknowledged tribes. The petitioner asserts that its members are not members of any other federally recognized Indian tribe. The petitioner also claims that its members have provided written confirmation of their exclusive membership in the tribe on an enrollment form as required by its membership criteria. Therefore, the petitioner appears to meet criterion § 83.11(f).

Criterion § 83.11(g) of the 2015 regulations requires proof that neither the petitioner nor its individual members have been the subjects of Congressional legislation that terminated a Federal relationship. This requirement is in place because the DOI does not have the authority to restore or acknowledge tribes or tribal members whose Federal relationship was legislatively terminated. Only Congress has that authority. The petitioner has asserted that the Chihene Nde Nation has not been the subject of legislation terminating a Federal relationship. Under the revised regulations, a petitioner is not required to submit evidence demonstrating that it meets this criterion because the DOI will determine if the criterion is met. No tribal entities in New Mexico had their Federal trust relationship terminated or were forbidden a Federal relationship. Therefore, it is likely that the petitioner meets criterion § 83.11(g).

The acknowledgement regulations provide that the OFA will evaluate a documented petition in two phases. In Phase I, the Office will determine if a petitioner meets criteria § 83.11(d) through § 83.11(g). In Phase II, it will determine if a petitioner meets criteria § 83.12, Previous Federal Acknowledgment, for those that claim it, as does the CNN petitioner, as well as evidence for the mandatory criteria §83.11(a) through § 83.11(c).

At the end of the Phase I evaluation, the OFA will publish a positive Proposed Finding in the *Federal Register*. A negative finding could lead to a Final Determination declining Federal acknowledgment. A positive finding allows a petitioner to proceed to a Phase II evaluation.

As noted above, this evaluation finds that it is likely that the CNN petitioner meets criteria § 83.11(d), § 83.11(f), and § 83.11(g). We could not evaluate whether it meets criterion § 83.11(e), Descent, because interested parties are restricted from access to a petitioner's genealogical data. If the OFA finds that the CNN meets all four criteria, it will publish a positive Proposed Finding, and the petitioner will proceed to a Phase II evaluation. If the petitioner fails to meet the Descent criterion or any other of the criteria in Phase I, this would lead to publication of a negative Proposed Finding declining acknowledgment and could lead to the issuance of a negative Final Determination.

If the CNN petitioner is permitted to proceed to a Phase II evaluation, our review has concluded that it may have had unambiguous previous Federal acknowledgment between 1852 and 1877, which significantly reduces its burden of proof for criterion § 83.11(b). Despite this advantage, however, we also conclude that the CNN petitioner is sorely lacking sufficient evidence to meet mandatory criteria § 83.11(a), § 83.11(b), and § 83.11(c).

Therefore, even if the Chihene Nde Nation is found to meet the Phase I criteria and permitted to proceed to a Phase II evaluation, we maintain that it will

ultimately be the subject of both a negative Proposed Finding and Final Determination declining acknowledgment.

General Introductory Comments on the Petition of the Chihene Nde Nation of New Mexico

Failure to Follow OFA Guidelines

The documented petition of the CNN for Federal acknowledgment is a substantially deficient submission. The petition fails to adequately describe or interpret the CNN's documentary evidence or demonstrate how that evidence is specifically related to the mandatory criteria set forth in Part 83.11 of Title 25 of the *Code of Federal Regulations* (25 CFR § 83.11). Moreover, the petitioner has not followed the DOI's most relevant and fundamental guidelines.

The OFA,[1] which evaluates petitions, has, for the benefit of petitioners, issued an outline for "How to Develop a Complete Documented Petition." That guidance indicates that a documented petition must contain "A concise written narrative, with citations to supporting documents, thoroughly explaining how the petitioner meets each of the criteria in §83.11, except the Congressional Termination Criterion (§ 83.11(g))," for which the OFA would conduct the research for making a determination if the criterion has been met.[2] The clear implication here is that a petition should specifically indicate the criterion each document is purported to evince. This standard was more emphatically described in more detailed OFA guidelines. Entitled "Documented Petition Description with a Suggested Outline for Concise Written Narrative," these additional guidelines are specifically addressed to the revised 2015 regulations. They stress that a documented petition "*must include*" a written narrative "thoroughly explaining how *each document* is applied to the criteria in § 83.11" [emphasis added].[3]

The CNN petition frequently cites exhibits without indicating how those documents specifically relate to a criterion. Conversely, it also includes descriptive

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[1] In 1978, when the initial Federal acknowledgment regulations were established (then in 25 CFR §54), management of the process was placed under the Bureau of Indian Affairs' (BIA) Federal Acknowledgment Project (FAP). That project office was elevated to branch status within the BIA, first as the Branch of Federal Acknowledgment (BFA) and later, under the revised regulations of 1994, as the BIA's Branch of Acknowledgment and Research (BAR). In 2003, the management function was moved to the new Office of Federal Acknowledgment (OFA). This office was established within the Office of the Assistant Secretary-Indian Affairs (AS-IA,) which is now technically outside of, and independent from, the BIA.

[2] U.S. Department of the Interior, Office of Federal Acknowledgment, "How to Prepare a Complete Documented Petition," https://www.bia.gov/as-ia/ofa/how-to-prepare-complete-documented-petition.

[3] U.S. Department of the Interior, Office of Federal Acknowledgment, "Documented Petition Description with a Suggested Outline for Concise Written Narrative," 1, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/DocPetDescWithSugOutlineForConcWritNarr.pdf.

paragraphs purporting that a criterion is met without citing any documentation. The OFA guidelines for the 2015 regulations suggest that a petitioner organize and present its evidence for criterion § 83.11(a), Identifications of an Indian Entity, by decade (for example, 1900-1909, 1910-1919) and its evidence for criteria § 83.11(b), Community, and § 83.11(c), Political Influence or Authority, in 20-year intervals (for example, 1900-1919, 1920-1939). In describing a suggested format, these guidelines again emphasize that the petitioner should "thoroughly explain how each piece of evidence meets [a] criterion."[4]

The CNN has chosen not to follow the OFA's suggested petition outline for petitioners under the 2015 regulations, with the consequence that it has not organized and provided evidence for criteria § 83.11(a), (b), and (c) for all of the ten- or twenty-year time periods since 1900.

Failure to Understand the 2015 Regulations

The revised 2015 Federal Acknowledgement regulations, under which the CNN is proceeding, provide that the evaluation period for criteria § 83.11(a), (b), and (c) begins in 1900. For criterion § 83.11(e), Descent from A Historical Tribe, the evaluation begins at the closest time prior to 1900 that the membership of the historic tribe or tribes from which the petitioner claims to descend can be established. Under the prior 1994 Acknowledgment regulations, the evaluation period for criteria (b) (Community), (c) (Political Influence or Authority,) and (e) (Descent from an Historical Tribe) began at the time of "first sustained contact with non-Indians."[5] For many petitioners, that time began in the Colonial era. In 2008, the AS-IA revised the procedures to provide that the evaluation period for those three criteria would begin on the date of "the earliest sustained non-Indian settlement and/or governmental presence in the local area . . . on or after March 4, 1789" (the date of the formation of the United States with the ratification of the Constitution).[6]

Despite the clear regulatory specifications in the 2015 regulations that establish a beginning date of 1900 for criteria § 83.11(a), (b), and (c), and the fact that as a new petitioner the CNN was not eligible to proceed under the 1994 regulations, which would have required evidence from previous centuries, most of the CNN petition is focused on providing descriptions and evidence for the period

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[4] Ibid., pp. 4-7.

[5] U.S. Department of the Interior, Bureau of Indian Affairs, Procedures for Establishing That an American Indian Exists as an Indian Tribe, *Federal Register*, Vol. 59, No. 38, February 25, 1994, pp. 9293, 9295-9296, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/25CFRPart83_1994_FinalRule.pdf.

[6] U.S. Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment: Guidance and Direction Regarding Internal Procedure, *Federal Register*, Vol. 73, No. 101, May 23, 2008, p. 30148, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/FR_70-30146_GuidanceDir_2008.pdf.

prior to 1900. By and large, this information is mostly irrelevant to both the mandatory criteria and the OFA's present evaluation process as explained later in this comment.

Failure to Conduct Due Diligence on the Acknowledgment Precedents

In addition to not following the DOI's guidelines nor understanding the required timelines of the 2015 regulations, the CNN petition fails to reflect that its authors and advisors conducted due diligence on either the history of the Acknowledgment process or how evidence has been interpreted by the DOI in previous cases.

The authors of the CNN petition have not demonstrated that they reviewed the OFA's Precedent Manuals (https://www.bia.gov/as-ia/ofa and https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/PrecedentManual2005.pdf). A careful review of these manuals would have provided a basic understanding of how the Acknowledgment regulations have been interpreted in prior cases, as well as what has been found to be positive evidence for each of the mandatory criteria. While these precedents are based on the 1978 and 1994 Acknowledgment regulations, the basic criteria and standards of evidence were not significantly changed in the revised 2015 regulations. Furthermore, the OFA has not yet evaluated enough cases under the 2015 regulations to have established precedents for all the criteria.

The advisors and leaders for the CNN likewise would have been well served by reviewing the AS-IA's guidance directives of 2000, 2005, and 2008. These *Federal Register* notices, which are also available on the OFA website, clarified or revised procedures for the internal processing of documented petitions. While some of those policies are no longer in place, many are still relevant.[7]

Both the Federal Acknowledgement regulations and the DOI's regulatory process are complex. What many petitioners have failed to understand is that they do not proceed directly from academic anthropological or historical definitions of such concepts as tribe and community. Rather, they are based on how those concepts have been interpreted in the precedents of Federal Indian law regarding

[7] See U.S. Department of the Interior, Bureau of Indian Affairs, Changes in the Internal Processing of Federal Acknowledgement Petitions, *Federal Register*, Vol. 65, No. 29, February 11, 2000; https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/FR_65-7052_GuidanceDir_2000.pdf; U.S. Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment, Reports and Guidance Documents; Availability, etc. *Federal Register*, Vol. 70, No. 61, March 31, 2005, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/FR_70-16513_GuidanceDir_2005.pdf; U.S. Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, *Federal Register*, Vol. 73, No. 101, May 23, 2008, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/FR_70-30146_GuidanceDir_2008.pdf.

the recognition of a government-to-government relationship between the United States and a tribal entity. As a result, the petition in its present form is deficient.

The portion of the CNN petition addressing criterion § 83.11(c), Political Influence and Authority, exemplifies all of the petition's deficiencies. Criterion (c) is critical because the essence of the Federal Acknowledgment process is to determine if unrecognized tribal entities are eligible to be acknowledged as having a government-to-government relationship with the United States. For such eligibility there must be substantial evidence of tribal governance.

For the 124-year evaluation period between 1900 and 2024, the CNN has referenced in less than nine full pages only six documents that it purports to evince meeting criterion § 83.11(c). The petitioner has not organized the descriptions and supporting evidence chronologically in twenty-year time spans (the DOI's preferred format). The first documentation cited is for the period 2014-2023.[8] No specific information is dated before 1948.[9] In most cases, the supporting exhibits are not described, but merely cited by number (access to the petitioner's separate exhibit lists has not been provided to interested parties that wish to comment on the petition). The petition presents descriptions of alleged political activities for some of the categories for meeting the criterion without citing any evidence at all. This is the case for subsections § 83.11(c)(1)(iv), § 83.11(c)(2)(i)(B), § 83.11(c)(2)(i)(C), and § 83.11(c)(ii).[10]

Where an exhibit is briefly described, only limited information is provided regarding its contents. For example, the petitioner cites a 2018 M.A. thesis in anthropology as evidence for § 83.11(c)(1)(ii), that many tribal members consider the issues acted upon by tribal leaders to be of importance, without either fully describing or citing the specific page numbers in the thesis where evidence might be found to demonstrate meeting the category.[11]

Failure to Adequately Advocate for Its Cause

The petition begins with a 136-page Historical Narrative (taking up half of the petition), which is largely focused on the period before 1900 and is often descriptive of tribal events and trends without citing a supporting document. When it does describe events after 1900, it does not note how they might relate to the specific categories of evidence for meeting the Acknowledgment criteria listed in the regulations, in contradiction to the OFA's guidelines. As previously noted, much of the pre-1900 history is irrelevant to the overall evaluation, except where it might

[8] CNN, 2024 Petition, Exhibit 306, p. 225.
[9] CNN, 2024 Petition, Exhibit 306, p. 226.
[10] CNN, 2024 Petition, pp. 229-233.
[11] CNN, 2024 Petition, pp. 227-228.

establish the historical tribe or tribes from which the petitioner claims to descend for the purpose of meeting criterion § 83.11(e).

In Part Two of the petition, where the petitioner does address the mandatory criteria, supporting documents are cited by number, often without any indication of their nature, rather than fully described in the text or footnotes. Evaluators of the petition are thus compelled to examine the separate lists of exhibits presented by the petitioner. Again, purported evidence for criteria categories is presented without citing any supporting documentation.

The CNN approach shifts the burden for determining the relevance of information either not sourced or not adequately sourced to the OFA evaluators. As indicated in the AS-IA's policy directive of March 31, 2005, this is a role that the OFA staff has only a limited responsibility to assume. That directive made clear that:

> Petitioners [should] have no expectations that the acknowledgment staff will perform additional research or analysis to correct omissions in their submitted documentation. The burden under the regulations remains on the petitioner to demonstrate that it meets the criteria.

The directive also reiterated a key warning in the regulations: "that a petition can and will be turned down for lack of evidence."[12]

The CNN petitioner has failed to properly advocate for success in the Federal Acknowledgement process.

§ 83.12, Criterion for Unambiguous Previous Federal Acknowledgment

This evaluation begins with this criterion for demonstrating previous acknowledgment because if the Chihene Nde petitioner can meet criterion § 83.12 it will substantially lower its burden of proof for meeting criteria §83.11(b), Community and potentially do so for criteria § 83.11(a), Indian Entity Identification and criteria § 83.11(c), Political Influence or Authority. The revised Federal acknowledgment regulations of 2015 simplify the wording of the previous acknowledgment criterion (§ 83.8) but retain the same standards:

> **§ 83.12, What are the criteria for previously federally acknowledged petitioners?**

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[12] U.S. Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, etc., *Federal Register*, Vol. 70, No. 61, March 31, 2005, pp. 16513-16514; https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/FR_70-16513_GuidanceDir_2005.pdf.

(a) The petitioner may prove it was previously acknowledged as a federally recognized Indian tribe, or as a portion that evolved out of a previously federally recognized tribe, by providing substantial evidence of unambiguous Federal acknowledgment, meaning that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date, including, but not limited to, evidence that the petitioner had:

(1) Treaty relations with the United States;

(2) Been denominated a tribe by act of Congress or Executive Order; or

(3) Been treated by the Federal Government as having collective rights in tribal lands or funds; or

(4) Land held for it or its collective ancestors by the United States.

(b) Once the petitioner establishes that it was previously acknowledged, it must demonstrate that it meets:

(1) At present, the Community Criterion; and

(2) Since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion.

There is a two-part test for determining if a petitioner seeking Federal acknowledgment meets the standard for being previously acknowledged as set forth in § 83.12 of the Acknowledgment regulations. The ability of a petitioner to demonstrate such status reduces its burden of proof for criterion § 83.11(b) and potentially for criteria § 83.11(a) and (c). If it meets the standard for previous acknowledgement, a petitioner only needs to further evince that it also meets criterion § 83.11(b), Community, at present, as well as criteria § 83.11(a), Indian Entity Identification, and § 83.11(c), Political Influence or Authority, since the last date of previous Federal acknowledgment (the date at which recognition ended rather than date it began) or 1900, whichever comes later.

The DOI has held that: "The first aspect of the test of previous Federal acknowledgment is to determine whether or not the Government acknowledged, by its actions, a government-to-government relationship between the United States and an Indian tribe."[13] The Acknowledgment regulations establish in § 83.12(a)(1) that a petitioner can meet the first part of the test by evincing "Treaty relations with the United States." The CNN petitioner repeatedly claims that its ancestors were a party to treaties with the United States in 1852, 1853, and 1855.[14] The petitioner claims that the 1852 Treaty was signed and ratified at Acoma Pueblo in New Mexico.[15] However, the Treaty with the Apache of July 1, 1852, states on its face that it was "made and entered into at Santa Fe, New Mexico." It was subsequently ratified by the U.S. Senate on March 23, 1853.[16] The Treaty with the Rio Mimbres and Rio Gila Apache of April 17, 1853, was negotiated at Fort Webster, New Mexico, but was never ratified.[17] The Treaty with the Mimbres Bands of Gila Apache of June 9, 1855 (the petitioner claims it was July 9, 1855[18]) was negotiated at Fort Thorn, New Mexico. In common with the 1853 Treaty, it was never ratified by the Senate.[19]

The DOI has previously established that tribes can be federally acknowledged by unratified treaties:

> For the purposes of a finding of unambiguous previous Federal acknowledgment, it does not matter that the Chinook do not have a ratified treaty, as the Senate refused to ratify the 1851 treaties and the Chinook representatives refused to sign the 1855/1856 treaty. By undertaking negotiations with the Chinook to obtain a treaty, the Government treated them as a tribal political entity.[20]

Regarding the second aspect of the two-part test for demonstrating previous acknowledgment, the DOI holds that:

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[13] U.S. Department of the Interior, Office of Federal Acknowledgment, Reconsidered Final Determination Against Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation, 2002, p. 60, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/petition/057_chinoo_WA/057_rfd.pdf.

[14] Chihene Nde Nation of New Mexico (thereafter CNN), Petition for Federal Acknowledgement, 2024, pp. 115, 128, 131-132. 134, 146, 149, 172, 240, 243-244.

[15] CNN, 2024 Petition, p. 149.

[16] Treaty with the Apache, July 1, 1852 (10 Stat. 879).

[17] Treaty with the Rio Mimbres and Rio Gila Apache, April 17, 1853, https://treaties.okstate.edu/treaties/treaty-with-the-rio-mimbres-and-rio-gila-apache-1853-22544.

[18] CNN, 2024 Petition, p. 21.

[19] Treaty with the Mimbres Bands of Gila Apache, June 9, 1855, https://treaties.okstate.edu/treaties/treaty-with-the-mimbres-bands-of-gila-apache-1855-22553.

[20] DOI, OFA, Reconsidered Final Determination Against Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation, 2002, p. 60, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/petition/057_chinoo_WA/057_rfd.pdf.

> a petitioner must demonstrate a link to the previously acknowledged tribe, not that it has evolved as a tribe from the previously acknowledged tribe . . . . [The petitioner must] show that the predominant portion of its members descend from the previously acknowledged tribe and that it will be able to advance a claim that some of its members or ancestors with descent from the historical tribe participated in group activities at various times since last Federal acknowledgment.[21]

Therefore, the CNN's burden of proof for previous acknowledgment is to demonstrate that most of its current membership descend from the Apache bands or specific tribal members who were parties to the treaties of the 1850s. This aspect of the two-part test is something that interested parties cannot evaluate because the petitioner's genealogical data are restricted from public access.

Assuming that the CNN petitioner was previously acknowledged as a tribe by the United States, a critical task for the OFA evaluators will be to determine the petitioner's last date of Federal acknowledgement. It is from that date or from 1900, whichever is later, that the petitioner would have to demonstrate that it also meets criterion § 83.11(a), Indian Entity Identification, and § 83.11(c), Political Influence or Authority. If it is before 1900, the petitioner essentially loses the reduction of its burden of proof for criteria § 83.11(a) and § 83.11(c), because 1900 is the starting date for the evaluation of the criteria.

The petitioner claims that it remained federally acknowledged in the early 1940s. This evaluation examines that claim and then works backwards to conclude that if indeed the Chihene ancestors were federally acknowledged by treaties in the 1850s, the last date of unambiguous previous Federal acknowledgment of those ancestors was probably 1877.

The 1940 Indian Tribe List

The CNN petitioner presents only one document to allege that it was a federally acknowledged tribal entity after 1900. This is an "Indian Tribe List" prepared by an Office of Indian Affairs (OIA) [22] statistician in 1940.[23] However, this

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[21] Ibid., pp. 59-60.

[22] A federal agency for Indian Affairs was established within the War Department in 1824. Although Secretary of War John C. Calhoun called the agency the Bureau of Indian Affairs, it was not commonly known by that name. Thomas McKinney, the first Commissioner of Indian Affairs, and the Commissioners following him, consistently referred to the agency as the "Office of Indian Affairs." In 1849, the agency was transferred to the Department of the Interior where it was officially designated as the Office of Indian Affairs (OIA). Although it was still referred to as the "Indian Bureau" by some, the agency retained its OIA's designation until 1947, when it was officially renamed the Bureau of Indian Affairs (BIA). See Francis Paul Prucha, *The Great Father: The United States Government and the American Indian,* 2 volumes (Lincoln: University of Nebraska Press, 1984), Vol. II, pp. 1227-29.

[23] CNN, 2024 Petition, pp. 150-151, 243-244.

document is not a list of tribal entities then considered to be federally recognized. Neither is it a listing of "Previously federally acknowledged tribes" as the petitioner describes it. This is because its compilers did not describe it as such. Neither did they clearly define what they meant by the term "tribe." Rather, this 1940 list is a mixture of the names of known historical tribes or bands or even language groupings. It includes the names of some of the tribes already found by DOI acknowledgment determinations to have not been federally recognized in 1940, such as Chinook, Mohegan, Shinnecock, and Tunica. In many cases, it does not list recognized tribal entities by their formal names, but rather by the historical bands or language groupings that comprised a broader tribal classification. For example, under Sioux it lists Mdewakanton, Brule, Minniconjou, Oohenonpa or Two Kettle, Sans Arc, Sihasapa, and Unkpapa. These were historic bands of the Sioux Nation and not the names of the then recognized Sioux tribal entities. For example, the tribal entity that then encompassed parts of the Minniconjou, Oohenonpa or Two Kettle, Sans Arc, and Sihasapa bands was the Cheyenne River Sioux Tribe in South Dakota. The list likewise did not include the formal names of other tribal entities that encompassed the historic bands such as the Standing Rock, Lower Brule, Crow Creek, Flandreau, and Rosebud Sioux Tribes. The Sioux listing also included Dakota and Teton, which are language groupings rather than bands or tribes.[24]

The introductory comments to the 1940 list of tribes indicate that it was intended to update the classifications in the "Handbook." This reference is to the *Handbook of American Indians North of Mexico* initially compiled by the Smithsonian Institution's Bureau of American Ethnology (BAE) in 1907 and published in two hardbound volumes in 1912. The comments establish that the 1940 list was verified by ethnologist John Harrington of the BAE. As with the 1940 Indian Tribe List, the *Handbook* was not a compilation of the federally recognized tribes. This detailed publication, which ran to more than 2,000 pages and was edited by ethnologist Frederick Webb Hodge, provided a descriptive list of the known ethnic stocks, confederacies, tribes, tribal divisions, and native settlements north of Mexico. It included brief sketches of tribal histories, manners, arts, customs, and institutions, as well as archaeological findings and biographies of noted tribal members. The *Handbook* was clearly not limited to tribes considered to be under Federal jurisdiction at the beginning of the 20th century.[25]

Therefore, the fact that the 1940 list included Chihene Apache does not evince either that: (1) there was then a distinct tribal entity by that name; or (2) there was a tribal entity by that name that was then federally recognized or acknowledged.

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[24] May M. Reed and John P. Harrington, Indian Tribe List, 1940, Document 120633, Petitioner Exhibit 3, pp. 1-14, https://static1.squarespace.com/static/5ba553b0797f74343ba14b80/t/5e2a682af0a5822b10b214cb/1579837491397/List+of+Tribes+1940.pd/

[25] Smithsonian Institution, Bureau of American Ethnology, *Handbook of American Indian North of Mexico*, edited by Frederick Webb Hodge, in Two Parts (Washington: Government Printing Office, 1912).

The 1941 Indian Tribe List

The CNN petition also presents and describes a second list that was prepared by the OIA the very next year.[26] This document, entitled "Tribes By State And Agency," is also not a list of the formal names of tribal entities then considered to be federally recognized or acknowledged. Rather, as self-described, it is a list of the "predominating tribes" in each state under the jurisdiction of either OIA agencies or State governments. Those designated as being under State jurisdiction, such as the "Mohegan, Pequot, and Scatticook" in Connecticut, were clearly not federally acknowledged. Those "predominating tribes" under Indian Office jurisdiction were not listed by the formal names of their tribal organization. For example, under New Mexico the listing includes "Apache" under "Mescalero Agency" rather than naming the Mescalero Apache Tribe.[27]

The petitioner claims that the absence of Chihene Apache on the 1941 list merely represents "the diminution of our previously acknowledged Indian identity in the U.S. listing of tribes after 1940."[28] However, what the document makes clear is that the petitioner's Chihene were not listed as a separate entity because they were not then under the jurisdiction of either an OIA agency or a State government. U.S. Government documents, such as the Commissioner of Indian Affairs' annual report of 1917, indicated that at a much earlier date these Chihene were not under the jurisdiction of any of the OIA agencies in New Mexico or Arizona.

Claim of Continued Acknowledgment Based on Lack of Congressional Termination

The petitioner also claims that although Chihene Apache was not included on the 1941 list, "there is no evidence that we were ever a subject of the U.S. Congressional termination policy."[29] This statement proceeds from the erroneous assumption that Federal tribal acknowledgment can only end if terminated by Congress. Although the Chihene Apache may have been federally acknowledged in treaties of the 19th century, status as a federally recognized tribe is not perpetual. Tribes can also lose that status based on two conditions: (1) they have ceased to be a tribal entity capable of maintaining a government-to-government relationship with the United States; and/or (2) they no longer have any relationships with the Federal Government though the OIA.

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[26] CNN, 2024 Petition, pp. 151, 244.

[27] U.S. Department of the Interior, Office of Indian Affairs, "Tribes by State and Agency," Document 138134, April 1, 1941, Petitioner Exhibit 3, https://static1.squarespace.com/static/5ba553b0797f74343ba14b80/t/5e2a67b2431d806f6885b8bb/1579837365356/List+of+Tribes+April+1+1941.pdf.

[28] CNN, 2024 Petition, p. 244.

[29] CNN, 2024 Petition, p. 244.

The DOI has held that: "[its] position in acknowledgment proceedings, upheld in litigation, is that there is no general 'presumption of continued existence' for petitioners who previously have been unambiguously federally acknowledged."[30] The Department has found in numerous acknowledgment cases that petitioners that had unambiguous previous federal acknowledgment subsequently lost that status due to conditions listed above. This has included Brothertown in 1839, Chinook in 1855, Match-e-be-nash-she wish in 1870, Cowlitz in 1880, Muwekma in 1927, and Snoqualmie in 1953.[31] Logically, if a tribal entity had not lost Federal status, there would be no need for it to petition the DOI to have its status reacknowledged.

Lack of Continued Acknowledgment for Certain Tribes After 1953

In its 1997 Final Determination for the Snoqualmie Tribal Organization of Washington, which had been federally acknowledged as a party to an 1855 treaty, the OFA held that the termination policy of the 1950s "considered that Federal responsibility was limited to tribes which had Federal trust land."[32] The termination policy was an initiative to end Federal trust responsibilities for tribes and place them fully under State jurisdiction. Thus, by 1953, when the policy was fully implemented, non-reservation tribes residing on the public domain, such as the Snoqualmie, were no longer considered to be federally recognized.[33] Therefore, if the ancestors of the CNN petitioner continued to be federally acknowledged as a tribal entity up until the early 1950s, and evidence from the Commissioner of Indian Affairs' annual reports from much earlier in the 20th century strongly indicates that they were not, they no longer held that status after 1953, because, as described below, the CNN petitioner readily admits that they had no Federal trust land.

The Chihene Petitioner and the Indian Reorganization Act of 1934

The CNN claims, without documentation, that the Chiende families from whom it claims descent did not come under provisions of the Indian Reorganization Act of 1934 (IRA) because they did not file the "required paperwork."[34] However, the petition provides no evidence that the alleged tribal entity was either (1) eligible to

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[30] DOI, OFA, Reconsidered Final Determination Against Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation, 2002, p. 51, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/petition/057_chinoo_WA/057_rfd.pdf.

[31] U.S. Department of the Interior, Office of Federal Acknowledgment, Draft Acknowledgment Precedents, January 31, 2005, pp. 282-283, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admindocs/PrecedentManual2005.pdf.

[32] U.S. Department of the Interior, Office of Federal Acknowledgment, Summary under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Snoqualmie Tribal Organization, 1997, p. 3.

[33] Ibid., pp. 2-3.

[34] CNN, 2024 Petition, pp. 31-32.

come under the IRA, or (2) invited or encouraged to consider its provisions or hold a referendum on acceptance of the legislation.

The IRA authorized some of the reform measures spearheaded by John Collier, who was President Franklin D. Roosevelt's Commissioner of Indian Affairs. Among its key features, the legislation ended the allotment of tribal lands in severalty and offered tribes the opportunity to establish constitutional governments and incorporate. The initiatives launched by Collier during his long tenure as Commissioner (1933-1945) became known as the "Indian New Deal."[35]

Section 19 of the IRA defined those Indians eligible to come under its provision as including:

> All persons of Indian descent who are members of a recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and all other persons of one-half or more Indian blood.[36]

The CNN petitioner has not demonstrated that it met any of these categories in 1934.

Neither has the petitioner evinced that it was under Federal jurisdiction in 1934. For example, the annual report of the Commissioner of Indian Affairs for 1917 included a table listing the Indians on allotted and unallotted lands that were then considered to be "under Federal supervision." For the Apache in New Mexico, that table only listed those under the Jicarilla and Mescalero superintendencies.[37] The 1917 annual report also included a table listing the Indian population of the states. Again, that listing for the Apache in New Mexico only included the Jicarilla and Mescalero tribes under the superintendency of the Jicarilla and Mescalero schools respectively.[38] Although the Commissioner's 1932 annual report did not have a listing of tribes under Federal supervision, it continued to contain a table of Indian populations by state and tribe. For New Mexico, it listed only the Jicarilla

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[35] Kenneth R, Philp, "John Collier (1933-1945)," in Robert M. Kvasnicka and Herman J. Viola, eds., *The Commissioners of Indian Affairs, 1824-1977* (Lincoln, NE: The University of Nebraska Press, 1979), pp. 273-280.
[36] Act of June 18, 1934 (Indian Reorganization Act), 48 Stat. 984, https://www.govinfo.gov/content/pkg/COMPS-5299/pdf/COMPS-5299.pdf.
[37] U.S. Department of the Interior, *Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Fiscal Year Ended June 30, 1917* (Washington: Government Printing Office, 1917), Table 3, p. 79, https://search.library.wisc.edu/digital/AWKX2TBHOEDZC59D/pages/AD22ZPUTT2CZW78W.
[38] Ibid., Table 2, p. 74, https://search.library.wisc.edu/digital/AWKX2TBHOEDZC59D/pages/AQHONWNG2NNFBR8Y.

and Mescalero populations and the small number of Apache descendants at Santa Clara Pueblo.[39]

Thus, it appears that ancestors of the petitioner were neither considered to be under Federal jurisdiction in 1934 nor enumerated among the Indian population in New Mexico in the decades before that year. They could not qualify under Section 19 of the IRA as being residents of a reservation. Neither has the CNN petitioner provided evidence that they could have qualified under that section as a community with an Indian blood quantum of one-half or more.

The petitioner has likewise presented no evidence that its ancestors, as a tribal entity, were invited or encouraged by the OIA to consider acceptance of the IRA. Commissioner Collier initiated a broad effort to communicate with tribes regarding the reform provisions of the legislation he had played a large role in crafting. He hoped that as many tribes as possible would vote to accept the IRA. In this regard, he scheduled so-called "Indian Congresses" across the nation where he or other OIA officials presented and discussed the proposed provisions prior to enactment of the legislation. Such discussion meetings were held, for example, in New Mexico at Santa Domingo Pueblo and in Arizona at Fort Defiance and at Phoenix in March of 1934. Apache representatives from San Carlos attended the Phoenix meeting.[40] After passage of the IRA, the Mescalero Apache in New Mexico and the Apache tribal entities at San Carlos and Fort Apache in Arizona voted to accept its provisions.[41]

If the CNN cannot provide evidence that its ancestors were invited to meetings to discuss the IRA provisions or otherwise encouraged by the OIA to consider holding a required referendum, then it may very well be because its claimed predecessor families were not considered to be an eligible tribal entity. The excuse of failing to submit the required paperwork is a hollow explanation. This is especially true when no supporting evidence is presented. If the Chiende families were eligible to come under the IRA, holding a referendum for its acceptance would have been an ideal way to affirm their alleged Federal recognition as a tribal entity. This is because in the years that followed a determinate of that status was increasingly based on whether a tribe had voted on the legislation one way or the other. If the Secretary of the Interior had sanctioned a tribal vote that was considered acknowledgment of an entity's Federal status.

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[39] U.S. Department of the Interior, *Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Fiscal Year Ended June 30, 1932* (Washington: Government Printing Office, 1932), Table 2, pp. 42-43, https://search.library.wisc.edu/digital/AH64S4VDDFXXVS87/pages/A42QLX5UPK55OT8W.

[40] Kenneth R. Philp, *John Collier's Crusade for Indian Reform, 1920-1954* (Tucson, AZ: University of Arizona Press, 1977), pp. 145, 152.

[41] U.S. Department of the Interior, United States Indian Service, *Ten Years of Tribal Government Under the IRA*, by Theodore H. Haas, Tribal Relations Pamphlets -1 (Lawrence, KS: Haskell Institute Printing Department, January 1947), Table A, pp. 14, 18.

The Probable End Date of Federal Acknowledgment of the CNN Petitioner

If the Chihene ancestors were federally acknowledged as a tribal entity by treaties in the 1850s, by their own admission, they appear to have lost Federal status by the late 1870s. The CNN petition states that "By 1878, our people no longer had the advocacy of the Southern Apache Agency and no permanent reservation in our territories."[42] It states further that "we lived off reservations, farmed, worked as laborers, being taxed, and being outwardly Catholic."[43]

The Southern Apache Agency, established in 1852, was moved to a new reservation in the Tularosa Valley in 1873 and then to Ojo Caliente, New Mexico in 1874. Both the Agency and the reserved lands under its supervision were abolished in 1877 after most Apache tribal members under its jurisdiction were relocated to the San Carlos Reservation in Arizona. An OIA employee was left in charge of the Agency property until it could be disposed of in 1878.[44]

The CNN petition holds that 400 Chiende "including some of our extended family and Victorio and Loco's people were moved to San Carlos" and that following the death of Victorio in 1880, "Loco became the reservation Chiende leader at San Carlos in Arizona but not the leader of all Chiende families still in Mexico and Northern Mexico."[45]

Victorio and other Apaches under the broad Chiricahua classification soon left San Carlos in September 1877 and fled to Mexico, where in 1880 he and most of his followers were killed in battle with Mexican soldiers. In 1886, the U.S. Army decided to relocate all the Chiracahua at San Carlos including Loco and his Chiende followers to Fort Marion in the city of St. Augustine, Florida. These Apache refugees/prisoners of war were subsequently moved to Mount Vernon Barracks near Mobile, Alabama, in 1887 and then to a reservation at Fort Sill, Oklahoma, in 1894, where Loco died the next year. In 1913, the Chiricahua at Fort Sill were freed from their prisoner status and given the choice of either remaining at Fort Sill or returning to New Mexico to share a reservation with the Mescalero Apache. Of the 271 remaining Chiricahua, 187 chose to go to Mescalero, where they eventually occupied remote settlements within the reservation, and where some intermarried with Mescalero and Lipan Apache tribal members.[46]

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[42] CNN, 2024 Petition, p. 13.

[43] CNN, 2024 Petition, pp. 39-40.

[44] Edward E. Hill, compiler, *Guide to Records of the National Archives of the United States Relating to American Indians* (Washington, D.C.: National Archives and Records Service, General Services Administration, 1981), p. 184; Morris E. Opler, "Chiracahua Apache," in *Handbook of North American Indians*, Volume 10, *Southwest*, edited by William C. Sturtevant and Alfonso Ortiz (Washington DC: Smithsonian Institution, 1983), pp. 404-406.

[45] CNN, 2024 Petition, pp. 13, 26.

[46] Opler, "Chiricahua," pp. 406-409; Bud Shapard, *Chief Loco: Apache Peacemaker* (Norman, OK: University of Oklahoma Press, 2010), pp. 226, 232, 250, 269-70, 299, 303-304.

The CNN petition makes only vague and somewhat unchronological references to this history of forced Apache movement from San Carlos to Florida, Alabama, and Oklahoma between 1886 and 1894, or to the eventual settlement of some Chiende on the Mescalero Apache Reservation. For example, it states:

> By 1882, Juh and other non-reservation family headmen directed how we engaged with settlers.[47]
>
> Juh and his people broke out four to seven hundred family members from San Carlos, including Loco and his people. Some returned to the Mescalero Apache reservation.[48]
>
> Unfortunately, some of those freed from San Carlos returned to reservations. Some of those were exiled from our homelands to Florida.[49]

The CNN petitioner has neither described nor enumerated how many of its Chiende ancestors might have been part of the exiled Apache prisoners or how many may have eventually settled on the Mescalero Apache Reservation. Nor is it clear how many of these ancestors were members of the federally recognized Mescalero Apache Tribe. For example, as indicated below, a 1960 source stated that claimed ancestor Catarino Beltran grew up on that reservation.[50]

If they were Apache descendants not represented by an existing federally recognized tribe, then these Apache descendants were living off reservation on the public domain and were no longer under the jurisdiction or supervision of an OIA agency. The petitioner admits this; moreover, this is indicated in other documentation. The majority of its Chiende ancestors would fall under condition (2) above (no longer having Federal relations) and their last date of unambiguous previous Federal acknowledgment was most likely 1877. However, there is also the possibility that the Chihene met condition (1) above (no longer existing as a distinct tribal entity). If the petitioner's Chiende ancestors were federally acknowledged by treaties in the 1850s and they retained that status until the late 1870s, the burden is on the CNN petitioner to prove that it continued to exist as a distinct tribal entity since that time.

If we assume that the petitioner has met § 83.12(a), it must then meet categories of evidence within criterion § 83.12(b), including "at present, the Community Criterion," and "since the time of previous Federal acknowledgment or

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[47] CNN, 2024 Petition, p. 26

[48] Ibid.

[49] Ibid., p. 27.

[50] Cliff Sherill, "Apache Grandpa Says: Train Children in Indian Way, Stop Delinquency," *El Paso Herald-Post*, May 20, 1960.

1900, whichever is later, the Indian Entity Identification Criterion [§ 83.11(a)] and Political Authority Criterion [§ 83.11(c)]." As explained in detail below, we maintain that the petitioner has failed to demonstrate that it meets these three mandatory criteria, which would be reviewed by the OFA in a Phase II evaluation.

Criterion § 83.11(a), Indian Entity Identification

Explanation of the Criterion and Its Requirements

In the revised 2015 regulations, this criterion is as follows:

a) *Indian entity identification.* The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification.

§ 83.11(a)(1), Identification as an Indian entity by Federal authorities.

§ 83.11(a)(2), Relationships with State governments based on identification of the group as Indian.

§ 83.11(a)(3), Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

§ 83.11(a)(4), Identification as an Indian entity by anthropologists, historians, and/or other scholars.

§ 83.11(a)(5), Identification as an Indian entity in newspapers and books.

§ 83.11(a)(6), Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

§ 83.11(a)(7), Identification as an Indian entity by the petitioner itself.

Criterion § 83.11(a) is included among the seven mandatory criteria in 25 CFR 83 to prove the continuous identity of a petitioner since 1900. It demands continual identification of a specific tribal entity since that time. The requirement for continuous identification as an Indian entity complements criteria § 83.11(b), (c), and (e). The criterion is intended to exclude from acknowledgment those groups that only have been identified as being tribal entities in recent times. It also is intended to exclude those groups whose claims are based solely on self-identification or, in other words, on documents or other evidence generated by the group itself.

The OFA has established in previous cases that the minimum standard of evidence for meeting criterion (a) is to provide at least one source of acceptable identification of the entity for each of the thirteen decades since 1900.

The qualification that identification of the petitioner must be on a "substantially continuous basis" allows for certain gaps in time during which the group's existence or activities may not have been documented. Many, if not most, petitioners find that they have such gaps. In evaluating the significance of these gaps, the OFA staff has frequently used the "tunnel" test. The analogy is to a train that goes in and out of a tunnel. If a train (petitioner) is reasonably identified and characterized prior to going into a tunnel (gap), and once it comes out of the tunnel (gap), it has the same identity and character, then it can be reasonably assumed that it remained fundamentally the same while it was in the tunnel (gap). The gap of evidence for criterion (a) can be as many as 19 years as long as there is at last one source for every decade. For example, if there is a source of sufficient evidence for 1910, but the next sufficient source is not until 1929, this would meet the minimum standard because it would provide one source for each of two decades, the 1910s and the 1920s.

The qualification that "evidence that the group's character as an American Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met" allows for certain periods during which the identity may have been characterized as being other than Indian. For example, a tri-racial group may have been identified as being White, Black, Negro, mulatto, colored, etc.

Criterion § 83.11(a) evidence should focus on the identity of the group as a distinct Indian tribal entity rather than on the Indian identity of its individual members or on a larger group of Indians, such as the broad category of non-reservation Apache Indians in New Mexico. The regulations state that the criterion may be met by using only one of the six categories of evidence specified, ranging from Federal records to other Indian tribes. However, most petitioners will not have continued identity from one source since 1900, and so are likely to have to demonstrate identity using two or more categories of evidence.

Federal identifications might include executive orders, unratified agreements, appropriations or other acts of Congress; census or annuity rolls, military, court, or claims records; maps or land records, or the health, education, or welfare records of the Bureau of Indian Affairs or other Federal agencies.

Petitioners may also meet the criterion via identification as an Indian entity by anthropologists, historians, and/or other scholars. The petitioner has asserted that a series of scholars has "document[ed] our families."[51] However, the Department has consistently ruled that petitioners must provide identifications of an American Indian entity rather than of individual Indians or families. In its 2004 proposed finding against acknowledgement of the Burt Lake Band of Ottawa and Chippewa Indians, the OFA stated:

> References to individual Indian descendants or Indian families or an Indian cemetery, or accounts of the military service of individual Indians do not meet the requirement that identifications must have been of 'an American Indian entity'.[52]

And, in its 2002 Final Determination against acknowledgement of the Muwekma Ohlone Tribe, the OFA wrote, "[t]he identification of individuals as Indians is not sufficient to meet the criterion, which requires the identification of an Indian entity."[53]

The petitioner has provided almost no evidence that any of these scholars have identified the petitioner as an Indian entity contemporaneously with the date of the publication. For example, in his 1941 book, *An Apache Life-Way*, Morris Edward Opler distinguishes between three historical Chiricahua bands, including the Warm Springs Apache, and describes Apache culture but does not provide any information about Apache bands in the 20th century – when he was writing. Thus, he does not identify the petitioner as an Indian entity contemporaneously.[54] Harry Basehart's 1959 collection of materials for various Indian Claims Commission dockets recognizes the existence of the Warm Springs Band in the past, but provides no information on then-contemporary Chiende Apaches.[55]

Petitioners who can establish "unambiguous Federal acknowledgment" only have to demonstrate identification as an Indian entity since the date of last Federal acknowledgment. They also must show that they are the same tribal entity that was

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[51] CNN, 2024 Petition, p. 161.

[52] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Burt Lake Band of Ottawa and Chippewa Indians, Inc., 2004, p. 34.

[53] U.S. Department of the Interior, Office of Federal Acknowledgment, Final Determination, Muwekma Ohlone Tribe, 2002, p. 29.

[54] Morris E. Opler, *An Apache Life-Way* (Chicago: The University of Chicago Press, 1941).

[55] Harry Basehart, *Mescalero Apache Subsistence Patterns and Socio-Political Organization: Commission Findings on the Apache* (New York: Garland Publishing Inc., 1974).

previously acknowledged or that has evolved from that entity. Unambiguous previous acknowledgment is only an advantage for criterion § 83.11(a) if the date of that prior recognition is after 1900. The CNN petitioner asserts that it has been recognized since the 1850s through a series of treaties and suggests that it has maintained a relationship since then. However, if the petitioner is able to demonstrate that most of its current membership descend from the Apache bands or specific tribal members who were parties to the treaties of the 1850s, the evidence points to an end to that relationship by 1877. Since the petitioner's actual date of previous acknowledgement is before 1900, its acknowledgement does not reduce its burden of proof in meeting the § 83.11(a) criterion. The Chihene Nde Nation must demonstrate identification as a specific tribal entity on a substantially continuous basis since 1900. In our judgement, it has not done so.

Comments on the Chihene Nde Nation Decade-by-Decade Evidence for Criterion § 83.11(a)

1900-1909

The petitioner has provided no evidence for this decade. Hodge's *Handbook of American Indians* listed Mimbrenos and Mogollones within the White Mountain Apache division in 1903. However, Hodge also observed that these peoples were under the Fort Apache agency, so it does not appear that this includes the petitioner's predecessors.[56] Instead, these peoples may be ancestors of the Mescalero and Fort Sill Apache tribes. In its June 1968 Findings of Fact, the Indian Claims Commission determined that Mimbres and Mogollon Apaches were among the band names in usage among whites describing the Apaches of the region;[57] those bands would later become known as the Mescalero and Fort Sill Apaches.

The petitioner does not meet criterion § 83.11(a) for the period 1900-1909.

1910-1919

The CNN petition includes only one document as evidence for this decade: an image of a page from the 1910 Federal Census of Santa Rita Precinct in New Mexico Territory. The petitioner asserts that the 1910 Census "shows hundreds of Chiende ancestors living in our distinct communities and being changed by census enumerators to White, under the category of Color or race."[58] The Census, however, does not identify these individuals as members of the petitioning entity or of any Indian entity. In its 2004 Proposed Finding to decline acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, the DOI stated that:

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[56] Smithsonian Institution, Bureau of American Ethnology, *Handbook of American Indian North of Mexico*, edited by Frederick Webb Hodge, in Two Parts (Washington: Government Printing Office, 1912), p. 66.
[57] Indian Claims Commission, Docket Nos. 30-A and 48-A, Findings of Fact, June 28, 1968, pp. 213-215.
[58] CNN, 2024 Petition, p. 150.

> References to individual Indian descendants or Indian families or an Indian cemetery, or accounts of the military service of individual Indians do not meet the requirement that identifications must have been of 'an American Indian entity'.[59]

The Chihene Nde Nation petitioner fails to meet criterion § 83.11(a) for the period 1910-1919.

1920-1929

The petitioner refers to a single document as evidence for this period — the 1920 Census at Salem, New Mexico. No image is provided. However, the petitioner argues that like the 1910 Census, the 1920 Census "shows hundreds of Chiende ancestors living in our distinct communities."[60] Like the 1910 Census, the 1920 Census does not identify these individuals as members of the petitioning entity or of any Indian entity. In its 2004 Proposed Finding to decline acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, the DOI stated that:

> References to individual Indian descendants or Indian families or an Indian cemetery, or accounts of the military service of individual Indians do not meet the requirement that identifications must have been of 'an American Indian entity'.[61]

The Chihene Nde Nation petitioner fails to meet criterion § 83.11(a) for the period 1920-1929.

1930-1939

The CNN has provided no evidence for this decade. The petitioner does not meet criterion § 83.11(a) for the period 1930-1939.

1940-1949

The petitioner offers one source as evidence for the decade from 1940 to 1949, a 1940 document entitled "Indian Tribe List" produced by the OIA that lists the names of known historical tribes or bands in alphabetical order. The petitioner claims that this document refers to "Previously federally acknowledged tribes" and

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[59] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Burt Lake Band of Ottawa and Chippewa Indians, Inc., 2004, p. 34.
[60] CNN, 2024 Petition, p. 150.
[61] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Burt Lake Band of Ottawa and Chippewa Indians, Inc., 2004, p. 34.

observes that their entity is referred to "under several names" in the document.[62] While the petitioner is listed in the document, we challenge the assertion that the document was a list of previously federally acknowledged tribes. There is no indication on the document itself that the tribes had such a status, and the document's introductory description suggests that it was intended as an update of the spelling and classification of the tribes included in the *Handbook of American Indians*, a reference source. Moreover, several tribes listed in the 1940 document were not previously federally acknowledged, including the Chinook, Mohegan, Shinnecock, and Tunica. It is much likelier that the list was an update of the spelling and classification of the tribes included in the *Handbook*. The document does not identify the petitioner as a contemporaneous Indian entity, but rather revises the spellings and classifications from the 1907 *Handbook*.

Curiously, the petitioner includes a reference to a 1941 Office of Indian Affairs list of tribes organized by state and agency. Unlike the 1940 list, this document clearly lists the tribes under each Agency "or under State jurisdiction where there are no Federal Agencies."[63] The petitioning entity is not among the tribes on this list.

The petitioner also refers to the fact that members "served in the military from the early 1900s to the late 1990s" and that "our military members were recognized by their peers as Native Americans."[64] One elder, Miguel Martinez, is identified as serving in the U.S. military during World War II in the 1940s. However, no evidence is included to substantiate these statements, and even if it were offered, such evidence would not meet the requirements of criterion (a) of identification of an Indian entity. As noted, in its 2004 Proposed Finding to decline acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, the DOI stated that:

> References to individual Indian descendants or Indian families or an Indian cemetery, or accounts of the military service of individual Indians do not meet the requirement that identifications must have been of 'an American Indian entity.'[65]

The CNN petitioner does not meet criterion § 83.11(a) for the period 1940-1949.

1950-1959

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[62] CNN, 2024 Petition, pp. 150-151.

[63] U.S. Department of the Interior, Office of Indian Affairs, "Tribes by State and Agency," Document 138134, April 1, 1941, Petitioner Exhibit 3.

[64] CNN, 2024 Petition, p. 152.

[65] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Burt Lake Band of Ottawa and Chippewa Indians, Inc., 2004, p. 34.

The CNN has provided no evidence for this decade. The petitioner does not meet criterion § 83.11(a) for the period 1950-1959.

1960-1969

The petitioner refers to a 1960 article in the *El Paso Herald* on an ancestor, Catarino Beltran, as evidence for the decade from 1960-1969. No citation of or quote from the article was provided. A search for the item revealed an article in the *El Paso Herald-Post* dated May 20, 1960, on Catarino Beltran. Mr. Beltran is identified as "an Apache Indian" who grew up on the Mescalero Indian Reservation.[66] The article does not identify Mr. Beltran as a member of the petitioner or identify the petitioner as an Indian entity.

The petitioner does not meet criterion § 83.11(a) for the period 1960-1969.

1970-1979

The petitioner has provided no evidence for this decade. The petitioner does not meet criterion § 83.11(a) for the period 1970-1979.

1980-1989

The petitioner has provided no evidence for this decade. The petitioner does not meet criterion § 83.11(a) for the period 1980-1989.

1990-1999

The petitioner refers to a performance of Knifewing Segura in a concert around 1993 and to Segura's acting debut in a 1994 film as evidence for this decade. However, the petitioner provides no evidence from either event that identifies Segura as a member of the petitioner or of the petitioning group as an Indian entity.

The petitioner also argues that a 1997 invitation of Knifewing Segura to speak before the New Mexico State Legislature and a State Senate Committee is evidence of State identification of its group as an Indian entity. Again, the petitioner provides no evidence or even a source citation to document these events. Furthermore, the petitioner itself observes that Segura was chosen in part for his role as coordinator for artists at the South West Association for Indian Arts, rather than as a representative of the Chihene Nde Nation. No evidence is offered that supports that the State of New Mexico specifically recognized the petitioner as an Indian entity, rather than Segura as an individual Indian.

[66] Cliff Sherrill, "Apache Grandpa Says: Train Children in Indian Way, Stop Delinquency," *El Paso Herald Post*, May 20, 1960, p. 17.

The petitioner does not meet criterion § 83.11(a) for the period 1990-1999.

2000-2009

The petitioner submits three actions as evidence for the decade between 2000 and 2009: the registration of the Ojo Caliente Restoration Society as a domestic New Mexico non-profit; the registration of the Chihene Nde Nation of New Mexico as a domestic New Mexico non-profit; and a 2009 letter of support from U.S. Representative Pearce for the recognition and restoration of the Chihene Nde Nation of New Mexico. We were unable to review any of this evidence since none was provided for the non-profit registrations and the Representative Pearce letter was not made available to the public. However, it is questionable whether he was in office at the time of the purported letter given that he was only in office in 2009 for three days; the respective term of office ended on January 3, 2009 and he did not serve again until January 3, 2011. In its 2002 Final Determination to decline acknowledgment to the Muwekma Ohlone Tribe, the BIA found that the State approval of the incorporation of the Ohlone Indian Tribe, Inc., did not meet the criterion because "it judged that the organization to be a non-profit corporation, not an Indian entity."[67] That suggests that the registration of the two entities as non-profits do not meet the criterion for external identification of an Indian entity.

The 2009 letter of support from U.S. Representative Pearce may, however, be sufficient to meet the criterion. In the past, the BIA has determined that certain demonstrations of support by Federal elected officials qualify as evidence under the criterion. In its 1983 Proposed Finding for the Poarch Band of Creeks, the DOI accepted evidence that "the entire Alabama congressional delegation has expressed their interest and support."[68] Of course, in contrast to this example, the letter referred to by the CNN petitioner is only from one federal representative, who may or may not have been in office at the time, not the entire New Mexico congressional delegation. Furthermore, in its 2004 Proposed Finding to decline acknowledgement on the Burt Lake Band of Ottawa and Chippewa Indians, the DOI accepted statements of identification of the Band by members of Congress.[69] Unfortunately, a copy of the letter has not been made available for public review. Depending on the language in the letter and its timing, it may meet the minimal standard for evidence of external identification for the 2000s.

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[67] U.S. Department of the Interior, Office of Federal Acknowledgment, Final Determination, Muwekma Ohlone Tribe of San Francisco Bay, CA, 2002, p. 37.

[68] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Poarch Band of Creeks, 1983, p. 3.

[69] U.S. Department of the Interior, Office of Federal Acknowledgment, Proposed Finding, Burt Lake Band of Ottawa and Chippewa Indians, Inc., 2004, pp. 33-34.

The petitioner also observes that it held annual gatherings during this decade and that members of recognized Indian entities sometimes participated.[70] However, the petitioner either neglects to supply documentation for many of these assertions or the citations provided are not available to the public for review. It is possible that the cited documents could provide evidence of identification of an Indian entity by the petitioner. The attendance of individual members of another tribe, however, does not mean that their respective tribes formally recognized the petitioner.

Elsewhere in the petition, the petitioner observes that a September 2000 article in the *El Paso Times* entitled "La Familia: About 450 members from one of Southern New Mexico's first families reunite in La Union," discussed the Apache lineage of the Enriquez family.[71] However, the article did not identify a contemporaneous Indian entity; in fact, it failed to identify the petitioner at all, but instead referred to an ancestor, Juliana, as a daughter of an Apache family. This article does not meet the criterion.

The petitioner may meet criterion § 83.11(a) for this decade if the 2009 letter of support from Congressman Pearce qualifies.

2010-2019

The petitioner submits several actions as evidence for the years 2010-2019: the granting of non-profit status by the Internal Revenue Service in 2011; the joining of the New Mexico Land Grant Consejo in 2012; support of the petitioner's effort to gain state recognition by a New Mexico state representative via a legislative action; annual gatherings; the listing of the petitioner in a document produced by the University of New Mexico School of Law; the hosting of a meeting of the Indian Affairs Committee of the State legislature; and invitations to various meetings and presentations. As in earlier decades, the petitioner either neglects to supply documentation for many of these assertions or the citation provided is not available to the public. Very few of these qualify as external identification of the petitioner as an Indian entity.

In its 2002 Final Determination to decline acknowledgment to the Muwekma Ohlone Tribe, the BIA found that the State approval of the incorporation of the Ohlone Indian Tribe, Inc., did not meet the criterion because "it judged that the organization to be a non-profit corporation, not an Indian entity."[72] That suggests that the granting of non-profit status by the Internal Revenue Service may not meet the criterion for external identification of an Indian entity.

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[70] CNN, 2024 Petition, pp. 163-164.

[71] CNN, 2024 Petition, p. 94.

[72] U.S. Department of the Interior, Office of Federal Acknowledgment, Final Determination, Muwekma Ohlone Tribe of San Francisco Bay, CA, 2002, p. 37.

The joining of the New Mexico Land Grant Consejo, an advocacy organization, does not appear to qualify as evidence under this criterion. The Consejo is not a governmental entity, a tribal entity or an Indian organization.

If the petitioner provided letters or resolutions from local elected officials that identify it as an Indian entity, those would apply. A transcript of the cited 2011 Indian Affairs Committee meeting revealed that the Committee did not take a position on endorsing the petitioner's effort to become a recognized tribe and thus may not qualify as evidence under the criterion.

The petitioner also neglects to provide adequate documentation of its annual gatherings. Again, if it submitted materials identifying the tribe as an Indian entity, these could fall under the internal identification clause of the criterion. They would need corroboration from another external source, but they would support the petitioner's claim. No documentation of these gatherings, their agendas, or their attendance has been made available for public review.

The 2014 University of New Mexico School of Law report could support the petitioner's claim of identification as an Indian entity. However, no documentation or citation was included, and it is uncertain as to whether the report identified the petitioner as an Indian entity.

Another piece of evidence in the petitioner's assertion is the submission of Senate Joint Memorial 5, a New Mexico State legislative action, that requested the support of the United States Congress for the establishment of the Chihene Nde Nation. However, the memorial did not pass the legislature.

In his 2016 book, *Apache Adaptation to Hispanic Rule*, Matthew Babcock identified the Chihene Nde Nation in reference to unsolicited communication that Chairman Sanchez made to him. His book focused on the adaption of Nde ways from pre-contact through the middle of the nineteenth century and did not discuss the petitioner in the 20th or 21st centuries. However, the book clearly identifies Sanchez as a member of the Chihene Nde Nation.[73]

The petitioner also refers to a 2018 M.A. thesis by Judy Marquez entitled "Indigenous Identity and Ethnogenesis in the Mimbres Valley in Southwest New Mexico." The petitioner provided no quotes from the document, and it is not accessible via ProQuest. It is possible that the author identifies the Chihene Nde Nation, though we were unable to confirm this.

[73] Matthew Babcock, *Apache Adaptation to Hispanic Rule* (Cambridge: Cambridge University Press, 2016), pp. xiii, xvii.

As presented in its 2024 petition, the evidence provided by the CNN petitioner meets the minimum standard for criterion § 83.11(a) for the period 2010-2019. Moreover, the petitioner could augment its case by providing documentation of the sources listed in its petition if they show identification as an Indian entity.

2020-2024

Several actions are offered as evidence for the period between 2020 and 2024: various invitations to schools and conferences, descriptions of annual gatherings, news features including tribal members, and an invitation by New Mexico State Senator Jeff Steinborn "as representatives of the local Indigenous population to discuss land preservation efforts in Dona Ana County."[74] As in previous decades, the petition either lacks documentation for these assertions or the citation provided is not available for public review. It is uncertain whether any of the news features identify the petitioner as a tribal entity; if they did so, that would qualify under the criterion. However, the petitioner does not highlight that in its narrative. Furthermore, it is uncertain whether the invitation by State Senator Steinborn identifies the petitioner as an Indian entity rather than as representatives of local Indigenous individuals. Last, the petitioner has not made documentation (such as programs, advertisements, or agendas) of its annual gathering available for public review. It is possible, though not assured, that these qualify as identification of an Indian entity by the petitioner. Such identifications must be combined with additional kinds of external identification in order to meet the criterion.

The petitioner refers to an April 2020 blog entry by Jessica Martinez in the University of New Mexico Indian Law Journal as evidence. The blog describes a paper on the petitioner's efforts to gain federal recognition, presumably written for a class, by a member of the Chihene Nde Nation. It may qualify as identification of an Indian entity by the petitioner.[75] However, the petitioner must provide additional, corroborating evidence from external sources to meet the criterion for this decade.

As presented in its 2024 petition, the evidence provided by the CNN petitioner is insufficient to meet criterion § 83.11(a) for the period 2020-2024. The only verifiable source is a 2020 blog entry by a member of the petitioner that provides identification. However, the petitioner must provide additional, corroborating evidence from external sources to meet the criterion for this decade. Without access to the petition's citations or documentation, the rest of the petitioner's assertions cannot be confirmed. Even though the evidence in the 2024 petition does not meet the minimum standard for criterion (a), it is possible that the petitioner may be able to do so with an addendum including supplementary evidence.

[74] CNN, 2024 Petition, p. 160.
[75] CNN, 2024 Petition, p. 171.

Conclusion

To summarize, the Chihene Nde Nation petitioner has failed to provide adequate evidence to meet criterion § 83.11(a), Indian Entity Identification, based on external sources for at least a hundred years since 1900. This gap in evidence exists for the entire twentieth century from 1900 to 1999. Furthermore, the evidence provided for the years between 2000 and 2009 appears inadequate and lacks documentation. The evidence for the period between 2020 and 2024 is also lacking, though it might be augmented with further research and analysis. With no consistent documentation of its existence as an Indian entity during the twentieth century, the petitioner has not met the criterion. Failure to meet the Indian Entity Identification criterion would alone result in a Phase II Proposed Finding declining Federal acknowledgment of the CNN petitioner.

Criterion § 83.11(b), Community

Explanation of the Criterion and its Requirements

This criterion reads as follows in the revised 2015 regulations:

(b) Community. The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

> **§ 83.11(b)(1), The petitioner may demonstrate that it meets this criterion at a given point in time by some combination of two or more of the following forms of evidence or by other evidence to show that a significant and meaningful portion of the petitioner's members constituted a distinct community at a given point in time:**
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> > **§ 83.11(b)(1)(i), Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages;**

§ 83.11(b)(1)(ii), Social relationships connecting individual members;

§ 83.11(b)(1)(iii), Rates or patterns of informal social interaction that exist broadly among the members of the entity;

§ 83.11(b)(1)(iv), Shared or cooperative labor or other economic activity among members;

§ 83.11(b)(1)(v), Strong patterns of discrimination or other social distinctions by non-members;

§ 83.11(b)(1)(vi), Shared sacred or secular ritual activity;

§ 83.11(b)(1)(vii), Cultural patterns shared among a portion of the entity that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies;

§ 83.11(b)(1)(viii), The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name;

§ 83.11(b)(1)(ix), Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period;

§ 83.11(b)(1)(x), Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the extent that supporting evidence documents the community claimed; or

§ 83.11(b)(1)(xi), A demonstration of political influence under the criterion in § 83.11(c)(1) will be

evidence for demonstrating distinct community for that same time period.

§ 83.11(b)(2), High Evidence: The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(c) at a given point in time if the evidence demonstrates any one of the following:

§ 83.11(b)(2)(i), More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area;

§ 83.11(b)(2)(ii), At least 50 percent of the members of the entity were married to other members of the entity;

§ 83.11(b)(2)(iii), At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies;

§ 83.11(b)(2)(iv), There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

§ 83.11(b)(2)(v), The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

To meet the requirements of criterion § 83.11(b), the petitioner must be more than a group of Indian descendants with common tribal ancestry who have little or no social or historical connection with each other. Sustained interaction and significant social relationships must exist among the members of the group. Interaction should be broadly distributed among the membership, not just small parts of it. Petitioners must show that interactions have occurred continuously since a given point in time.

The acknowledgment regulations also require that the petitioner be a community distinct from other populations in the area. Members must maintain at least a minimal social distinction from the wider society. This requires that the petitioner's members are differentiated from and identified as distinct in some way from nonmembers. The existence of only nominal differences provides no supporting evidence for the existence of community among the membership.

In essence, community as defined in the regulations means the continued maintenance of tribal relations. This requires that tribal members knew each other and interacted in various ways. Ideally, this interaction can be demonstrated by showing that there was intermarriage across tribal family lines and reasonable residential proximity of the tribal families within a defined geographic area. Community can also be shown, however, by evidence that tribal members visited each other, shared information, attended each other's life events, such as weddings and funerals, and/or discussed or even argued and fought over issues of importance to the tribal membership.

If an acknowledgment petitioner's present tribal membership is comprised of components or subgroups, then it must be demonstrated either that these components have always been socially and politically interactive or, if they were separate at one time, that they naturally became part of a single tribal community.

The settlement patterns and social relationships of the petitioner need to be documented and interpreted within the context of strategies used by the members to retain their distinct identity, social cohesion, and interaction. Actual interaction does not need to be evidenced if marriage and residential patterns can demonstrate that the families lived in close enough proximity to make interaction probable.

Petitioners who can establish "unambiguous Federal acknowledgment" only have to demonstrate community "at present." The CNN petitioner asserts that it has been recognized since the 1850s through a series of treaties and suggests that it has maintained a relationship since then. As we show in our evaluation, the evidence points to an end to that relationship by 1877.

Furthermore, our evaluation concludes that while the petitioner may meet part of the criteria through the treaties, the CNN must also demonstrate that most of its current membership descends from the Apache bands or specific tribal members who were parties to the treaties of the 1850s. Interested parties cannot evaluate this because the petitioner's genealogical data is restricted from public access. We have assumed that the petitioner will meet criterion § 83.12 for the purposes of this evaluation.

If the petitioner meets the criterion as a previously federally acknowledged tribe, the CNN would only need to show that it meets criterion (b) in the present

day. Thus, we will focus on its arguments and evidence for community in the last ten to fifteen years. Even with that substantially reduced burden, we conclude that the petitioner fails to meet the criterion.

Comments on the Chihene Nde Nation Documentation for Categories of Evidence for Criterion § 83.11(b), Community

§ 83.11(b)(1)(i), Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages

The petitioner asserts that their "existing norm has always been to marry *two mountains over*" and that this pattern exists today. The petitioner then provides an example of the Provencios to illustrate a pattern of in-group marriages and observes that marriage within extended family groups continued in the second half of the twentieth century. However, the petitioner makes no determination of the rate of such marriages and provides no evidence aside from the anecdote of the Provencios. Nor is there sufficient geographic information to confirm its assertion of the norm of marrying two mountains over. Last, the petitioner makes no effort to demonstrate that this pattern continues in the twenty-first century.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(ii), Social relationships connecting individual members

The petitioner claims that it meets this category through "family celebrations, cultural activities, recreational activities, civic organizations, and religious affiliations[;] [m]any Chiende still enjoy planning road and camping trips to visit relatives and close friends on the other side of the mountain."[76] It then describes a few of the civic and advocacy organizations to which members belong. The petitioner, however, provides minimal evidence of these activities or of participation by individual members. It includes an image of the 1955 Cobre High School football squad and an undated image of an elder with his granddaughter after a tribal ceremony. The 1955 image does not provide evidence of a current community; furthermore, it only identifies one tribal member, Manuel Rodriguez.

The petitioner also includes some information from oral interviews with members, including Nancy Lopez, Vice-Chair. According to the petition, Ms. Lopez stated that her extended family, the Beltrans, gathered at a cousin's home in 2011 and decided to become tribal members of the Chihene Nde Nation. There is no material on social relations connecting Beltran family members with those of other petitioner families. Elsewhere in the petition, the petitioner alleges that the "Rodriguez, Renteria, and Provencio families maintained a collective and coherent Chiende identity reinforced through extended family gatherings and refined

[76] CNN, 2024 Petition, p. 175.

through ongoing and consistent cultural practices."[77] This claim also lacks any documentation demonstrating relations between these families and others within the group.

In its 2001 Final Determination against the Duwamish, the BIA stated:

> For kinship interactions to be useful evidence. . . they must connect individuals from a number of different family lines over many generations. In this tribal context, crisscrossing connections link the entire membership and generate over time a dense network of ties and obligations.[78]

The CNN petitioner lacks the evidence of kinship interactions that would demonstrate a network of ties and obligations. There are no quotes from oral interviews, photographs of family celebrations and recreational activities, records of church participation, or similar sorts of evidence that would document interactions over time.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(iii) Rates or patterns of informal social interaction that exist broadly among the members of the entity

The petitioner argues that it meets this category of evidence through a series of claims featuring individual members engaged in past activism or serving in the military and/or law enforcement. Furthermore, it asserts that even after families had to leave its homelands in southern New Mexico for economic reasons, they "frequently returned when we had the opportunity and remained connected to our ancestral homelands."[79] The CNN has supplied virtually no evidence of any of these claims, such as quotes from oral interviews, programs, attendance lists for weddings or funerals, or church records, that might document social interaction among its members. Other claims made by the petitioner are not relevant to this category of evidence. For instance, one of its assertions, that of the regular interaction between the Martinez and Manzo families, would qualify as supporting evidence for § 83(b)(1)(ii) if the petitioner provided evidence of the interaction, and if that interaction continued to the current day. It does not, and no evidence is submitted that this demonstrates a pattern of informal social interaction.

Similarly, the claim that "extended families who lived in Socorro County were active in community events" lacks specificity in the rate or pattern of interaction of

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[77] CNN, 2024 Petition, p. 51.
[78] U.S. Department of Interior, Office of Federal Acknowledgment, Final Determination, Duwamish Tribal Organization, 2001, pp. 37-38.
[79] CNN, 2024 Petition, p. 73.

these community events and includes no evidence beyond an advertisement for an event known as Geronimo Days.[80] There is no information on attendance or participation by the petitioner's families, and the petitioner fails to observe that these families even interacted with each other. No other community event is noted.

While the petitioner provides some information on the connections between Apaches and a tradition of military service, it provides no link between this tradition and informal social interaction. It neglects to demonstrate that these veterans knew each other or participated in informal social interaction through veterans' groups or other organizations.

Last, the petitioner argues that its members regularly gather at homes in Las Cruces, Albuquerque, and Southern California, and that this is "where our informal social interaction takes place."[81] This would be relevant to § 83(b)(1)(ii) and possibly to this category if a rate or pattern could be established, but again, no evidence is provided of these gatherings, and the petition lacks material on the attendance of these gatherings.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(iv), Shared or cooperative labor or other economic activity among members

The petitioner asserts that it meets this category through the work of members in cultural film and audio production. It describes two companies, Knifewing Productions and Native Stars, as "methods of cooperative labor for our tribal members" and notes that members have assisted Knifewing Segura as judges in the Gallup Film Festival. Such activity is presumably recent and may demonstrate economic activity among members. However, the petitioner fails to quantify member participation in this activity, describe it, or discuss its effect on the entity's community. The podcast appears to be a family business with no additional participation as an economic activity within the group.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(v), Strong patterns of discrimination or other social distinctions by non-members

The petitioner attempts to demonstrate strong patterns of discrimination in the nineteenth and early twentieth centuries. However, it fails to provide evidence of discrimination or other social distinctions in the present day or recent past.

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[80] CNN, 2024 Petition, p. 181.
[81] CNN, 2024 Petition, p. 192.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(vi), Shared sacred or secular ritual activity

The CNN petitioner refers to several shared ritual activities: ceremonies around childbirth, a child's first haircut, the Sunrise Puberty Ceremonial, the Crown Dance Ceremony, weddings, and funerals. It also observes that it holds private Chiende ceremonies in the backcountry. All of these examples could fall under this category of evidence. However, the petitioner provides very little evidence, aside from two photographs of undescribed, undated weddings and a 2023 photo of four members in the Gila National Forest, that its members engaged in these activities. The petitioner observes that there are burial practices, but it does not include information on how they differ from non-Indian ceremonies or any documentation that its members conform to them. In order to meet this category of evidence, the petitioner must describe and provide more evidence that its members take part in shared ritual activities.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(vii), Cultural patterns shared among a portion of the entity that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic - identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies

The petitioner asserts that it meets this category by arguing that the members of the petitioner are "intensely spiritual people" with Indigenous worldviews, a non-Western understanding of their relationship with the natural world, and different belief systems. Moreover, it claims these cultural patterns extend to use of herbal remedies and plant use for healing and, at least in the past, a superior Native diet.

The petitioner, however, fails to provide any evidence that its members share cultural patterns that are different from the non-Indians with whom it interacts. There is no documentation of the practice of its intense spirituality; there are no descriptions of ceremonies where this might be demonstrated, and no oral interviews evincing this understanding. Use of native plants in healing in a culturally specific way would contribute to this category, but again, there is no evidence that a portion of the membership currently shares this practice. Likewise, while cultural foodways have been accepted as evidence of distinct cultural differences, the petitioner has provided no evidence of their use in the contemporary period. In fact, its claims all seem to indicate that these have been in the distant past.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(viii), The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name

The petitioner argues that its collective identity as Chiende has existed continuously for more than 50 years and points to various ceremonial practices and the persistence of three key extended families in tribal affairs as proof of this identity. The OFA has accepted evidence of a collective identity through both external sources and from individual members. However, the petitioner has provided no evidence of either external identification or self-identification of its collective identity before 2008. The petitioner appears to have provided copies of its governing document and membership criteria in its supporting document, including evidence of its development since 2008. Those materials have not been made available for public review, but we acknowledge that they might demonstrate the creation of a formal organization and provides some indication of a group identity. However, as determined by the BIA in its Proposed Finding against the acknowledgement of the Steilacoom Tribe of Indians in 2000, the existence of a formal organization is not in itself sufficient to show collective group identity."[82] Without any evidence of collective identity as an Indian entity before 2008 and minimal documentation since 2008, the petitioner has failed to demonstrate the persistence of a collective identity continuously over a period of 50 years.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(ix), Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period

The petitioner alleges that its members and the ancestors resided on and used lands set aside by the United States for Apaches in the nineteenth century, and held on to undescribed properties until the end of the nineteenth century before they were dispossessed. The petitioner has provided no evidence of the State of New Mexico, or any other State, setting aside land for the petitioner, or its collective ancestors.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(1)(x), Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the

[82] U.S. Department of Interior, Office of Federal Acknowledgement, Proposed Finding, Steilacoom Tribe of Indians, 2000, p. 12.

extent that supporting evidence documents the community claimed

The petitioner has not submitted evidence regarding this category of evidence, and it appears that the petitioner does not meet its requirements.

§ 83.11(b)(1)(xi), A demonstration of political influence under the criterion in § 83.11(c)(1) will be evidence for demonstrating distinct community for that same time period

The petitioner appears unable to demonstrate political influence for any of the categories under § 83.11(c)(1). Thus, the petitioner has not met this category of evidence.

Section 83.11(b)(2), High Evidence: The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(b) at a given point in time if the evidence demonstrates any one of the following:

> **§ 83.11(b)(2)(i), More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area.**

The petitioner has not submitted evidence regarding this category of evidence, and it appears that the petitioner does not meet its requirements.

> **§ 83.11(b)(2)(ii), At least 50 percent of the members of the entity were married to other members of the entity.**

The petitioner has not submitted evidence regarding this category of evidence, and it appears that the petitioner does not meet its requirements.

> **§ 83.11(b)(2)(iii), At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies.**

The petitioner bases its claims that it meets this category of evidence on its declaration that "over 50 percent of our members publicly demonstrate their Indian cultural patterns in their public employment spheres, including their self-disclosed identity as Apache" and that they "wear clothing, make jewelry and gather our traditional plants and herbs."[83] The petitioner provides no evidence documenting

[83] CNN, 2024 Petition, p. 215.

these "public employment spheres" and offers no explanation of what these spheres might be aside from the publication of "essays, articles, booklets and an MA thesis."[84] It seems very unlikely that over 50 percent of its 425 adult members are gainfully employed as authors.

The aim of this category of evidence is to allow a petitioner to demonstrate that the majority of its membership engage in specific cultural practices that show significant social distinction. Self-identification as a tribal member has not been accepted as an activity or practice by the OFA. In its 2001 Final Determination against the Duwamish, the BIA rejected evidence on self-identity, stating that "evidence [that] deals primarily with self-declarations of what people believe and not actual evidence about their activities" does not meet the criterion.[85]

The wearing of clothing and jewelry is not distinctive to the Chihene Nde Nation. Even assuming that the petitioner meant to argue that its members wear clothing and jewelry unique to its people, it has provided no evidence of this or of the prevalence of such sartorial practice.

The petitioner also identifies Indigenous plant medicine and the diets of the past as distinct cultural patterns. If the petitioner could identify plant medicine distinctive to its people and evince that at least 50 percent of its members currently practice this medicine, that would be powerful evidence of the maintenance of a distinct cultural practice. However, the petitioner fails to describe medicinal practices particular to its people and does not include any evidence of the extent of these practices among its members.

The petitioner's entire section on food sources and diet describes practices of the past. There is no evidence of distinctive modern dietary habits or their connection to ceremonies currently practiced.

The CNN asserts elsewhere in its petition that it holds Chiende private gatherings where it performs ceremonies and rituals. These include the Crown Dance Ceremony. This could fall under this category of evidence. However, the petitioner provides very little evidence, aside from two photographs of undescribed, undated weddings and a 2023 photo of four members in the Gila National Forest, that its members engaged in these activities. Furthermore, the petitioner identifies Paul Ortega and Joel Lester, members of the Mescalero Apache Tribe, as spiritual leaders and their medicine men, rather than CNN members. It does not identify or describe differences in the practices of separate Apache tribes or whether the petitioner has its own unique ceremonies. The petitioner observes that there are burial practices, but it does not include information on how they differ from non-

[84] CNN, 2024 Petition, p. 215.
[85] U.S. Department of Interior, Office of Federal Acknowledgment, Final Determination, Duwamish Tribal Organization, 2001, pp. 31-32.

Indian ceremonies or any documentation that half of its members conform to them. In order to meet this category of evidence, the petitioner must describe these distinct cultural practices and provide evidence that at least half of its members maintain them.[86]

The petitioner has not met the requirements for this category of evidence.

§ 83.11(b)(2)(iv), There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations.

The petitioner has not submitted evidence regarding this category of evidence, and it appears that the petitioner does not meet its requirements.

§ 83.11(b)(2)(v). The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

The CNN appears unable to demonstrate political influence for any of the categories under § 83.11(c)(2). Thus, the petitioner has not met this category of evidence.

Conclusion

Despite the fact that the CNN petitioner may enjoy a much-reduced evidentiary burden to meet § 83.11(b), Community, thanks to its possible status as a previously acknowledged Indian entity, it has failed to meet any of the categories of evidence within criterion (b). It cannot even demonstrate the persistence of a collective identity, often the easiest of the categories to meet. The petitioner has produced almost no evidence of an existing community, even though it needs only to do so in the present day. There are no quotes from oral interviews, no articles, no tribal records, and very few images documenting activity or interaction among the alleged tribal community. The petitioner has not met criterion § 83.11(b), Community, "at present." Failure to meet the Community criterion would in and of itself result in a Phase II Proposed Finding to decline Federal acknowledgment of the CNN.

Criterion § 83.11(c), Political Influence or Authority

Explanation of the Criterion and its Requirements

[86] CNN, 2024 Petition, pp. 65-67.

This criterion reads as follows:

(c) Political influence or authority. The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

§ 83.11(c)(1), The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following forms of evidence or by other evidence that the petitioner had political influence or authority over its members as an autonomous entity:

§ 83.11(c)(1)(i), The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

§ 83.11(c)(1)(ii), Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

§ 83.11(c)(1)(iii), There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

§ 83.11(c)(1)(iv), The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

§ 83.11(c)(1)(v), There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

§ 83.11(c)(1)(vi), The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

§ 83.11(c)(1)(vii), Land set aside by a State or petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

§ 83.11(c)(1)(viii), There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

§ 83.11(c)(2), High Evidence: The petitioner will be considered to have provided sufficient evidence of political influence or authority at a given point of time if the evidence demonstrates any one of the following:

§ 83.11(c)(2)(i), Entity leaders or internal mechanisms exist or existed that:

§ 83.11(c)(2)(i)(A), Allocate entity resources such as land, residence rights, and the like on a consistent basis;

§ 83.11(c)(2)(i)(B), Settle disputes between members or subgroups by mediation or other means on a regular basis;

§ 83.11(c)(2)(i)(C), Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior; or

§ 83.11(c)(2)(i)(D), Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

§ 83.11(c)(2)(ii), The petitioner has met the requirements in § 83.11(b)(2) at a given time.

This criterion requires that a petitioner must have maintained the political characteristics of a tribal entity throughout time since 1900. A successful tribal entity must show that it has existed as a separate political body that exercises political influence or authority over its membership. The leadership can be formal,

such as a tribal council with a constitution, and/or informal, such as any tribal member who is able to influence the behavior of other tribal members.

Petitioners who can establish "unambiguous Federal acknowledgment" only have to demonstrate political influence or authority as an Indian entity since the date of last Federal acknowledgment. They also must show that they are the same tribal entity that was previously acknowledged or that has evolved from that entity. Unambiguous previous acknowledgment is only an advantage for criterion § 83.11(c) if the date of that prior recognition is after 1900. The CNN petitioner asserts that it has been recognized since the 1850s through a series of treaties and suggests that it has maintained a Federal relationship since then. However, as we show in our evaluation, the evidence points to an end to that relationship by 1877. Furthermore, CNN must also demonstrate that most of its current membership descends from the Apache bands or specific tribal members who were parties to the treaties of the 1850s. Interested parties cannot evaluate this because the petitioner's genealogical data are restricted from public access. We have assumed that the petitioner will meet criterion § 83.12 for the purposes of this evaluation.

Since the petitioner's actual date of previous acknowledgement would be before 1900, its possible acknowledgement does not reduce its burden of proof in meeting the § 83.11(c) criterion. The Chihene Nde Nation must demonstrate that it has maintained political influence or authority over its members as an autonomous entity from 1900 until the present.

The petitioner fails to provide almost any evidence demonstrating that it had political influence or authority over its members as an autonomous entity. Of the eight categories of potential evidence under § 83.11(c)(1) and the five categories under § 83.11(c)(2), the petitioner claims to meet nearly all of them, but in fact it has met none. For the 125-year evaluation period between 1900 and 2024, the Chihene Nde Nation has referenced in less than nine full pages only six documents that it purports to evince meeting criterion § 83.11(c). We have reviewed the entire petition in search of others that may be germane, but even where the petitioner alleges political activities, there is a lack of documentation supporting the allegation. The petitioner fails to meet the criterion.

Comments on the Chihene Nde Nation Documentation for Categories of Evidence for Criterion § 83.11(c), Political Influence or Authority

§ 83.11(c)(1)(i) The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

The petitioner asserts that it mobilizes significant numbers of members and significant resources from its members for entity purposes, but it provides no evidence in support of these claims. For example, the CNN claims that it meets

regularly as a whole and in committee to conduct business. But there is no documentation of such meetings or of attendance. Elsewhere in the petition, the petitioner lists annual gatherings since 2000 and suggests that these involved substantial numbers of members, but no documentation of these gatherings, such as programs, advertisements, or agendas has been provided for public review, and there is no information on attendance.

While there are references to communication, no evidence of this is provided. The only example of involvement provided is that of occasional formation of teams since 2014 to write grants for specific purposes. However, there is no indication of whether these "specific purposes" were for entity purposes, how many members participated in these teams, and if they were supported by a significant portion of the membership. Furthermore, the petitioner offers no materials evincing mobilization in the twentieth century.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(1)(ii) Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

While the petitioner asserts that its membership considers the issues acted upon or taken by entity leaders or governing bodies to be of importance, it has provided virtually no evidence to demonstrate this claim. The petitioner has not clearly identified its entity leaders or governing bodies and has not shown that the membership supported the efforts of those who have taken actions. For example, the petitioner identified the family of Earl Montoya as activists for the preservation of ancestral sacred sites in the 1940s. However, there is no specific information on the members of this family, what the Montoya family did, whether other entity leaders were involved, or whether the petitioner's membership was engaged on this topic.

In another example, the petitioner identifies Eddy Montoya as a tribal elder and states that he made a statement protesting mining in Socorro County, New Mexico in 2009 and "publicly spoke out against the closing of the road to the Monticello Box Canyon in Socorro County."[87] If these issues were of importance to the membership, then such actions could qualify. But the petitioner provides no material verifying that these issues were important, and whether they were significant to other members. In fact, the petitioner provides no evidence documenting any of its assertions.

Where an exhibit is briefly described, only limited information is provided regarding its contents. For example, the petitioner cites a 2018 M.A. thesis in anthropology as evidence for § 83.11(c)(1)(ii) without either fully describing or citing

[87] CNN, 2024 Petition, p. 226.

the specific page numbers in the thesis where evidence might be found to demonstrate meeting the category, which is that many tribal members consider the issues acted upon by tribal leaders to be of importance.[88]

Nearly all of the petitioner's limited examples date from the last fifteen years. There are two from the twentieth century: the Montoya family activism in the 1940s and the participation of Audrey Espinoza's brother Gene in the 1972 Trail of Broken Treaties group's takeover of the BIA building in Washington, D.C. Neither example is documented, there is no explanation of these actions' significance to the petitioner's membership, and there are no further instances of actions taken on issues of importance for the entire twentieth century.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(1)(iii), There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

The petitioner asserts that it meets this category through several actions, including: the reporting of the Federal acknowledgement effort by tribal leadership to membership since 2008; submission of material to the tribe, including family genealogies, by members in support of the petition; undescribed involvement in the Land Grant Consejo by unnamed members; and use of various media by the petitioner to keep its members informed of political processes. All of these assertions are insufficient to meet the category.

First, the petitioner provides no evidence to support any of its assertions. To wit, there are no agendas, programs, minutes, recordings, transcripts, screenshots, or any other documents demonstrating knowledge, communication, or involvement in political processes by many of the entity's members. The petition lacks any information on rates of attendance in meetings or participation in political processes. Moreover, the petitioner makes no effort to historicize any of its claims, with the exception of its efforts to achieve Federal acknowledgement beginning in 2008. To meet this category, the petitioner must provide evidence dating back to 1900. It has provided none.

Of the examples provided, none have been demonstrated to be important to or the subject of significant involvement by the membership. No attempt has been made to show, for instance, widespread knowledge of, communication about, or involvement in the Land Grant Consejo. Nor is there any evidence that the Consejo's activities are of concern to many of the petitioner's members.

In its 1997 Proposed Finding against Federal acknowledgement of the Chinook Indian Tribe/ Chinook Nation, the BIA wrote:

[88] CNN, 2024 Petition, pp. 227-228.

> "There is very little information available about the internal political processes of the petitioner. . . . There is very little information available regarding whether or not there is two-way communication between the council and the members, how broad the influence of the Chinook council is, and how effectively the council carries out the wishes of the members."[89]

That summary, while directed at the Chinook's petition, also describes the CNN petition.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(1)(iv), The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

The petitioner claims to meet this category of evidence; however, its response reveals that it misunderstands the requirements. To meet this, a petitioner must demonstrate that it has met § 83.11(b) with at least 50 percent of its members or met criterion (c) via one of the four High Evidence categories. The petitioner has not submitted the evidence sufficient to meet any of these categories in its narrative. As discussed elsewhere, we do not have access to the necessary records to categorically prove or disprove a claim that "more than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area." However, the petitioner does not appear to be able to meet the evidentiary burden for criterion § 83.11(b) from 1900 to 2024 and thus would not be able to meet the criterion at greater than or equal to the 50 percent standard set forth under § 83.11(b)(2). Nor has the petitioner demonstrated that it has met any of the four High Evidence categories within criterion (c).

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(1)(v), There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

The petitioner has not claimed that it meets this category of evidence and has not submitted evidence for this category of evidence in its 2024 submission.

§ 83.11(c)(1)(vi), The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

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[89] U.S. Department of Interior, Office of Federal Acknowledgment, Proposed Finding, Chinook Indian Tribe/ Chinook Nation, 1997, p. 32.

The petitioner has not claimed that it meets this category of evidence and has not submitted evidence for this category of evidence in its 2024 submission.

§ 83.11(c)(1)(vii), Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

The petitioner has not claimed that it meets this category of evidence and has not submitted evidence for this category of evidence in its 2024 submission.

§ 83.11(c)(1)(viii), There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

The petitioner asserts that there are continuous lines of entity leaders and a means of selection or acquiescence, but it does not provide clear documentation for either assertion. Instead, it states that before 2008, the petitioner was organized by kinship groups "that were part and parcel of an organized political structure with influence."[90] It lists several of these extended family groups and argues that they "maintained Chiende leadership practices throughout the 20th century."[91] According to the petitioner, these families include: the Enriquez, the Lunas, the Morales, the Juradoes, the Benavides, the Espinozas, the Parras, the Renterias, the Flores, the Marquez, the Trujillos, the Oronas, and the Levyas. The petitioner provides the names of several leaders in the Enriquez kinship group, but omits any information on leaders within the other families. Since the petitioner insists that it did not have a single leader or a tribal council with a Chair until it reorganized in 2008, the omission of any information on entity leaders outside of the Enriquez family is a substantial flaw in the petition.

The petition also lacks evidence to document how these leaders were selected since 1900, or that a significant number of the entity's members acquiesced to their leadership. The petitioner asserts that the Mimbres-Chihene and Gila-Chihene sub-bands were headed by a leader, the Nantan, and that this person was chosen by female members of the family. No documentation or examples are provided of this process, and it remains unclear as to whether the entity's members have accepted this leadership structure.

The petitioner provides an organizational chart, with no date, of the tribal council and Ojo Caliente Restoration Society (OCRS) Board of Directors. According to the petitioner, there are now tribal elections, though it is unclear when these began or which positions are eligible. No information is provided on past elections and their results or how long the current members of these two bodies have occupied these positions. The petitioner asserts that the OCRS Board of Directors

[90] CNN, 2024 Petition, p. 84.
[91] CNN, 2024 Petition, p. 85.

are chosen by the Tribal Council from among enrolled tribal elders, but no information is provided on whether appointed members have been leaders and how they have earned this status.

Ideally, the CNN petitioner should have been able to produce a chronological list of the tribal leaders in each twenty-year period since 1900, as well as a description of how each leader was selected or generally accepted by the tribal membership.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(2)(i)(A), Allocate entity resources such as land, residence rights, and the like on a consistent basis.

The petitioner has not claimed that it meets this category of evidence and has not submitted evidence for this category of evidence in its 2024 submission.

§ 83.11(c)(2)(i)(B), Settle disputes between members or subgroups by mediation or other means on a regular basis.

The petitioner appears to claim that it meets this category. However, as with all of the categories within criterion (c), it provides no evidence to support its assertions. There are no examples of disputes within the petitioner's members that were settled by mediation or other means. In fact, the petitioner provides no instances of any internal disputes since 1900. It claims that its Tribal Council members have the training to settle disputes, presumably through military service, but fails to demonstrate that this training has been used. Furthermore, while the petitioner insists that its governance model of seeking consensus helps to resolve differences, it has not provided evidence demonstrating this — either recently or in the past.

The petitioner has not met the requirements for this category of evidence.

§ 83.11(c)(2)(i)(C), Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior.

The petitioner alleges that it meets this category of evidence by providing general statements about how its leaders "have always been exceptional" and that this is due to "their participatory tribal leadership style."[92] It also refers to examples in the historical narrative of maintaining norms and directing the behavior of others; however, the petitioner only provides one example of this since 1900. It cites the generosity of Stanley Enriquez and Miguel Martinez sometime

[92] CNN, 2024 Petition, p. 231.

after 1945 to support "the impoverished members of the Chiende community in New Mexico" and claims that their acts "directed the behavior of other members to pursue similar acts of charity through their actions."[93] The petitioner fails to describe these acts of generosity and how they exerted strong influence on individual members. Furthermore, the petition lacks any evidence demonstrating this claim.

The remainder of the petitioner's assertions, such as elders communicating cultural protocols between generations or teaching their children about traditional camping locations, do not fall within this category. If supported by evidence, they are relevant within criterion (b).

The petitioner has not met the requirements for this category.

§ 83.11(c)(2)(i)(D), Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

The petitioner has not claimed that it meets this category of evidence and has not submitted evidence for this category of evidence in its 2024 submission.

§ 83.11(c)(ii), The petitioner has met the requirements in § 83.11(b)(2) at a given time.

While the petitioner asserts that it has met the requirements of this criterion, it has provided no evidence in its narrative that it has done so. To meet this criterion, a petitioner must demonstrate that it has met § 83.11(b)(2)(i) through (iv) with at least 50 percent of its members. The petitioner has not submitted the quantitative evidence sufficient to meet any of these categories in its narrative. As discussed elsewhere, we do not have access to the necessary records to categorically prove or disprove a claim that "more than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area." However, the petitioner does not appear to be able to meet the evidentiary burden for criterion § 83.11(b) from 1900 to 2024 and thus would not be able to meet the criterion at greater than or equal to the 50 percent standard set forth under § 83.11(b)(2).

Conclusion

The CNN petitioner fails to provide almost any evidence demonstrating that it had political influence or authority over its members as an autonomous entity since 1900. For example, in § 83.11(c)(1)(i), mobilization of membership and resources for entity purposes, the petitioner asserts that it mobilizes significant

[93] CNN, 2024 Petition, p. 232.

numbers of members and significant resources from its members for entity purposes, but it provides no evidence in support of these claims. The petitioner claims that it meets regularly as a whole and in committee to conduct business. But there is no documentation of such meetings or of attendance. Elsewhere in the petition, the CNN lists annual gatherings since 2000 and suggests that these involved substantial numbers of members, but no documentation of these gatherings, such as programs, advertisements, or agendas has been provided for public review, and there is no information on attendance. Moreover, the petitioner offers no materials evincing mobilization in the twentieth century.

Even in the rare cases where it provides some documentation for a particular category of evidence, it neglects to include material dating back to 1900. There are no quotes from oral interviews, no articles, no tribal newsletters or records, and very few images documenting interaction, political or otherwise, among the alleged tribal community.

The CNN petitioner has not met criterion §83.11(c), Political Influence or Authority, since 1900. Failure to meet this criterion would alone result in a Phase II Proposed Finding to decline Federal acknowledgment.

Criterion § 83.11(d), Governing Document

Explanation of the Criterion and its Requirements

This criterion reads as follows in the 2015 regulations:

(d) Governing document. The petitioner must provide:

> **§ 83.11(d)(1), A copy of the entity's present governing document, including its membership criteria; or**
>
> **§ 83.11(d)(2), In the absence of a governing document, a written statement describing in full its membership criteria and current governing procedures.**

The petitioner must have a governing document or some other written document that defines membership criteria. This criterion is required primarily so that the OFA can adequately measure a petitioner's membership to determine if the current members meet the membership criteria. To the extent that the membership criteria require descent from ancestors in the historical tribe claimed by the petitioner, the criterion also helps measure the evidence for criterion (e), Descent from a Historical Tribe. While a governing document is not required, if one is submitted, it also helps the OFA evaluate the evidence for criterion (c), Political

Influence or Authority, by understanding how the petitioner has formally defined its political structure and then measuring the extent to which the petitioner actually abides by its governing document. As noted, no petitioner has ever failed to meet this criterion, because it only requires a statement of the membership criteria. However, if the membership criteria are not adequate and are included in a governing document that also is inadequate, this can greatly hinder the petitioner's ability to meet criteria (c) and (e).

The CNN petitioner submitted copies of its governing document and membership criteria in its supporting documents. This submission was not available to the public for review. Assuming that the governing document and membership criteria are adequate, the petitioner is likely to meet § 83.11(d).

Criterion § 83.11(e), Descent

Explanation of the Criterion and its Requirements

The criterion reads as follows in the 2015 regulations:

The petitioner's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).

> **§ 83.11(e)(1), The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate; or**
>
> **§ 83.11(e)(2), If no tribal roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion by demonstrating descent from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity) with sufficient evidence including, but not limited to, one or a combination of the following identifying present members or ancestors of present members as being descendants of a historical Indian tribe (or of historical Indian tribes that combined and functioned as a single autonomous political entity):**

§ 83.11(e)(2)(i), Federal, State, or other official records or evidence;

§ 83.11(e)(2)(ii), Church, school, or other similar enrollment records;

§ 83.11(e)(2)(iii), Records created by historians and anthropologists in historical times;

§ 83.11(e)(2)(iv), Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and

§ 83.11(e)(2)(v), Other records or evidence.

Criterion § 83.11(e) requires proof that that a petitioner's current membership descends from an historical tribe or from two or more tribes that have joined together and acted politically as a single entity. This criterion requires a petitioner to provide a list of its current members and ancestry charts and vital records that demonstrate how current members descend from ancestors who were members of an historical tribe. Under the 2015 regulations, "historical" is interpreted as meaning "before 1900."

There are several components to this criterion, including: identifying a historical tribe (or two or more tribes that have joined together and acted as a single autonomous entity) for the purpose of calculating descent; whether a petitioner had demonstrated that this tribe existed before 1900; and whether a petitioner has documented descent of the petitioner's members to that historical tribe. Meeting criterion § 83.11(e) is usually more straightforward than criteria § 83.11(b) and (c). What constitutes evidence of tribal community and political influence is often subject to interpretation, but Indian ancestry is not. One can either prove descent from a historical tribe or one cannot. Exceptions can be made for some families that may lack documentation, but who have been a part of the historical tribal community (if there is a high probability that they have Indian ancestry), as well as for members of other tribes who marry into the community. However, non-Indian spouses, non-Indian collateral relatives, and non-Indians adopted by the petitioner should not be included in any official tribal membership roll submitted to the OFA.

It should be obvious that the inclusion of non-Indians in the membership is not acceptable. But there are also important factors that must be considered regarding the inclusion of those individuals who can demonstrate Indian descent. In addition to being able to prove ancestry, it must also be shown (in order to meet criteria § 83.11(b) and (c)) that a substantial portion of the members descend from families that interacted more or less continually as part of the petitioner's historical

community. The DOI accepts the fact that some family members move away and then later rejoin the community, but it looks askance at members who have not had any social or political connection until recent times. Therefore, the guiding principle should be that a petitioner should not accept a person into membership if either they or their parents and grandparents are not known by present members to have been a part of the petitioner's community. The hard reality is that if there are present members who cannot demonstrate their ancestry and connection to the historical tribe the petitioner is claiming, it is imperative to drop them from membership. This is because their presence on the tribal roll may kill the chances of gaining Federal acknowledgment. It may be possible to add some of these dropped members after a petitioner becomes federally acknowledged, because there is almost no scrutiny by the DOI of the membership procedures of tribes after they are federally acknowledged.

It should be noted that the DOI has in the past made some allowance for petitioner's members who could either not document descent from the historical tribe or for whom there was not sufficient information on which to make a determination. In the Mohegan case, for example, what is now the OFA determined that 15 percent of the tribal membership could not document descent from a historical tribe, but the AS-IA still determined in a Proposed Finding that the tribe met criterion § 83.7(e), which was then the section number for the Descent criterion. The Mohegan petitioner chose to drop those members that could not be documented. However, it was not required to take this action in order to meet criterion § 83.7(e). The precedents of Federal acknowledgment decisions under the 1978 and 1994 regulations indicate that a minimum of 80 percent of a petitioner's current members must demonstrate descent from an historical tribe in order to meet criterion 83.7(e) (see the OFA's 2005 Draft Acknowledgment Precedent Manual, pp. 232-33.)

The petitioner's evidence documenting descent for criterion § 83.11(e) could not be commented on because its genealogical data and records and membership lists were not made accessible. These records are, at least in part, protected from public disclosure under provisions of the Privacy Act and the Freedom of Information Act. The OFA's technical assistance reviews often reveal weaknesses in petitioners' submissions and suggest improvements, but no Technical Assistance letter has been made available to the public for this petitioner. It cannot be determined, absent the genealogical record, whether the petitioner's data and records will be sufficient to permit the petitioner to meet criterion § 83.11(e).

If the present evidence does not meet criterion § 83.11(e), the petitioner is subject to a negative Phase I proposed finding declining Federal acknowledgment under the 2015 regulations (§ 83.26(a)(1)(ii)). Should OFA find that the petitioner fails to adequately demonstrate and document its descent from the individual signers of 1852, 1853, and 1855 Treaties, this would be fatal to the CNN petitioner's case. Under § 83.26(a)(3) of the revised regulations, the DOI can issue a negative

Proposed Finding if a petitioner does not meet criteria § 83.11(d), (e), (f), or (g) during a Phase I evaluation.

Criterion § 83.11(f), Unique membership

Explanation of the Criterion and its Requirements

The criterion reads as follows in the 2015 regulations:

The petitioner's membership is composed principally of persons who are not members of any federally recognized Indian tribe. However, a petitioner may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, a federally recognized Indian tribe, if the petitioner demonstrates that:

> **§ 83.11(f)(1), It has functioned as a separate politically autonomous community by satisfying criteria in paragraphs (b) and (c) of this section; and**
>
> **§ 83.11(f)(2), Its members have provided written confirmation of their membership in the petitioner.**

This criterion is required because the DOI did not want federally recognized tribal components or factions to be able to use the Federal acknowledgment process to break up acknowledged tribes. Even though the Federal government sometimes consolidated unrelated Indian entities on the same reservation, and those historical tribes then became one entity (e.g., the Mandan, Hidatsa, and Arikara Nation of North Dakota), the DOI wanted to make sure that entities that desired to separate would have to do so through Congressional legislation or some other route.

The petitioner asserts that its members are not members of any other federally recognized Indian tribe. The petitioner also claims that its members have provided "unequivocal written confirmation of their exclusive membership in the tribe through their signature on an enrollment form as required by our membership criteria."[94] This information was not available to the public for review. The petitioner appears to meet criterion § 83.11(f).

Criterion § 83.11(g), Congressional termination

Explanation of the Criterion and its Requirements

[94] CNN, 2024 Petition, p. 239.

The criterion reads as follows in the 2015 regulations:

Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. The Department must determine whether the petitioner meets this criterion, and the petitioner is not required to submit evidence to meet it.

Criterion § 83.11(g) is a mandatory requirement because the DOI does not have the authority to acknowledge tribes or tribal members whose Federal relationship was terminated by Congress. Only Congress can restore such a relationship.

The petitioner has asserted that "the Chihene Nde Nation, also known to the United States as the Coppermine and Mimbres Apache Bands and/or the Mimbres Bands of Gila Apaches," has not been the subject of legislation terminating a Federal relationship.[95] Under the revised regulations, a petitioner is not required to submit evidence demonstrating that it meets this criterion because the DOI will determine if the criterion is met. No tribal entities in New Mexico had their Federal trust relationship terminated or were forbidden a Federal relationship. The petitioner appears to meet criterion § 83.11(g).

Conclusion

Phase I

Sections 83.26 and 86.33 of the revised 2015 Federal acknowledgment regulations state that the OFA will review documented petitions in two phases. In Phase I, the Office will determine if a petitioner meets criteria § 83.11(d) through § 83.11 (g). If a petitioner fails to meet any of these four mandatory criteria, the OFA will publish a negative Proposed Finding in the *Federal Register* (see § 83.26(a)(3)) that could lead to the AS-IA issuing a Final Determination declining Federal acknowledgment of the petition as specified in § 83.43 of the regulations. If the OFA determines that a petitioner meets criteria (d) through (g) in the Phase I evaluation, the OFA will publish a positive Proposed Finding that will allow the petitioner to proceed to a Phase II evaluation of the remaining three mandatory criteria (see § 83.26(a)(4)).

We find that it is possible that the CNN petitioner meets criteria § 83.11(d), Governing Document, § 83.11(f), Unique Membership, and § 83.11(g), Congressional Termination. We could not evaluate whether it meets criterion § 83.11(e), Descent, because interested parties are restricted from access to a petitioner's genealogical

[95] CNN, 2024 Petition, p. 240.

data. If the OFA finds the CNN meets all four criteria, it will publish a positive Proposed Finding and the petitioner will proceed to a Phase II evaluation.

As also indicated above, if the CNN fails to meet the Descent criterion, this would lead to publication of a negative Proposed Finding declining acknowledgment and could lead to the AS-IA's issuance of a negative Final Determination. As the regulations now stand (see §83.44), a decision declining Federal acknowledgment would represent the DOI's final agency action under the Administrative Procedure Act (APA) (Part 704 of Title 5 of the *United States Code*). The APA governs the process by which Federal agencies develop and issue regulations.

Phase II

Sections 83.26(b) and 83.33(b) of the acknowledgment regulations provide that for those petitioners found eligible to proceed to a Phase II evaluation, the OFA will review the record to determine if a petitioner meets criteria § 83.12, Previous Federal Acknowledgment, for those that claim it, as does the CNN petitioner. It will also evaluate evidence for the mandatory criteria §83.11(a), Indian Entity Identification, § 83.11(b), Community, and § 83.11(c), Political Influence or Authority. The OFA will then publish a Proposed Finding to either acknowledge the petitioner or decline acknowledgment. A negative finding, if not successfully challenged by the petitioner (see § 83.37 and § 83.38), would result in a Final Determination by the AS-IA to decline acknowledgment [see § 83.43(b)]. A positive finding, if not successfully challenged by interested parties, would lead to a Final Determination to acknowledge the petitioner [see § 83.43(a)].

This evaluation has concluded that the CNN petitioner may have had unambiguous previous Federal acknowledgment for the twenty-five-year period between 1852 and 1877, which would significantly reduce its burden of proof for criterion§ 83.11(b), Community. However, we also conclude that despite this advantage, the petitioner does not have sufficient evidence to meet criteria § 83.11(a), Indian Entity Identification, § 83.11(b), Community, or § 83.11(c), Political Influence or Authority.

Therefore, even if the Chihene Nde Nation is found to meet the Phase I criteria and proceeds to a Phase II evaluation, we have concluded that it will ultimately be the subject of both a negative Proposed Finding and Final Determination declining acknowledgment, and this will be the DOI's final action.