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Elizabeth Appel
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Dear Ms. Appel:

These are comments upon the Preliminary Discussion Draft (“Discussion Draft”) regarding proposed changes to the regulations governing federal acknowledgment of Indian tribes, 25 C.F.R. Part 83. While the undersigned has and continues to represent various petitioning groups in that administrative process, these comments are not made on behalf of any one or more of these present or former clients.¹ Rather, these comments represent the views of the undersigned only, based upon the author’s professional experience with the administrative acknowledgment process.

The importance of the Department’s efforts to reform this process cannot be overstated. The Indian communities that are the focus of these regulations, i.e., non-federally recognized Indian tribes, are at the very bottom of the low socio-economic profile of Indian country. They are typically the poorest, least educated, and most under-served among Indian communities. They have also suffered literally hundreds of years of federal neglect, leaving them to the not so tender mercies of the states and local governments where they reside.² Yet, these communities

¹ In the interest of full disclosure, I continue to represent two tribes that might be affected by changes to the acknowledgment regulations - the Miami Nation of Indiana and the United Houma Nation of Louisiana.

² The Supreme Court’s observation in *United States v. Kagama*, 118 U.S. 375, 384 (1886) applies with particular force to non-federally recognized Indian communities: “Because of the local ill-feeling, the people of the States where they [Indians] are found are often their

have survived and today reflect tribal sovereignty in its purest form. Justice compels that the Department impose as lightly on these communities as possible in determining tribal existence, given their meager resources and admitted federal neglect.

Further, the current federal acknowledgment regulations have been the subject of long-standing and numerous criticisms. As of 2005, now fewer than 28 bills had been introduced in Congress to replace the federal acknowledgment process with a statutory framework. *Indian Issues, Timeliness of the Tribal Recognition Process Has Improved, but It Will take Years to Clear the Existing Backlog of Petitions*, Feb. 10, 2005, GAO-05-347T, pp. 4-5. The Department should be applauded for taking on the important task of reforming this broken process.

The Discussion Draft proposes meaningful changes to the administrative acknowledgment process, changes that will go a long way toward providing justice and fair treatment to non-federally recognized tribes. The most beneficial changes are noted below. However, more can and should be done. When judged against the background of past practice, it is evident that even with the proposed changes the regulations remain unnecessarily restrictive. These comments make three points: first, the past administrative practice of recognizing Indian tribes teaches that more flexibility is appropriate and helpful; second, there are important and helpful changes in the discussion draft; and third, further changes are necessary to insure that reform is complete, effective, and consistent with past administrative practice.

deadliest enemies.”

Past administrative practice of recognizing Indian tribes teaches that more flexibility is appropriate and helpful.

The current regulations were adopted in 1978, literally hundreds of years after the United States first engaged in the business of recognizing Indian tribes, albeit in a haphazard manner. As the American Indian Policy Review Commission found in 1977, the Congress had recognized tribes initially through treaty-making and later through agreements and statutes. Recognition occurred in the words of the Commission as “accidents of history,” that is, because circumstances required the United States to deal with a given tribe, not because the United States considered recognition of the tribe appropriate or just as a matter of policy. *American Indian Policy Review Commission Final Report*, Chap. 11, p. 463 (GPO 1977). As a result, no defining hallmarks of tribalism or definition of tribal existence can be gleaned from Congress’ practice.

In the twentieth century, the Department of the Interior extensively considered the question of tribal existence, particularly as part of the administration of the Indian Reorganization Act of 1934 (“IRA”). Tribal existence was deemed a pre-requisite for the holding of a referendum on the adoption of a tribal constitution under the IRA and unclear cases were generally determined by the Solicitor’s Office at the Department of the Interior. In his original *Handbook of Federal Indian Law*, Felix Cohen said the following about the tribal existence inquiry by the Department:

The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a “tribe” or “band” have been:

- (1) That the group has had treaty relations with the United States.
- (2) That the group has been denominated a tribe by act of Congress or Executive Order.
- (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- (4) That the group has been treated as a tribe or band by other Indian

tribes.

(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.

F. Cohen's Handbook of Federal Indian Law (1942), p. 271. Cohen noted that ethnological and historical considerations are entitled to great weight, that a political character to the Indian community is necessary, and contemporary functioning as a distinct group is essential. *Id.*, 271-272.³ Notably, the notions that evidence of tribal existence must be continuous every 20 years from time immemorial or must reflect a particular set of these considerations (as opposed to others) are missing in administrative practice before 1978.

Further, this flexible and less restrictive approach is supported by Supreme Court decisions that address the limits of federal authority to recognize Indian tribes. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court concluded that the pueblos fell within Congress' authority to manage relations with Indian tribes. Regarding the extent of Congress' authority to recognize tribes, the Court observed:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

Id., at 46. No court has ever overturned a congressional or executive determination to recognize an Indian tribe based on this standard. *Handbook of Federal Indian Law* (2012 ed.), §3.02[4].

³ These considerations are reflected in the following opinions of the Solicitor's Office: Memorandum of Solicitor, Interior Department, Feb. 8, 1937 (Mole Lake); Memorandum of Solicitor, Interior Department, July 15, 1937 (Creek Nation); Memorandum of Solicitor, Interior Department, Dec. 13, 1938 (Miami and Peoria Indians).

This *Sandoval* standard is consistent with the definition of tribe formulated by the Court in *Montoya v. United States*, 180 U.S. 261, 266 (1901), where the Court formulated a federal common law test for tribal existence for purposes of the Indian Depredation Act of 1891: “By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory...”⁴ Again, these formulations of tribal existence did not require continuous proof of mandatory criteria every twenty years since time immemorial.

Despite the absence of any such requirement in past practice or the law, the Department adopted a standard of tribal existence in the 1978 regulations - the Department’s first regulatory attempt to define the term - that imposes mandatory criteria requiring continuous proof (i.e., proof of each criterion every twenty years) from the time of first sustained white contact (defined in guidelines as no earlier than 1789). Based on their early experience with the process, petitioning tribes nonetheless welcomed the new administrative process as a reasonable one, one that would be interpreted and applied with the same flexibility historically applied to the question. Over time this changed, with every successful petition requiring an increasing level of detail with no quarter given for so called gaps in documentation to prove continuous existence. In short, the documentary burden increased and the flexibility decreased over time.⁵

⁴ Before the 1978 regulations, courts also used the *Montoya* standard to determine tribal existence for purposes of the 1790 Indian Trade and Intercourse Act. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1979). In these cases, the courts typically required proof of continuity since 1790. But this requirement arose from the need to prove coverage by the federal statute enacted in 1790, not from a general requirement related to proof of tribal existence.

⁵ A simple comparison illustrates this phenomenon. The first tribe acknowledged under the administrative process was the Grand Traverse Band in 1980; the Grand Traverse proposed finding (the comprehensive analysis under all the mandatory criteria) covered 78 pages. The

One of the tribal petitioners challenged the acknowledgment regulations as a departure from its past practice and as beyond the Department's authority. The courts held otherwise, not because the stringent standard was necessary or the only way to define tribal existence, but because the definition adopted by the Department was a reasonable one adopted in the exercise of the Department's discretion, one to which courts were obliged to defer. *Miami Nation of Indiana v. Babbitt*, 887 F. Supp. 1158 (N.D. Ind. 1995), *aff'd* 255 F.3d 347 (7th Cir. 2001). There is no case law to the contrary, i.e., indicating that the particular definition of tribal existence now in the acknowledgment regulations is necessary or essential as a matter of law. It is clear, then, that the Department has the discretionary authority to reconsider its regulatory definition of tribal existence. The discussion draft does so in meaningful and helpful ways, ways that return to the more flexible and reasonable standard of tribal existence previously employed by the Department. Those changes are welcomed and should be adopted.

The Discussion Draft makes important and helpful changes.

The Discussion Draft proposes a number of changes that would make the tribal existence inquiry more consistent with the Department's past practice and guided by due regard for the real world experience of non-federally recognized tribes. These most important of these changes are listed below and, for the reasons stated, the author encourages the Department to move forward with these changes. The changes are listed in order of appearance in the Discussion Draft, not in order of importance.

most recently acknowledged tribe under the administrative process was the Shinnecock Tribe; the proposed finding covered 229 pages. See www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/index.htm.

1. Revised definition of continuously or continuous, § 83.1. The Discussion Draft proposes to shorten the time span for the continuity requirement from first sustained contact to 1934. Presumably, 1934 was chosen because of the dramatic change in federal policy inaugurated that year with the enactment of the IRA. This is a fair beginning point for the inquiry. First, it requires petitioners to establish 80 years of existence, a time period that proves tribal existence as defined by *Montoya*, above, and the Department's past practice, which required no particular time depth. Second, it allows non-federally recognized tribes to take advantage of the change in federal policy that year, a policy to support and encourage tribal existence and self-governance.⁶ It is, therefore, reasonable to use this change in federal policy as the beginning point for evidence of continuous tribal existence.
2. Adoption of preponderance of evidence standard, § 83.6(d)(1). By proposing the preponderance of evidence standard, the Discussion Draft acknowledges that history is never absolute. Every tribal history contains supportive and unfavorable data. Adoption of this evidentiary standard brings the process closer to the real life experience of petitioning tribes.
3. Deletion of criterion (a), identification of an Indian entity. This criterion does not go to the essential nature of tribal existence. Instead, it inquires whether outsiders have recorded tribal existence since 1900. As such, it is not appropriate as a mandatory criterion.
4. Addition of relevant evidence on proof of (e), descent from an historic tribe, § 83.7(3)(1)(v).

⁶ There can be no question that the IRA was intended to reverse the debilitating effects of federal neglect. The statute specifically authorized the reorganization of tribes as a means of strengthening tribal communities. 25 U.S.C. § 476; *Morton v. Mancari*, 417 U.S. 533, 542 (1974). The statute also specifically authorized the organized of previously unrecognized so-called half blood Indian communities. 25 U.S.C. § 479; *United States v. John*, 437 U.S. 634 (1978).

Even though the current regulations do not explicitly so state, practice under the regulations has relied almost exclusively on genealogical proof of descent from an historic tribe. This is an unreasonable requirement. Genealogical records do not exist for certain periods of the history of non-federally recognized communities, through no fault of those communities. It must be remembered that such records are maintained by the dominant society, not the communities themselves. The communities themselves have no reason to keep such records. And if the dominant society chose to ignore the Indian community or, worse, misidentify it, then the records required by current practice under criterion (e) would not exist and the petition would be denied. The Discussion Draft makes a modest improvement on this criterion by providing that records created by historians and anthropologists are also acceptable evidence.

5. Streamlined previous federal acknowledgment provisions, § 83.8. The Discussion Draft proposes to modify the previous federal acknowledgment provisions by limiting the community inquiry for previously acknowledged tribes to contemporary community (usually interpreted to mean within last 10 years) and political authority rather than continuously since the last evidence of federal acknowledgment. This proposed change finally gives due regard to the solemnity of federal acknowledgment. Because of other provisions in the regulations, such previous federal acknowledgment has not been terminated by Congress. Under such circumstances, it is entirely appropriate that the Department of the Interior respect a federal relationship that has not been terminated by foreshortening any further requirements upon proof of previous federal acknowledgment.

6. Expedited Favorable Finding, § 83.10(f). For the first time, the Discussion Draft proposes to add grounds for an expedited favorable finding, as well as grounds for an expedited negative.

The expedited favorable is available to petitioners which can prove the existence of a state reservation it has maintained since 1934 or land held by the petitioner for the United States at any point since 1934. At all times and under all criteria, the existence of a land base for a tribe has been deemed a hallmark of tribal existence. Under these circumstances, there has been of necessity a determination by either a state or the United States that a tribe exists. Such a determination is entitled to the deference given it by the Discussion Draft. As to land set aside by the United States, this provision is closely akin to the previously acknowledged provisions and is wholly justified. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (land set aside by the federal government for the use and occupation of a native community is Indian country.) Similarly, land set aside or dedicated for the exclusive use of a tribe by a state government reflects a state judgment that the tribe exists as a separate political entity. And for many non-federally recognized tribes, states are in a far better position to make a judgment about the continued existence of an Indian community and such judgments are entitled to deference in the federal system.⁷

7. Hearing upon Negative Proposed Finding, § 87.10 (n). In the event of a negative proposed finding, the Discussion Draft gives petitioners the opportunity to request a hearing to test the factual basis of the proposed finding. This is an important change that introduces an element of due process for petitioners. For the first time, technical staff analyses and conclusions would be subjected to the rigors of examination.

⁷ The Supreme Court has noted that, due to historical circumstances, some tribes on the east coast have had long-standing relationships with states in which they reside. The existence of these state relationships is not inconsistent with a simultaneous federal relationship. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

8. Previously Denied Petitioners, § 87.10 ®. The Discussion Draft proposes to change the acknowledgment process in the face of serious and sustained criticisms of that process. As noted above, the criticisms include arbitrary and unpredictable decisions, unfair documentary burdens, and unrealistic requirements. Petitioning tribes that have been subjected to such a process are entitled in all fairness to another review, if those petitioners can demonstrate a possible different outcome under the revised process. The Discussion Draft authorizes precisely this. This is a fundamental and essential part of reform, if the reform is to be considered serious, effective, and just.

All of these changes (and more, see below) are necessary to make the proposed changes productive. Without these, revised regulations will not produce the change sought by the Department.

Two Additional Changes Must Also be Made.

While the proposed changes advance the cause of fairness and justice to non-federally recognized tribes significantly, complete reform requires at least two additional changes, in the author's view. Those are listed below in order of importance.

1. The Discussion Draft proposes to reduce the time depth on the core mandatory criteria, except for the proof of descent from historic tribe. This must be changed. If it is not, then the same burdensome and unreasonable documentary proof requirement that the Discussion Draft proposes to eliminate for the other criteria remains in effect for this one criterion. Even worse, by keeping the sustained white contact beginning point for this single criterion could completely undermine the shortened time depth for community and political authority. This is so because an "historic

tribe” requirement that goes back earlier than 1934 would allow the processing staff to inquire into community and political authority before 1934, all in the name of insuring that the petitioner descends from an “historic tribe.” Integrity of the overall process, then, requires that the same time depth be required for all the core criteria - community, political authority, and descent from an historic tribe. Further, this extreme time depth for the historic tribe criterion is unnecessary to insure that only legitimate Indian communities are recognized. If a petitioner demonstrates Indian ancestry as of 1934, the petitioner has by biological necessity also proved that its members descend from historic Indian people as of 1789. And because the petitioner must otherwise demonstrate community and political authority, there is no danger that a collection of unrelated Indian people will be recognized. If the goal is complete reform of the process, this change is absolutely vital.

2. As do the existing regulations, the Discussion Draft recognizes the close connection between the community and political authority criteria. In the event either is proved by so-called high evidence, then this evidence is deemed to prove the other criterion as well. For example, if for a given period a petitioner demonstrates community by an in-marriage rate of 50% or higher, that is deemed evidence of political authority as well for the same period of time. Anthropologically, this makes sense. A community cannot exist without political leadership. Given this admitted relationship, it makes no sense to limit the reciprocal proof to high evidence only. In other words, if a petitioner can demonstrate community for any period by any proof, that proof should be deemed acceptable for political authority as well, and vice versa. This would make these 2 criteria alternative, so that proof of one necessarily proves the other; independent proof of both for all periods would no longer be necessary. This would re-introduce the element of flexibility

that has traditionally informed the tribal existence inquiry. It would allow petitioners to establish either community or political authority continuously since 1934, with full confidence that both must necessarily exist.

With these additional changes along with the ones already proposed in the Discussion Draft, the Department will have for the first time in this country's history extended the federal hand to non-federally recognized tribes in a fair and even-handed manner. It is about time.

Sincerely,



Arlinda F. Locklear