



THE BURT LAKE BAND OF
OTTAWA & CHIPPEWA INDIANS, INC.

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September 23, 2013

By e-mail

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW., MS 4141
Washington, DC 20240

consultation@bia.gov

Re: 1076–AF18: comments of the Burt Lake Band of Ottawa and Chippewa Indians on proposed revisions of 25 C.F.R. Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*

Dear Ms. Appel:

Thank you for the opportunity to comment on the preliminary discussion draft of proposed revisions to the procedures for establishing that an American Indian group exists as an Indian Tribe. An overhaul of these procedures is long overdue, and we applaud the Department's initiative in undertaking this effort.

The Burt Lake Band

The Burt Lake Band of Ottawa and Chippewa Indians (the Burt Lake Band or the Band) is a sovereign Indian Tribe with its headquarters in Brutus, Emmet County, Michigan. It has approximately 250 enrolled members, a constitution, and an elected tribal council.

Why We Comment

The Burt Lake Band was previously known as the Cheboiganing Band of Ottawa and Chippewa Indians.¹ The United States recognized the Cheboiganing

¹ In some documents, Cheboiganing is rendered as Cheboigan or Cheboygan.

Band on a government-to-government basis through the 1836 Treaty of Washington, 7 Stat. 491, and the 1856 Treaty of Detroit, 11 Stat. 621. In 1911 the United States prosecuted litigation on behalf of the Band.² The State of Michigan has formally recognized the Burt Lake Band since 1986.

Despite this evidence that the Burt Lake Band has long existed as a Tribe with that existence acknowledged by the United States, the Bureau of Acknowledgment and Research (the BAR, now the Office of Federal Acknowledgment (OFA)) did not agree that we should be included on the Department's list of Federally recognized tribes eligible to receive services from the Bureau of Indian Affairs. After 21 years of examining our petition for acknowledgment and the many volumes of evidence we submitted, in 2006 the BAR declined to acknowledge that we exist as an Indian Tribe. In rejecting the Band's petition, the BAR was nonetheless satisfied that the Band had been identified as an American Indian entity on a substantially continuous basis since 1900.

Despite the BAR's decision, we continue to exist and to exist as an Indian Tribe. We have not gone away, and we will not go away.

We consequently have a profound interest in reforming the process through which Indian Tribes are acknowledged, both to allow our own status to be correctly recorded and to assure that others who may be similarly situated are not subjected to a similar ordeal.

Our comments

In general, the Burt Lake Band supports the revisions set forth in the preliminary discussion draft. Our efforts to secure acknowledgment through the BAR process under the current regulations, as noted above, took more than 21 years and ended unfavorably. To satisfy the regulations, we submitted volumes of historical, anthropological, and genealogical research and documents.

Kevin Gover, a former Assistant Secretary-Indian Affairs, described the BAR professional staff as so obsessed with its document-by-document analysis of tribal history and leaf-by-leaf look at family trees that it had lost the ability to see a broad picture. Tribes with undeniable histories and continuity confronted unreasonable, almost impossible, standards of proof.³

² *United States v. McGinn*, U.S. Circuit Court for Eastern Michigan., Equity No. 94.

³ *Indian Country Today*, Aug. 21, 2001.

That was the Burt Lake Band's experience. We are a small Tribe and, like many Native Americans, we are not wealthy. It is no secret that, under the current regulations, a Tribe seeking acknowledgment cannot afford to do so unless it has financial backing, and that this financial backing often comes from gaming interests. The very fact of this backing generates political opposition to the Tribe's efforts, not only from those opposed to gaming in general but from neighboring acknowledged Tribes that have casinos and do not want competition.

We note that the Burt Lake Band's efforts to gain acknowledgment through the BAR process started in 1985, before the Supreme Court decision that gave birth to Indian gaming.⁴

Threshold determination. We suggest that the proposed regulations specifically recognize the threshold authority of the Assistant Secretary to restore to the list of acknowledged Tribes any Tribe omitted from that list because of administrative error. If the administrative error is clear, neither the Tribe nor the OFA should be required to go through the still arduous Part 83 procedures. If is not clear that an administrative error was committed, the Assistant Secretary would always be free to require the Tribe to go through the Part 83 procedures.

Burden of proof. Assistant Secretary Gover, in his comments mentioned above, noted the unreasonable, almost impossible, standards of proof Tribes are required to meet to satisfy the Part 83 criteria. Most Indian Tribes historically did not have written languages and relied on oral tradition to pass knowledge from one generation to the next. The acknowledgment process, however, heavily relies on histories, anthropological accounts, government records, and other written documents. Most of these documents were not prepared by members of the petitioning Tribe but by non-Indian outsiders. Even if a Tribe had these documents in its possession at one time, an impoverished Tribe without secure storage facilities may be hard-pressed to locate and present the documents when it petitions for acknowledgment.⁵

Because of these factors, the Burt Lake Band believes § 83.6(e) of the proposed revised regulations is particularly important. That provision requires that the evaluation of a petition take into account that evidence is simply not available for some situations and time periods. It also makes clear that fluctuations in tribal

⁴ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁵ As the *Cobell* litigation demonstrates, even the Federal Government with its supposedly secure storage facilities has difficulty in locating and providing documents related to tribal affairs that it had a clear duty to maintain.

activity during particular periods should not in themselves be a cause for denying acknowledgment.⁶

Re-petitioning. The Burt Lake Band obviously supports § 83.3(f) and § 83.10(r), allowing a group previously denied Federal acknowledgment to re-petition if it would qualify under the revised regulations. Allowing new petitioners to be recognized under less onerous criteria without giving the same opportunity to a Tribe denied acknowledgment under prior more stringent criteria would be grossly unfair.

When a Tribe re-petitions, any criteria found to have been met in the review of its earlier petition should be conclusive for the new petition without further review. Given the stringent standards previously applied, administrative economy would not be served by revisiting the earlier conclusion in the Tribe's favor.

Distinct community. Indian Tribes, like many other groups and organizations in American society, undergo change over time, including shifts in membership. Tribes adapt to modernization just as does any other group, and should not lose the protection of Federal law because they adapt. Adaptation does not mean that the Tribe has voluntarily abandoned its political existence or has been assimilated into the non-Indian society. A Tribe should not be denied acknowledgment because of its failure to meet an unduly restrictive definition of "distinct Indian community."

Change is often caused by circumstances beyond the Tribe's control, for example, when tribal members seek work outside of the traditional tribal area during difficult economic times. Smaller Tribes are particularly susceptible to economic fluctuations.

Change is also often caused by the actions of the neighboring non-Indian communities. The Burt Lake Band can attest to a particularly egregious example: In 1884, a local timber baron illegally obtained tax titles to the Cheboiganing Band's communal trust-property. In 1900, armed with a writ of assistance from the state court and with the aid of the local sheriff, he forcibly removed Band members from their homes, doused the buildings with kerosene, and burned the Band's village to the ground, leaving the members of the Band immediately homeless and destitute. The members of the Band to this day refer to this incident as the "burnout."

⁶ In some circumstances, local prejudice against Indians may have caused members of a Tribe to "lay low" to avoid trouble. What appears to be a period of inactivity may have just been a period when activities were not publicized.

Because of circumstances beyond their control, many tribal members have been forced to reside in a geographical area that is not exclusively or almost exclusively composed of members of the group. Tribes should not be prejudiced by actions that are reasonable responses to economic circumstances, especially when—like the burnout—those responses were caused by the neighboring non-Indian community. The incursions of outsiders into traditional tribal areas likewise should not count against a Tribe seeking acknowledgment.

For a small Tribe like the Burt Lake Band, it does not make genetic sense to require that a specified percentage of the marriages in the group be between members of the community.

The denial of federal acknowledgment can also force shifts in the tribal community. Tribal members will quite naturally seek to affiliate with neighboring Tribes that are acknowledged and can provide access to the federal benefits and services available only to members of acknowledged Tribes. Affiliating to obtain benefits and services that should be available to them as members of their own Tribe should not be seen as a repudiation of their own Tribe.

Tribes should not be prejudiced because their members enter into affiliations of convenience with other tribes to obtain benefits and services to which they are entitled under the treaties signed by their ancestors.⁷

Conclusion

The Burt Lake Band supports revision of the Part 83 regulations. The preliminary discussion draft is a positive step toward that revision.

We hope the Department will take our comments into account in preparing the next draft of the regulations. We look forward to seeing that draft.

Do not hesitate to contact us if we may be of further assistance.

Sincerely,

Bruce R. Hamlin

Bruce Hamlin
Tribal Chair

⁷ To be sure, some who could be members of a petitioning Tribe can also legitimately be members of another Tribe, and may choose enrollment in the other Tribe rather than in the petitioning Tribe.