AAIA
Association on American Indian Affairs

Executive Office
966 Hungerford Drive, Suite 12-B
Rockville, MD 20850
Phone: 240-314-7155 Fax: 240-314-7159
E-Mail: general.aaia@verizon.net Website: www.indian-affairs.org

Jack F. Trope
Executive Director

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Faith Roessel
Navajo

AAIA Language Program
P.O. Box 509
Agency Village, SD 57262
Phone: 605-698-4400 x367
Fax: 605-698-7067
E-mail: tdc.aaia@verizon.net
www.aaialanguageprogram.org

September 13, 2013

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative
Action – Indian Affairs
1849 C Street, NW
MS 4141-MIB
Washington, DC 20240

Re: Amendments to Part 83 – Preliminary Discussion Draft

Dear Ms. Appel:

Please accept this letter as a response to the Preliminary Discussion Draft of the Part 83 regulations that has been circulated.

The Association on American Indian Affairs is an 91 year old Indian advocacy organization located in South Dakota and Maryland and governed by an all-Native American Board of Directors who are members of federally-recognized tribes from across the country. Our current projects focus to a considerable extent in the areas of cultural preservation, youth/education, and sovereignty, including federal recognition of unrecognized Indian tribes. In regard to the latter, we have been working to support tribes seeking federal acknowledgment for more than 25 years, most recently working with the Pueblo of San Juan de Guadelupe.

As a whole, we believe that the changes to Part 83 included in the discussion draft would be a major step forward – although we do have concerns about a few provisions which will be described below. In general, we believe that the changes move the federal acknowledgment process back toward what it was originally intended to be – a mechanism for differentiating between legitimate Indian tribes and communities that have maintained their integrity through time and newly-formed Indian groups that are not legitimate tribes. In view of the lengthy delays in considering petitions and the ever-changing and increasing burden of proof upon petitioners, we agree with the general consensus that the current system clearly is broken. Federally unrecognized tribes that have survived in spite the array of forces pushing them to extinction deserve better and we believe that changing these regulations generally along the lines that have been proposed would be a big step in the right direction.

In particular, we agree with the following changes:

- Utilizing 1934 as the date from which petitioning groups must demonstrate community (§83.7(b)) and political influence (§83.7(c))
- Elimination of the requirements in §83.7(a)
- Providing for "expedited positive and negative findings"
- Allowing tribes who have previously been denied to reapply under the new regulations and tribes who are currently under active consideration the options of proceeding under the new regulations
- Eliminating the appeals process involving the Interior Board of Indian Appeals
- Recognizing that the existence of a "continuous line of group leaders" recognized by the community is conclusive evidence of political authority
- Recognizing that conclusions of historians and anthropologists can be used to support historical descendancy under §83.7(e)
- Requiring that a positive final determination be issued whenever the preliminary decision is positive and no one has objected to the finding
- Eliminating the letter of intent
- Clarifying that "preponderance of the evidence" is the appropriate standard

We have a number of significant concerns, however. We will address these issues in our specific section-by-section comments. The most significant changes that we are recommending are the following:

- Remove the continuing requirement in §83.7(e) that tribes trace their ancestry back to "a historical Indian tribe", i.e., back to first contact, and replace it with a requirement that ancestry be traced back only to 1934 if it can be established that a community existed at that time or to such earlier point in time as the existence of a community can be established.
- Have the preliminary decision issued by the Assistant Secretary of Indian Affairs, and not the Office of Federal Acknowledgment; if the preliminary decision is negative, give the petitioner the option of submitting new information/argument to the AS-IA and having the AS-IA makes the final decision or having a hearing before and the final decision made by the Office of Hearings and Appeals.

- Do not require that a petition be updated once it is filed; the filing date should be the date at which the criteria must be met unless a petitioner would prefer to submit updated information and be evaluated as of the date of active consideration.

- Include a preamble explaining why the 1934 date is justified.

The following are section by section recommendations:

§83.1 Definitions

We recommend inserting the word "relatively" before the word "consistent" in the definition of "community".

We recommend changing the words "substantially without interruption" to "without substantial interruption" in the definition of "continuously" or "continuous".

We would delete the definition of "historically, historical, or history". If the changes that we propose to §83.7(e) are adopted, then this definition is unnecessary and potentially misleading.

§83.3 Scope

We would particularly note that we agree with the changes in section (d) that allows tribes that have functioned autonomously since 1934 to be acknowledged and section (f) which allow previously denied tribes to reapply under certain circumstances.

We also agree with section (g)(2) that tribes under active consideration should have the option of proceeding under either the existing regulations or the new regulations, but believe that they should be clarified to allow tribes currently under active consideration to obtain a proposed finding before they need to make a decision about which regulations to utilize.

§83.6 General provisions for the documented petition

We would particularly note that we agree with changes to sections (c) through (f). These changes are vitally important to redress what we perceive as the current institutional bias against recognition, particularly the expedited favorable provision and the section establishing a preponderance of the evidence standard with the facts viewed in the light most favorable to the petitioner.

§83.7 Mandatory criteria for Federal acknowledgment

We agree with the deletion of criteria (a), provided that tribes are permitted to submit the types of evidence previously specified in order to meet the remaining criteria. We believe that this evidence might be particularly relevant to meet criteria (e) if it is changed as we (and others) are recommending.

We strongly agree with the change in section (b) to replace "from historical times" to 1934. We would recommend that "a predominant portion" be replaced with "a substantial portion". We

would also suggest that language be added similar to the language in the Native American Graves Protection and Repatriation Act regulations (need cite) – specifically that the decision should be based upon the totality of the evidence and should not be precluded solely because of some gaps in the record. We would also create a rebuttable presumption that any interruption in tribal activity that is less than 25 years is not substantial. In sections (b)(1)(vii) and (b)(2)(iii), we would put the language "religious beliefs and practices" back into the regulations in addition to the other examples provided. In some cases, shared religious belief may be one of the strongest indicia of community. In sections (b)(2)(i), (ii), and (iii), we suggest using 30%. This would track with the criteria under the Indian Reorganization Act providing for approval of a tribal constitution if the vote cast is 30% of those community members entitled to vote in the election. Finally, we would add attendance at boarding schools by tribal members as one of the pieces of evidence that meets the section (b) criteria, provided that the boarding school records identify the individuals as belonging to a community.

We strongly agree with the changes in section (c) replacing "historical times" with "1934" and including the language providing that the criteria is met if a petitioner can show a continuous line of group leaders and a means of selection or acquiescence by the group's members. We suggest adding the same language similar to the NAGPRA regulations that we recommended for section (b) above. We also suggest adding references to attorney contracts, claims filings and other court cases as evidence of political authority.

We strongly urge the Department to change section (e) in the same way that it has changed section (b) and (c) by replacing "historical Indian tribe or tribes" with an "identifiable tribe or tribes in a distinct community" that existed in 1934 or any earlier point in time. Ancestry would need to be traced from that time only. Evidence of the existence of an Indian community may include citations by historians, anthropologists, ethnologists, citations in government reports and correspondences, studies by agencies such as the Smithsonian and the Bureau of Ethnology and other serving as arms of the government and the tribe being eligible for government services while also being identified as a community. It should also be specified that some of the current section (a) evidence may be used to support a finding that an Indian community existed in 1934. We also believe that the identification of a community within 20 years of 1934 should create a rebuttable presumption that the community existed in 1934. In addition, because some states refused to call communities "Indian" particularly during the segregation era, we believe that if there an identifiable community in 1934 that was later identified as Indian (before the FAP process commenced) that should also create a rebuttable presumption that an Indian community existed in 1934.

This change is consistent with Congressional policy. In 1993-94, the BIA took the position that "historic" tribes – those directly traceable to a tribe that existed at the time of first contact – had greater rights than "created" tribes, namely those tribal communities that clearly were (and are) Indian communities and were recognized by the federal government, but which were not directly traceable to a tribe that existed in the same form throughout history. Congress rejected this distinction, see House Report 103-781 (1994), and amended the section 16 of the Indian Reorganization Act to make clear that all tribes -- whether "historic" or "created" -- have equal rights as federally-recognized tribes. In short, these amendments affirmed the basic principle that any *bona fide* Indian community that existed in 1934 should have been given the opportunity to organize and be recognized. If a community was overlooked – or worse yet denied the

opportunity to organize because of the racism of the time – that should be rectified now provided that the connection with a present day community can be established.

§83.8 Previous Federal acknowledgment

Section (c)(2) should be edited to include tribes that have been recognized by a Federal court decision.

§83.10 Processing of the documented petition

We believe that greater recognition of the factual and legal arguments of interested and informed parties in first sentence of section (a) is misguided. It will only encourage a more adversarial process. The last sentence allowing consideration of evidence submitted by interested or informed parties is adequate by itself.

Some criteria and limitations must be placed upon the ability of OFA to suspend consideration of a petition under section (e)(2). The regulations as drafted give OFA almost unlimited authority to suspend consideration for an unlimited amount of time, authority that appears to not even be subject to review by the Assistant Secretary. We strongly oppose this unchecked grant of power to OFA. The Assistant Secretary must need to approve any suspension and, unless the petitioner has requested or consents to the suspension, there should be specific and narrow criteria that must be met for suspension to take place. Otherwise, the time limits in the regulations become meaningless.

We support the expedited negative and favorable findings sections [(f) and (g)], except that we recommend that an additional expedited favorable criteria should be added to section (g)(3) – where there has been an official state action to provide specific and unique benefits to an Indian community, for example, special schools, so long as there is a minimal showing that a significant number of the descendants of that community are still living in that community if the benefit is no longer provided.

In section (h), it should be made clear that any petitioner currently under active consideration does not lose its place in line if it chooses to proceed under the new regulations. Language should also be added indicating that a tribe's petition should be considered as of the time that it is filed. Tribes should not be required to update their petitions when they are placed on active consideration. It is an unfair burden on tribes to be required to do this when the delays in considering the petition are entirely because of federal inaction due to budgetary limitations or otherwise.

We strongly oppose the provision in section (i) providing OFA with the authority to issue preliminary decisions. There is a widespread belief among past, present and future petitioning tribes that OFA has been biased against them and a big part of the problem. We do not believe that it is a solution to further empower that office. Rather we believe that OFA should be restricted to collating information and making a recommendation and that the preliminary decision should be made by the Assistant Secretary of Indian Affairs.

Consistent with the above recommendation, we recommend that section (j) should be changed to provide tribes with a choice if the preliminary decision is negative. They should be allowed to

submit new information/argument to the AS-IA or choose a more "adversarial" hearing before the Office of Hearings and Appeals. In either case, third parties would be allowed to submit information following a preliminary determination (whether positive or negative), but should never be allowed to be a party to the appeal.

We support the remaining changes in this section [subsections (k) – (r)], in particular the sections authorizing previously-denied tribes to reapply under the new regulations and the provision requiring that a preliminary positive determination must be affirmed if there is no objection. We would add language to section (r) indicating that decisions under the old regulations should not be considered to be precedent for decisions made under the revised regulations.

§83.11 Independent review, reconsideration and final action

We agree with the deletion of this section.

Thank you for considering these comments.

Sincerely,

Jack F. Trope
Executive Director