Chihene Nde Nation of New Mexico

TO: Bureau of Indian Affairs, Office of Regulatory Affairs & Collaborative Action
FROM: Manuel Paul Sanchez, Chairman
Chihene Nde Nation of New Mexico
DATE: August 31, 2014
RE: **BIA-2013-007 (1076-AF18)**

Accompany this cover letter are the comments of the Chihene Nde Nation of New Mexico regarding the Federal Acknowledgment Proposed Rule Docket ID: BIA-2013-007 (1076-AF18). The Chihene Nde Nation of New Mexico is currently a non-federally recognized Tribe which has submitted a letter of intent to submit to the BIA Federal Acknowledgement Process. However, we are still in the process of completing our full submission. We currently plan to provide the full submission within the next 90 days.

We are grateful to have the opportunity to comment on these proposed rule changes.

Most Respectfully,

Manuel P. Sanchez

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CHIHENE NDE NATION
OF NEW MEXICO

COMMENTS ON
FEDERAL ACKNOWLEDGMENT PROCESS PROPOSED RULE
BUREAU OF INDIAN AFFAIRS
DOCKET ID: BIA-2013-007 (1076-AF18)

The Chihene Nde Nation of New Mexico respectfully submits their comments on the Federal Acknowledgment Process Proposed Rule, Docket ID: BIA-2013-007 to the Bureau of Indian Affairs, Office of Regulatory Affairs & Collaborative Action, U. S. Department of the Interior, 1749 C Street NW., MS 4141, Washington, DC 20240.

The Chihene Nde Nation views the proposed rule as a positive step in streamlining the process and an attempt at eliminating arbitrary and capricious decision making in considering a petition for federal acknowledgment. The proposed rule must raise the level of transparency in the acknowledgment process while maintaining precise and exacting standards.

The following comments of the Chihene Nde Nation are presented initially as positive and supportive comments and secondly, as proposed and suggested additional changes to the Proposed Rule. This Proposed Rule which will become the regulations petitioners must comply, should state within the regulations that evidence submitted by a petitioner must be interpreted within the context of the petitioner's historical circumstances, cultural and social dynamics.

Supportive Comments and Statements

The following are supportive comments and statements for the changes that have been suggested by the Bureau of Indian Affairs which the Chihene Nde Nation supports as follows:

1. The Preamble should include language that indicates that prior negative decisions of the Office of Federal Acknowledgment should not be used to interpret the terms of these new revised regulations. (83.2)

2. Replacing the term “Indian group” with “petitioner” which may be viewed as demeaning the inherent status of historic tribes and communities.

3. The elimination of the requirement to file a letter of intent.

4. The elimination of criterion (a) in the current regulations, which requires evidence from outside observers from 1900 to the present.

5. The establishment of 1934 as the year from which a petitioner must prove social community and political authority under criteria (b) and (c).

6. The definition of historical to mean 1900 or earlier. This should be restated for each criterion to ensure its application.

7. The definition of “Tribe” as any Indian tribe, band, nation, pueblo, village or community.”

8. The inclusion of Alaska Native villages and tribes as eligible petitioners.

9. The ability for tribes that had previously received negative final determinations to reapply under the new rules. The evaluation as to whether a petitioner meets the requirements to repetition will be determined by the Office of Hearing and Appeals.

10. Clarification of the “reasonable likelihood” standard.

11. Flexibility in the format and type of evidence submitted by petitioners.

12. The fact that a definitions section is included and should be referenced in the review of an application in order to safeguard the spirit of the new regulations.

13. The definition of “substantial interruption” as generally more than 20 years.

14. The provision that tribes currently on active status can chose to petition under the new regulations or proceed under the current regulations needs further clarity on how that is to be done and what is required of the tribes that wish to proceed under the new regulations.

15. The treatment of petitioner’s members and ancestors as Indian who attended boarding schools or received an Indian education to serve as evidence of community.

16. Recognition that names or identification by outside entities may change over time. It should be clearly stated that various, or even disparaging and depreciatory historic references used to identify the petitioner should not weigh negatively against Indian identity, but could be used to prove the uniqueness of the community.

17. The definition of predominant portion as thirty percent (30%).

18. The inclusion of a provision that having a state reservation or federal land holdings establishes social community and political authority.

19. Recognition that political authority should be understood in the context of the Tribe’s history, culture, and social organization. The evaluation of the criteria should be understood in the context of the Tribe’s specific history, geography, culture and social organization.

20. The determination that the time period for proving descent from a historical tribe or tribes is 1900 or earlier.

21. The improvement in transparency by requiring the Office of Federal Acknowledgment to provide copies of comments and materials to the petitioner.

22. The opportunity for a petitioner to respond to comments prior to the issuance of a Proposed Finding.

23. The opportunity for a petitioner to request a hearing before an independent body.

24. The elimination of the Interior Board of Indian Appeals from the recognition process.

25. The expedited final determination if no comments are received.

SUGGESTIONS OR ADDITIONS

1. **Remove the Third Party Veto.** Third parties should not have the power to veto a Tribe's desire to re-petition. In the alternative, the third parties could be given notice of the reapplication and be given an opportunity to participate in the hearing that determines whether petitioner meets the criteria to re-petition. This opportunity to participate should be based on whether the third party has information pertinent to whether the petitioner meets the standards to repetition. Because the relationship is a political relationship between the federal government and the tribe, a third party should not be able to claim that it has a right to rely on the government's denial of a past decision to not approve its petition through the Federal Acknowledgment Process, especially if the process was flawed.

2. **Clarify time frame for tribes who re-petition.** Under section 83.4, tribes reapplying for recognition should be given a time frame for review. It is unclear whether they must go to the back of the line once the Office of Hearing and Appeals determines that they satisfy the criteria to re-petition.

3. **Eliminate the phrase "for purposes of Federal law."** In section 83.2, the language should be changed to take into account that tribes not listed by the Bureau of Indian Affairs are considered Indian tribes under some federal statutes. This provision is really meant to clarify that tribes recognized through the Federal Acknowledgment Process are eligible to be placed on the Federally Recognized Tribes List Act, 108 Stat. 471. Therefore, the language "for purposes of Federal law" should be changed to "for purposes of establishing a government-to-government relationship."

4. **Enhance Preamble language by including additional clarifying language.** Importantly, it should be clear that decisions issued under the current regulations should not be used to interpret the revised regulations.

5. **A "presumption" statement should be added**, clearly indicating that it should be presumed that the burden of proof is on the Department of the Interior instead of the petitioner when evaluating evidence provided by the petitioner. It should be clearly stated as a guideline that each criterion should be read and applied in a manner favoring the petitioner.

6. **Clarify that substantial interruption should mean 20 years or more.** In section 83.10, "substantial interruption" should mean 20 years or more, not 20 years or less. Recognition should not be precluded if there are gaps in time; the review should take into account the totality of the circumstances.

7. **Historic or modern third party nomenclature racially misidentifying or mislabeling a tribe shall not be weighed against a tribe**, but may be considered as evidence supporting the petitioner's claim of being a "distinct" community.

8. **Clarify criterion in section 83.11 (a).** It is unclear what (a) requires. The language should be revised so that petitioner can choose the point in time prior to 1900. Specifically, the language should be revised from "at a point in time" to "at any point" prior to 1900. The year 1900 should be a general benchmark

allowing for tribes to use dates prior to or reasonably close but subsequent to that year to establish this criterion. It should be kept in mind that some tribes were previously identified as uniquely distinct communities, but due to racial tensions of the era and area were only subsequently identified by the term "Indian." It should be clear that this must be reasonably acknowledged in reviewing evidence provided by petitioner.

The preamble states that the Petitioner can submit evidence to support existing (a) to support (a), (b), and (c); however, this should be added in the language of criteria (a). Expand the type of evidence that can be used to meet criteria (a). Consider expanding the language to include the "the types of evidence" relied on by the Department prior to the promulgation of the Federal Acknowledgment Process to include the *Montoya* criteria.

9**. Evidence to prove social community should be used to prove Descent.** The social community section (83.11(b)) is positive in that it sets the starting point for meeting this criteria in 1934, which is consistent with the historical shift in federal Indian policy. Additionally, this criteria allows for the attendance of Indian boarding schools or other forms of specific Indian education to serve as evidence of tribal community and should be further elaborated on to show Indian identity for the entire community. However, it should be noted that if the community was determined to be Indian at some point in time for the purpose of Indian boarding schools, specific Indian education, services, or even studies, it must therefore have also been Indian prior to 1900 and proof of such attendance, services, studies should suffice for the purpose of determining descent from an Indian community in section 83.11(e).

10. **Greater weight should be given to the supportive testimony of federally recognized tribes which have viewed the petitioner as a historic tribe.** However, the lack of supportive testimony or the submission of negative testimony from any entity should not be weighed against the petitioner in the application process, as it could be racially and politically motivated and not reflective of the history of a petitioner or worthiness of a petition.

11. **Greater evidentiary weight should be given to communities that have maintained their indigenous language in a continuous fashion** in proving Indian identity and continuous community.

12. **The determination of how endogamy will be evaluated should be clarified and revised.** If a tribe has 10 tribal members and 6 marry within the tribe and 4 marry outside the Tribe, the calculation is that there are only 3 marriages within the tribe and 4 outside; however, most of the members are still marrying within the Tribe. To clarify how endogamy will be reviewed, change this review to count endogamy by individual tribal member, not by each marriage. Under this revised understanding, 60% of the marriages are within the Tribe versus 42% under the current evaluation.

13. **Patterned out marriages should be included in the evaluation of community.** Section 83.11(b) (1) recognizes that patterned out-marriages should be included in the evaluation of marriages to meet the distinct community requirement under section 83.11(b) (1) (i). Patterned out-marriages should also be added to section 83.11(b) (2) (ii) as evidence to demonstrate distinct community and political authority.

14. **Ensure that Office of Federal Acknowledgment staff be trained, certified, and adhere to Genealogical Proof Standards to mitigate unfair and unreasonable negative findings related to an application.** The Office of Federal Acknowledgment staff should operate with the understanding that the "benefit of the doubt" should always be in favor of the petitioner in reviewing such material.

15. **Descent in subsection 83.11(e) should refer to the point in time identified in subsection 83.11(a).** Criteria (a) and (e) should be more clearly tied together so that the date used in (e) to track descent can be traced to whatever date has been determined under criteria (a). This is important because the process for reviewing petitions in section 83.26 indicates that (e) is reviewed before (a). This could suggest that (e) is not tied to the (a) date, but still require tracing back to what the Office of Federal Acknowledgment would consider to be an "historic tribe."

16. **Criteria in subsection (e) should be clarified regarding descent from historical tribes**. A tribe should not be required to prove how its ancestors

combined prior to 1900. If a tribe existed in 1900 as a distinct Indian community, with origins from tribal ancestors, the Office of Federal Acknowledgment should presume that a tribe meets this requirement. The organization of tribes across the country changed dramatically from 1835 to 1900 because of federal Indian policies; some were thrown onto reservations and required to reformulate. This change would recognize the ebb and flow of tribal life prior to 1900. It should be clear that a petitioner need only meet this requirement by 1900 and not 1789. The descent calculation should take into account historical differences. This criteria should be revised to state that 80% of the membership must descend from a distinct Indian community or Indian ancestors to take into account historical differences.

17. **Tribes should not have to supply additional evidence after submission** if the Office of Federal Acknowledgment does not review the application in a timely manner.

18. **Previously federally acknowledged tribes should not have to meet the criteria prior to the date of previous acknowledgment.** Previously acknowledged Tribes should be required to prove criteria in subsection 83.11(a) and should only have to meet subsection (e) since the date of previous acknowledgment.

19. **Clarify dual enrollment cut-off date.** It is unclear and should be explained why there is the 2010 cutoff deadline for dual membership with a federally recognized tribe.

20. **Clarify Tribal Rolls.** There is a need for further clarification of the use of "tribal rolls" with an emphasis on ensuring that the historical situation of many tribes would not include formal rolls during certain periods of history, including the latter part of the nineteenth and early twentieth centuries.

21. **Review order should not be lost if a petitioner's withdrawal is less than one year.** When a petitioner withdraws its petition under section 83.30, if it is for a period of less than a year, the petitioner should not lose its place in line.

22. **Suspension should not be longer than one year, unless petitioner consents.** Under section 83.31, a suspension should not be for an indefinite period unless the petitioner consents; otherwise there should be a time limit. A petitioner should also be able to request a suspension if there are acts outside of the petitioner's control that prevent petitioner from pursuing its petition. This would include acts of God, fires, etc.

23. **Office of Federal Acknowledgment staff should be required to participate in the hearings of the Office of Hearing and Appeals.** Under section 83.38, it should be made clear that Office of Federal Acknowledgment employees be required to testify and be cross-examined by the petitioner.

24. **The comment period for petitioners should be expanded**. Not all petitioners will be able to meet the 90-day response period in 83.35 or the 60-day response requirements in section 83.38 due to resources. It is well-known that tribes not listed by the Bureau of Indian Affairs have few resources. This should be expanded to 180 days; the petitioner does not need to take all of the time if it does not need it. A petitioner should have more than 60 days to prepare for a hearing if it receives a Negative Proposed Finding. The petitioner should first file a Notice of Appeal, and the hearing should be set within 180 days or sooner if requested by the petitioner.

25. **Soften appropriations language.** Under section 83.46, the appropriations language should be softened. Tribes acknowledged under the Federal Acknowledgment Process will be eligible for various programs and benefits.

Though implementation may be slow due to resources and petitioners should be aware of this fact, this language could be softened to acknowledge that efforts will be made to secure resources for newly recognized tribes.