

September 13, 2024

Director Oliver Whaley
Office of Regulatory Affairs and Collaborative Action
Office of the Assistant Secretary – Indian Affairs
U.S. Department of Interior
1849 C Street NW, MS 4071 MIB
Washington, DC 20240
Via Email: consultation@bia.gov

RE: RIN 1076-AF67 / BIA-2022-0001
Comment on the Re-Petition Authorization Process Concerning Federal
Acknowledgement of American Indian Tribes

Dear Director Whaley:

On behalf of the Indian Legal Clinic (ILC) at the Sandra Day O'Connor College of Law at Arizona State University, thank you for providing an opportunity to comment on changes to the Federal Acknowledgment Process (FAP).

The ILC serves Indian Country and the local urban Indian populations by providing high quality legal services in a variety of legal matters, with attention to the special legal and cultural needs of native peoples. The ILC works on civil, criminal, administrative, and policy matters, including federal recognition. The ILC has thoroughly studied federal acknowledgment issues, conducted a federal recognition survey with unrecognized Tribes, hosted a conference concerning the FAP, conducted research on federal recognition issues, provided testimony on the FAP, and prepared comments on draft regulations. The ILC supports efforts to make the process fairer and to create a pathway for previously denied Tribes to clarify their status with the federal government.

Right to Self-Determination

Federal recognition is critical to a Tribe's right to exercise its self-determination.¹ The right to self-determination is the most fundamental right, and includes the right for Tribes within the United States to determine their own political status.² Some scholars have defined self-determination as the right for "culturally and historically distinct people" to choose their own

¹ James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), Report of the Special Rapporteur on the rights of Indigenous peoples, U.N. Doc. A/HRC/21/47/Add.1, at 41 (Aug. 30, 2012).

² G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

political status.³ Furthermore, Indigenous peoples have the right to participate in all “decision-making in matters which would affect their rights.”⁴ However, lack of recognition can negatively impact a Tribe’s ability to exercise its self-determination in areas such as defending sovereignty, protecting culture, accessing resources, and ensuring the survival of tribal ways of life. Although these rights should not be contingent upon a determination by the United States, these rights are often ignored or limited in violation of international laws and norms.

The federal government—through the FAP—determines which Tribes are placed on a list to have their rights recognized and respected. Therefore, the FAP should provide an opportunity for all Tribes to be fairly reviewed because of the impact the decision has on basic rights for the future of the Tribe. Doing so is in line with the purpose of the regulations as envisioned in 1978. The regulatory framework’s purpose was to provide an “equitable solution to a longstanding and very difficult problem.”⁵ However, as noted in reports, testimony, and articles, the process was quickly broken. Problems with the process included shifting standards, delays, undue expenses, inefficiency, lack of predictability, and lack of transparency. These shifting standards could impact the outcome of a Tribe’s petition depending on when its petition was evaluated as evidenced by the Little Shell Tribe’s experience in the FAP. Tribes have spent decades in the process, and some have spent millions of dollars. A 2001 General Accounting Office Report (GAO) Report about the Federal Acknowledgment Process noted that there were fundamental issues with the FAP.⁶ The GAO also found that “[q]uestions about the level of evidence required to meet the criteria and the basis for decision reached will continue without more transparent guidance.”⁷

Re-Petitioning Provides a Pathway for Tribes to Clarify their Legal Status

The 2015 Regulations sought to improve the responsiveness of the tribal recognition process by making the process more transparent and consistent. The proposed rule creates a pathway for petitioners to be re-evaluated under the 2015 FAP regulations, which sought to clarify acceptable evidence and improve the process. Allowing Tribes an opportunity to repetition based on new

³ Mary Ellen Turpel, *Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT’L L. J. 579, 592 (1992).

⁴ G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art.18 (Sept. 13, 2007).

⁵ Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, Fed. Reg. 39,361 (Sept. 5, 1978).

⁶ U.S. Gen. Accounting Office, GAO-02-49, Indian Issues: *Timeliness of the Tribal Recognition Process* (2001).

⁷ *Id.*

evidence or changes in Part 83 will create a pathway to provide an equitable solution for those Tribes whose rights are in peril due to their nonrecognized status.

Under the 1994 Regulations, a petitioner could not appeal a decision to the Interior Board of Indian Appeals if OFA failed to correctly apply the legal standard.⁸ The 2015 Regulations clarified acceptable evidence and changed the process for challenging OFA's decisions. The 2015 Regulations created a phased review that provides for appeals to an Administrative Law Judge (ALJ) after each phase. The 2015 appeals process requires the ALJ to apply the correct legal standard. Under the revised procedures, "[t]he ALJ will consider a criterion to be met if the evidence establishes a reasonable likelihood of the validity of the facts related to the criteria. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met."⁹ Thus, under the 2015 Regulations, Tribes have a right and opportunity to challenge the correct application of the legal standard. This right did not exist under the 1994 Regulations. Having this phased review should provide for more consistency and accuracy in determinations. Therefore, since the Proposed Rule allows for challenges based on the misapplication of the legal standard, the changes should help to prevent injustice and unfair prejudice overall in the federal acknowledgment process. In addition, plausibly alleging that the standard was misapplied and would render a different result but for the misapplication of the standard should be a successful argument to repetition under the proposed rule.

Responsive to Litigation

The Proposed Rule is directly responsive to litigation. In 2020, two federal district courts determined that the ban on repetitiveness was arbitrary and capricious.¹⁰ The *Chinook* court remarked that "[t]here is no reason why new petitioners should be entitled to this 'consistency'

⁸ *But see In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 IBIA 63, 70 (Aug. 4, 1999) (misapplication of the federal acknowledgement process standard to the facts of a petition is not a ground for reconsideration); *In re Federal Acknowledgment of Nipmuc Nation*, 45 IBIA 231, 247 (Sept. 4, 2007) (IBIA lacks jurisdiction over an allegation that the Final Determination applied the wrong evidentiary standard); *In re Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana*, 57 IBIA 101, 130 (June 12, 2013) (IBIA lacks jurisdiction over misapplication of the legal standard even if the correct legal standard would result in conclusion that the criteria would be met).

⁹ Hearing Process Concerning Acknowledgment of American Indian Tribes, 43 C.F.R. § 4.1048 (2015).

¹⁰ *See Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668-RBL, 2020 WL 238563 (W.D. Wash. Jan. 10, 2020); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 613 F. Supp. 3d 371 (D.D.C. 2020).

while past petitioners are not.”¹¹ Removing the ban will help to improve consistency resulting from the problems identified with the FAP.

Conclusion

The proposed rule provides a much-needed pathway to ensure that the rights of Tribes and Tribal people are respected. If you have any questions regarding this comment, please feel free to contact me at indianlegalclinic@asu.edu.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Patty Ferguson-Bohnee", with a large, stylized flourish at the end.

Patty Ferguson-Bohnee
Director, Indian Legal Clinic

¹¹ *Chinook*, 2020 WL 128563, at *8.