



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

**JUL 11 2013**

The Honorable Don Young  
Chairman  
Committee on Natural Resources  
Subcommittee on Indian and Alaska Native Affairs  
House of Representatives  
Washington D.C. 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the Office of the Assistant Secretary – Indian Affairs in response to questions submitted following the March 19, 2013 hearing before the House Natural Resources Committee Subcommittee on Indian and Alaska Native Affairs on Authorization, Standards, Procedures for Whether, How and When Indian Tribes Should be Recognized by the Federal Government.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and  
Legislative Affairs

cc: The Honorable Colleen Hanabusa  
Ranking Member

Enclosure

**Questions from Chairman Don Young on behalf of Rep. Richard Hudson to Assistant Secretary Kevin Washburn:**

**1. From testimony offered in various congressional hearings, it appears that tribes feel that the criteria outlined in Part 83 places the burden of proof upon the tribe and is continuously increased the further they move along with the recognition process. What is being done in the reform process to ensure that the standard of review is static and applied as intended?**

**Response:** As part of its Part 83 review, the Department will evaluate ways in which the burden of proof may be clarified. As with other potential areas of improvement, the Department anticipates receiving substantial input before selecting a specific approach. A goal of any reform in this area will include providing clear standards to petitioners and the public. These standards should contribute to improving both the transparency and efficiency of the recognition process. For example, the Department's discussion draft clarifies the standard of review by providing that a criterion will be considered met if: (1) a preponderance of the evidence supports the validity of the facts claimed when viewed in the light most favorable to the petitioner; and (2) when the facts establish a reasonable likelihood that the criterion is met. 25 C.F.R. § 83.6(d). The Department's discussion draft also suggests placing the burden on the Department in certain circumstances. For example, the Department, rather than petitioners, would be required to demonstrate the petitioner or its members are the subject of congressional legislation terminating or forbidding a federal relationship. *Id.* §§ 83.6(b)(4), 83.7(g).

**2. To what extent does recognition by others play a role in determining whether a tribe such as the Lumbee is deserving of federal recognition? Will any weight be given to petitions like the Lumbee when the record shows that the House of Representatives has passed recognition bills twice, the Bureau has testified in favor of Lumbee recognition, the White House has gone on record supporting federal recognition for the Lumbee, and the State has recognized the Lumbee for over 100 years?**

**Response:** Under the Department's acknowledgment regulations, 25 C.F.R. Part 83, identification of the group by others is one of the mandatory criteria in determining whether a petitioning group is eligible for federal acknowledgment. Criterion (a) requires a petitioning group to be identified as an American Indian entity on a substantially continuous basis since 1900. 25 C.F.R. § 83.7(a). Information such as identification by the House of Representatives, the Bureau of Indian Affairs, and the State, may be relevant to establishing criterion (a).

**3. With regard to the process you have articulated here today, you indicated that there will be a draft sent out, written comments on the draft received, and then a formal rulemaking process will be initiated with the Tribes. If you institute a rulemaking procedure as defined by Executive Order 13175, which limits participation to federally recognized tribes, how does the Department intend to receive comment from those tribal groups going through the process, or in line to go through the process, in a fair and open way? Executive Order 13175 requires negotiations with federally recognized tribes on policies affecting Indians, but nothing in the Order precludes a more open consultation process when the policy will affect more American citizens than just the federally**

**recognized tribes.**

**Response:** While the Department plans to formally consult with federally recognized tribes on the forthcoming draft revisions to 25 CFR 83, the Department also plans to solicit comments from members of the public that have an interest in the revisions, including but not limited to groups that are seeking or plan to seek federal recognition as Indian tribes. The Department will solicit comments through publication of a notice in the Federal Register and by making the draft available on [www.bia.gov](http://www.bia.gov). The Department will be holding five tribal consultation sessions with five accompanying public meetings in order to gather comments on the Part 83 discussion draft. 78 Fed. Reg. 38,618 (June 27, 2013).

**4. Would you be willing to meet in my office to brief me on the opportunities and challenges for Lumbee Recognition?**

**Response:** The Office of the Assistant Secretary would be happy to provide a briefing on the challenges for Lumbee Recognition on a date and time feasible for both our schedules.

## **Questions from Ranking Member Hanabusa to Assistant Secretary Kevin Washburn:**

**1. In light of the U.S. Supreme Court's decision in *Salazar v. Patchak*, are all new recognition decisions similarly subject to challenge under the Administrative Procedures Act?**

**Response:** The Assistant Secretary – Indian Affairs' final determination of whether a group is a federally recognized tribe is a final agency action subject to judicial review under the Administrative Procedure Act.

**2. With respect to the 7 mandatory criteria currently at Part 83 of the federal acknowledgment regulations, what types of evidence can a tribe present that adequately demonstrates its continued existence?**

**Response:** A variety of primary and secondary sources of evidence may be used to demonstrate continued existence. We review that evidence along with any explanation of how it is applicable to one or more criteria.

**a. Does Interior provide guidance to applicants on the type of evidence that would be considered adequate?**

**Response:** Yes, the Office of Federal Acknowledgment provides guidance, advice, and direction from its anthropologists, historians, and genealogists. Arrangements are made through teleconference or face-to-face meetings.

**b. Does BIA consider precedent to provide guidance for future decisions with respect to what qualifies as a group's continued existence?**

**Response:** Yes, generally speaking the Department looks to prior decisions when appropriate in considering the specific facts and circumstances of each individual petition.

**c. Is the use of precedent reflected in Part 83 or other guidelines? Why or why not?**

**Response:** The Department issued guidance in 2005 and 2008 in Federal Register notices to attempt to clarify certain issues. This is an area that we are examining as we propose revisions to the Part 83 regulations.

**3. After your oral testimony I asked you, "So are you saying, as the Secretary in charge, that if a tribe was in existence prior to 1934; was around before 1934; that somehow that would then satisfy the requirement of being federally recognized?"**

**You responded:**

**"Even under our Part 83 process we are only recognizing the existence of a group that has proven that it has been around sort of since time a d memorial basically. So every tribe in essence was**

around in 1934. So the narrower question that Carcieri poses is, were they under federal jurisdiction in 1934? And given the trust responsibility, we think that most of them were under our jurisdiction or our responsibility in 1934. What the recognition process does is it finds those tribes that while were a distinct group as of that time, were not sort of having specific interactions with the federal government regularly at that time. That is the difference." Given your response, please provide the following:

a. A definition of what a "recognized tribe is."

**Response:** Generally speaking, a federally recognized tribe is an Indian entity with a government-to-government relationship with the United States. Pursuant to the Federally Recognized Indian Tribe List Act of 1994, all federally recognized tribes now appear on the Federal Register "list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1.

b. The criteria that BIA uses to affirm that a tribe was under "federal jurisdiction or responsibility" in 1934.

**Response:** The Supreme Court's decision in *Carcieri v. Salazar*, requires the Department in certain instances to determine whether a particular tribe was "under federal jurisdiction in 1934" before it can take land into trust under the Indian Reorganization Act. In determining whether a tribe was "under federal jurisdiction" in 1934, the Department determines first whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, circumstances that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Second, the Department determines whether the tribe's jurisdictional status remained intact in 1934. Some federal actions may in and of themselves unambiguously demonstrate that a tribe was under federal jurisdiction, or a variety of actions when viewed in concert may achieve the same result. For instance, an election held under section 18 of the Indian Reorganization Act establishes that those Indians were under federal jurisdiction in 1934. Enumeration on the Department's Indian Census rolls also evidences a federal-tribal relationship and demonstrates that the federal government acknowledged responsibility for the tribes and the Indians identified therein. Evidence varies by tribe and historical circumstances.

## **Questions from Rep. Grace Napolitano to Assistant Secretary Kevin Washburn:**

**1. How many tribes are currently waiting to be federally recognized? List requested if possible.**

**Response:** The Department currently has 9 petitions under active consideration, and 4 petitions awaiting active consideration. In addition, 265 groups have submitted only letters of intent or partially documented petitions, and are not ready for evaluation. The Office of Federal Acknowledgment has two helpful lists on its webpage: "List of Petitioners by State" and "Status Summary of Acknowledgment Cases." Both of these lists can be accessed and downloaded from <http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm>.

**2. When a tribe has different factions, will this delay a federal recognition decision? It is very difficult to understand what is needed to make final decisions on cases such as these. How do you intend to provide more clarity and disclosure on the process and what follow up are you going to give the tribes?**

**Response:** Internal conflicts may delay the Federal acknowledgment process. In 2008, the Department published guidance, in the Federal Register specifically addressing the issue of groups that splinter. This published notice can be accessed and downloaded from <http://www.bia.gov/cs/groups/public/documents/text/idc-001206.pdf>

**3. The Gabriellino recognition case has been ongoing for over a decade, my involvement in the case has been over 3 years. I have submitted letters requesting status updates and a timeline for determination of their request. In July 2012 the latest letter was sent but has yet to be answered. I have met with past BIA officials, but with the constant changes in the BIA, this case continuously stalls. No decision has been rendered in all this time and the team says no more information is needed. What guarantee can you provide that a decision and/or a timeline for a decision?**

**Response:** We cannot provide a specific timeline for a decision, due to the ongoing review of the Gabriellino's request for a review of their reaffirmation claim.

**4. As Ranking Member on Water and Power, one of my priorities is Tribal Water Rights settlements. Can settlements simply be defined as the government's legal liability? no more no less? What guarantee can you provide that these agreements between tribes and the federal government will be a BIA priority?**

**Response:** Settling Indian water rights is a priority for the Department of the Interior. Indian water settlements help fulfill the United States' general trust responsibility to tribes and ensure that Indian people have safe, reliable, and accessible water supplies. Indian water settlements also end decades of controversy and contention among tribes and neighboring communities and promote cooperation in the management of water resources. The Department is committed to resolving Indian water rights claims

and ensuring that Native American communities can use and manage water to meet domestic, economic, cultural, and ecological needs.

**5. Statistics shows that Native Americans have the highest rate of suicide compared to any other ethnic groups. Are you aware of these rates and what are the updates about actual improvements in mental health services? There have been discussions in the past, but I would like someone to connect with our office to work in a more collaborative effort. Report requested.**

**Response:** We are aware of the high rates of suicide in Indian communities, particularly with American Indian and Alaska Native youth. This is a tragedy. BIA's most direct action in youth suicide prevention is through the Bureau of Indian Education (BIE), which is providing technical assistance and monitoring through BIE regional School Safety Specialists to ensure schools are compliant with intervention strategies and reporting protocols to further ensure student safety. BIE's partnering with other federal agencies, including SAMHSA and the Indian Health Service (IHS) and the Department of Education, has enabled BIE to address the unique needs of students within these schools in the areas of behavioral health and suicide prevention efforts. Because it falls within its area of expertise, we defer to the Indian Health Service for updates on actual improvements in mental health services. The Department of the Interior is, however, working on a report titled, "American Indian/Alaska Native Suicide Prevention Report 2010-2011" that is expected to be released in the near future. Once the report is finalized, our office will provide you with a copy.

**Questions from Rep. Mike Thompson to The Honorable Kevin Washburn:**

**1. In your testimony before this Committee in March, you talked about reforming the Office of Federal Acknowledgment (OFA) recognition process to increase its transparency, efficiency and flexibility. What are BIA's goals in reforming the recognition process? Is it to recognize more tribes than what could be recognized under the current process? Also, what did you mean when you suggested that you would like to add flexibility to the process? Flexibility in what ways? How can you assure this Committee that the reforms you propose to undertake will leave in place objective criteria, based on ethno-historical evidence, and not replaced by the concept of fairness only?**

**Response:** As the Department testified, the goals of reforming the federal acknowledgement process are to increase transparency, timeliness, efficiency, and flexibility. This reform is intended to ensure that our regulations provide a transparent and efficient process that recognizes bona fide tribes utilizing standards that could be satisfied by tribes currently recognized. Objective criteria will remain an important part of any reform effort because the integrity of the findings must be paramount. Allowing for flexibility in the process is intended to appropriately take into account the unique history of each tribal community. However, the Department anticipates obtaining a good deal of input before choosing specific reforms.

**2. Do you think terminated tribes that sue the federal government for restoration, as in the case of a number of California tribal groups who *have* or are currently challenging their termination under the California Rancheria Act, are obligated to produce ethno-historical evidence to support their claims? Mr. Roberts testified at the Committee's March 2013 hearing that in order for a modern group to obtain federal recognition under BIA's Part 83 process based on its relationship to a historical group, the modern group must demonstrate lineal descent from the historic tribe. Typically, such modern groups show 95% or 98% lineal descent from the historic tribe to successfully complete the Part 83 process. Is it the Department's position that the same level of documented lineal relationship is required for tribal restoration by way of litigation settlement? If so, do you believe the tribe must turn over that evidence in litigation? Do you also agree that part of that evidence is its current membership roll? If you think the answer is different for litigation, why? If so, do you think this creates different or even unfair standards for a tribe that seeks restoration through litigation, as opposed to a tribe that must satisfy a different or higher standard through BIA's administrative OFA process?**

**Response:** Ethno-historic information is not required to support the claims of terminated Rancherias seeking restoration. The legal premise for such restorations is that the termination was invalid under the termination statute. If the Secretary or a court determines that the termination was invalid under the process laid out in federal statutes and regulations, then the Rancheria is restored. Federal acknowledgment under Part 83 rests on legal premises different from those underlying restoration of a wrongly-terminated Rancheria and therefore a different standard is appropriate.

**3. During the Committee's March 2013 hearing, Secretary Washburn agreed to give to the**



committee, the current membership list BIA has in their possession for the modern group that is attempting to demonstrate their lineal descent with the Mishewal Wappo Tribe of Alexander Valley. In addition to this document request, can BIA please provide to the committee their analysis and documentation as to who among those listed are direct lineal descents from the original distributees of the Alexander Valley Rancheria? What percentage of the group is of lineal descent? What documentation is used to prove the lineage?

**Response:** As noted in a previous response, when it has been determined either through litigation or by a stipulated agreement that termination was defective and the Rancheria is to be restored, the Bureau of Indian Affairs will establish a list of eligible descendants of the original distributees. At the hearing, Assistant Secretary Washburn believed that a list of current members had already been made public in the course of the litigation. No such list has been assembled or made public as of yet. Due to privacy concerns, we are reluctant to provide names or other information not already in the public record. Given that the lineage being established goes back only a few generations, the Bureau of Indian Affairs can base its conclusions on ordinary documents such as birth certificates.

4. Also during the Committee's March 2013 hearing, Secretary Washburn emphatically stated that BIA actively and aggressively asserts all appropriate and available defenses when the department is engaged in litigation. However, a review of court records demonstrates that BIA has not asserted a statute of limitations defense in all lawsuits involving tribal restoration. Why has BIA declined to pursue this defense? Why are terminated tribes continuing to sue and settle with the government when the termination has occurred more than 50 years ago for California tribes?

**Response:** In litigation, the Department works with the Department of Justice to assert the statute of limitations where it demonstrably applies. Where, in the course of litigation, our records confirm that termination was improper and not consistent with the requirements established by statute, we have agreed to correct the error. The termination policy underlying the passage of the California Rancheria Act was rejected by the federal government more than 40 years ago. While the Department requires those seeking restoration of a Rancheria to prove that the Rancheria was wrongfully terminated, the Department, through the federal courts, has agreed that restoration is the appropriate remedy for a defective termination.

5. How does BIA treat concerns from local governments in lawsuits brought against the Federal government regarding tribal restoration? How much weight does BIA give to local governments' concerns in BIA's settlement decision making process? What standards does BIA apply in addressing these local concerns and what is the basis for those standards?

**Response:** The Department always is interested in the concerns of the local governments and those governments have been parties to many, if not most, of the restoration lawsuits. In addressing the restoration lawsuits, the Department is trying to correct a historical wrong done to the Indian community. So while the Department is interested in the concerns of the local governments, its first obligation is to try to mitigate the wrong and comply with the law.