



September 22, 2014

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street, NW, MS4141
Washington, D.C. 20240

RE: Docket ID: BIA-2013-0007 - Federal Acknowledgment of American Indian Tribes

Dear Ms. Appel:

The Rural County Representatives of California (RCRC) submits these comments to Docket ID: BIA-2013-0007, Federal Acknowledgement of American Indian Tribes. RCRC is an organization of thirty-four rural counties in California, comprising nearly half of the land mass of the state and nearly 3 million residents. RCRC works with its member counties to advocate on behalf of rural issues at the state and federal levels. RCRC provides the rural county perspective on issues as diverse as land use, water and natural resources, housing, transportation, wildfire protection policies, and health and human services, among others, in the legislative and regulatory processes.

RCRC thanks you for granting an extension on public comments for this rule, as many smaller counties with fewer resources needed additional time to process and submit their concerns.

RCRC supports the right of American Indian tribes to petition the federal government for acknowledgment and appreciates the Bureau of Indians Affairs (BIA) attempt to update those regulations governing the acknowledgment process. RCRC fully understands that federal acknowledgment confers upon Indian tribes certain rights and privileges, most importantly the right to act as a sovereign nation. Once a tribe is acknowledged, it has the right to petition the federal government for trust lands and other federal benefits, such as healthcare, economic development, and all matters of land use, including the right to organize gaming activities, as well as the creation of businesses and other entities that compete with local businesses but do not contribute to the infrastructure costs of the community through tax revenue.

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ALPINE AMADOR BUTTE CALAVERAS COLUSA DEL NORTE EL DORADO GLENN HUMBOLDT IMPERIAL INYO LAKE LASSEN MADERA MARIPOSA MENDOCINO
MERCED MODOC MONO NAPA NEVADA PLACER PLUMAS SAN BENITO SHASTA SIERRA SISKIYOU SUTTER TEHAMA TRINITY TULARE TUOLUMNE YOLO YUBA

The government-to-government relationship that the Federal government has with recognized tribes is the same relationship that county governments have with those tribes. Therefore, RCRC believes that the acknowledgment process must not only be efficient and transparent for petitioning tribes but also for local governments who are deeply affected by acknowledgment decisions. RCRC believes that the proposed rule can be improved in this regard.

The State of California is home to 109 federally recognized tribes with 81 pending petitions for acknowledgment in California, according to the BIA as of November 2013. Nineteen of those petitions are within RCRC member counties. The land use and taxation authorities of local governments are significantly affected when tribes are recognized and tribal lands and land uses are exempted from local authority. This is particularly true in rural areas, where much of the land is already out of private hands. For example, in one of RCRC's member counties only 3% of the land mass of the county generates tax revenue to the county since 97% of the county is owned by public entities.

While RCRC appreciates the intent of this proposed rule to “make the process and criteria more transparent, promote consistent implementation and increase timeliness and efficiency, while maintaining the integrity of the process”, we would like to caution rule makers that such an objective should be maintained for all levels of government affected by the acknowledgment process—including county governments, the principal land use planners for communities throughout California and the United States.

Tribe acknowledgment affects more people and a much larger region than the members of the tribe and their immediate property. The acknowledgment process, and subsequent actions that result from it, can benefit from the early engagement of the affected local governments that will continue to interact on a government-to-government basis after a tribe is acknowledged. This is particularly true for the land use and mitigation decisions that must be made, as well as the social services and public infrastructure that must be provided to benefit all residents of a region, including tribal members.

RCRC's concerns for this rule are based on revisions to the evidentiary material required for a petition and restrictions on the participation of local governments in the acknowledgment process. The proposed rule reduces the amount of documentation and eases the burden of evidence that a tribe must produce to justify its petition for acknowledgment. The proposed rule also would limit notification of a filed acknowledgment petition, reduce by half the public comment period for acknowledgment petitions, and restrict the access of third parties to the hearing and appeals processes.

RCRC is also concerned about the potential conflict created by the proposed rule regarding the ability to tribes to petition for trust lands acquisition. As your office is aware, the Supreme Court in *Carcieri v Salazar* (2009) struck down the Secretary of Interior's ability to take land into trust for those tribes not federally recognized on the date of enactment of the Indian Reorganization Act in 1934. If finalized, the proposal would only exacerbate the *Carcieri* issue by creating a divide between two separate classes of Indian tribes: those that were recognized before 1934 and can petition for trust lands and those newly recognized tribes that cannot petition for trust lands. The proposal would only create more confusion for all parties and raise tribal expectations that cannot be recognized until Congress addresses the land into trust issue.

RCRC believes any confusion created by reforming the acknowledgment process in this manner prior to final resolution of the *Carcieri* issue would only serve to damage the relationship between tribes and local governments. RCRC believes that a more comprehensive approach to addressing the issues associated with tribal acknowledgment and land into trust is more appropriate and supports a delay in proceeding with this rule until all those concerns are addressed.

Given the extensive benefits conferred upon federally recognized tribes and the impacts to local government services, authority, and revenue, RCRC provides specific comment on the following provisions of the proposed rule:

1. The proposed rule eliminates steps in the process that ensured notification and participation of local governments and other interested parties in the petition process. The existing requirement for a petitioning tribe to file a notice of intent is eliminated. A notice of intent is consistent with other federal practices and provides early notification to affected parties, including local governments, that a petition will be filed. The rule would also eliminate the role of the Interior Board of Indian Appeals (IBIA) to review a decision by the Assistant Secretary. Rather, the Assistant Secretary's decision would constitute final agency action, and any appeals must be made to a federal district court, substantially increasing costs for any interested in further review of the petition. Further, the proposed rule would allow for an administrative appeal by the petitioner to the Office of Hearings and Appeals (OHA) but would permit only the petitioner and the Office of Federal Acknowledgment to determine what testimony and exhibits would be submitted for consideration. RCRC recommends that early notice of intent be retained to ensure that local governments and other interested parties are aware of impending petitions. We also recommend that the administrative appeals process be retained and accessible to all interested parties. Federal courts require that administrative appeals be exhausted before a case is ripe for judicial consideration. The proposed rule short-changes that process for many parties interested in and affected by the petition process. Regarding appeals to the OHA, such proceedings would be better informed if testimony and exhibits are submitted by all interested parties, including affected local governments.

2. The proposed rule solicits comment on the type of OHA judge who should preside over an administrative appeal: an administrative judge with OHA, an administrative law judge, or an attorney assigned by OHA. To ensure a fair proceeding, RCRC would recommend an experienced administrative judge who is impartial to the proceedings. Other courts do not substitute attorneys for judges, and we encourage OHA to follow that precedent.
3. The proposed rule would allow petitioners whose petitions were denied under previous regulations to re-petition under this rule. Eligibility for this proposal would be satisfied if an OHA judge believes, due to the change in rules, that a reconsideration is warranted and the petitioner was denied and did not seek a review by the IBIA or a federal court, or was denied and did seek a review but no opposing party was present. While RCRC is concerned that this proposal could allow any previously denied petitioner, regardless of the merits of denial, to reinitiate the petition process, we welcome the requirement that any third party in a previous petition must consent to the re-petition. However, in cases where a petition was previously denied, but a county was not involved in the process, we encourage the addition of a requirement to notify the local government jurisdiction in which the tribe is located that a previously denied petition for acknowledgement has been granted the right of re-petition. If the circumstances have changed significantly enough that the re-petition might be successful, then the circumstances may have changed enough such that the county is now interested in being a party to the process.
4. The rule proposes to post information regarding the petition on the internet, redacting private information, and allow interested parties to become “informed parties” in the process. The governor and attorney general of the State in which the petitioner is located would be notified when a petition is filed, as would any tribe within a 25-mile radius. Local governments whose tax revenue base, land use decisions, public infrastructure, and public services would be profoundly affected by an acknowledgment decision are relegated the status of “informed parties” as long as they are fortunate enough to see the information posted on the internet—for some of our counties that still lack broadband internet access, this is not a guarantee. Similarly, the Assistant Secretary may issue a final determination for acknowledgment if the OFA makes a positive recommendation and neither timely comments nor evidence challenging the proposed findings are received from state or local governments where the petitioner’s headquarters is located. RCRC strongly recommends that local governments receive early notification when a petition is filed and when a recommendation is made to the Assistant Secretary. The government-to-government relationship between local governments and tribes warrants better communication and closer cooperation in this process and additional government actions going forward regarding tribal issues within the county’s jurisdiction.

5. The public comment period for a petition is cut in half under the proposed rule, and any extension period is one-third of the time allowed under existing regulations. While timely decision-making is important to a petitioning tribe and all other interested parties, a transparent and thorough process can be better facilitated by allowing adequate time for public comments. The proposed rule establishes an iterative process for a petitioner to engage OFA at every stage of the process, creating a tutelage-like process between the petitioner and the agency. It is only equitable that the process provide for a more robust public comment period, maintaining the existing allowance for a public meeting, when considering acknowledgment petitions. RCRC recommends that the comment period remain 180 days with a reasonable extension allowed when the agency determines that circumstances warrant.
6. The burden of proof and evidence required of a petitioning tribe are reduced in the proposed rule. While some reduction in documentation may be justified, we strongly encourage the agency to reconsider the historical requirement for a tribe to demonstrate community and political authority. The proposed rule eases the requirement to demonstrate such authority from as early as 1789 under the previous rule to 1934 under the proposed rule. At the very least, the standard should be set at 1900 which is consistent with other thresholds in the rule and requiring evidence that the tribe, at a minimum, pre-dates the Indian Reorganization Act.

RCRC supports the BIA's effort to update its regulations governing the federal acknowledgment process. The process has long been described as insufficiently transparent, lengthy, expensive, and overly burdensome. However, for the reasons described above, RCRC has significant concerns with the regulation in its proposed form. RCRC strongly believes the federal acknowledgment process would be better served by greater public involvement with specific requirements to notify and engage local governments, more convincing burdens of proof, and higher thresholds to clearly demonstrate tribal identity, and more comprehensive approach to resolving acknowledgment and tribal land issues. The benefits to tribal acknowledgment and the impacts of the surrounding region are significant and warrant a more robust and comprehensive process than proposed in this rule.

Sincerely,

A handwritten signature in cursive script that reads "Cyndi B. Hillery".

CYNDI HILLERY
Legislative Advocate