September 30, 2014

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
US Department of the Interior
1849 C Street, NW, MS 4141
Washington, DC 20240

Re: 1076-AF18

Dear Ms. Appel:

We write in our individual capacities as professors and scholars of American Indian law and policy. We write to support the Department's efforts to make the Federal Acknowledgment Process at 25 C.F.R. Part 83 more transparent, more efficient, more consistent, and less burdensome. The current process is broken and has proven to be inconsistent, time-consuming, and inefficient. Revising the recognition process is an important step to ensure that the rights of all tribes indigenous to the United States are respected. The process must be reformed to promote equity and integrity.

We generally support the proposed changes to the Federal Acknowledgment Process in the proposed rule. In particular, clarifying the reasonable likelihood standard in the proposed rule should prevent the misapplication of this standard in the future. Further, removing the IBIA process is positive because this process has provided no meaningful review for petitioners. Finally, we support the Department's efforts to increase transparency and promote efficiency by automatically providing petitioners copies of documents submitted in their file and posting nonprotected documents online without requiring a FOIA request.

While we agree with the Department's effort to create more workable standards for criteria (a), (b), and (c), we have suggestions that we believe will better capture the Department's decision to make these changes. As we will explain below, criterion (a) should be expanded

beyond the *Cohen* criteria to also include the *Montoya* criteria. We believe that criteria (b) and (c) should be evaluated from a start date some time after the passage of the Indian Reorganization Act (IRA) because of the political realities facing tribal governments at the time the IRA was implemented.

Finally, although we understand the pressures the Department is under to address third-party concerns, this letter addresses why the third-party veto should be abandoned. The Federal Acknowledgment Process is necessary to clarify the government-to-government relationship. The question of collateral estoppel should not be an issue for tribes seeking federal recognition under the revised regulations.

I. We support the clarification of the reasonable likelihood standard.

Clarifying the reasonable likelihood standard will result in more consistent application of the standard to the regulations. Under the current rule, petitioners satisfy the seven criteria for federal acknowledgment if the evidence "establishes a reasonable likelihood of the validity of the facts relating to that criterion."[1] This standard has been applied inconsistently to the detriment of petitioners. Part 83.10 in the proposed rule clarifies the standard and provides guidance on how the Office of Federal Acknowledgment (OFA) will evaluate petitions using this standard. These changes improve the overall process and will help eliminate confusion among petitioners and OFA staff.

The burden in satisfying the reasonable likelihood standard is quite low. According to former Assistant Secretary of Indian Affairs Kevin Gover, OFA researchers apply a higher standard than necessary, requiring "near certainty of the facts asserted by petitioners."[2] The

[1] 25 C.F.R. § 83.6 (d).
[2] *Federal Acknowledgment Process Reform Act of 2003*: *Hearing on S. 297 Before the Senate Committee on Indian Affairs*, 108th Cong. 71 (2004) (statement of Kevin Gover, Professor of Law, Arizona State University College of Law).

proposed rule makes clear that "'reasonable likelihood' means there must be more than a mere possibility, but does not require 'more likely than not.'"[3] This is a consistent interpretation of the reasonable likelihood standard. In *Boyde v. California*, the United States Supreme Court explained that the reasonable likelihood standard is not equivalent to the "more likely than not" standard, which requires a 51% degree of belief that the validity of a fact or set of facts have been established by the evidence.[4] Thus, when evaluating a petition, the Department need only conclude that it is reasonably likely, with less than 51% degree of belief, that the evidence submitted by petitioner establishes the validity of the facts relating to each criterion.

Inconsistent application of the reasonable likelihood standard has placed an incredible burden on tribes. Over time, the Department's interpretation of reasonable likelihood standard has resulted in the need for increased certainty and voluminous evidence and more conclusive analysis by the Department. An illustration of this is comparing the experiences of two Louisiana tribes who submitted petitions. In 1978, the Tunica-Biloxi Tribe filed a petition 78 pages long. The Tribe received federal recognition three years later in 1981. The United Houma Nation applied for federal recognition in 1979. By the time the United Houma Nation's petition was evaluated, it had submitted more than 19,100 pages of evidence. The BIA issued a proposed finding against the Nation in 1994. The Department claims it applies professional standards to determine whether a petitioner has submitted sufficient evidence before applying the "reasonable likelihood" standard to the evidence, as required by a guidance document from the year 2000.[5] In some cases, the professional standard may require multiple sources verifying a piece of

[3] Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 146 (proposed July 30, 2014) (to be codified at 25 C.F.R. pt. 83.10(a)(1)).
[4] *Boyde v. California*, 494 U.S. 370, 380 (1990).
[5] Lorinda Riley, *Shifting Foundation: The Problem With Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. Rev. L. & Soc. Change 629, 636 (2013).

evidence before it can be accepted.[6] This subjects a petitioner's evidence to a stricter standard than the "reasonable likelihood" standard.[7]

Clarifying the "reasonable likelihood" standard will help ensure that the petitions are evaluated appropriately, reduce the petitioner's burden in producing evidence to satisfy the criteria, and allow a more consistent application of the standard.

II. We support the elimination of the IBIA process.

Although the regulations currently allow a petitioner to seek reconsideration of a final determination before the Interior Board of Indian Appeals (IBIA), this process is burdensome and of little use to petitioners. The Assistant Secretary of Indian Affairs has acknowledged that the IBIA has rarely granted petitions for reconsideration, and the IBIA's heavy caseload has resulted in even further delays in the acknowledgment process.[8]

The IBIA has vacated only two final determinations in the reconsideration process, and both of those requests resulted in reversals of positive final determinations to negative reconsidered determinations.[9] Out of the thirty IBIA decisions, not one is a positive reconsidered determination.[10] Of the four IBIA cases decided in the last seven years, one request for reconsideration was dismissed, one final decision was affirmed (to the extent of the Board's jurisdiction), and two final decisions were affirmed in part, while five other grounds for reconsideration submitted by the petitioners were deemed to be outside of the Board's

[6] *Id.*
[7] *Id.*
[8] ASSISTANT SECRETARY-INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, FREQUENTLY ASKED QUESTIONS PERTAINING TO PROPOSED RULE: FEDERAL ACKNOWLEDGMENT (25 C.F.R. § 83) (2014), *available at* http://www.bia.gov/cs/groups/xopa/documents/text/idc1-026773.pdf.
[9] *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 I.B.I.A. 30 (May 12, 2005); Reconsidered Final Determination To Decline To Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. 60, 101 (Dep't of the Interior Oct. 14, 2005); *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 I.B.I.A. 1 (May 12, 2005); Reconsidered Final Determination to Decline to Acknowledge the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, 70 Fed. Reg. 60,099 (Dep't of the Interior Oct. 14, 2005).
[10] U.S. Department of Interior, Indian Affairs, Documents Pertaining to the Interior Board of Indian Appeals, http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm (last visited Sept. 30, 2014).

jurisdiction and were referred to the Secretary.[11] These results strongly suggest that petitioners have found no meaningful review in the IBIA reconsideration process.

Moreover, the burden of proof is higher during the reconsideration process than it is during the initial acknowledgment process in two ways.[12] First, the burden during reconsideration is "preponderance of the evidence," meaning that when all of the evidence is properly weighed, "it is either more likely than not, or it is likely not, that X is true."[13] Second, a petitioner cannot appeal the OFA's final determination on the merits. Rather, the petitioner "must prove that new elements, or administrative shortcomings during the recognition process, change the evidence in such a way that, if taken as a whole, it is more likely than not that reconsideration is appropriate."[14]

The IBIA's review is limited to the following four issues:

(1) That there is new evidence that could affect the determination; or
(2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or
(3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or
(4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in §83.7 (a) through (g).[15]

If OFA fails to properly apply the burden of proof to the facts in the petition, the IBIA does not have authority to vacate a final determination.[16] Further, the IBIA does not have jurisdiction to

[11] U.S. Department of Interior, Indian Affairs, Documents Pertaining to the Interior Board of Indian Appeals, http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm (last visited Sept. 30, 2014).
[12] *Fixing the Federal Acknowledgment Process: Hearing Before the Comm. of Indian Affairs*, 111th Cong. 75 (2009) (statement of Patty Ferguson-Bohnee).
[13] *Id*; 25 C.F.R § 83.11 (e)(9)-(10).
[14] *Id.* at 76; *Id.* at § 83.11 (d)(1-4).
[15] 25 C.F.R § 83.11 (d)(1-4).
[16] *Fixing the Federal Acknowledgment Process*, *supra* note 12, at 76.

reconsider a petition on grounds that the Department required proof that exceeded the requirements of the regulation.[17]

Allowing third parties to appeal a positive final determination seems to violate the spirit of the regulation. The IBIA process allows a third party to introduce new evidence in a post-final determination process that was never made available to the petitioner or evaluated by the OFA staff.

Further, not only are petitions for reconsideration rarely granted and result in even further delay in the Federal Acknowledgment Process, they also present a burden on the petitioner. Most unrecognized tribes lack financial and other resources, and it is difficult for a petitioner to meet all of the requirements for reconsideration.[18] This is especially true after an unrecognized tribe has gone through the initial Federal Acknowledgment Process, which is extremely costly and time-consuming.

For these reasons, we support the removal of the IBIA and the replacement of this process with an independent review of a negative proposed finding as outlined in Part 83.38 of the proposed rule. A hearing on the proposed finding by an administrative law judge will provide a fair opportunity for a petitioner to challenge the findings of the OFA. Currently, there is no process to challenge the misapplication of the reasonable likelihood standard or to cross-examine the OFA staff who evaluate the petitioner's case and write the technical reports. This process should provide for the cross-examination of OFA staff and the disclosure of the documents relied on for their decision. Further, the recommended decision of the OHA judge will be provided to the Assistant Secretary to issue a final determination.

[17] *In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 I.B.I.A. 63, 70 (Aug. 4, 1999).
[18] *Fixing the Federal Acknowledgment Process*, *supra* note 12, at 76.

III. We support the prompt and automatic disclosure of documents to petitioners without requiring a FOIA request.

The proposed rule aims to increase transparency and efficiency. These goals are accomplished by requiring prompt and automatic disclosure of documents submitted in a petitioner's case. Under the current rule, a petitioner's access to the administrative record for its petition is difficult to obtain due to bureaucracy, technology, and expense.[19] At present, these documents are not made available to a petitioner without a Freedom of Information Act request, and the process of submitting this request is a burden on the petitioner's resources and time.[20] Moreover, once a FOIA request is submitted, the documents are made available to view under the FAIR database and will be copied for the petitioner at a rate of $0.10 per page, which can easily cost a petitioner thousands of dollars given the large volume of documentation complied for each petition.[21] Not every petitioner or interested party has access to the FAIR database, in which case they would have to pay to travel to Washington, D.C. in order to review the petition documents and identify which documents they want to request a copy of under FOIA.[22]

In addition, the GAO reported that the Federal Acknowledgment Process was being hampered by ineffective procedures for providing information to interested parties.[23] The GAO reported that there were substantial numbers of FOIA requests related to petitions.[24] Requiring the Department to automatically post information on the internet will alleviate these impediments, promote public transparency, and reduce the excess burden placed on petitioners and interested parties.

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[19] *Id.* at 35.
[20] *Id.*
[21] *Id.* at 36.
[22] *Id.*
[23] GAO, INDIAN ISSUES: TIMELINESS OF THE TRIBAL RECOGNITION PROCESS HAS IMPROVED, BUT IT WILL TAKE YEARS TO CLEAR THE EXISTING BACKLOG OF PETITIONS, 2 (2005).
[24] *Id.* at 8.

IV. Expand criterion (a) to include common law and pre-1978 standards.

The proposed change to criterion (a) would allow a petitioner to provide a narrative of "its existence as an Indian tribe, band, nation, pueblo, village, or community at a point in time during the historical period." This is a significant improvement over the current criterion (a), which requires a petitioner to provide evidence of recognition by, or a relationship with, an external source like a state government, anthropologist, or other Indian tribe.[25] To satisfy the proposed rule, a petitioner can provide supporting evidence including, but not limited to, evidence used to satisfy the remaining criteria. We support this change to the extent that it eases the burden on petitioners in satisfying criterion (a) by relying on a petitioner's own narrative of its existence, rather than external identifications. However, if the purpose of criterion (a) is to demonstrate a petitioner's collective rights, we recommend expanding criterion (a) to include the *Montoya* criteria.

The preamble of the proposed rule outlines the Cohen criteria, which was used before 1978 to recognize tribes on an *ad hoc* basis. The proposed criterion (a) allows the use of the Cohen criteria to meet this criterion. Specifically petitioners will be allowed to submit evidence of the following criteria singly or jointly: 1) treaty relations with the United States, 2) that the group has been denominated a tribe by act of Congress or Executive Order, 3) that the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe, 4) that the group has been treated as a tribe or band by other Indian tribes, or 5) that the group has exercised political authority over its members, through a tribal council or other governmental forms.[26] The preamble to the proposed rule states that the proposed criterion (a) will "adhere to these foundational legal principles."

[25] 25 C.F.R. § 83.7 (a).
[26] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[7][a] (2012).

In addition to the pre-1978 *ad hoc* administrative criteria, petitioners should be allowed to submit evidence that meets the common law standard set forth in *Montoya v. United States*. Expanding criterion (a) to include the *Montoya* criteria would allow petitioners to submit evidence demonstrating that they are: 1) a body of Indians of the same or a similar race, 2) united in a community, 3) under one leadership or government, and 4) inhabiting a particular though sometimes ill-defined territory.[27] The *Montoya* criteria are consistent with the Cohen criteria in that petitioners must demonstrate their existence as a collective unit. Furthermore, including these criteria would ease the burden on petitioners in satisfying criterion (a), which is consistent with the overall purpose of the proposed changes.

In one instance, a tribe satisfied the *Montoya* criteria, but had yet to satisfy the 25 C.F.R. Part 83 criteria. The Shinnecock Indian Nation satisfied the *Montoya* criteria for the purposes of an aboriginal title claim while its federal acknowledgment petition was under review.[28] Additionally, there is one instance where a tribe failed to satisfy the *Montoya* criteria, but later satisfied the 25 C.F.R. Part 83 criteria. In the case of the Mashpee Wampanoag Tribe, it failed to prove its status as an Indian tribe for the purposes of a Non Intercourse Act claim, which required evidence of its tribal existence dating back to 1790.[29] The First Circuit concluded that the evidence failed to prove that as of 1820, the Mashpee Tribe was "united in one community under one leadership or government," and that the evidence was ambivalent as to the "same or similar race" requirement.[30] This conclusion was based on evidence submitted by the Mashpee Tribe describing the Tribe as "diminishing, though rather slowly."[31] The Mashpee Wampanoag Tribe was federally recognized in 2007 and satisfied criterion (a) by proving substantially

[27] *Montoya v. United States*, 180 U.S. 261, 266 (1901).
[28] *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489 (E.D. N.Y. 2005).
[29] *Mashpee Tribe v. Sec. of Interior*, 820 F. 2d 480, 482 (1st Cir. 1987).
[30] *Id*. at 483.
[31] *Id*.

continuous identification as Mashpee Indians since 1900.[32] Thus, the Mashpee Tribe's failure to satisfy the *Montoya* criteria was due to a lapse in their evidence at a much earlier point in time than required by 25 C.F.R. Part 83.

Petitioners should be allowed to submit evidence that may exceed the requirements of criterion (a) with the assurance that such evidence will be analyzed in a manner that gives this evidence proper weight. Expanding criterion (a) to include *Montoya*, in addition to the Cohen criteria, provides this assurance to petitioners.

V. We suggest changing the start date for criteria (b) and (c) to a date shortly after the passage of the Indian Reorganization Act.

The Department's proposed changes would evaluate criteria (b) (community) and (c) (political authority) from 1934 to the present instead of from historical times to the present. As the Department explained, it chose 1934 as the start date because it coincides with the passage of the Indian Reorganization Act (IRA) in 1934, which has come to represent a major shift in federal Indian policy. It may be more likely that this shift in policy encouraged tribes to organize politically and socially. We generally support moving the date forward because it will create more efficiency for both petitioners and the Department. However, because of the delays in effectuating the policy shift of the IRA, selecting a date after the passage of the IRA will best capture the Department's intentions in revising this part of the rule.

Federal Indian policy in the pre-IRA era was destructive of tribal governments and tribal community life. John Collier, the Commissioner for Indian Affairs from 1933 until 1945, developed and advocated for the passage of the IRA because "past [Federal] policies were bizarre and cruel" and were directed at breaking up "the tribal, communal and religious

[32] Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Dep't of the Interior, May 23, 2007).

organization of Indians."[33] Because Indian resistance to the increasingly dominant society was "largely an expression of [Indians'] tribal strength and loyalty," federal policies were created "to destroy tribal life" altogether.[34] In particular, the General Allotment Act of 1887 broke up tribal communities by forcing Indians to take non-contiguous individual land holdings and effectively "banish[ing] native social heritage, including the local community life, the language, the family institutions, and the traditional religious observances."[35] With no federal services or aid to make use of the individual allotments they were given, Indians were often forced to sell or lease their lands to whites under unfavorable conditions.[36] The effect of the pre-IRA era was "the destruction of everything Indian," forcing Indians into conditions of extreme poverty and social decline.[37]

For Collier, the passage of the IRA in 1934 was a triumph over non-Indian interests. In the period surrounding the enactment of the IRA, Collier referred to the shift in federal policy as "an effort to set right evils . . . which [had] become conventionalized into a system and [ ] for a large part sunk to the level of popular acceptance."[38] In a collection of speeches given by Collier, he explained that the IRA ended the allotment policy, supported Indian religious liberty, and reorganized Indian life by restoring tribal self-rule over local laws and government.[39] By changing the start date for criteria (b) and (c) of the Federal Acknowledgement Process to 1934, the Department is recognizing the significance of the passage of the IRA and the failed federal policies that led to its enactment.

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[33] John Collier, Speech to the Commission, *The New Deal for the American Indian*, October 24, 1935.
[34] John Collier, *The New Deal for the American Indian*, Part of the Address at Grand Rapids, 1935.
[35] *Id*.
[36] John Collier, *The Plight of the Indian and the Wheeler-Howard Bill*, Radio Address, April 30, 1934.
[37] John Collier, *Policies and Problems in the United States*, 1939.
[38] John Collier, *The New Deal for the American Indian*, Part of the Address at Grand Rapids, 1935.
[39] John Collier, *The Plight of the Indian and the Wheeler-Howard Bill*, Radio Address, April 30, 1934; John Collier, *The New Deal for the American Indian*, Speech to the Commission, October 24, 1934.

Collier understood that a shift in federal Indian policy that ended the allotment era would not be well received by some non-Indians. Several years after the enactment of the IRA, he recognized that "Indian policy and Indian administration . . . [was] underlaid with strata of the earlier process."[40] During the initial implementation of the new policy, "[e]nemies of the IRA misinformed the Indians as to its real purposes" in an attempt to obstruct reformation of the allotment policies.[41] Because the progress of the IRA was not automatic, the federal government faced "demands that the [IRA] . . . be scrapped, that Indian matters be restored to the absolutism of departmental regulations."[42] Amid pressures from the House and Senate Indian Affairs Committees to repeal the IRA, "the Bureau of the Budget and the House Appropriations Committee slashed the funds originally authorized by Congress" for the implementation of the IRA shortly after it was enacted.[43] Despite the shift in federal policy, these political realities made the effects of the IRA gradual; in 1939, Collier knew the reformation of Indian policy had "only well begun."[44]

The United States Supreme Court case *U.S. v. John*[45] sheds light on the piecemeal implementation of the IRA. In the opinion, Justice Blackmun detailed the tenuous history between the federal government and the Mississippi Band of Choctaw Indians leading up to the Tribe's adoption of the IRA. In 1830, the federal government entered into the Treaty at Dancing Rabbit Creek with the Choctaw Indians, which provided that they cede all of their lands east of the Mississippi River to the federal government and remove west by the Fall of 1833.[46]

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[40] John Collier, *Policies and Problems of the United States*, 1939.
[41] John Collier, *The Reorganization Act to Date*, April 1936.
[42] John Collier, *Policies and Problems in the United States*, 1939.
[43] ROBERT M. KVASNICKA & HERMAN J. VIOLA, THE COMMISSIONERS OF INDIAN AFFAIRS: 1824–1997 279 (Univ. of Nebraska 1979).
[44] John Collier, *Policies and Problems in the United States*, 1939.
[45] 437 U.S. 634 (1978).
[46] *Id*. at 640-41. The first attempt at removing the Choctaws was in 1820 with the signing of the Treaty at Doak's Stand, but this attempt was largely unsuccessful. *Id*. at 639.

Although many Choctaws adhered to the removal terms, many did not.[47] The land belonging to the Choctaws that remained in Mississippi was sold to settlers, however these remaining Choctaws did not receive any annuities that were paid to the Oklahoma Choctaw nor did they receive any substitute lands.[48] Poverty and lack of adequate living conditions necessarily followed.[49] The federal government extended the IRA to the Choctaw who remained in Mississippi to organize as a tribe and establish a relationship with the federal government apart from the Oklahoma Choctaw who had left Mississippi. Despite supporting the enactment of the IRA,[50] it was not until March 30, 1935 that the Mississippi Choctaw were able to vote to adopt it.[51] In 1939 lands were taken into trust, and in 1944 the Department officially proclaimed the lands as a reservation.[52] It was not until 1945 that the Mississippi Choctaw adopted a constitution and by-laws as anticipated by the IRA.[53]

This pattern of delayed implementation of the IRA was quite common.[54] The first tribal constitution developed pursuant to the IRA was not adopted and approved by the Secretary until October of 1935.[55] The most active period of IRA implementation was between 1936 and 1938.[56] Although the IRA originally required that tribal elections to vote on its implementation be held within the year of its passage, the period was extended in June of 1935 for another year.[57] Tribal constitutions and by-laws were not adopted immediately once a vote was secured; rather,

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[47] *Id*. at 641.
[48] *Id*. n.9. Any offer of lands by the federal government to these remaining Choctaw was still being conditioned on removal up until the 1930s. *Id*. at 644-45.
[49] *Id*. n.12.
[50] *Id*. at 641. The Mississippi Choctaw voted to support the passage of the IRA before it was even enacted.
[51] *Id*. at 645.
[52] *Id*. at 646.
[53] *Id*.
[54] Theodore H. Haas, Chief Counsel United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* (1947), *available at* http://www.doi.gov/library/internet/subject/upload/haas-tenyears.pdf. Haas explains that "[a]lthough [the IRA] was approved by the President on June 18, 1934, none of the authorized appropriations became available until May 1935." *Id*. at 1.
[55] *Id*. at 3.
[56] *Id*.
[57] *Id*. at 2.

on many occasions the development and approval of these governing documents lingered through the 1940s.[58]

Many large tribes that are federally recognized today did not vote to accept the IRA.[59] Out of 258 elections held, 77 tribes, representing over 86,000 Indians, rejected it.[60] As Collier often recalled, the lack of success in effectuating the policy shift of the IRA was credited to misrepresentations by those who did not want to see the allotment period (and the non-Indian interests it served) come to an end.[61] Many federal agents responsible for assisting tribes in the implementation of the IRA did not believe in the policy of Indian self-government, and they "relegated Indian organization to the background."[62] Additionally, while the passage of the IRA in 1934 was a dramatic policy shift on paper, many tribes were hesitant to believe in it. Because the allotment policy set out to destroy everything Indian, "[t]he suspicion was ingrained that any new policy which might be started by the government was motivated by a desire to aid the whites and hurt the Indians."[63]

Although the enactment of the IRA signifies a dramatic shift in federal policy, the lasting effects of the pre-IRA era hindered the application of that policy to Indian tribes for many years after its passage.[64] In part, the Department's decision to revise the start date for criteria (b) and

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[58] *Id*. at 21 table B. For example, the Salt River Indian Community did not have an IRA constitution until June 11, 1940.
[59] *Id*. at 13 table A.
[60] *Id*. at 3.
[61] *Id*. at 6-7. Hass explains that opponents of the FDR administration "conducted a nation-wide campaign to defeat the measure. . . Fantastic rumors were spread such as: the bill was designed to deprive the Indians of their interests in their lands [and] to take away their allotments and communize them . . ."
[62] *Id*. at 5-6.
[63] *Id*. at 5.
[64] The problems associated with the implementation of the IRA continued well beyond Collier's time as the Commissioner of Indian Affairs. On May 19, 1994, Senator John McCain and Senator Daniel Inouye introduced Senate Bill 1654, an amendment to section 16 of the IRA "to clarify that [the IRA] was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized tribes." 140 Cong. Rec. S6144-03, 1994 WL 196882. Until the amendment was passed, the Department had been categorizing Indian tribes as either created or historic, and created tribes were "only able to exercise such powers of self-governance that the Secretary may confer on them." While it was not clear which tribes were considered "created," generally tribes that

(c) reflects an effort to avoid potential problems with locating historical records to establish these criteria. However, in light of the resistance to the implementation of the IRA and the inconsistency of its effects, the 1934 date may not best capture the Department's purpose and intent in revising the Federal Acknowledgment Process. Despite the passage of the IRA, many tribes still felt they had little to gain from making themselves known to the federal government. Rather, it may be more practical to use a date sometime after the passage of the IRA, when tribal courts and governments were operating consistently across the political landscape.

To the extent that oral history may satisfy criteria (b) and (c), the Department might consider a rolling start date, for example, 75 years[65] prior to the age of a petitioner's oldest elder at the time the petition is being reviewed to the present. Currently, this start date would be approximately 1939, which coincides appropriately with the historical record of implementation of the IRA. This suggestion also reflects the unique circumstances of tribal documentation of social and political community. Such a revision is more forgiving of the interruptions in documentation that are likely to occur in looking to a period when federal policy was dramatically shifting and continually disputed well after 1934.

It may be argued that revising the review period for criteria (b) and (c) may make it too easy for some petitioners to establish these criteria. However, it should be noted that under the process of the proposed rule, (b) and (c) are reviewed by the OFA only if the petitioner meets criteria (e), (d), (f), and (g). Many of these criteria require documentation from 1900 to the present. It is therefore not likely that a petitioner that meets criteria (e), (d), (f), and (g) will fail

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were relocated west of their aboriginal homelands were treated as not possessing the powers of inherent sovereignty that the IRA was meant to restore to them. Additionally, other federal agencies followed the Department's lead by treating "created" tribes differently than "historic" ones, necessarily creating inconsistencies in the effects of the IRA on the development of tribal governments. The 1994 amendment "void[ed] any past determination by the Department that an Indian tribe is created and . . . prohibit[ed] any such determination in the future."

[65] According to the Indian Health Service, the median life expectancy for the average American Indian in 2007 was 77.7 years of age. *See* Indian Health Service, Disparities, *available at* http://www.ihs.gov/newsroom/factsheets/disparities/. (last visited September 2014).

to meet criteria (b) and (c). Yet, if a petitioner successfully meets criteria (e), (d), (f), and (g) and fails to meet (b) and (c), it may likely be because that petitioner was not persuaded to adopt provisions of the IRA or did not do so before the hostile attitudes that dominated the pre-IRA era began to work against its successful implementation. Without the tribal organization that the IRA encouraged, some tribes may not possess the documentation needed to meet criteria (b) and (c). This type of inequitable result would not be consistent with the purpose of revising the current regulations.

Updating the review period for criteria (b) and (c) is strongly encouraged. Revising the period to 1934 to the present certainly will create a more efficient and less costly and burdensome process for petitioners and the Department alike. However, updating the review period to a point in time after the passage of the IRA to the present would better reflect the social and political realities that tribes faced after surviving the harsh federal policies in the period prior to the IRA, while not disrupting the integrity of the Federal Acknowledgement Process that these revisions are meant to capture.

VI. We suggest abandoning the third party veto in the re-petition process.

The proposed changes to the Federal Acknowledgment Process allow a tribe previously denied under Part 83 to re-petition provided it meets several conditions. The first condition requires obtaining the consent of third parties who participated in the petitioner's IBIA or federal court appeal. While we support this proposed change to the extent that it allows previously denied petitioners to re-petition, we recommend abandoning the requirement that petitioners obtain an interested third party's consent in order to re-petition. This requirement unfairly burdens a small number of tribes and could potentially be used as a sword by third parties against

future petitioners. Furthermore, the third party veto unfairly deprives tribes the benefits of the more rational revised criteria, and this is improper.

Although the common law doctrines of collateral estoppel and res judicata may be applied to adjudicative decisions by administrative agencies, courts refuse to grant such preclusion where inappropriate.[66] In particular, preclusive effect will not be granted to administrative decisions if it would frustrate federal purposes,[67] or where the legal standard of the prior proceeding was "significantly different."[68] Although some lower courts have found BIA's determinations of tribal status to be adjudicative decisions,[69] preclusion should not be granted because it would frustrate federal purposes in having a just and rational acknowledgment process and because the revised standards are significantly different.

Here, the legal standards governing the determination of tribal status under the proposed changes are significantly different because they are potentially outcome determinative for previously denied petitioners.

First, the proposed change to criterion (a) allows tribes to submit a narrative of their existence at some point during the historical period, rather than relying exclusively on evidence of identification by external parties. This is especially significant for petitioners who cannot satisfy the current requirements of criterion (a) due to lapses in record-keeping and periods of discrimination that discouraged petitioners from holding themselves out as a tribe. The proposed change decreases the burden the petitioner must meet under criterion (a) by allowing petitioners to rely on self-identification rather than external identification.

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[66] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (holding that there is no collateral estoppel for an administrative determination on an age discrimination claim).

[67] *Id.*; *Wallace Corp. v. Nat'l Labor Relations Bd.*, 323 U.S. 248, 253-254 (1944) (approving the invalidation of an N.L.R.B. approved settlement agreement where necessary to accomplish mission of promoting promote fair labor practices).

[68] *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 199 (D. Conn. 1992).

[69] *United States v. 43.47 Acres of Land, More or Less, Situated in County of Litchfield, Town of Kent*, 896 F. Supp. 2d 151, 162 (D. Conn. 2012).

Second, the proposed change to criteria (b) and (c) is different because it decreases the burden petitioners must meet in order to demonstrate community and political authority since historical times. The proposed change makes 1934 the starting year for evaluating community and political authority whereas the current rule requires evaluation to start from the year 1789. This decreases the burden on petitioners in producing evidence.

Finally, the proposed change to criterion (e) defines the term "historical" to mean 1900 or earlier, rather than dating from 1789. Similar to the proposed change to criterion (b), this change decreases the burden on petitioners in satisfying this criterion. Thus, the proposed changes in the current regulations would result in new regulations that are different than the current regulations and petitioners should not be collaterally estopped from re-litigating their tribal status, which the third party veto virtually guarantees to their detriment. Interested third parties will most certainly be heard fully in any reconsideration proceedings and would therefore have full due process.

We recognize that third parties have legitimate interests at stake in the Federal Acknowledgment Process. However, the third party veto gives too much weight to those interests in the re-petition process. Further, this process is about the government-to-government relationship between a tribe and the federal government. The Department must remember that states and tribes have long competed for authority, and the federal government has equally long assumed a duty of protecting tribes against state incursions.[70] States and similar third parties cannot be given veto power over the tribal-federal relationship. In the alternative, we recommend giving third parties notice of a petitioner's intent to re-petition and providing an opportunity for third parties to participate in the petitioner's re-petition process. This gives

[70] *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.").

adequate consideration to third party interests without foreclosing a petitioner's opportunity to re-petition.

VII. Conclusion

The proposed rule is a much needed improvement to the broken Federal Acknowledgment Process. We support the proposed revisions to the Federal Acknowledgment Process, with additional suggestions that will further the goals of these revisions. The Federal Acknowledgment Process has thus far been inefficient, and it has created burdens for the Department and petitioners alike. These proposed changes, along with our suggestions, are necessary to improving and enhancing the integrity of the process.

Respectfully yours,

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