



From the Office of Certified Genealogist & Researcher

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To: Elizabeth Appel, Acting Director, Office of Regulatory Affairs & Collaborative Action

From: Lorraine Escobar, CG/NAL

RE: Additional Comments to the Proposed Revisions to 25 CFR 83

At the July 22nd meeting, through the “Comparison Chart, Current Federal Acknowledgment Rule (25 CFR 83) vs. Proposed Federal Acknowledgment Rule (25 CFR 83),” the Office of the Regulatory Affairs & Collaborative Action committee reiterated interpretations of the proposed revisions. As a result of seeing these reiterations, I find it necessary to further emphasize the problem with two revisions.

#1. Believe it or not, there are frauds in California Indian country:

(e) Would establish that this criterion may be satisfied by a roll prepared by the Department of at the direction of Congress, and the Department will rely on that roll as accurate roll of descendants of the tribe that existed in historical times; ... [emphasis added]

For California, to ask OFA to rely on the congressionally directed roll of the 1928 California Indian Jurisdictional Roll is a grave mistake.

In both the case of the Juaneño Band of Mission Indians (who failed (e) in the PF stage) and the Muwekma Ohlone Tribe (who passed (e) in the FD), OFA rightly determined that the 1928 California Indian Jurisdictional Act [CIJA] paperwork was insufficient as unequivocal evidence to prove descent from an Indian tribe. (OFA also emphasized that proof can and should come from other more reliable sources.) In doing so, OFA did not totally dismiss this paperwork as evidence of genealogy (as applied for children of applicants) but it clearly dismissed it as proof of an applicants parentage (where no witnesses signed as eye-witness of that fact) and as proof of an Indian lineage or tribal affiliation. In my experience as a certified genealogist working with several California tribes, I believe OFA’s conclusion is on the mark. Self-affirmation is not a reliable, or uncontested, means of proving genealogy or tribal identity.

I propose an exception be made for California because it will protect those who are truly authentic California Indians. The real Indians can and do have the evidence to prove their heritage. But, there is a negative phenomenon now in place, for California Indians, which will only be exacerbated, should the revisions not make this exception. This is because another federal arm of the DOI – the California-based Bureau of Indian Affairs – currently *relies* on

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the 1928 CIJA data as the gospel of authority to issue Certificates of Degree of Indian Blood to people, even when other more reliable evidence indicates they are not California Indian. (Robert Dorame, David Belardes, et al.)¹ In turn, the California agency, created to protect the rights of California Indian repatriation – The Native American Heritage Commission – continues to rely on the BIA-issued documents even though they are given various reports disproving those claims. So, the end result is that there are non-Indians or non-California Indians who are usurping the repatriation rights of authentic California Indians and tribes. ***This chain of error has no chance of being broken if the only other federal agency (OFA) who deals with this issue is prevented from verifying these claims.***

[I have attached my paper, “Worthless Paper & Shattered Identities,” for your perusal to assist your office in understanding the problem of relying on these BIA-issued CDIB’s for California Indians.]

I recommend revisiting the revision language to incorporate a more reliable means of achieving verification of the claim of a descent from a historical Indian tribe, i.e. the Genealogy Proof Standard.

#2. Litigation makes enemies out of friends

I emphasize the need to ***encourage*** a cooperative back-and-forth relationship between OFA and the petitioner at every opportunity. Replacing the formal technical assistance meeting between the AS-IA and the petitioner (which currently occurs between the PF and FD) with a hearing process only closes the door on the hope of transparency. ***In fact, the common-sense conclusion is that this litigious replacement, in the middle of the process as opposed to the end of the process, would only promote hostility and hamper and prevent any open dialogue between parties.***

Granted, before the process arrives at the point between the PF and the FD, the current regulations promote a dialogue before active consideration. This allows the petitioner to submit additional evidence and clarification before its petition is formally considered [83.10 (b)] And, it is up to the petitioner to request a second review prior to active consideration because such a review will not be an *automatic* response to any new evidence or information. [83.10 (c) (1)] And, after the PF is issued, under the current regulations, under 83.10, the petitioner can request to *hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding*. But, **under the proposed revisions, this request is removed from its current place between the proposed finding and the final determination:**

83.10 ... Would allow petitioner to elect to have a hearing if the proposed finding is negative. The hearing would be before an OHA judge and would allow parties to intervene. The OHA judge would then issue a recommended decision for AS-IA-s consideration in preparing the final determination.

Granted, after the PF is issued, the petitioner (along with interested parties) may challenge the PF. But, now that challenge is destined to take place in a litigious environment instead of a

¹ The list goes on and on. For example, in Orange County alone, nearly 50% of the approve 1928 CIJA applicants were not Indian when the research was conducted by various entities such as OFA, myself and other genealogists. But, for privacy reasons, I cannot name any of those living persons in this public document other than those for whom this information has already been made a matter of public information.

cordial, truth-seeking, fact-finding cooperative effort. Under the revisions OFA will be obligated to provide *technical advice concerning the factual basis ...and the reasoning, analyses, and factual bases for the proposed finding in a timely fashion ... to assist the petitioner in challenging or supporting the proposed finding and preparing for any requested hearing.* [83.10 (l)] But, how does an OHA hearing promote any open dialogue between the petitioner and OFA? History dictates it does not.

The case of JBMI-84A, in its IBIA appeal process, is an excellent example of what happens when the case has to go before an appellate court:

In response to the negative FD, the JBMI response team pointed out several errors OFA had made in its FD. But, rather than being able to address OFA directly, we had to do so through the IBIA appeal which necessitated the inclusion of many argumentative statements as well as articulated allegations against OFA. IBIA offered a copy of the appeal to OFA. In response, Solicitor Barbara Cohen, acknowledged only one of the errors though all were equally argued and substantiated. (That error was related to Jose Uriol Mireles, impacting 249 tribal members.) No acknowledgment was made regarding any of the other errors. No doubt, the litigious nature of the appeal worked against any progress in resolving these other errors with OFA.

It would have been so much easier if the team could have asked OFA, for example, “Did you review the records for the whole family of Jose Uriol Mireles, his siblings, and his mother?” As it turns out, OFA discovered they did not review everything for that family. Once OFA did the review, they found their error. But, there were many more errors that were not reviewed at all. And, the JBMI response team was yet left with no avenue to pose any questions directly to OFA.

For good cause, I suspect I know what really happened. But, it is not part of my purpose here to reiterate that conclusion. However, *I do want to point out any cooperation and flow of back-and-forth communication stopped when the JBMI-84A had to take their case to an appellate court. So, if the revisions insist on replacing the formal Technical Assistance Meeting with the AS-IA, between the PF and the FD, with an appeal process, history dictates it will only close the door on communication and promote the lack of transparency that already exists.*

Because the revisions are designed to alleviate OFA’s burden of review by introducing a fast-tracking process based on 83.7 (e), I urge this panel to consider other options previously recommended by this commenter, i.e. A separate, objective, and unequivocally credentialled genealogical panel to assist OFA in trouble-shooting problems in genealogical evidence.