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Towns of

Cornwall *Ledyard* *North Stonington* *Preston* *Roxbury*

Connecticut

September 4, 2014

Acting Director Brian Deese
The Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, D.C. 20503

Attention: OMB Desk Officer for the Department of the Interior:
OIRA_Submission@omb.eop.gov.

Re: Docket ID: BIA–2013–0007, RIN 1076–AF18
Comments on Interior's Paperwork Burdens Analysis for Proposed Rule on Tribal Acknowledgement

Dear Mr. Deese:

The Towns of Colchester, Cornwall, Ledyard, North Stonington, Preston and Roxbury, Connecticut (the "Towns") are filing with the Office of Management and Budget (OMB) our preliminary comments on the paperwork burdens imposed by the Department of the Interior's (DOI's) recently published rulemaking revising the existing tribal acknowledgment regulations at 25 CFR Part 83. See Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30766 (May 29, 2014) (Proposed Rule). On July 7, 2014, we requested that OMB defer its comments to DOI on the paperwork burdens of the Proposed Rule until at least July 28, 2014. Not having received a response, we are now filing our preliminary comments on DOI's analysis and estimate of the paperwork burdens of the Proposed Rule. As a result, these comments address the general deficiencies of DOI's analysis and estimate of the Proposed Rule's paperwork burdens. Sufficient time has not been made available to provide our own specific estimate. On June 25, 2014, we also wrote DOI requesting an extension of the overall comment period on the Proposed Rule until no earlier than October 1, 2014. We have not received a response from DOI on our June 25 request. Nonetheless, we will be also filing paperwork burden comments with DOI within comment period on the Proposed Rule itself.

There are significant deficiencies in DOI's estimate of how the Proposed Rule will decrease the annual burden hours on all respondents involved in the Federal Acknowledgement process. DOI has grossly underestimated the paperwork burden for the Proposed Rule and ignored several important factors, including the paperwork burden on a petition's opponents, as documented in these comments. We request that OMB (1) reject DOI's paperwork burden analysis and estimate, (2) require DOI to withdraw the Proposed Rule until DOI develops an adequate paperwork burden analysis and estimate, and (3) require DOI to publish a new proposed rule containing an adequate paperwork burden analysis and estimate, if DOI chooses to

move forward with a rule on Federal Acknowledgement. Short of this, OMB should include or endorse the Town's comments in OMB's own public comments to DOI on the paperwork burdens of the Proposed Rule and, if DOI proceeds with a final rule without rewriting its paperwork burden analysis, direct DOI to include these comments in the preamble to the final rule.

I. The Paperwork Reduction Act and OMB's Implementing Regulations

OMB has issued rules to implement the provisions of the Paperwork Reduction Act (PRA), 44 U.S.C. chapter 35 (PRA), concerning "collections of information." The regulations are designed to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government.

Under these regulations, OMB defines "burden" as follows: "[b]urden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. . . ." 5 CFR § 1320.3(b)(1). Under 5 CFR § 1320.3(h), "[i]nformation means any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media. ***." Under our reading of OMB's PRA regulations, not only has DOI failed to adequately analyze and estimate the paperwork burdens of the Proposed Rule on petitioners (and re-petitioners), but it has failed even to address in any fashion the paperwork burdens of the Proposed Rule on those third parties opposing petitions, a clear violation of the PRA.

We understand that under the PRA the failure of DOI to comply with the requirements of PRA does not allow a suit against the OMB Director and categorically precludes DOI from punishing a person or entity for failure to meet the terms of the information collection system. Nonetheless, the PRA does not preclude challenges by third parties that DOI's decision making was arbitrary and capricious under the Administrative Procedures Act (APA) for failure to account properly for paperwork burdens.

In *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), the Supreme Court summarized the relevant analysis for review under the "arbitrary and capricious" APA standard:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.

463 U.S. at 43. Here, DOI's inadequate PRA analysis and estimate of the paperwork burden on petitioners and its abject failure to consider the paperwork burden on a petition's opponents in the petition process and in potential litigation of an affirmative acknowledgement determination could be considered by a court to be a failure to consider an important aspect of the problem that

unfairly tipped the balance of Interior's decision-making to proceed with the final rule. Such a decision would result in a remand of the final rule to DOI to address the failure. It is far better to address the deficiencies in DOI's PRA analysis now, rather than being forced to redo the entire rule making process several years down the road.

II. DOI's PRA Estimate

Section I of the preamble to the Proposed Rule addresses the requirements of the PRA and its implementing regulations at 5 CFR Part 1320, as they pertain to the collection of information from respondents (petitioners and re-petitioners) in the Federal Acknowledgment process. In this section, DOI estimates that implementation of the Proposed Rule will decrease the annual burden hours for respondents by a "minimum of 8,510 hours, for a total of 12,240 hours." To demonstrate how this estimate was calculated, the section includes a table that indicates the burden hours for certain evidentiary requirements under the Proposed Rule. These projections both underestimate the burden hours for these specific requirements and ignore the total information collection requirements of the Proposed Rule.

III. Failure to Consider a Petitioner's Burden Hours for All Stages of the Process

The DOI estimate only considers the annual burden hours for petitioners in collecting information to meet the mandatory criteria in preparing a documented petition and responding to a Technical Assistance (TA) review. It fails to consider the burden hours on petitioners for the several other stages of the proposed acknowledgment process. These stages include, but are not limited to, responding to the comments of informed parties following the receipt and posting of the documented petition under 25 CFR § 83.24, responding to a Proposed Finding issued by the Office of Federal Acknowledgment (OFA) under § 83.35(a), and responding to comments and evidence submitted by informed parties during the Proposed Finding comment period under § 83.38(a)(2). Other stages include responding to challenges made by specified State and local governments and recognized tribes to a favorable Proposed Finding under § 83.37(b), which may require receiving and responding to further technical assistance from the OFA under § 83.42(b),[1] and challenging a negative Proposed Finding in a hearing before an administrative law judge within the Office of Hearing and Appeals (OHA) under §83.38(a)(1), which requires the preparation of exhibits and witnesses. In the case where a favorable Proposed Finding is challenged by eligible third parties and results in the issuance of a negative Proposed Finding by the OFA under §83.42(b)(1), petitioners may also need to respond to additional comments and evidence submitted by informed parties and prepare exhibits and witnesses for a hearing before an OHA judge, the same as petitioners that receive an initial negative Proposed Finding may do under the provisions of §83.38(a)(1).

IV. Failure to Consider the Burden Hours for Previously Denied Petitioners

The DOI estimate likewise ignores the burden hours for previously denied petitioners that must submit new arguments and evidence in order to request permission from an OHA judge to re-petition under § 83.4(b). The process for re-petitioning under this section (at § 83.4(b) (1))

[1] The DOI estimate only appears to consider the burden hours of OFA technical assistance that take place prior to a Proposed Finding.

may also require obtaining written consent from third parties that previously participated in administrative and/or judicial appeals in opposition to the petitioner. It may likewise include pleadings and hearings before an OHA judge and responses to the judge's request for further evidence under § 83.4(b)(2)(ii).

V. Failure to Consider the Burden Hours for Informed Parties

The DOI estimate also fails to consider the burden hours on other respondents in the Federal Acknowledgment process, such as State governments, federally recognized tribes, and other petitioners that are required to be notified of the receipt of a documented petition under § 83.22(b)(2-3) and which have the opportunity to support or oppose a petition. Neither does it consider the burden hours on those specified State and local governments and federally recognized tribes that have the right under § 83.37(a)(1-2) to challenge a favorable Proposed Finding. The DOI estimate likewise ignores the burden hours on those other State and local governments, federally recognized tribes and unrecognized Indian groups, corporations and other businesses, organizations, and individuals that may request to become "informed parties" in regard to a petition under § 83.22(b)(1)(v). In some past cases, under the existing regulations, the burden hours on "interested or informed parties" opposing a petition have sometimes equaled or exceeded the burden hours of the petitioners they have opposed.

Informed parties can be burdened by having to submit Freedom of Information Act (FOIA) requests to the DOI in an effort to obtain petitioner's evidence that is not made publically available on the OFA website under the provisions of § 83.22(a)(1). They can likewise be burdened by the need to submit comments on a petition before an OFA review begins under § 83.24, to submit comments and evidence in response to a Proposed Finding to both the DOI and the petitioner under § 83.35(a)(1-2) and § 83.35(b), and to submit comments and evidence to the OFA in the case where a favorable Proposed Finding is challenged by eligible third parties and results in the issuance of a negative Proposed Finding under § 83.42(b)(1).

VI. Lack of a Clear Explanation of the Basis for Estimating the Current Burden and Lack of Adequate Statistical Data on Which to Make Such an Estimate

The PRA requires estimates for the time and costs effected parties will encounter in complying with a statute and accompanying regulations. Often, the Congressional Research Service estimates this burden during the legislative process. A Federal agency charged with promulgating regulations may use this information as part of its estimates in preparing regulations. An agency may also study time and costs as part of the regulatory process, on a formal or informal basis as time and budgets permit. The agency should be able to readily point to such information that formed its PRA estimate.

The DOI estimate projects numbers that could be pulled out of hat because it fails to be open and transparent in describing the methodology used to arrive at the projections. Furthermore, the DOI estimate is clearly not based on any broad or accurate statistical data, because there is no requirement or mechanism in place for petitioners to report annual burden hours. As is indicated below, both petitioners and interested parties have provided testimony at recent Congressional hearings describing the burden of the process in terms of the years and costs involved and/or the volume of materials submitted. However, neither these respondents

nor DOI officials testifying at these hearings have ever described the process in terms of the annual burden hours for any of the parties involved.

Section I of the preamble of the Proposed Rule gives no indication of how the DOI calculated the total annual burden hours for petitioners preparing a documented petition and responding to a TA review prior to a Proposed Finding under the current regulations. The section states that under the proposed regulations the annual burden hours for petitioners "will decrease by a minimum of 8,510 hours, for a total of 12,240 hours." The table indicates that the 12,240 hours are the annual burden hours for "10 respondents" (petitioners) and that the annual burden hours for each petitioner is 1,224 hours. Stating that the total annual burden hours for ten petitioners will decrease "by a minimum of 8,510 hours," assumes that the annual burden hours for ten petitioners in preparing a documented petition prior to a Proposed Finding is at least 20,750 hours (the total of 12,240 hours under the proposed regulations plus the minimum estimated decrease of 8,510 hours) or 2,075 hours per petitioner. This estimate indicates that both the total annual burden hours for ten petitioners and the annual burden hours for each petitioner will decrease under the proposed regulations by approximately 41 percent.

The critical question that the DOI estimate fails to address is how DOI determined the starting point of its calculation, *i.e.*, the annual burden hours on petitioners preparing a documented petition and responding to a Technical Assistance (TA) review prior to a Proposed Finding under the existing regulations? There is no requirement for petitioners to report how many hours they have worked on documenting a petition during the course of a year. Neither is there any known example where a petitioner has volunteered to provide the OFA with an estimate of its annual burden hours. The OFA can determine how many pages of narrative and supporting documents a petitioner has submitted, but there is no information collection mechanism in place for it to calculate how many overall hours a petitioner has expended in collecting and interpreting material for a documented petition. The record clearly indicates that under the existing regulations petitioners that submit a documented petition and then request and respond to a TA review are engaged in these stages of the Federal Acknowledgment process over the course of many years.[2] The critical question then, which is not explained in the PRA statement in the preamble to the Proposed Rule, is how did the DOI determine the annual burden hours for such petitioners?

VII. The DOI Estimates Grossly Underestimate the Burden Hours on Petitioners Under the Existing Regulations

Most petitioners that have succeeded in the Federal Acknowledgment process, as well as many that have been denied acknowledgment, have had a team of individuals working on documenting their petitions. Such a team might typically include group leaders who must endorse the petition and review its contents, legal counsel that advises the petitioner and both represents and reviews the petition, professional researchers such as anthropologists, historians, and genealogists, who conduct research and often take the lead role in drafting a narrative, and group members who either volunteer or are paid for roles ranging from administrative support,

[2] A relatively recent petitioner has proceeded very quickly through the process by going from a letter of intent to petition to a Proposed Finding in 5 years. The last petitioner acknowledged through the process took nearly 32 years to go through these same stages.

document management, research, coordination of community studies, etc. As a representative sample, let us use a team that consists of eight individuals: two group leaders, an attorney, an anthropologist, a genealogist, an historian, and two group members that serve as support staff. This is perhaps an average team, much smaller team than many known petitioners have had, but larger than other known petitioners have been able to assemble, particularly in regard to professional assistance. If each of these team members spent an average of a quarter of their time working on a documented petition or responding to a TA review on the basis of a 40-hour week over the course of five years, assuming that the workload would be heavier in the years immediately preceding the submission of a documented petition and TA responses (up to full-time or more) than in earlier years, the total burden hours for this team would be 20,800 hours or an average of 4,160 annual burden hours. This is approximately 50 percent more annual burden hours than is projected by the DOI estimate for petitioners to submit a documented petition and receive technical assistance under the current regulations. If the Proposed Rule decreases the annual burden hours by 41 percent, as the DOI projects, the annual burden hours for this team would be approximately 2,454 hours rather than the 1,223 hours estimated in the DOI table.

This hypothetical case can be contrasted with an actual case in which the approximate annual burden hours are known. This case involved a large research team that was intensely involved over the course of a year in a petitioner's response to a negative Proposed Finding. The team consisted of the group's chief, chairwoman, and council, two attorneys, an overall coordinator, an anthropologist, a genealogist, an historian, at least four research assistants, and at least four group members that served as support staff. The team spent approximately 10,000 hours on this response, which consisted of hundreds of pages of narrative descriptions and thousands of pages of exhibit documents. Although this case involved a stage of the Federal Acknowledgment process that DOI is not measuring in its PRA estimate, it strongly suggests that DOI has underestimated the annual burden hours for petitioners to document a petition under the current regulations at 2,075 hours, because this team had an annual burden of 10,000 hours in merely supplementing a documented petition.

If a petitioner only had four individuals working on documenting a petition and/ or responding to a TA review, 2,075 hours would represent only a little more than three months of 40-hour work weeks for each of them over the course of a year.[3] Professional researchers that have worked closely with petitioners on these stages of the process agree that 2,075 hours does not come close to capturing the intensity level of the annual burden on petitioners under the current regulations.

VIII. Provisions in the Proposed Rule That Will Slow Down the Acknowledgment Process

The overall goal of the Proposed Rule is to improve the timeliness, efficiency, and cost benefit of the Federal Acknowledgment process, which has been for some time one of most backlogged and inefficient administrative processes in all of Government. For example, the process's historical average for the final resolution of petitions between 1978 and 2013 was 1.46 cases per year. The DOI has decided to try to reach this goal by shortening the timelines and

[3] 2,075 hours divided by 4 workers = 518.75 hours, divided by 40 hour weeks = 12.96875 weeks or slightly more than three months.

evaluation periods, revising the mandatory criteria, lowering the evidentiary standards, and limiting the role of third parties, rather than addressing the existing problems by dedicating more financial and staffing resources to the OFA to allow it to expand its workload and evaluate a greater number of petitions and provide more timely technical assistance each year. However, there are many aspects of the proposed revisions that have the potential of working against the reduction of the logjam and the faster processing of documented petitions.

A. Incentivizing More Documented Petitions

The proposed revisions will provide greater incentive to potential petitioners to submit documented petitions. The OFA currently has four evaluation teams and because the DOI's PRA projections are based on ten annual respondents, perhaps that is the number of documented petitions the staff is expected to be evaluating, if not resolving, each year. If so, that would seem to be an overly optimistic estimate. If the OFA staffing level remains the same, a rapid influx of new documented petitions could easily overwhelm the new process and create its own backlog. If that happens, the DOI will ultimately fail in its goal of providing greater timeliness and efficiency at the cost of having provided a much easier path for petitioners and having created a far less thorough evaluation process.

B. Allowing Denied Petitioners to Re-Petition

One of the revisions that will definitely increase the number of pending petitions and could very well contribute to a future backlog is the proposal under § 83.4(b) that would allow previously denied petitioners to re-petition under certain conditions. This provision creates the potential of having 34 cases that the DOI has already resolved added to the 266 cases that are already pending before the Department. If the DOI's estimate in its PRA statement of reducing the annual burden hours on petitioners by 41 percent is perhaps a reflection of the overall efficiency it hopes to gain with the proposed revisions, a 41 percent increase in the historical average of cases resolved each year would boost that number to 2.46 per year. At that rate, it would take more than 121 years for DOI to resolve the cases of the pending petitioners and the previously denied petitioners, without even considering new petitioners and petitioners denied under the revised regulations that might request to re-petition.

C. Redaction of All Petition Narratives for Public Release

There are several proposed provisions that will require more rather than less of the OFA's staff time. One of these is the requirement under § 83.22(b)(i) to publish a redacted copy of the narrative portion of a documented petition on the OFA website within 60 days after receipt of the petition. Under the current regulations, OFA only provides redacted copies of a petition narrative upon the request by interested or informed parties and such requests usually have to be made under provisions of the FOIA. Redaction for the purpose of protecting privacy can take considerable time and requires review by a FOIA officer as well as legal counsel within the Office of the Solicitor. Instead of providing redaction of some petition narratives, the OFA will be required to redact and publish the narratives of all documented petitions.

D. Providing More Extensive Technical Assistance to Petitioners

The proposed regulations will also require the OFA to provide a greater and more fragmented amount of technical assistance to petitioners than it does currently. Section 83.26 of the Proposed Rule provides for the review of a documented petition in defined phases according to the criteria. This evaluation can include four separate technical assistance reviews by OFA staff under § 83.26(a)(1)(i), § 83.26(a)(2)(i), § 83.26(c)(1), and § 83.26(c)(1)(i)(B). The existing regulations require only one technical assistance review of a documented petition § 83.10(b) and give petitioners the option of requesting a second review under § 83.10(c)(1). In a case under the Proposed Rule where the Assistant Secretary, Indian Affairs (AS-IA) remands a positive Proposed Finding challenged by eligible third parties to the OFA for reconsideration under § 83.42(b), the OFA will be required to provide further technical assistance to the petitioner.

E. Allowing Petitioners to Withdraw from the Review Process

The phased review of a documented petition under § 83.26 of the Proposed Rule allows petitioners to withdraw at several intervals in order to regroup and collect more evidence. The existing regulations do not permit petitioners to withdraw from the process after active consideration of a documented petition has begun. The proposed review process will be much less efficient for the OFA staff because it has great potential for subjecting them to several starts and stops in their evaluation that might be separated by several months or even years. The OFA review team might be far along in the review process when a petitioner decides to withdraw and if there is a long period before the petition comes back with more evidence, it will take time for the review team to get back up to speed on the status of the petition. If the initial review team is not available at that time, a new review team will take even longer to become familiar with the documented petition.

F. Requiring Appeals to the OHA Rather Than to the IBIA

The Proposed Rule (§ 83.1 and § 83.39) would for the first time require administrative appeals of Federal Acknowledgment decisions to be handled by judges within the Hearings Division of the Office of Hearings and Appeals (OHA) or other OHA Boards or attorneys appointed by the OHA Director as judges, rather than exclusively those of the Interior Board of Indian Appeals (IBIA). OHA judges would make final decisions on whether previously denied petitioners should be allowed to re-petition under § 83.4(b)(2-3) and recommended decisions to the AS-IA regarding negative Proposed Findings appealed by petitioners under either § 83.39 or § 83.42(b)(1). The OHA has no experience with Federal Acknowledgment decisions, whereas the IBIA has issued 31 decisions involving acknowledgment appeals since 1997. It will take time for the OHA's administrative law judges to get up to speed, and within the first few years after implementation of the proposed revisions they might need to make as many as 34 decisions just on whether previously denied petitioners should be allowed to re-petition.

The OHA hearing process under § 83.38 and § 83.39 is much more formal and complex than the IBIA appeal process under the existing acknowledgment regulations, which has consisted primarily of a mere review of the documentary record by two administrative judges. The OHA hearing process will involve oral testimony, which means that instead of just furnishing copies of the administrative record, members of the OFA staff could be called upon to serve as witnesses. The preparation and presentation of testimony and other involvement in OHA hearings could take considerable time away from the OFA staff's primary duties of

reviewing documented petitions and comments and evidence submitted by informed parties and providing technical assistance to petitioners.

G. Requiring Appeals of a Final Determination to Go to Federal District Court

Sections 83.44 and 83.45 of the Proposed Rule provide that the AS-IA's Final Determination will become effective immediately and that it will represent "the final agency action under the Administrative Procedures Act (5 U.S.C § 704)." This means that neither petitioners nor informed parties can challenge a Final Determination through an administrative appeal but must instead appeal the decision in Federal District Court. Under the existing regulations, petitioners and interested parties can appeal a Final Determination to the IBIA. The elimination of the existing appeal process will undoubtedly result in more litigation, in which case DOI personnel, including officials within the Office of the AS-IA, legal counsel from the Office of the Solicitor, and OFA staff members will have to become more involved in providing courts with evidence and testimony. Even if personnel are not directly involved in reproducing the administrative record for litigation, they may be subject to subpoena to provide testimony at deposition or trial. This too could take considerable time away from their primary tasks under the revised regulations.

IX. Conclusion

DOI has grossly misanalysed and underestimated the paperwork burden for the Proposed Rule and ignored several important factors that the PRA requires it to consider, as documented above. We request that OMB (1) reject DOI's PRA analysis and estimate, (2) require DOI to withdraw the Proposed Rule until DOI develops an adequate PRA analysis and estimate, and (3) require DOI to publish a new proposed rule containing adequate PRA analysis and estimate, if DOI chooses to move forward with a rule making on Federal Acknowledgement. Short of this, OMB should include or endorse the Town's comments in OMB's own public comments to DOI on the PRA aspects of the Proposed Rule and, if DOI proceeds with a final rule without rewriting its PRA analysis, direct DOI to include these comments in the preamble to the final rule.

Thank you for considering these comments and our requests.

Very truly yours,

G. Ridgway

Gordon Ridgway
First Selectman
Cornwall

J. Rodolico

John Rodolico
Mayor
Ledyard

Nicholas H. Mullane, II
First Selectman
North Stonington

Robert Congdon
First Selectman
Preston

Barbara Henry
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Roxbury

cc: Senator Richard Blumenthal
Senator Chris Murphy
Representative John Larson
Representative Joe Courtney
Representative Rosa DeLauro
Representative James Himes
Representative Elizabeth Esty
Governor Dan Malloy
Attorney General George Jepsen
Sally Jewell, Secretary of the Interior
Kevin Washburn, Assistant Secretary-Indian Affairs
Lee Fleming, Director of the Office of Federal Acknowledgment