

(10) Reconsidered Final Determination Documents

- November 7, 1997

Reconsidered Final Determination Declining to Acknowledge that Ramapough Mountain Indians, Inc. Exists as an Indian Tribe

In an opinion issued on July 18, 1997, the Interior Board of Indian Appeals (IBIA) affirmed the Department of the Interior's (the Department) final determination (January 16, 1996) to decline to acknowledge that the Ramapough Mountain Indians, Inc. (RMI) existed as an Indian tribe. This affirmation was based on the consideration of the arguments and evidence presented by the petitioner and interested parties, and on critical documents relied upon by the Assistant Secretary - Indian Affairs (AS -IA) in the final determination (25 CFR 83.11(e)(8)).¹ At the same time, the IBIA asked the Secretary of the Department of the Interior (the Secretary) to consider whether four issues specified in the IBIA's decision constituted grounds for reconsideration of the final determination (31 IBIA 61, 81-85 (1997)).

In a memorandum dated September 29, 1997, Secretary Babbitt requested that the AS - IA address the four issues that were raised by the IBIA and, without passing on the merits, requested that the AS - IA issue a "reconsidered determination" in accordance with the applicable regulations, 25 CFR Part 83. Three of the four issues concern allegations of a denial of due process which, in the opinion of the IBIA, had not been addressed previously by the Department. The fourth issue concerns an interpretation of one of the seven mandatory criteria which must be met to be acknowledged as an Indian tribe. These issues will be addressed in the order in which they appear in the IBIA opinion. This reconsidered final determination supplements the final determination of January 16, 1996, and supersedes the final determination and the Federal Register notice, which was published on February 6, 1996, on the specific points discussed below.

¹The regulations read:

For purposes of review by the Board, the administrative record shall consist of all appropriate documents in the Branch of Acknowledgment and Research relevant to the determination involved in the request for reconsideration. The Assistant Secretary shall designate and transmit to the Board copies of critical documents central to the portions of the determination under a request for reconsideration. The Branch of Acknowledgment and Research shall retain custody of the remainder of the administrative record, to which the Board shall have unrestricted access (25 CFR 83.11(e)(8)).

The regulations also contain a provision that the IBIA may ask for technical assistance from the AS - IA or ask the AS - IA to provide more documents:

... The Board may also request, at its discretion, comments or technical assistance from the Assistant Secretary concerning the final determination or, pursuant to paragraph (e)(8) of this section, the record used for the determination. (25 CFR 83.11(e)(3)).

Issue One

The IBIA requested the Secretary to determine whether or not the RMI's allegation that the BIA had ignored its repeated oral requests for photocopies of the field notes taken in 1993 by anthropologist Steven Austin was well-founded:

Petitioner contends that BIA refused to furnish it with copies of the notes of anthropologist Steven Austin until the notes were submitted to the Board as a part of the Critical Documents. The Board recommends that the Secretary determine whether this allegation is well-founded and, if so, whether it constitutes a basis for reconsideration in this case (31 IBIA 61, 81 (1997)).

The anthropologist's field notes, which typically relate to the evaluation of the petition under 25 CFR 83.7(b) and (c), are provided by the Department routinely to petitioners upon request, with necessary redactions to protect privacy interests. The Bureau of Indian Affairs (BIA) is not aware of any requests from the RMI, written or oral, for these field notes. The IBIA decision, in footnote 10, states that the RMI's alleged requests were oral. The petitioner did not specify to the IBIA when the requests were made, who made the requests, or to whom the requests were directed.

In response to the Secretary's request to review this issue of an alleged denial of the field notes as raised by the IBIA in response to the petitioner's allegations, the BIA reviewed the notes taken by the Branch of Acknowledgment and Research (BAR) case administrator on telephone conversations with the petitioner, as well as the limited notes which have been retained from meetings with the petitioner. These documents are available as part of the record. The notes on the telephone conversations with the RMI do not refer to any request for field notes. Those notes retained by BIA researchers on technical assistance meetings held with the RMI do not have any references to a request for the field notes. Further, the February 6, 1995, letter from BIA to Ronald Van Dunk, which summarized the RMI technical assistance meeting of January 12, 1995, does not reference any request for field notes, nor any denial of these notes. In addition, the BIA researchers working on the petition and the BAR Branch Chief do not recall any oral request for these field notes.

In addition to this review, the files containing correspondence to and from the petitioner were reviewed. These files do not include any documents from RMI which requested these notes. Also, these files do not contain any written denials of the field notes, either in response to these alleged oral requests or in response to any written request. Prior to the petitioner's complaint before the IBIA, there were no documents from the RMI which complained that the notes had not been provided to them.

The files do contain references to requests from the petitioner's lawyer for other documents between the time of the anthropologist's fieldwork in March, 1993, and the final determination, January 16, 1996, including requests dated April 13, 1995, May 8, 1995, and May 24, 1995. The

correspondence files reflect the fact that all the requested documents were provided to the petitioner in accordance with the policies of the Department.

Those portions of the field notes which were relied upon in the proposed finding were specifically cited in the proposed finding as "(Austin 1993)." The petitioner was aware of the field notes, therefore, and had the opportunity to request the notes and to respond to all of the interview information relied upon in the proposed finding during the comment and reply periods.² The final determination did not rely upon portions of the field work other than those which were cited in the proposed finding.

Based on the review of the files as well as the actual notice of the nature and extent of the AS - IA's reliance on the field notes in the proposed finding, the AS - IA concludes that this allegation of the denial of access to the field notes is without foundation, is not a cause for reconsideration of the final determination, and that there was no denial of due process.

Issue Two

In discussing a second possible due process issue, the IBIA decision stated:

Petitioner also contends that BIA violated Petitioner's right to due process by failing to provide consultation under 25 C.F.R. § 83.10(l). . . Petitioner made this allegation . . . [by letter written] October 16, 1995, . . . [which allegation] was not specifically addressed in the December 18, 1995, response signed by the Solicitor. . . The Board recommends that the Secretary determine whether the allegations are well-founded and, if so, whether it constitutes a basis for reconsideration in this case (31 IBIA 61, 82 (1997)).

The cited provision of the regulations gives notice to the petitioner of when the Department begins its final deliberations and analysis of the petition, evidence, and comments. The time period for final consideration commences only after the time period for comments has expired and only after unsolicited comments from petitioners and third parties are no longer accepted (25 CFR 83.10(l)). Once this final consideration time period starts, the AS - IA has the opportunity to conduct additional research but is not required to discuss issues or evidence with the petitioner or interested parties. The time period for comments expires before the Assistant Secretary

²The AS - IA transmitted the anthropologist's field notes to the IBIA as part of the documents relied upon by the AS - IA in the final determination, where they were reviewed by the RMI. The RMI apparently showed the field notes to Reverend Ruth Wainwright, who had been interviewed in 1993 by the anthropologist. The affidavit by Reverend Wainwright, submitted to the IBIA by the RMI, concerning the accuracy of the BAR anthropologist's field notes did not address any of the portions of the field notes that were relied upon in the proposed finding or in the final determination. The affidavit challenges the field notes' record of an example given by Reverend Wainwright of how some of the RMI's members express their low sense of self-esteem. Neither the proposed finding nor the final determination referred to or relied upon this issue of self-esteem generally or to the specific example that she challenged.

determines the time frame for final consideration. In the case of the RMI, by letter dated September 20, 1995, the RMI were notified that the Department "will begin consideration" on September 18, 1995.

The acknowledgment regulations state:

At the end of the period for comment on a proposed finding, the Assistant Secretary shall consult with the petitioner and interested parties to determine an equitable time frame for consideration of written arguments and evidence submitted during the response period. The petitioner and interested parties shall be notified of the date such consideration begins (25 CFR 83.10(1)).

The Department interpreted this consultation provision of the regulations in a letter to another petitioner as follows:

[T]he consultation which occurs under 25 C.F.R. § 83.10(1) to establish an equitable time frame for consideration of the written comments submitted during the response and rebuttal periods is usually accomplished over the phone, as the time period is governed primarily by work load considerations within the Branch of Acknowledgment and Research. This consultation does not necessitate a meeting. (Letter dated February 26, 1997, from the Assistant Solicitor, Branch of Tribal Government and Alaska, Division of Indian Affairs, to opposing counsel in United Houma Nation v. Babbitt).

The consultation called for in the regulations is commonly done orally, either on the phone or in person. However, given the petitioner's repeated allegations of improper and illegal conduct by BIA personnel, it was more prudent to contact the RMI about the beginning of the final evaluation in writing. The question then is whether the written notification was a denial of due process. It is concluded that written notification was not a denial of due process.

The 1994 revised regulations state that the AS - IA will publish a summary of the final determination in the Federal Register within 60 days after the final determination evaluation process is begun (83.10(1)(2)). The intent of this provision of the regulations is to allow the BIA to discuss with the petitioner a proposed time frame for beginning and/or completing the final determination evaluation when the beginning of the evaluation may be delayed for an extended period of time, or when the amount of new evidence presented by the petitioner is so extensive that the evaluation may require more than the regulatory 60 days. The Department does attempt to ensure that petitioner's researchers are available during the final time period of active consideration, but reserves the right to make the final decision about when the final determination evaluation will begin and end.

The petitioner had previously requested, and received, several extensions to comment on the proposed finding. These extensions postponed the final determination phase of the

acknowledgment process from April 8, 1994, until May 8, 1995. The RMI was advised by the BIA in letters as recent as March 31, 1995, and May 5, 1995, that:

Due to the insubstantial nature of the comments received thus far, we do not foresee any grounds to extend the 60-day response period.

[T]he Federal regulations were not designed to allow unlimited extensions. It is the intent of the new regulations to make a final determination within one year of the proposed finding (Manuel to Van Dunk May 5, 1995, p.2).

By these statements regarding the comment period and petitioner's response period, the RMI was on notice that the BIA would proceed with the final determination in an expeditious manner. Also, the Department was aware of and considered the RMI objections to beginning the final determination process, as stated in their "Motion for Recusal or Suspension of Consideration Pending Investigation."³

Nevertheless, at the close of the period for the RMI to respond to third party comments, it was determined by the AS - IA that personnel were available to begin the final determination evaluation immediately. The RMI had not submitted evidence in their response to the proposed finding or in response to third party comments that would require more than the regulatory 60 days to evaluate. The AS - IA, therefore, did not need to consult with the RMI any further about the beginning or ending of the evaluation.

The decision to notify the RMI in writing about the beginning of the final determination process did not impact the final determination's evaluation under the criteria. The RMI did not allege in their correspondence with the Department or in their submissions to the IBLA any specific harm from being notified in writing on September 20, 1995, that the final determination process had begun. The Department finds no evidence that the petitioner was harmed. The AS - IA determines that this allegation of denial of due process is unfounded. Therefore, there is no need to reconsider the final determination based on this allegation of the denial of due process.

³The "Motion for Recusal or for Suspension of Consideration Pending Investigation" was filed on July 10, 1995. The Department denied the RMI's request at the same time that it notified the RMI that it would begin final consideration of the petition (Manuel to Van Dunk, September 20, 1995, and AS - IA to Catalano, September 25, 1995). Subsequently, the RMI's "Motion for Reconsideration and Immediate Suspension of Proceeding," dated October 16, 1995, was also denied (Leshy to Catalano, December 18, 1995).

Issue Three

The third due process issue referred to the Secretary involves several points. The IBIA's opinion states that the third unresolved due process issue raised by the RMI concerned the BIA's evaluation of evidence under criterion 83.7(b).⁴ This allegation:

[C]oncerns BIA's finding that Petitioner failed to satisfy the "community" requirement under 25 C.F.R. § 83.7(b) for the period after 1950. Petitioner argues that BIA reversed itself on this point . . . [and] suggests that . . . BIA misled Petitioner by stating that Petitioner should concentrate on bolstering its research for the period 1750-1820, without mentioning a need for further research on the later period. Petitioner alleges . . . that BIA's failure to give Petitioner notice of the change of position was a denial of due process. The Board recommends that the Secretary determine whether this allegation is well-founded and, if so, whether it constitutes a basis for reconsideration in this case (31 IBIA 61, 82 (1997)).

A review of the files indicates that the petitioner was not misled by the BIA after the proposed finding with regard to which criteria it had failed to meet or what evidence was still needed to satisfy the requirements of the criteria. Several letters from the Department, as well as a technical assistance meeting, addressed the question of required research. For instance, when Ronald Van Dunk, the chief of the RMI council, wrote to Secretary Babbitt (February 23, 1994) stating that the Bureau of Indian Affairs had not told the RMI how much and what type of evidence would be needed to demonstrate that the RMI met the four criteria that they had failed to meet, the Bureau of Indian Affairs responded:

In order to prove that the RMI meet the four criteria that were not met in the proposed finding, criteria a, b, c, and e, the response must address both the evidence which the proposed finding concludes demonstrates that the RMI do not meet these criteria and also provide evidence that they do meet these criteria. It would be necessary to present additional evidence which would show that our specific factual conclusions concerning the historical origins of the RMI, and its members, as not being derived from an Indian tribe, are incorrect.

Our report and finding are the best discussion of how the proposed evidence for Indian ancestry and continuous existence as an Indian tribe submitted by the

⁴The word "community" has many popular meanings. For some people it has a geographical connotation. The definition of community used when evaluating petitioners under the Federal acknowledgment regulations is: "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture, and social organization of the group" (25 CFR 83.1). In this way, the regulations emphasize the importance of the social relations between the people in a group, not a shared geographical area.

petitioner was weighed and evaluated against the evidence which we concluded demonstrated that these four criteria had not been met (Cordova to Van Dunk, March 24, 1994).

See also the letter of September 27, 1994, from the BIA, written in response to the RMI's request for a second extension to the comment period. The BIA included the following guidance for responding to the proposed finding:

As stated in our letter of March 24, 1994, and as we discussed with Mr. Jarvis, the new evidence which you are gathering must meet the four criteria (a, b, c, and e) that were not met in the proposed finding. The response must also address the evidence which the proposed finding concludes demonstrates that the RMI do not meet these criteria (Reckord to Van Dunk, September 27, 1994).

Rather than restating what was in the proposed finding's summary under the criteria, which would risk leaving out important points, these letters referred the petitioner back to the summary and the technical reports in answer to Mr. Van Dunk's inquiries.⁵ The summary under the criteria and the technical reports are the clearest statements of the evidence and how it was evaluated, and Mr. Van Dunk was advised that the RMI needed to respond to all of the issues raised in the proposed finding.

At a technical assistance meeting held on January 12, 1995, RMI was told that it not only needed to find evidence establishing a connection to an historical Indian tribe, but also to provide more information on all the issues and concerns addressed in the proposed finding. It was emphasized in that meeting that finding evidence that demonstrated a connection to an historical tribe was of paramount importance: without demonstrating a connection to an historical tribe, there would be no practical need to do more research on modern community, because they would fail to meet criteria 83.7(a), (b), (c), and (e) on that point alone. But the need for more evidence for all the criteria not met was also addressed in that meeting. In a letter dated February 6, 1995, the BIA summarized the technical assistance meeting with the RMI, stating:

During the meeting, Branch of Acknowledgment and Research (BAR) researchers advised you to focus your response to the proposed finding on: criteria (a) identification as an American Indian entity on a substantially continuous basis since 1900; (b) a predominant portion of the group comprises a distinct community and has existed as a community from historical contact *until the present*; (c) maintenance of political influence or authority over the members as an autonomous entity from historical times until the present; and (e) the membership consists of individuals who descend from a historical Indian tribe or

⁵While these letters are part of the record on the RMI acknowledgment decision, they were not among the critical documents transmitted by the AS - IA to the IBIA (see 25 CFR 83.11(e)(3) and 83.11(e)(8) and footnote 1, above).

from historical tribes which combined and functioned as a single autonomous political entity. Since the significance of meeting criteria (a), (b), and (c) depends on meeting (e), your research should first be to determine which, if any, ancestors of the RMI were members of an historic Indian tribe (Reckord to Van Dunk, February 6, 1995). [emphasis added]

These same points were addressed in the BIA letter dated March 31, 1995, in response to the RMI's request for a suspension of consideration of the RMI petition.

For criteria (b) and (c), you were advised in this 1990 letter to provide documentation that demonstrated that the scattered communities constituted a cohesive community which maintained tribal relations and that the members recognized a leader or leaders of the group. You were asked to provide evidence that there were activities or events that had helped maintain member interaction and cohesiveness. The regulations require that *community* and political influence or other authority be maintained *from historical times until the present* (Manuel to Van Dunk March 31, 1995). [emphasis added]

Although the period of 1950 to the 1990's may not have been specified in these letters, the record clearly shows that the RMI were notified that there was a lack of evidence for community to the present. In each instance, the RMI were guided back to the proposed finding for a discussion of the critical issues, including criterion 83.7(b). The questions then become, "Did the proposed finding, either the summary under the criteria or the technical report, indicate that the petitioner had not met criterion 83.7(b) for the modern time period, particularly from 1950 to the present? Did the proposed finding indicate that more research was required?"

The summary under the criteria, page 10, in discussing present day, or modern, community, states:

[T]he evidence is not sufficient to establish the existence of patterns of significant contact beteen [sic] residents and non-residents. . . . Because the RMI do not meet the requirements of criterion b on other grounds, it was not necessary to definitively evaluate this question (Proposed Finding, Summary Under the Criteria, p. 10).

Thus, the proposed finding clearly did not find that the RMI met criterion 83.7(b) from 1950 to the present. Rather, the proposed finding left unresolved the question of whether the RMI in the three settlements maintained sufficient contact with those outside the settlements as required for

the petitioner to meet criterion 83.7(b).⁶ And, on page 25 of the Anthropology Technical Report, the Department noted that:

The petitioner did not show that those RMI who are dispersed throughout New York and New Jersey communicate frequently with each other, or those at the core, face to face. . . . The petitioner could strengthen their case by providing more information on RMI and their patterns of migration from and return to the core.

Referring to another form of possible evidence, the summary under the criteria stated, "There is no evidence that there were significant cultural differences between the RMI and other populations in the area, at any time period, despite petitioner's claims to the contrary" (Proposed Finding, Summary Under the Criteria, p. 8).

The proposed finding did not conclude that the petitioner met criterion 83.7(b) from 1950 to the present.⁷ As a result, the petitioner needed to address this issue during the response period to the proposed finding. Nothing in the Department's letters to RMI indicated that this issue no longer needed to be addressed. The letters were consistent in indicating that all aspects of the proposed finding needed to be addressed. Based on this review, the AS-IA finds that the petitioner was not misled by the BIA after the proposed finding, but was fully informed of the shortcomings of its petition on all four of the criteria it had failed to meet, and that there was no denial of due process on this issue.

In conjunction with the third issue, the IBIA referred a subsidiary question of due process to the Secretary. This question was based on the petitioner's contention that it had not been notified that the AS - IA had changed her conclusions between the proposed finding and final determination. Based on new evidence and new arguments, the AS - IA has sometimes changed

⁶In the same way that it was necessary for RMI to provide more evidence to meet criterion 83.7(b) in the modern era, the petitioner was directed to focus on criterion 83.7(c) for the petitioner as a whole:

It is clear that this is a reasonably cohesive and distinct group socially, at least in the core geographic community. . . . To the limited degree that significant informal leadership has been demonstrated for local portions of the group between 1940 and the 1970's, there is supporting evidence that such may exist presently. Clearly establishing the existence of local leaders and/or organizations would provide supporting evidence for the existence of group-wide exercise of political influence. However, establishing the existence of political influence within separate subgroupings would not by itself establish political influence for the group as a whole (Proposed Finding, Summary Under the Criteria, p. 15-16).

These citations refer to large gaps in time, 1940's to 1978 and 1978 to the present, years compatible with the phrase "the 1950's to the present" in question under criterion 83.7(b), where there is little or no evidence that, either among the three settlements or within the petitioner as a whole, there were leaders or bilateral political influence.

⁷For a full discussion of the reasons why the RMI did not meet criterion 83.7(b), the reader is referred to the proposed finding and the final determination, and the respective technical reports.

conclusions between the proposed finding and the final determination. The petitioners have never been notified of such changes before the final determination. Before the final determination is actually signed by the AS - IA, there is no requirement in the regulations to give either the petitioner or interested parties such notice. Further, until the AS - IA signs the decision, the BIA staff does not know what the Department's position will be and whether it changes the proposed finding.

In order to maintain the integrity of the deliberative process, the Department does not disclose drafts of acknowledgment decisions. The Department defends vigorously non-disclosure of drafts of the acknowledgment decisions and has moved for a protective order in other acknowledgment cases to protect the integrity of the deliberative process by preventing disclosure of such drafts. RMI's comment to the IBIA that it needed notice of any changes between a proposed finding and a final determination, before the decision is made by the AS - IA, is inconsistent with the positions taken in other acknowledgment litigation to protect the integrity of the deliberative process. The AS - IA determines that there was no denial of due process on the issue of not granting notice to the petitioner that the final determination might change a conclusion of the proposed finding.

The IBIA also recommended the further investigation of another point related to the third issue, which the IBIA opinion characterized as an apparent discrepancy between the proposed finding and the final determination. The apparent discrepancy concerned the AS - IA's conclusions in the proposed finding and the final determination regarding the RMI's maintenance of community. The proposed finding concluded that the RMI did not meet criterion 83.7(b) at any point in time, whereas the final determination concluded that there was sufficient evidence that the RMI met criterion 83.7(b) from 1870 to 1950. The IBIA stated its recommendation as follows:

[T]he Board also recommends that the Secretary request the Assistant Secretary to address an apparent discrepancy between the Proposed Finding and the Final Determination concerning Petitioner's "community" for the post-1870 period. This apparent discrepancy may well be a result of the change in regulations. The Board believes, however, that some clarification is warranted (31 IBIA 61, 82 (1997)).

The IBIA continues by comparing statements made in the Federal Register notice of the final determination with statements in the proposed finding. The IBIA opinion states: "[i]n the Board's view, these statements [in the final determination] are inaccurate" (31 IBIA 61, 82 (1997)). The Board continues:

Although this is not a critical point, the Board recommends that, at the same time Petitioner's due process allegation is considered, the Assistant Secretary be requested to clarify the statements in the Final Determination concerning the findings made in the Proposed Finding (31 IBIA 61, 84 (1997)).

The IBIA opinion indicates that there are inaccuracies in how the Federal Register notice of the final determination characterized the proposed finding. On review, this discrepancy is not only found in the Federal Register notice, but in the final determination itself (Final Determination, Summary Under the Criteria, p. 21). The IBIA was correct in suggesting that the apparent discrepancy was due, in part, to a change in the wording of the acknowledgment regulations, which were revised in 1994.⁸ The following discussion provides a reconsidered determination, as requested by the Secretary, of the differences between the proposed finding and final determination with regard to the conclusions about RMI and the maintenance of community. This discussion supersedes the portions of the final determination which are inconsistent with it.⁹ The final determination's conclusion that the RMI did not meet criterion 83.7(b) is affirmed; its characterization of the proposed finding is amended.

The proposed finding on the RMI petition was written under the 1978 regulations, while the final determination was written, following the choice of the RMI, under the 1994 revised regulations. As suggested by the IBIA opinion, changes in the 1994 revised regulations did result in changes

⁸After the 1994 regulations were published, petitioners that were already on active consideration, including the RMI, were given the opportunity to choose if they wanted to continue having their petition evaluated under the 1978 regulations, or if they wanted to proceed under the revised 1994 regulations. The RMI chose to proceed under the revised regulations, thus prompting part of the change in conclusions between the proposed finding and the final determination on criterion 83.7(b).

⁹The petitioner's lawyer contended that there was no need to "clarify" issues regarding the maintenance of community from 1870 to the present (Catalano to Babbitt 1997). The letter stated that the proposed finding had established that the petitioner had met 83.7(b) from 1870 to the present. In support of this, the letter quoted several statements from the three technical reports (*ibid.*, 5). For example, the letter quotes one sentence as follows: "Based on this evidence, it is concluded that a community currently does exist among the RMI" (Anthropology Technical Report, p. 24). When read in the context of the preceding and following pages, it is clear that this statement refers only to the RMI members living in the three settlements, not to the RMI membership as a whole. The statement on page 11 of the proposed finding, summary under the criteria, which stated "they were socially cohesive," should be understood in the same way.

The RMI also quoted a portion of a sentence from the history technical report. The full sentence reads: "The petitioning group does represent a distinct community with significant continuity from the early 19th century to the present, but is not a community that has resided in the Ramapo Mountains since colonial times." This reconsidered final determination clarifies that this sentence from the introduction to the summary of the evidence, was intended to reference the RMI living in the three settlements (Proposed Finding, History Technical Report, p. 77).

The only reliable evidence presented by the petitioner that could be used to evaluate whether the petitioner had maintained its community between 1950 and 1992 was the 1992 membership list. The members living in those three settlements only accounted for 44 percent of the individuals on the 1992 membership list. There was only anecdotal evidence regarding social connections between the 56 percent living outside of the three settlements and the 44 percent living in the settlements. This was insufficient evidence to establish the required social connections between those living inside the three settlements and those living outside of them (Proposed Finding, Summary Under the Criteria, p. 10). This lack of evidence contributed to the conclusion in the proposed finding that the RMI as a whole did not meet criterion 83.7(b) at any point in time, including from 1950 to 1992. The RMI was told to provide additional evidence on this point for the final determination (Proposed Finding, Anthropology Technical Report, p. 25).

in the conclusions regarding 83.7(b). In the 1978 regulations, the criterion on the maintenance of community read as follows:

Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area (25 CFR 83.7(b)).

The guidelines written for the 1978 acknowledgment regulations, in reference to criterion 83.7(b), provide that "[i]n this section the petitioning group should demonstrate that a sizeable number of its members live close enough to each other to meet, associate, and conduct tribal business on a regular basis, and that they do so" (Guidelines for the 1978 acknowledgment regulations, p. 8).¹⁰

The proposed finding concluded that RMI did not meet this criterion at any point in time (Proposed Finding, Summary Under the Criteria, pp. 11-12). A summary of the evidence for this conclusion in the proposed finding follows. The first evidence that a separate settlement comprised of the RMI's ancestors was coalescing in the Ramapough Mountains (a mission was started for them at Darlington, NJ, by the AME Zion Church) dates to the 1850's. "In the 1860's a major portion of the RMI families listed on the census were living next to each other, while others remained scattered in the various townships" (Proposed Finding, Summary Under the Criteria, p. 6). The first clear evidence that RMI's ancestors were a distinct, separate social community did not appear until 1872¹¹ (Proposed Finding, Summary Under the Criteria, pp. 6-7). The proposed finding summarized the preceding evidence: "[c]ommunity cohesion is established post-1850 by the existence of geographically distinct, exclusive residence areas, and a high degree of marriage within the group" (Proposed Finding, Summary Under the Criteria, p. 8). Based on this evidence, it was concluded in the proposed finding that at some time between 1850 and 1872, the RMI ancestors developed into a distinct, geographically isolated settlement. The AS - IA concluded that the settlement that was in evidence by 1872 did not meet the requirements of 83.7(b) at any point in time: "[w]hile the group was considered distinct, it was

¹⁰In the preamble to the 1994 revised regulations, the Review of Public Comments discusses changes in the wording of criterion 83.7(b), and the requirements for meeting that criterion.

Criterion (b), demonstration of community, and the associated definition of community in § 83.1, were substantially revised in the proposed revised rule. The revision omitted an apparently implied requirement that a group live in a geographical community in order to demonstrate that this criterion was met. The revised definition effectively requires a showing that substantial social relationships and/or social interaction are maintained widely within the membership; that is, that members are more than simply a collection of Indian descendants, and that the membership is socially distinct from non-Indians (Federal Register, Vol. 59, No. 38, February 25, 1994, p. 9286).

¹¹About 1872, both the Episcopalian and Reformed denominations tried to establish mission activities among the RMI's ancestors. In the summary under the criteria 1872 was sometimes rounded to 1870.

not distinguished as Indian; rather, the RMI were distinguished as being part Indian and part non-Indian” (Proposed Finding, Summary Under the Criteria, p. 8).¹²

The proposed finding also drew some conclusions about the RMI and the maintenance of community in the present day. Using the 1992 RMI membership list, the proposed finding concluded that “a substantial portion of the RMI ancestors and their descendants have lived in the three Ramapo Mountain communities of Stag Hill/Mahwah, NJ, Ringwood, NJ, and Hillburn, NY from the 1870's to the present” (Proposed Finding, Summary Under the Criteria, p. 10). The summary under the criteria concluded: “[s]lightly over one-half of these members (1,333 [of 2,654, or 50.2 percent]) live in a ten-mile geographical core area [sic “within a five-mile radius” (i.e. an area ten miles in diameter), as in Anthropology Technical Report, p. 19] that includes the three principal RMI settlements, with 44 percent in the settlements themselves” (Proposed Finding, Summary Under the Criteria, p. 10).

At the time of the field research in 1993, there was only anecdotal evidence of continuing social relations between the 56 percent of the petitioner’s members that did not live in those three towns and the 44 percent that did.¹³ The important modern community issue of the social connection between the RMI members who lived in the three towns and those who did not was not definitively answered at the time of the proposed finding:

Evidence concerning the maintenance of social relations with those RMI resident outside of the core geographic area is much more limited than that concerning the core geographic area itself. There is anecdotal evidence for the following statements, but the evidence is not sufficient to establish the existence of patterns of significant contact between [sic] them Because the RMI do not meet the requirements of criterion 83.7(b) on other grounds, it was not necessary to

¹²The requirement that the petitioner’s community be viewed as American Indian was removed from criterion 83.7(b) in the revised 1994 regulations. This is one of the reasons that the final determination concluded that there was sufficient evidence that the RMI met this criterion from 1870 to 1950 and the proposed finding did not.

¹³In conjunction with this review, it is found that the last full paragraph at the bottom of page 24 of the Anthropology Technical Report is inconsistent with the remaining discussion in that report. The report stated:

Based on this evidence, it is concluded that a community currently does exist among the RMI. One half of the RMI membership lives in the 10 mile core area and have the opportunity to interact on a frequent basis and they seem to do so. Significant social and economic ties exist between the RMI members in the three core communities, based on intermarriage and kinship (Proposed Finding, Anthropology Technical Report, p. 24).

This reconsidered final determination clarifies and rejects a portion of that paragraph and finds that it should read as follows: Based on this evidence, it is concluded that a community currently does exist among the RMI living in the three settlements. Forty-four percent of the RMI membership lives in separate enclaves of the three main settlements and have the opportunity to interact on a frequent, face-to-face basis, and they seem to do so. Significant social and economic ties exist between RMI members in the three settlements, based on intermarriage and kinship.

definitively evaluate this question.” (Proposed Finding, Summary Under the Criteria, p. 10).

That is, there was no need for the BIA to do further analysis on the modern community issue since the petitioner had not demonstrated that it existed from historical times to the present as a community viewed as American Indian, or that its members were descendants of an Indian tribe which historically inhabited a specific area. The acknowledgment regulations clearly state that it is the petitioner’s responsibility to do the research for their petition: “The Department shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition. The Department shall not be responsible for the actual research on behalf of the petitioner” (25 CFR 83.5(c)).

The final paragraph of the summary under the criteria for 83.7(b) concluded first that RMI did not meet the requirements of the criterion from 1850 to the present because “they were not distinct as Indians” as called for by the criterion. “Even though outsiders attributed partial Indian ancestry to them, they were not identified as an Indian group by outsiders” (Proposed Finding, Summary Under the Criteria, p. 11). Thus, the IBIA opinion is correct in stating that in the proposed finding: “no conclusion was reached on the question of whether the petitioner satisfied the community requirement, as presently constituted for any of the period after 1850, because the negative conclusion in the proposed finding was based on another, now-removed, requirement” [that its community be identified as American Indian] (31 IBIA 61, 83 (1997)).

The 1994 (revised) regulation’s statement of criterion 83.7(b) is as follows:

A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

The 1994 statement of criterion 83.7(b) no longer requires that the petitioner’s community be viewed as American Indian or that its members descend from an Indian tribe that historically inhabited a specific area.¹⁴ Because of this change to criterion 83.7(b), evidence concerning the RMI settlements which had come into existence by 1872 was evaluated anew at the time of the final determination. The final determination concluded that the RMI met criterion 83.7(b) from 1870 to 1950. This conclusion does not reflect a significant change from the conclusions in the proposed finding, but a refinement of those conclusions based on revisions in the wording of criterion 83.7(b), as well as additional evidence (church records that reflected a significant rate of

¹⁴The 1994 revised regulations analytically separated out from criterion 83.7(b) the issues of external identification as an Indian entity and descent from an historical Indian tribe. Petitioners must still demonstrate that they have been identified by external sources as an Indian entity, and that they descend from an historical tribe under criteria 83.7 (a) and (e), respectively. While the revision of the regulations may have changed the evaluation for specific criteria - in this case allowing the RMI to meet criterion (b) for a specific time period - the overall outcome of any acknowledgment determination would be the same under the 1978 regulations and the 1994 revisions (see Federal Register, Vol. 59, p. 9280).

endogamy from 1878 to 1918) that was discovered by the BIA in the period between the proposed finding and the final determination.

The evaluation of the evidence at the time of the final determination, under the revised statement of criterion 83.7(b), showed that there was sufficient evidence that the RMI were a distinct community from 1870 to 1950, but not before 1870 or after 1950 (Final Determination, Summary Under the Criteria, p. 24). The IBIA opinion is correct in stating that the proposed finding did not arrive at this explicit conclusion. Rather, at the time of the proposed finding, the issue of whether or not the petitioner had a community in the modern era was left undecided 1) because the evidence available at the time was not sufficient to conclude that RMI met criterion 83.7(b); 2) because RMI had failed to establish that they descended from an historical Indian tribe; 3) because RMI did not document that they had an ancestral community before 1872; and 4) because RMI failed to meet criterion 83.7(b) because as a group they were not viewed as American Indian.

Thus, the Federal Register notice announcing the final determination (and the final determination itself) inaccurately characterized the conclusions in the proposed finding. The proposed finding concluded that the RMI's settlements came into existence over a period of time between 1850 and 1870. It was difficult to be more precise than that based on the available data. The proposed finding also concluded that the first solid evidence that the RMI were a distinct, separate settlement appeared in 1872. The proposed finding determined that further analysis under criterion 83.7(b) was not necessary because the settlements had not been identified as "Indian." Because of the revisions in the wording of criterion 83.7(b), and on the basis of new evidence discovered by the BIA researchers during their evaluation of the RMI response to the proposed finding, the evidence concerning the maintenance of community was reevaluated for the final determination. That reevaluation of the evidence concluded that there was sufficient evidence to demonstrate the maintenance of community between 1870 and 1950 but that the evidence before 1870 and after 1950 remained insufficient.

While the proposed finding did not specify 1950 as the year after which the evidence was insufficient to conclude that the RMI's community still existed, this conclusion in the final determination is consistent with the proposed finding which cited no evidence for community among the RMI as a whole from 1950 to present, and stated that there was only anecdotal evidence in 1992 that members living outside of the three settlements continued to maintain social relations with members living in the three settlements. Anecdotal evidence is not sufficient evidence to demonstrate that a petitioner has met the requirements of criterion 83.7(b) (see Proposed Finding, Summary Under the Criteria, p. 10; Anthropology Technical Report, p. 22).

RMI was not harmed by the refined conclusions of the final determination regarding criterion 83.7(b). In fact, it benefitted from the change in the wording of criterion 83.7(b) in the 1994 revised regulations (which no longer required a petitioner's community to be viewed as an American Indian community). Whereas the proposed finding concluded that RMI did not meet

criterion 83.7(b) at any point in time, the final determination found that RMI met criterion 83.7(b) from 1870 to 1950. Of course, without sufficient evidence that RMI descends from an historical Indian tribe, and without sufficient evidence of an ancestral community before 1870, it is a moot point whether there is sufficient evidence for community from 1950 to the present.¹⁵ However, the conclusion of the final determination that the RMI does not meet criterion 83.7(b) before 1870 or from 1950 to the present is affirmed.

Issue Four

The IBIA opinion notes a fourth and final issue which "requires clarification." It is also related to criterion 83.7(b).

Another point which the Board believes requires clarification is also related to the "community" requirement in 25 C.F.R § 83.7(b). It concerns Petitioner's "core geographical area" as used to determine residency percentages under 25 C.F.R. § 83.7(b)(2)(i).

Specifically, the IBIA found a discrepancy between the proposed finding and the AS - IA's "Transmittal Memorandum" filed by the Department with the IBIA concerning the geographical core area and membership residential distribution. The proposed finding sometimes discussed a "10-mile geographical core area that includes the three principal settlements" (Proposed Finding, Summary Under the Criteria, p. 10) and sometimes referenced "the core geographic area" as the three settlements: "[T]he core geographic area, both within and between the three communities" (Id.).

The transmittal memorandum was written, in part to clarify an error found in the final determination's summary of the proposed finding's conclusions about the residential distribution of RMI members (31 IBIA 61, 84 (1997)). The final determination mistakenly stated that the proposed finding had concluded that one third of the RMI's members still lived in the RMI's three settlements and that two thirds of the RMI's members lived outside of those settlements (Final Determination, Technical Report, p. 80). The same mistake was repeated when referring to the failure of the RMI to provide new evidence about modern community: "No new evidence was presented concerning the relationship of the two-thirds majority of the RMI to the one-third living in the geographical core" (ibid.). This was not a new conclusion of the final determination, but an inaccurate summary of the proposed finding's conclusions. The proposed finding was very clear in its conclusions based on the analysis of the 1992 membership list that had been provided by RMI. The proposed finding stated:

¹⁵If the RMI petition had begun evaluation under the 1994 revised regulations, it would have received an expedited negative proposed finding on criterion 83.7(e) (descent from an historical Indian tribe) alone, prior to the start of active consideration (see 83.10(e)(1); also Final Determination, Summary Under the Criteria, p. 7).

A substantial portion of the RMI ancestors and their descendants have lived in the three Ramapo Mountain communities of Stag Hill/Mahwah, Hillburn, and Ringwood, from the 1870's to the present. According to the 1992 RMI membership list submitted to the BAR, there are about 2,654 members of the group. Slightly over one half of these members (1,333) live in a 10-mile geographical core area that includes the three principal RMI settlements of Stag Hill/Mahwah, New Jersey, Hillburn, New York, and Ringwood New Jersey, with 44 percent in the settlements themselves (Proposed Finding, Summary Under the Criteria, p. 10).

This conclusion was not changed at the time of the final determination. The reasons why this evidence was not sufficient to meet criterion 83.7(b) at the time of the final determination has been discussed above.

The misstatement of the evidence in the final determination did not change the conclusions reached in the final determination, because the issue of concern was the lack of evidence for social connections between the RMI members living in the three settlements and those living outside those settlements. The final determination, including the technical report pages 79-80, are hereby amended to reflect the conclusion in the proposed finding that 56 percent of the RMI lived outside of the three settlements and 44 percent lived in the three settlements in 1992.

The IBIA notes that "core geographical area" and "village-like setting" are two undefined terms which do not appear in the regulations. The RMI's geographical core area,¹⁶ and the social interaction among the RMI living in the three principal settlements was described in the proposed finding's anthropology technical report. The geographical core area was defined usually as having "a five-mile radius core area that includes seven towns or villages"¹⁷ (Proposed Finding,

¹⁶The phrase "geographical core area" is an analytical designation based on historical descriptions of the location of a group's historical place of residence as it existed at a particular point in time. It does not necessarily imply anything about the maintenance of community under criterion 83.7(b) among the people that live in that area, since this can change dramatically over time. For example, in 1992, the area covered by the five-mile radius that encompasses Stag Hill/Mahwah, NJ, Ringwood, New Jersey, and Hillburn, New York includes several other towns and villages which have not historically been associated with the RMI or their descendants. Today these towns and villages have very few, if any, RMI members living in them. Since 1870, many people who are not genealogically related to the RMI have moved into the RMI's "geographical core area," making it impossible to assume that the RMI in that area are maintaining a distinct community with each other solely on the basis of their residence. By contrast, when a petitioner's members live in an area almost exclusively inhabited by them, as the RMI's ancestors did in 1872, it is possible to assume, barring evidence to the contrary, that those members are maintaining a community among themselves. See also final determination technical report (p. 80) which refers to the three settlements in the core area and states that the BIA cannot "assume that the RMI, as a whole, continued to constitute a community on the grounds of geographical distribution alone."

¹⁷From 1870 to 1992, these were not Indian towns or villages. Nor were they exclusively RMI towns or villages from 1870 to 1992, but towns comprised of non-RMI ancestors and descendants as well. In 1992, the vast majority of the people in this five-mile radius area were not RMI members. While population data on the four towns not historically associated with the RMI was not readily available, it is instructive to consider the data for the three

Anthropology Technical Report, pp. 19-22). The proposed finding stated that the geographical core area included the three main towns in which many RMI ancestors and descendants lived since 1870. In 1992, the fact that 50.2 percent of the RMI lived in this five-mile radius was not the same as stating that it lived in an area exclusively inhabited by its members, since the vast majority of the population living in that five-mile radius in 1992 was not descended from RMI ancestors. Further, the statement that 50.2 percent of RMI's members resided in the five-mile radius area in 1992 did not imply anything about the maintenance of community among the people that live in that area.

By contrast, however, when a substantial portion of a petitioner's members reside in an area exclusively or nearly exclusively inhabited by them, the AS - IA does make the assumption that social ties exist among those individuals when there is no direct evidence to the contrary. This is what is meant by "village-like setting." This term, which is not defined in the regulations is sometimes used to designate situations like that anticipated by 83.7(b)(2)(i). According to the proposed finding, no more than 44 percent of the RMI's members lived in such a setting.

The IBIA opinion also states another concern:

It appears possible that imposition of the "village-like setting" requirement was the cause of BIA's apparent alteration in its conclusion concerning the population of Petitioner's core geographical area. To the extent the imposition of a requirement not stated in the regulations resulted in a conclusion adverse to Petitioner - even though the specific conclusion was not critical to the ultimate determination concerning petitioner's acknowledgment - the Board recommends that the Secretary determine the requirement to be invalid (31 IBIA 61, 85 (1997)).

As already discussed, the Department has never imposed a "village-like setting" requirement on petitioners for Federal acknowledgment under criterion 83.7(b), whether they were evaluated under the 1978 regulations or the 1994 revised regulations. The AS - IA agrees that it would be unreasonable to require all petitioners to provide such evidence to meet 83.7(b), even though some petitioners have met some of the provisions of 83.7(b)(2)(i-v).¹⁸

settlements themselves. In 1992, 1,168 RMI members lived in the three settlements. In 1997, the population for the three modern towns in which there are RMI enclaves was as follows: Mahwah Township: 21,057; Hillburn, NY: 1,000; Ringwood: 12,500. The total population of these three towns is 34,557. This means that the RMI members living in the three towns are a distinct minority of only three percent. This percentage would be even lower for the five-mile radius area.

¹⁸In documenting their petitions, several petitioners have successfully provided evidence like this in order to demonstrate that they have met criterion 83.7(b). As one example, see the final determinations for the Jena Choctaw Band, who were acknowledged under the 1994 revised regulations.

While the AS - IA does not require that petitioners live in a village-like setting, the concept is used when evaluating petitions. For example, when considering the issue of the maintenance of community, the BIA's researchers perform a series of analyses. The first question asked is, "Has the petitioner demonstrated that it meets the evidence described in 83.7(b)(2)(i-v)?" These five subsections specify evidence that is sufficient, in and of itself, for demonstrating 83.7(b). In the regulations, the first type of sufficient evidence is described as follows:

A petitioner shall be considered to have provided sufficient evidence of community *at a given point* in time if evidence is provided to demonstrate any one of the following: (i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group and the balance of the group maintains consistent interaction with some members of the group [83.7(b)(2)(i), emphasis added].

This is the same as asking, as was done in the RMI proposed finding and final determination, "Do more than 50 percent of the petitioner's members live in a geographical community and, if so, do the remainder of the members interact socially with them?" This approach does not impose a mandatory "village-like setting" requirement on petitioners; rather, it is one of several means for demonstrating 83.7(b). The provisions of 83.7(b)(2)(i-v) were incorporated into the 1994 revised regulations to reduce the burden of research on petitioners who could provide such sufficient evidence and to reduce the time required to evaluate petitions.

It is possible that a petitioner could meet 83.7(b)(2)(i) without living in an actual village. As indicated in the IBIA opinion, a petitioner could live dispersed in a rural area that is mostly inhabited by its members. Or they might, as appears to be the case with many of the RMI members (approximately 44 percent in 1992), live in relatively isolated locations, in three different towns, and form a community. In the three towns of Stag Hill/Mahwah, Hillburn, and Ringwood, the RMI tend to live in separate enclaves. There was sufficient evidence, based on the 1992 RMI membership list and the BIA's 1993 evaluation of it, to demonstrate that 44 percent of the RMI membership lived in those enclaves which interacted with each other.

However, there are several reasons why this was not sufficient for RMI to meet the requirements of 83.7(b). First, the proposed finding and the final determination were evaluations of the petitioner as a whole. If all of the petitioner's members had lived in these three interacting settlements, this would have met criterion 83.7(b) in 1992; rather, only 44 percent of the petitioner's members lived in the three settlements in 1992. Second, it would also have been sufficient had more than fifty percent of RMI members lived in these three interacting settlements and had there been evidence that the remainder of the petitioner's members continued to maintain social relations with members of the group. But, there was insufficient evidence to demonstrate the existence of continuing social relations between the petitioner's members who lived in the three settlements and those who did not. For example, there was no evidence that the 6 percent of RMI members that lived in the other four towns within the five-mile radius interacted socially with RMI members in the three principal towns. And there was only limited,

anecdotal evidence that a few of the 56 percent of the RMI living outside the three RMI settlements interacted with those who lived in the settlements. Thus, the RMI failed to demonstrate that they met 83.7(b)(2)(i).

Providing evidence that more than 50 percent of its members live in an area almost exclusively inhabited by its members is not the only sufficient evidence which petitioners may use to demonstrate that they meet the requirements of criterion 83.7(b). If a petitioner does not meet 83.7(b)(2)(i), it is evaluated under the remaining four subsections of 83.7(b)(2), which consider such evidence as shared language, continuing participation in religious activities, and endogamy (a pattern of marriages to other members of the group). The final evaluation found no evidence demonstrating that the petitioner met the provisions of 83.7(b)(2)(ii-v) before 1870 or after 1950.

If the petitioner does not meet 83.7(b)(2)(i-v), it leads to the second question that BIA researchers ask: "Does the petitioner meet the requirements of 83.7(b)(1)?" More specifically, "Is there any other evidence that a predominant portion of the members of the group comprise a distinct community from historical times until the present?" The regulations suggest nine specific types of evidence that may be used in combination to demonstrate that petitioners meet this criterion (83.7(b)(1)(i-ix)). The regulations also state that other evidence may be used to demonstrate that the petitioner meets criterion 83.7(b). Since the final determination found that RMI did not provide sufficient evidence under 83.7(b)(2), an evaluation under 83.7(b)(1) was undertaken. The final determination concluded that the RMI did not provide sufficient evidence that demonstrated it met 83.7(b)(1), before 1870 or between 1950 and the present. No sufficient evidence was found by the BIA. This conclusion of the final determination is affirmed.

Based on the above clarifications, and in response to the Secretary's request for the issuance of a reconsidered final determination, this document, in conjunction with the original final determination, will become an amended final determination for the RMI petitioner. In accordance with 25 CFR §83.11(h)(3), a Federal Register notice announcing the reconsidered final determination will be published.

11-7-97
Date
ada E. Deer
Assistant Secretary - Indian Affairs