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Ms. Elizabeth Appel  
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1849 C Street, NW; MS-4141  
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**Via electronic submission:** [consultation@bia.gov](mailto:consultation@bia.gov) (1076-AF18)

Re: Proposed Rule - Federal Acknowledgment of American Indian Tribes

Dear Ms. Appel:

These comments are submitted on behalf of the Seminole Tribe of Florida (the "Tribe") on the Department of the Interior's proposed rule on the Federal Acknowledgment of American Indian Tribes published in the May 29, 2014, issue of the Federal Register (79 Fed. Reg. 30766).

The Tribe commends the Department for the thoughtful revisions to this complex process set forth in the proposed rule. For many years the acknowledgment process has been criticized by petitioners, interested parties, the General Accounting Office ("GAO") and Congress as a system that lacks transparency and is excessively costly, overly-burdensome, too time consuming, and unpredictable. The Tribe supports this effort by the Department to fix these longstanding problems.

The comments presented below express support for many of the procedural changes contained in the proposed rule. These comments support rule improvements intended to facilitate final determinations in which the outcomes are made fairer by offering more consistency, uniformity, efficiency and transparency in the acknowledgment process. These comments also encourage the Department to consider additional provisions that would limit the delays, burdens and inconsistencies caused by third parties who may engage in the acknowledgment process not for the purpose of providing further documentary evidence, but instead to mount preemptive challenges against the petitioner intended to foreclose future disputes over matters such as land-into-trust and gaming even though such matters are not ripe for consideration until the federal acknowledgment process is completed and a favorable decision is issued. The comments also provide suggestions intended to foster further consideration of approaches that may enable the Department to meet its objectives while avoiding unintended adverse impacts.

***Federal Acknowledgment Demands an Effective, Reliable and Fair Process Consistent with the Federal Trust Responsibility.***

The federal acknowledgment process is of essential importance because of the fundamental rights, privileges and immunities that flow from the determination of tribal status. If a tribe meets the criteria in the Federal Acknowledgment Process, then a tribe enjoys a government-to-government relationship with the United States and comes under federal jurisdiction. As the Department recently stated in testimony to Congress:

The decision to acknowledge an Indian tribe has a significant impact on the petitioning group, other Indian tribes, surrounding communities, and federal, state, and local governments. Acknowledgment generally carries with it certain powers, privileges, and immunities, including the authority to establish a land-base over which to exercise jurisdiction, provide government services to tribal citizens, and sovereign immunity from lawsuits and taxation from other governments.

*Federal Acknowledgement: Political and Legal Relationship Between Governments: Oversight Hearing Before the Senate Committee on Indian Affairs, 112th Cong. at 3 (2012) (statement of Bryan Newland, Senior Policy Advisor, Office of the Assistant Secretary for Indian Affairs). See also 25 C.F.R. § 83.2.*

The House Report accompanying the Federally-Recognized Tribe List Act explains that federal acknowledgment "establishes tribal status for *all federal purposes*." H.R. Rep. No. 103-781, at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768 (emphasis added).

Unfortunately, to date, both the modern administrative acknowledgment process (25 C.F.R. Part 83) and the *ad hoc* methods applied in the past have been criticized for serious shortcomings. The American Indian Policy Review Commission concluded that the recognition process prior to 1978 had resulted in *many tribes being mistakenly not formally recognized by the United States*. AM. INDIAN POLICY REVIEW COMM'N, FINAL REPORT 461 (1977) (emphasis added). The Commission stated that it believed there were 130 tribes that should be formally recognized but which had not received formal recognition due to mistakes by federal officials. *Id.* Since the administrative procedure went into effect in 1978, many petitions have been subject to reconsideration and appeal and many others have simply languished for years due to lack of resources of petitioners or of the Department. Repeatedly, both petitioners and third parties have questioned the wide variation in the application of the mandatory criteria in both the denial and affirmation of recognition petitions.

Erroneous denials may have devastating consequences for petitioning groups. Although these tribal communities may have demonstrated remarkable resilience in

sustaining their form of government, culture and identity for generations, today they are vulnerable. As noted in Cohen's Handbook of Federal Indian Law, "non-federally recognized tribes suffer from lack of federal respect for their sovereignty and land-bases, lack of protection from state jurisdiction, lack of access to repatriation rights and other forms of cultural protection under federal law, and denial of most benefits available to tribes that enjoy a government-to-government relationship with the United States." Cohen's Handbook of Federal Indian Law, § 3.02[3] at 135 (Nell Jessup Newton ed., 2012). While many tribal entities not federally recognized may continue to sustain their culture and activities following a denial, most groups face political, social and economic pressures that undermine a non-recognized tribe's ability to sustain its existence into the future. On the other hand, recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe... and imposes on the government a fiduciary trust relationship to the tribe and its members." H.R. Rep. No. 103-781, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768. Without a doubt, the implications of acknowledgment decisions are substantial.

The Department has a trust responsibility to those tribes currently federally recognized. The resources available for programs serving those currently recognized tribes have not been meeting vital needs and have not kept pace with the budget increases in other areas within the Department. In considering the prospect that more tribes may be recognized, the Tribe calls on the Department to properly exercise its trust responsibility by ensuring that budget resources grow proportionately and that the acknowledgment of new tribes will not adversely impact funding available to currently recognized tribes.

Additionally, even the proposed rule itself suggests new funding needs and raises the question of how those funds will be made available and what impact allocating funding to this process will have upon the limited level of funding available for programs serving tribes already federally recognized. Undoubtedly, insufficient funding for the Part 83 process has been a critical deficiency. More resources will be needed if the Department is to successfully fix this broken system. In the current budget climate, many questions remain as to how the Department will manage the competing priorities and stakeholder conflicts that may arise as the federal government reinvigorates its federal acknowledgement process. The Tribe is encouraged that the procedural improvements may produce significant cost savings compared to the current system while also producing fairer and more reliable results. To the extent budgetary issues and other considerations may evolve into competing priorities, the Tribe strongly recommends that the Department openly share budget projections over time and openly discuss competing interests so that potential conflicts may be managed and the Department's acknowledgement objectives achieved.

***The Documentary and Administrative Burden and the Contentious Politicization of the Acknowledgment Process.***

In the preamble to the proposed rule, the Department states that it is particularly interested in receiving comments on "easing the documentary and administrative burdens

and providing flexibility by defining historical as 1900 or earlier rather than requiring the documentation from as early as 1789 to the present." 79 Fed. Reg. 30766-67.

The documentary and administrative burdens on petitioners and the Department are matters that must be addressed by any new rule on the federal acknowledgment procedures. Easing such burdens will be essential to the effectiveness, efficiency and budgetary feasibility of the acknowledgment process. Rather than commenting on the specific changes to time frames governing the historical evidentiary requirements in the criteria, these comments assert that the burdensome documentation demands are not solely (or even predominately) caused by the lengthy historical time frames set forth in the rule. While the more limited timeframes will make important contributions to reducing the excessive documentary and administrative burdens the Part 83 process has become known for, the Department must further analyze the nature of these burdens and to identify additional solutions to address the underlying causes of the expansion of the documentary and administrative burdens. In the Tribe's view, more consideration should be given to the fact that the acknowledgment process has been transformed into a contentious forum where numerous parties obtain interested party status to mount preemptive challenges to the petitioners' eligibility for rights, protections and programs available only to recognized tribes.

Under the existing regulatory process, there have been no significant changes to the evaluation criteria since the process was adopted in 1978. Yet, nonetheless, the burden on the petitioners and the Department has dramatically changed over the years.

For example, when the Tunica-Biloxi Tribe was recognized in 1981 through the Part 83 process, the Department's positive proposed finding and technical report consisted of 78 pages. Just over a decade later, when the Department reviewed the United Houma Nation petition in 1994, the petitioner had submitted 19,100 pages of documentation and the Department's technical report and proposed finding consisted of 449 pages. *See Recommendations for Improving the Federal Acknowledgment Process, Oversight Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (2008)* (statement of Patty Ferguson-Bohnee at 15-17).

The administrative burden expanded not only in the process of submitting and reviewing petitions, but also in the Department's responses to voluminous Freedom of Information Act (FOIA) requests. The Department's statements in congressional hearings over the past 20 years have identified FOIA requests as having substantial impact on the timeliness of decisions because technical teams are called away from their review of documented petitions in order to perform tasks associated with FOIA requests.

This dramatic expansion of the documentary and administrative burden has arisen in direct response to the participation of third party interests in the acknowledgment process (as interested parties). These third parties have invested substantial resources to challenge the evidence and to question the interpretation of the Part 83 criteria and the applicable evidentiary standards. While in some cases the additional engagement of

these third parties may have contributed to expanding the scope and quality of documentary evidence considered by the Department, the Tribe suggests that the proposed rule could benefit from more explicit criteria that would limit the standing of interested parties. The Part 83 experience is replete with third party interests seeking to undermine the credibility of the process as a whole or seizing the process in order to preempt the prospect of potential future disputes with a newly-recognized tribe over land status, taxation, regulatory jurisdiction, gaming and other economic development activities.

Support for proposed rule improvements. The proposed rule includes process improvements that deserve praise for promoting greater fairness in addressing third party views (including allowing a petitioner to respond to comments made before the Office of Federal Acknowledgment ("OFA") begins its review (§83.24), during the preparation of the proposed finding (§83.37(b)) as well as procedures that may help defuse the politicization of the Part 83 process through an administrative law hearing for negative proposed findings (§83.38-39), and eliminating the reconsideration process before the IBIA). Given the Department's experience with third parties demanding more narrow or extreme interpretations of the evidentiary standards in Part 83, we think it is highly significant that the proposed rule makes important strides in providing greater precision in defining what evidence is needed to meet the evidentiary thresholds (e.g., the "predominant portion" of a community that establishes a distinct community is set as 30% of the membership, a "substantial interruption" in evidentiary documentation of community and political influence means more than 20 years, and the "reasonable likelihood" standard does *not* mean "more likely than not"). Additionally, limiting the Department's reports to 100 pages and publication of information on the website in order to mitigate FOIA duties also represent significant improvements to help put the focus upon the documentary evidence and the criteria rather than refuting spurious assertions or fielding procedural challenges from third parties.

Additional Suggestions. The Tribe notes that third parties have existing forums to challenge the Secretary and federally-recognized Indian tribes in taking land into trust, in addressing taxation and regulatory jurisdiction, and for influencing gaming. Rather than permitting third parties to use the acknowledgment process as a forum for preemptive challenges on matters that have not ripened into real controversies, standing for interested parties in the acknowledgement process should be made clearer and be subjected to stricter limits. The proposed rule should establish a framework to protect the reliance interests of third parties without diminishing the integrity of the federal process.

Certain third parties may have reliance interests for consideration, but many of those interests are pertinent to matters of trust land, gaming or other post-recognition matters – not the acknowledgment criteria and process. The Tribe urges the Department to further evaluate and develop mechanisms to minimize disruptive efforts of third parties, particularly as those parties use the acknowledgment process in order to challenge a tribal entity when it lacks the federal protection of a recognized tribe (and is at its most vulnerable) regarding matters that can only become matters in controversy

once a tribe is federally recognized. This egregious form of forum-shopping by interested parties is fundamentally unfair and must be addressed.

For example, the Tribe proposes that an additional subparagraph be added after Part 83.35(a)(2) that expressly states:

(3) The comments and evidence submitted shall be directly relevant to questions of the petitioner's eligibility for recognition with respect to the criteria set forth in § 83.11. Argumentation, explanation or documentation not directly relevant to the criteria shall be returned to the commentator explaining that the commentator must conform comments to comply with this section.

Additionally, even where interested parties properly establish standing to participate in the acknowledgment process, the regulations should also consider including provisions as to how the Department will weigh evidence of third parties when it conflicts with evidence submitted by the petitioner and documentation found by the Department to be credible. While the documentation of state and local governments should be given weight when the evidence serves to clarify or refute evidence petitioners provide regarding state and local government policies and practices, in other contexts it may not be entitled to any deference.

The Federal Budget and Grants Funding. As noted above, groups seeking recognition are particularly vulnerable as they generally have few resources and their members are unable to participate in federal programs. Lack of resources has contributed to the problems with Part 83 failing to meet objectives of fair, uniform and consistent decision-making. This is in part due to the fact that the agency staff is underfunded and because petitioners' lack of resources inhibits their ability to prepare petitions in the most effective, efficient method.

Lack of resources has also contributed to the politicization and contentiousness of the process as petitioners have had to rely upon developers or other interests to finance the preparation of their petitions. This has triggered concern from states and other third parties that recognition is directly intertwined with a specific form of post-recognition development. This outside influence has also contributed to making the Part 83 process more adversarial and burdensome. Alternative funding solutions are needed.

In advancing the proposed regulatory revisions, the Department must establish the budget resources appropriate for the Department to fulfill its responsibilities promptly. Budget resources must also enable petitioners to receive fair treatment by having the ability to meet the documentation responsibilities without becoming beholden to third party financial interests or flattened by heavily-financed opposition campaigns. The Tribe calls on the Department to ensure that any budget requests associated with the revised regulations to include proper levels of funding for the Department's administration of the Part 83 process and also for the Department to support new and/or

revised federal grant programs for acknowledgment research that assists petitioners. The new rule should explicitly indicate that the Department will provide a listing of grant programs available and the Department should commit to working to request funding for grant programs that will fund the conduct of research and presentation of evidence in the documented petition and hearing process. Such funding might include the Administration for Native Americans (ANA) grants that were made available in the past and other sources. Such a commitment would be important in order for the Department to avoid recreating a problem it now seeks to correct: that a tribe otherwise eligible for recognition should not be denied due to administrative error, insufficient documentation, or factors other than the merits of the documented petition.

Maximizing the Efficiency of the Department's Research Teams. In the past, delays and inefficiencies have been attributed to extensive FOIA requests, requests for reconsideration in the IBIA and litigation. Each of these matters has been cited in testimony as requiring the Department to redirect resources away from evaluating petitions. The Tribe commends the proposed rule for its variety of narrowly-tailored solutions, including new procedures for threshold and expedited review, more succinct timeframes and elimination of the IBIA process. The Tribe also expects that altering the timeframes for evidence establishing the historical tribe (to 1900 or earlier) and for evidence of tribal community and political authority (to 1934) offer substantive changes that should dramatically accelerate the review process.

Additional Suggestion for Increased Efficiency. The Tribe recommends that the new rule include provisions that assign research teams to region-specific focus areas. Rather than assigning research teams based on their availability and the queue of pending petitions, teams would be allocated to petitions based upon the region of the United States where the petitioner is located. Through regional assignments, individual researchers and their research team partners will become directly familiar with the types of documentation and information available in those regions and should be able to complete their reviews faster and more comprehensively.

Additional suggestion. As Department research teams encounter relevant archives, databases and other documentary evidence, such research source guides could be published on the website as resources for petitioners.

Area of Concern. The Tribe applauds the use of threshold review processes to streamline the decision-making process and promptly dispose of petitions that fail to meet a particular criterion. The proposed rule is not clear, however, as to how the Department will use evidence of descent from a historical tribe as the first line of threshold review. As Constitutional due process subjects a race-based classification to strict scrutiny review, the Tribe recommends that the Department further explain how it will examine descent consistent with longstanding court rulings that tribal membership is a political classification based on the tribe's determination of its membership rules and requirements and not a race-based classification based on ethnicity or lineage.

Additional Area of Concern. Establishing greater efficiency in determinations demands finality with respect to those petitions which are supported by little or no evidence. The Tribe objects to the proposed rule's elimination of the process for expedited rejection of petitions that are supported by little or no evidence that is presently contained in Part 83.10(e). The Tribe urges revision of the proposed rule to maintain an expedited process for issuing a proposed negative finding before OFA consideration of a petition when "there is little or no evidence that establishes that the group can meet the mandatory criteria . . . ." Frivolous petitions should not clog the system or delay consideration of meritorious petitions.

Concern Associated with the Order of Consideration of Petitions. The proposed rule would provide greater transparency in the petitioning process by providing petitioners with greater information on what is happening with their petition. Although Part 83.23 of the proposed rule states that the OFA will review petitions in the order they are received, it also appears to allow OFA to suspend its review of petitions while waiting for information and then return to its review "as soon as possible" after it receives requested materials. The Tribe questions the need to provide OFA with the ability to suspend or delay review. The request for additional materials is already part of the process as is waiting for those materials. The rule would give OFA additional authority to delay active review by allowing OFA to inform petitioners that it will return to its review as soon as possible. If the petition is active, then OFA should return to its review immediately. We recommend that the following be struck from the proposed rule:

§ 83.23 How will OFA determine which documented petition to consider first?

(a) OFA will begin reviews of documented petitions in the order of receipt of documented petitions. Petitioners whose documented petitions OFA has not yet begun to review may request that OFA estimate when review will begin.

~~(1) At each successive review stage, there may be points at which OFA is waiting on additional information or clarification from the petitioner. Upon receipt of the additional information or clarification, OFA will return to its review of the documented petition as soon as possible.~~

~~(2) To the extent possible, OFA will make completing reviews of documented petitions it has already begun to review the highest priority.~~

### ***Transparency.***

The Part 83 process has been criticized for the lack of clarity and transparency as to the level of evidence required to meet the criteria and the basis for decisions reached. As noted above, the Tribe supports the proposed rule's clarifications to the evidentiary thresholds (e.g., the "predominant portion" of a community that establishes a distinct community is set as 30% of the membership, a "substantial interruption" in evidentiary

documentation of community and political influence means more than 20 years, and the "reasonable likelihood" standard does *not* mean "more likely than not"). Meanwhile, the proposed rule offers improvements by requiring posting of information on its website, which will keep all parties apprised of the arguments being made. This should also eliminate multiple and voluminous FOIA requests that have often delayed the process while providing little additional transparency.

The Tribe sees important benefits in making petition materials publicly available, including the possibility of increased sharing of information among petitioners (whether intentional or not) regarding federal and state practices affecting them and documentation of interactions between tribal entities in certain regions during particular periods of time. At the same time, increased transparency raises some concern where information has been obtained at significant cost to a petitioner which may then become freely available to others. To what extent has the Department considered tools and methods to protect information from appropriation by other groups? The Part 83 process has experienced numerous examples of conflicts between petitioners where one asserts that it (and not another faction or group) is the historical tribe. These conflicts have produced significant delays in the past. Transparency may be useful in limiting such conflicts, but it also introduces risk that other entities or opponents of a petitioner may seek to manipulate and/or appropriate publicly available information.

### *Predictability and Consistency.*

Hearing before the Office of Hearings and Appeals. In addition to the increased transparency of information and clarity regarding evidentiary standards, the proposed rule seeks to offer a more neutral forum for challenging a negative proposed finding by providing for hearings in the Office of Hearings and Appeals ("OHA"). The Tribe applauds this change which should enable the petitioner to more specifically pinpoint deficiencies in the documentary evidence and provide further clarification.

In the past, petitioners were not notified until the end of the process of which criteria they had failed to meet. Sometimes, after the petitioner had supplied further evidence, the Department found different criteria that the petitioner had failed to meet. This made the process confusing and unpredictable. The new rules would give petitioning tribes a far greater sense of what exactly they need to demonstrate by evidence in order to meet the criteria because the petitioner would be able to learn during the course of the hearing exactly where the Department determined they had failed, and the petitioner would have the opportunity to convince an administrative law judge that the evidence meets the criteria.

Additionally, petitioners had complained to Congress that the process in effect placed the Department in the position of both advocate and trier of fact. The proposed administrative hearing transfers at least part of the determination to a neutral trier of fact and would place the OFA in the position of an adversarial party to the tribe.

Additional Suggestion. The Tribe recommends that the hearing provisions should be clarified in the following respects.

**§ 83.38 What options does the petitioner have at the end of the comment period on a negative proposed finding?**

(a) At the end of the comment period for a negative proposed finding, the petitioner **may within** ~~will have~~ 60 days **of the date on which the comment period ends** ~~to~~:

(1) Elect to challenge the proposed finding in a hearing before an OHA judge by sending a written election of hearing to OFA that lists:

(i) The issues of material fact; and

(ii) The witnesses and exhibits the petitioner ~~intends to~~ **reasonably foresees presenting** at the hearing, other than solely for impeachment purposes, including:

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The "Reasonable Likelihood" Standard. The Tribe supports Part 83.10 of the proposed rule which clarifies that the burden of proof under the "reasonable likelihood" standard does not require that the petitioner show that it is "more likely than not" to prevail in meeting the criteria. In the past, the lack of predictability in applying the burden of proof prevented petitioning tribes from meeting the criteria. The Tribe notes, however, that the "reasonable likelihood" standard has not been used throughout the regulations in a consistent manner. The Tribe calls upon the Department to use the standard consistently throughout the rule and to provide clear explanation and justification in those provisions where another standard applies.

These comments note that the following changes would be needed for a consistent application of the reasonable likelihood standard:

Part 83.11 (a) Tribal Existence. The petitioner must ~~describe~~ **establish by a reasonable likelihood** its existence as an Indian tribe, band, nation, pueblo, village, or community at a point in time during the historical period. The petitioner must provide a brief narrative, and evidence supporting the narrative, of its existence as an Indian tribe, band, nation, pueblo, village or community generally identified at a point in time during the historical period.

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(b) Community. The petitioner must **establish by a reasonable likelihood that it** now constitutes a distinct community and ~~must demonstrate~~ **establish by a reasonable likelihood** that it existed as a distinct community from 1934 until the present without substantial interruption. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members

are differentiated from and distinct from nonmembers. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a random, statistically significant sample of known adult members.

(1) The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following forms of evidence or by other evidence **that establishes by a reasonable likelihood** ~~to show~~ that at least 30 percent of the petitioner's members constituted a distinct community at a given point in time.

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(2) The petitioner will ~~be considered to have provided sufficient evidence to demonstrate~~ **have demonstrated** distinct community and political authority at a given point in time if the evidence ~~demonstrates~~ **establishes by a reasonable likelihood** any one of the following:

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(3) The petitioner will ~~be considered to have provided sufficient evidence to demonstrate~~ **have demonstrated** distinct community if it ~~demonstrates~~ **establishes by a reasonable likelihood** either of the following factors

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(c)(1) The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following evidence or by other evidence **that establishes by a reasonable likelihood** that the petitioner meets the definition of political influence or authority in § 83.1:

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(c)(2) The petitioner will ~~be considered to have provided sufficient evidence of~~ **have demonstrated** political influence or authority at a given point in time if the evidence ~~demonstrates~~ **establishes by a reasonable likelihood** any one of the following.

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(c)(3) The petitioner will ~~be considered to have provided sufficient evidence to demonstrate~~ **have demonstrated** political influence and authority if it ~~demonstrates~~ **establishes by a reasonable likelihood** either of the following factors:

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(e) *Descent*. At least 80 percent of the petitioner's membership must consist of individuals who can ~~demonstrate~~ **establish by a reasonable likelihood** that they descend from a tribe that existed in historical times or tribes that combined and functioned in historical times.

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(f) (1) However, a petitioner may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, a federally recognized Indian tribe, if the petitioner ~~demonstrates~~ **establishes by a reasonable likelihood** that:

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Part 83.12 What are the criteria for previously federally acknowledged petitioners?

(a) If the petitioner meets the criteria in § 83.11(a) and (d) through (g), the petitioner may prove it was previously acknowledged as a federally recognized Indian tribe by providing ~~unambiguous~~ evidence **that establishes by a reasonable likelihood** that the United States Government recognized the petitioner as an Indian tribe for purposes of Federal law with which it carried on a government-to-government relationship at some prior date, including, but not limited to evidence that the petitioner had:

### *Conclusion*

If you have questions regarding these comments, please contact Joe Webster ([jwebster@hobbsstrauss.com](mailto:jwebster@hobbsstrauss.com)) or Michael Willis ([mwillis@hobbsstrauss.com](mailto:mwillis@hobbsstrauss.com)) or by phone at (202) 822-8282.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER LLP

*Joseph H. Webster /s/*

By: Joseph H. Webster

cc: Jim Shore, Esq.