

[4337-15]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 83**

[156A2100DD/AAKC001030 /A0A501010.999900 253G]

**RIN 1076-AF18**

**Federal Acknowledgment of American Indian Tribes**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule revises regulations governing the process and criteria by which the Secretary acknowledges an Indian tribe. The revisions seek to make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process. For decades, the current process has been criticized as “broken” and in need of reform. Specifically, the process has been criticized as too slow (a petition can take decades to be decided), expensive, burdensome, inefficient, intrusive, less than transparent and unpredictable. This rule reforms the process by, among other things, institutionalizing a phased review that allows for faster decisions; reducing the documentary burden while maintaining the existing rigor of the process; allowing for a hearing on a negative proposed finding to promote transparency and integrity; enhancing notice to tribes and local governments and enhancing transparency by posting all publicly available petition documents on the Department’s website; establishing the Assistant Secretary’s final determination as final for the Department to promote efficiency; and codifying and

improving upon past Departmental implementation of standards, where appropriate, to ensure consistency, transparency, predictability and fairness.

**DATES:** This rule is effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

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#### **I. Executive Summary of Rule**

This rule updates Part 83 to improve the processing of petitions for Federal acknowledgment of Indian tribes, with an aim of making the process more transparent, promoting fairness and consistent implementation, and increasing timeliness and efficiency, while maintaining the integrity and substantive rigor of the process. Primary revisions to the process would:

- Increase timeliness and efficiency by providing for a two-phased review of petitions that establishes certain criteria as threshold criteria, potentially resulting in the issuance of proposed findings and final determinations earlier in the process and

- thereby expediting negative decisions (e.g., if a petitioner's membership does not consist of individuals who descend from a historical Indian tribe);
- Increase timeliness and efficiency while maintaining the substantive rigor and integrity of the process by providing a uniform start date of 1900 for criteria (a) Identification, (b) Community and (c) Political Influence/Authority;
  - Promote fairness and consistent implementation by providing that if a prior decision finding evidence or methodology was sufficient to satisfy any particular criterion, the Department will find that evidence or methodology sufficient to satisfy the criterion for a present petitioner;
  - Promote transparency by providing that the Office of Federal Acknowledgment (OFA), rather than the Assistant Secretary, will issue the proposed finding (PF);
  - Promote fairness, objectivity, transparency and consistent implementation by offering petitioners who receive a negative PF the opportunity for a hearing, in which third parties may intervene, to address their objections to the PF before an administrative law judge (ALJ) who will then provide a recommended decision to the Assistant Secretary;
  - Promote transparency by requiring all publicly available documents relating to a petition be posted on the Department's website and providing broader notice to local governments;
  - Promote fairness, transparency and efficiency by providing that the Assistant Secretary will review the PF and the record, including an ALJ's recommended decision, and issue a final determination that is final for the Department, such that any

challenges to the final determination would be pursued in United States District Court rather than in an administrative forum; and

- Promote efficiency by eliminating the process before the Interior Board of Indian Appeals (IBIA) providing for limited reconsideration of final determinations.

This rule clarifies the criteria by codifying past Departmental practice in implementing the criteria. An overriding purpose for codification is to address assertions of arbitrariness and ensure consistency. If methodology or evidence was sufficient to satisfy a particular criterion in a decision for a previous petitioner, such evidence or methodology is sufficient to satisfy the particular criterion for a current petitioner. This clarification ensures that a criterion is not applied in a manner that raises the bar for each subsequent petitioner. Evidence or methodology that was sufficient to satisfy a criterion at any point since 1978 remains sufficient to satisfy the criterion today.

The rule does not substantively change the Part 83 criteria, except in two instances.

- One instance is that the final rule retains the current criterion (a), requiring identification of the petitioner as an Indian entity, but does not limit the evidence in support of this criterion to observations by those external to the petitioner. In other words, the final rule allows the Department to accept any and all evidence, such as the petitioner's own contemporaneous records, as evidence that the petitioner has been an Indian entity since 1900.
- The other instance in which the criteria is changed is in the review of the number of marriages in support of criterion (b) (community) – past Departmental practice has been to count the number of marriages within a petitioner; this rule instead provides

that the Department count the number of petitioner members who are married to others in the petitioning group.

The final rule differs from the proposed rule in a number of important respects. First, the final rule does not adopt the proposed evaluation start date for criteria (b) (Community) and (c) (Political Authority) of 1934. *See* the response to comments below. Rather, the final rule starts this evaluation at 1900. The Department does not classify the start date change, from 1789 or the time of first sustained contact to 1900, as a substantive change to the existing criteria because: 1) 1900 is squarely during a particularly difficult Federal policy era for tribes – there were strong forces encouraging allotment of Indian lands and assimilation of Indian people and the federal government discouraged tribes from maintaining community and political authority during that time period; 2) depending on the history of an area, first sustained contact for some petitioners was as late as the mid-1800s; 3) the regulations currently provide for a 1900 start date for criterion (a) and utilization of that start date for over 20 years has demonstrated that the date maintains the rigor of the criteria; 4) records are generally more available beginning in 1900, making the lack thereof more compelling too; and 5) a consistent start date will apply the same documentary burden to every petitioner uniformly across the country. Further, based on its experience in nearly 40 years of implementing the regulations, every group that has proven its existence from 1900 forward has successfully proven its existence prior to that time as well, making 1900 to the present a reliable proxy for all of history but at less expense. Further, in 1994 the Department implemented 1900 as a start date for evaluation of criterion (a) to reduce the documentary burden of this criterion while retaining the requirement for substantially continuous identification as an Indian entity.

In other words, the time since 1900 has been shown to be an effective and reliable demonstration for historical times for criterion (a). Starting the evaluation of the community and political authority criteria will promote uniformity for criteria (a), (b) and (c). Relying upon 1900 as the starting year to satisfy the community and political authority criteria will reduce the documentary burden on petitioners and the administrative burden on the Department, and avoid potential problems with locating historical records, all while maintaining the integrity and rigor of the process.

Second, the final rule defines “historical” as prior to 1900. Using pre-1900 for the end date of “historical” and 1900 for the start date for analysis of community and political influence/authority allows for a rigorous and seamless examination of each petitioner, requiring evidence of descent from a historical Indian tribe that existed prior to 1900 and requiring an evaluation of identification, community, and political influence/authority for more than a century from 1900 to the present. The final rule also retains the current requirement that a criterion be met “without substantial interruption.” The final rule does not incorporate the proposed definition of this phrase, instead allowing for the Department’s continued interpretation consistent with any past positive finding on a criterion made as part of, or incorporated in, a final agency decision. Consistent with the Department’s previous final decisions, documentary gaps longer than 10 years may be justified in certain historical situations and context.

Third, the final rule maintains the current standard of proof as “reasonable likelihood” without the proposed incorporation of judicial explanations of the phrase.

Fourth, the final rule does not incorporate the proposal for limited re-petitioning, as explained in the response to comments below.

To encourage conciseness, which improves transparency and facilitates public understanding of our decisions, the revisions provide that the Department will strive to abide by page limits for the proposed finding and final determination. To ensure transparency, the revisions require the Department to make available on the Internet the narrative of the petition, other parts of the petition, comments or materials submitted by third parties to OFA relating to the documented petition, and any letter, proposed finding, recommended decision, and final determination issued by the Department that the Department is publicly releasing in accordance with Federal law. This rule also comprehensively revises part 83 to comply with plain language standards, using a question-and-answer format.

## **II. History and Development of the Rule**

For many years, the process for acknowledgment of American Indian and Alaska Native tribes has been criticized as broken. Since the establishment of the Part 83 process, multiple Congressional hearings have been held to address its failings. Some members of Congress, such as Chairman John Barrasso of the Senate Committee on Indian Affairs, have stated that the process simply takes too long. S. Hrg. 112-684 (July 12, 2012). Previous Chairs of the Senate Committee on Indian Affairs, such as Byron Dorgan, have raised similar critiques. S. Hrg. 110-189 (September 19, 2007). Congressional leaders in the House have raised other concerns. For example, Congressman Tom Cole has said that the process is “complex,” “controversial,” and

“frankly, has not worked well.” H. Hrg. No. 110-47 (October 3, 2007). Chairman Don Young has said that “reforms to expedite the process and to upgrade the fairness, consistency, and transparency are warranted.” H. Hrg. No. 110-47 (October 3, 2007). Others have supported the Department’s efforts to reform Part 83. For example, Senator Tim Kaine stated he is “encouraged by BIA’s efforts to improve its federal recognition process” and “support[s] the Department’s efforts to expedite the federal recognition process, add transparency, and provide multiple opportunities for petitioners to engage the Department during the decision-making process.” September 30, 2014, letter from Senator Tim Kaine to Assistant Secretary – Indian Affairs Kevin K. Washburn.

Members of Congress are joined by others in criticism of the current regulation. A 2001 GAO Report entitled “Improvements Needed in Tribal Recognition Process” (Nov. 2001), is an example. The political nature of this work has also drawn scrutiny from the Department’s Office of Inspector General (“Allegations Involving Irregularities in the Tribal Recognition Process,” Report No. 01-I-00329, Feb. 2002).

Despite wide agreement by the public that this process is broken, solutions are not obvious because members of the public have differing perspectives on the exact nature of the problems. Some reforms are as controversial as the broken process. Individual decisions are highly contested. Of the 51 petitions resolved since this process began, only 17 petitions have been approved for acknowledgment and 34 have been denied. Far more tribes have been recognized by Congress during this time period, and Congress unquestionably has the power, in the first instance, to speak for the United States on recognition of groups as Indian tribes.

Some think that the acknowledgment process is strongly related to gaming. The facts do not bear this out. Many of the petitioning groups came forward a long time ago. As the late Senator Daniel K. Inouye observed, if gaming were the driving force, “we would have to attribute to many of the petitioning tribal groups a clairvoyance that they knew that one day in the distant future there was going to be a Supreme Court decision and thereafter the Congress was going to enact a law authorizing and regulating the conduct of gaming . . . .” S. Hrg 109-91 at 3. Of the 17 tribes that have been recognized since this process began 37 years ago, only 11 have obtained land in trust, a process regulated by an additional, separate set of regulations (25 CFR part 151), and only 9 of these currently engage in Indian gaming. Of course, Congress has enacted a detailed law establishing whether trust land is eligible for gaming. It is set forth in the Indian Gaming Regulatory Act of 1988 (IGRA) and the Department has promulgated separate regulations implementing IGRA (25 CFR part 292). For those 9 tribes that successfully navigated acknowledgment and obtained land in trust, it took, on average, nearly 10 years after acknowledgment to engage in Indian gaming.

The Department sought wide input in reforming Part 83 and used extraordinary process. It formed an internal workgroup in 2009 to reform the process through rulemaking. At a hearing before the House Subcommittee on Indian and Alaska Native Affairs in March of 2013, the Department explained the process it would follow in pursuing reform and set forth goals. After publicly identifying goals of reform of the regulations, the Department distributed a “Discussion Draft” of revisions to Part 83 in June 2013. In July and August 2013, the Department hosted five consultation sessions with federally recognized Indian tribes and five public meetings at various locations

across the country. The Department received approximately 350 written comment submissions on the Discussion Draft, which were made available on its website with the transcripts of each consultation and public meeting. After considering all written comments as well as comments received at consultation sessions and public meetings, the Department developed and published a proposed rule. *See* 79 FR 30766 (May 29, 2014).

### **III. Comments on the Proposed Rule and the Department's Responses**

The proposed rule was published on May 29, 2014. *See* 79 FR 30766. In response to requests, the Department then extended the initial comment deadline of August 1, 2014, to September 30, 2014. *See* 79 FR 44149. Throughout July 2014, the Department held public meetings and separate consultation sessions with federally recognized Indian tribes at regional locations across the country. In response to requests for additional meetings and consultations, the Department added two teleconference consultation sessions for federally recognized Indian tribes and two teleconference sessions for the public, which were held in August 2014. During the public comment period, the Department received over 330 written comment submissions plus several form letters, one of which included hundreds of signatories.

Federally recognized tribes from across the country weighed in on the proposed rule. Tribes such as the Crow Nation, the Stockbridge-Munsee Band of Mohican Indians, the Seminole Tribe of Florida, the San Juan Southern Paiute Tribe, the Mashantucket Pequot Tribal Nation, and the Mashpee Wampanoag Tribe expressed support for the proposed rule. Other tribes such as the Eastern Band of Cherokee, the Confederated Tribes of the Grand Ronde Community of Oregon, the Muckleshoot Indian Tribe, and the

Temecula Band of Luiseno Mission Indians expressed opposition to and concerns with certain proposed changes.

State and local governments also commented on the proposed rule. States such as Connecticut and numerous counties and local governments, such as Sonoma County in California, strongly opposed the proposed rule. In contrast, Governor Bullock of Montana strongly supported the proposed rule.

The Department reviewed each of the comments received and has made several changes to the proposed rule in response to these comments. The following is a summary of comments received and the Department's responses.

## **A. Criteria**

### *1. Criteria, Generally*

The criteria in the proposed and final rule are set out at 83.11. Many commenters stated that the proposed rule would "weaken" the criteria. These commenters stated that the criteria would be weakened by: allowing for a presumption of continuous existence from 1789/first sustained contact to 1934; weakening listed items of evidence and adding new, potentially invalid forms of evidence; increasing allowable gaps in evidence; and deleting the requirement for external identifications. Further, these commenters asserted that the changes would: exceed the Department's authority; be inconsistent with longstanding precedent; redefine tribes as racial, rather than political, entities; allow appropriation of tribes' identities; violate the trust responsibility; and fail to meet the stated goals for efficiency or transparency.

Commenters also specifically argued for and against reliance on different types of evidence, including: the California Indian judgment rolls; oral history; and recognition

by courts under criteria derived from *Montoya v. United States*, 180 U.S. 261 (1900). Some requested the addition of language that evaluation of the criteria will be based on the totality of the circumstances and evidence and/or consideration of specific circumstances. Some commented that while the basic criteria have not changed, the criteria are continually being reinterpreted in a way that makes them more onerous. Other commenters described the impacts to localities and others of weakening the criteria and argued that the “broken” parts of the acknowledgment process could be fixed through better staffing and clearer guidelines, rather than changing the criteria.

*Response:* In light of comments expressing concern that the proposed rule would weaken the criteria, the final rule minimizes changes to the criteria, as described below. Instead, and in light of comments about the increasingly burdensome application of the criteria, it works to ensure consistent application across time. Given that the criteria have remained substantively unchanged since 1978, the amount and type of evidence that was sufficient to satisfy a particular criterion in 1980 remains sufficient today. Our review of the Department’s prior decisions confirms that, as a matter of both logic and fairness, evidence that has supported positive findings as to particular criteria in the past should support similar findings for present petitioners. Any other petitioning group that meets the same rigorous criteria should be recognized. Petitioning groups ought not face criteria that are interpreted more narrowly.

The proposed rule would have provided that the Department will apply the criteria “consistently with threshold standards utilized to acknowledge other tribes under this part.” The final rule at 83.10(a)(4) adopts a modified version of this provision, to better ensure consistency with precedent, which expressly provides that if there is a prior

decision finding that evidence or methodology was sufficient to satisfy any particular criterion in a previous petition, the Department will find that evidence or methodology sufficient to satisfy the criterion for a present petitioner. In other words, a petitioner today satisfies the standards of evidence or baseline requirements of a criterion if that type or amount of evidence was sufficient in a previous decision. These prior decisions on criteria provide examples of how a criterion may be met. Even decisions finding a criterion was met in a final determination that was, on the whole, negative, provide examples of how a criterion can be met. Decisions finding a criterion was met in positive final determinations are especially compelling, however (*see* decisions such as those issued for the Grand Traverse Band of Ottawa and Chippewa Indians, the Jamestown S’Klallam Tribe, the Tunica-Biloxi Indian Tribe, the Death Valley Timbi-sha Shoshone Tribe, the Poarch Band of Creeks, the San Juan Southern Paiute Tribe of Arizona, Mohegan Indian Tribe, the Jena Band of Choctaw Indians, etc.). For example, evidence and methodology found sufficient by the Department to satisfy criterion (e) for tribes such as the Poarch Band of Creeks or Death Valley Timbi-sha Shoshone Tribe is sufficient under these final regulations for any subsequent petitioner. To be sure, some successful petitioners have provided more evidence to satisfy a particular criterion than other successful petitioners. However, the fact that a successful petitioner may have vastly exceeded a baseline threshold of a particular criterion does not raise the bar for subsequent petitioners. Section 83.10(a)(4) ensures that the basic criteria are not reinterpreted to apply any more onerously than they have been applied to a previous petitioner that has satisfied that criterion.

Obviously, if there is significant actual countervailing evidence with regard to a petition that was not present in a previous positive determination on a criterion, the Department may consider whether the prior positive decision provides an appropriate precedent. Thus, for example, evidence or methodology that seems similar to that applied in a prior positive determination on a criterion may be evaluated differently in light of substantial countervailing evidence showing significantly different historical facts and circumstances. However, such affirmative significant countervailing evidence does not necessarily preclude a positive determination. It remains the Department's responsibility to consider such evidence and provide an explanation of the significant countervailing evidence when deciding whether a criterion has been satisfied. Absent significant affirmative countervailing evidence, if the evidence or methodology was deemed sufficient in a previous positive decision on a criterion, it will be deemed sufficient for all current and future petitioners for that criterion.

The final rule generally does not change how different types of evidence are evaluated or weighed, but does add certain categories of evidence. In one instance (criterion (a)), a new category of evidence is allowed to address issues of fairness. In other instances, categories of evidence are added to clarify the Department's past practice in accepting such evidence (e.g., Indian educational institutions may be evidence of the Community criterion; land set aside by a State for the petitioner or collective ancestors of the petitioner that was actively used by the community may be evidence of Community or Political Influence/Authority criteria; and historian and anthropologist records as evidence of the Descent criterion). These do not reflect substantive changes in the criteria and includes evidentiary categories that might have been considered previously;

this change is simply meant to be explicit about the value and relevance of certain evidence. The final rule does not incorporate language regarding the totality of the circumstances and evidence because the rule already provides the parameters within which the Department will evaluate the criteria. *See* 83.10(b) (providing that the Department will apply the criteria in context with the history, regional differences, culture, and social organization of the petitioner, etc.). The proposed rule would have provided that the Department will apply the criteria “consistently with threshold standards utilized to acknowledge other tribes under this part.” The final rule adopts a modified version of this provision, to better ensure consistency with precedent, which states that if there is a prior decision finding evidence or methodology to be sufficient to satisfy any particular criterion previously, the Department shall find it sufficient to satisfy the criterion for a present petitioner.

2. *Criterion (a)*

a. *Proposed Elimination of Current “Criterion (a)” and Requirement for External Observer as an Independent Criterion*

The existing criterion (a) required that external observers identify the petitioner as an Indian entity; the proposed rule would have eliminated this requirement for evidence of external observations. Many who commented supported the proposed elimination of this requirement as an independent criterion because outside assessments of Indian tribes may be based on folk beliefs about “Indianness.” Moreover, it has been said to be unfair to rely on external identification because tribal groups were sometimes forced into hiding to avoid persecution by outside groups. Commenters noted that external identifications have been inaccurate in the past, as shown by the fact that outsiders have denied or

mischaracterized the Indian entity of many currently federally recognized tribes. Some commenters pointed out that, because no petitioner has been denied solely on this criterion, it is of limited value and yet has consumed considerable petitioner and Department time and resources. Several other commenters opposed eliminating this criterion, stating that any petitioner that truly qualifies as a tribe should be able to prove external identifications, and that tribal existence should not be based completely on self-assertion and self-identification or on historical material the petitioner developed through its own resources.

*Response:* The Department agrees with commenters' concerns regarding the unfairness of having an independent requirement for external identifications. The Department also considered other commenters' concerns with eliminating the criterion, which stated that some external evidence is appropriate to avoid a situation where a group relies merely on its own self-assertion that it is, and has been, an Indian tribe. The final rule retains the current criterion (a), requiring identifications on a substantially continuous basis since 1900, with an adjustment to accept identifications by the petitioner in the same manner as we would accept identifications by external sources.

While there may be factors affecting how outsiders view an Indian entity, allowing evidence from the Indian entity itself for a particular time period to demonstrate that the entity identified itself as an Indian entity addresses this concern. With regard to concerns that a petitioner may have mostly, or even only, self-identifications rather than external identifications, the Department does not find these concerns compelling. An entity that descends from a historical tribe and exists continuously as a community with political influence/authority is still a tribe, regardless of whether records of external

observers identify the tribe as an Indian entity. But the tribe's continued view of itself as an Indian entity is essential. To the extent the commenters are concerned that a petitioner could recreate past self-identifications, the final criterion (a) requires contemporaneous self-identifications, just as external identifications must be contemporaneous.

The Department believes that it is appropriate to retain the 1900 starting date for requiring evidence of identifications on a substantially continuous basis for the reasons stated in the 1994 rulemaking. *See* 59 FR 9280, 9286 (February 25, 1994). While the requirements of this criterion consume both petitioner and Departmental time, we have determined the final rule strikes a balance, taking into account the comments advocating substantial changes to or elimination of criterion (a) and those comments that advocated no change.

*b. Proposed Criterion (a), Requiring Narrative of Pre-1900 Existence*

Many commenters requested clarification of the proposed criterion (a) at proposed 83.11(a), specifically asking for clarification on what evidence would be sufficient; whether the phrase "generally identified" indicates external identifications are still required; whether "a point in time" means any point in time chosen by petitioner, or chosen by the Department; whether 1900 is a general benchmark or definitive date; and what standard the Department will use to judge this criterion.

Some commenters opposed the proposed criterion (a), stating that it does not meet the requirement for showing continuous political existence during historical times, that the "slightest connection" to a historical tribe prior to 1900 and existence of a contemporary tribal organization would be sufficient under this criterion, and that it does not sufficiently guard against a petitioner claiming a recognized tribe's identity and

history. These commenters also stated the criterion lends itself to politics-based rather than merits-based decisions. Commenters also objected to requiring a showing of existence at only one point prior to 1900. These commenters found the deletion of the requirement for external identification criteria in favor of a brief narrative showing that the group existed as a tribe at some point “alarming.”

*Response:* As discussed above, the Department has decided to retain the current criterion (a), with some adjustments, in lieu of the proposed criterion (a). *See* final 83.11(a). The comments we received on the proposed criterion (a) expressed concern that the proposed criterion was not specific enough, but we received no suggestions for specifications that would address all commenters’ concerns. In attempting to identify revisions that would sufficiently address all commenters’ concerns with the proposed criterion (a), the Department determined that the current criterion (a) should be retained with a revision to allow for the petitioner’s own records to serve as evidence.

### *3. Criterion (e) – Descent*

#### *a. Requirement for 80 percent Descent*

We received comments both in support of and in opposition to the proposed requirement at proposed 83.11(e) that petitioners show that at least 80 percent of their membership descends from a historical tribe. Those in support stated that using a quantitative measure is appropriate here because petitioners have lists of their members. Some stated that using 80 percent is appropriate for determining Indian ancestry in general, but not for showing a connection to a specific historical tribe because records that identify historical tribes do not contain censuses of the members. Some commenters, including some federally recognized tribes, strongly opposed any percentage less than

100 percent, and opposed using 80 percent because it could effectively allow for a petitioner with a membership of 20 percent non-Indians. A few commenters stated that the percentage requirement should be less than 80 percent to account for lack of records.

*Response:* The final criterion (e) remains substantively unchanged from the current criterion (e). While the final rule does not include a percentage, this criterion will continue to be applied consistently with previous decisions. Evidence and methodology sufficient in positive decisions on criterion (e), such as Tunica-Biloxi Indian Tribe, Poarch Band of Creeks, and Death Valley Timbi-sha Shoshone Tribe, will continue to be sufficient to satisfy criterion (e) under these final regulations. The Department aims to maintain consistency in applying the baseline utilized to satisfy the criteria. The 80 percent threshold was not intended to be a change in policy; it merely attempted to codify this existing Departmental practice. Yet a number of commenters expressed concern both for and against codifying this number, so the rule does not incorporate the 80 percent threshold. Instead, the criterion is satisfied if the petitioner provides evidence and utilizes methodology consistent with any previous positive determination under this criterion.

*b. Descent as a Race-Based Criterion*

Some commenters stated that criterion (e) should be deleted because it is race-based, while tribal membership is a political classification.

*Response:* The Department recognizes descent from a political entity (tribe or tribes) as a basis from which evaluations of identification, community, and political influence/authority under criteria (a), (b), and (c) may reveal continuation of that political

entity. Evidence sufficient to satisfy (e) is utilized as an approximation of tribal membership before 1900.

*c. Defining “historical” to be before 1900*

Commenters opposed, and others supported, defining “historical” to be before 1900. Some requested clarification for the beginning date of the “historical” period. Some commenters also requested clarification of “historical tribe” to require that the tribe functioned autonomously, and to ensure that a petitioner does not claim the same historical tribe as that claimed by a federally recognized tribe.

*Response:* The final rule defines “historical” to be before 1900, maintaining the same approach as the proposed rule but clarifying that the year 1900 is not included in the “historical” period. The final rule does not identify the beginning date for the “historical” period, but it necessarily must be some date prior to 1900. The final rule does not identify the beginning date for the historical period to be 1789 or the period of earliest sustained non-Indian settlement and/or governmental presence in the local area, whichever is later, because these beginning dates would not achieve any reduction in the documentary or administrative burden. The term “autonomous” has been reinserted in the definitions and political influence/authority criterion to require autonomous functioning since 1900, which is satisfied if evidence is provided consistent with any previous positive finding of this criterion.

*d. Evidence in Support of Descent*

We received several comments either requesting clarification of the phrase “most recent evidence” in proposed criterion (e) or opposing the requirement to rely on the “most recent evidence” as limiting the Department’s ability to examine or rely on earlier,

and more probative, evidence. Commenters also stated concerns with the language stating that rolls prepared by the Secretary or at the direction of Congress “satisfy” the criterion. Specifically, these commenters stated that that the proposed rule would not allow the Department to evaluate the reliability of rolls prepared by the Secretary or at the direction of Congress, and pointed out that in some cases, such rolls may be inaccurate or fail to identify tribal affiliation. Commenters also had suggestions for other categories of evidence or requested use of “best genealogical evidence.” We received comments both in support of and opposition to using historian and anthropologist conclusions as evidence of descent. Commenters stated their concerns that affidavits are not reliable for ancestry, unless they are contemporaneous records.

*Response:* The final rule provides for evaluating the most recent evidence prior to 1900. Documents that are erroneous or fraudulent are not evidence and thus will not satisfy this criterion. The final rule also places great weight on applicable tribal Federal rolls prepared at the direction of Congress or by the Department. Based on the Department’s expertise, any inaccuracies of such tribal rolls are de minimis. Many federally recognized tribes rely on tribal Federal rolls as base membership rolls and the Department’s approach here regarding such rolls for this process is consistent with this tribal practice. While no human endeavor is perfect, tribal rolls created by the Department were often prepared in person by a Departmental representative or team to promote accuracy. The final rule clarifies that the roll must have been prepared for a tribe. In contrast, rolls of the Indians of California for claims payments would not satisfy 83.11(e)(1) because those rolls were not prepared for specific tribes, but rather descendants from an Indian who lived in the State on June 1, 1852. If Departmental

tribal censuses or rolls are not available, the Department will then look to other documents, as needed. For example, the rolls of the Indians of California may be provided as evidence to be evaluated under 83.11(e)(2). This approach codifies past practice. For example, in acknowledging the Death Valley Timbi-Sha Shoshone Band, the Department relied on Departmental rolls and censuses:

The Timbi-Sha Shoshone Band provided a total of three rolls and censuses, the current membership list dated March 1978, and 1933 and 1936 censuses prepared by the Bureau of Indian Affairs. . . . Rolls prepared from 1916 through 1940 by the Bishop and Carson agency staffs were also researched, as was the roll prepared pursuant to the Act of September 21, 1968, for the distribution of judgment funds awarded to the Indians of California. All data from these rolls and censuses confirm that virtually all of the members of the group have or can conclusively establish Shoshone Indian ancestry. We conclude, therefore, that the membership of the Death Valley Timbi-Sha Shoshone Band of Indians consists of individuals who have established descendency from historical Shoshone bands in the Death Valley area which combined and functioned as a single autonomous entity, and that the band has met the criterion in 25 CFR 54.7(e).

Proposed Finding at 6-7. Rather than requiring “best genealogical evidence,” which may impose an additional burden on the petitioner, the Department will continue its long standing practice of evaluating evidence under the standards established in this regulation.

Criterion (e) also maintains the use of records created by historians and anthropologists identifying the tribe in historical times or historians’ and anthropologists’ conclusions drawn from historical records. This approach is consistent with past practice. For example, in Tunica-Biloxi the Department relied on the following historical records to satisfy (e):

The work of anthropologists in the late 1800's and early 1900's and a list prepared by a representative of the Bureau in the 1930's were used in conjunction with other recorded documents, the 1900 Federal Population census, and testimony from a 1915 civil court suit to establish Indian ancestry in the historical tribes.

Tunica-Biloxi Proposed Finding at 4.

Five sources were available which identified current tribal members, their relations, and/or ancestors as Indian: Ruth M. Underhill's "Report on a visit to Indian groups in Louisiana, Oct. 15-25, 1938"(6); James Owen Dorsey's list of "Biloxis in Raipides Parish, La." of 1892 and 1893; the 1900 Federal Population Census; pre-1900 church records submitted as genealogical documentation; and, testimony taken in the *Sesostris Youchican v. Texas and Pacific Railway Company* court case in 1915.

Tunica Biloxi Genealogical Report at 3. We have also clarified the existing practice that affidavits must be based on first-hand knowledge.

*e. Review of Descent*

Many commenters suggested tying review of criterion (e) together with the proposed criterion (a), which required a narrative of existence prior to 1900, to provide context for the historical tribe.

*Response:* Because the final rule retains an amended version of the current criterion (a), rather than the proposed criterion (a), these comments are no longer applicable.

*4. 1934 Starting Date for Evaluating Criteria (b) (Community) and (c) (Political Influence/Authority)*

The Department may have received more comments on the proposed starting date for evaluating criterion (b) (community) and criterion (c) (political influence/authority), at proposed 83.11(b) and (c), than any other part of the rule. Several supported the

proposed starting date of 1934, including renowned legal scholars, the Seminole Tribe of Florida, tribes that have successfully completed the process, and Senator Tim Kaine. Those opposed to this starting date, such as the Connecticut Congressional delegation and Governor, local governments, and tribes such as the Eastern Band of Cherokee and Muckleshoot Indian Tribe, generally stated that it cannot be assumed that tribes existed continuously from first sustained non-Indian contact or 1789, whichever is later, to 1934. These commenters stated that beginning evaluation in 1934 would significantly weaken the criteria, allow recently formed groups to obtain acknowledgment, and be inconsistent with precedent. They also disagreed with the Department's basis for using 1934, stating that there are several turning points in Indian policy other than passage of the Indian Reorganization Act (IRA) and that the IRA had no effect on a tribe's existence. Several commenters suggested moving the 1934 date to 1900 to be consistent with the definition of "historical." A few commenters advocated for earlier or later dates.

*Response:* The Department considered the full range of comments from those advocating for no change to those advocating for a date later than 1934. Of course, as a practical matter, it bears noting that under the current regulations 1789 does not uniformly apply to all petitioners. Depending on the location of the petitioner, first sustained contact for some petitioners may be the mid-1800's. Of course, if the Petitioner demonstrates previous unambiguous Federal acknowledgment, the review period for (b) and (c) can be well after 1934. In considering the comments received, a number of dates were suggested for consideration. For example, there are several turning points in Indian policy other than the passage of the IRA. The Department also considered using 1871 (the end of the treaty-making era), 1880 (Special Census of Indians), or 1887 (passage of

the General Allotment Act and beginning of the allotment era), as possible starting dates. We summarize below our response to various start dates proposed by commenters during the rulemaking process.

## **1934**

The Department received a number of comments supporting the use of 1934 as set forth in the proposed rule. Legal scholars, a number of federally recognized tribes, and others provided particularly strong comments in support of the Department's use of 1934. In the nearly 40 years that the Department has utilized the Part 83 process, no petitioner has satisfied the seven mandatory criteria after 1934, but failed the criteria prior to 1934. The start date of 1934 is compelling also because groups who satisfy these criteria from 1934 maintained community and political authority for decades and across generations with little external incentive, given that the Part 83 process did not come into existence until 1978. Indeed, in 1998, the House Committee on Resources reported out favorably H.R. 1154, which would have utilized 1934 as a starting date under the criteria. While the bill did not garner the two-thirds votes required to suspend the rules and pass H.R. 1154, bi-partisan leadership on tribal issues voted in support of suspending the rules and passing the bill, including Representatives Young, Pombo, Kildee, and Rahall.

While opposition to a start date of 1934 is based on a perception that a 1934 start date would significantly weaken these two criteria, we note that 1934 is the year the Indian Reorganization Act was passed, which was a turning point in the Federal government's relationship with Indian tribes. However, in determining the appropriate date for (b) and (c), the Department concludes that, to maintain public faith in the Part 83

process, 1934 is not appropriate. Wide opposition to the 1934 date suggests that some people would question the rigor and integrity of the Department's conclusions if the Department required less than a century's review of these two particular criteria.

## **1900**

The Department received a number of comments relating to 1900 as a start date. Some of those that commented advocating for no change did note that earlier time periods were important for review and that if a change were to be made, the Department should begin its review at least since 1900. For example, the Muckleshoot Indian Tribe expressed concern with not evaluating the time period between 1900 and 1925.

Similarly, on this point, the Suquamish Tribe stated that “[t]he position advanced by the Department and implicitly agreed to by Congress is that an applicant must establish proof of a continuous political existence since at least 1900.” The Rural County Representatives of California, an organization of thirty-four rural counties in California comprising nearly half of the land mass of the state, commented that “at the very least, the standard should be set at 1900 which is consistent with other thresholds in the rule and requiring evidence that the tribe, at a minimum, pre-dates the Indian Reorganization Act.” Similarly, the Town of Kent advocated for no change but asserted that “at a minimum they should be amended to require the petitioning group to demonstrate that it has comprised a distinct community and exercised political authority from historical times to the present. With the definitional change of "historic" from "first sustained contact" to "1900" (see proposed Section 83.1), the burden upon petitioning groups will

have already been substantially mitigated and with far less risk that groups who did not maintain tribal existence prior to 1934 will be entitled to recognition as Indian tribes.”

In response to these comments as well as based on the Department’s experience in administering the Part 83 regulations, the final rule adopts the date of 1900 as the starting point for criteria (b) and (c). As discussed earlier in this preamble, there are number of factors that support the use of 1900. As explained in the 1994 rulemaking that established a 1900 starting point for criterion (a), use of this date avoids some of the problems with historical records in earlier periods while retaining the requirement for substantially continuous community and political influence/authority. The past 20 years has demonstrated that use of 1900 for criterion (a) has maintained the substantive rigor of the process and using 1900 for (b) and (c) will provide uniformity for these three criteria and to all petitioners regardless of where they are located.

1900 is also squarely during the allotment and assimilation period of federal policy that was particularly difficult for tribal governments. Indeed, leading up to 1900 the United States continued to engage in military conflict with tribes in tragedies such as the Wounded Knee Massacre of 1890 and the 1898 Battle of Sugar Point. Simply put, there was little benefit and some risk to openly functioning as a tribal community and government in 1900. Under this final rule, petitioners will need to provide evidence of community and political authority beginning in 1900. If evidence is not available beginning in 1900, a petitioner may submit evidence that pre-dates 1900.

The Department further notes that Congressional bills, from time to time, have utilized a starting date for evaluation of criteria (b) and (c) to begin in 1900. For example, in 2004 under the leadership of Senate Indian Affairs Committee Chairman Ben

Nighthorse Campbell, the Senate Committee on Indian Affairs reported S. 297 favorably out of the Committee. S. 297 provided for a start date of 1900.

## **1887**

While the Department received very few suggestions for 1887, many of the comments asserted that the Department should utilize a starting date when there was widespread discrimination for being a tribe or Indian. The Eastern Band of Cherokee expressed strong opposition to any change from 1789 or time of first non-Indian contact to the present, stating:

It makes no sense to use the date of passage of the IRA as the starting point for showing continuous tribal existence. Rather, a year pre-dating the enactment of the policy of allotment (1887) and assimilation aimed at destroying tribal governments would be more appropriate.

Eastern Band of Cherokee Nation Comments at 5. Utilization of 1900 as a start date is responsive to this comment. 1900 is within a period of time when federal policy in favor of allotment and assimilation was explicitly aimed at destroying tribal governments.

## **First Sustained Contact or 1789.**

The Department considered the comments advocating for no change from a starting date of first sustained non-Indian contact or 1789, but determined that the efficiency gains from shortening the evaluation period, and factors gleaned from the Department's vast expertise and experience in determining whether to acknowledge tribes both prior to and under the Part 83 regulations, merit adjustment of the review period for these two criteria.

Based on public input and expressions of concern, the Department has focused at this time on consistency with other parts of Part 83, reducing the documentary burden, and improving document availability for the new starting date and, as such, the final rule relies on 1900 as a starting point for criteria (b) (community) and (c) (political influence/authority). *See* final 83.11(b) and (c). It is the Department's intention to preserve the rigor and integrity of the process and the public's trust in the legitimacy of tribes that have successfully navigated the rigorous standards in Part 83. Using 1900 as a starting date will accomplish the goals of consistency and efficiency while preserving substantive rigor by requiring well over a 100-year period of documentation.

*5. State Reservations and U.S.-Held Land in Criteria (b) and (c)*

The proposed rule stated that a petitioner would satisfy criterion (b) (community) and criterion (c) (political influence/authority) if it maintained a State reservation since 1934 or if the United States held land for the petitioner at any time since 1934. *See* proposed 83.11(b)(3) and (c)(3). Commenters in support of this provision stated that it is consistent with Felix Cohen's thinking in the mid-1930's that a reservation or Federal land holding is a formalization of collective rights in Indian land and results in cultural continuation of the tribe. Commenters opposed this provision for several reasons. Among them were that the existence of a reservation or Federal-held land is not a proxy for community and political influence/authority. States may establish reservations for reasons unrelated to the tribe's community or political influence/authority (e.g., tourism, parks) and, at most, the fact that land was put aside for the group could be evidence of the group's existence at that point in time only, but is not evidence of the group's continued existence without additional evidence, as the petitioner may not have been active in

maintaining the reservation. These commenters further stated that, even where members live on the reserved or set-aside land, that fact does not provide evidence of an organizational structure. Commenters were concerned that under the proposed provisions, descendants of a tribe for which a reservation was established, but which ceased operating as a tribe, could be acknowledged, or that several different petitioners may claim the same reservation. Commenters also asserted that reliance on States' determinations is improper, that Cohen looked to collective rights as reflective of a Federal relationship after already determining that a tribe exists, and that the provision is discriminatory to Connecticut.

A few commenters suggested limiting this provision to when the State agrees the reservation does, in fact, demonstrate community and political authority, or the petitioner demonstrates it has maintained on the reservation rates or patterns of social interaction that exist broadly among members of the entity and shared or cooperative labor or other economic activity among members.

Commenters also requested numerous clarifications, including but not limited to, whether "collective ancestors" requires holding land for a group rather than individuals, whether the petitioner must have had authority over the land, and whether public domain and individual allotments are included.

Other commenters requested various items of evidence be added as a third category that would satisfy criteria (b) and (c), including individual allotments, establishment of Indian schools, and participation in treaty negotiations or land and water claims litigation before the Indian Claims Commission.

*Response:* The final rule does not adopt the approach in the proposed rule that a State reservation held continuously since 1934 or Federal land held for a group at any point after 1934 satisfies (b) and (c). However, tribes with State reservations will most likely have additional evidence of political influence/authority, as well as community. We note that under the regulations, evidence that the group has been treated by the Federal Government as having collective rights in tribal lands (i.e., the United States held land for the benefit of the group) or in funds demonstrates previous Federal acknowledgment. This evidence has been added to the list of evidence supporting previous Federal acknowledgment in final 83.12(a). However, under no circumstance may a petitioner claim a current federally recognized tribe's reservation as land that the United States set aside for the petitioner. Similarly, for purposes of this section, land set aside by the United States refers to those lands set aside by the Department of the Interior for a group. Any such lands set aside by another federal agency will need to continue to be evaluated on a case-by-case basis to determine whether such set aside demonstrates previous Federal acknowledgment.

The Department has decided that State reservations, unlike federally-held land that demonstrates previous Federal acknowledgment, may generate evidence of community and political influence/authority, but are not determinative for these two criteria. As the late Chairman Inouye explained,

“[s]hould the fact that a State has recognized a tribe for over 200 years be a factor for consideration in the acknowledgment process? I would say definitely yes. How could it be otherwise? Don't most, if not all, of our States want the Federal Government to recognize the official actions of a State Government, when most

of our States want the Federal Government to defer to the sovereign decisions and actions of those States over the course of their history? I think the answer to that question would be decidedly in the affirmative.”

S. Hrg. 109-91 (2005). There may be a multitude of circumstances in which a State establishes a reservation. Nevertheless, a State reservation may generate documents or evidence used to satisfy the categories of evidence identified in criteria (b) (community) or (c) (political influence/authority). *See* final 83.11(b)(1)(ix) and (c)(1)(vii).

*6. Criterion (b) (Community)*

*a. Using 30 percent as a Baseline*

The current criterion (b) requires a “predominant portion of the petitioning group” to comprise a community. The proposed rule would provide that the petitioner must constitute a community (deleting the phrase “predominant portion”), and would provide that the petitioner demonstrates the criterion by showing two or more forms of evidence that at least 30 percent of its members constituted a community. *See* proposed 83.11(b). Several commenters opposed this change, saying that it lowers the requirement for showing a distinct community and defies logic that a group could be a community when 70 percent do not interact. These commenters stated that relying on the voting requirements under the IRA as a basis for choosing the 30 percent figure is misplaced because the IRA was not a measurement of social interaction, and voting occurred after the Department already determined the group was a tribe; these commenters also noted that adoption of the IRA required a majority vote. Some commenters pointed out that no definitive percentage is appropriate because it would require identification of all the members at various times, which may not be possible.

A few commenters supported the proposed change and agreed with the Department's rationale. A few suggested lowering the percentage further to account for historical realities. One suggested eliminating the criterion entirely.

*Response:* The final rule requires the petitioner to constitute a distinct community, and provides that the petitioner may demonstrate this criterion by showing evidence that a "significant and meaningful portion" of its members constituted a community. *See* final 83.11(b)(1). While the proposed rule included a specific percentage in an attempt to set an objective standard, in reality, the number of members who must constitute a community depends on the historical circumstances faced by the petitioner. In practice, there is a range in which the Department has identified whether the petitioner's members are a distinct community. As described above, those previous determinations serve as precedent. The rule continues to provide that a petitioner demonstrates both distinct community and political influence/authority if the petitioner provides evidence that 50 percent or more of its members satisfy the factors in 83.11(b)(2).

*b. Allowing Sampling for Criterion (b)*

Some commenters opposed specifying statistically significant sampling as a method of demonstrating community because it is only one of many methods, could be easily manipulated, and has never before been used for criterion (b). One commenter stated that they appreciate the clarification that the Department may utilize this method in evaluating criterion (b). One commenter recommended multi-sampling for use on populations with over 10,000 members on their current rolls.

*Response:* There may be circumstances in which sampling is appropriate. For this reason, the final rule retains the proposed allowance for sampling. The final rule adds that the sampling must be “reliable” to address concerns that sampling could be easily manipulated; “reliable” is intended to reflect that the sample must abide by professional sampling methodologies. *See* final 83.11(b).

*c. Deletion of “Significant” in Criterion (b)*

A few commenters said the evidentiary requirements for paragraph (b)(1) are weakened because the proposed rule deleted the word “significant” which qualified some of the items of evidence listed (e.g., social relationships, marriages, informal social interactions). One commenter supported the removal of the “significant” qualifier and further recommended removing the qualifier “strong” from § 83.11(b)(1)(v), discussing patterns of discrimination or other social distinctions by non-members. This commenter also commented on the percentages for definitively showing marriage, distinct cultural patterns, etc., and suggested it be made clear that these percentages do not imply that something close to those percentages is needed to establish community absent such a definitive showing.

*Response:* The Department has determined that it is appropriate to qualify the evidence with the term “significant” in these circumstances because the evidence needs to be probative of the criterion. Further, an alternative option, a definitive percentage, would be inappropriate without a baseline membership list for each period in time (which may not be available). Because the introductory paragraph requires a showing that a “significant and meaningful” portion of the petitioner’s members constituted a distinct

community, insertion of the term “significant” for each item of evidence listed is not necessary. *See* final 83.11(b).

*d. Marriages/Endogamy as Evidence of Community*

Several commenters requested clarification of the provisions allowing for marriages to be considered evidence of community, specifically requesting that the Department count marriages by individual petitioner member rather than by marriage (e.g., if a petitioner has 100 members and 60 marry within the petitioner, that should count as 60 marriages, rather than 30). A few commenters stated that marriages should not be considered.

*Response:* The Department has, in past practice, counted marriages by marriage, but commenters support the alternative approach—counting by individual petitioner member. Given that scholarship supports either approach, the Department has determined in its final rule to change its approach to specify counting by individual petitioner member, rather than by marriage. The final rule also includes the term “patterns,” in addition to the existing term “rates,” in reference to marriages and informal social interactions, to capture that the Department’s past practice of looking at either rates or patterns as indications of community. *See* final 83.11(b)(1).

*e. Indian Schools as Evidence of Community*

Several commenters stated their support of the proposal to include as evidence of community that children of petitioner’s members from a geographic area were placed in Indian boarding schools or other Indian educational institutions. *See* proposed 83.11(b)(1)(ix). Several commenters opposed this proposal on the basis that: (1) relying on Indian educational institutions conflicts with past Departmental determinations; (2)

attendance of children from a “geographic area” is not evidence of a community corresponding to a specific tribe because many children were placed in schools based on blood quantum rather than tribal affiliation and non-Indian children often attended Indian schools. One commenter noted that this provision fits essentially a third-party identification of whether someone is a tribal member and, as such, should be deleted.

Some commenters requested clarifications that the rule must require that agency records refer to the community in describing actions to place children in schools or that the school had been established exclusively for education of Indian children from petitioner’s community. A few comments advocated allowing as evidence of community any records that show that children from a specifically identified Indian community were sent to public schools with Federal funds. One commenter requested that this item of evidence alone suffice for the purpose of determining criterion (e) (descent).

*Response:* In response to commenters’ concerns that placement in an Indian boarding school or other Indian educational institution may not necessarily reflect a distinct community, the final rule clarifies that the Department relies upon this evidence to the extent that other supporting documentation, pieced together with the school evidence, shows the existence of a community. *See* final 83.11(b)(1)(ix). This codifies how the Department currently examines school evidence. In the past, the Department has issued decisions relying upon boarding school records as evidence of community because there was corroborating evidence to support that the school records were indicative of a community, while in others, the Department found that boarding school records were not sufficient because there was no corroborating evidence to indicate a community. The

Department has concluded that boarding school records can be highly relevant when corroborated by other evidence.

*f. Language as Evidence of Community*

Several commenters stated that greater evidentiary weight should be given to communities that have maintained their indigenous language in a continuous fashion in proving Indian identity and continuous community.

*Response:* The Department agrees that language is an important indication of community and is often a binding force in a community. The regulations continue to list “language” as evidence of community, and continue to provide that if at least 50 percent of the petitioner’s members maintain distinct cultural patterns such as language, the petitioner satisfies criterion (b) (community). No change to the rule is needed in response to this comment. *See* final 83.11(b)(1)(vii), (2)(iii).

*g. Nomenclature as Evidence of Community*

Several commenters requested clarification that historical references used to identify the petitioner should not weigh negatively against Indian identity if they racially misidentify, disparage, and/or deprecate the petitioner. Several commenters endorsed the proposed provision recognizing that names or identifications by outside entities may change over time.

*Response:* The Department does not weigh references negatively against Indian identity if they racially misidentify, disparage, or deprecate the petitioner; rather, the Department may rely upon these references to prove a distinct community. This reflects the way the Department has reviewed historical references identifying petitioners in past decisions.

*h. Other Evidence of Community*

Under proposed 83.11(b)(2)(iv), community may be shown by evidence of distinct community social institutions encompassing at least 50 percent of the members. The phrase “at least 50 percent” was substituted for the word “most” in the current version. Commenters opposed replacing “most” with “at least 50 percent” as no longer strong enough to demonstrate community by itself without further evidence. Others opposed relying on members residing in a “geographical area” as evidence under proposed 83.11(b)(2)(i) because some currently recognized tribes that are landless could not meet this requirement and such evidence does not account for active armed service members. Some opposed the criterion in general as archaic in light of the assimilation of American Indians since 1830. Some commenters stated that flexibility should be allowed for California tribes, who were identified collectively as “Mission Indians” rather than a specific tribe. A few commenters also requested clarifications of “social relationship,” and whether enrollment evidence is required for each year. A commenter stated that review of this criterion should account for the history of racial prejudices, which often caused people to self-identify in various ways.

*Response:* The replacement of “most of” with “at least 50 percent” is not a significant change to the social institution evidence. The percentage is included for petitioners’ guidance as a more definitive threshold than “most of.” No change is required in response to comments opposing reliance on members residing in a “geographical area” because this evidence is merely one of several items of evidence petitioners may offer; those who do not reside in a geographical area are not penalized. The provision in § 83.10 that the Department will review each petition in context with the

history, regional differences, culture, and social organization of the petitioner, addresses the remaining comments on criterion (b).

*7. Criterion (c)(Political Influence/Authority)*

*a. Bilateral Political Relationship*

A few commenters requested clarification in the rule that no bilateral political relationship is now required and/or that language from the proposed rule preamble (at 79 FR 30769, stating that political influence or authority does not mean that petitioner's members must have actively participated in the political process or mechanism), be inserted into the rule. Several commenters stated that the requirement for bilateral political relationships should be retained in practice and made explicit in the rule because it has always been a fundamental part of the Department's evaluation of criterion (c), is required by Federal court decisions, and prevents a finding of political influence/authority if petitioners have self-appointed leaders without followers.

*Response:* The comments revealed different understandings of the meaning of the term "bilateral political relationship." The Department has required, as part of a showing of political influence/authority, that there be some activity between tribal leaders and membership regarding issues that the petitioner's membership considers important. The Department has not required a formal political organization or that a certain percentage of members vote. Indeed, the percentage of citizens who vote in Federal, State, tribal and local elections can be quite small. Accordingly, comments to change the regulations and require "bilateral political relationship" in (c) are not adopted. The petitioner may satisfy (c) with evidence of activity between tribal leaders and membership regarding issues that the petitioner's membership considers important. A petitioner will satisfy (c) in this final

rule if it provides similar evidence or methodology as was deemed sufficient by the Department in a previous decision on this criterion. Nor is it necessary to reinsert this phrase into criterion (f) (at 83.11(f)) because this criterion already requires, where membership is composed principally of members of a federally recognized tribe, that the petitioner function as a separate politically autonomous community under criteria (b) and (c).

*b. “Show a continuous line of entity leaders and a means of selection or acquiescence by a majority of the entity’s members”*

The proposed criterion (c) adds to the list of evidence (of which petitioner must provide two or more items), that the petitioner has a “continuous line of entity leaders and a means of selection or acquiescence by a majority of the entity’s members.” *See* proposed 83.7(c)(1)(viii). A few commenters opposed this proposed language stating that this requirement is less stringent than the requirement for having leaders and followers interact politically on issues of mutual importance. Commenters were also concerned that if “continuous” is interpreted to allow for a 20-year gap in this context, a significant time gap would be allowed for this item of evidence. A few commenters that supported this item of evidence stated that it should reflect that a majority of adult members need to select or acquiesce, as children have no role in the selection.

*Response:* The Department has determined that no change to this item of evidence is necessary in response to comments, because this item demonstrates political influence/authority only in combination with another item of evidence. The final rule does replace “majority” with “significant number” because the entity may allow for fewer than a majority of members to select leaders. *See* the discussion in “*Substantially*

*Continuous Basis, Without Substantial Interruption,*” below, regarding allowable evidentiary gaps. The final rule does not specify that “adult” members need to select or acquiesce because petitioners may allow for youth participation in some circumstances.

*c. Evidence*

Some commenters requested adding references to attorney contracts, claims filings and other court cases as evidence of political influence or authority.

*Response:* The items of evidence listed in criterion (c)(1) are examples, and are not exhaustive. *See* final 83.11(c)(1)(i)-(viii). Actions by a petitioner’s leaders with regard to attorney contracts, claims filings, and other court cases may provide evidence of political influence/authority. The final rule also clarifies that a formal “government-to-government” relationship is not required between the federally recognized tribe and petitioner, as long as a “significant” relationship is present. *See* final 83.11(c)(1)(vi).

8. *“Substantially Continuous Basis, Without Substantial Interruption”*

The proposed rule would have defined “substantial interruption” to mean a gap of 20 years or less, unless a 20-year or longer gap is reasonable given the history and petitioner’s circumstances. *See* proposed 83.10(b)(5). Some commenters pointed out the typographical error, that this should have defined “without substantial interruption.” Several commenters supported the proposal because it would add clarity and, when there is evidence before and after such gaps, would add fairness. Two commenters said 20 years is too short, because it is less than one generation and may not account for the affirmative measures taken to eradicate tribes.

Several commenters said 20 years is too long, stating that it is “patently unreasonable” to allow 20-year or longer gaps in evidence when the proposed baseline

requires only 80 years (evaluating from 1934 forward), as opposed to the 200+ years under the current regulations. Some interpreted the provision to allow acknowledgment of groups who could prove the criteria only in 1954, 1974, 1994, and 2014. These commenters stated that this is a major reduction in the standard, and provides no clarity because it allows for gaps less than or more than 20 years. These commenters also disputed the Department's assertion that this reflects past practice because the current approach rejects a specific time period for an allowable gap.

Some commenters requested more specification as to what level and time period of evidence is necessary before and after the gap (bookends) and a more definitive gap limit, given that the proposed rule allows longer than 20-year gaps in some circumstances. Others requested that the Department examine gaps in the context of the totality of the circumstances on a case-by-case basis. Finally, others such as Connecticut Attorney General George Jepsen commented that evidentiary gaps should continue to be evaluated on a case-by-case basis.

*Response:* The Department has decided not to change the definition set forth in the previous rule. The previous rule allows some evidentiary gaps because evidentiary material may not be available for certain periods of time, even though a petitioner has continuously existed. Instead, the final rule expressly provides that evidence or methodology that was sufficient to satisfy any particular criterion previously will be sufficient to satisfy the criterion for a present petitioner. Likewise, any gaps in evidence that were allowable to satisfy any particular criterion previously will be allowable to satisfy the criterion for a present petitioner. A petitioner under these rules will satisfy a criterion if that type or amount of evidence was sufficient for a positive decision on that

criterion (*see, e.g.*, determination in decisions such as the Grand Traverse Band of Ottawa and Chippewa Indians, the Jamestown S’Klallam Tribe, the Tunica-Biloxi Indian Tribe, the Death Valley Timbi-sha Shoshone Tribe, the Poarch Band of Creeks, the San Juan Southern Paiute Tribe of Arizona, the Jena Band of Choctaws, and the Mohegan Tribe of Indians of Connecticut). Many previous Federal acknowledgment decisions had gaps of evidence and a one-size-fits-all approach will not reflect the unique histories of petitioners and the regions in which they reside. The Department recognizes that there are circumstances in which gaps considerably longer than 10 years may be appropriate. For example, some petitioners may have gaps in documentation of political activity and community in the 1940’s and 1950’s that are explainable by World War II and the Korean War.

*9. Criterion (f) (Unique Membership)*

*a. Criterion (f), In General*

Criterion (f) (at 83.11(f)) requires that the petitioner’s membership be composed principally of persons who are not members of any federally recognized Indian tribe. A few commenters opposed this criterion, stating that it is an imposition into tribal sovereignty by prohibiting dual tribal membership. Commenters noted that tribal memberships may change, and that such changes do not indicate that a tribe ceases to exist (even if “key members” of the petitioner leave to join a federally recognized tribe to obtain services). A commenter suggested renaming this criterion as something other than “membership” because it is confusable with criterion (d). Other commenters suggested clarifying whether members must withdraw from the federally recognized tribe,

clarifying how this criterion discourages splintering, and clarifying “principally” with a percentage.

*Response:* The Department has not changed Criterion (f)’s substantive requirements from the previous rule. The previous rule does not prohibit dual tribal membership; it requires only that a petitioner’s membership not be “composed principally” of persons who have dual membership. The Department recognizes that tribal memberships may change, and that such changes do not indicate that a tribe ceases to exist. This criterion is intended to prohibit factions or portions of federally recognized tribes from seeking Federal acknowledgment as a separate tribe, unless they have been a politically autonomous community since 1900 (criteria (b) and (c)). The final rule does not define a percentage for “composed principally” because the appropriate percentage may vary depending upon the role the individuals play within the petitioner and recognized tribe. Even if a petitioner is composed principally of members of a federally recognized tribe, the petitioner may meet this criterion – as long as it satisfies criteria (b) and (c) and its members have provided written confirmation of their membership in the petitioner. There is no requirement to withdraw from membership in the federally recognized tribe. The final rule titles this criterion “unique membership” in response to the comment that the title “membership” causes confusion.

*b. Deletion of previous rule’s provision prohibiting members from maintaining a “bilateral political relationship” with the federally recognized tribe*

The previous rule at 83.11(f) requires that, if petitioner’s membership is principally composed of members of a federally recognized tribe, the petitioner must show that “its members do not maintain a bilateral political relationship with the

acknowledged tribe,” in addition to showing the petitioner is politically autonomous and providing written confirmation of membership in petitioner. The proposed rule deleted the requirement to show that members do not maintain a bilateral political relationship with an acknowledged tribe. Some commenters opposed this change, stating that it could allow the acknowledgment process to become a vehicle to allow for acknowledgment of factions of federally recognized tribes. These commenters requested that the Department correct the rule if criterion (f) is not intended to allow portions of a recognized tribe to separate.

*Response:* Criterion (f) requires that the petitioner be a separate politically autonomous community since 1900. In the past, the Department has acknowledged a tribe even though its members had census numbers with a federally recognized tribe. Notice of Final Determination That the San Juan Southern Paiute Tribe Exists as an Indian Tribe, 54 FR 51502, 51504 (December 15, 1989) (finding that San Juan Paiute members were not members in the Navajo Nation despite having Navajo census numbers). Indeed, the Department may acknowledge a tribe even though its members has dual citizenship in a federally recognized tribe and maintains a bilateral political relationship with that tribe if the petitioner operates as a separate politically autonomous community on a substantially continuous basis. The disqualification for having a bilateral political relationship in (f) is unnecessary because criterion (f) already requires that the petitioner function as a politically autonomous entity. For this reason, the final rule implements the proposed deletion of bilateral political relationship from criterion (f). See final 83.11(f).

*c. Exception for Members of Petitioners Who Filed Prior to 2010*

For a petitioner who filed a letter of intent or a documented petition prior to 2010, the proposed rule would not consider as members of a federally recognized tribe, petitioner's members who became members of a federally recognized tribe after filing of the petition. Several commenters supported this proposed new exception. However, nearly all of those who commented on the 2010 cut-off date requested clarification of why the date was chosen or advocated for eliminating the date limitation. *See* proposed 83.11(f)(2).

Several commenters opposed the exception, stating that it creates the possibility that portions of a recognized tribe could separate and become acknowledged. Some stated that a case-by-case examination is more appropriate than a blanket exception. Others requested specifying that a petitioner's members should sign statements saying they would belong exclusively to the petitioner should the petitioner obtain acknowledgment.

*Response:* The Department recognizes that there are situations in which petitioners' members have become members of federally recognized tribes to obtain needed services pending the Department's review of a petition. The proposed rule attempted to address this situation by establishing a blanket exception. After reviewing the comments and past petitions, the Department has determined that this exception is not necessary because, if so many of a petitioner's members join a federally recognized tribe that the petitioner is then "composed principally" of members of the federally recognized tribe (i.e., the petitioner is "composed principally" of members with dual membership), then the petitioner may nevertheless be acknowledged if it meets criterion (f) as just discussed. The proposed additional exception for petitioners who filed prior to 2010 is

unnecessary because the existing exception adequately addresses those situations where a petitioner's members join a federally recognized tribe to obtain services. For this reason, the final rule deletes the proposed exception for petitioners who filed prior to 2010, but retains the intent of the proposed exception by permitting petitioners whose members have joined federally recognized tribes to obtain services while their petition is in the queue to still be eligible for acknowledgment. *See* final 83.11(f).

*10. Criterion (g) (Termination)*

A few commenters expressed support for the proposed change to criterion (g) (at 83.11(g)), which would put the burden on the Department to show that a petitioner was terminated or the subject of legislation forbidding the Federal relationship. Commenters stated this is “obviously an important improvement” and “common sense.” A few commenters objected to the proposed amendment because it reduces the burden on petitioners and is “not appropriate.” One commenter stated that there should be a process for groups to respond to the Federal Government's position on termination and for interested parties to weigh in.

*Response:* In past practice, the Department's legal team reviewed whether the petitioner is subject to legislation that has terminated or forbidden the Federal relationship, regardless of the documentation the petitioner provided in support of this criterion. Additionally, terminating or forbidding the relationship is a Federal action. For these reasons, the Department has determined that it is appropriate to clarify explicitly that the burden is on the Department to show that a petitioner was terminated or forbidden. *See* final 83.11(g). Petitioners and interested parties may weigh in on the Federal Government's position on this criterion in response to the PF.

## *11. Splinter Groups*

The proposed rule did not revise provisions addressing “splinter groups,” which is a subset of membership that “separates from the main group.” *See* proposed 83.4(a)(2). Many commenters stated that clarification is necessary regarding treatment of splinter groups in light of the proposed allowance for re-petitioning and proposed revisions to criteria. (For example, one commenter speculated that splinter groups each could be recognized without actually demonstrating criteria (b) (community) or (c) (political influence/authority) simply by pointing to a State reservation.) Among the clarifications requested were what qualifies as a “splinter group,” and whether and to what extent splinter groups may be acknowledged. Commenters appeared to use the term “splinter group” to mean one or more of the following: groups who splinter from current petitioners; groups who splinter from previously denied petitioners; groups who splinter from currently federally recognized tribes (as evidenced by eligibility for membership or claiming the same historical tribe); groups who splinter from (i.e., are just a portion of) a historical tribe claimed by another petitioner or federally recognized tribe; and groups who splinter from tribes named in Termination Acts. Commenters argued that various types of these groups should or should not be acknowledged. For example, with regard to groups who splinter from current petitioners, several commenters requested incorporating the procedures in the 2008 Directive for dealing with splintering petitioners, noting that continued leadership disputes hamper the evaluation process, and dueling petitions from entities that trace themselves in some fashion to a common tribal entity have long caused problems, leading to delayed and costly petition reviews, intense

conflicts, and litigation. Commenters also requested a prohibition against the Department forcing petitioners into one group.

With regard to groups who splinter from previously denied petitioners, several commenters were concerned that petitioners may be acknowledged even if they are splinters of previously denied petitioners or petitioners who claim they are the “main group” and the previously denied petitioner was the splinter.

Federally recognized tribes, in particular, expressed concern that groups who claim the same historical tribe could appropriate the federally recognized tribe’s history and that the shortened time period for showing community and political influence/authority would facilitate their acknowledgment. A few commenters requested prohibiting splinters from historical tribes and State-recognized tribes to prevent subsets of a historical tribe from being acknowledged (rival groups may claim to be descendants of the historical tribe).

*Response:* The final rule does not change the way the Department has handled “splinter groups.” The Department will continue to address “splinter groups” with the same rigor it has applied under the existing rules. With regard to splinters of petitioners, the final rule continues to allow for the approach of the 2008 Departmental guidance to address conflicting claims to leadership within a petitioning group that interfere with OFA’s ability to conduct business with the group. Specifically, the Department may request additional information from the petitioner to clarify the situation and OFA may suspend its review of the petition. *See* 73 FR 30146 (May 23, 2008). OFA’s suspension would be based on the leadership dispute qualifying as an “administrative problem” with the petition under 83.31.

With regard to other types of “splinter groups,” final 83.4 incorporates a cross-reference to criterion (f), which prohibits any petitioner from being composed principally of members of a federally recognized tribe unless the petitioner can provide evidence that it was an autonomous political community since 1900. The Department will continue the approach it has previously utilized. *Final Determination of Federal Acknowledgment for the Jena Band of Choctaw Indians*, 60 FR 28480 (May 31, 1995) (finding the Jena Band of Choctaw Indians to be a separate and distinct Indian group, first identified by Federal Census in 1880, who descended from the Choctaws who left the historical Mississippi Choctaws).

## **B. Re-Petitioning**

Numerous commenters stated their support for allowing re-petitioning, stating that it is necessary for equal protection, appropriate because implementation of the rules has become more stringent over the years, and may be legally permissible. *See* proposed 83.4(b).

Numerous commenters were opposed to allowing re-petitioning, stating that allowing re-petitioning:

- Violates Federal law (separation of powers, collateral estoppel, res judicata), is arbitrary and capricious, and exceeds the Department’s authority;
- Is unnecessary if the regulatory revisions truly are not affecting criteria or changing the standard of proof;
- Is inefficient and administratively burdensome;
- Undermines finality and certainty, disrupting settled expectations;

- Is unfair to stakeholders, especially those who have already litigated against the unsuccessful original petition;
- Is unfair to other petitioners and tribes who may have legitimate petitions;
- Is unfair particularly to Connecticut;
- Could result in acknowledgment of previously denied petitioners;
- Is unnecessary because petitioners can challenge in court instead; and
- Is unreasonable, especially with such a low standard for allowing re-petitioning.

A few commenters were neutral on re-petitioning because ultimately the same individuals who reviewed the original petition would be reviewing the re-petition and re-petitioning will require a petitioner to obtain resources (hire historians, genealogists, e.g.) to go through the petitioning process again. Some suggested that any Departmental employee who was associated with the original negative finding should be precluded from participating in the review of the re-petition. A few requested clarifications on the standard for allowing re-petitioning and on the order in which petitions, once re-petitioning is granted, would be reviewed.

Many commenters, including those who submitted form letters, opposed the proposed condition that re-petitioning would be allowed only with the consent of the opponents to the original petition, which some characterized as the “third party veto.” These commenters stated that this condition, among other things:

- Is unfair (favoring third-party interest over correction of injustice), will deprive a petitioner of even making the case for re-petitioning, and will prevent getting to the truth of whether the tribe should be acknowledged;
- Treats petitioners unequally;

- Allows for political intervention in what should be a fact-driven process;
- Is an illegal delegation of authority under the Appointment Clause and is legally unprecedented;
- Is illegal for other reasons (under the Fifth Amendment Due Process Clause, Supremacy Clause, Commerce Clause) or is arbitrary and capricious;
- Is based on an invalid justification (established equities) that fails to consider petitioners' interests; and/or
- Is politically motivated by Connecticut's influence.

Some commenters suggested removing the third-party consent condition and instead allowing interested parties to participate in the hearing on whether re-petitioning is appropriate. Others suggested third parties be limited to participating in the petitioning process, if the re-petitioning request is granted. Some commenters stated that no third-party participation is appropriate in a re-petitioning request because third parties' objections are based on factors other than whether the petitioner meets the criteria for acknowledgment.

Those in support of the third-party consent condition stated that they would prefer not to allow re-petitioning at all, but if re-petitioning is allowed, then the third-party veto is necessary to protect established equities and should be expanded to require consent of all interested parties, regardless of whether they participated in a prior proceeding involving the original petition.

A few commenters suggested different approaches to re-petitioning, allowing re-petitioning in only certain circumstances, such as if:

- A substantial number of years passes and there is significant new evidence;

- There is a showing of some modification of evidence;
- The ALJ consults with nearby federally recognized tribes before making a decision, to give those who were not notified previously a chance to be involved;
- The petitioner exhausted their administrative and appellate remedies; or
- Third parties involved in a prior proceeding are granted special standing.

*Response:* The proposed rule would have provided for a limited opportunity for re-petitioning. After reviewing the comments both in support of and in opposition to allowing for any opportunity for re-petitioning, limiting re-petitioning by providing for third-party input, and other suggested approaches for re-petitioning, the Department has determined that allowing re-petitioning is not appropriate. The final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner. The Department has petitions pending that have never been reviewed. Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular. The Part 83 process is not currently an avenue for re-petitioning.

### **C. Standard of Proof**

Proposed 83.10(a) would attempt to clarify that the “reasonable likelihood” standard of proof means that there must be more than a mere possibility but does not require “more likely than not.” The clarifying language is based, in part, upon the

definition of “reasonable likelihood” applied by the Supreme Court in determining whether there is a reasonable likelihood that a jury has misapplied a jury instruction for capital offense sentencing. *See* proposed 83.10(a)(1). Several commenters expressed support for the proposed clarification to increase predictability and consistency in application. Some stated they specifically support clarification that the standard does not require “more likely than not” to counteract what, they assert, is a Departmental trend to require more and more evidence over time. Several commenters opposed how the proposed rule defined “reasonable likelihood,” stating that it would substantially lower the standard of proof, would allow acknowledgment of groups who “more likely than not” do *not* meet criteria, and would take away the Department’s ability to balance evidence by requiring acknowledgment if there is “more than a mere possibility.” Commenters also stated that the Supreme Court’s interpretation of “reasonable likelihood” in the case cited in the proposed rule is inapplicable and inappropriate for application to the acknowledgment process because the cited case involved jury instructions in a criminal (death penalty) case—where, as one commenter stated, society would rather acquit the guilty than wrongly convict the innocent. Commenters also stated that interpreting “reasonable likelihood” in this way exceeds the Department’s authority, is inconsistent with the Administrative Procedure Act and *Steadman v. SEC*, 450 U.S. 91 (1981), raises significant due process issues, and is unprecedented (no other Federal agency uses this standard in making eligibility determinations).

Several commenters provided alternative suggestions, including applying a preponderance of the evidence/“more likely than not” standard. One suggested providing that a criterion is met “if the evidence is sufficient for a reasonable mind to conclude that the criterion is met viewing the evidence in the light most favorable to the petitioner, in the specific cultural, social, political, and historical context of the tribe and in the light of adverse consequences caused by Federal policy or actions.” Some commenters stated that subjective judgment is involved, even with a clear definition of “reasonable likelihood.” Some requested reinserting the June 2013 discussion draft’s language that the evidence will be viewed in the light most favorable to the petitioner.

*Response:* In light of commenters’ concerns that the proposed rule changed the standard of proof, the final rule retains the current standard of proof and discards the proposed interpreting language. The final rule expressly provides that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner. In other words, a petitioner today satisfies the standards of evidence or baseline requirements of a criterion if that type or quantum of evidence was sufficient for a past positive decision on that criterion. The Department will continue to interpret “reasonable likelihood of the validity of the facts” as described in the 1994 preamble (at 59 FR 9280 (February 25, 1994)) and will not apply a more stringent interpretation of that standard. *See* final 83.10(a). *See also, e.g.,* Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe, February 14, 2000, p. 101 (stating that the general standard is a “reasonable likelihood” and “not that there must be conclusive proof”).

#### **D. Third-Party Participation in the Acknowledgment Process**

Many commenters addressed the level of third-party participation in the petitioning process. Those commenters arguing that third parties should have more opportunity for participation stated that the proposed rule would severely limit third-party involvement by restricting the right to notice, allowing no opportunity to rebut petitioner's responses, eliminating the opportunity to seek an on-the-record meeting or IBIA reconsideration, restricting to certain parties the right to have an impact on a positive PF, and making monitoring the petition more difficult by establishing more phases of review. One commenter stated that the proposed rule establishes an iterative process for the petitioner to engage OFA at every stage – creating a tutelage-like process between the petitioner and the agency. Federally recognized tribes asserted that they, in particular, should have more opportunity for input under the *DOI Policy on Consultation with Indian Tribes* and because they are more aware of tribal histories. Commenters provided a number of suggestions for allowing more opportunity for third-party input.

Other commenters stated that more limits on third-party participation should be imposed because third parties improperly weigh in on acknowledgment petitions based on land-into-trust issues, taxation, discrimination, gaming fears, financial and political pressures, and other factors that do not address whether the petitioner meets the criteria. These commenters state that the process should be between a petitioner and the Department only and that, otherwise, third parties with substantial resources and power can challenge evidence and question interpretation of the criteria to disrupt petitions. Commenters provided suggestions for prohibiting or limiting third party participation,

including imposing a requirement for comments and evidence to be directly relevant to whether the petitioner meets the criteria.

Specific provisions that were the focus of comments on third party participation follow.

*1. Who Receives Notice of the Receipt of the Petition*

The proposed rule provides that the Department will publish receipt of a documented petition in the Federal Register and on the OFA website, but will also notify in writing the governor and attorney general of the State in which petitioner is located, any federally recognized tribe within the State or within a 25-mile radius, or any other recognized tribe and petitioner that appears to have a historical or present relationship with the petitioner or may otherwise have a potential interest. *See* proposed 83.22(b)(2).

With regard to restricting notice to tribes within a certain radius, some commenters supported this limitation, stating that it would reduce the influence of parties hundreds of miles away who may be antagonists. Commenters opposed to this limitation stated that it is arbitrary because petitioners beyond the 25-mile radius could claim the same heritage as a federally recognized tribe, that it inappropriately suggests a gaming standard, and that generally a tribe's presence extends beyond its headquarters. Some commenters suggested notifying any federally recognized tribe: to which the petitioner claims to have ties or shared heritage; with trust land in the same State as petitioner; within a radius of aboriginal territory rather than headquarters; or within 100 miles. The proposal also provided that when a positive PF is issued, only certain parties may object, including tribes within 25 miles. *See* proposed 83.37.

Several commenters stated that local governments should receive written notice of the petition because the local governments have interests beyond those of the State (e.g.,

public health and safety service impacts) and otherwise may not be aware of the petition. Some commenters suggested that notice of the petition and proposed finding should be provided to all residents, businesses, landowners, and others within a 25-mile radius. Another commenter suggested notice to State government agencies responsible for Indian affairs. A few commenters stated that sending notice to the State and others is inappropriate because tribes do not receive notice of every State action.

*Response:* After reviewing the comments, the Department determined the proposed addition of notice to tribes within a certain radius or within the State to be unnecessary, because the rule already provides for constructive notice to all through publication in the Federal Register and direct notice to any tribe that appears to have a historical or present relationship with the petitioner or that may otherwise be considered to have a potential interest in the acknowledgment determination. The final rule provides additional notice to county-level (or equivalent) governments, in response to comments by Stand Up for California and others; continues to require notice to the State governor and attorney general and affected tribes and petitioners; and allows for notice to everyone else through publication in the Federal Register and on the OFA website. *See* final 83.22. Through much greater use of website publication, the new rule increases transparency throughout the administrative process of consideration.

## *2. Deletion of Interested Party Status*

Many commenters opposed the proposed deletion of the “interested party” definition from 83.1 and asserted that certain parties should have the ability to participate fully in the acknowledgment process. These commenters stated that local governments, landowners, and other parties affected by the acknowledgment decision must have

broader rights of participation to ensure due process, fairness, integrity, and transparency. Some federally recognized tribal commenters stated that the Department's Indian trust responsibility requires their full participation in the acknowledgment process. Other commenters suggested reinserting the definition of "interested party" but establishing a formal process for determining who qualifies as an "interested party" or restricting interested parties to those with direct material interests. Commenters had other suggestions about disclosing the identity of interested parties and clarifying what happens to those who already have been granted interested party status in pending petitions. Comments on the term "informed party" defined in 83.1 requested some process for determining whether a party is informed of the petitioner's history (as opposed to a party who wants to be informed of the petition's progress).

*Response:* The final rule allows anyone who is interested in the petition to submit comments and evidence and receive notice, without labelling such individuals or entities. The final rule allows for broader notice, regardless of whether a particular party would qualify as an "interested" or "informed" party under the prior rules. The Department wishes to obtain relevant, reliable evidence from any source. Accordingly, the terms "interested party" and "informed party" are no longer necessary for the purposes of defining the persons who will be notified of actions on a specific petition, and therefore the terms have been deleted. *See* final 83.1.

### *3. Comment Periods*

Several commenters stated that limiting the period for commenting after receipt of a petition to 90 days from website posting and reducing the time period for comment on PFs unjustly limits third party participation.

*Response:* These comments are addressed in *Process – Timelines*, below.

## **E. Process – Approach**

### *1. Letter of Intent*

The proposed rule would delete the optional step in the current 83.4 of providing a letter of intent to submit a petition. Some commenters expressed support for deletion because many who provide letters of intent never submit petitions. Some commenters opposed eliminating this step because the letters track groups claiming tribal status, put others on notice that groups intend to seek Federal acknowledgment (and allow the others to start their own research), provide information for Departmental budget and staffing planning, benefit petitioners by allowing them to qualify for grants, etc., impose only a minimal burden, and are consistent with other Federal practices. Some commenters suggested alternatives to deleting this step, for example, imposing an expiration date so that a letter of intent is effective for a limited time (e.g., three years).

*Response:* The final rule deletes the letter of intent step because, as some commenters noted, many who submit letters of intent never follow through to submit petitions. The Department reviewed the commenters' concerns with deleting this step and determined that the improvements in clarity (the process will now clearly begin with the filing of a documented petition) and efficiency (fewer Departmental resources required) outweigh the potential negatives of eliminating this step. Prior to the effective date of this rule, the Department will send a letter to each entity who has submitted only a letter of intent, and encourage submission of a documented petition and inform them that if they do not, they will not be considered petitioners. Each entity that has submitted only

a letter of intent is not a petitioner in the process unless and until it submits a documented petition.

## *2. Phased Review*

Under proposed 83.26, OFA would conduct a phased review of the criteria. Most who commented on the proposed phased review supported it, noting that satisfaction of the descent criterion (e) is a threshold issue and that, because evaluation of criteria (b) (community) and (c) (political influence/authority) is more time consuming, phased review should make the process more efficient. One petitioner suggested reviewing criterion (d) (governing document) with criterion (e) to ensure submission of a governing document and membership list.

A few commenters opposed eliminating the process for allowing expedited rejections of petitions in the current 83.10(e) based on any one of the descent, membership, or termination criteria; others preferred the 2013 discussion draft approach of having expedited positive and negative findings.

*Response:* The final rule streamlines the phased review and expedites the entire process by providing for a review first of criteria (d) (governing document), (e) (descent), (f) (unique membership), (g) (termination), and any claim to previous Federal acknowledgment; and second of criteria (a) (identification), (b) (community), and (c) (political influence/authority). *See* final 83.26. These two phases combine evaluations of the criteria that are most likely to be evaluated together even in the absence of defined phases. The result is likely to produce any negative decisions in a quicker manner, thereby resolving petitions sooner, reducing time delays, increasing efficiency, and preserving resources.

### *3. Technical Assistance*

The proposed rule would require OFA to conduct a technical assistance (TA) review for each of the two review phases, *see* proposed 83.26(a)(1) and (b)(1). A few commenters requested that interested parties be permitted to request and participate in TA reviews. A few commenters stated that allowing multiple TA reviews creates a fragmented process and omits the pre-review TA that often identifies problems in advance of OFA consideration.

*Response:* Under the Department's long-standing practice, OFA provides the petitioner with TA review because the petitioner is seeking Federal acknowledgment. However, to promote transparency, the final rule provides for the Department to make each TA review letter publicly available by posting it on the website as soon as it is issued, to allow review by anyone who is interested. *See* final 83.22(c). The final rule limits the number of TA reviews to two, at the most: one for each phase. Each TA review will be limited to the criteria that are to be reviewed during that stage (i.e., Criteria (d) (Governing Document), (e) (Descent), (f) (Unique Membership) and (g) (Termination) in Phase I and the remaining criteria in Phase II). Because some petitioners may fail to proceed to the second phase, splitting the TA review into two phases will help promote efficiency. In addition, petitioners may seek informal assistance and guidance from OFA prior to submitting a petition.

### *4. Providing Petitioner With Opportunities to Respond*

Several commenters supported the proposed provision allowing a petitioner to respond to comments prior to issuance of a PF (proposed 83.24), ensuring the Department has all relevant information. A few suggested allowing a reasonable

extension beyond 60 days, if requested. Also, some commenters expressed support for the proposed requirements that OFA provide the petitioner with any material used in the PF or FD and that the AS-IA remand a favorable PF to OFA if new evidence might support a negative PF (proposed 83.42(b)). One commenter stated that these changes are necessary to ensure due process and address the problems that, in its experience as a petitioner, plagued its petition following a favorable PF.

*Response:* The final rule includes the proposed approach allowing a petitioner to respond to comments prior to the issuance of a PF and ensuring OFA provides the petitioner with any material used in the PF, to the extent allowable under Federal law. The requirement in proposed 83.42(b) for remand to OFA if new evidence may support reversal of a positive PF has been deleted because it could have added significant delays to the process. Instead, the final rule provides, at 83.41, that the Assistant Secretary will review the positive PF in light of the comments on the PF and the petitioner's response.

#### *5. Suspensions (proposed 83.31) and Withdrawals (proposed 83.30)*

Several commenters requested a time limit on suspension of review of a petition for technical or administrative problems to ensure the suspension lasts no longer than a year and to allow the petitioner to resume at any time. A few commenters also requested allowing petitioners to request suspension of their petitions where acts of God impede them from moving forward.

Some commenters stated that the proposal to allow petitioners to withdraw their petitions after active consideration begins would allow petitioners to avoid negative findings, affecting the integrity of the acknowledgment process. They also note that it is inefficient to allow withdrawals because the Department will expend resources without

reaching a final decision. A few commenters suggested allowing for withdrawal after active consideration only with the consent of AS-IA.

Other commenters said that the proposal to allow withdrawal after the beginning of active consideration is only fair, to allow petitioner to gather additional evidence if needed. Several commenters objected to the proposal that petitions that are withdrawn and then re-filed will be placed at the end of the register of documented petitions when re-filed; these commenters stated that petitioners who withdraw should not lose their place in line if the withdrawal is for less than a year.

*Response:* The final rule takes the approach that when the petitioner is preparing information to submit in response to technical assistance, no timeline applies. This negates the need for the petitioner to request a suspension from the Department; rather, the petitioner may take whatever time it needs. Upon submission of petitioner's response, the timelines imposed on the Department for that phase will begin to run. Where the Department faces technical or administrative difficulties that prevent review, the final rule allows for the Department to suspend its own review. *See* final 83.31. No suspension is necessary to allow time for the petitioner's responses to technical assistance, because the final rule does not impose timelines on these actions. With regard to withdrawal, the final rule allows for withdrawal but with the consequence that the petition will be placed at the end of the numbered register upon re-submission. There is no need to provide that a petitioner does not lose their place in line if the withdrawal is less than a certain timeframe, because the petitioner always has the option of taking as long as they like to respond to technical assistance, in lieu of withdrawal.

## 6. *Decision-maker*

Several commenters opposed the proposed approach of having OFA issue the PF (proposed 83.32) and AS-IA issue the FD (proposed 83.42), rather than the current approach where AS-IA issues both the PF and FD with OFA's input. These commenters stated that separating OFA experts' analysis from AS-IA's evaluation would allow AS-IA to deviate from evidence and findings without standards and make a political decision. Commenters also stated that the proposed approach promotes the idea that there is an adversarial relationship between OFA and AS-IA. These commenters believe OFA should provide neutral, expert analysis to AS-IA in each instance and AS-IA should issue both the PF and FD to provide greater checks and balances and more accurate findings by allowing for another level of fact checking and editing. At least one commenter supported the proposed approach, saying that OFA's findings should be advisory only.

*Response:* The Department does not agree that having OFA issue the PF separates OFA experts from AS-IA, allows for arbitrary deviation, or promotes an adversarial relationship. OFA exists within and reports to the Office of the AS-IA and works at AS-IA's direction. Moreover, having OFA issue the PF underscores the crucial role that OFA plays in the process. The final rule retains the proposed approach of having OFA issue the PF as a documented recommendation for AS-IA to consider when preparing the FD. AS-IA's preparation of the FD will be based on the complete record, including the PF issued by OFA, comments and responses on the PF, and any hearing record and ALJ recommended decision. The Assistant Secretary may continue to seek the input of OFA, as technical staff throughout this process.

#### *7. Automatic Final Determination*

For improved efficiency, several commenters supported proposed 83.37(a), which would require automatic issuance of a positive FD when there is no significant opposition to a positive PF from the State or local government or any federally recognized Indian tribe within the State or within a 25-mile radius of petitioner's headquarters. One commenter stated that a positive FD should be issued within 30 days after issuance of the positive PF rather than waiting 90 days for comments under proposed 83.35(a). Those who opposed this requirement stated that all positive PFs should be treated the same, regardless of who submits comments, and that limiting commenters to certain interested parties violates the APA requirement that the whole record be considered, leaving those other interested parties without any procedural rights to protect their interests.

*Response:* In response to commenters' concerns regarding limiting commenters to certain parties, the final rule treats all commenters the same, regardless of who submits comments, but clarifies that the objection to the positive PF must be supported by evidence as to whether the petitioner meets the criteria. *See* final 83.36. Allowing for automatic issuance of a positive FD if there is no objection with evidence germane to the criteria, conserves resources, and promotes efficiency in the process.

#### *8 Prioritizing Reviews*

A number of commenters requested clarification of the priority of various categories of petitions (those pending during the regulatory process, suspended petitions, previously denied petitions), and advocated that various categories be given top priority in the order of review. One commenter suggested creating tiers for review based on which petitions are easiest to process.

*Response:* The final rule's revised process, which separates review into two phases, is intended to improve efficiency by focusing review first on a limited number of criteria to eliminate petitioners who do not meet those basic criteria, before embarking on the more time- and resource-intensive review of the other criteria. *See* final 83.26.

#### *9. Proceeding under the New or Old Version of the Regulations*

Several commenters stated their support for allowing a petitioner who has a currently pending, complete documented petition on active status to choose whether to proceed under the new or current regulations. These commenters requested clarification on how to proceed under the new regulations and requested that they be placed in highest priority if they already submitted a letter of intent or other documentation under the current regulations.

*Response:* The final rule, at 83.7, establishes that the final rule will apply, except that a petitioner with a currently pending, complete documented petition may choose to proceed under the current regulations if it notifies the Department by the stated deadline. The Department will notify each such petitioner of the option to proceed under the current regulations. A petitioner must respond by the deadline if it chooses to do so; otherwise, the petitioner will be subject to the new regulations. *See* 83.7. OFA will maintain a list of petitions that are awaiting Departmental action at any given time and address those petitions in the order in which they were submitted.

#### *10. Precedent and Other Comments*

A few commenters requested specific language be added to the preamble regarding precedent (ranging from ensuring that OFA precedent continues to be followed, to ensuring that prior negative decisions of OFA will not be used to interpret the new

regulations) and other statements as to applicability. Commenters commented on various other aspects of the process, OFA's qualifications and oversight, making available example formats for the petition, and whether the Department owes a trust responsibility to petitioners.

*Response:* Because the final rule does not make significant changes to the criteria, the Department's precedent stands. To address concerns that the Department is implementing the criteria in an increasingly stringent manner, the final rule adds a section in 83.10 to ensure that the Department is applying the criteria consistently. The final rule states that if there is a prior final positive decision finding evidence or methodology to be sufficient to satisfy any particular criterion previously, the Department will find it sufficient to satisfy the criterion for a present petitioner. In other words, a petitioner satisfies the standards of evidence or baseline requirements of a criterion if that type or amount of evidence was sufficient for a positive decision on that criterion in prior final decisions (*see., e.g.,* the Grand Traverse Band of Ottawa and Chippewa Indians, the Jamestown S'Klallam Tribe, the Tunica-Biloxi Indian Tribe, the Death Valley Timbi-sha Shoshone Tribe, the Poarch Band of Creeks, the San Juan Southern Paiute Tribe of Arizona, the Jena Band of Choctaws). The Department has considered the other miscellaneous comments and determined that they do not warrant any revisions to the regulation.

## **F. Petitioning Process Timelines**

### *1. Timelines – Overall*

We received several comments on how long the process currently takes, noting that, even with the proposed deadlines, the proposed process would continue to be

lengthy, due to multiple instances of providing technical assistance, submission of new evidence, and the requirement that petitioners see and respond to any evidence before a PF is issued. These commenters stated that these parts of the process are unrealistic, unworkable, and inefficient. A few commenters suggested having more accountability for timeliness through a deadline for all prospective petitioners to submit their petitions, a deadline for the Department to issue decisions on all petitions, or parameters for how long a petition stays on the “ready” list.

Several commenters supported the proposed timelines and requested they be strictly upheld, either allowing for a way to compel agency action or the issuance of automatic findings in support of petitioner. One commenter suggested adding timelines to the technical assistance process and one suggested the entire process be subject to a 6-month deadline.

*Response:* The Department has retained the proposed timelines in nearly all instances to ensure efficiency. The final rule reduces the proposed opportunities for technical assistance to two (not including any informal guidance a petitioner may obtain prior to submitting a documented petition) – one for each of the two review phases. This change is intended to promote efficiency because the expectation is that each technical assistance review will be more targeted to certain criteria, and therefore likely shorter, and some petitioners may receive only the first phase of technical assistance, where Phase I results in a negative final determination. Ensuring that petitioners see and respond to any evidence before a PF is issued may, in fact, add time to the process; however, the Department believes this is an instance where the need for transparency, fairness, and rigor outweighs the need for promptness. The final rule does not impose parameters for

how long a petition stays on the “ready” list because the length of stay is subject to the availability of OFA staff at any given time. To emphasize that the Department plans to strictly uphold its timelines, the final rule deletes each individual provision allowing for a specific time extension and replaces them with a new section providing that the Department may extend a deadline only upon consent of the petitioner or for good cause. *See* 83.8.

### *2. Timelines – Notice of Receipt of Documented Petition*

Proposed 83.22(b)(1)(iv) establishes a deadline of 90 days from the date a documented petition is posted on OFA’s website for submission of comments. Several commenters stated that comments should be accepted without any definitive time limit until active consideration of the documented petition begins. These commenters argued that petitioners have as long as possible to prepare research and limiting others’ input to a 90-day window appears to be designed to preclude meaningful public comment. A few commenters requested expanding the 90-day comment period to 120 or 150 days.

*Response:* In response to comments, the final rule extends the comment period to 120 days. The final rule retains a defined comment period because it is necessary to have a cut-off point in order to allow the petitioner time to respond to comments. We note that commenters also have the time to further prepare comments and gather evidence for submission during the comment period on the proposed finding.

### *3. Timelines – Petitioner Response to Comments Prior to PF*

Proposed 83.24 would allow a petitioner at least 60 days to respond to comments before OFA begins review. A few commenters suggested allowing a reasonable extension beyond 60 days, if requested by petitioner.

*Response:* The final rule allows the petitioner 90 days rather than 60 days to respond to comments (83.24) and adds a provision in 83.8 that generally allows for extensions of time for good cause.

#### *4. Timelines – Issuance of a PF*

A few commenters noted that it will be difficult for OFA to issue a PF within 6 months, as required by proposed 83.32, for petitioners with large memberships. One commenter suggested adding flexibility to allow OFA and the petitioner to agree upon a deadline. This commenter pointed out that proposed 83.26(a)(1)(i)(B) allows the petitioner to submit additional information, but proposed 83.32 still requires issuance of PF within 6 months of beginning review.

*Response:* The final rule clarifies that the time periods for issuance of PFs and FDs are suspended when the Department is waiting for a technical assistance response from the petitioner. *See* 83.32(b), 83.42(b). In other words, the clock on these timelines runs only when the Department is obligated to act.

#### *5. Timelines – Comment Period on PF*

The previous rule provides a 180-day period for comment on the PF, with the possibility of a 180-day extension. The proposed rule would reduce these time periods, allowing for a 90-day comment period (proposed 83.35), with the possibility of a 60-day extension (proposed 83.36). Most who commented on the proposed comment period stated their opposition to reducing the period from 180 days to 90 days. These commenters stated that this is a significant reduction, will place a substantial burden on petitioners and interested parties, and fails to account for petitions with large amounts of evidence requiring substantial time to review and possibly time to conduct independent

research and submit evidence. Some commenters stated that this provision also appears designed to preclude third-party participation. A few commenters stated that the time should be further reduced to limit third-party involvement.

Most commenters advocated for retaining the 180-day timeframe; one requested at least 120 days. Commenters also stated that, even with the 60-day extension, depending on the nature of the findings and petitioner's resources, it may require longer than the initial 90-day period plus the additional 60 days to submit comments. These commenters advocated for a 90-day extension, an extension for any period AS-IA chooses, or an automatic 60-day extension at the petitioner's request and allowance of additional extensions for good cause shown, such as needing more time to generate probative evidence..

*Response:* The final rule establishes a 120-day timeframe to comment on the PF. *See* final 83.35. This deadline is shorter than the existing 180-day timeframe, but longer than the proposed 90-day timeframe, in order to promote efficiency in the process while still allowing sufficient time for input. The final rule also allows the timeframe to be extended for good cause. *See* final 83.8.

#### *6. Timelines – Period for Petitioner's Response to Comments on a Positive PF*

Several commenters requested additional time for the petitioner to respond to comments on a positive PF (proposed 83.37 would allow 60 days and an unspecified extension), advocating for a total of 120 days because petitioners may not have the resources to respond more quickly.

*Response:* The final rule retains the 60-day deadline to respond in order to promote efficiency in the process while still allowing sufficient time for input. The final rule also allows the timeframe to be extended for good cause. *See* final 83.8.

*7. Timelines – Petitioner Response to Comments and/or Election of Hearing*

Proposed 83.38 would allow the petitioner 60 days to respond to comments and/or elect a hearing on a negative PF, and would allow AS-IA to extend the comment period if warranted. Commenters stated that 60 days is too short (*see* comments under “Hearings”). They also suggested requiring filing of just a notice of appeal initially, then allowing for submission of lists of material facts, exhibits, and witnesses later rather than requiring their submittal with the election of hearing.

*Response:* The final rule retains the 60-day deadline in order to promote efficiency in the process; however, the final rule provides the response timeframe and the timeframe for electing a hearing will run sequentially, rather than concurrently, to allow time to prepare the election of hearing listing the issues of law and material fact, witnesses, and exhibits. *See* final 83.36(b), 83.38. The final rule also allows the timeframe to be extended for good cause. *See* final 83.8.

*8. Timelines – Issuance of FD*

Proposed 83.42 would require the Assistant Secretary to issue a FD within 90 days. This is an increase from the current 60-day period for issuance of a FD. A small number of commenters opposed the extended time for AS-IA review as counter to the goal for efficiency.

*Response:* While the 90-day period is an increase from the current 60 days, the Department believes this increase is justified given that the preparation of the final

determination will be the first occasion for the AS-IA to review the administrative record and formulate a determination. *See* final 83.42.

## **G. Hearings**

### *1. Deleting the IBIA Reconsideration Process, and Adding a Hearing on the PF*

The proposed rule eliminates the process for limited reconsideration of the AS-IA's determination by the IBIA and adds an option for a petitioner to elect a hearing on a negative PF before an independent judge in the Office of Hearings and Appeals (OHA). Many commenters expressed their strong support for the proposed option, saying this process adds transparency, fairness, and neutrality. These commenters also supported the proposed elimination of the IBIA reconsideration process, stating that the hearing process would be more fair and efficient.

Others expressed their strong opposition to the proposed hearing process, stating that it makes the petitioning process more adversarial, more burdensome, and less transparent. These commenters also stated that the hearing and review of re-petition requests inappropriately burden an administrative court with analysis of non-legal issues. Several commenters also opposed elimination of the IBIA reconsideration process, disputing the accuracy of the rationale for the elimination: that there are no other instances where IBIA reviews an AS-IA decision). Those commenters also argued that the IBIA process is more efficient than appeals to Federal court and is necessary to correct administrative errors before costly litigation and to guard against politically motivated Departmental decisions. These commenters note that IBIA has particular expertise with respect to Federal-tribal relations that a judge from elsewhere in OHA lacks. Some commenters claimed that replacing the IBIA process with the option for a hearing will

result in more adversarial dealings and litigation. A few commenters suggested allowing the Secretary to direct reconsideration to IBIA on her own motion or upon request.

*Response:* The final rule implements the proposal to delete the limited IBIA reconsideration process and to allow for a hearing on a negative PF. This procedure will require the parties to pinpoint specific findings that they dispute and provide evidence from the record, from testimony based on the record, or cite to precedent in support of their positions in a setting that is well-suited to objective consideration of discrete issues in a transparent manner. Rather than making the process more adversarial, a hearing will help crystalize the issues in preparation for consideration by the AS-IA. Since it occurs before an objective forum without any preconceived notion of an outcome, it will further insulate the process from criticisms of perceived bias.

## *2. Opportunity for Third Parties to Request a Hearing and Intervene in Hearings*

Many commenters objected to the proposed rule allowing hearings only at the election of a petitioner on a negative PF. *See* 83.38(a). These commenters asserted that any party should be entitled to request a hearing on a PF to ensure that all parties are treated equally. They asserted that third parties with evidence relevant to a positive PF are left only with the option of submitting comments and pursuing an appeal before Federal district court under the APA's deferential "arbitrary and capricious" standard of review. Some commenters also stated that the proposed approach effectively precludes interested parties from appealing, because the proposed rule would not allow a hearing on a positive PF and interested parties may not be able to establish standing in Federal district court. Tribal commenters stated that the Department owes a trust responsibility to allow tribes the opportunity for a hearing where they have a present or historical

relationship to petitioner and the petition involves the identity or heritage of the federally recognized tribe.

Commenters also stated that standards for intervention should be broader than traditional standards, to allow intervention by States, local governments, federally recognized tribes, and any entity with a legal, factual, or property interest. These commenters stated that there should be no limit on the issues an intervenor can raise and intervenors should have the right to introduce evidence and testimony.

*Response:* The Part 83 petitioning process is similar to other administrative processes uniquely affecting an applicant's status in that the applicant may administratively challenge a negative determination, but third parties may not administratively challenge a positive determination. The question being examined in Part 83 is whether a petitioner meets the criteria to be federally acknowledged as an Indian tribe. Part 83 does not allow for consideration of speculative consequences because such consequences are not yet ripe for consideration and administrative and judicial review is available for those separate decisions. For example, if the newly acknowledged tribe seeks to have land taken into trust and that application is approved, state or local governments may challenge that action under the land-into-trust process (25 CFR part 151), an entirely separate and distinct decision from the Part 83 process. Submissions are more appropriately addressed there. The Part 83 process provides third parties with the opportunity to submit comments and evidence. Comments that are germane to the criteria will be carefully considered.

Also, the Office of the Secretary (OS) companion final rule at 43 CFR part 4, subpart K, adopts the proposed approach of allowing for intervention as of right in the

hearing process for anyone with an interest that may be adversely affected by the FD. *See* 43 CFR 4.1021(d). No good reason has been identified for deviating from this traditional standard of intervention. The final rule allows anyone who intervenes as of right to participate as a full party, subject to the restriction that the intervenor may not raise issues of law or material fact beyond those raised in the election of hearing. 43 CFR 4.1021(f)(3). This restriction is necessary to keep the hearing focused on the issues related to the negative PF.

### *3. Hearing Process Timelines*

In the OS companion proposed rule, timelines were proposed for various activities during the hearing process as well as an overall 180-day time limit to complete the hearing process and issue a recommended decision. *See* proposed 43 CFR part 4, subpart K. Some commenters supported establishing definitive timelines. One commented that the proposed timelines were too long because the timelines are similar to those in the IBIA process, which is considered lengthy. Most commented that the timelines are unrealistically short given all that must occur during the overall 180-day timeline – prehearing conference, interventions, discovery, written direct testimony, oral cross-examination, post-hearing briefs, and issuance of a recommended decision. These commenters stated that full adjudications could take a year and opposed the overall 180-day deadline as interfering with the judge’s deliberation. Others opposed the timelines as not accounting for petitioner’s limited resources, and thereby compromising their ability to fully participate. Another commenter suggested an automatic 90-day extension of the 180-day time limit for the entire hearing process upon request of the petitioner, and

additional extensions upon good cause shown, such as needing more time to prepare and generate probative evidence.

Some commenters stated that the 60-day timeframe for electing a hearing is too short to provide the required lists of issues of material fact, exhibits, and witnesses. These commenters suggested requiring a filing of “intent to challenge” within 60 days, then leaving it to the ALJ to establish the schedule for pre-hearing submittal of the lists. Others suggested expanding it to 180 days.

Commenters also specifically opposed the proposed timeline for filing motions to intervene (15 days after issuance of the referral notice under 83.39(a)) as a violation of due process, because the short timeframe would be “wholly unreasonable” for reviewing the administrative record and providing notice of all witnesses, issues, and exhibits. Commenters suggested a minimum timeline of 30, 45, or 60 days, or a deadline to identify only the movant’s affected interest and position on the issues, and then allowing the judge to set timelines for identifying witnesses and exhibits.

*Response:* These comments relate to the OS companion final rule addressing hearing procedures at 43 CFR part 4, subpart K. To maintain an efficient process, that final rule adopts the proposed 180-day time period for completion of the hearing process. *See* final 43 CFR 4.1051(a). Because the hearing record is limited to documents that have already been presented, except in under extraordinary circumstances, *see* final 43 CFR 4.1046(a), the time needed to “generate probative evidence” should be minimal (*see* the discussion below on scope of record). To address comments that the proposed timeline for intervention is unreasonably short, the final 43 CFR 4.1021(a), doubles the proposed timeline to file a motion to intervene to 30 days.

#### *4. Scope of Record*

In the proposed rule, we invited comment on whether the hearing record before OHA should include all the evidence in OFA's administrative record for the petition or be limited to testimony and exhibits specifically identified by the parties. Most who commented on this question stated that the ALJ should rely on the entire administrative record before OFA (including the petition and all documents that were provided, or relied upon, for the PF, and comments and responses on the PF).

A few commenters stated that the ALJ should engage in traditional fact-finding, limiting the hearing record to the testimony and exhibits presented by the parties, to narrow the issues in the record and put the burden on the parties to bring the salient facts to the decision-maker's attention. Commenters provided arguments both for and against allowing the parties to provide evidence beyond what was in the OFA administrative record during and after the hearing – some saying it offers the opportunity to clarify the OFA administrative record and others saying it reduces transparency to expand the OFA administrative record after OFA has already issued a PF.

*Response:* A primary purpose of the hearing process is to inform the AS-IA's final determination by focusing in on the key issues and evidence and producing a recommended decision on those issues from an independent tribunal. To that end, under the OS companion final rule, the hearing record will not automatically include the entire administrative record reviewed by OFA, but only those portions which are considered sufficiently important to be offered by the parties as exhibits and admitted into evidence by the ALJ. While the AS-IA may consider not only the hearing record, but also OFA's

entire administrative record, we believe that an independent review of the key issues and evidence will be invaluable to the AS-IA.

Part of the hearing process is to ensure that the Department abides by the baseline precedent of previous final decisions. Petitioners may rely on previous final decisions to establish that their evidence is sufficient to meet a criterion, where evidence in a previous final decision was sufficient to meet a criterion. The companion final rule also includes documentation in the OFA administrative record, including comments and responses on the PF, and testimony clarifying or explaining the information in that documentation. *See* 43 CFR 4.1046. That rule also limits who may testify to expert witnesses and OFA staff who participated in preparation of the negative proposed finding. *See* 43 CFR 4.1042. The ALJ may admit other evidence or allow other persons to testify only under extraordinary circumstances.

These limits will afford the parties the opportunity to clarify the record, without expanding the record beyond what was before OFA when it issued the PF and comments and responses submitted following issuance of the PF. The limits will encourage the petitioner and all others to be diligent in gathering and presenting to OFA all their relevant evidence and discourage strategic withholding of evidence, which will further ensure that OFA's PF is based on the most complete record possible, allowing the ALJ to focus on discrete issues in dispute if a hearing is requested.

##### *5. Presiding Judge Over Hearings*

In the OS companion proposed rule, any of several different employees of OHA could be assigned to preside as the judge over the hearing process: an ALJ appointed under 5 U.S.C. 3105, an IBIA judge, or an attorney designated by the OHA Director. *See*

proposed 43 CFR 4.1001, definition of “judge.” We invited comments on who is an appropriate OHA judge to preside. Most commenters who expressed an opinion on this question stated that an ALJ is necessary to ensure sufficient qualifications, independence, impartiality, and objectivity. One commenter recommended an attorney because of the commenter’s belief that the attorney would be able to issue decisions more quickly. One stated that an IBIA judge would be most qualified due to experience with acknowledgment issues. Several commenters stated that the judge should have some background or training in Indian law and tribal histories and cultures.

*Response:* The final rule establishes that the judge presiding over hearings will be an ALJ. *See* final 83.39. There is no evidence that an attorney could issue decisions more quickly than an ALJ. An IBIA judge does not necessarily have more background in acknowledgment issues or tribal histories and cultures, and ALJs are skilled at presiding over hearings and managing procedural matters to facilitate justice. Also, their independence is protected and impartiality fostered by laws which, among other things, exempt them from performance ratings, evaluation, and bonuses (*see* 5 U.S.C. 4301(2)(D), 5 CFR 930.206); vest the Office of Personnel Management rather than the Department with authority over the ALJ’s compensation and tenure (*see* 5 U.S.C. 5372, 5 CFR 930.201-930.11); and provide that most disciplinary actions against ALJs may be taken only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for a hearing (*see* 5 U.S.C. 7521).

#### *6. Conduct of the Hearing*

Several commenters asserted that OFA should be required to participate in the hearing and be subject to cross-examination to increase transparency in the process. A

few commenters requested clarification of whether only “senior departmental employees” or all of OFA were subject to discovery. A few commenters stated that OFA should not need to restate its PF at hearing to controvert petitioner’s claims because the PF should be sufficient on its own. Other commenters observed that the proposed requirement to submit direct testimony in writing will allow for faster hearings.

*Response:* The OS companion final rule clarifies that OFA employees who participated in preparing the negative PFs may be called as witnesses. *See* final 43 CFR 4.1042. While the PF may be sufficient on its own in some cases, in others, it may be appropriate for OFA to call its staff to testify to elucidate parts of the PF or the OFA administrative record, subject to cross-examination, and/or to allow the petitioner or other parties to probe OFA’s rationale through direct examination of OFA staff. The OS companion final rule affords the ALJ discretion to consider requests regarding hearing locations, prehearing telephonic conferences, any discovery that the ALJ believes to be appropriate, and written testimony submittals.

#### *7. Miscellaneous Hearing Process Comments*

A few commenters stated that the summary recommended decision process in proposed 43 CFR 4.1023 is not an appropriate procedure to overturn a PF. Other commenters made suggestions for facilitating petitioner participation in the hearing process, stating that hearings should be held in a location near the petitioner, that telephonic conferences should be allowed, and that filing and service of documents by priority mail or email should be allowed as an alternative to the OS companion proposed rule’s requirements that overnight mail or delivery services be used for both filing and service. *See* proposed 43 CFR 4.1012(b) and 4.1013(c). These suggestions are based in

part upon the commenters' stated concern that a petitioner's participation may be impeded by a lack of resources. Commenters also observed that some petitioners may be in remote locations without access to overnight mail or delivery services.

*Response:* Proposed 43 CFR 4.1023 would allow any party to file a motion for a summary recommended decision if the material facts are undisputed and a summary decision is appropriate as a matter of law. The OS companion final rule retains this provision. If the ALJ issued a summary recommended decision contrary to the PF (e.g., if the summary recommended decision were in favor of the petitioner who had received a negative PF), it would not overturn the PF; rather, the AS-IA would consider that recommended decision when preparing a FD.

A standard hearing procedure is for the ALJ to consider the convenience of all parties, their representatives, and witnesses in setting a place for hearing, but not to unduly favor the preferences of one party over another. A provision mandating that the hearing be held in a location near the petitioner would deviate from this fair standard in all cases without sufficient justification. Indeed, in some cases, the petitioner itself may not favor a hearing location near to it, such as where its witnesses are not located near the petitioner. The selection of a hearing location is best left to the discretion of the ALJ. To guide the exercise of that discretion, a provision has been added to the OS companion final rule incorporating the fair standard that the ALJ will consider the convenience of all parties, their representatives, and witnesses in setting a place for hearing. *See* 43 CFR 4.1040(a)(2).

Regarding telephonic conferences, both the OS proposed and final rules include a provision that conferences will ordinarily be held by telephone. *See* proposed 43 CFR 4.1022(c) and final 43 CFR 4.1022(d).

The suggestion to allow for filing and service of documents by priority mail has not been adopted in the OS final rule. Requiring filing and service by overnight delivery promotes compliance with time limits for specific actions as well as with the overall time limit for the hearing process of 180 days. The use and cost of overnight delivery can be avoided by filing and serving a document by fax and regular mail if the document is 20 pages or less. *See* 43 CFR 4.1012(b)(iii). Given the limits on discovery and admissible evidence, we do not anticipate a large volume of exchanges of documents exceeding 20 pages. Nevertheless, to address the rare situation where mandating strict compliance with the prescribed filing and service methods would be unfair, the OS final rule adds language to both 43 CFR 4.1012(b) and 4.1013(c) giving the ALJ discretion to allow deviation from those methods.

Nor has the OS final rule adopted the suggestion to allow filing and service by email. A hard copy of each filing is needed to complete the hearing record that ultimately becomes part of the OFA administrative record. Service by email is problematic because not all parties may have email access.

#### **H. Previous Federal Acknowledgment**

Several commenters suggested rearranging the review process so that previous Federal acknowledgment is considered at the beginning, making it procedurally easier for previously federally recognized tribes to obtain acknowledgment. Several commenters stated that the rule should be clarified so that previously acknowledged tribes need not meet criteria (b) (Community) and (c) (Political Influence or Authority) in proposed

83.11 prior to either 1934 or the date of previous acknowledgment, whichever is later. Otherwise, previous Federal acknowledgment would be more stringent than fulfilling all criteria at proposed 83.11.

Several commenters provided suggestions for the definition of “previous Federal acknowledgment” at proposed 83.1 – some stating that it should mean Federal government officials with authority had clearly acknowledged the government-to-government relationship with the petitioner, others stating that it should be defined more broadly to include tribes under Federal jurisdiction or to capture other historical dealings where the Federal Government did not respect the tribes’ sovereignty. Several commenters stated that the key proposed language, “an entity that qualified as an Indian tribe for the purposes of Federal law,” is more vague than the current “tribal political entity.” Commenters also stated that “for the purposes of Federal law” should be deleted because it is broader than necessary.

Some commenters noted that the proposal to evaluate criteria (b) and (c) from 1934 to the present may reduce the advantage of previous Federal acknowledgment, because the types of actions listed in proposed 83.12(a) as evidence of previous Federal acknowledgment are not likely to be probative post-1934. For example, there were no treaty negotiations between 1934 and the present, and any petitioner that was recognized by an Act of Congress or Executive Order since 1934 is likely already a recognized tribe.

Some commenters requested clarification of the burden of showing previous Federal acknowledgment, stating that the “reasonable likelihood” standard of proof should apply, or that this standard conflicts with the requirement for “unambiguous evidence” in proposed 83.12(a). One commenter stated that the proposed rule weakens

the criteria for previous Federal acknowledgment because it no longer requires “substantial” evidence of unambiguous previous Federal acknowledgment.

One commenter stated that proposed 83.12 eliminates the current requirement at 83.8(d)(1) that the petitioner demonstrate it is the same group as was previously acknowledged tribe.

A few commenters asserted that the rule should state that claims statutes allowing descendants of tribes to bring claims do not constitute previous Federal acknowledgment. Others advocated for including various additional items in the proposed 83.12(a) list of evidence of previous Federal acknowledgment (e.g., recognition by Federal court, allotments, payments by Indian Court of Claims, unratified treaties, documented attempts to obtain land for the petitioner). Several commenters advocated for redefining previous Federal acknowledgment to include any tribe that can show it was under Federal jurisdiction, particularly for tribes who were never terminated but for whom the Federal Government may have failed to take action.

Some commenters supported the proposed previous Federal acknowledgment provisions at 83.12 as more clear, particularly provisions clarifying that a showing of continuous community is not necessary.

*Response:* The final rule adopts the commenters’ suggestion for moving evaluation of previous Federal acknowledgment to the first phase of OFA review and clarifying that, once previous Federal acknowledgment is shown, the petitioner need only meet the criteria in 83.11 since 1900 or the date of previous Federal acknowledgment, whichever is later. *See* final 83.12(b). Otherwise, the intention of the final rule is not to

make any changes to the previous Federal acknowledgment provisions but to clarify them.

For example, the final rule deletes the proposed new phrase “government-to-government” in proposed 83.12(a). That proposed section provided that previous Federal acknowledgment may be proven “by providing unambiguous evidence 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 . . . .” The “government-to-government” phrase has been deleted because it is not in the current provisions and may indicate a more formal relationship than is currently required for previous Federal acknowledgment. Further, just as with each criterion, evidence or methodology that was sufficient to satisfy previous Federal acknowledgment previously remains sufficient to satisfy previous Federal acknowledgment today. This clarification ensures that this section is not applied in a manner that raises the bar for each subsequent petitioner claiming previous Federal acknowledgment. In response to comments, the phrase “for the purposes of Federal law” is also deleted as overly broad.

While moving the evaluation date to 1900 may limit the usefulness of the previous Federal acknowledgment provisions, there remains a possibility that a petitioner may show previous Federal acknowledgment post-1900. The final rule does not substantively change the burden for showing previous Federal acknowledgment – deletion of the term “substantial” in “substantial evidence of unambiguous Federal acknowledgment” does not change the evaluation – unambiguity is still required. The rule requires a showing that the petitioner is the same tribe that was previously acknowledged. Previous Federal acknowledgment requires that the petitioner, not

another group, was previously acknowledged. The final rule adds that the entity may have evolved out of the previously recognized tribe (*see* 83.12(a)); this addition incorporates a provision in the current 83.8(d)(1) that was inadvertently omitted in the proposed rule. *See* 83.12(a). The final rule does not substantively change the list of examples of evidence of previous Federal acknowledgment in response to requests for additions (or deletions). Land held by the United States for a group satisfies the existing category of evidence that the group has been treated by the Federal Government as having collective rights in tribal lands.

The final rule simplifies the showing required after a petitioner proves previous Federal acknowledgment, to require the petitioner to meet criterion (b) (community) at present, as currently required, and require the petitioner to meet criteria (a) and (c) since 1900 or date of previous Federal acknowledgment, whichever is later. *See* 83.12(b). The final rule deletes the proposed provision allowing a petitioner that has established previous Federal acknowledgment to meet the criteria for acknowledgment through “demonstration of substantially continuous historical identification by authoritative, knowledgeable external sources of leaders and/or a governing body that exercises political influence or authority, together with demonstration of one form of evidence listed in 83.11(c),” because the existing criteria are satisfactory to provide adequate justification for acknowledgment.

## **I. Automatic Disclosure of Documents**

Several commenters stated that the proposed regulations increase transparency by requiring, throughout the process, prompt and automatic disclosure of documents to the petitioner, without a FOIA request and posting documents to the Internet.

Others requested that additional documents, such as all TA letters, be posted on the Internet based on the allegation that publishing only the narrative denies the public the opportunity to critically examine the evidence, and is thus a denial of due process. One suggested posting all OFA communications and a review of each petition's status on OFA's website .

Some opposed making documents available on the website because of their concern about others appropriating their information and viewing confidential information such as sacred sites. One pointed out that posting will require additional OFA time.

One commenter stated that lobbyists should present themselves to OFA and be listed on a website.

*Response:* The final rule takes a significant step forward in promoting transparency by providing that the OFA will publish on its website the narrative portion of the petition and, to the extent allowable under Federal law, other portions of the documented petition, in addition to other items of information including but not limited to: the name, location, and mailing address of the petitioner and other information to identify the entity; the date of receipt of the petition; a notice of the opportunity to submit comments and evidence; and a notice of the opportunity to be kept informed of general actions regarding a specific petitioner. Transparency is crucial to maintaining trust in the Federal acknowledgment process. The Department will endeavor to make all information on each petition available on the OFA website to the extent it is releasable under Federal law, and to the extent it is feasible to do so (e.g., extraordinarily large files may instead be provided upon request). Nevertheless, the Department generally will not post

genealogical information on living persons, in response to concerns about confidentiality and privacy. The final rule also allows petitioners to identify additional confidential information to be withheld by directing the petitioner to provide an unredacted version and a separate version redacting any confidential information. *See* 83.21(b). The Department will withhold any information that is protectable under Federal law, but may release any redacted information that is not protectable under Federal law. In response to the comment regarding listing lobbyists on the website, the final rule adds that OFA's list of contacts for each petitioner, which may include attorneys and other representatives of the petitioner, along with a list of anyone else who requested to be kept informed of the petition will be posted on the website. *See* 83.22(c). The Department encourages petitioners and others to provide their submissions electronically.

#### **J. Elimination of Enrollment Limitations**

A few commenters objected to the deletion of current 83.12(b), which requires BIA review of tribal enrollment of acknowledged tribes to ensure that major changes have not occurred prior to taking administrative action in favor of the tribe. These commenters state that this review serves an important function by ensuring a tribe remains the tribe it was for the basis of acknowledgment, and that eliminating this section without explanation violates the APA.

*Response:* The Department eliminated this section because Part 83 is focused on the process and criteria for Federal acknowledgment and this section would impose limitations on newly acknowledged tribes. The Department affords newly acknowledged tribes the same deference to determine its own membership as it affords other federally recognized tribes.

## **K. Purpose (Proposed 83.2)**

Several commenters opposed the provision in 83.2 stating that Part 83 establishes whether the petitioner is an Indian tribe “for the purposes of Federal law” because some non-listed tribes are considered Indian tribes for certain benefits under other Federal statutes. Other commenters opposed the provision in 83.2 stating that Part 83 establishes whether a petitioner is an Indian tribe and “therefore entitled to a government-to-government relationship with the United States.” One commenter pointed to the Federally Recognized Indian Tribe List Act of 1994, and noted that it says nothing about acknowledging tribes for the purposes of Federal law or that the Secretary maintains a government-to-government relationship with listed tribes. This commenter disagreed with the implication that even if a tribe is not recognized for purposes of Federal law, it might still exist.

*Response:* The final rule replaces the phrase “for the purposes of Federal law” with language that more closely tracks the Federally Recognized Indian Tribe List Act of 1994. *See* 25 U.S.C. 479a-1.

## **L. Definitions**

### *1. “Historical”*

Several commenters opposed the proposed definition of “historical” to mean 1900 or earlier. These commenters were concerned that the definition implied that tracing prior to 1900 would not be required, allowing acknowledgment of petitioners who did not exist as tribes before 1900 and ignoring over a century of relevant history. Some pointed to alternative dates, such as 1830 when the Indian Removal Act was passed, or the date

the State was admitted to the United States. Others stated that the definition should require tracing back to the date of first sustained European contact.

Several commenters supported the proposed definition of “historical.” These commenters stated that relying on 1900 greatly reduces the evidentiary burden on petitioners and the Department, prevents further penalization of tribes for disruptive historical circumstances resulting from expansion of the United States, and because records before 1900 may have been lost, destroyed, or expunged. A few commenters requested that the definition of “historical” be explicitly restated in each criterion.

A few commenters requested flexibility, to ensure the 1900 date serves as a benchmark rather than a definitive cut-off date. These commenters pointed out that a petitioner may have had reliable evidence in 1901, and that such evidence should be sufficient if the petitioner provides an explanation as to why it is unable to produce earlier evidence. Others stated that “first sustained contact” is subject to disagreement among experts, so exact, federally accepted sources of when first sustained contact occurred should be used.

*Response:* The final rule defines “historical” as being before 1900. The rule still requires tracing to a historical (i.e., pre-1900) tribe as set forth in criterion (e) of 83.11. As explained above, the Department considered other dates for the start of our evaluation period, but determined that the fact that more documents are generally available after 1900 justifies a more intensive documentary review from that date on. The 1900 date is a definitive start date, but the Department will examine all evidence in light of the history, regional differences, culture, and social organization of the petitioner. *See* 83.10(b)(7).

## 2. “Indigenous”

Several commenters requested reinsertion of the term “indigenous” (to come from within the continental U.S. at the time of first sustained contact, rather than migrating into the U.S. during historical times), stating that Indians must have been in the U.S., at least in part, throughout history, and that it is inappropriate to delete the term in light of the United Nations Declaration on the Rights of Indigenous Peoples.

*Response:* In response to these comments, the final rule reinserts the current definition of “indigenous” and the reference to “indigenous” in 83.3.

### 3. “Tribe”

Several commenters supported the proposed definition of “tribe” as any Indian tribe, band, nation, pueblo, village or community. One requested clarification of a “community” versus a “tribe,” given that “community” is used in the proposed definition. A commenter suggested definitions for new terms: “Federal Indian tribe” and “Non-Federal Indian tribe.” A commenter stated that the definition of “tribe” should clarify that if the tribe is not recognized, the Federal Government does not consider it to be a tribe. One commenter requested adding Native Hawaiians to the definition. A few commenters opposed the statement in 83.2 that the regulations determine whether a petitioner is an Indian tribe “for the purposes of Federal law” and is therefore entitled to a “government-to-government relationship.”

*Response:* The final rule maintains the proposed definition of “tribe.” Clarification of “community” versus “tribe” is unnecessary because the word “community” in the definition of “tribe” is merely nomenclature (as opposed to the concept of community required by criterion (b)). The final rule also separately defines “federally recognized tribe.” The final rule does not change the current approach to

Native Hawaiians; rather, it continues to exclude Native Hawaiians from the definition of “tribe,” because the acknowledgment process has never applied to them.

The final rule also simplifies the language in 83.2 to instead reflect the language of the Federally Recognized Indian Tribe List Act of 1994; that simplification deletes the phrases suggested for deletion.

#### *4. Other Definitions*

Some commenters suggested additional definitions in conjunction with their more substantive comments, such as for “federal jurisdiction” and “government-to-government.” Some commenters suggested various edits to proposed definitions—for example, a commenter stated that the definition of “tribal rolls” should recognize that many tribes did not have formal rolls. A commenter suggested using the term “determination” rather than “recognition” or “acknowledgment.”

*Response:* The final rule does not incorporate any of the new suggested definitions or edits to proposed definitions because they are not necessary for understanding the content of the rule. For example, the definition of “tribal rolls” already recognizes that tribes may not have a formal roll and provides an alternative definition in the absence of such a roll. The final rule does, however, change the term from “tribal roll” to “roll” to better match the terminology used throughout the rule.

The final rule ensures that “acknowledgment” is used to refer to the process by which the United States acknowledges a tribe; once a tribe is acknowledged, it is considered a “recognized” tribe.

## **IV. Legislative Authority**

Congress granted the Assistant Secretary-Indian Affairs (then, the Commissioner of Indian Affairs) authority to “have management of all Indian affairs and of all matters arising out of Indian relations.” 25 U.S.C. 2 and 9, and 43 U.S.C. 1457. This authority includes the authority to administratively acknowledge Indian tribes. *See, e.g., Miami Nation of Indians of Indiana, Inc. v. United States Dep’t of the Interior*, 255 F.3d 342,, 346 (7<sup>th</sup> Cir. 2001); *James v. United States Dep’t of Health & Human Servs.*, 824 F. 2d 1132, 1137 (D.C. Cir. 1987). The Congressional findings that supported the Federally Recognized Indian Tribe List Act of 1994 expressly acknowledged that Indian tribes could be recognized “by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,’” and described the relationship that the United States has with federally recognized tribes. *See* Public Law 103-454 Sec. 103(2), (3), (8) (Nov. 2, 1994).

## **V. Procedural Requirements**

### **A. Regulatory Planning and Review (E.O. 12866 and 13563)**

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and

maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

#### **B. Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### **C. Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to Federal acknowledgment of Indian tribes.

#### **D. Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private

sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

**E. Takings (E.O. 12630)**

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable “taking.” A takings implication assessment is therefore not required.

**F. Federalism (E.O. 13132)**

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**G. Civil Justice Reform (E.O. 12988)**

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

**H. Consultation with Indian Tribes (E.O. 13175)**

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments,” Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. The Department distributed a “Discussion Draft” of this rule to federally recognized Indian tribes in June 2013, and hosted five consultation sessions with federally recognized Indian tribes throughout the country in July and August 2013.

Several federally recognized Indian tribes submitted written comments; some strongly supportive of revising the regulations and others strongly opposed to revisions.

Following publication of the proposed rule, the Department then hosted five additional in-person consultations and two teleconferences in July and August 2014. We considered each tribe's comments and concerns and have addressed them, where possible, in the final rule.

## **I. Paperwork Reduction Act**

*OMB Control Number:* 1076–0104.

*Title:* Federal Acknowledgment as an Indian Tribe, 25 CFR 83

*Brief Description of Collection:* This information collection requires entities seeking Federal recognition as an Indian tribe to collect and provide information in a documented petition evidencing that the entities meet the criteria set out in the rule.

*Type of Review:* Revision of currently approved collection.

*Respondents:* Entities petitioning for Federal acknowledgment.

*Number of Respondents:* 10 on average (each year).

*Number of Responses:* 10 on average (each year).

*Frequency of Response:* On occasion.

*Estimated Time per Response:* (See table below).

*Estimated Total Annual Hour Burden:* 14,360 hours.

*Estimated Total Annual Non-Hour Cost:* \$21,000,000

OMB Control No. 1076-0104 currently authorizes the collections of information contained in 25 CFR part 83. DOI estimates that the annual burden hours for respondents

(entities petitioning for Federal acknowledgment) from this final rule will decrease by a minimum by approximately 6,390 hours. Because the final rule would change sections where the information collections occur, we are including a table showing the section changes.

<b>Current Sec.</b>	<b>New Sec.</b>	<b>Description of Requirement</b>	<b>Burden hours on respondents per response</b>	<b>Annual burden hours (10 respondents)</b>
83.7 (a) - (d) 83.7 (f) - (g); 83.7 (e)	83.21 (referring to 83.11 (a) - (d) 83.11 (f) - (g)); 83.21 (referring to 83.11 (e))	Conduct the anthropological and historical research relating to the criteria (a)-(d) and (f)-(g); Conduct the genealogical work to demonstrate tribal descent	1,221	12,210
83.7 (e)	83.21	Provide past membership rolls and complete a membership roll of about 333** members (BIA Form 8306)	38	380
83.7 (e)	83.21 (referring to 83.11 (e))	Complete Individual History Chart (BIA Form 8304). On average, it takes 2 minutes per chart X 333** charts.	11	110
83.7 (e)	83.21 (referring to 83.11 (e))	Complete the Ancestry Chart (BIA Form 8305). On average, it takes about 30 minutes per chart X 333** charts.	166	1,660

One comment submission, from several towns in Connecticut, was submitted specifically addressing the information collection requirements in the proposed rule. The comments and responses are summarized here.

PRA Comment 1: The estimate only considers the annual burden hours for petitioners in collecting information to meet the mandatory criteria in preparing a documented petition and responding to a Technical Assistance (TA) review, and fails to consider the burden hours on petitioners for later stages of the process.

PRA Response 1: The commenter is correct that the estimate only covers the burden hours for petitioners in collecting the information to develop and submit the documented petition. Once the documented petition is submitted, the Department opens an administrative case file for the petitioner, and all subsequent information collections are covered by the exemption in 5 CFR § 1320.4(c). The comment alerted the Department to the fact that it had previously included the burden for responding to a TA review; because the TA review occurs following the opening of the administrative case file, this too is covered by the regulatory exemption. As such, the Department has removed this burden estimate. No change is necessary in response to this comment.

PRA Comment 2: The estimate fails to include burden hours for previously denied petitioners that must submit new arguments and evidence in order to request permission from an Office of Hearings and Appeals (OHA) judge to re-petition.

PRA Response 2: The proposed rule contained a provision that allowed previously denied petitioners to seek the opportunity to re-petition. The final rule deletes this provision. This comment is no longer applicable. No change is necessary in response to this comment.

PRA Comment 3: The estimate fails to consider the burden hours on other respondents in the Federal Acknowledgment process, such as State governments, federally recognized tribes, and other petitioners that may submit information in support of or opposition to a petition.

PRA Response 3: The estimate does not consider the burden hours on those who may submit information in support of or in opposition to a petition because such information is voluntarily submitted only after the administrative case file is opened, and is therefore covered by the exemption in 5 CFR § 1320.4(c). No change is necessary in response to this comment.

PRA Comment 4: The preamble to the proposed rule fails to describe the methodology used to arrive at the projections. The estimate is not based on any broad or accurate statistical data because there is no requirement or mechanism in place for petitioners to report annual burden hours.

PRA Response 4: The supporting statement submitted in conjunction with the proposed rule described the methodology for arriving at the proposed projections, and was available upon request or at [www.reginfo.gov](http://www.reginfo.gov). A revised supporting statement, which again describes the methodology used to arrive at the projections, has been submitted to OMB in conjunction with this final rule. The comment is correct that there is no requirement or mechanism in place for petitioners to report annual burden hours—the Department examined Congressional testimony and reached out to petitioners for help in developing its estimates. No change is necessary in response to this comment.

PRA Comment 5: Most petitioners have a team of individuals working on their petitions, including group leaders and members, legal counsel, and professional

researchers (such as anthropologists, historians, and genealogists). If each of these spent a quarter of their time working on a documented petition, the team would have an average of 4,160 annual burden hours. For an actual case, including all the information provided throughout the process, including the stages that the Department is not including in its estimate, the team spent approximately 10,000 hours total. This experience strongly suggests the Department underestimated the annual burden hours with its estimate of 2,075.

PRA Response 5: The burden hour estimate includes only the time that the petitioner itself expended in preparing the documented petition; the time that all professionals the petitioner had to hire to prepare the petition is accounted for as non-hour cost burden. In our development of the non-hour cost burden, we reached out to several petitioners (one of whom indicated the total hours reached 12,000 cumulative hours). No change is necessary in response to this comment.

PRA Comment 6: Provisions of the proposed rule will slow down the acknowledgment process by: incentivizing more documented petitions; allowing denied petitioners to re-petition; requiring OFA time to redact petition narratives; providing more extensive technical assistance to petitioners; allowing petitioners to withdraw from the review process; requiring appeals to OHA rather than IBIA; and requiring appeals of a final determination to go to Federal district court.

PRA Response 6: Overall, this comment is not directly related to the Paperwork Reduction Act burdens; however, the Department disagrees with the assertions that the rule will slow down the acknowledgment process for the reasons stated elsewhere in this preamble. No change is necessary in response to this comment.

## **J. National Environmental Policy Act**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See*, 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

## **K. Effects on the Energy Supply (E.O. 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

## **List of Subjects in 25 CFR Part 83**

Administrative practice and procedure, Indians-tribal government.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 83 in Title 25 of the Code of Federal Regulations as follows:

## **PART 83 – PROCEDURES FOR FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES**

### **Subpart A – General Provisions**

Sec.

- 83.1 What terms are used in this part?
- 83.2 What is the purpose of these regulations?
- 83.3 Who does this part apply to?
- 83.4 Who cannot be acknowledged under this part?
- 83.5 How does a petitioner obtain Federal acknowledgment under this part?
- 83.6 What are the Department's duties?
- 83.7 How does this part apply to documented petitions submitted before [INSERT EFFECTIVE DATE OF FINAL RULE]?
- 83.8 May the deadlines in this part be extended?
- 83.9 How does the Paperwork Reduction Act affect the information collections in this part?

### **Subpart B – Criteria for Federal Acknowledgment**

- 83.10 How will the Department evaluate each of the criteria?
- 83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?
- 83.12 What are the criteria for a previously federally acknowledged petitioner?

### **Subpart C – Process for Federal Acknowledgment**

#### *Documented Petition Submission*

- 83.20 How does an entity request Federal acknowledgment?
- 83.21 What must a documented petition include?
- 83.22 What notice will OFA provide upon receipt of a documented petition?

#### *Review of Documented Petition*

- 83.23 How will OFA determine which documented petition to consider first?
- 83.24 What opportunity will the petitioner have to respond to comments before OFA reviews the petition?
- 83.25 Who will OFA notify when it begins review of a documented petition?
- 83.26 How will OFA review a documented petition?
- 83.27 What are technical assistance reviews?
- 83.28 When does OFA review for previous Federal acknowledgment?
- 83.29 What will OFA consider in its reviews?
- 83.30 Can a petitioner withdraw its documented petition?
- 83.31 Can OFA suspend review of a documented petition?

#### *Proposed Finding*

- 83.32 When will OFA issue a proposed finding?
- 83.33 What will the proposed finding include?
- 83.34 What notice of the proposed finding will OFA provide?

#### *Comment and Response Periods, Hearing*

- 83.35 What opportunity will there be to comment after OFA issues the proposed finding?
- 83.36 What procedure follows the end of the comment period for a favorable proposed finding?
- 83.37 What procedure follows the end of the comment period on a negative proposed finding?
- 83.38 What options does the petitioner have at the end of the response period on a negative proposed finding?
- 83.39 What are the procedures if the petitioner elects to have a hearing before an ALJ?

#### *Final Determination*

- 83.40 When will the Assistant Secretary begin review?
- 83.41 What will the Assistant Secretary consider in his/her review?
- 83.42 When will the Assistant Secretary issue a final determination?
- 83.43 How will the Assistant Secretary make the final determination decision?
- 83.44 Is the Assistant Secretary's final determination final for the Department?
- 83.45 When will the final determination be effective?

83.46 How is a petitioner with a positive final determination integrated into Federal programs as a federally recognized Indian tribe?

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a-1; Public Law 103-454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

### **Subpart A – General Provisions**

#### **§ 83.1 What terms are used in this part?**

As used in this part:

ALJ means an administrative law judge in the Departmental Cases Hearings Division, Office of Hearings and Appeals (OHA), Department of the Interior, appointed under 5 U.S.C. 3105.

Assistant Secretary or AS-IA means the Assistant Secretary – Indian Affairs within the Department of the Interior, or that officer’s authorized representative, but does not include representatives of the Office of Federal Acknowledgment.

Autonomous means independent of the control of any other Indian governing entity.

Bureau means the Bureau of Indian Affairs within the Department of the Interior.

Continental United States means the contiguous 48 states and Alaska.

Department means the Department of the Interior, including the Assistant Secretary and OFA.

Documented Petition means the detailed arguments and supporting documentary evidence submitted by a petitioner claiming that it meets the Indian Entity Identification (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria and claiming that it:

(1) Demonstrates previous Federal acknowledgment under § 83.12(a) and meets the criteria in § 83.12(b); or

(2) Meets the Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

Federally recognized Indian tribe means an entity listed on the Department of the Interior's list under the Federally Recognized Indian Tribe List Act of 1994, which the Secretary currently acknowledges as an Indian tribe and with which the United States maintains a government-to-government relationship.

Historical means before 1900.

Indigenous means native to the continental United States in that at least part of the petitioner's territory at the time of first sustained contact extended into what is now the continental United States.

Member of a petitioner means an individual who is recognized by the petitioner as meeting its membership criteria and who consents to being listed as a member of the petitioner.

Office of Federal Acknowledgment or OFA means the Office of Federal Acknowledgment within the Office of the Assistant Secretary – Indian Affairs, Department of the Interior.

Petitioner means any entity that has submitted a documented petition to OFA requesting Federal acknowledgment as a federally recognized Indian tribe.

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Roll means a list exclusively of those individuals who have been determined by the tribe to meet the tribe's membership requirements as set forth in its governing document. In the absence of such a document, a roll means a list of those recognized as members by the tribe's governing body. In either case, those individuals on a roll must have affirmatively demonstrated consent to being listed as members.

Secretary means the Secretary of the Interior within the Department of the Interior or that officer's authorized representative.

Tribe means any Indian tribe, band, nation, pueblo, village or community.

### **§ 83.2 What is the purpose of these regulations?**

These regulations implement Federal statutes for the benefit of Indian tribes by establishing procedures and criteria for the Department to use to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A positive determination will result in Federal recognition status and the petitioner's addition to the Department's list of federally recognized Indian tribes. Federal recognition:

(a) Is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States;

(b) Means the tribe is entitled to the immunities and privileges available to other federally recognized Indian tribes;

(c) Means the tribe has the responsibilities, powers, limitations, and obligations of other federally recognized Indian tribes; and

(d) Subjects the Indian tribe to the same authority of Congress and the United States as other federally recognized Indian tribes.

**§ 83.3 Who does this part apply to?**

This part applies only to indigenous entities that are not federally recognized Indian tribes.

**§ 83.4 Who cannot be acknowledged under this part?**

The Department will not acknowledge:

(a) An association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community;

(b) A splinter group, political faction, community, or entity of any character that separates from the main body of a currently federally recognized Indian tribe, petitioner, or previous petitioner unless the entity can clearly demonstrate it has functioned from 1900 until the present as a politically autonomous community and meets § 83.11(f), even though some have regarded them as part of or associated in some manner with a federally recognized Indian tribe;

(c) An entity that is, or an entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship; or

(d) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners).

**§ 83.5 How does a petitioner obtain Federal acknowledgment under this part?**

To be acknowledged as a federally recognized Indian tribe under this part, a petitioner must meet the Indian Entity Identification (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria and must:

(a) Demonstrate previous Federal acknowledgment under § 83.12(a) and meet the criteria in § 83.12(b); or

(b) Meet the Community (§ 83.11(b)) and Political Authority (§83.11(c)) Criteria.

### **§ 83.6 What are the Department's duties?**

(a) The Department will publish in the Federal Register, by January 30 each year, a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians, in accordance with the Federally Recognized Indian Tribe List Act of 1994. The list may be published more frequently, if the Assistant Secretary deems it necessary.

(b) OFA will maintain guidelines limited to general suggestions on how and where to conduct research. The guidelines may be supplemented or updated as necessary. OFA will also make available examples of portions of documented petitions in the preferred format, though OFA will accept other formats.

(c) OFA will, upon request, give prospective petitioners suggestions and advice on how to prepare the documented petition. OFA will not be responsible for the actual research on behalf of the petitioner.

### **§ 83.7 How does this part apply to documented petitions submitted before [INSERT EFFECTIVE DATE OF FINAL RULE]?**

(a) Any petitioner who has not submitted a complete documented petition as of [INSERT EFFECTIVE DATE OF FINAL RULE] must proceed under these revised regulations. We will notify these petitioners and provide them with a copy of the revised regulations by [INSERT EFFECTIVE DATE OF FINAL RULE].

(b) By [INSERT EFFECTIVE DATE OF FINAL RULE + 30 DAYS], OFA will notify each petitioner that has submitted complete documented petitions but has not yet received a final agency decision that it must proceed under these revised regulations unless it chooses by [INSERT DATE 60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE] to complete the petitioning process under the previous version of the acknowledgment regulations as published on February 25, 1994, 59 FR 19293.

(c) Any petitioner who has submitted a documented petition under the previous version of the acknowledgment regulations and chooses to proceed under these revised regulations does not need to submit a new documented petition, but may supplement its petition.

#### **§ 83.8 May the deadlines in this part be extended?**

(a) The AS-IA may extend any of the deadlines in this part upon a finding of good cause.

(b) For deadlines applicable to the Department, AS-IA may extend the deadlines upon the consent of the petitioner.

(c) If AS-IA grants a time extension, it will notify the petitioner and those listed in § 83.22(d).

#### **§ 83.9 How does the Paperwork Reduction Act affect the information collections in this part?**

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076–0104. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer – Indian Affairs, 1849 C Street, NW., Washington, DC 20240.

### **Subpart B – Criteria for Federal Acknowledgment**

#### **§ 83.10 How will the Department evaluate each of the criteria?**

(a) The Department will consider a criterion in § 83.11 to be met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.

(1) The Department will not require conclusive proof of the facts relating to a criterion in order to consider the criterion met.

(2) The Department will require existence of community and political influence or authority be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years will not in themselves be a cause for denial of acknowledgment under these criteria.

(3) The petitioner may use the same evidence to establish more than one criterion.

(4) Evidence or methodology that the Department found sufficient to satisfy any particular criterion in a previous decision will be sufficient to satisfy the criterion for a present petitioner.

(b) When evaluating a petition, the Department will:

(1) Allow criteria to be met by any suitable evidence, rather than requiring the specific forms of evidence stated in the criteria;

(2) Take into account historical situations and time periods for which evidence is demonstrably limited or not available;

(3) Take into account the limitations inherent in demonstrating historical existence of community and political influence or authority;

(4) Require a demonstration that the criteria are met on a substantially continuous basis, meaning without substantial interruption; and

(5) Apply these criteria in context with the history, regional differences, culture, and social organization of the petitioner.

**§ 83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?**

The criteria for acknowledgment as a federally recognized Indian tribe are delineated in subsections (a) through (g) of this section.

(a) *Indian Entity Identification.* The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in

determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(7) Identification as an Indian entity by the petitioner itself.

(b) *Community*. The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. 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. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

(1) The petitioner may demonstrate that it meets this criterion at a given point in time by some combination of two or more of the following forms of evidence or by other evidence to show that a significant and meaningful portion of the petitioner's members constituted a distinct community at a given point in time:

(i) Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages;

(ii) Social relationships connecting individual members;

(iii) Rates or patterns of informal social interaction that exist broadly among the members of the entity;

(iv) Shared or cooperative labor or other economic activity among members;

(v) Strong patterns of discrimination or other social distinctions by non-members;

(vi) Shared sacred or secular ritual activity;

(vii) Cultural patterns shared among a portion of the entity that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies;

(viii) The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name;

(ix) Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period;

(x) Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the extent that supporting evidence documents the community claimed; or

(xi) A demonstration of political influence under the criterion in § 83.11(c)(1) will be evidence for demonstrating distinct community for that same time period.

(2) The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(c) at a given point in time if the evidence demonstrates 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 entity, and the balance of the entity maintains consistent interaction with some members residing in that area;

(ii) At least 50 percent of the members of the entity were married to other members of the entity;

(iii) At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies;

(iv) There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

(c) *Political Influence or Authority.* The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the

present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

(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 the petitioner had political influence or authority over its members as an autonomous entity:

(i) The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

(ii) Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

(iv) The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

(v) There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

(vi) The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

(vii) Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

(viii) There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

(2) The petitioner will be considered to have provided sufficient evidence of political influence or authority at a given point in time if the evidence demonstrates any one of the following:

(i) Entity leaders or other internal mechanisms exist or existed that:

(A) Allocate entity resources such as land, residence rights, and the like on a consistent basis;

(B) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(C) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior; or

(D) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(ii) The petitioner has met the requirements in § 83.11(b)(2) at a given time.

(d) *Governing Document*. The petitioner must provide:

(1) A copy of the entity's present governing document, including its membership criteria; or

(2) In the absence of a governing document, a written statement describing in full its membership criteria and current governing procedures.

(e) *Descent.* The petitioner's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).

(1) The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate; or

(2) If no tribal roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion by demonstrating descent from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity) with sufficient evidence including, but not limited to, one or a combination of the following identifying present members or ancestors of present members as being descendants of a historical Indian tribe (or of historical Indian tribes that combined and functioned as a single autonomous political entity):

(i) Federal, State, or other official records or evidence;

(ii) Church, school, or other similar enrollment records;

(iii) Records created by historians and anthropologists in historical times;

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and

(v) Other records or evidence.

(f) *Unique Membership.* The petitioner's membership is composed principally of persons who are not members of any federally recognized Indian tribe. 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 that:

(1) It has functioned as a separate politically autonomous community by satisfying criteria (b) and (c); and

(2) Its members have provided written confirmation of their membership in the petitioner.

(g) *Congressional Termination.* Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. The Department must determine whether the petitioner meets this criterion, and the petitioner is not required to submit evidence to meet it.

**§ 83.12 What are the criteria for a previously federally acknowledged petitioner?**

(a) The petitioner may prove it was previously acknowledged as a federally recognized Indian tribe, or is a portion that evolved out of a previously federally recognized Indian tribe, by providing substantial evidence of unambiguous Federal acknowledgment, meaning that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date including, but not limited to, evidence that the petitioner had:

(1) Treaty relations with the United States;

(2) Been denominated a tribe by act of Congress or Executive Order;

(3) Been treated by the Federal Government as having collective rights in tribal lands or funds; or

(4) Land held for it or its collective ancestors by the United States.

(b) Once the petitioner establishes that it was previously acknowledged, it must demonstrate that it meets:

(1) At present, the Community Criterion; and

(2) Since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion.

### **Subpart C – Process for Federal Acknowledgment**

#### *Documented Petition Submission and Review*

#### **§ 83.20 How does an entity request Federal acknowledgment?**

Any entity that believes it can satisfy the criteria in this part may submit a documented petition under this part to: Department of the Interior, Office of the Assistant Secretary – Indian Affairs, Attention: Office of Federal Acknowledgement, 1951 Constitution Ave., NW., Washington, DC 20240.

#### **§ 83.21 What must a documented petition include?**

(a) The documented petition may be in any readable form and must include the following:

(1) A certification, signed and dated by the petitioner’s governing body, stating that it is the petitioner’s official documented petition;

(2) A concise written narrative, with citations to supporting documentation, thoroughly explaining how the petitioner meets each of the criteria in § 83.11, except the Congressional Termination Criterion (§ 83.11 (g))—

(i) If the petitioner chooses to provide explanations of and supporting documentation for the Congressional Termination Criterion (§ 83.11 (g)), the Department will accept it; but

(ii) The Department will conduct the research necessary to determine whether the petitioner meets the Congressional Termination Criterion (§ 83.11 (g)).

(3) Supporting documentation cited in the written narrative and containing specific, detailed evidence that the petitioner meets each of the criteria in § 83.11;

(4) Membership lists and explanations, including:

(i) An official current membership list, separately certified by the petitioner's governing body, of all known current members of the petitioner, including each member's full name (including maiden name, if any), date of birth, and current residential address;

(ii) A statement describing the circumstances surrounding the preparation of the current membership list;

(iii) A copy of each available former list of members based on the petitioner's own defined criteria; and

(iv) A statement describing the circumstances surrounding the preparation of the former membership lists, insofar as possible.

(b) If the documented petition contains any information that is protectable under Federal law such as the Privacy Act and Freedom of Information Act, the petitioner must provide a redacted version, an unredacted version of the relevant pages, and an explanation of the legal basis for withholding such information from public release. The

Department will not publicly release information that is protectable under Federal law, but may release redacted information if not protectable under Federal law.

**§ 83.22 What notice will OFA provide upon receipt of a documented petition?**

When OFA receives a documented petition, it will do all of the following:

(a) Within 30 days of receipt, acknowledge receipt in writing to the petitioner.

(b) Within 60 days of receipt:

(1) Publish notice of receipt of the documented petition in the Federal Register and publish the following on the OFA website:

(i) The narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under § 83.21(b));

(ii) The name, location, and mailing address of the petitioner and other information to identify the entity;

(iii) The date of receipt;

(iv) The opportunity for individuals and entities to submit comments and evidence supporting or opposing the petitioner's request for acknowledgment within 120 days of the date of the website posting; and

(v) The opportunity for individuals and entities to request to be kept informed of general actions regarding a specific petitioner.

(2) Notify, in writing, the following:

(i) The governor of the State in which the petitioner is located;

(ii) The attorney general of the State in which the petitioner is located;

(iii) The government of the county-level (or equivalent) jurisdiction in which the petitioner is located; and

(iv) Notify any recognized tribe and any petitioner that appears to have a historical or present relationship with the petitioner or that may otherwise be considered to have a potential interest in the acknowledgment determination.

(c) Publish the following additional information to the OFA website:

(1) Other portions of the documented petition, to the extent feasible and allowable under Federal law, except documentation and information protectable from disclosure under Federal law, as identified by Petitioner under § 83.21(b) or otherwise;

(2) Any comments or materials submitted by third parties to OFA relating to the documented petition;

(3) Any substantive letter, proposed finding, recommended decision, and final determination issued by the Department;

(4) OFA's contact list for each petitioner, including the point of contact for the petitioner; attorneys, and representatives; and

(5) Contact information for any other individuals and entities that request to be kept informed of general actions regarding the petitioner.

(d) All subsequent notices that the Department provides under this part will be provided via the most efficient means for OFA to:

(1) The governor of the State in which the petitioner is located;

(2) The attorney general of the State in which the petitioner is located;

(3) The government of the county-level (or equivalent) jurisdiction in which the petitioner is located;

(4) Any recognized tribe and any petitioner that appears to have a historical or present relationship with the petitioner or that may otherwise be considered to have a potential interest in the acknowledgment determination; and

(5) Any individuals and entities that request to be kept informed of general actions regarding a specific petitioner.

*Review of Documented Petition*

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

(a) OFA will begin reviews of documented petitions in the order of their receipt.

(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 give highest priority to completing reviews of documented petitions it has already begun to review.

(b) OFA will maintain a numbered register of documented petitions that have been received.

(c) OFA will maintain a numbered register of any letters of intent, which were allowable prior to [INSERT EFFECTIVE DATE OF RULE], or incomplete (i.e., not fully documented) petitions and the original dates of their filing with the Department. If two or more documented petitions are ready for review on the same date, this register will determine the order of consideration.

**§ 83.24 What opportunity will the petitioner have to respond to comments before OFA reviews the petition?**

Before beginning review of a documented petition, OFA will provide the petitioner with any comments on the petition received from individuals or entities under § 83.22(b) and provide the petitioner with 90 days to respond to such comments. OFA will not begin review until it receives the petitioner's response to the comments or the petitioner requests that OFA proceed without its response.

**§ 83.25 Who will OFA notify when it begins review of a documented petition?**

OFA will notify the petitioner and those listed in § 83.22(d) when it begins review of a documented petition and will provide the petitioner and those listed in § 83.22(d) with:

- (a) The name, office address, and telephone number of the staff member with primary administrative responsibility for the petition;
- (b) The names of the researchers conducting the evaluation of the petition; and
- (c) The name of their supervisor.

**§ 83.26 How will OFA review a documented petition?**

(a) Phase I. When reviewing a documented petition, OFA will first determine if the petitioner meets the Governing Document Criterion (§ 83.11(d)), Descent Criterion (§ 83.11(e)), Unique Membership Criterion (§ 83.11(f)), and Termination Criterion (§ 83.11(g)), in accordance with the following steps.

(1)(i) OFA will conduct a Phase I technical assistance review and notify the petitioner by letter of any deficiencies that would prevent the petitioner from meeting the Governing Document, Descent, Unique Membership, or Termination Criteria. Upon receipt of the letter, the petitioner must submit a written response that:

- (A) Withdraws the documented petition to further prepare the petition;
- (B) Submits additional information and/or clarification; or
- (C) Asks OFA to proceed with the review.

(ii) If the documented petition claims previous Federal acknowledgment and/or includes evidence of previous Federal acknowledgment, the Phase I technical assistance review will include a review to determine whether that evidence meets the requirements of previous Federal acknowledgment (§ 83.12).

(2) Following the receipt of the petitioner's written response to the Phase I technical assistance review, OFA will provide the petitioner with:

- (i) Any comments and evidence OFA may consider that the petitioner does not already have, to the extent allowable by Federal law; and
  - (ii) The opportunity to respond in writing to the comments and evidence provided.
- (3) OFA will publish a negative proposed finding if it issues a deficiency letter under paragraph (a)(1)(i) of this section, and the petitioner:

- (A) Does not withdraw the documented petition or does not respond with information or clarification sufficient to address the deficiencies; or
- (B) Asks OFA in writing to proceed with the review.

(4) OFA will publish a positive proposed finding and proceed to Phase II if it determines that the petitioner meets the Governing Document, Descent, Unique Membership, and Termination criteria.

(b) Phase II. If the petitioner meets the Governing Document, Descent, Unique Membership, and Termination criteria, OFA will next review whether the petitioner meets the Indian Entity Identification Criterion (§ 83.11(a)), the Community Criterion (§

83.11(b)), and the Political Influence/Authority Criterion (§ 83.11(c)). If the petitioner claims previous Federal acknowledgment, the Department will also review whether petitioner proves previous Federal acknowledgment and, if so, will review whether the petitioner meets the criteria under § 83.12(b).

(1) OFA will conduct a Phase II technical assistance review and notify the petitioner by letter of any deficiencies that would prevent the petitioner from meeting these criteria. Upon receipt of the letter, the petitioner must submit a written response that:

- (i) Withdraws the documented petition to further prepare the petition;
- (ii) Provides additional information and/or clarification; or
- (iii) Asks OFA to proceed with the review.

(2) Following receipt of the petitioner's written response to the Phase II technical assistance review, OFA will provide the petitioner with:

(i) Any comments and evidence OFA may consider in preparing the proposed finding that the petitioner does not already have, to the extent allowable by Federal law; and

- (ii) The opportunity to respond in writing to the comments and evidence provided.

(3) OFA will then review the record to determine:

(i) For petitioners with previous Federal acknowledgment, whether the criteria at § 83.12(b) are met; or

(ii) For petitioners without previous Federal acknowledgment, whether the Indian Entity Identification (§ 83.11(a)), Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria are met.

(4) OFA will publish a negative proposed finding if it issues a deficiency letter under paragraph (a)(1) of this section, and the petitioner:

(i) Does not withdraw the documented petition or does not respond with information or clarification sufficient to address the deficiencies; or

(ii) Asks OFA in writing to proceed with the review.

(5) OFA will publish a positive proposed finding if it determines that the petitioner meets the Indian Entity Identification (§ 83.11(a)), Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria or, for petitioners with previous Federal acknowledgment, that the petitioner meets the criteria at § 83.12(b).

#### **§ 83.27 What are technical assistance reviews?**

Technical assistance reviews are preliminary reviews for OFA to tell the petitioner where there appear to be evidentiary gaps for the criteria that will be under review in that phase and to provide the petitioner with an opportunity to supplement or revise the documented petition.

#### **§ 83.28 When does OFA review for previous Federal acknowledgment?**

(a) OFA reviews the documented petition for previous Federal acknowledgment during the Phase II technical assistance review of the documented petition.

(b) If OFA cannot verify previous Federal acknowledgment during this technical assistance review, the petitioner must provide additional evidence. If a petitioner claiming previous Federal acknowledgment does not respond or does not demonstrate the claim of previous Federal acknowledgment, OFA will consider its documented petition on the same basis as documented petitions submitted by petitioners not claiming previous Federal acknowledgment.

**§ 83.29 What will OFA consider in its reviews?**

(a) In any review, OFA will consider the documented petition and evidence submitted by the petitioner, any comments and evidence on the petition received during the comment period, and petitioners' responses to comments and evidence received during the response period.

(b) OFA may also:

(1) Initiate and consider other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status; and

(2) Request and consider timely submitted additional explanations and information from commenting parties to support or supplement their comments on the proposed finding and from the petitioner to support or supplement their responses to comments.

(c) OFA must provide the petitioner with the additional material obtained in paragraph (b) of this section, and provide the petitioner with the opportunity to respond to the additional material. The additional material and any response by the petitioner will become part of the record.

**§ 83.30 Can a petitioner withdraw its documented petition?**

A petitioner can withdraw its documented petition at any point in the process but the petition will be placed at the end of the numbered register of documented petitions upon re-submission and may not regain its initial priority number.

**§ 83.31 Can OFA suspend review of a documented petition?**

(a) OFA can suspend review of a documented petition, either conditionally or for a stated period, upon:

(1) A showing to the petitioner that there are technical or administrative problems that temporarily preclude continuing review; and

(2) Approval by the Assistant Secretary.

(b) Upon resolution of the technical or administrative problems that led to the suspension, the documented petition will have the same priority on the numbered register of documented petitions to the extent possible.

(1) OFA will notify the petitioner and those listed in § 83.22(d) when it suspends and when it resumes review of the documented petition.

(2) Upon the resumption of review, OFA will have the full six months to issue a proposed finding.

*Proposed Finding*

**§ 83.32 When will OFA issue a proposed finding?**

(a) OFA will issue a proposed finding as shown in the following table:

<b>OFA must</b>	<b>within ...</b>
(1) Complete its review under Phase I and either issue a negative proposed finding and publish a notice of availability in the Federal Register, or proceed to review under Phase II	six months after notifying the petitioner under § 83.25 that OFA has begun review of the petition
(2) Complete its review under Phase II and issue a proposed finding and publish a notice of availability in the Federal Register	six months after the deadline in paragraph (a)(1) of this section.

(b) The times set out in paragraph (a) will be suspended any time the Department is waiting for a response or additional information from the petitioner.

(c) OFA will strive to limit the proposed finding and any reports to no more than 100 pages, cumulatively, excluding source documents.

**§ 83.33 What will the proposed finding include?**

The proposed finding will summarize the evidence, reasoning, and analyses that are the basis for OFA's proposed finding regarding whether the petitioner meets the applicable criteria.

(a) A Phase I negative proposed finding will address that the petitioner fails to meet any one or more of the following criteria: Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), or Congressional Termination (§ 83.11(g)).

(b) A Phase II proposed finding will address whether the petitioner meets the following criteria: Indian Entity Existence (§ 83.11(a)), Community (§ 83.11(b)), and Political Influence/Authority (§ 83.11(c)).

**§ 83.34 What notice of the proposed finding will OFA provide?**

In addition to publishing notice of the proposed finding in the Federal Register, OFA will:

(a) Provide copies of the proposed finding and any supporting reports to the petitioner and those listed in § 83.22(d); and

(b) Publish the proposed finding and reports on the OFA website.

*Proposed Finding – Comment and Response Periods, Hearing*

**§ 83.35 What opportunity to comment will there be after OFA issues the proposed finding?**

(a) Publication of notice of the proposed finding will be followed by a 120-day comment period. During this comment period, the petitioner or any individual or entity may submit the following to OFA to rebut or support the proposed finding:

- (1) Comments, with citations to and explanations of supporting evidence; and
- (2) Evidence cited and explained in the comments.

(b) Any individual or entity that submits comments and evidence must provide the petitioner with a copy of their submission.

**§ 83.36 What procedure follows the end of the comment period on a favorable proposed finding?**

(a) At the end of the comment period for a favorable proposed finding, AS-IA will automatically issue a final determination acknowledging the petitioner as a federally recognized Indian tribe if OFA does not receive a timely objection with evidence challenging the proposed finding that the petitioner meets the acknowledgment criteria.

(b) If OFA has received a timely objection and evidence challenging the favorable proposed finding, then the petitioner will have 60 days to submit a written response, with citations to and explanations of supporting evidence, and the supporting evidence cited and explained in the response. The Department will not consider additional comments or evidence on the proposed finding submitted by individuals or entities during this response period.

**§ 83.37 What procedure follows the end of the comment period on a negative proposed finding?**

If OFA has received comments on the negative proposed finding, then the petitioner will have 60 days to submit a written response, with citations to and explanations of supporting evidence, and the supporting evidence cited and explained in the response. The Department will not consider additional comments or evidence on the proposed finding submitted by individuals or entities during this response period.

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

(a) At the end of the response period for a negative proposed finding, the petitioner will have 60 days to elect to challenge the proposed finding before an ALJ by sending to the Departmental Cases Hearings Division, Office of Hearings and Appeals, with a copy to OFA a written election of hearing that lists:

(1) Grounds for challenging the proposed finding, including issues of law and issues of material fact; and

(2) The witnesses and exhibits the petitioner intends to present at the hearing, other than solely for impeachment purposes, including:

(i) For each witness listed, his or her name, address, telephone number, and qualifications and a brief narrative summary of his or her expected testimony; and

(ii) For each exhibit listed, a statement confirming that the exhibit is in the administrative record reviewed by OFA or is a previous final determination of a petitioner issued by the Department.

(b) The Department will not consider additional comments or evidence on the proposed finding submitted by individuals or entities during this period.

**§ 83.39 What is the procedure if the petitioner elects to have a hearing before an ALJ?**

(a) If the petitioner elects a hearing to challenge the proposed finding before an ALJ, OFA will provide to the Departmental Cases Hearings Division, Office of Hearings and Appeals, copies of the negative proposed finding, critical documents from the administrative record that are central to the portions of the negative proposed finding at issue, and any comments and evidence and responses sent in response to the proposed finding.

(1) Within 5 business days after receipt of the petitioner's hearing election, OFA will send notice of the election to each of those listed in § 83.22(d) and the Departmental Cases Hearings Division by express mail or courier service for delivery on the next business day.

(2) OFA will retain custody of the entire, original administrative record.

(b) *Hearing Process.* The assigned ALJ will conduct the hearing process in accordance with 43 CFR part 4, subpart K.

(c) *Hearing record.* The hearing will be on the record before an ALJ. The hearing record will become part of the record considered by AS-IA in reaching a final determination.

(d) *Recommended decision.* The ALJ will issue a recommended decision and forward it along with the hearing record to the AS-IA in accordance with the timeline and procedures in 43 CFR part 4, subpart K.

*AS-IA Evaluation and Preparation of Final Determination*

**§ 83.40 When will the Assistant Secretary begin review?**

(a) AS-IA will begin his/her review in accordance with the following table:

<b>If the PF was:</b>	<b>And:</b>	<b>AS-IA will begin review upon:</b>
(1) Negative	The petitioner did not elect a hearing,	Expiration of the period for the petitioner to elect a hearing.
(2) Negative	The petitioner elected a hearing,	Receipt of the ALJ's recommended decision.
(3) Positive	No objections with evidence were received,	Expiration of the comment period for the positive PF.
(4) Positive	Objections with evidence were received,	Expiration of the period for the petitioner to respond to comments on the positive PF

(b) AS-IA will notify the petitioner and those listed in § 83.22(d) of the date he/she begins consideration.

**§ 83.41 What will the Assistant Secretary consider in his/her review?**

(a) AS-IA will consider all the evidence in the administrative record, including any comments and responses on the proposed finding and any the hearing transcript and recommended decision.

(b) AS-IA will not consider comments submitted after the close of the comment period in § 83.35, the response period in § 83.36 or § 83.37, or the hearing election period in § 83.38.

**§ 83.42 When will the Assistant Secretary issue a final determination?**

(a) AS-IA will issue a final determination and publish a notice of availability in the Federal Register within 90 days from the date on which he/she begins its review. AS-IA will also

(1) Provide copies of the final determination to the petitioner and those listed in § 83.22(d); and

(2) Make copies of the final determination available to others upon written request.

(b) AS-IA will strive to limit the final determination and any reports to no more than 100 pages, cumulatively, excluding source documents.

**§ 83.43 How will the Assistant Secretary make the determination decision?**

(a) AS-IA will issue a final determination granting acknowledgment as a federally recognized Indian tribe when AS-IA finds that the petitioner meets the Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria and:

(1) Demonstrates previous Federal acknowledgment under § 83.12(a) and meets the criteria in § 83.12(b); or

(2) Meets the Indian Entity Identification (§ 83.11(a)), Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

(b) AS-IA will issue a final determination declining acknowledgement as a federally recognized Indian tribe when he/she finds that the petitioner:

(1) In Phase I, does not meet the Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), Unique Membership (§ 83.11(f)), or Congressional Termination (§ 83.11(g)) Criteria: or

(2) In Phase II, does not:

(i) Demonstrate previous Federal acknowledgment under § 83.12(a) and meet the criteria in § 83.12(b); or

(ii) Meet the Indian Entity Identification (§ 83.11(a)), Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

**§ 83.44 Is the Assistant Secretary’s final determination final for the Department?**

Yes. The AS-IA’s final determination is final for the Department and is a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

**§ 83.45 When will the final determination be effective?**

The final determination will become immediately effective. Within 10 business days of the decision, the Assistant Secretary will submit to the Federal Register a notice of the final determination to be published in the Federal Register.

**§ 83.46 How is a petitioner with a positive final determination integrated into Federal programs as a federally recognized Indian tribe?**

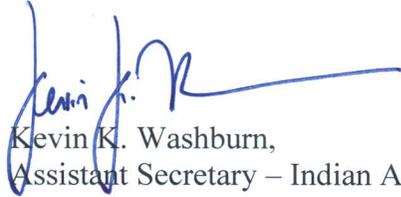
(a) Upon acknowledgment, the petitioner will be a federally recognized Indian tribe entitled to the privileges and immunities available to federally recognized Indian tribes. It will be included on the list of federally recognized Indian tribes in the next scheduled publication.

(b) Within six months after acknowledgment, the appropriate Bureau of Indian Affairs Regional Office will consult with the newly federally recognized Indian tribe and develop, in cooperation with the federally recognized Indian tribe, a determination of needs and a recommended budget. These will be forwarded to the Assistant Secretary. The recommended budget will then be considered with other recommendations by the Assistant Secretary in the usual budget request process.

(c) While the newly federally acknowledged Indian tribe is eligible for benefits and services available to federally recognized Indian tribes, acknowledgment as a

federally recognized Indian tribe does not create immediate access to existing programs. The newly federally acknowledged Indian tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations will follow a determination of the needs of the newly federally acknowledged Indian tribe.

Dated: **JUN 23 2015**

A handwritten signature in blue ink, appearing to read "Kevin K. Washburn", with a long horizontal flourish extending to the right.

Kevin K. Washburn,  
Assistant Secretary – Indian Affairs.