Federal Acknowledgment of Indian Tribes
Discussion Draft Rule - 25 CFR 83

Background

- Ways in which U.S. Government may acknowledge or recognize an Indian tribe:
  - Judicially
    - Federal court decision
  - Congressionally
    - Congress passes law
  - Administratively
    - Determination by Assistant Secretary – Indian Affairs (AS-IA)
Background (continued)

• Pre-1978
  – AS-IA reviewed, on an ad-hoc basis, petitions by groups seeking Federal acknowledgment as Indian tribes
• 1978
  – Regulations published to establish uniform process for AS-IA review of petitions
• 1994
  – Revisions to regulations published
  – Criteria unchanged, previous acknowledgment added
  – Guidance published with internal processing changes
• Of the 566 federally recognized Tribes, 17 recognized through Part 83

Need for Revisions

• Many have criticized that process is “broken”:
  – Too long
  – Burdensome
  – Expensive
  – Unpredictable
    • Interpretation of criteria
    • What proof is sufficient
    • Results
  – Not transparent
Development of 2013 Discussion Draft

- 2009 – Secretary Salazar commits to examining ways to improve the process
- 2010 – AS-IA, SOL, OFA work on draft revisions to Part 83
- 2012 – AS-IA rep. Newland identifies “guiding principles” (“Goals” below)
- 2013
  - Assistant Secretary Washburn promises release of a Discussion Draft
  - On June 21, AS-IA releases Discussion Draft developed by DOI workgroup
  - Goals of Discussion Draft:
    - Transparency – Make petitioning process more easily understood
    - Timeliness – Move petitions through the process
    - Efficiency – Be mindful of limited resources
    - Flexibility – Account for the unique histories of tribal communities
    - Integrity – Maintain the accuracy and integrity of decisions

Discussion Draft Revisions

Overview of Primary Proposals to Improve Process:

- Eliminates “Letter of Intent”
- Adds Expedited Favorable & Negative Decisions
- Clarifies some criteria
- Allows petitioner to withdraw after active consideration begins, anytime before proposed finding
- Provides for automatic final determination under certain circumstances
- Examines who issues final determination
- Eliminates IBIA review
*Draft also includes placeholders for input
Discussion Draft Revisions – Eliminate Letter of Intent

§ 83.4

• Eliminate “Letter of Intent”
  – Process begins by filing documented petition
  – No change:
    • OFA keeps register of prior letters of intent based on original filing date [§ 83.10(h)]
    • If two or more documented petitions receive priority of the same date, the register of any prior letters of intent or incomplete petitions shall determine the order of consideration [§ 83.10(h)]

Goal: Transparency, Timeliness, Efficiency

Discussion Draft Revisions – Expedited Negative Finding

§ 83.10(f)

“Expedited negative” review at beginning of active consideration

• Review of criteria:
  – (e) (descent from historical Indian tribe);
  – (f) (membership principally of persons who are not members of another acknowledged tribe); and
  – (g) (federal relationship was not terminated or forbidden)

• If petitioner fails criteria (e), or (f), or (g):
  – Proposed finding declining to acknowledge
  – Within 6 months of beginning active consideration

• If petitioner meets criteria (e), and (f), and (g):
  – Proceed to full evaluation of petition (or “expedited favorable” review if asserted)

Goal: Timeliness, Efficiency, Flexibility
**Discussion Draft Revisions – Expedited Favorable Finding**  
§ 83.10(g)

“Expedited favorable” review is done only if petitioner asserts that it is eligible, after passing expedited negative review

- **Criteria:**  
  - Petitioner maintained since 1934 a reservation recognized by the state and continues to hold a state reservation; OR  
  - U.S. has held land for the group at any point in time since 1934.

- If petitioner provides its governing document (or summary) and meets either of the above criteria:  
  - OFA will issue a proposed finding acknowledging the tribe  
  - Within 6 months of beginning active consideration

- If petitioner fails the criteria, OFA will undertake full evaluation

**Goal:** Timeliness, Efficiency, Flexibility

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**Discussion Draft Revisions – Adjustments to Criteria**  
§ 83.7

- Deletes criterion (a) (external observers identify group as “Indian”)

- In criteria (b) (community) and (c) (political influence/authority)  
  - Analysis of criteria is from **1934 to present**  
  - Frequency at which criteria must be proven is made on a case-by-case basis

- In criterion (e) (descent from historical tribe), allows historians’ and anthropologists’ conclusions as evidence of descent from historical Indian tribe (since first sustained contact with non-Indians)

- Specific numbers (see placeholders) for more objective criteria

**Goal:** Transparency, Timeliness, Efficiency, Flexibility
Discussion Draft Revisions – Withdrawal §83.10(e)  
Automatic Final Determinations §83.10(m)

• Petitioner may withdraw petition at any time before proposed finding is published  
  – OFA will cease consideration upon withdrawal  
  – If re-submit, petition will be placed at the bottom of the numbered register and may not regain its initial priority number

Goal: Flexibility

• Automatic final determination if:  
  – Proposed finding is positive; and  
  – No timely arguments/evidence in opposition to acknowledgment are received from either:  
    • An acknowledged tribe located in same State as petitioner; or  
    • The State or local government where petitioner’s office is located

Goal: Timeliness, Efficiency

Discussion Draft Revisions – Who Issues Final Determination  
§83.10(i)-(r)

• Currently, OFA prepares and AS-IA issues both:  
  – Proposed finding  
  – Final determination

• In Discussion Draft, OFA prepares and issues proposed finding, and following publication of proposed finding:  
  – Petitioner submits arguments and evidence to OHA or AS-IA*  
    • Challengers may also submit arguments & evidence  
  – OHA or AS-IA:  
    • Decides whether to grant extensions of deadlines  
    • Holds hearing (if requested by petitioner or interested party)  
    • Considers submitted arguments and evidence  
    • May require additional research to supplement record  
    • Issues final determination

• *OHA or AS-IA – Which is more appropriate?

Goal: Transparency, Integrity
Discussion Draft Revisions – Delete IBIA Review

§83.11

• Currently, the final determination by AS-IA is the only AS-IA decision that is appealable to the Interior Board of Indian Appeals (IBIA)

• Discussion Draft deletes opportunity to challenge a final determination before the IBIA
  – All challenges to final determinations would instead have to be filed in Federal court

Goal: Timeliness, Efficiency

Which version of Part 83 will apply

• If the Discussion Draft is proposed and finalized, the new version would apply to:
  – Anyone who has not yet reached active consideration as of the effective date of the new version
  – Anyone who is under active consideration (even if they have received a proposed finding) that chooses to complete the process under the new version, and files a new documented petition

• A petitioner that has been denied Federal acknowledgment under previous regulations may re-petition if it proves, by a preponderance of the evidence that:
  – Change from previous version to new version of regulations warrants reversal of the final determination.

Goal: Flexibility, Integrity
Also Seeking Comment On:

- Draft revisions
- § 83.1 - Should the definitions be revised? If so, which & how?
- § 83.5, 83.6 - Would a standard form for petitions be helpful?
  - Should a standard form be available, but optional to use?

Goal: Transparency, Efficiency

Also Seeking Comment On:

(continued)

Criteria

- § 83.7(b) (community)
  - What percentage should comprise a distinct community?
  - What percentage should reside in geographic area?
  - What percentage of marriages should be between group members?
  - What percentage should maintain distinct cultural patterns?
  - Could “cultural patterns” be clarified?

Goal: Transparency, Efficiency, Integrity
Also Seeking Comment On:
(continued)

Criteria (continued)
• § 83.7(c) (political influence or authority)
  – A “bilateral” relationship has been examined by OFA
    • Should evidence of a bilateral relationship be required?

• § 83.7(e) (descent from historical tribe)
  – What percentage of the group’s membership should descend from a historical Indian tribe?
  – What are other objective standards that could be used for this criterion?

Goal: Transparency, Flexibility, Integrity

Also Seeking Comment On:
(continued)

• What page limits (if any) should apply to:
  – Petition
  – Proposed finding
  – OFA’s report in support of proposed finding
  – Petitioner’s arguments supporting or rebutting the proposed finding
  – Interested and informed parties’ comments on the proposed finding
  – Petitioner’s response to comments

Goal: Timeliness, Efficiency
Comments Due

• Comments on this draft rule are due: **August 16, 2013**

• You may submit comments either by email or mail:
  – E-mail: consultation@bia.gov

• Next steps
  – Review comments, make changes as appropriate
  – Publish a proposed rule in the Federal Register