Federal Acknowledgment of Indian Tribes
Proposed 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

• June 2013 – Assistant Secretary Washburn distributes the Discussion Draft

• July & August 2013 – Public meetings and tribal consultations on Discussion Draft
  – Over 350 comment submissions received plus > 2,000 form letters and signatories to comment letters
Proposed Rule - Development

• Development of Proposed Rule
  – Reviewed all comments received on Discussion Draft and made changes to address comments
  – Rewrote rule to meet “plain language” requirements (question and answer format, reorganization)
  – Submitted rule to OMB for EO 12866 review
  – Published in Federal Register on May 29, 2014

• Comments due August 1, 2014 – September 30, 2014
Proposed Rule

Proposed Rule Revisions - Overview:

• Revisions to process
• Revisions and clarifications to criteria
• Clarification of previous federal acknowledgment
• Clarification of burden of proof
• Allowance for re-petitioning under limited circumstances
• Additional notice requirements
Proposed Rule – Revisions to Process

• Eliminate “Letter of Intent”
  – Process begins by filing a complete documented petition

• Phased Review
  – Phase I
    • Review whether descent criterion (e) is met
    • Next review whether criteria (a), (d), (f), (g) are met
  – Phase II
    • Phase II-A (only if petitioner asserts Phase II-A applies):
      Review whether State reservation or U.S. held land since 1934
    • Phase II-B: Review for community (b) and political influence/authority (c)

Goal: Transparency, Timeliness, Efficiency
Proposed Rule – Revisions to Process (continued)

• Proposed Finding (PF) issued by OFA
  – Comment period on PF
    • If PF is positive, and no comments from certain parties
      – Then, AS-IA automatically issues a positive FD
    • If PF is negative,
      – Then petitioner may elect a hearing before an OHA judge and OHA judge makes recommended decision to AS-IA

• Final Determination (FD) issued by AS-IA
  – AS-IA’s FD is final for the Department
    • No IBIA reconsideration
    • Immediate review in Federal District Court

Goal: Transparency, Timeliness, Efficiency, Integrity
Hearing on Negative PF: OHA Proposed Procedures

- Who should preside over hearing and issue recommended decision?
  - An Administrative Law Judge
    - Independent of supervision, routinely conducts hearings
  - An Administrative Judge (AJ)
    - Reports to OHA Director, routinely serves on appellate board
  - An attorney designated by OHA Director
    - Reports ultimately to OHA Director, may have no experience conducting hearings

- Should basis for OHA judge’s decision be limited to hearing record?

Goal: Transparency, Efficiency, Integrity
Proposed Rule – Revisions to Process (continued)

• Petitioner may withdraw petition at any time before the PF 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

• Department will post to the Internet those portions of the petition and PF and reports releasable under Federal law

  Goal: Transparency

§ 83.30

§ 83.21(b), § 83.22(b)
Proposed Rule – Criteria

• Criterion (a)
  – Current
    • Requires that external observers identify the petitioner as “Indian”
    • External identifications required from 1900 to the present, every 10 years
  – Proposed
    • Requires a narrative of petitioner’s existence as a tribe pre-1900
    • External identification evidence can still be provided to support other criteria

Goal: Transparency, Timeliness, Efficiency, Integrity
Proposed Rule – Criteria

- **Criterion (b) (community)**
  - Analysis of criteria is from 1934 to present
  - At least 30% must show distinct community for each time period
  - Attendance of students at Indian boarding school acceptable
  - Met if State reservation maintained since 1934 or U.S. held land at any point since 1934

- **Criterion (c) (political influence and authority)**
  - Analysis of criteria is from 1934 to present
  - Met if State reservation maintained since 1934 or U.S. held land at any point since 1934

- Defines “without substantial interruption” to be < 20 years

Goal: Transparency, Timeliness, Efficiency, Flexibility, Integrity
Proposed Rule – Criteria (continued)

- **Criterion (e) (descent)**
  - 80% must descend from tribe that existed in historical times (pre-1900)
  - Allows descent to be traced from
    - Roll prepared by Department or at direction of Congress
    - Otherwise, most recent pre-1900 evidence

- **Criterion (f) (membership)**
  - Ensures that petitioners who filed by 2010 and then had members joining federally recognized tribe for services are not penalized

- **Criterion (g) (Congressional termination)**
  - Shifts the burden to the Department to show that a petitioner was terminated by Congress

Goal: Transparency, Timeliness, Efficiency, Flexibility, Integrity
Proposed Rule – Previous Federal Acknowledgment

- Current rule – unclear
- No substantive change – rule now reflects practice
  - 1. Meet criteria (a), (d), (e), (f), (g) (all except community and political influence/authority)
  - 2. Establish previous unambiguous Federal acknowledgment
  - 3. Either
    - Meet (b) (community) at present and (c) (political authority) from last acknowledgment to present using authoritative, knowledgeable third parties or governing bodies and one other item of evidence; or
    - Meet (b) (community) and (c) (political authority) since last acknowledgment.

Goal: Flexibility, Integrity
Proposed Rule – Burden of Proof

• Burden of proof is still “reasonable likelihood”
  – Clarification of what “reasonable likelihood” is based on Supreme Court explanation
    • Requires “more than a mere possibility”
    • Does not require “more likely than not”

§ 83.10(a)(1)

Goal: Transparency, Integrity
Proposed Rule – Re-petitioning

• Allow re-petitioning if:
  – Any third parties involved in an IBIA reconsideration or Federal court appeal consent to the re-petitioning; and
  – OHA judge determines that a preponderance of the evidence shows either:
    • A change in the regulations warrants reconsideration; or
    • Misapplication of the burden of proof warrants reconsideration.

• Procedures for re-petition request to the OHA
  – Addressed in separate proposed rule issued by OHA

Goal: Transparency, Integrity
Proposed Rule – Notice of Petitions

• OFA receives petition
  – Acknowledges receipt to petitioner within 30 days
  – Within 60 days
  • Publish notice of receipt in Federal Register
  • Post petition’s narrative and other information on OFA website
  • Notify Governor and Attorney General in State
  • Notify any federally recognized Tribe within State or 25-mile radius
  • Notify any other 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

Goal: Transparency Integrity
Proposed Rule – Notice of Petitions (continued)

• Notice to petitioner & informed parties when:
  – OFA begins review of petition
  – OFA issues its Proposed Finding
    • Also will publish notice of availability in Federal Register and post on OFA website
  – AS-IA grants any time extensions
  – AS-IA begins review of petition
  – AS-IA issues Final Determination
    • Also will publish notice of availability in Federal Register

Goal: Transparency, Integrity

§§ 83.25, 83.32, 83.34, 83.38(b), 83.40, 83.42
Comments Due

- Comments on the proposed rule are due: August 1, 2014 – September 30, 2014
- Comments on OHA’s proposed rule are due: August 18, 2014 – September 30, 2014

- Email is preferred method to submit comments:
  - E-mail: consultation@bia.gov

- Next steps
  - Review comments, make changes as appropriate
  - Publish a final rule in the Federal Register
  - Final rule will not become effective for at least 30 days after publication