

Department of the Interior  
Office of the Assistant Secretary – Indian Affairs



**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
- 2000, 2005, 2008
  - 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” § 83.20
  - Process begins by filing a complete documented petition
- Phased Review § 83.26
  - 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 § 83.32
  - Comment period on PF
    - If PF is positive, and no comments from certain parties
      - Then, AS-IA automatically issues a positive FD § 83.37
    - 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 § 83.38
  - AS-IA's FD is final for the Department
    - No IBIA reconsideration
    - Immediate review in Federal District Court

§§ 83.43 – 83.45

Goal: Transparency, Timeliness, Efficiency, Integrity

## Proposed Rule – Revisions to Process (continued)

- Hearing on Negative PF: OHA Proposed Procedures 43 CFR 4, Subpart K
  - 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

§ 83.30

Goal: Flexibility

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

§ 83.21(b), § 83.22(b)

Goal: Transparency

## Proposed Rule – Criteria

- Criterion (a) § 83.11(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) § 83.11(b)
  - 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) § 83.11(c)
  - 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 § 83.10(b)(5)

Goal: Transparency, Timeliness, Efficiency, Flexibility, Integrity

## Proposed Rule – Criteria (continued)

- Criterion (e) (descent) § 83.11(e)
  - 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) § 83.11(f)
  - Ensures that petitioners who filed by 2010 and then had members joining federally recognized tribe for services are not penalized
- Criterion (g) (Congressional termination) § 83.11(g)
  - 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 § 83.12
  - 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” § 83.10(a)(1)
  - Clarification of what “reasonable likelihood” is based on Supreme Court explanation
    - Requires “more than a mere possibility”
    - Does not require “more likely than not”

## Proposed Rule – Re-petitioning

- Allow re-petitioning if: § 83.4(b)
  - 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 43 CFR 4, Subpart K
  - Addressed in separate proposed rule issued by OHA

Goal: Transparency, Integrity

## Proposed Rule – Notice of Petitions

§ 83.22

- 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

§§ 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](mailto: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