FEDERAL ACKNOWLEDGMENT OF AMERICAN INDIAN TRIBES

25 CFR Part 83
Proposed Rule
Consultation Summary Report

October 11, 2024

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Federal Acknowledgment of American Indian Tribes

25 CFR Part 83 – Proposed Rule

Final Written Summary & Analysis: Tribal Consultations held August 19 & September 3 and Listening Session held September 5 on 25 CFR Part 83

1. Overview

The Department of the Interior's ("Department" or "DOI"), Bureau of Indian Affairs ("BIA") conducted three virtual sessions to seek input on a proposed rule to create a conditional time-limited opportunity for denied petitioners to re-petition for Federal acknowledgement as an Indian Tribe. The Federal Acknowledgment of American Indian Tribes, 25 CFR Part 83 (Part 83) proposed rule, published on July 12, 2024, 89 FR 57097. The Department hosted two virtual consultation sessions with Federally recognized Indian Tribes over Zoom on August 19 and September 3, 2024, and a listening session with present, former, and prospective petitioners on September 5, 2024. The consultations lasted approximately one hour or less and the listening session lasted approximately two hours. In regard to the virtual sessions with the Federally recognized Indian Tribes, 71 people registered for the August 19 session with 48 participants, and 68 people registered for the September 3 session with 49 participants. Finally, 159 people registered for the September 5th listening session with 148 participants. Technology ran smoothly for all three sessions.

The consultations and its written comment period garnered comments from the following Federally recognized Indian Tribes: 1) Santa Ynez Band of Chumash Indians, 2) the Morongo Band of Mission Indians, 3) the Puyallup Tribe of Indians, 4) the Confederated Tribes of Siletz Indians, 5) the Yuhaaviatam of San Manuel Nation, 6) the Tunica-Biloxi Tribe of Louisiana, 7) the Tulalip Tribes, 8) the Eastern Band of Cherokee Indians, 9) the Swinomish Indian Tribal Community, 10) the Suquamish Indian Tribe of the Fort Madison Reservation, 11) the Muckleshoot Indian Tribe, 12) the Shawnee Tribe, 13) the Delaware Nation, 14) the Federated Indians of Graton Rancheria, 15) the Seneca Nation of Indians, and 16) Shinnecock Indian Nation. There was a total of 146 individualized comments submitted by the Federally recognized Indian Tribes on the Part 83 proposed rule.[1]

The listening session and the written comments participants included Federally recognized Indian Tribes; State recognized Tribes; non-federally recognized groups; Tribal and intertribal groups, associations, and alliances; state officials, congressional delegations and coalitions; national associations; and academic institutions, including Yale University, Stanford University, and the Indian Legal Clinic of Arizona State University's College of Law. There was a total of 408 individualized comments submitted on the Part 83 proposed rule by 159 present, former, prospective petitioners, and other interested parties.

During the virtual sessions, most comments were received verbally, with a few submitted through the Zoom chat function. The Department responded to verbal comments and questions where time permitted.

In each virtual session, the Assistant Secretary – Indian Affairs (AS-IA) substantively

[1] An individualized comment is a comment on a discrete issue or concern, raised by a commentator in response to the proposed rule, whether in writing or orally. For example, a written comment letter could have addressed several different issues or concerns. Also, during the consultations and listening session, a commentor could have orally discussed several different issues or concerns in their address.

engaged with participants, presented the history behind the proposed changes to Part 83 , and provided a detailed explanation of the proposed changes. Most participants seemed in listen-only mode and did not offer substantive thoughts and comments during the virtual sessions. Commenters that did respond provided brief responses and committed to follow-up with more detailed written comments before the deadline of September 13, 2024. The September 5th listening session provided the most verbal comments, many supportive of the proposed rule, and several participants asked general questions about the rulemaking process.

Overall, the Federally recognized Indian Tribes that commented either verbally or through written comments oppose re-petitioning, the Tunica-Biloxi Tribe and the Shinnecock Indian Nation being the outliers. Correspondingly, non-federally recognized groups support re-petitioning and would support expanding the opportunity to re-petition to all unsuccessful petitioners. Those that oppose re-petitioning also would limit the 5-year timeframe to submit a request to re-petition and expand the comment period for third parties, while those that support re-petitioning believe the 5-year timeframe is too restrictive and should instead be open-ended.

States and local governments that commented mostly aligned with the Federally recognized Indian Tribes that oppose re-petitioning, often citing the various costs and burdens associated with opposing recognition petitions, and the potential effects on property, economic development, and tax bases. Not all state and local government comments opposed the proposed rule. Connecticut State Senator Osten and Representatives Conley, Wilson, and Nolan submitted a letter in support of the proposed rule and the recognition of Connecticut's State-recognized Tribes: the Golden Hill Paugussett, the Schaghticoke, and the Eastern Pequot Tribe. The Mayor of Charlestown, Indiana also wrote in support of the proposed rule, stating "it is important for all of Indiana to acknowledge and respect the legacy and resilience of these communities." Senator Todd Young (Indiana) and Senator Mike Braun (Indiana) also submitted a joint letter in support of the proposed rule, while also expressing that the process has taken far too long for petitioners, particularly the Miami Nation of Indiana.

Over one hundred individuals submitted either written comments or provided oral comments supporting the process generally, often specifically advocating for the federal recognition of specific groups. Many wrote in support of recognizing the Ma-Chis Lower Creek Indian Tribe, the Golden Hill Paugussett Tribe of Connecticut, and the Eastern Pequot Nation of Connecticut.

2. Summary of Comments

The comments summarized below are divided into the following groupings:

- "Scope of Petitioners" comments, which implicate 25 C.F.R. § 83.47 - *Who can seek authorization to re-petition under this subpart?*;
- "Change in Rule/New Evidence" comments, which implicate 25 C.F.R. § 83.48 - *When will the Department allow a re-petition?*;
- "Documentation" or "Standard of Review" comments;
- "3rd-Party Finality" comments;
- "DOI Interests in Finality" comments;
- "Due Process" or "Fairness" comments;
- Recommendations from commenters;
- "Federal Acknowledgment" comments generally; and
- "General/Other Comments."

Note: the following groupings of comments reflect a fair summary of all the comments submitted, both verbal and written, but are not intended to provide an exhaustive listing of all the comments submitted.

a. *Scope of Petitioners - 25 C.F.R. § 83.47*

These comments focus on which entities are allowed to re-petition.

- The Puyallup Tribe of Indians, the Federated Indians of Graton Rancheria, and the Santa Ynez Band of Chumash Indians support retaining the ban on re-petitioning.
- The Federated Indians of Graton Rancheria noted its support for DOI's rationale for retaining the ban, as stated in the 2022 proposed rule[2].
- The Puyallup Tribe of Indians said petitioners unable to meet the criteria for "community" and "political influence or authority" for periods before 1900 should not be allowed to re-petition based upon the 2015 final rule[3] changes which relax that standard.
- Connecticut's congressional delegation, made up of Senators Blumenthal and Murphy and Representatives Larson, Courtney, Delauro and Himes, generally oppose re-petitioning but offers that if DOI does move forward, it should implement a more limited standard where "any re-petitioning should exclude those Tribes where a U.S. District Court has reviewed the denial and upheld it." They believe that, in these instances, "not only has the [BIA] determined the petitioner has failed to provide sufficient evidence to meet all the regulatory criteria, but an independent judicial body has also made a similar determination."
- A number of commenters support broader re-petitioning where, as stated by Steilacoom Tribal Chairwoman Unzueta, all petitioners that "have been harmed by this broken system should have an opportunity to re-petition." Among these commenters were representatives from the Golden Hill Paugussett Tribe, the MOWA Band of Choctaw Indians, the Eastern Pequot Nation, the Ma-Chis Lower Creek Indian Tribe of Alabama, the Muwekma Ohlone Tribe, the Burt Lake Band of Ottawa and Chippewa Indians, and the Chinook Indian Nation, as well as individual citizens and supporters of non-federally recognized entities.

b. *Change in Rule / New Evidence - 25 C.F.R. § 83.48*

Many commented on the "limited" or "narrow path" to re-petitioning offered by DOI in the proposed rule. Some of these comments discussed the legal standard for reviewing requests to re-petition, and others commented on the change in the proposed rule and new evidence thresholds themselves. While most Federally recognized Indian Tribes that commented oppose the proposed rule, many offered the suggestions below in the event DOI decides to move forward.

- The Puyallup Tribe of Indians believes the "new evidence" exception will allow petitioners to submit new evidence where their own initial research was inaccurate. Similarly, the Shawnee Tribe believes allowing a second bite at the apple encourages groups to prematurely submit petitions, increasing burdens on all parties. Further, the Shawnee Tribe notes that petitioners, as it stands, may withdraw their petitions to gather further evidence if needed, then resubmit their petitions under 25 CFR Part 83.30.
- The Yuhaaviatam of San Manuel Nation and the Shawnee Tribe believe "new evidence" is

[2] 87 FR 24908 (April 27, 2022).
[3] 80 FR 37862 (July 1, 2015)

not a compelling reason to allow re-petitioning. Similarly, the Eastern Band of Cherokee Indians believes "new evidence" is not a valid basis for allowing re-petitioning because petitioners know the criteria and standards beforehand, can withdraw their petition when and if new evidence is uncovered and resubmit its petition later. The Swinomish Indian Tribal Community believes the only check on the "new evidence" exception is the AS- IA's determination on whether the reasons for re-petitioning under the "new evidence" standard are "plausibly alleged." Otherwise, Swinomish Indian Tribal Community believes petitioners can simply allege evidence was not considered by the Department or seek re-petitioning after locating new evidence decades after the administrative record has closed.

- The Suquamish Indian Tribe of the Fort Madison Reservation and the Muckleshoot Indian Tribe believe "new evidence" does not justify authorization to re-petition, noting that historic records, which must be relied upon heavily by petitioners, are not "new evidence"; that petitioners have had ample time to research and prepare their petitions; and that petitioners can seek reconsideration.
- The Tulalip Tribes, the Swinomish Indian Tribal Community, the Shawnee Tribe, the Seneca Nation of Indians, and the Eastern Band of Cherokee Indians ask DOI to eliminate the "new evidence" requirement. The Seneca Nation of Indians asks rhetorically how DOI can justify a one-time re-petitioning due to "new evidence" and not grant another opportunity based on "new evidence" in 10 or 20 years?
- The Puyallup Tribe of Indians, the Shawnee Tribe, and the Eastern Band of Cherokee Indians take issue with the "new technology" rationale, which they believe may provide "limitless opportunities to re-petition."
- The Tulalip Tribes strongly encourage DOI to retain the ban on re-petitioning, but also suggested that DOI reduce the five-year time limit to request re-petitioning to one year. The Eastern Band of Cherokee Indians believe the five-year time limit was applied without consideration of new technology, which can improve vastly within two or ten years, and is undermined by potential future changes to the regulations.
- The Tulalip Tribes provide that if DOI moves forward with the proposed rule, despite its opposition, the 90-day response time to re-petitions should be extended "by at least twofold."
- The Shawnee Tribe notes that "new evidence" is not defined and that "the proposed rule sets forth no standard the petitioner must meet regarding what constitutes 'new' evidence." The Eastern Band of Cherokee Indians asked that the term "new evidence" be defined. The Federated Indians of Graton Rancheria note that Federal Rules of Civil Procedure (F.R.C.P.), at Rules 59 and 60, dictates that "new evidence" is not just "*any* new evidence," but requires "a showing that the evidence was discovered after the judgment, could not have been discovered through the exercise of reasonable diligence, and likely would have changed the outcome." The Federated Indians of Graton Rancheria recommend DOI adopt Rule 59 and Rule 60's approach to "new evidence" into the proposed rule at 25 CFR section 83.48(a)(2).
- The Eastern Band of Cherokee Indians requested that DOI require third-party consent to authorize re-petitioning.
- The Eastern Band of Cherokee Indians ask DOI to implement a "preponderance of the evidence"/"more likely than not" standard for applications to re-petition, instead of the standard described as akin to a motion to dismiss standard under F.R.C.P. Rule 12(b)(6).
- The Eastern Band of Cherokee Indians recommends a ban on tolling pending judicial review.
- Many individual commenters support a consideration to re-petition based upon "new evidence", noting that historic records are being made available where they were not before because of improvements in technology. Commenters noted the judicial process and its

recognition of new evidence as a well-known pathway toward more equitable outcomes.

- The North Carolina Commission of Indian Affairs believes the five-year timeframe to submit a request to re-petition should be stricken and open-ended to allow petitioners sufficient time to acquire additional research with new technology. Similarly, the Haliwa-Saponi Indian Tribe, a State-recognized Tribe in North Carolina, suggested the time frame be increased from five years to ten years.

c. Documentation / Standard of Review - 25 C.F.R. § 83.55

Commenters provided input on various issues regarding required documentation to support requests to re-petition, and the standard of review relating to requests to re-petition. Many of these comments are summarized below.

- The Puyallup Tribe of Indians said the proposed rule is ambiguous and misleading and does not use clear language to explain the phrase "plausibly allege," resulting in two issues: 1) knowledge of federal court civil practice is required to understand and comment on this part of the rule; and 2) questions about whether the standard is the same as the F. R. C. P Rule 12(b)(6)[4] standard for motions to dismiss or differs in some respects.
- Similarly, the Muckleshoot Indian Tribe questioned DOI's reference to the motion to dismiss standard and asked DOI to confirm it will not implement a fact-finding threshold in its review. Muckleshoot Indian Tribe also wondered why DOI was referring to this process as "limited" and "narrow" when it is broader than the 2014 draft regulations[5] approach to re-petitioning.
- The Puyallup Tribe of Indians disagrees with DOI's position that the proposed rule provides a "limited" and "narrow path" to re-petitioning, noting the standard for a motion to dismiss under F.R.C.P. Rule 12(b)(6) is ""exceedingly low, and throws the door wide open to petitioners by unnecessarily limiting the Department's ability to evaluate the truth of previously denied petitioners' allegations in support of a request to re-petition and excluding only re-petition requests that are facially frivolous." The Puyallup Tribe of Indians suggests DOI adopt a standard of review akin to F.R.C.P. Rule 60(b)(6)[6] instead of the motion to dismiss standard under F.R.C.P. Rule 12(b)(6).
- The Shinnecock Indian Nation disputed comments from tribes that have never been through the process and detailed document destruction during the Jim Crow era as an example of issues petitioners must overcome.
- Individual commenters noted the historic colonial violence and injustices that have made it difficult to gather adequate documentation.
- One commenter said petitioners should be able to provide documentation of genocidal tactics resulting in document destruction in place of certain documentation needed to satisfy certain criteria.
- Another commenter said California Tribes have unique circumstances that require special consideration, such as the specific pre-contact political economies of the state's Tribes, most of whom were hunter/gatherer/fisher peoples; the region's repressive colonial history

[4] Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing - (b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: - (6) failure to state a claim upon which relief can be granted.

[5] 79 FR 30766 (May 29, 2014).

[6] Rule 60. Relief from a Judgment or Order - (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief.

including the Spanish mission system, indenture under Mexican rule, and the post-Gold Rush genocide; as well as a long precedent of outsiders dismissing the region's small Tribes as "extinct."

- Another commenter believes State Recognized Reservations, such as those in Connecticut, should be valued over political influence against petitioners in the process.
- The Towns of Ledyard, North Stonington, and Preston, CT believe the Office of Federal Acknowledgment (OFA) is better suited to review requests for re-petitioning than the AS-IA office, that granted requests to re-petition should be open to challenge in court by interested third parties, and that the comment period on requests should be "at least six months."
- The Connecticut Attorney General believes the motion to dismiss standard is arbitrary and capricious and recommends that DOI instead adopt the standard articulated in Rule 60 of the F.R.C.P.
- Petitioners Ramapough Munsee Nation, Eastern Pequot Tribal Nation, Golden Hill Paugussett, and Muwekma Ohlone Tribe shared their frustration with submitting all the required documentation to meet the criteria but then ultimately being denied Federal acknowledgment.

d. *3rd Party-Finality - 25 C.F.R. § 83.4*

The following comments shed light on the interests of third parties in the Federal acknowledgment process.

- The Santa Ynez Band of Chumash Indians believes re-petitioning unfairly subjects third parties to the burden of responding to petitioners' arguments, noting the past state and local efforts to oppose the recognition of the Eastern Pequot Indians; Schaghticoke Tribal Nation; Paucatuck Eastern Pequot Indians; Golden Hill Paugussett Tribe; Mohegan Indian Tribe; and Mashantucket Pequot Indian Tribe, and the efforts for Washington State Tribes to oppose petitions in order to protect treaty fishing rights, sovereignty, Tribal membership, lands, resources, and infrastructure. The Confederated Tribes of Siletz Indians also commented on the burden placed on Federally recognized Indian Tribes.
- The Eastern Band of Cherokee Indians believes there is a heavy burden placed on Federally recognized Indian Tribes by re-petitioning, highlighting, as an example, "six groups that have falsely and fraudulently claimed to be Cherokee and that already undergone and completed the Part 83 process" and the burden on resources these petitions place on the Eastern Band of Cherokee Indians – resources which the Tribe could use to improve the lives of its citizens instead..
- The Delaware Nation "objects to any changes to or recission of the ban on re-petitioning under Part 83." The Tulalip Tribes also urge DOI to retain its ban on re-petitioning, calling the proposed rule "fatally flawed" and stating that it "contravenes Federally recognized Indian Tribes' settled expectations of finality."
- Similarly, the Suquamish Indian Tribe of the Fort Madison Reservation and the Muckleshoot Indian Tribe stated the finality interests of third parties weigh strongly against endless re-petitioning, saying "after almost 50 years of decisions under the Part 83 process, States, local governments, Federally recognized Indian Tribes, and the federal government have a compelling interest in repose and the finality of tribal acknowledgment decisions. The Shawnee Tribe echoes these concerns and believes the proposed rule violates federal law and should not be finalized. Instead, the Shawnee Tribe believes DOI should provide the court a more thorough explanation of its reasoning for retaining the ban.

- The Confederated Tribes of Siletz Indians believes that DOI should provide further clarification on the scope of re-petitioning, noting that "re-petitioners should not be open-ended in which a group on re-petition can now claim to be a totally different group than it alleged to be in its original petition and was found to be by the Bureau [of Indian Affairs]."
- The Tulalip Tribes believe the proposed rule provides for "unending" challenges for denied petitioners to seek "further bites at the apple." The Swinomish Indian Tribe believes re-petitioning will create an ongoing cycle of review and exhaust DOI resources, prevent DOI from reviewing new petitions, and exhaust the resources of Federally recognized tribes.
- The Morongo Band of Mission Indians believes third parties "deserve a speedier evaluation process," noting that tribes and other third parties have invested extensively to oppose petitions that could impact their economies, jurisdiction, etc. The Morongo Band of Mission Indians believes the current process provides ample opportunities for petitioners' interests and thinks re-opening petitions for further review is unnecessary.
- The Puyallup Tribe of Indians similarly believes that third party interests in finality weighs strongly against endless re-petitioning allowed under the proposed rule. The Yuhaaviatam of San Manuel Nation disagrees that third party interests are outweighed by re-petitioners' recognition interests when DOI concedes that it is "unlikely to result in any change in its prior decision."
- The Puyallup Tribe of Indians commented that third parties should have 180 days to comment on re- petition requests instead of 90 days, and also that notices provided under the proposed Section 83.51 should be provided to "active participants in any previous administrative proceeding or federal court proceeding concerning a previously denied petitioner including via amicus curiae or those granted formal intervention." Relatedly, the Yuhaaviatam of San Manuel Nation believes the 90-day comment period for third parties is too short when compared to the 5-year deadline for unsuccessful petitioners to request authority to re- petition.
- The Towns of Ledyard, North Stonington, and Preston take issue with DOI's redaction requirements and believe DOI should implement regulations requiring that information relevant to the decision be made available to interested parties before the comment period begins.
- The Kent School and the Town of Kent highlight the decades of investments of "millions of dollars in participating in the rulemaking process and subsequent legal challenges." They recommend DOI withdraw the proposed rule - which they believe is arbitrary and capricious; republish the 2022 proposed rule[7]; and revise the 2015 final rule[8] so the standards for acknowledgement remain the same.
- The Connecticut Attorney General believes the proposed rule fails to "Meaningfully" consider third-party reliance interests, stating re-petitioning brings the threat of extensive land claims, loss of state and local government jurisdiction and tax base, adverse environmental and land use impacts, casinos, and other issues. Connecticut's congressional delegation, Senators Blumenthal and Murphy, and Representatives Larson, Courtney, Delauro, and Himes, shared these same concerns.
- Non-federally recognized groups, like the Muwekma Ohlone Tribe believe third-party interests are not enough to outweigh limited re-petitioning, and that the proposed rule strikes the proper balance in weighing the competing interests. Other non-federally recognized entities, such as the Chinook Indian Nation and the Eastern Pequot Tribal Nation referenced the need to ensure that politics and third parties do not get in the way of

[7] 87 FR 24908 (April 27, 2022).
[8] 80 FR 37862 (July 1, 2015).

recognition.

- The Chinook Indian Nation believes third party comments should be strictly limited to comments on the Request for Authorization to Re-petition ("RAR"), and the rule should be clear that there can be no *ex parte* contacts or other attempts to influence the agency's decision on the RAR or on a re-petition if a RAR is successful.

e. DOI Interests in Finality

The comments below reference DOI interests in finality specifically.

- The Eastern Band of Cherokee Indians, and the Shawnee Tribe believe the proposed rule will burden DOI, where resources "are better spent reviewing new and pending petitions." Eastern Band of Cherokee Indians also referenced the increase in the BIA's Freedom of Information Act ("FOIA") requests resulting from the proposed rule as a concern. The Shawnee Tribe referenced increased notice and comment periods, time spent reviewing submitted materials, time spent preparing decisions, as well as FOIA requests and responses as additional DOI burdens resulting from the proposed rule.
- The Shawnee Tribe noted that DOI should be prepared to receive new RARs each time the regulations are revised. Also, the Shawnee Tribe noted that based on past final determinations, DOI can expect that many of the 34 current unsuccessful petitioners, as well as future unsuccessful petitioners, would likely submit RARs, many resulting in costly litigation.
- The Shinnecock Indian Nation said that every entity that should be on the list of Federally recognized Indian Tribes but is not, is a horrible mistake. Shinnecock noted the 2015 final rule[9] denied the right to re-petition, which federal courts have said is not right, while acknowledging that petitioners must still provide proof that would change the outcome of a prior finding.
- Another commenter rhetorically asked, what the cost is, other than "bureaucratic time and effort," for allowing re-petitioning?
- The Towns of Ledyard, North Stonington, and Preston, Connecticut believe re-petitioning will result in politicized decision-making and litigation and that principles of *res judicata* and finality should govern.
- The Kent School and the Town of Kent believe re-petitioning will call into question the legitimacy of prior approvals and the 2015 final rule. The Kent commenters noted that DOI is limited by the definition of Indian Tribe in the Constitution and the 2015 final rule weakened DOI's criteria in violation of the Administrative Procedures Act (APA).

f. Due Process / Fairness

The following comments discuss due process and fairness with respect to the proposed rule. While many of the comments were high-level and overarching, due process and fairness were issues raised in the *Burt Lake* and *Chinook* litigation, which warrant a separate grouping for these comments.

- The Santa Ynez Band of Chumash Indians, the Choctaw Nation of Indians, and the Morongo Band of Mission Indians believe unsuccessful petitioners have opportunities for redress through the federal courts or Congress. The Eastern Band of Cherokee Indians

[9] 80 FR 37862 (July 1, 2015).

agrees that DOI prior decisions are sound and notes that unsuccessful petitioners had opportunities to respond to OFA's proposed negative findings and also appeal to an Administrative Law Judge (ALJ).

- The Puyallup Tribe of Indians disagrees that unsuccessful petitioners will not be able to relitigate the reasoning and analysis of DOI's prior determinations, and also disagrees with what it refers to as the unlimited *de novo* review that will be conducted as a result of the current proposed rule.
- The Eastern Band of Cherokee Indians believe the proposed rule is unfair to pending and future petitioners who may have legitimate petitions, stating "requiring groups with valid claims to wait their turn for review of their original documented petitions while [RARs] from unsuccessful petitioners are considered would be an affront to legitimate sovereign nations whose status has not yet been recognized by the United States."
- The Tunica-Biloxi Tribe of Louisiana supports the conditional, time-limited opportunity to re-petition, based on principles of fairness and transparency and its understanding of the rigors of the Federal acknowledgment process, and noting that many petitioners might not have had the resources or expertise to meet the criteria during their initial petition process.
- Many individual commenters believe the proposed rule provides fairness to unsuccessful petitioners, particularly where such petitioners experienced what they perceive as unfair treatment related to their initial petitions.
- The Burt Lake Band of Ottawa and Chippewa Indians noted how long the proposed re-petitioning process might take, estimating the timeline for BIA decisions might approach 44 years and referring to that as "insufficient justice for re-petitioners."
- The Eastern Pequot Tribal Nation shared details about unfairness in its initial petition process, and the Chinook Indian Nation referenced the 2015 final rule[10] purported efforts to provide consistency, fairness, and efficiency, but then also prohibiting re-petitioning.
- Arizona State University's Indian Legal Clinic noted its experience with the Federal acknowledgment process, and provided support for the proposed rule as consistent with efforts to make the process more fair and to create a pathway for previously denied petitioners to clarify their status with the federal government.
- The MOWA Band of Choctaw Indians referenced former Assistant Secretary-Indian Affairs, Kevin Gover, and his statements that petitioners like MOWA Band should be "permitted another opportunity under revised processes to pursue recognition." Noting the recent overturning of the *Chevron* doctrine, MOWA Band believes a re-petitioning process "not only aligns with the principles of justice and fairness but also provides a necessary administrative pathway for Tribes to seek reconsideration without resorting to the courts."

g. Recommendations

Several commenters provided recommendations for the proposed rulemaking, some in the form of recommended edits to sections of the proposed rule and others more general.

- The Delaware Nation recommends DOI remove the 2015 final rule[11], which changed the criteria, and reinstate the 1994 final rule[12]. The Tribe believes the ban on re-petitioning would then be legally defensible in court.
- The Federated Indians of the Graton Rancheria recommended a stricter standard of review

[10] 80 FR 37862 (July 1, 2015).
[11] 80 FR 37862 (July 1, 2015).
[12] 59 FR 9280 (February 25, 1994).

since DOI has already performed a detailed analysis of the petition related to a RAR, so DOI's posture in this instance is more "akin to a request for a new trial or relief from judgment under F.R.C.P. 59 and 60," which allow reopening of cases in "limited situations, to be used sparingly and in extraordinary circumstances."

- The Swinomish Indian Tribal Community offered suggested language to 25 CFR section 83.48 which would provide for a clear and convincing evidence standard and remove "new evidence" as a possible reason to submit a RAR.
- The Federated Indians of the Graton Rancheria offered proposed language that would make clear that grants of authorizations to re-petition are final agency actions appealable under the APA.
- The Burt Lake Band of Ottawa and Chippewa Indians believe the proposed rule provides a subjective standard or review, and requests that the rule incorporate an independent reviewer into the process, such as an ALJ or a retired judge. Burt Lake recommends the "decision on whether there is a factual basis to grant an application for re-petitioning . . . be shortened to 90 days" and "if the independent reviewer does not decide the matter in 90 days, the application for re-petitioning is approved and petitioner moves to the next step."

h. Federal Acknowledgement / Recognition Generally

The following comments deal with the Federal acknowledgment process generally or perhaps with specific tribal entities' petitions for acknowledgment.

- The Shawnee Tribe referenced false appropriation of Tribal identity as an issue, noting that Federally recognized Indian Tribes view the Federal acknowledgment process as intended to sort out false appropriators from legitimate Tribes.
- The Shinnecock Nation said the "search for the truth must be the most important goal of the Federal acknowledgment process," and shared specific details about its path toward recognition.
- Many individual commenters expressed support for the recognition of the Golden Hill Paugussett Tribe of Connecticut and the Schaghticoke and Eastern Pequot Tribes of Connecticut. Individual commenters also provided support for the recognition of the Chinook Indian Nation, the Mewekma Ohlone Tribe, and the Ma-Chis Lower Creek Indian Tribe as well.
- Commenters generally supported federal recognition for moral reasons, and others for reasons such as improved economic development, jobs opportunities, increased Tribal and federal resources to the community, and tourism.

i. General / Other Comments

The following comments were general in nature or related to an issue that not many commenters responded to.

- The Shinnecock Indian Nation recommended DOI consult with Tribes that have been through the process, suggesting the implementation of a Tribal Advisory Committee made up of Federally recognized Indian Tribes that have been through the Part 83 process.
- The Yuhaaviatam of San Manuel Nation, the Seneca Nation of Indians, the Federated Indians of the Graton Rancheria, the Muckleshoot Indian Tribe, and the Suquamish Indian Tribe of the Fort Madison Reservation support DOI's 2022 proposed rule and urges DOI to retain the ban on re-petitioning. The Yuhaaviatam of San Manuel Nation questions why

DOI proposed re-petitioning in response to the *Burt Lake* court decision when the court did not order it to do so. Eastern Band of Cherokee similarly notes the decisions in *Burt Lake* and *Chinook* only require DOI to provide a fuller, more detailed explanation for its "already sound policy."

- The Swinomish Indian Tribal Community urges DOI to modify the proposed rule and narrow the circumstances for seeking possible re-petitioning, and believes re- petitioning should not be available to any petitioner that failed to satisfy the seven mandatory criteria in Part 83, noting the Part 83 process is fact-intensive, lengthy, and affords petitioners adequate due process.
- The Shawnee Tribe believes the proposed rule should include third party consent requirements, regardless of whether they participated in the prior proceeding, so long as they have already dedicated time and expense into the exhaustive Part 83 process.
- The Suquamish Indian Tribe of the Fort Madison Reservation and the Muckleshoot Indian Tribe believe 90 days is too short a timeframe for third party comments and suggest a minimum timeline of 180 days for third party comments. The Seneca Nation of Indians also believes 90 days is too short a timeframe for third party comments, but suggests at least one year from notice of re- petitioning in the Federal Register for third party comments.
- The Shawnee Tribe and the Seneca Nation of Indians assert the five-year timeline for unsuccessful petitioners to submit RARs is arbitrary, with DOI providing no explanation given on why five years is appropriate.
- The Suquamish Indian Tribe of the Fort Madison Reservation and the Muckleshoot Indian Tribe believe notice should be expanded to active participants in any administrative proceeding or federal court proceeding, including *amici*, concerning a previously denied petitioner.
- The Seneca Nation of Indians believes the reviewing entity for RARs should be OFA and not the AS-IA.
- A professional wildland firefighter commented in support of the proposed rule, noting that federal recognition helps preserve forests through bolstering Tribal practices and through Tribal access to funding and other resources when Federally recognized.
- The Towns of Ledyard, North Stonington, and Preston believe DOI is without authority to recognize tribes generally, but also that lifting the ban on re-petitioning was not adequately explained by DOI under APA jurisprudence standards, noting that DOI seems to give little weight to the remedies petitioners have through Congress.
- The Connecticut AG believes DOI lacks the authority to implement the rule.

3. Conclusion

The Part 83 consultations and listening session provided an important opportunity for Federally recognized Indian Tribes and other interested individuals and entities, including non-federally recognized petitioners, to offer comments on whether DOI should implement a limited and narrow path towards re-petitioning. The comments received provided varying perspectives from fully supportive, to outright against, and many in between. While Federally recognized Indian Tribes generally oppose the proposed rule, they also offered constructive proposals to help address issues they identified within the proposed rule.

Overall, there were over 550 individualized comments received on this rulemaking; 146 of which collectively came from 16 different Federally recognized Indian Tribes and 408 collectively came from present, former, prospective petitioners, and other interested parties. The majority of the non-tribal comments were supportive of the rulemaking.