

[4310-W7-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

[K00103 12/13 A3A10; 134D0102DR-DS5A300000-DR.5A311.IA000113]

**25 CFR Part 83**

**[Docket ID: BIA-2013-0007]**

**RIN 1076-AF18**

**Federal Acknowledgment of American Indian Tribes**

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

**ACTION:** Proposed Rule.

**SUMMARY:** This proposed rule would revise 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 of the process. The current process has been criticized as “broken” or 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. The proposed rule would reform the process by, among other things, institutionalizing a phased review that allows for faster decisions; reducing the documentary burden; allowing for a hearing on the proposed finding to promote transparency and process integrity; establishing the Assistant Secretary’s final determination as final for the Department to promote efficiency; and establishing objective standards, where appropriate, to ensure transparency and predictability. This publication also announces the dates and locations for tribal consultation sessions and public meetings on this proposed rule.

**DATES:** Comments on this rule must be received by August 1, 2014. *Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule.* Comments on the information collection burden should be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to ensure consideration, but must be received no later than August 1, 2014. Please see the SUPPLEMENTARY INFORMATION section of this notice for dates of tribal consultation sessions and public meetings.

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>. The rule is listed under the agency name “Bureau of Indian Affairs.” The rule has been assigned Docket ID: BIA-2013-0007.

- E-mail: [consultation@bia.gov](mailto:consultation@bia.gov). Include the number 1076-AF18 in the subject line.

- Mail or hand delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, NW, MS 4141, Washington, DC 20240. Include the number 1076-AF18 on the envelope.

Please note that none of the following will be considered or included in the docket for this rulemaking: comments received after the close of the comment period (see DATES); comments sent to an address other than those listed above; or anonymous comments.

Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395-5806 or e-mail to the OMB Desk Officer for the Department of the Interior at [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov). Please send a copy of your

comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

Please see the SUPPLEMENTARY INFORMATION section of this notice for locations of tribal consultation sessions and public meetings.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov. You may review the information collection request online at [http:// www.reginfo.gov](http://www.reginfo.gov). Follow the instructions to review Department of the Interior collections under review by OMB.

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

This proposed rule would comprehensively revise part 83 to comply with plain language standards, using a question-and-answer format. The proposed rule would update the Part 83 criteria to include objective standards and improve the processing of petitions for Federal acknowledgment of Indian tribes. The proposed rule is limited to Part 83 and does not affect federal acknowledgment under any other statutory or administrative authorities. Primary revisions to the process would:

- Provide for a series of reviews that may result in the issuance of proposed findings and final determinations earlier in the process;
- Separate the Departmental review into three main steps whereby:
  - The Office of Federal Acknowledgment (OFA) first reviews the petition and issues a proposed finding;

- If the proposed finding is negative and the petitioner elects to have a hearing before a judge with the Office of Hearings and Appeals (OHA), the OHA judge issues a recommended decision to the Assistant Secretary-Indian Affairs;
- The Assistant Secretary reviews the record, including (if applicable) an OHA judge's recommended decision, and issues a final determination. The final determination is final for the Department and any challenges to the final determination would be pursued in United States District Court.
- Remove the Interior Board of Indian Appeals (IBIA) process by which a final determination can be reconsidered on certain grounds.
- Allow, in limited circumstances, a petitioner previously denied under the regulations to re-petition under the revised rules.

Revisions to the criteria for acknowledgement would eliminate the need for a petitioner to demonstrate that third parties identified the petitioner as a tribe (although this evidence may be submitted in support of other criteria, including (b) (Community) and (c) (Political authority)). The proposed rule would require petitioners to provide a brief narrative with evidence of the group's existence at some point during historical times. The revisions would also define "historical" to be prior to, but as late as, 1900, and require evidence of criteria (b) (Community) and (c) (Political Authority) from 1934 to the present.

The Department is defining historical as 1900 or earlier based in part on the Department's experience over its nearly 40 years in implementing the regulations that any group that has proven its existence in 1900 has proven its existence prior to that time. Accordingly, the Department seeks comment on easing the documentary and administrative burdens and

providing flexibility by defining historical as 1900 or earlier rather than requiring the documentation from as early as 1789 to the present.

Updating the review period for criteria (b) and (c) to 1934 reflects the United States' enactment of the Indian Reorganization Act (IRA), which reversed the Federal Indian policy of allotment and assimilation that was aimed at destroying tribal governments and their communities. The IRA expressly repudiated the failed allotment and assimilation policy and provided a statutory framework to promote and foster tribal governments. Consistent with the existing policies of the IRA, utilizing 1934 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 while maintaining the integrity of the process. This is more fully explained below in section II, Explanation of Rule, under the heading "Criteria."

Other revisions would clarify "substantial interruption" and clarify the existing burden of proof to reflect case law; provide that the Department will strive to abide by page limits for the proposed finding and final determination; and require the Department to post on the Internet those parts of the petition, proposed finding, recommended decision, and final determination that the Department is publically releasing in accordance with Federal law.

## **II. Explanation of Rule**

The following summarizes revisions this proposed rule would make to part 83.

### **Definitions**

The proposed rule consolidates definitions, where possible, deletes unnecessary definitions, and adds appropriate definitions.

## **Scope and Applicability**

The proposed rule would refer to petitioners as such, rather than as “Indian groups” – a term that some have objected to as offensive and that presumes Indian ancestry. The proposed rule would allow, in very limited circumstances, a petitioner previously denied under the regulations to re-petition under the revised rules. If a third party individual or entity has participated in an IBIA or Secretarial reconsideration or an Administrative Procedure Act appeal in Federal court and ultimately prevailed, the denied petitioner may seek to re-petition only with the consent of the individual or organization. If the individual or organization consents, or a third party did not participate in a reconsideration or appeal, an OHA judge will determine whether the changes to the regulations warrant a reconsideration of that particular final determination or whether the wrong standard of proof was applied to the final determination. This determination will be made based on whether the petitioner proves, by a preponderance of the evidence, that re-petitioning is appropriate. Because the changes to the regulations are generally intended to provide uniformity based on previous decisions, re-petitioning would be appropriate only in those limited circumstances where changes to the regulations would likely change the previous final determination. Having an OHA judge review re-petitioning requests promotes consistency, integrity, and transparency in resolving re-petition requests. Requiring third-party consent recognizes the equitable interests of third parties that expended sometimes significant resources to participate in the adjudication and have since developed reliance interests in the outcome of such adjudication. Having weighed these equity considerations, the Department has determined that the proposed rule must acknowledge these third-party interests in adjudicated decisions.

## **Process**

The proposed rule would eliminate the requirement to file a letter of intent. The letter of intent is merely a statement of intent to petition and does not trigger any review by the Department; as such, it is unnecessary as a separate step. Under the proposed rule, the filing of a documented petition would begin the review process.

For transparency, the proposed rule would require that the Department post to the Internet those portions of the petition and the proposed finding and reports throughout the process that the Department is publically releasing in accordance with Federal law. (“Federal law” in this context refers to the Freedom of Information Act, Privacy Act, and any other Federal laws that may limit information the Department publicly releases). The proposed rule would also add a provision to provide the petitioner with the opportunity to respond to comments received during preparation of the proposed finding, before the proposed finding is issued.

The proposed rule would delineate the roles of OFA and the Assistant Secretary in furtherance of transparency, and would revise the process to promote more timely decisions. Specifically, the proposed rule would allow for a Phase I review of criteria (e) (Descent), then (a) (Tribal Existence), (d) (Governing Document), (f) (Membership), and (g) (Congressional Termination) to allow for issuance of a negative proposed finding if any of these criteria are not met. A petitioner who satisfies these criteria, may obtain a review of whether the petitioner satisfies criteria (b) (Community) and (c) (Political Authority). A petitioner may satisfy criteria (b) and (c) through a number of ways, including if it has maintained a State reservation since 1934 or if the United States has held land at any point in time since 1934 for the petitioner. These criteria are appropriate for favorable determinations based on the Department’s particular reliance on collective rights in tribal lands to conclude that an entity constitutes a tribe as

explained in Felix Cohen's 1945 Handbook of Federal Indian Law. This is more fully explained under the heading "Criteria."

If the proposed finding is negative, the proposed rule changes the process by providing the petitioner the right to a hearing before an OHA judge (who may be an administrative law judge with OHA, administrative judge with OHA, or an attorney designated by the OHA Director to serve as the OHA judge). If a hearing is held, individuals and organizations that can make a proper showing of interest or other factors for intervention may participate in the hearing, OFA staff shall be made available for testimony and the OHA judge shall issue a recommended decision to the Assistant Secretary. The rule does not require deference to OFA during the hearing process, but the Department's final determination would continue to be entitled to *Chevron* deference given that the Assistant Secretary would continue to issue the final determination. The goals of the hearing process are to promote transparency and efficiency and to focus the potential issues for the Assistant Secretary's consideration. Following the comment and response periods, and (if applicable) receipt of an OHA judge's recommended decision, the Assistant Secretary would then consider the evidence and publish a final determination. The final determination would be final for the Department.

The proposed rule would delete the IBIA reconsideration process because this process is the only instance in which the Assistant Secretary's decision is subject to IBIA review, the IBIA's jurisdiction for ordering reconsideration is limited, it has been exceedingly rare that IBIA has granted petitions for reconsideration, and the IBIA's heavy caseload has resulted in even further delays in the acknowledgment process. The finality of the Assistant Secretary's decision will allow parties to challenge the decision in United States District Court where all appropriate grounds may be considered.

The Department specifically requests comments on the proposed hearing process and the following questions: (1) who is an appropriate OHA judge to preside over the hearing and issue a recommended decision—an administrative law judge appointed under 5 U.S.C. 3105, an administrative judge with OHA, or an attorney designated by the OHA Director to serve as the OHA judge (the proposed rule defines “OHA judge” broadly to include all three); (2) whether the factual basis for the OHA judge’s decision should be limited to the hearing record; and (3) whether the hearing record should include all evidence in OFA’s administrative record for the petition or be limited to testimony and exhibits specifically identified by the petitioner and OFA. Indian Affairs is working with the Office of Hearings and Appeals (OHA) on a new rule at 43 CFR 4, subpart K, that would establish procedures for such hearings including procedures and limitations on expert testimony.

To promote efficiency, the proposed rule would allow the Assistant Secretary to automatically issue final determinations in those instances in which a positive proposed finding is issued and no timely comments or evidence challenging the proposed finding are received from the State or local government where the petitioner’s headquarters is located or any federally recognized tribe within 25 miles of the petitioner’s headquarters. This 25-mile radius is intended to include federally recognized tribes that may be across State lines but still be close enough to have evidence about the petitioner.

Other process changes the proposed rule would make are: allowing petitioners to withdraw their petitions after active consideration, to provide the petitioner with flexibility if time and resources are not available at that time; limiting the comment periods for proposed findings to 90 days and any potential extensions to 60 days; providing that the Department will strive to abide by page limits in proposed findings and final determinations; and lengthening the Assistant

Secretary's review time from 60 to 90 days because the Assistant Secretary is not involved in the decision-making until the final determination stage. If the Department does not meet its deadlines, parties may file a motion to compel action, as appropriate.

### **Burden of Proof**

The proposed rule would not change the burden of proof set forth in the existing regulations. In the acknowledgment context, courts have examined whether the Department correctly applied the "reasonable likelihood" standard but have not articulated what the standard actually requires. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220–21 (D.C. Cir. 2013). Instead, they have only stated that "conclusive proof" or "conclusive evidence" is not required. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 212 (D.C. Cir. 2013). The proposed rule would incorporate the Supreme Court's clarification—arising from criminal cases in which jury instructions are challenged—that the "reasonable likelihood" burden of proof standard does not require "more likely than not." *Boyd v. California*, 494 U.S. 370, 380 (1990) (explaining that the "reasonable likelihood" standard does not require something to be "more likely than not").

### **Criteria**

Prior to the enactment of the Federal recognition regulations in 1978, the Department utilized an ad hoc approach to recognize tribes. The Department's longstanding ad hoc approach recognized tribes utilizing criteria developed by Felix Cohen. Cohen has since been recognized as the most important Federal Indian law scholar in American history, sometimes known as the "Blackstone of Federal Indian law." As explained in his 1945 Handbook of Federal Indian Law, the passage of the IRA in 1934 prompted "extensive" analysis by the Commissioner of Indian

Affairs or the Solicitor's Office of what groups or bands constituted Indian tribes for purposes of federal law. Cohen then summarized that analysis as follows.

The considerations which, *singly or jointly*, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:

- (1) That the group has had treaty relations with the United States.
- (2) That the group has been denominated a tribe by act of Congress or Executive order.
- (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- (4) That the group has been treated as a tribe or band by other Indian tribes.
- (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and social solidarity of the group. Ethnological and historical considerations, although not conclusive, are entitled to great weight[.]

Handbook of Federal Indian Law at 271 (1945) (emphasis added). The proposed rule would adhere to these foundational legal principles while substantially reducing the documentary burden on petitioners and the public and review time by the Department.

The changes proposed in the proposed rule remain true to these fundamental standards and depart only in very modest ways from our existing Part 83 criteria. Consistent with the Federal policy of the IRA, the proposed rule would evaluate the community and political authority criteria from 1934 to the present. The starting year coincides with the 1934 passage of the IRA, which was a turning point in the Federal government's relationship with Indian tribes, recognizing and promoting tribal sovereignty. When Congress enacted the IRA, it also provided an avenue for tribes to reorganize as political entities with a political structure that facilitated the

government-to-government relationship with the Federal Government. In other words, the IRA represented a sea change in Federal policy that promoted tribal governments by providing a framework that would make it easier for the Federal Government to interact with the tribe as an independent sovereign nation. The passage of the IRA in 1934 was a communication to tribes that the Federal Government would no longer pursue destruction of tribal governments and communities. Prior to this date, tribes had little to gain, and much to lose, by making themselves known to the Federal Government. To the contrary, Federal governmental policies prior to the IRA were aimed at dissolving tribes. While tribes existed as communities governed by political structures prior to 1934, the IRA encouraged tribes to document this framework through a constitution or otherwise. Further, the Department recognizes the limitations inherent in documenting community and political authority prior to 1934 and maintains that it is logical to deduce that a tribe in existence when the IRA was passed was in existence historically. Tribes that survived decades of harsh government policies and treatment leading up to the passage of the IRA should not be required to show documentation of their continuous existence, in spite of such harsh policies and treatment, up to that point.

Criteria (b) and (c) examine the internal community and the political authority of the petitioner. Consistent with the current regulations, the primary focus is on the petitioner and not the nature of the petitioner's relationship, if any, with the Federal Government. By utilizing 1934 as a starting point of evaluation, this proposed rule does not intend to change current practice regarding the types of evidence that may be submitted to establish criteria (b) and (c). Consistent with previous decisions, petitioner's may continue to submit evidence of interactions with Federal and other officials to the extent it illustrates community or political authority. While the Department previously considered utilizing the 1934 date but did not adopt it in the

1994 rulemaking, the Department's 20 years of experience since then suggests that the heavy administrative burden both on the petitioner and the Department of submitting and reviewing documentation back to 1789 is not justified.

The proposed rule would replace the existing criterion (a), currently at Section 83.7(a). Currently, criterion (a) requires parties external to the petitioner to identify the petitioner as an Indian entity from 1900 to the present. This requirement is being eliminated because the absence of such external identifications does not mean a tribe did not exist. Tribes may have insulated themselves from the outside world for protection, for example. While external identifications may provide evidence of the other criteria, the absence of external identifications alone is not appropriate for determining a tribe does not exist. The proposed rule would require the petitioner to provide a brief narrative, and evidence supporting the narrative, of its existence as an Indian tribe, band, nation, pueblo, village or community generally identified at some point in time during the historical period (prior to and including 1900). The proposed rule would continue to allow the submittal of evidence that would have been provided under the existing criterion (a) in support of criteria (a) (tribal existence), (b) (distinct community), and/or (c) (political influence or authority).

The proposed rule would modify criterion (b) (distinct community) to include objective standards for clarity to petitioners and the public. For example, the proposed rule would clarify that the existing "predominant portion" standard in (b) is satisfied if 30 percent of the petitioner's members constitute a distinct community. This 30 percent standard follows the percentage of a tribe's eligible voters that Congress, in the IRA, required to vote on the tribe's governing document. With this percentage requirement, Congress signaled that this is a sufficient percentage of a tribe's membership to convene as a community to represent, and fulfill an

official act on behalf of, the entire community. While the term “predominant portion” may be understood in common usage to be a majority, here it can mean as low as 30 percent in accordance with this standard established by Congress.

Consistent with earlier decisions, the proposed rule would clarify that the Department may utilize statistically significant sampling, rather than examining every individual relationship for petitioners with large memberships. This sampling promotes efficiency in review of petitions.

The proposed rule would add an example of evidence that may be submitted in support of criteria (b), particularly, placement of petitioners’ children at an Indian boarding school or other Indian educational institution. In the past, the Department may have accepted such evidence only when the child was identified as a member of a specific tribe in school enrollment records. Allowing for this evidence even where a specific tribe may not be identified reflects that the Federal Government identified those children as Indian, and where there are children from one area placed at an Indian boarding school, this is indicative of an Indian community in that area.

The proposed rule would also add that a petitioner may satisfy criteria (b) and (c) if it has maintained a State reservation since 1934 or if the United States has held land at any point in time since 1934 for the petitioner. Regardless of what a State’s process or criteria are for acknowledging a tribe, if a State recognizes land as a reservation for a petitioner for nearly the past 80 years continuously, it indicates the existence of a community possessing the requisite political cohesiveness to maintain the tribal land base. Maintenance of a State reservation since 1934 until present indicates a high likelihood that the community actually interacted throughout this time period by providing a physical location for such interactions. Likewise, maintenance of a State reservation since 1934 also indicates the petitioner had political authority/influence

during this time period because some governing structure was necessary to address activities on the land and interact with the State regarding the reservation. In short, a State reservation is a formalization of “collective rights in Indian land” that the Department identified as a dispositive indicator of an Indian tribe. Nevertheless, the proposed rule would require that the petitioner still meet the other criteria (e.g., criteria (a), (d), (e), (f) and (g)).

The proposed rule would retain the current rule’s provisions that allow certain evidence of criterion (b) to serve as evidence of criterion (c) and vice versa (§ 83.7(b)(2)(v) and (c)(3) of the current rule). These cross-over provisions reflect that evidence of criteria (b) and (c) may combine to show the existence of a tribe.

The proposed rule would define “substantial interruption” in criteria (b) and (c) to mean generally more than 20 years. This definition is intended to provide some clarity and uniformity with past practice in early Departmental acknowledgment decisions. Additionally, the proposed rule would allow petitioners to submit evidence for pre-1934 periods as relevant to (b) and (c), but would not require it. This is meant to provide flexibility in those instances where documentary evidence around 1934 may be lacking but pre-1934 evidence is relevant to the criteria.

We received several comments on the Discussion Draft that a bilateral political relationship should not be required for criterion (c) (Political Authority). The existing text of criterion (c) does not include such a requirement, and therefore the proposed rule makes no revision on this point. Political influence or authority does not mean that petitioner’s members must have actively participated in the political process or mechanism. Just as there are various levels of

engagement in Federal and State government by Federal and State citizens, engagement by tribal members will vary throughout the tribe and active reciprocating political action is not required.

The proposed rule would establish that 80 percent of the petitioner's members must descend from a tribe that existed in historical times (prior to 1900, as discussed above) to meet criterion (e). This quantification would make the standard more objective and is consistent with earlier decisions. Additionally, the proposed rule would clarify that criterion (e) may be satisfied by a roll prepared by the Department or at the direction of Congress, and the Department will rely on that roll as an accurate roll of descendants of the tribe that existed in historical times; otherwise, the petitioner may satisfy criterion (e) through the most recent evidence available for the historical time period (prior to 1900). The Department will not require evidence from years prior to that most recent evidence. The submission of a current membership list in support of this criterion has been moved to the section on what a documented petition must include.

In criterion (f), requiring the petitioner to be composed principally of persons who are not members of already acknowledged tribes, the proposed rule would add that members of petitioners who filed a petition by a certain date (2010) and then joined a federally recognized tribe would not be counted against the petitioner. The reason for this addition is to ensure that petitioners are not penalized if their members choose to affiliate with a federally recognized tribe in order to obtain needed services because of the time the petitioning process takes. The reason 2010 was chosen as the date is because four years have passed since then, and ideally, a final decision would be issued within at least four years. For all other purposes, criterion (f) remains unchanged.

The proposed rule would shift the burden of proof for criterion (g) to the Department to show that Congress has terminated or forbidden a relationship with the petitioner.

### **Previous Federal Acknowledgment**

To align with current practice, the proposed rule would clarify the criteria a petitioner must meet after it has established that it was previously federally acknowledged. It would also delete the provision regarding petitions that seek to show previous Federal acknowledgment but are awaiting active consideration as of the date the regulations are adopted because this provision applied only at the adoption of the last version of the regulations in 1994 when consideration of previous Federal acknowledgment was codified.

### **III. Tribal Consultation Sessions and Public Meetings**

We will be hosting several tribal consultation sessions and public meetings throughout the country to discuss this proposed rule. Tribal consultations are for representatives of currently federally recognized tribes only, to discuss the rule on a government-to-government basis with us. These sessions may be closed to the public. The dates and locations for the tribal consultations are as follows:

<b>Date</b>	<b>Time</b>	<b>Location</b>
Tuesday 7/1/2014	1:00 p.m. – 4:30 p.m.	Paragon Casino & Resort, 711 Paragon Pl, Marksville, LA 71351
Tuesday 7/15/2014	1:00 p.m. – 4:30 p.m.	BIA Regional Office, 911 NE 11th Ave, Portland, OR 97232*
Thursday 7/17/2014	1:00 p.m. – 4:30 p.m.	Menominee Casino Resort, N277 Hwy. 47/55, P.O. Box 760, Keshena, WI 54135
Tuesday 7/22/2014	1:00 p.m. – 4:30 p.m.	Cache Creek Casino Resort, 14455 California 16,

		Brooks, CA 95606
Thursday 7/24/2014	8:30 a.m. – 12:00 p.m.	Crowne Plaza Billings, 27 N 27th St, Billings, MT 59101
Tuesday 7/29/14	1:00 p.m. – 4:30 p.m.	Mashpee Wampanoag Tribe Community & Government Center Gymnasium, 483 Great Neck Road – South, Mashpee, MA 02649

\*Please RSVP for the Portland consultation to [consultation@bia.gov](mailto:consultation@bia.gov), bring photo identification, and arrive early to allow for time to get through security, as this is a Federal building. No RSVP is necessary for the other consultation locations.

Public meetings will be held on the following dates and locations:

<b>Date</b>	<b>Time</b>	<b>Location</b>
Tuesday 7/1/2014	8:30 a.m. – 12:00 p.m.	Paragon Casino & Resort, 711 Paragon Pl, Marksville, LA 71351
Tuesday 7/15/2014	8:30 a.m. – 12:00 p.m.	BIA Regional Office, 911 NE 11th Ave, Portland, OR 97232*
Thursday 7/17/2014	8:30 a.m. – 12:00 p.m.	Menominee Casino Resort, N277 Hwy. 47/55, P.O. Box 760, Keshena, WI 54135
Tuesday 7/22/2014	8:30 a.m. – 12:00 p.m.	Cache Creek Casino Resort, 14455 California 16, Brooks, CA 95606
Thursday 7/24/2014	1:00 p.m. – 4:30 p.m.	Crowne Plaza Billings, 27 N 27th St, Billings, MT 59101
Tuesday 7/29/14	8:30 a.m. – 12:00 p.m.	Mashpee Wampanoag Tribe Community & Government Center Gymnasium, 483 Great Neck Road – South, Mashpee, MA 02649

\*Please RSVP for the Portland meeting to [consultation@bia.gov](mailto:consultation@bia.gov), bring photo identification, and arrive early to allow for time to get through security, as this is a Federal building. No RSVP is necessary for the other meeting locations.

## **IV. 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. We considered each tribe’s comments and concerns and have addressed them, where possible, in the proposed 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:* 12,240 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. If this proposed rule is finalized, DOI estimates that the annual burden hours for respondents (entities petitioning for Federal acknowledgment) will decrease by a minimum of 8,510 hours, for a total of 12,240 hours. Because the proposed 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 (b) - (d) 83.7 (f) - (g); 83.7 (e)	83.21 (referring to 83.11 (b) - (d) 83.11 (f) - (g)); 83.21 (referring to 83.11 (e))	Conduct the anthropological and historical research relating to the criteria (b)-(d) and (f)-(g); Conduct the genealogical work to demonstrate tribal descent	869	8,690
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**	166	1,660

		charts.		
83.10(b)	83.27	Respond to the technical assistance letters which may require revising or adding to the above existing forms and overall petition.	140	1,400

We invite comments on the information collection requirements in the proposed rule.

You may submit comments to OMB by facsimile to (202) 395-5806 or you may send an e-mail to the attention of the OMB Desk Officer for the Department of the Interior:

[OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov). Please send a copy of your comments to the person listed in

the FOR FURTHER INFORMATION CONTACT section of this notice. *Note that the request for comments on the rule and the request for comments on the information collection are*

*separate*. To best ensure consideration of your comments on the information collection, we

encourage you to submit them by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE

FEDERAL REGISTER]; while OMB has 60 days from the date of publication to act on the

information collection request, OMB may choose to act on or after 30 days. Comments on the

information collection should address: (a) the necessity of this information collection for the

proper performance of the functions of the agency, including whether the information will have

practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the

collection of information, including the validity of the methodology and assumptions used; (c)

ways we could enhance the quality, utility and clarity of the information to be collected; and (d)

ways we could minimize the burden of the collection of the information on the respondents, such

as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it displays a valid OMB Control Number.

#### **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.

#### **L. Clarity of this Regulation**

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the “COMMENTS” section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections

where you believe lists or tables would be useful, etc.

#### **M. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### **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, proposes to amend chapter I in Title 25 of the Code of Federal Regulations by revising part 83 to read as follows:

### **PART 83 – PROCEDURES FOR ACKNOWLEDGMENT OF FEDERALLY RECOGNIZED 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 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 previously federally acknowledged petitioners?

### **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*

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- 83.25 Who will OFA notify when it begins review of a documented petition?
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- 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 review?
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#### *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 Can the Assistant Secretary extend the proposed finding comment period?
- 83.37 What procedure follows the end of the comment period for a favorable proposed finding?
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- 83.39 What are the procedures if the petitioner elects to have a hearing before an OHA judge?

#### *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; and 43 U.S.C. 1457.

## Subpart A – General Provisions

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

As used in this part:

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.

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 to substantiate its claim that it meets the Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), 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 Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

Federally recognized Indian tribe means an entity listed on the Secretary's list of federally recognized tribes, which the Secretary currently acknowledges as an Indian tribe for purposes of Federal law and with which he/she maintains a government-to-government relationship.

OHA judge means an administrative law judge appointed under 5 U.S.C. 3105, an administrative judge with the Office of Hearings and Appeals, or an attorney with the Office of Hearings and Appeals assigned to preside over the hearing process by the Office of Hearings Appeals.

Historical means 1900 or earlier.

Informed party means any person or organization who submits comments or evidence or requests to be kept informed of general actions regarding a specific petitioner.

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.

Pages means pages containing 1-inch margins and type that is double-spaced and 12-point Times New Roman font.

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 an entity that qualified as an Indian tribe for purposes of Federal law and indicating clearly the recognition of a government-to-government relationship between that entity and the United States.

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

Tribal 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 tribal roll means a list of those recognized as members by the tribe's governing body. In either case, those individuals on a tribal roll must have affirmatively demonstrated consent to being listed as members.

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 for purposes of Federal law and is therefore entitled to a government-to-government relationship with the United States. A positive determination will result in Federal recognition status and the petitioner's addition to the Department's list of federally recognized Indian tribes. An entity may consider itself an Indian tribe and be considered an Indian tribe by other entities, but it does not possess federally recognized status and a government-to-government relationship with the United States unless it is placed on the Department's list of federally recognized Indian tribes. Failure to be included on the list does not deny that the entity is an Indian tribe for purposes other than Federal law. It means only that the entity is not a federally recognized Indian tribe. Federal recognition:

(a) Is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes for purposes of Federal law 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 entities that self-identify as Indian tribes, are located in the continental United States, and believe they meet the criteria for Federal acknowledgment in this part. This part does not apply to Indian or Alaska Native tribes, bands, pueblos, villages, or communities that are federally recognized.

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

(a) The entities listed in the following table cannot be acknowledged under this part unless they meet the requirement in the second column.

<u>The Department will not acknowledge...</u>	<u>Unless...</u>
(1) An association, organization, corporation, or entity of any character formed in recent times	the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community.
(2) 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	the entity can clearly demonstrate it has functioned from 1934 until the present as a politically autonomous community under this part, even though some have regarded them as part of or associated in some manner with a federally recognized Indian tribe.
(3) An entity that is, or an entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship.	N/A
(4) 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,	the entity meets the requirements of paragraph (b) of this section.

splinter, spin-off, or component groups that were once part of previously denied petitioners)	
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(b) A petitioner that has been denied Federal acknowledgment after petitioning under a previous version of the acknowledgment regulations at part 54 or part 83 of this title may re-petition if it meets the requirements of this paragraph.

(1) A petitioner may re-petition only if:

(i) Any third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning; and

(ii) The petitioner proves, by a preponderance of the evidence, that either:

(A) A change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination; or

(B) The “reasonable likelihood” standard was misapplied in the final determination.

(2) To initiate the re-petitioning process, the petitioner must submit to the Office of Hearings and Appeals a certification, signed and dated by the petitioner’s governing body, stating that it is the petitioner’s official request for re-petitioning and explaining how it meets the conditions of paragraph (b)(1) of this section.

(i) The petitioner need not re-submit materials previously submitted to the Department but may supplement the petition.

(ii) The OHA judge may receive pleadings, hold hearings, and request evidence from OFA and the petitioner, and will issue a decision regarding whether the petitioner may re-petition.

(3) The OHA judge’s decision whether to allow re-petitioning is final for the Department and is a final agency action under the Administrative Procedure Act, 5 U.S.C. 704.

### **§ 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 Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), 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. 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 an example of a documented petition in the preferred format, though other formats are acceptable.

(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) Petitioners whose have not submitted complete documented petitions 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 the following petitioners that they must choose by [INSERT DATE 60 DAYS AFTER PUBLICATION OF FINAL RULE] to complete the petitioning process under these regulations. Otherwise, the following petitioners will proceed under the previous version of the acknowledgment regulations as published on February 25, 1994, 59 FR 19293.

(1) Petitioners who have submitted complete petitions or those petitioners that are under active consideration, including those that have received a proposed finding, as of [INSERT EFFECTIVE DATE OF FINAL RULE]; and

(2) Petitioners who have not received a final agency decision as of [INSERT EFFECTIVE DATE OF FINAL RULE].

(c) Petitioners who have submitted a documented petition under the previous version of the acknowledgment regulations and who choose to proceed under these revised regulations do not need to submit a new documented petition.

### **§ 83.8 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 to be met if the available evidence establishes a reasonable likelihood that the facts claimed by the petitioner are valid and that the facts demonstrate that the petitioner meets the criterion.

(1) “Reasonable likelihood” means there must be more than a mere possibility, but does not require “more likely than not.”

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

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

(b) The Department will evaluate petitions:

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

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

(3) Taking into account the limitations inherent in demonstrating historical existence;

(4) Requiring demonstration that these criteria are met on a substantially continuous basis, meaning without substantial interruption;

(5) Interpreting “substantial interruption” to mean a gap, either as a fluctuation in tribal activity or a gap in evidence, of 20 years or less, unless a 20-year or longer gap is reasonable given the history and the petitioner’s circumstances;

(6) Applying these criteria consistently with threshold standards utilized to recognize other tribes under this Part; and

(7) Applying these criteria in context with the history, geography, culture, and social organization of the petitioner.

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

(a) Tribal Existence. *The petitioner must describe its existence as an Indian tribe, band, nation, pueblo, village, or community at a point in time during the historical period.* The petitioner must provide a brief narrative, and evidence supporting the narrative, of its existence as an Indian tribe, band, nation, pueblo, village or community generally identified at a point in time during the historical period. Such evidence can include, but is not limited to, types of evidence used to satisfy the remaining criteria in this section or types of evidence relied on by the Department prior to the promulgation of the Federal acknowledgment regulations.

(b) Community. *The petitioner must now constitute a distinct community and must demonstrate that it existed as a distinct community from 1934 until the present without substantial interruption.* 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. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a random, statistically significant sample of known adult members.

(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 to show that at least 30 percent of the petitioner's members constituted a distinct community at a given point in time.

(i) Rates 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

entity. 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) Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions;

(x) A demonstration of political influence under the criterion in § 83.11(c)(1), which is a form of evidence for demonstrating distinct community for that same time period; or

(xi) Evidence that it has been identified as a community by individuals and entities external to the petitioner.

(2) The petitioner will be considered to have provided sufficient evidence to demonstrate distinct community and political authority 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 known marriages in the entity are between 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).

(3) The petitioner will be considered to have provided sufficient evidence to demonstrate distinct community if it demonstrates either of the following factors:

(i) The petitioner has maintained since 1934 to the present a State reservation; or

(ii) The United States has held land for the petitioner or collective ancestors of the petitioner at any point in time from 1934 to the present.

(c) Political Influence or Authority. *The petitioner must have maintained political influence or authority from 1934 until the present without substantial interruption.* Political influence or authority means a council, leadership, internal process, or other mechanism which the entity has used 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 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 evidence or by other evidence that the petitioner meets the definition of political influence or authority in § 83.1:

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

(ii) Most of the membership considers 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 most 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) A federally recognized Indian tribe has a government-to-government relationship with the petitioner.

(vii) Evidence that it has been identified as politically autonomous by individuals and entities external to the petitioner.

(viii) Show a continuous line of entity leaders and a means of selection or acquiescence by a majority 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.

(3) The petitioner will be considered to have provided sufficient evidence to demonstrate political influence and authority if it demonstrates either of the following factors:

(i) The petitioner has maintained since 1934 to the present a State reservation; or

(ii) The United States has held land for the petitioner or the collective ancestors of the petitioner at any point in time from 1934 to the present.

(d) *Governing Document. The petitioner must submit a copy of the entity's present governing document, including its membership criteria. In the absence of a governing document, the petitioner must provide a written statement describing in full its membership criteria and current governing procedures.*

(e) *Descent. At least 80 percent of the petitioner's membership must consist of individuals who can demonstrate that they descend from a tribe that existed in historical times or tribes that combined and functioned in historical times.*

(1) The petitioner satisfies this criterion by demonstrating descent from a roll directed by Congress or prepared by the Secretary on a descendency basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes.

(2) If no roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion with the most recent evidence available for the historical time period, including, but not limited to:

(i) Federal, State, or other official records or evidence identifying present members or ancestors of present members as being descendants of a tribe or tribes that existed in historical times;

(ii) Church, school, or other similar enrollment records identifying the petitioner's present members or ancestors of present members as being descendants of a tribe or tribes that existed in historical times;

(iii) Historical records created by historians and anthropologists identifying the tribe in historical times or historians and anthropologists' conclusions drawn from historical records identifying the petitioner's present members or ancestors of present members as being descendants of a tribe or tribes existing in historical times;

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a tribe or tribes existing in historical times; and

(v) Other records or evidence identifying present members or ancestors of present members as descendants of a tribe or tribes existing in historical times.

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

(1) 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:

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

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

(2) If a petitioner filed a letter of intent (under a previous version of the regulations) or filed a documented petition prior to 2010, the petitioner's members who were not members of a federally recognized Indian tribe at the time the petitioner filed the documented petition, but who subsequently became members of a federally recognized Indian tribe, will not be considered as members of the federally recognized Indian tribe for purposes of this criterion.

(g) Congressional Termination. *Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the government-to-government 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 previously federally acknowledged petitioners?**

(a) If the petitioner meets the criteria in § 83.11(a) and (d) through (g), the petitioner may prove it was previously acknowledged as a federally recognized Indian tribe 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, 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; or
- (3) Been treated by the Federal Government as having collective rights in tribal lands or funds.

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

- (1) Demonstrate that it meets the Community Criterion at present and Political Authority Criterion since the time of previous Federal acknowledgment to the present by 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), or
- (2) Demonstrate that it meets the Community and Political Authority Criteria since the time of previous Federal acknowledgment.

**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: Office of Federal Acknowledgement, Assistant Secretary – Indian Affairs, Department of the Interior, 1849 C Street 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 thorough explanations of, and citations to supporting documentation for how the petitioner meets each of the applicable criteria, 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 at § 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), 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) Petitioners should exclude from the narrative portion of the documented petition any information that is protectable under Federal law such as the Privacy Act and Freedom of Information Act, as it will be published on the OFA website. If it is necessary to include this information, the petitioner must clearly identify, in writing, the specific information that should be redacted prior to publication on the OFA website and the basis for redacting. The Department will determine whether the redaction is appropriate 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 organizations to submit comments supporting or opposing the petitioner's request for acknowledgment within 90 days of the date of the website posting; and
- (v) The opportunity for individuals and organizations to request to become informed parties.

(2) Notify, in writing, the governor and attorney general of the State in which the petitioner is located and any federally recognized tribe within the State or within a 25-mile radius.

(3) 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.

(c) Publish other portions of the documented petition to the OFA website, to the extent allowable under Federal law.

#### *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 receipt of documented petitions. Petitioners whose documented petitions OFA has not yet begun to review may request that OFA estimate when review will begin.

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

(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 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 organizations under § 83.22(b) and provide the petitioner with at least 60 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 informed parties when it begins review of a documented petition and will provide the petitioner and informed parties 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.

(1) OFA will first determine if the petitioner meets the Descent Criterion (§ 83.11(e)).

(i) OFA will conduct a technical assistance review and notify the petitioner by technical assistance letter of any deficiencies that would prevent the petitioner from meeting the Descent Criterion. Upon receipt of the letter, the petitioner may:

(A) Withdraw the documented petition to further prepare the petition;

(B) Submit additional information and/or clarification within an agreed-upon timeframe; or

(C) Ask OFA in writing to proceed with the review.

(ii) OFA will publish a negative proposed finding if it issues a deficiency letter under paragraph (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 within the agreed-upon timeframe; or

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

(2) If the petitioner meets the Descent Criterion, OFA will next review whether the petitioner meets the Tribal Existence Criterion (§ 83.11(a)), Governing Document Criterion (§ 83.11(d)), the Membership Criterion (§ 83.11(f)), and the Congressional Termination Criterion (§ 83.11(g)).

(i) OFA will conduct a technical assistance review and notify the petitioner by technical assistance letter of any deficiencies that would prevent the petitioner from meeting these criteria. Upon receipt of the letter, the petitioner may:

(A) Withdraw the documented petition to further prepare the petition;

(B) Submit additional information and/or clarification within an agreed-upon timeframe; or

(C) Ask OFA in writing to proceed with the review.

(ii) OFA will publish a negative proposed finding if it issues a deficiency letter under paragraph (2)(i) of this section and the petitioner:

(A) Does not withdraw the documented petition;

(B) Does not respond with information or clarification sufficient to address the deficiencies within the agreed-upon timeframe; or

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

(iii) If the petitioner meets the Descent (§ 83.11(e)), Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(g)), Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria, OFA will either:

(A) Proceed to Phase II-A, if the petitioner asserts that it meets either of the factors in § 83.11(b)(3) and (c)(3); or

(B) Proceed to Phase II-B, if the petitioner does not assert that it meets the factors in § 83.11(b)(3) and (c)(3).

(b) Phase II-A.

(1) OFA will review whether the petitioner meets either of the factors in § 83.11(b)(3) and (c)(3), if the petitioner asserts that it does.

(2) If the petitioner meets either of the factors in § 83.11(b)(3) and (c)(3), OFA will publish a favorable proposed finding in the Federal Register.

(3) If the petitioner does not meet either of the factors in § 83.11(b)(3) and (c)(3), OFA will proceed to Phase II-B.

(c) Phase II-B.

(1) If the petitioner does not meet either of the factors in § 83.11(b)(3) and (c)(3), or the petitioner does not assert that it meets those factors, OFA will conduct the technical assistance review for the Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria (and for previous Federal acknowledgment, if asserted).

(i) OFA will notify the petitioner by technical assistance letter of any obvious deficiencies or significant omissions apparent in the documented petition and provide the petitioner with an opportunity to withdraw the documented petition for further work or to submit additional information and/or clarification.

(A) Petitioners can either respond in part or in full to the technical assistance review letter or ask OFA in writing to proceed with review of the documented petition using the materials already submitted.

(B) If the petitioner requests that materials submitted in response to the technical assistance review letter be again reviewed for adequacy, OFA will provide the additional review. However, this additional review will occur only at the request of the petitioner and is available only once.

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

(2) Following the 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 hold, to the extent allowable by Federal law; and

(ii) The opportunity to respond in writing to the comments and evidence petitioner did not already hold.

(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 Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria are met.

(4) OFA will then proceed with publication of a proposed finding.

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

Technical assistance reviews are preliminary reviews for OFA to tell the petitioner where there appear to be documentary 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 technical assistance review of the documented petition for the Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria.

(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.

(c) OFA will notify petitioners that fail to demonstrate previous Federal acknowledgment after a review of any materials submitted in response to the technical assistance review.

### **§ 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 received on the petition, and petitioners' responses to comments.

(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 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 bottom 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 with the documented petition that temporarily preclude continuing review; and

(2) Approval by the Assistant Secretary of the suspension.

(b) Upon resolving 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 informed parties when it resumes review of the documented petition.

(2) Upon the resumption of review, the time period for OFA to issue a proposed finding will begin anew.

### *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-A, if applicable, or Phase II-B.	six months after notifying the petitioner under § 83.25 that OFA has begun review of the petition
(2) Complete its review under Phase II-A and either issue a favorable proposed finding and publish a notice of availability in the Federal Register, or proceed to Phase II-B.	two months after the deadline in paragraph (a)(1) of this section.
(3) Complete its review under Phase II-B 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) AS-IA may extend these deadlines only if it has approved a suspension under § 83.31(a).

(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: Descent (§ 83.11(e)), Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Membership (§ 83.11(f)), or Congressional Termination (§ 83.11(g)).

(b) A Phase II-A favorable proposed finding will address that the petitioner meets one of the factors in § 83.11(b)(3) and (c)(3) and that the petitioner meets all of the following criteria: the Descent (§ 83.11(e)), Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria.

(c) A Phase II-B proposed finding will address whether the petitioner meets either the Community (§ 83.11(b)) and Political Authority (§ 83.11(c)) Criteria or the previous Federal acknowledgment criteria (§ 83.12(b)) and whether the petitioner meets all of the following criteria: Descent (§ 83.11(e)), Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Membership (§ 83.11(f)), and Congressional Termination (§ 83.11(g)) Criteria.

**§ 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 informed parties; and
- (b) Publish the proposed finding and reports available 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 90-day comment period. During this comment period, the petitioner or any individual or organization may submit the following to AS-IA 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 parties that submit comments and evidence must provide the petitioner with a copy of their submission.

**§ 83.36 Can the Assistant Secretary extend the comment period on the proposed finding?**

(a) AS-IA can extend the comment period for a proposed finding for up to an additional 60 days upon a finding of good cause.

(b) If AS-IA grants a time extension, it will notify the petitioner and informed parties.

**§ 83.37 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 AS-IA does not receive timely comments or evidence challenging the proposed finding from either:

- (1) The State or local government where the petitioner's office is located; or
- (2) Any federally recognized Indian tribe within the State or within a 25-mile radius of the petitioner's headquarters.

(b) If AS-IA has received timely comments and evidence challenging the proposed finding from any of the parties listed in paragraph (a) of this section, then the petitioner will have 60 days to respond with responses, with citations to and explanations of supporting evidence, and supporting evidence cited and explained in the responses. AS-IA can extend the comment response period if warranted by the extent and nature of the submitted comments and evidence and will notify the petitioner and informed parties by letter of any extension. AS-IA will not consider further comments or evidence on the proposed finding submitted by individuals or organizations during this period.

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

(a) At the end of the comment period for a negative proposed finding, the petitioner will have 60 days to:

(1) Elect to challenge the proposed finding in a hearing before an OHA judge by sending a written election of hearing to OFA that lists:

(A) The issues of material fact; and

(B) 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 specifying whether the exhibit is in the administrative record reviewed by OFA; and/or

(2) Respond to any comments and evidence made during the comment period with responses, , with citations to and explanations of supporting evidence, and evidence cited and explained in the responses.

(b) AS-IA can extend the comment response period if warranted by the extent and nature of the comments and will notify the petitioner and informed parties by letter of any extension. AS-IA will not consider further comments or evidence on the proposed finding submitted by individuals or organizations during this period.

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

(a) *Case referral.*

(1) If the petitioner elects to challenge the proposed finding in a hearing before an OHA judge, OFA will refer the case to the Office of Hearings and Appeals.

(2) The case referral will consist of the entire record, including any comments and evidence and responses sent to AS-IA, and a notice of referral containing:

(A) The name, address, telephone number, and facsimile number of the Office of Hearings and Appeals;

(B) The name, address, and other contact information for the representatives of the petitioner and OFA; and

(C) The date on which OFA is referring the case.

(3) Within 5 business days after receipt of the petitioner's hearing election, OFA will send the case referral to the Office of Hearings and Appeals and the notice of referral to the petitioner and each informed party by express mail or courier service for delivery on the next business day.

(b) *Hearing Process.* The Office of Hearings and Appeals will conduct the hearing process in accordance with 43 CFR 4, subpart K.

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

(d) *Recommended decision.* The OHA judge will issue a recommended decision and forward it along with the rest of the record to the AS-IA in accordance with the timeline and procedures in 43 CFR 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:

(1) Upon expiration of the period for the petitioner to respond to comments or upon expiration of the comment period for a positive proposed finding if no comments were submitted; or

(2) If a hearing is held, upon receipt of the OHA judge's recommended decision.

(b) AS-IA will notify the petitioner and informed parties 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.

(b) AS-IA will not consider comments submitted after the close of the response period established in § 83.35 and § 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 informed parties; and

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

(b) If the proposed finding was positive, AS-IA may not issue a negative final determination unless and until AS-IA remands the matter to OFA for the petitioner to receive technical assistance addressing new evidence that would be the basis for the negative final determination.

(1) If OFA concludes that the technical assistance does not resolve the issue presented by the new evidence, OFA will issue a negative proposed finding and individuals and organizations will have the opportunity to comment, and the petitioner will have the opportunity to respond to comments and elect to have a hearing, under the procedures in §§ 83.35 to 83.38;

(2) If the technical assistance resolves the issue presented by the new evidence, then the Assistant Secretary will proceed with § 83.41, and incorporate resolution of the new evidence in the final determination.

(c) 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 Tribal Existence (§ 83.11(a)), Governing Document (§ 83.11(d)), Descent (§ 83.11(e)), 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 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 does not meet the criteria in paragraph (a) of this section.

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

Yes. The 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 shall submit to the Federal Register a notice of the final determination to be published in the Federal Register.

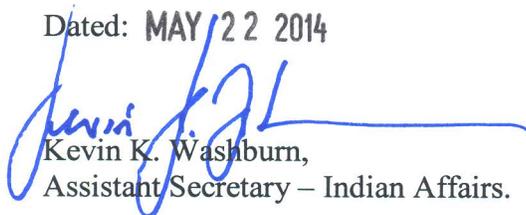
**§ 83.46 How is a petitioner with a positive final determination integrated into Federal programs as a federally recognized Indian tribe?**

(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 recognized 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 federally recognized 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 recognized Indian tribe.

Dated: MAY 22 2014

  
Kevin K. Washburn,  
Assistant Secretary – Indian Affairs.