Comparison Chart

Current Federal Acknowledgment Rule (25 CFR 83) vs. Proposed Federal Acknowledgment Rule (25 CFR 83)

Category	Current Rule	Proposed Rule	Reason for Change
Criteria – (a) (External identification)	Criterion (a) requires external identifications of the petitioner as an Indian entity since 1900.	Would delete the requirement for external identifications, and instead require a brief narrative that petitioner existed at some point in time during the historical period. Evidence of external identifications may still be submitted in support of this criterion and criteria (b) and (c).	The absence of external identifications does not mean a tribe did not exist. The new requirement for a brief narrative that the petitioner existed during the historical period.
Criteria – (b) (community) & (c) (political authority)	Criteria (b) & (c) require a showing of community and political authority, respectively, since historical times (meaning, time of first sustained contact with non-Indians or 1789).	Would establish 1934 as the starting year for evaluation of community and political authority. Would allow petitioners to submit evidence for pre-1934 periods as relevant to (b) and (c), but would not require it.	The starting year coincides with the 1934 passage of the IRA, will reduce the documentary burden on petitioners and the administrative burden on the Department, and will avoid potential problems with locating historical records while maintaining the integrity of the process.
Criteria – (b) (community) & (c) (political authority)	Criteria (b) and (c) are silent on what gaps are allowable in showing community and political authority from historical times to the present.	Would define "substantial interruption" to be generally more than 20 years.	This revision provides clarity and uniformity with past practice in Departmental acknowledgment decisions.
Criteria – (b) (community) & (c) (political authority)	Silent on significance to community and political authority of State reservation or U.S. holding land for the petitioner.	Would establish the following as evidence of community and political authority: if the petitioner 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*.

Criteria – (b) (community)	Criterion (b) requires that a "predominant portion" of the petitioner's membership comprise a community.	Would require 30% of the petitioner's membership comprise a community.	This revision adds an objective standard that follows the percentage that Congress, in the IRA, required for a vote on the tribe's governing document.
Criteria – (b) (community)	Criterion (b) is silent on whether statistical sampling is permitted.	Would clarify that the Department may utilize statistically significant sampling, rather than examining every individual relationship for petitioners with large memberships.	This revision makes rule consistent with current practice.
Criteria – (b) (community)	Criterion (b) is silent on whether boarding school attendance may be considered as evidence of community.	Would add that placement of petitioners' children at an Indian boarding school or other educational institution is an example of evidence that may be provided in support of community.	This revision 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 and provides consistency with previous Acknowledgment decisions.
Criteria – (e) (descent)	Defines "historical" to be dating from first sustained contact with non-Indians. Under guidance, allowed "historical" to be dating from the latest of 1789 or the period of earliest sustained non-Indian settlement and/or governmental presence in the local area.	Would define "historical" as 1900 or earlier.	Provides consistency with previous decisions that relied on evidence closer in time to 1900 and did not require evidence from 1789. Any group that has proven its existence in 1900 has proven its existence prior to that time, based on the Department's experience over its 40 years in implementing the regulations. Would ease the documentary and administrative burdens and provide flexibility by defining historical as 1900 or earlier rather than requiring the documentation from 1789 to the present.
Criteria – (e) (descent)	Criterion (e) requires that membership descend from a historical tribe.	Would require 80% of petitioner's membership to descend from a tribe that existed in historical times.	This revision adds an objective standard that is consistent with previous decisions.

Criteria – (e) (descent)	Criterion (e) provides examples of what evidence may be provided to show descendancy.	Would establish that this criterion 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 (and lists examples) for the historical time period (prior to 1900).	This revision saves resources where there is a Departmental roll, or roll prepared at the Direction of Congress, listing members of the tribe, by relying on that roll. Also, this revision conforms to past practice to rely on most recent roll prior to 1900.
Criteria – (f) (membership)	Criterion (f) requires the petitioner to be composed principally of persons who are not members of already acknowledged tribes.	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.	This revision ensures 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 year 2010 was chosen because four years have passed since then, and ideally, a final decision would be issued within at least four years.
Criteria – (g) (termination)	Criterion (g) requires the petitioner to show that it hasn't been the subject of Congressional legislation forbidding or terminating a Federal relationship.	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	The Department and Congress are both part of the Federal Government, so the Department should have better access to this information.

Re-Petitioning	Prohibits previously denied petitioners from re-petitioning.	Would allow, in limited circumstances, a petitioner previously denied under the regulations to re-petition under the revised rules. Circumstances are: -If a third party participated in an IBIA or Federal Court appeal, that third party must consent to the re-petitioning. -If third parties consent, then petitioner must prove to OHA, by a preponderance of the evidence, that either: (1) changes to the regulations warrant a reconsideration of the final determination; or (2) the wrong standard of proof was applied to the final determination. If OHA decides re-petitioning is appropriate, petitioner enters petitioning process at the beginning (with OFA).	This approach promotes consistency and transparency in resolving re-petition requests and recognizes third-party interests in adjudicated decisions.
Process – Letter of Intent	Allows petitioners to file a letter of intent prior to filing a documented petition. Review begins after a documented petition is filed.	Would eliminate letters of intent. No change to when review begins.	Letters of intent caused confusion for petitioners who erroneously believed that submission of a letter of intent triggered Departmental review, but review is not actually triggered until submission of the documented petition.
Process – Phased review	Under current guidance, the Department may issue negative decisions based on one criterion.	Would allow review of the straight-forward criteria first and issuance of a negative decision if any of these are not met.	This revision allows for timely issuance of decisions by limiting cases in which evaluation of the more intensive criteria (community and political authority) is necessary to those that already have shown descent, etc.
Process – Hearing	Allows for a “formal meeting” on the proposed finding with OFA.	Would allow petitioner to elect to have a hearing if the proposed finding is negative. The hearing would be before an OHA judge and would allow parties to intervene. The OHA judge would then issue a recommended decision for AS-IA’s consideration in preparing 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.

Process – IBIA Reconsideration	Provides the opportunity to seek reconsideration of a final determination before the IBIA, based on certain stated grounds.	Deletes the IBIA process. The AS-IA's final determination will be final for the Department.	The IBIA process is the only instance in which the AS-IA's decision is subject to IBIA review, the IBIA's jurisdiction for ordering reconsideration is limited, and the IBIA's heavy caseload has resulted in even further delays in the acknowledgment process. The finality of AS-IA's decision will allow parties to challenge the decision in United States District Court where all appropriate grounds may be considered.
Process – Uncontested Proposed Findings	The rule is silent on whether the Department may automatically issue a final determination if there are no objections to the proposed finding.	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 revision is consistent with past practice and improves efficiency in cases that are uncontested by State and local government and federally recognized tribes in the area.
Process – Withdrawal	Prohibits petitioners from withdrawing their petitions once "active consideration" begins.	Would allow petitioners to withdraw their petitions after active consideration.	This revision provides the petitioner with flexibility if time and resources are not available at that time.
Process – Page limits	Provides no page limits.	Would add that the Department will strive not to exceed 100 pages in its proposed findings and final determinations.	This revision encourages conciseness without affecting ability to provide evidence.
Process – Comment period	Provides a 180-day comment period on the proposed finding, with the option for a 180-day extension.	Would limit the comment periods for proposed findings to 90 days and any potential extensions to 60 days.	This revision encourages timeliness.

Process – Comment period	Is silent on whether a petitioner may respond to any comments submitted to OFA prior to issuance of a proposed finding.	Would provide the petitioner with the opportunity to respond to comments received during preparation of the proposed finding, before the proposed finding is issued.	This revision ensures that the petitioner can respond to all information relied upon in the proposed finding.
Process – Time to prepare final determination.	Allows AS-IA 60 days to prepare the final determination.	Would lengthen time to 90 days for preparation of a final determination.	This additional time is necessary because the AS-IA is now not involved in the decision-making until the final determination stage.
Burden of proof	Requires a reasonable likelihood of the validity of the facts relating to that criterion.	No substantive change. Would clarify that "reasonable likelihood" means more than a mere possibility, but does not require "more likely than not."	This clarification does not change the burden of proof, but clarifies the burden based on Supreme Court precedent.
Previous Federal Acknowledgment	[See current rule at 83.8].	Would clarify the criteria a petitioner must meet after it has established that it was previously federally acknowledged.	The requirements of previous federal acknowledgment have been a source of confusion for petitioners because the current regulations are not clear. This would align with how the provisions are implemented in practice.
Previous Federal Acknowledgment – petitions awaiting in 1994	Addresses situations for petitions seeking to show previous Federal acknowledgment that were awaiting active consideration as of the date the regulations are adopted (1994).	Would delete this provision.	This provision applied only at the adoption of the last version of the regulations in 1994 when consideration of previous Federal acknowledgment was codified.
Transparency	No requirement to make petitioning information publicly available (without the need for members of the public to file a Freedom of Information Act request).	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.	This requirement would promote public transparency.

Acronyms:
AS-IA—Assistant Secretary- Indian Affairs
IBIA – Interior Board of Indian Appeals
OFA—Office of Federal Acknowledgment
OHA—Office of Hearings and Appeals