

ASSISTANT SECRETARY - INDIAN AFFAIRS



SUMMARY OF COMMENTS & RESPONSES

On Part 83 Discussion Draft

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Introduction

The following summarizes comments received on the Discussion Draft of revisions to 25 CFR 83 distributed in June 2013 and, following each category, responds to comments and identifies how the proposed rule addresses the comment. The comment summaries reflect a best attempt to capture the main themes and issues of the comments in each category.

Note: Comment summaries are in regular (non-italicized) font.
Responses are in italicized font.

I. Criteria-Related

A. Criterion (a) (external identification)

The overwhelming majority of commenters support deleting current criterion (a)'s requirement for providing evidence of external identifications of petitioner as an Indian entity, but requested clarification that evidence of external identifications could be submitted in support of other criteria. A few commenters stated that the external identification requirement is necessary and should be retained, because every petitioner identifies itself as a tribe. At least one commenter suggested retaining the requirement for criterion (a) but requiring identification since 1934 rather than since 1900.

Response:

The proposed rule would replace criterion (a), eliminating 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). Instead, the proposed rule's criterion (a) would require petitioners to provide a brief narrative with evidence of the group's existence at some point during historical times. See § 83.11(a). Petitioners may provide evidence of external identifications in support of other criteria, however. See § 83.11(b)(1)(xi), § 83.11(c)(1)(vii).

B. Criteria (b) (community) & (c) (political influence/authority)

(1) 1934

We received several comments on using 1934 as the starting year for examination of criteria (b) (community) and (c) (political authority). Some supported using 1934 because the shortened time period would ease evidentiary burden. These commenters stated that it is a logical start date because prior to the Indian Reorganization Act of 1934 (IRA), there was no discernable benefit to being a tribe. Others opposed the 1934 start date because they believed that groups that lacked "any organizational structure" before then should not be accorded the same powers and rights as tribes that survived intact from historical times. These commenters stated that the change in Federal Indian policy in the IRA provided no evidence for or against tribal existence. Some commenters stated that 1978, when the part 83 process was first established, should be relied upon, rather than 1934. Others stated that 1986 was a more appropriate start date because, they asserted, that was when southern States

stopped discriminating against Indians. Commenters in support of using 1934 as a start date stated that they should nevertheless be permitted to submit pre-1934 evidence.

Response:

The proposed rule would update the starting date for review for criteria (b) and (c) to 1934. See § 83.11(b)-(c). This reflects the United States' enactment of the IRA, which reversed the Federal Indian policy of allotment and assimilation that was aimed at destroying tribal governments and their communities. 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. 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 and providing an avenue for reorganizing as political entities with a political structure that facilitated the government-to-government relationship with the Federal Government. 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 because a group would have nothing to gain by asserting itself as a tribe in the pre-IRA era. To the contrary, Federal governmental policies prior to the IRA were aimed at dissolving tribes. 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.

We note that no previously denied petitioner has met the criteria from 1934 to the present, while failing the criteria prior to 1934.

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.

(2) Substantial Interruption

Many commenters requested that "substantial interruption" be clarified, so petitioners know what gaps in evidence are allowable without negative effect. Most of these commenters suggested that gaps less than 20 years should be acceptable; others suggested gaps of 40 years. At least one other commenter stated that the Department should instead look at the totality of evidence, regardless of gaps in the evidence.

Response:

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 prior Departmental acknowledgment decisions.

(3) Criterion (b) (community)

Comments on criterion (b) addressed whether to incorporate objective standards by establishing what percentage of petitioner's membership must comprise a distinct community, reside in the geographical area, be married within the group, and maintain distinct cultural patterns (suggestions ranged from 10% to 75%). Other commenters opposed establishing percentages, stating that they aren't appropriate for qualitative evidence and don't allow flexibility.

Many commenters had wording suggestions for the examples of acceptable and sufficient evidence of community, or suggested additions to the lists of acceptable and sufficient evidence. For example, several commenters said the requirement for intra-marriages should be clarified or deleted as irrelevant, discriminatory, and ill-suited to small tribes. Commenters requested that the Department consider regional history and its impact on the petitioners' ability to meet the criteria (e.g., colonization, removal, disbursement for economic opportunities).

At least one commenter suggested that the rule should allow for a statistically significant sampling of relationships among tribal members where proof of relationship is required.

Response:

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 that Congress, in the IRA, required for a vote on the tribe's governing document.

We considered commenters wording suggestions for examples of acceptable and sufficient evidence of community. While we accepted some of these suggestions, we note that these are merely examples of evidence of community that may or may not be relied upon; for example, evidence of marriage rates is not required in cases where intra-marriages are irrelevant or discriminatory. We did add placement of petitioners' children at an Indian boarding school or other educational institution as an example of evidence that may be provided in support of criterion (b). Allowing for this evidence 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. We believe that the criteria provide for sufficient flexibility for petitioners to provide evidence in the context of regional histories.

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.

(4) Criterion (c) (political influence/authority)

Comments on criterion (c) included suggestions to combine this criterion with criterion (b) (community) or make them alternatives. These comments asserted that if a group maintained an

Indian community, it is evidence of the intention to form a political community and that distinct cultural patterns are evidence of political influence/authority.

Comments also stated that the requirement for a bilateral political relationship should be optional because rejection of a leader can show political community.

At least one commenter suggested allowing for “continuity credits” to help level the playing field for California groups. “Continuity credits” would work by allowing a year of activity sharing information with researchers, benefitting Indian people, or working on federal acknowledgment to count for 4 years of continuity.

Commenters also had suggestions for specific items to add to the list of acceptable and sufficient evidence of political influence/authority including, but not limited to, tribal leader interactions with other governments, endogamy, attorneys contracts, claims filings, and court cases.

Some commenters stated that this criterion does not account for Southeastern people where Native Americans kept their heritage secret.

Response:

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 political entity.

The proposed rule’s preamble clarifies that criterion (c) in the existing regulation does not require a showing of bilateral political influence.

We did not accept the suggestion for “continuity credits” because evidence of sharing information with researchers, benefitting Indian people, and working on federal acknowledgment is not necessarily evidence of continuity.

We reviewed suggestions for specific items to add to the list of acceptable and sufficient evidence of political influence and authority, but did not make significant revisions because these items are examples of evidence that may be submitted and do not preclude submission of other items.

With regard to Southeastern people that kept their heritage secret, oral histories and interview evidence could explain the documentary gap. Also, because the timeframe for evidence is being shortened to begin in 1934, documentation will be more readily available.

C. Criterion (d) (governing document and membership criteria)

Comments on criterion (d) suggested we change (d) from a criterion to a requirement for a documented petition or clarify the criterion to require proof of how the governing body and membership works.

Response:

We considered these suggestions but left this criterion unchanged.

D. Criterion (e) (descent from a historical tribe)

(1) Predominant Portion

Comments on criterion (e) requested that we change the term “predominant portion” (for who must descend from a historical tribe) to a defined percentage and suggested percentages ranging from 30% to 100%.

Response:

We accepted comments requesting that we replace the term “predominant portion” with a percentage, and have replaced this term with 80%, which would make the standard more objective and is consistent with earlier decisions.

(2) Descent

Several commenters requested that the rule not require descent back to a historical tribe and instead suggested requiring descent back to later dates. Suggestions for later dates included 1900, 1934, and 1954. These commenters stated that requiring documentation back to the time of first sustained contact defeats the relief of documentary burden granted by revisions that relate back to 1934.

Response:

The proposed rule would provide that the petitioner may satisfy criterion (e) through the most recent evidence available for the historical time period (prior to 1900). Under the proposed rule, the Department would not require evidence from years prior to that most recent evidence.

(3) Historians’ and Anthropologists’ Conclusions

Many commented on whether to rely on historians’ and anthropologists’ conclusions. Those opposed to relying on these experts’ conclusions stated that such experts have ethnocentric western interpretations of what is to be “Indian,” that experts often disagree on historical facts, and that relying on such experts introduces bias into the process. Those in favor of allowing for reliance on these experts’ conclusions note that these experts use a rigorous methodology for evaluating evidence and context and that their conclusions may allow petitioners to address periods where genealogical proof may not exist due to the dominant society failing to keep records or ignoring or misidentifying the community. Others suggested adding qualifications to allow reliance on historians’ and anthropologists’ conclusions only when certain conditions are met.

Response:

The proposed rule allows historians' and anthropologists' conclusions as an example of evidence of descent because these experts conclusions may be appropriate evidence of descent where no roll is available. OFA staff and, for some petitions, an administrative judge will review the conclusions and recommend to the Assistant Secretary what weight to provide these conclusions.

(4) Lack of Genealogical Records

At least one commenter stated that this criterion is unfair to Eastern tribes that have no written records of Native genealogy because native names weren't recorded with descendants and ancestors, Native people didn't issue birth certificates, and Natives often changed their names several times throughout their lives.

Response:

Allowing for historians' and anthropologists' conclusions will help address situations such as those cited by commenters, where Eastern tribes without written records of Native genealogy must prove descent.

(5) Moving Requirement for Membership List

Some comments suggested moving the requirement for an official membership list to a section on required contents of a petition, rather than part of the criteria.

Response:

The proposed rule would move the submittal of an official membership list to the section on what a documented petition must include. See § 83.21(a).

(6) OFA Qualifications

Several comments requested a requirement that OFA staff have certain qualifications for their genealogists, historians, and anthropologists.

Response:

While the proposed rule would not require OFA staff to have certain qualifications, the current OFA staff members met the knowledge, skill, and abilities requirements applicable to their positions, as future staff members will be required to.

E. Criterion (f) (membership, not of another federally recognized tribe)

(1) Composed Principally

Comments on criterion (f) requested that the requirement that the petitioner be "composed principally" of members who are not members of a federally recognized tribe, to instead require that none of the tribes members may be members of a federally recognized tribe. For the exception, allowing the petitioner to be composed principally of members of a federally acknowledged tribe if the petitioner functioned as a separate autonomous entity from 1934 forward, some commenters requested the date be changed to 1986.

Response:

The proposed rule would retain the term “composed principally” here because flexibility is appropriate here to prevent impeding on tribes’ rights to determine their own memberships without encouraging splintering. The proposed rule would not change the date to 1986 as requested because the 1934 date is consistent with moving (b) and (c) to 1934.

(2) Bilateral Political Relationship

Commenters requested that we delete or clarify the requirement for petitioner’s members to not maintain a bilateral political relationship with an acknowledged tribe.

Response:

The proposed rule would incorporate the requested change to delete the requirement that petitioner’s members not maintain a bilateral political relationship with an acknowledged tribe because some tribes allow for dual enrollments and the main factor is that the petitioner has functioned as a separate and autonomous tribe from the federally recognized tribe.

(3) Dual Membership Due To Petitioning Delay

Commenters noted that in some cases, the petitioner’s members may have joined federally recognized tribes out of frustration with the delays in the petitioning process, in order to obtain needed services that are available only to federally recognized tribal members.

Response:

To address the commenters’ concern regarding petitioners’ members who join a federally recognized tribe to obtain services, the proposed rule would add that members of petitioners who filed a letter of intent or 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.

F. Criterion (g) (terminated/forbidden)

One commenter requested changing the wording of (g) to say “removed them from recognition.” Another commenter requested that this criterion be eliminated because, according to the commenter, Congress is “ill-equipped” to determine who should be federally recognized.

Response:

No changes were made in response to these comments. The requested wording change would be less clear than the current wording. The Department is bound by Congress’s determinations as to tribal status.

G. Criteria (Generally)

Several comments addressed the criteria generally. These comments fell into the following broad categories:

- The criteria should be more objective to ensure that evaluation is consistent from one petitioner to another.
- The criteria should allow more flexibility to consider the context of the history, geography, culture and social organization of the petitioner and the effect of regional issues on the ability of the petitioners to provide evidence.
- The criteria should be made less stringent because the U.S. should assume responsibility for tribes that have managed to survive centuries of neglect.
- The criteria should not be made less stringent because doing so may allow acknowledgment of racial, rather than political groups.
- Give greater weight to various types of evidence.

Response:

The proposed rule would add objective standards into the criteria, where possible, to ensure consistency, while retaining some flexibility to account for the circumstances faced by each petitioner. The proposed rule would retain provisions specifically stating that the criteria will be evaluated in the context of the history, geography, culture, social organization, and regional issues of each petitioner.

The proposed rule would not make the criteria less stringent, but would relieve the documentary burden where doing so will not affect the integrity of the criteria. For example, requiring evidence of community and political influence and authority from 1934 to the present relieves documentary burden but, because no petitioner to date has been able to meet these criteria from 1934 to the present without also meeting the criteria pre-1934, this revisions does not affect the integrity of the criteria.

The proposed rule would not assign weights to various types of evidence because the weight of each item of evidence is relative to the other evidence presented.

II. Burden of Proof

Most comments addressing the burden of proof either supported or opposed lowering the burden of proof to “preponderance of the evidence” and supported or opposed or allowing for consideration of the evidence in the light most favorable to petitioner. Some comments requested clarification of the burden. Others requested a list of evidence that would establish that the burden is met. Others requested easing documentary requirements because documents may not be available.

A few commenters stated that the burden should be on the Department to prove a petitioner should not be federally recognized as a tribe.

A few commenters also said that a higher burden of proof should apply to contesting parties because their motive may be to protect market share.

Response:

The proposed rule would not revise the current burden of proof, but instead would incorporate the Supreme Court’s clarification that the “reasonable likelihood” burden of proof standard means that there must be more than a mere possibility, but does not require “more likely than not.”

The proposed rule would not incorporate the requirement that evidence be considered in the light most favorable to petitioners because the clarification of the “reasonable likelihood” burden of proof addresses concerns that the burden of proof is unclear.

We did not incorporate the suggestion that the burden of proof be placed on the Department because the petitioner is requesting the federally acknowledged status and has the knowledge of its particular characteristics and circumstances.

We did not require a higher burden of proof to contesting parties because the Department reviews evidence, regardless of the motives of the parties presenting the evidence.

III. Definitions

Commenters had many suggestions for technical wording changes in the definitions. Some of the more significant comments were:

- Use of the term “group” is offensive to some unrecognized tribes.
- Keep the word “indigenous” and incorporate into “Indian group” to capture historic element and UN Declaration.
- Define “substantial interruption” to include more than 25 years considering the time period, geography, local, state and federal laws.
- Define “significant,” “substantial,” and “consistent”

Response:

The proposed rule would replace the term “Indian group” with “petitioner” because the term “Indian group” pre-supposes that petitioners are Indian and does not recognize that the group may, in fact, be a tribe.

The proposed rule would retain the word “indigenous” in describing the scope of the regulations.

(See discussion of “substantial interruption” under Criteria (b) & (c), above).

The proposed rule would replace the words “significant” and “substantial” with more objective standards, where possible.

IV. Process

A. Public Involvement in the Petitioning Process

(1) Notice

We received several comments on who OFA should notify of a petition and its status, and how. Most comments requested that OFA officially notify various parties of the receipt of a petition.

- a. Officially inform federally acknowledged tribes with a “potential interest” of the outcome, regardless of what State they’re in.
- b. Require notice of active consideration 45 days prior.
- c. Require AS-IA to notify the governor, etc., of receipt of a petition and publish it in the newspaper.
- d. Notice in the FR is not sufficient; OFA should provide actual notice to every petitioner.
- e. Do not publish notice of receipt until the petition is ready for active consideration.
- f. Give notice to tribes during technical review (before active consideration).
- g. Give notice to third parties, including State and local governments, residents, and businesses in the area.
- h. Not notify the governor and AG and tribes.

Response:

The proposed rule would require broad public notice to be provided at each major step in the petitioning review process. Specifically, the proposed rule would require the Department to:

- *Post notice of receipt of the petition and information about the petition on the OFA website within 60 days of receiving the petition. Any member of the public can become an informed party and as such will receive additional notice as the petition is being processed. See §83.22.*
- *Send notice of receipt of the petition to the governor and attorney general of the State in which the petitioner is located, any federally recognized tribe within the State or a 25-mile radius, and any other recognized tribe or 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. See §83.22.*
- *Notify the petitioner and informed parties when it begins review of the petition. § 83.25.*
- *Publish notice of the proposed finding in the Federal Register and post the proposed finding and reports on the website. § 83.34.*
- *Provide copies of the proposed finding to the petitioner and informed parties. § 83.34.*
- *Notify the petitioner and informed parties when the Assistant Secretary begins review. § 83.40*
- *Provide copies of the final determination to the petitioner and informed parties, in addition to publishing notice in the Federal Register. § 83.40.*

The requirements to post notice on the website, notify any federally recognized tribe within the State or a 25-mile radius, and to provide copies of the final determination are all new notification requirements.

The requirement to post notice on the website is in lieu of publication in the local newspaper because website posting reaches a broader audience at a lower cost.

The proposed rule would also eliminate the distinction between “informed parties” and “interested parties,” instead providing that any person or organization just needs to submit comments or evidence or request to be kept informed of general actions regarding a specific petitioner is considered an “informed party” entitled to notice. § 83.1.

(2) Interested Party Involvement

Comments argued for increasing interested party involvement to ensure fair opportunities to participate, while others argued for reducing interested party involvement because interested parties may be biased.

Likewise, some commenters were concerned that those who comment on a petition may be biased. Others stated that all should have the opportunity to contradict petitioner’s claims, comment if petitioner raises new issues in its responses to comments, and submit information following the proposed finding.

Response:

The proposed rule would allow any party to submit comments and evidence on a petition. The proposed rule would allow any individual or organization following posting of notice of receipt of the petition to submit comments on the petition and following publication of the proposed finding. § 83.22, § 83.35. Regardless of whether the commenter is biased, the Department will examine the evidence provided.

(3) Public Availability of Petition Documents

Commenters requested that evidence be made available to all interested and informed parties for transparency, either by requiring petitioners to submit copies to them, or by having the Department provide copies. Others stated that the Department should release nothing without a written release from the petitioner.

Response:

The proposed rule would require that 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. Specifically, the proposed rule would require posting of the narrative portion of each petition and other portions of the petition on the Department’s website, to the extent allowable by Federal law. See §§ 83.21-83.22. The proposed rule would also require the Department to post the proposed finding and any supporting reports on the website. See § 83.34.

B. Letter of Intent

We received comments both in support of and opposed to deleting the letter of intent. Comments in support of deleting the letter of intent said doing so would simplify the process and remove an unnecessary burden. Comments opposed to deleting the letter of intent said that letters of intent allow for forecasting, provide early notice to local governments of potential petitioners near and in their jurisdictions, and allow petitioners to say they are in the petitioning process when fundraising.

Response:

The proposed rule would eliminate the allowance for petitioners to file a letter of intent prior to a documented petition. 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.

C. Technical Assistance

Comments regarding technical assistance included several suggestions for ensuring that both OFA and the petitioner have the same documentation and improving communication between OFA and the petitioner. Comments also suggested limiting OFA's role in a number of ways, including ways to separate out the technical assistance function from the review function and to further separate responsibilities for responding to FOIA.

Response:

The proposed rule would require that both OFA and the petitioner have the same documentation. Specifically, the proposed rule would require OFA to provide the petitioner with comments received on the petition and provide an opportunity to respond prior to OFA's review of the petition. See § 83.24. The proposed rule would require OFA to provide technical assistance prior to each phase of its review. See §§ 83.25-83.26. After technical assistance on criteria (b) (community) and (c) (political influence/authority), OFA would again provide the petitioner with comments and evidence OFA may consider in preparing the proposed finding that the petitioner does not already hold. See § 83.26(c)(2). The proposed rule would also require that OFA provide any additional material it obtains through research or from commenters to the petitioner and provide the petitioner with the opportunity to respond. See § 83.29.

The proposed rule would alter OFA's role and better delineate OFA's role as compared to AS-IA's role. Under the proposed rule, OFA would provide technical assistance and prepare and publish a proposed finding. If the proposed finding is negative, the petitioner could elect a hearing before an OHA judge, who would then issue a recommended decision to the AS-IA. The AS-IA would prepare and publish a final determination.

The proposed rule does not address responsibilities for responding to FOIA, because that is outside the scope of this rule.

D. Expedited Negative Finding

Comments on the discussion draft's process for issuance of an expedited negative finding were uniformly supportive.

Response:

The proposed rule would allow for what is essentially an expedited negative process by allowing for issuance of a negative proposed finding during the first phase of review of the descent, tribal existence, governing document, membership, or Congressional termination criteria.

E. Expedited Favorable Finding

Comments on the discussion draft's process for an expedited favorable finding were split. Those who opposed the favorable expedited process stated that the bifurcation was confusing and inequitable and opposed the expedited favorable criteria (State reservation continuously since 1934 or the U.S. holding land at any time since 1934). These commenters stated, among other things, that States do not have uniform criteria for recognizing tribes and setting aside reservations for them. Commenters opposing relying on the U.S. holding land for the petitioner stated that the U.S. may have purchased land for individuals or an organization that was not a tribe and that holding land is not evidence of tribal existence.

Those in support of an expedited favorable process stated that it would help clear the backlog of petitions and make the process more efficient. These commenters stated that the criteria gave State reservations appropriate weight as a hallmark of tribal community. Commenters stated that the Federal holding of land was an appropriate criterion because it is tantamount to previous Federal acknowledgment.

Response:

The proposed rule would not include an expedited favorable process, but would provide that a petitioner that has met five of the seven criteria (descent, tribal existence, governing document, membership, and Congressional termination) can prove the community and political influence/authority criteria with evidence that a State has held a reservation for it since 1934 or that the U.S. has held land for it at any time after 1934. 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. We note that land held for an individual does not satisfy these provisions of criteria (b) and (c).

F. Automatic Final Determinations

We received comments in support of the automatic issuance of a positive final determination and comments opposed to limiting which interested parties can stop the automatic issuance. For example, some stated that limiting federally recognized tribes to those within the state is arbitrary because a

tribe could be affected but not be within the same state. Others stated that any and all interested parties should be able to stop an automatic issuance to reduce post-decision litigation.

Response:

The proposed rule would include the provision allowing the Assistant Secretary to automatically issue a positive final determination where no timely comments or evidence challenging the positive proposed finding are submitted by certain parties. Those parties are 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 (rather than within the same State).

G. Decision-maker

Most comments on the decision-maker were in favor of the Assistant Secretary as the ultimate decision-maker. These comments stated that OFA should serve as a technical advisor to AS-IA, and that OHA does not have the background in Indian law to serve as the decision-maker. Other comments stated that a panel outside the Department (e.g., a six-member jury, Blue Ribbon Commission) should serve as the decision-maker.

Response:

The proposed rule would continue having the Assistant Secretary as the final decision-maker, but would allow the Assistant Secretary to consider a proposed finding by OFA in light of any comments and responses on that proposed finding, and (if the proposed finding was negative and the petitioner elected a hearing) in light of a recommended decision from an OHA judge. It is questionable whether the Department has the authority to vest decision-making authority in an outside panel..

H. Hearing

Several comments supported the idea of an administrative hearing on the proposed finding. Some stated that interested parties should be treated as full parties to the hearing, while others stated that participation should be limited to the petitioner or to certain interested parties. A comment on the timing of the hearing stated that it should be held during, rather than after, the comment period. Several commenters had requests for the hearing to be held in specific locations.

Response:

The proposed rule would allow the petitioner to elect to have an administrative hearing before an OHA judge if the proposed finding was negative. See § 83.38. Specifics of the hearing procedures are addressed in the companion rule at 43 CFR 4, subpart K. That subpart provides that participation is available to those who can provide a basis for intervention. OHA has administrative courts across the country, addressing concerns about location. These procedures rely on time-tested administrative hearing procedures, while allowing the petitioner and interveners the opportunity to present their evidence to an independent, neutral official.

I. Formal meeting

Some commenters requested retaining allowance for a formal meeting between the petitioner and OFA prior to the PF.

Response:

The proposed rule would eliminate the formal meeting (which occurred following issuance of proposed finding, rather than before) but would instead ensure that the petitioner possesses and has the opportunity to respond to all the information that OFA may rely upon. See, § 83.24, § 83.29(c). Instead of a formal meeting, the proposed rule would allow for an administrative hearing before an OHA judge following issuance of a negative proposed finding. See § 83.38. This will allow the petitioner to present its case to an independent, neutral official.

J. IBIA

We received comments both in support of and in opposition to removing the IBIA reconsideration process. Those in support of removing the process stated that the IBIA process is an unnecessary administrative step and comes too late in the process to be useful. Those opposed to removing the process said that IBIA review is a necessary check for correction of administrative errors by an independent body and that removal of the IBIA review would leave litigation as the only option. One comment asked why the Department is taking away appeal rights. Other commenters suggested replacing the IBIA appeal process with mediation or arbitration.

Response

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, and the IBIA's heavy caseload has resulted in even further delays in the acknowledgment process. Like all other decisions made by the Assistant Secretary, 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.

K. Previous Federal Acknowledgment

Comments on previous Federal acknowledgment requested clarifying what is required and retaining the status quo. Other comments requested adding to the list of evidence to demonstrate previous acknowledgment and, once previous acknowledgment is shown, limiting examination of criteria (b) and (c) to whether they are met at present rather than since the date of last unambiguous acknowledgment.

Response:

The proposed rule would clarify how previous Federal acknowledgment has been interpreted and applied to date. See § 83.12. No change to current practice is proposed.

L. Timeframes

Comments recommended imposing timeframes on various phases of the process.

Response:

The proposed rule would add timeframes for each phase of OFA's review, ensuring a proposed finding is issued within 8 months or 1 year after OFA begins review of the petition. See § 83.32. The phased approach allows for issuance of negative proposed findings earlier and more quickly. See § 83.26. These timeframes provide enough structure to the process without hindering a substantive review of petitions.

The proposed rule would add a 90-day timeframe for individuals and organizations to submit comments on the petition following posting of receipt of the petition. See § 83.22. The proposed rule would also provide a 60-day timeframe for the petitioner to respond to any comments. See § 83.24. The proposed rule would limit the timeframes for commenting on proposed findings to 90 days (currently 180 days), and any extension to 60 days (same as current). The proposed rule would, however, lengthen one time period – the time for Assistant Secretary review—to 90 days (currently, 60 days). This is necessary because, under the proposed process, this is the first opportunity the Assistant Secretary has to review the record.

The final determination will become effective immediately upon issuance (currently 90 days from publication) because it will be a final agency action.

M. Suspension of Petition Review

Comments on suspending review of petitions suggested allowing OFA to suspend review within limitations or just cause.

Response:

The proposed rule would retain the current provisions allowing for suspension of review due to technical or administrative problems that preclude review only if the Assistant Secretary approves the suspension. See § 83.31.

N. Extensions

Commenters suggested limitations on granting extensions of time for Departmental review.

Response:

The proposed rule would allow the Assistant Secretary to allow extensions only if it approves a suspension under § 83.31(a). See § 83.32(b).

O. Withdrawal of Petitions

A few comments suggested prohibiting petitioners from withdrawing from the process because it is inefficient and allows petitioners to avoid negative findings. A comment also suggested that federally

recognized tribes should be able to force a petition to complete the process even where the petitioner has withdrawn.

Response:

The proposed rule would allow the petitioner to withdraw at any point in the process. See § 83.26, § 83.30. In most administrative petitioning and application processes, the petitioner/applicant can withdraw at any time; there is no compelling reason to prohibit withdrawal in this instance. Any petitioner who withdraws will lose their place in line for review, providing a sufficient deterrent to strategic withdrawals and resubmissions. Further, the Department can minimize inefficiencies by retaining any work it conducted on the petition prior to withdrawal and relying on the work upon resubmission.

P. Order

A few comments provided input on what order petitions will be considered, expressing concern that petitioners may lose their place in line or there may be a race to file.

Response:

Under the proposed rule, petitions would be considered in the order in which complete documented petitions are submitted to the Department, regardless of whether a letter of intent or incomplete petition was previously filed. This is consistent with current practice, in which petitions are considered in the order they are “ready” for evaluation. Newly submitted documented petitions would be in order behind the ones that were already in order under the old regulations (to date, this affects only 5 petitioners who are on the ready/waiting list or active consideration and have elected to suspend their petitions pending the new regulations—they are lined up based on historical date as to when they’re ready). See § 83.23.

Q. Newly Acknowledged Tribes’ Membership

Some commenters were concerned about newly acknowledged tribes changing their membership – for example, cherry-picking their rolls in the acknowledgment process and then changing character following acknowledgment through changes in membership.

Response:

After a group is acknowledged as a tribe, the tribe has the sovereign right to determine its members.

R. Re-Petitioning

We received many comments strongly supporting re-petitioning, and many comments strongly opposing re-petitioning. Some of those in support stated that it is a significant burden to require previously denied petitioners to prove by a preponderance of the evidence that the new regulations warrant reversal. Others stated that a decision to deny re-petitioning should be subject to de novo appeal to OHA. Supporters also stated that petitioners should not have to re-submit all their evidence

to re-petition. Those in opposition to re-petitioning stated that this change would not promote efficiency and timeliness and would unnecessarily open the door to revisiting settled decisions. Those in opposition were also concerned that a previously denied petitioner could prove community and political authority from 1934 forward after having failed these criteria for historical time periods.

Response:

The proposed rule would allow, in limited circumstances, a petitioner previously denied under the regulations to re-petition under the revised rules. If a third party individual or organization has participated in an IBIA or Secretarial reconsideration or an Administrative Procedure Act appeal in Federal court and ultimately prevailed, the denied petitioner may only seek to re-petition 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 the 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. See § 83.4(b). This approach promotes consistency and transparency in resolving re-petition requests and recognizes third-party interests in adjudicated decisions.

The proposed rule would not require petitioners to resubmit evidence, but would allow the petitioner to submit supplemental evidence. See § 83.4(b).

There are 31 previously denied petitioners that could request approval from an administrative judge to re-petition so long as all third parties that participated in an IBIA or Secretarial reconsideration or an Administrative Procedure Act appeal in Federal court and ultimately prevailed consent to the petitioner seeking approval to repetition from the administrative judge.

V. Other

A. Precedent

Comments regarding use of precedent requested that the rule explicitly state that past decisions under the old regulations are not precedent, while other comments regarding use of precedent stated that the rule should not directly overrule past precedent.

Response:

The proposed rule would revise the current process and criteria in ways that are consistent with precedent.

B. Reaffirmation

Comments regarding reaffirmation requested that the rule explicitly state that AS-IA may restore tribes to the list that were omitted because of administrative error without requiring the tribes to undergo the part 83 process. Other comments requested specific procedures for reaffirmation outside of the current petitioning process.

Response:

Reaffirmation is beyond the scope of this rule and is exceedingly rarely used by the Department. The proposed rule focuses on reforming the Part 83 process to be more transparent, timely, efficient, and flexible.

C. Splinter Groups

Several comments requested clarification on whether, and the extent to which, “splinter groups” may receive federal acknowledgment. Some comments supported federal acknowledgment of petitioners that have separated from a currently federally recognized tribe and have functioned autonomously from 1934 to the present. Those commenters stated that outside pressures may have caused the split and noted that tribal existence is fluid. Others opposed federal acknowledgment of these groups, stating that it would undermine the sovereignty of the acknowledged tribe from which the petitioner split. Other commenters limited their interpretation of “splintering” to apply only to situations where members of petitioners split off into a new petitioner, and note that guidance should be provided so that fewer OFA resources are expended on addressing these situations.

Response:

The proposed rule does not change the Department’s fundamental approach to splinter groups. The Department will not recognize splinter groups. Rather, petitioners must have functioned separately and autonomously from an acknowledged tribe by satisfying criteria (b) and (c) may be acknowledged. See § 83.11(f).

D. Standard Form

We received comments supporting a standard form, but most of those in support stated that the form should be optional. A few comments opposed the use of forms because of concern that the form could be discriminatory.

Response:

The proposed rule would not establish a standard form, instead allowing the petitioner to provide a narrative in its own format for flexibility.

E. Page Limits

We received comments both in support of and opposition to imposing page limits on the petition, but nearly all comments supported imposing page limits on the proposed finding. Those in support of page limits suggested limits ranging from 50 pages to 300 pages. Those in opposition stated that content over quantity should be the focus and that page limits will arbitrarily constrain evidence.

Response:

The proposed rule would not impose page limits on the petition, comments, or responses to comments, but would provide that the Department will strive to limit its proposed findings and the final determinations to 100 pages.

F. Preamble

Several comments requested that the preamble to the proposed rule clarify what the goals of the revisions are and clarify why the 1934 date is being used.

Response:

We have articulated in the preamble to the proposed rule what the goals of the revisions are and the basis for relying on the 1934 date.

G. Public Meetings

We received several comments requesting that future public meetings be held in specific locations and to improve outreach and notification to non-recognized tribes.

Response:

We have taken the requested locations into consideration in planning the public meetings on the proposed rule. We continue to work with our Office of Public Affairs to publicize the proposed rule for input by non-recognized tribes.

H. Consultation

Some commenters requested that tribal consultations be opened to the public, others requested “true tribal consultation” prior to finalization.

Response:

Tribal consultation sessions may be closed to the public because they are government-to-government sessions, rather than public meetings. We are notifying all federally recognized tribes by letter of the proposed rule and will be hosting additional consultation sessions to discuss this rule.