

ASSISTANT SECRETARY - INDIAN AFFAIRS



FREQUENTLY ASKED QUESTIONS

Proposed Rule: Federal Acknowledgment (25 CFR 83)

What is the Federal Acknowledgment proposed rule?

The Federal Acknowledgment proposed rule would update the regulatory process for federally acknowledging an Indian tribe (i.e., “Federal recognition” or “Federal acknowledgment” of an Indian tribe). The U.S. Department of the Interior (the Department) recognizes tribes administratively, under its authority to manage Indian Affairs. Prior to 1978, the Department reviewed requests for recognition on an ad hoc basis. In 1978, the Department established a regulatory process for acknowledging an Indian tribe (now at 25 CFR Part 83).¹ This proposed rule would revise that process.

Why is the Department issuing this proposed rule?

Over the past few decades, the Part 83 process has been criticized as too slow (a petition can take decades to be decided), expensive, inefficient, burdensome, intrusive, less than transparent and unpredictable. Many have described the federal acknowledgment process as “broken” or in need of reform, including several U.S. Senators and Representatives and the National Congress of American Indians. In 2009, then-Secretary of the Interior Ken Salazar committed to examining ways to improve the Part 83 process.² In 2013, the Assistant Secretary – Indian Affairs Kevin Washburn testified before Congress on the need for revisions.³

What action on the proposed rule is being taken today?

The Department is publishing the proposed rule in the Federal Register for public notice and comment. The Department is also announcing public meetings and tribal consultations to discuss the proposed rule.

Has OMB reviewed this rule?

Yes, the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) reviewed this under Executive Order 12866.

How was this rule developed?

Indian Affairs (IA) convened an internal working group with representation from the Solicitor’s Office, the Office of Federal Acknowledgement (OFA), and the AS-IA to develop a discussion draft. On June 21, 2013, IA released the “discussion draft,” and requested input by federally recognized tribes and the public. The preliminary discussion draft of potential revisions to Part 83 was intended to generate comments on potential improvements to the process while maintaining the integrity of the acknowledgment decisions.

¹ Of the 566 federally recognized tribes, 17 have been acknowledged through the Part 83 process to date.

² Feb. 12, 2009 SCIA Oversight Hearing.

³ March 2013 House Subcommittee on I&ANA Hearing.

IA held five tribal consultation sessions and five public meetings across the country on the discussion draft in July and August 2013. IA also requested written comments and extended the original deadline of August 19 to September 25, 2013, in response to written requests and requests received at the tribal consultation sessions and public meetings.

IA has closely reviewed all the comments received on the discussion draft, and has considered the suggestions and comments in development of the proposed rule.

Does the proposed rule include any changes that were in the discussion draft?

The proposed rule includes some of the same changes and concepts that were included in the discussion draft and also concepts and suggestions provided by tribes and the public.

What changes would the proposed rule make?

The proposed rule includes changes to the process and criteria that are intended to improve Part 83's transparency, timeliness, efficiency, flexibility, and integrity. See the "comparison chart" for a list of changes.

Would the proposed rule make the process more transparent?

Yes. The proposed rule is written in a more user-friendly format and uses more plain language, than the current rule. Also, the proposed rule establishes objective standards where appropriate, makes explicit certain past implementation practices, requires information to be made publicly available on the Internet when permitted under Federal law, ensures that the petitioner has all the information that is being considered by OFA, provides for greater involvement by an administrative judge on proposed negative determinations, and provides others the opportunity to comment on petitions.

Would the proposed rule make the process more timely and efficient?

Yes. The proposed rule would make the process more timely and efficient in a number of ways, some of which are explained here.

- First, the proposed rule would institutionalize a series of reviews that may result in the issuance of proposed findings and final determinations earlier in the process. The reviews would allow a negative proposed finding and final determination to be issued solely on the descent criterion if the petitioner fails that criterion. If the petitioner meets the descent criterion, then the petition would be reviewed for the other criteria, and only if it passes those criteria would the Department undertake the more time-intensive review of criteria (b) (community) and (c) (political authority).
- Second, the proposed rule would allow for the Department to automatically issue a positive final determination when the positive proposed finding is uncontested by the State or tribes within the State as well as local government and tribes within 25 miles of petitioner's headquarters.
- Third, the proposed rule would limit the time frames for which the petitioner must provide and the Department must review evidence. This narrowing of the time frames will not affect the integrity of any acknowledgment decision, but will eliminate unnecessary document collection and review.

- Fourth, the proposed rule would rely on the petitioner having maintained a State reservation since 1934 or the U.S. holding land for the petitioner at any time since 1934 as satisfactory evidence of community and political authority (criteria (b) and (c)).
- Fifth, the proposed rule would eliminate the need for petitioners to provide evidence of external identification as Indian entities for each 10-year period, as required under the current criterion (a), while allowing such evidence in support of other criteria.
- Finally, the proposed rule would provide clear timeframes for comments and responses.

Would the proposed rule make the process more flexible?

Yes. While there is a trade-off between establishing objective standards and maintaining flexibility, IA believes it has struck this balance. While the proposed rule would add some objective standards into the criteria, the substantive criteria are, for the most part, consistent with past practice, such that each petitioner can describe how its unique history and circumstances fit the criteria.

Would the proposed rule maintain the integrity of the process?

Yes. The proposed rule would maintain the integrity of the process by ensuring that petitions are subject to rigorous review. Changes to the criteria that lighten the documentary burden would not lower the bar for Federal acknowledgment. For example, no petitioner has failed solely on criterion (a). Likewise, no previously denied petition satisfied criteria post-1934 but failed the criteria prior to 1934. The proposed rule would further contribute to the integrity of the process by allowing petitioners who receive a negative proposed finding from OFA to elect a hearing before an Office of Hearings and Appeals (OHA) judge to present its case and third parties can intervene in that proceeding. While the Assistant Secretary will retain final decision-making authority, the recommended decision will provide the Assistant Secretary with the benefit of the OHA judge having narrowed the issues. The integrity of the process is further maintained by the fact that the Assistant Secretary’s final determination would then be final for the Department, and reviewable in United States District Court without limited review by IBIA.

Would the proposed rule allow previously denied petitioners to petition again?

The proposed rule would allow for re-petitioning in limited circumstances. First, if the original final determination was reconsidered before IBIA or appealed to a United States District Court and a third party participated in the reconsideration or appeal, then that third party must consent to the re-petitioning. This condition recognizes third-party interests in adjudicated decisions. Second, if the petitioner obtains third parties’ consent or if there was no third party, then the petitioner must prove to the Office of Hearings and Appeals (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, the petitioner enters petitioning process at the beginning (with OFA), but need not re-submit evidence it already provided.

Who would issue the proposed finding and final determination for a petition under the proposed rule?

Currently, OFA prepares both the proposed finding and final determination for AS-IA review and issuance. The proposed rule would instead have OFA prepare and issue a proposed finding and have AS-IA prepare and issue the final determination. OFA’s proposed finding would be subject to

comments and responses and, if negative, a hearing at the election of the petitioner. The Assistant Secretary would then independently review the entire record, including any recommended decision from an OHA judge, and issue the final determination. The AS-IA final determination would be subject to review in United States District Court.

What procedures would apply to the hearing on a negative proposed finding?

The proposed rule would provide the opportunity for petitioners to elect to have a hearing on a negative proposed finding. The procedures by which the hearing will be conducted are established in a companion proposed rule from the Office of Hearings and Appeals (OHA) that would appear in 43 CFR 4, Subpart K. The proposed Federal acknowledgment rule would cross-reference this new OHA rule for hearing procedures.

Who will be the “OHA judge” for the hearings on negative proposed findings?

The proposed rule defines “OHA judge” broadly to include an administrative law judge with OHA, an administrative judge with OHA, or an attorney designated by the OHA Director to serve as the OHA judge. An administrative law judge routinely holds hearings, and is fully independent (i.e., not subject to oversight by a supervisor). An administrative judge routinely serves on an appellate board, but reports to the Director of OHA. An attorney designated by the OHA Director is an attorney who may serve as a judge on occasion and reports to the head of his or her individual office under OHA.

Why would the proposed rule delete the IBIA reconsideration process?

The proposed rule would delete the process for IBIA reconsideration of the Assistant Secretary’s final determination because 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, IBIA has rarely granted petitions for reconsideration, 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.

How do I comment on the proposed rule?

The easiest way to submit comments on the proposed rule is by emailing your comments to consultation@bia.gov, with “1076-AF18” in the subject line. If you prefer to submit your comments by mail, please refer to the Federal Register publication for the mailing address. The comment deadline is **August 1, 2014**.

Will there be any public meetings on this rule?

Yes. IA will host public meetings to discuss the rule. Please refer to the Federal Register publication for the dates and locations of the meetings.

When will this proposed rule become final?

Once the public comment period closes, IA will review the comments and make any appropriate edits. The timing of the issuance of a final rule depends on a number of factors, including the number and complexity of comments.