DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 83

[BIA-2022-0001; 256A2100DD/AAKC001030/A0A501010.999900]

RIN 1076-AF67

Federal Acknowledgment of American Indian Tribes

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The United States Department of the Interior (Department) revises the regulations governing the process through which the Secretary acknowledges an Indian Tribe, creating a conditional, time-limited opportunity for denied petitioners to re-petition for Federal acknowledgment.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals can obtain this document in an alternate format, usable by people with disabilities, at the Office of Federal Acknowledgment, Room 4071, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Oliver Whaley, Director, Office of Regulatory Affairs and Collaborative Action, Office of the Assistant Secretary—Indian Affairs, (202) 738-6065. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Since 1994, the regulations governing the Federal acknowledgment process, located at 25 CFR part 83 (part 83), have included an express

prohibition on re-petitioning (ban). When the Department revised the part 83 regulations in 2015 (2015 regulations), the Department decided to retain the ban; however, two Federal district courts held that the Department's stated reasons for doing so, as articulated in the final rule updating the regulations, were arbitrary and capricious under the Administrative Procedure Act. The courts remanded the ban to the Department for further consideration. In a 2022 notice of proposed rulemaking (2022 proposed rule), the Department initially proposed to retain the ban. Subsequently, in a second notice of proposed rulemaking published at 89 FR 57097 on July 12, 2024 (2024 proposed rule), the Department proposed to create a limited exception to the ban, through implementation of a re-petition authorization process. In this final rule, the Department adopts a limited exception to the ban.

I. Background

A. Federal Acknowledgment Process

Congress granted the Secretary of the Interior, as delegated to the Assistant Secretary – Indian Affairs (AS-IA), authority for "the management of all Indian affairs and of all matters arising out of Indian relations."[1] This authority includes the authority to implement an administrative process to acknowledge Indian Tribes.[2] As the congressional findings that support the Federally Recognized Indian Tribe List Act of 1994 indicate, Indian Tribes may be recognized "by the administrative procedures set forth in part 83 of the Code of Federal Regulations."[3]

Part 83 codifies the process through which a group may petition the Department for acknowledgment as a federally recognized Indian Tribe. Part 83 requires groups petitioning for Federal acknowledgment to meet seven mandatory criteria, the satisfaction of which has been central to the Federal acknowledgment process since its inception.[4] The Department refers to the seven criteria as the (a) "Indian Entity Identification" criterion, (b) "Community" criterion, (c) "Political Authority" criterion, (d) "Governing Document" criterion, (e) "Descent" criterion, (f) "Unique Membership" criterion, and (g) "Congressional Termination" criterion.[5]

B. 1994 and 2015 Revisions of Part 83

First promulgated in 1978 at 25 CFR part 54 (1978 regulations),[6] the Federal acknowledgment regulations were subsequently moved to part 83[7] and revised in 1994 (1994 regulations),[8] in part, "to clarify requirements for acknowledgment and define more clearly

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[1] 25 U.S.C. 2; *see also* 25 U.S.C. 9; 43 U.S.C. 1457.
[2] *See, e.g.*, *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209, 211 (D.C. Cir. 2013); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).
[3] *See* Public Law 103-454, section 103(3) (1994).
[4] 25 CFR 83.11(a) through (g) (2015 version of the criteria); 25 CFR 83.7(a) through (g) (1994) (1994 version); 25 CFR 54.7(a) through (g) (1978) (1978 version).
[5] 25 CFR 83.5.
[6] 43 FR 39361 (Sept. 5, 1978).
[7] 47 FR 13326 (Mar. 30, 1982).
[8] 59 FR 9280 (Feb. 25, 1994).

standards of evidence."[9] The 1994 regulations also implemented procedural changes to the acknowledgment process, including "an independent review" of a final determination on a part 83 petition by the Interior Board of Indian Appeals and an "opportunity for a formal hearing on proposed findings."[10] In the final rule promulgating the 1994 regulations, the Department explained that, notwithstanding the revisions, "the standards of continuity of tribal existence that a petitioner must meet remain unchanged" and that "none of the changes . . . will result in the acknowledgment of petitioners which would not have been acknowledged under the [1978] regulations."[11]

The Department revised part 83 again in 2015 (2015 regulations). In the final rule promulgating the 2015 regulations (2015 final rule), the Department explained that the purpose of the revision was to "increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the [Federal acknowledgment] process."[12] To that end, the Department introduced several process-related reforms, including a two-phased review of the seven mandatory criteria. In Phase I, the Office of Federal Acknowledgment (OFA) reviews criteria (d) (Governing Document) through (g) (Congressional Termination), and in Phase II, OFA evaluates criteria (a) (Indian Entity Identification) through (c) (Political Authority).[13] If a petitioner does not satisfy any of the Phase I criteria, then, instead of moving to Phase II, OFA publishes a negative proposed finding, which can then serve as the basis for a final determination on the Phase I criteria alone,[14] saving time and resources.[15] Additionally, to

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[9] *Id.*
[10] *Id.*; *see also* 25 CFR 83.11 (1994) (describing the process for IBIA review).
[11] 59 FR 9280.
[12] 80 FR 37862 (July 1, 2015).
[13] 25 CFR 83.26.
[14] 25 CFR 83.43(b)(1).
[15] 80 FR 37862 (explaining that the "two-phased review of petitions . . . establishes certain criteria as threshold criteria, potentially resulting in the issuance of proposed findings and final determinations earlier in the process"); 80 FR 37877 (explaining that the two-phased review "is likely to produce any negative decisions in a quicker manner, thereby resolving petitions sooner, reducing time delays, increasing efficiency, and preserving resources").

promote efficiency, the Department limited the number of technical assistance reviews that OFA can provide to a petitioner, permitting only one during each phase.[16]

The Department emphasized in the 2015 final rule that the rule "clarifies the criteria" but "does not substantively change the Part 83 criteria, except in two instances."[17] In the first instance, the Department revised criterion (a) (Indian Entity Identification) to accept "the petitioner's own contemporaneous records, as evidence that the petitioner has been an Indian entity since 1900,"[18] not only the records of external observers.[19] Second, the Department revised a provision under criterion (b) (Community) describing how the Department evaluates evidence of endogamy (that is, marriages within a petitioner's membership).[20] Other changes to the criteria in the 2015 regulations include the following:

1. A new evaluation start date for criterion (b) (Community) and (c) (Political Authority), from 1789 or the time of first sustained contact, to 1900, consistent with the 1900 start date for criterion (a) (Indian Entity Identification)[21];
2. A change to criterion (e) (Descent) to emphasize the "great weight" that the Department places on "tribal Federal rolls prepared at the direction of Congress or by the Department" during the evaluation of the criterion[22];
3. The deletion of a condition in criterion (f) (Unique Membership) that required a petitioner to show that its members do not maintain a "bilateral political relationship" with a federally recognized Indian tribe, in the event that the petitioner's membership is composed principally of members of the federally recognized tribe;[23] and

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[16] 80 FR 37877.
[17] 80 FR 37863.
[18] *Id.*
[19] 80 FR 37866.
[20] 80 FR 37863.
[21] *Id.*
[22] 80 FR 37867.
[23] 80 FR 37873.

4. The insertion of a new provision under criteria (b) (Community) and (c) (Political Authority), clarifying that evidence of "land set aside by a State for the petitioner or collective ancestors of the petitioner" may be used to satisfy the criteria.[24]

In proposed rules published in April 2022 and July 2024, the Department discussed each of the changes identified above,[25] as well as the Department's view that none of the 2015 final rule's changes to part 83 "would affect the outcome of the Department's previous, negative final determinations."[26] The 2022 and 2024 proposed rules are discussed in subsequent sections of this rule.

C. Ban on Re-Petitioning

The 1978 regulations were silent on the question of re-petitioning, but since the 1994 revision of part 83, the Federal acknowledgment regulations have expressly prohibited petitioners that receive a negative final determination from the Department from re-petitioning.[27] The final rule updating the regulations in 1994 notes that although some commenters had expressed concern that "undiscovered evidence which might change the outcome of decisions could come to light in the future," the Department reasoned that "there should be an eventual end to the present administrative process."[28] Additionally, the Department pointed out that "petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence."[29] The Department also explained that "[t]he changes in the regulations are not so fundamental that they can be expected to result in different outcomes for cases previously decided."[30] Finally, the Department observed that "[d]enied petitioners still have the opportunity to seek legislative recognition if substantial new evidence develops."[31]

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[24] 80 FR 37865.
[25] 87 FR 24908, 24912–14 (Apr. 27, 2022).
[26] 89 FR 57097, 57102–03 (July 12, 2024) (citation omitted).
[27] 25 CFR 83.3(f) (1994); 59 FR 9294.
[28] 59 FR 9291.
[29] Id.
[30] Id.
[31] Id.

In a 2014 notice of proposed rulemaking (2014 proposed rule), the Department proposed giving previously denied petitioners a conditional opportunity to re-petition.[32] The 2014 proposed rule would have allowed re-petitioning 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
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> (ii) The petitioner proves, by a preponderance of the evidence, that either:
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> (a) A change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination; or
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> (b) The "reasonable likelihood" standard was misapplied in the final determination.[33]

In the preamble of the 2014 proposed rule, the Department explained that the requirement of third-party consent would "recognize[] the equitable interests of third parties that expended sometimes significant resources to participate in the adjudication [of a final determination in a reconsideration or appeal] and have since developed reliance interests in the outcome of such adjudication."[34] The Department did not discuss the extent to which the third-party consent condition might limit the number of re-petitioners.[35]

Similarly, the Department did not specify the extent to which the other conditions listed above—requiring an unsuccessful petitioner to prove that either a change in the regulations or a misapplication of the reasonable likelihood standard warrants

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[32] 79 FR 30766, 30767 (May 29, 2014).
[33] 25 CFR 83.4(b)(1) (proposed 2014); *see also* 79 FR 30774 (containing the proposed provision).
[34] 79 FR 30767.
[35] *See Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 613 F. Supp. 3d 371, 385 (D.D.C. 2020) (noting that the record "does not provide statistics to show . . . how many [petitioners] would be able to re-apply under the limited proposed exception"). The Department has since identified eleven denied petitioners that would have been subject to the third-party consent condition under the 2014 proposed rule: the Duwamish Tribe, the Tolowa Nation, the Nipmuc Nation (Hassanamisco Band), the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, the Eastern Pequot Indians of Connecticut and Paucatuck Eastern Pequot Indians of Connecticut (collectively, the "Eastern Pequot Indians"), the Schaghticoke Tribal Nation, the Golden Hill Paugussett Tribe, the Snohomish Tribe of Indians, the Chinook Indian Nation, and the Ramapough Mountain Indians.

reconsideration—might limit the number of re-petitioners. However, as a general matter, the Department noted that "the changes to the regulations are generally intended to provide uniformity based on previous decisions" (that is, uniformity between decisions predating and postdating the revision), so the circumstances in which re-petitioning might be "appropriate" would be "limited."[36] The proposed rule did not identify any change to the seven mandatory criteria that "would likely change [any negative] previous final determination[s]."[37]

Ultimately, in the 2015 final rule updating part 83, the Department expressly retained the ban on re-petitioning.[38] In the preamble of the rule, the Department summarized its reasoning as follows: "The final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner. The Department has petitions pending that have never been reviewed. Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular. The part 83 process is not currently an avenue for re-petitioning."[39]

D. Remand of the Ban

In 2020, two Federal district courts—one in a case brought by a former petitioner seeking acknowledgement as the Chinook Indian Nation[40] and one in a case brought by a former petitioner seeking acknowledgement as the Burt Lake Band of Ottawa and Chippewa Indians[41]—held that the Department's reasons for implementing the ban, as articulated in the preamble to the 2015 final rule revising part 83, were arbitrary and capricious under the

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[36] 79 FR 30767.
[37] *Id.*
[38] 25 CFR 83.4(d); *see* 80 FR 37888–89.
[39] 80 FR 37875.
[40] *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668-RBL, 2020 WL 128563 (W.D. Wash. Jan. 10, 2020).
[41] *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 613 F. Supp. 3d 371 (D.D.C. 2020).

Administrative Procedure Act (APA). As an initial matter, both courts agreed with the Department that the Department's authority over Indian affairs generally authorized a re-petition ban.[42] Additionally, both courts noted that their review was highly deferential to the agency's decision under applicable tenets of administrative law.[43] As a result, the narrow question left for the courts to decide was whether the Department, in retaining the ban, "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[44]

Both courts concluded that the Department had not satisfied this standard. The *Chinook* court held that the Department's reasons were "illogical, conclusory, and unsupported by the administrative record," as well as not "rationally connect[ed] . . . to the evidence in the record."[45] Similarly, the *Burt Lake* court concluded that the Department's reasons were "neither well-reasoned nor rationally connected to the facts in the record."[46] Both courts concluded that, despite the Department's argument that the 2015 revisions to part 83 did not make any substantive changes to the criteria other than those specifically identified, the Department had failed to explain why the Department could permissibly maintain the ban given those changes and others, after having proposed a limited re-petition process in the 2014 proposed rule.[47] The *Chinook* court focused in particular on a provision introduced in the 2015 final rule that sought to promote consistent implementation of the criteria and stated that "[t]here is no reason why new petitioners should be entitled to this 'consistency' while past petitioners are not."[48] The *Burt Lake* court linked reform of the

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[42] *Chinook*, 2020 WL 128563, at *6 (stating that "the Court agrees with DOI that its expansive power over Indian affairs encompasses the re-petition ban" (citation omitted)); *Burt Lake*, 613 F. Supp. 3d at 378 (stating that "the regulation [banning re-petitioning] comports with the agency's authority").
[43] *Chinook*, 2020 WL 128563, at *7 (citation omitted); *Burt Lake*, 613 F. Supp. 3d at 379 (citation omitted).
[44] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[45] *Chinook*, 2020 WL 128563, at *8.
[46] *Burt Lake*, 613 F. Supp. 3d at 386.
[47] *See Chinook*, 2020 WL 128563, at *4–5 (identifying five "notable" changes in the 2015 version of part 83); *Burt Lake*, 613 F. Supp. 3d at 383–84 (highlighting two changes that the court deemed "not minor").
[48] *Chinook*, 2020 WL 128563, at *8.

Federal acknowledgment process generally with an "opportunity to re-petition and to seek to satisfy the new criterion."[49]

Neither the *Chinook* nor *Burt Lake* courts struck down the 2015 final rule in whole or in part. Rather, both courts remanded the ban to the Department for further consideration.[50]

E. 2022 Proposed Rule

Pursuant to the courts' orders, on December 18, 2020, the Department announced an intent to reconsider the ban and invited federally recognized Indian Tribes to consult on whether to allow or deny re-petitioning. On February 25, 2021, the Department held a Tribal consultation session. The Department also solicited written comments on the ban through March 31, 2021. On April 27, 2022, the Department published a proposed rule (2022 proposed rule) to retain the ban, albeit based on revised justifications in light of the courts' rejection of the reasoning set forth in the 2015 final rule.[51] The 2022 proposed rule highlighted the following in proposing to retain the ban:

(1) The substantive integrity of the Department's previous, negative determinations;

(2) The due process that has already been afforded to unsuccessful petitioners;

(3) The non-substantive nature of the revisions to part 83 in the 2015 final rule;

(4) The interests of the Department and third parties in finality; and

(5) The inappropriateness of allowing re-petitioning based on new evidence.[52]

F. 2024 Proposed Rule

Following publication of the 2022 proposed rule, the Department held two Tribal consultation sessions with federally recognized Indian Tribes and a listening session with present, former, and prospective petitioners for Federal acknowledgment. The Department also solicited written comments through July 6, 2022, and received approximately 270

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[49] *Burt Lake*, 613 F. Supp. 3d at 384.
[50] *Chinook*, 2020 WL 128563, at *10; *Burt Lake*, 613 F. Supp. 3d at 387.
[51] 87 FR 24908.
[52] 87 FR 24910–16.

comments from federally recognized Indian Tribes and a wide range of stakeholders, including former and prospective part 83 petitioners, various State and local government representatives, individuals, and others.

After reviewing the written comments, as well as the transcripts of the consultation and listening sessions, the Department engaged in further deliberation of three options: (1) keeping the ban in place; (2) creating a limited avenue for re-petitioning; and (3) creating an open-ended avenue for re-petitioning, with few or no limitations. On July 12, 2024, the Department published a proposed rule (2024 proposed rule) to create a limited exception to the ban,[53] in line with the second option, through implementation of a re-petition authorization process.[54] In the preamble of the rule, the Department explained that its proposal "reflect[ed] a reconsidered policy on re-petitioning for Federal acknowledgment."[55]

Following publication of the 2024 proposed rule, the Department again held two Tribal consultation sessions with federally recognized Indian Tribes and a listening session with present, former, and prospective petitioners for Federal acknowledgment. The Department also solicited written comments through September 13, 2024, and received 163 comments from federally recognized Indian Tribes and a wide range of stakeholders.[56] What follows is a summary of this final rule, as well as a discussion of the comments that informed the Department's deliberations.

II. Summary of the Final Rule

A. Re-Petition Authorization Process

This final rule appends a new subpart titled "Subpart D--Re-Petition Authorization Process" to the end of the current part 83 regulations. The new subpart applies to

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[53] 89 FR 57097.
[54] *See* 89 FR 57097, 57100–02 (summarizing the proposed re-petition authorization process).
[55] 89 FR 57100.
[56] https://www.regulations.gov/document/BIA-2022-0001-0194/comment.

"unsuccessful petitioner[s]," which is a new term defined in § 83.1.[57] Pursuant to the new subpart, an unsuccessful petitioner that seeks to re-petition must first plausibly allege that the outcome of the previous, negative final determination would change to positive on reconsideration based on one or both of the following: (1) a change in part 83 (from the 1978 or 1994 regulations to the 2015 regulations); and/or (2) new evidence.[58]

This standard, requiring a petitioner to state a plausible claim for re-petitioning based on one of the conditions above, is similar to the standard for surviving a motion to dismiss,[59] except that the Department may conduct limited fact-finding to assess the reasonableness of the claim (for example, cross-referencing alleged facts with facts discussed during the original evaluation of a petition, if able to be done in a timely manner). Under the standard, a petitioner's allegations regarding changes in part 83 and/or new evidence must address the deficiencies that, according to the Department, prevented the petitioner from satisfying all seven mandatory criteria (located at § 83.11(a) through (g) in the 2015 regulations). Otherwise, even if the allegations were taken as true, they would not change the previous, negative outcome and, therefore, would not justify reconsideration. That is, because Federal acknowledgment requires satisfaction of all seven criteria,[60] the petitioner's re-petition request must address all of the criteria that the petitioner did not satisfy. For example, if the Department determined in the previous, negative final determination that the petitioner did not satisfy criteria (a) (Indian Entity Identification), (b) (Community), and (c) (Political Authority), then the petitioner must plausibly allege that application of the 2015 regulations,

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[57] 25 CFR 83.1 (defining an "unsuccessful petitioner" as "an entity that was denied Federal acknowledgment after petitioning under the acknowledgment regulations at part 54 of this chapter (as they existed before March 30, 1982) or part 83"). The term "unsuccessful petitioner" applies only to those that have received a final agency decision, not to those that have received only a proposed finding or that have withdrawn from the process prior to receiving a final agency decision. For a complete list of unsuccessful petitioners, see Petitions Denied Through 25 CFR part 83 (34 Petitions), Office of Fed. Acknowledgment, https://www.bia.gov/as-ia/ofa/petitions-resolved/denied (last visited Jan. 7, 2025) (listing thirty-four unsuccessful petitioners as of November 9, 2024).

[58] 25 CFR 83.48.

[59] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[60] 25 CFR 83.43(a); 25 CFR 83.5.

consideration of new evidence, or both would address the deficiencies relating to all three criteria, not only one or two.

A decision granting authorization to re-petition (grant of authorization to re-petition) is not the same as a final agency decision granting Federal acknowledgment. Rather, a decision granting authorization to re-petition simply permits the petitioner to proceed with a new documented petition through the Federal acknowledgment process.[61] Upon authorization to re-petition, the petitioner must submit a complete documented petition under § 83.21 to request Federal acknowledgment and will then receive substantive review of the petitioner's claims and evidence.

In the interest of finality, any petitioner denied prior to the effective date of this final rule must request to re-petition within five years of the effective date of the rule.[62] Any petitioner denied after the effective date of the final rule will have to request to re-petition within five years of the date of issuance of the petitioner's negative final determination.[63] However, the five-year time limit applicable to a petitioner denied after the effective date of the final rule will be tolled during any period of judicial review of the negative final determination.[64] Additionally, any petitioner denied authorization to re-petition under the re-petition authorization process—or denied Federal acknowledgment upon re-petitioning, after receiving authorization to do so—will be prohibited from submitting a new re-petition request based on new evidence.[65]

In many respects, the Department's processing of a re-petition request will mirror the processing of a group's documented petition, particularly the procedures relating to notice and comment. To initiate the re-petition authorization process, an unsuccessful petitioner must submit a complete re-petition request to OFA, explaining how the petitioner meets the

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[61] 25 CFR 83.61(a).
[62] 25 CFR 83.49(a).
[63] 25 CFR 83.49(b).
[64] 25 CFR 83.49(b)(1).
[65] 25 CFR 83.47(c). This provision does not prevent a petitioner from resubmitting a re-petition request withdrawn prior to receipt of a decision on the request. 25 CFR 83.56.

conditions of §§ 83.47 through 83.49.[66] Upon receipt of a request containing all of the documentation required under § 83.50, OFA will publish notice of the request in the *Federal Register* and on the OFA website.[67] Additionally, OFA will provide notice to certain third parties, including specific government officials of the State in which the petitioner is located, federally recognized Indian Tribes that may have an interest in the petitioner's acknowledgment determination, and any third parties that participated in an administrative reconsideration or Federal Court appeal concerning the petitioner's original documented petition.[68] OFA will also provide notice to individuals and entities that had interested-party or informed-party status under the 1994 regulations,[69] with the understanding that those individuals and entities previously "request[ed] to be kept informed of general actions regarding a specific petitioner" and presumably wish to remain informed.[70] The Department will then allow for comment on the re-petition request and give the petitioner an opportunity to respond to comments received.[71]

After the close of the comment-and-response period, the Department will consider the re-petition request ready for active consideration, and within 30 days of the close of the comment-and-response period, OFA will place the request on a register listing all requests that are ready for active consideration.[72] The order of consideration of re-petition requests will be determined by the date on which OFA places each request on OFA's register.

Pursuant to § 83.23(a)(2), the Department's highest priority is to complete reviews of documented petitions already under review, and those reviews will take precedence over

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[66] 25 CFR 83.50(a)(2).
[67] 25 CFR 83.51(b)(1).
[68] 25 CFR 83.51(b)(2).
[69] 25 CFR 83.1 (1994) (defining "[i]nterested party" and "[i]nformed party"); 59 FR 9293.
[70] 25 CFR 83.22(d)(5).
[71] 25 CFR 83.52 (stating that publication of notice of the re-petition request will be followed by a 120-day comment period and that, if OFA receives a timely objection and evidence challenging the request, then the petitioner will have 60 days to submit a written response).
[72] 25 CFR 83.52(d); *see also* 25 CFR 83.53(a) (describing the register of re-petition requests that OFA will maintain and make available on its website).

reviews of re-petition requests.[73] Pursuant to this final rule, the Department will also prioritize review of documented petitions awaiting review and new documented petitions over review of re-petition requests, at least initially.[74] Re-petition requests pending on OFA's register for more than two years will have priority over any subsequently filed documented petitions.[75]

Once AS-IA is ready to begin review of a specific request, OFA will notify the petitioner and third parties accordingly.[76] In making a decision, AS-IA will consider the claims and evidence in the re-petition request and in any comments and responses received.[77] AS-IA may also consider other information,[78] such as documentation contained in the record associated with the petitioner's denied petition and additional explanations and information requested by AS-IA from commenting parties or the petitioner. Any such additional material considered by AS-IA will be added to the record and shared with the petitioner.[79] The petitioner then will have an opportunity to respond to any additional material considered.[80]

AS-IA will issue a decision on a re-petition request within 180 days of the date on which OFA notifies the petitioner that AS-IA has begun review, subject to any suspension period.[81] AS-IA will grant the petitioner authorization to re-petition if AS-IA finds that the petitioner meets the conditions of §§ 83.47 through 83.49.[82] Conversely, AS-IA will deny authorization to re-petition if AS-IA finds that the petitioner has not met the conditions of §§

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[73] 25 CFR 83.53(c) (stating, in part, that "the Department will prioritize review of documented petitions over review of re-petition requests").
[74] *See* 25 CFR 83.53(c).
[75] 25 CFR 83.53(c).
[76] 25 CFR 83.54.
[77] 25 CFR 83.55(a).
[78] 25 CFR 83.55(b).
[79] 25 CFR 83.55(c).
[80] 25 CFR 83.55(c) (providing the petitioner with a 60-day opportunity to respond to the additional material).
[81] *See* 25 CFR 83.57 and 83.58 (discussing suspension of review). The way that the clock runs during the review of a re-petition request is similar to the way that it runs during the review of a documented petition. *See, e.g.*, 25 CFR 83.32 (requiring OFA to complete its review under Phase I "within six months after notifying the petitioner . . . that OFA has begun review of the petition," subject to suspension "any time the Department is waiting for a response or additional information from the petitioner").
[82] 25 CFR 83.59(b).

83.47 through 83.49.[83] OFA will then provide notice of AS-IA's decision to the petitioner and third parties.[84] Additionally, OFA will publish notice of the decision in the *Federal Register* and on the OFA website.[85]

AS-IA's decision will become effective immediately and will not be subject to administrative appeal.[86] Furthermore, a grant of authorization to re-petition is not final for the Department. Rather, as noted above, it simply permits the petitioner to proceed through the Federal acknowledgment process with a new documented petition.[87] By contrast, a decision denying a re-petition request (denial of authorization to re-petition) represents the consummation of the Department's decision-making about the petitioner's recognition status, is final for the Department, and is a final agency decision under the APA.[88]

B. Additional, Related Revisions

Consistent with the introduction of a new re-petition authorization process, this final rule inserts new definitions for "re-petition authorization process" and "re-petitioning" in § 83.1, as well as a new definition for "unsuccessful petitioner," as noted above. This rule also makes a change to § 83.4(d), the provision that previously prohibited re-petitioning. The change notes a limited exception to the re-petition ban for unsuccessful petitioners that meet the conditions of §§ 83.47 through 83.49, as determined by AS-IA in the re-petition authorization process.

This final rule also gives any petitioner currently proceeding under the 1994 regulations the choice to proceed instead under the 2015 regulations.[89] In doing so, the rule presents a choice similar to the one given to pending petitioners in the 2015 regulations.[90]

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[83] 25 CFR 83.59(c).
[84] 25 CFR 83.60.
[85] 25 CFR 83.60.
[86] 25 CFR 83.61.
[87] 25 CFR 83.61(a).
[88] 25 CFR 83.61(b).
[89] 25 CFR 83.47(b).
[90] *See* 25 CFR 83.7(b) (giving "each petitioner that . . . has not yet received a final agency decision" the choice "to proceed under these revised regulations" or "to complete the petitioning process under the previous version of the acknowledgment regulations as published in 25 CFR part 83, revised as of April 1, 1994").

Absent the choice, a petitioner proceeding under the 1994 regulations that wants to proceed under the 2015 regulations would have to await a final determination and then receive authorization to re-petition if the determination is negative. By allowing a petitioner to switch directly to the current regulations, the relevant provision promotes efficiency.

Finally, this final rule clarifies the Department's position on the severability of the provisions in the regulations promulgated here.[91] Notwithstanding the Department's position that the provisions, taken together, properly balance competing interests, the Department considered whether the provisions could stand alone and has concluded that they could. Specifically, the Department considered whether, if one of the conditions on re-petitioning set forth at §§ 83.47 through 83.49 were held to be invalid, the other conditions should remain valid. The Department's position is that they should because each provision could "function sensibly" without the others.[92] For example, a change in part 83 would remain a valid basis for a re-petition request under § 83.48(a) even if a court held § 83.48(b) (allowing new evidence to be basis for a re-petition request) to be invalid, and vice versa. The Department also considered whether the provisions describing the processing of a re-petition request, set forth at §§ 83.50 through 83.61, could stand alone, and the Department's position is that they could. For example, provisions relating to notice and comment and the order of priority for review could each function independently if other requirements were determined to be invalid.

C. Technical Revisions

Finally, this final rule makes technical revisions to the legal authority citation for part 83 because 25 U.S.C. 479a-1 has been transferred to 25 U.S.C. 5131 and Public Law 103-454 Sec. 103 (Nov. 2, 1994) has been reprinted in the United States Code at 25 U.S.C. 5130

[91] 25 CFR 83.62.
[92] *Belmont Mun. Light Dep't v. FERC*, 38 F. 4th 173, 188 (D.C. Cir. 2022) (citation omitted).

note (Congressional Findings). This final rule also makes a technical revision to the mailing address listed in § 83.9.

III. Discussion of the Comments on the 2024 Proposed Rule

A. Overview

The Department conducted three virtual sessions to seek input on the 2024 proposed rule. The Department hosted two virtual consultation sessions with federally recognized Indian Tribes and a listening session with present, former, and prospective petitioners. In each virtual session, the AS-IA engaged with participants, provided background on the proposed changes to part 83, and provided a detailed explanation of the proposed changes.

The sessions and written comment period (which closed on September 13, 2024) garnered comments from the following federally recognized Indian Tribes: (1) Santa Ynez Band of Chumash Mission Indians; (2) the Morongo Band of Mission Indians; (3) the Puyallup Tribe; (4) the Confederated Tribes of Siletz Indians; (5) the Yuhaaviatam of San Manuel Nation; (6) the Tunica-Biloxi Indian Tribe; (7) the Tulalip Tribes; (8) the Eastern Band of Cherokee Indians; (9) the Swinomish Indian Tribal Community; (10) the Suquamish Indian Tribe; (11) the Muckleshoot Indian Tribe; (12) the Shawnee Tribe; (13) the Seneca Nation of Indians; (14) the Delaware Nation; (15) the Federated Indians of Graton Rancheria; and (16) the Shinnecock Indian Nation.

Others that participated in the listening session and that submitted written comments included State-recognized Tribes; non-federally recognized groups (including unsuccessful petitioners for Federal acknowledgment); national associations (including inter-Tribal organizations), State and local government representatives, congressional delegations and coalitions; and individuals associated with educational institutions, including Yale University, Stanford University, and the Indian Legal Clinic of Arizona State University's College of Law.

The federally recognized Indian Tribes that commented either verbally or through written comments generally oppose re-petitioning, with the exception of the Tunica-Biloxi Indian Tribe and the Shinnecock Indian Nation. By contrast, non-federally recognized groups (including unsuccessful petitioners) support an avenue for re-petitioning.

State and local government representatives mostly aligned with the federally recognized Indian Tribes that oppose re-petitioning. Those commenters noted the resources already expended to oppose petitions for Federal acknowledgment and that would have to be spent opposing requests to re-petition. They also highlighted the potential consequences of Federal acknowledgment on local communities, including detrimental economic impacts. However, not all of the State and local government representatives who submitted comments oppose re-petitioning. A Connecticut State senator and group of State representatives submitted a letter in support of the 2024 proposed rule, as well as in support of three unsuccessful petitioners based in Connecticut: the Golden Hill Paugussett Tribe, the Schaghticoke Tribal Nation, and the Eastern Pequot Indians. The Mayor of Charlestown, Indiana, also submitted a comment in support of the 2024 proposed rule and of unsuccessful petitioners, stating that "[i]t is important for . . . all of Indiana to acknowledge and respect the legacy and resilience of the Indigenous communities that occupied the land where our cities were established." Indiana Senators Todd Young and Mike Braun similarly submitted a letter in support of the 2024 proposed rule, while also asserting that the rulemaking has taken too much time to complete.

Over one hundred individuals submitted either written comments or verbal comments in support of re-petitioning, often in support of specific groups previously denied Federal acknowledgment. Many individual commenters expressed support for the Golden Hill Paugussett Tribe, the Schaghticoke Tribal Nation, and the Eastern Pequot Indians. Individual commenters also expressed support for the Chinook Indian Nation, the Muwekma Ohlone Tribe, and the Ma-Chis Lower Creek Indian Tribe.

The consultations, listening session, and comment period provided a valuable opportunity for federally recognized Indian Tribes and stakeholders, including non-federally recognized groups and State and local government representatives, to offer comments on whether the Department should implement a re-petition authorization process. The comments ranged from wholly supportive to strongly opposed. Although most federally recognized Indian Tribes that commented oppose re-petitioning, many offered constructive feedback on the 2024 proposed rule. The majority of non-Tribal commenters were supportive of a re-petition authorization process.

What follows is a summary of the comments received, organized by issue, and the Department's responses to the comments.

B. Comments Citing Fairness as a Justification for the Re-Petition Authorization Process

Numerous commenters cited fairness as a justification for allowing re-petitioning. Commenters emphasized the significant impact of Federal recognition on the lives of a petitioner's members, for example, linking recognition with increased access to federal funding for housing, healthcare, and education. Some cited the potential economic benefit of recognition, like a boost in tourism that would benefit surrounding communities as well, while others focused on the "dignity and respect" accorded through Federal acknowledgment. The Indian Legal Clinic of Arizona State University's College of Law commented that a "lack of recognition can negatively impact a Tribe's ability to exercise its self-determination in areas such as defending sovereignty, protecting culture, accessing resources, and ensuring the survival of tribal ways of life." The Shinnecock Indian Nation commented that leaving any Tribe entitled to acknowledgment off of the Department's list of federally recognized Indian Tribes is a "horrible mistake that lasts for generations." The Haliwa-Saponi Indian Tribe (a State-recognized Tribe in North Carolina) relatedly stated that the re-petitioning process "safeguards against unintentional error in the evaluation of

evidence from petitioners." The MOWA Band of Choctaw Indians (an unsuccessful petitioner) stated that implementing a re-petition authorization process "not only aligns with the principles of justice and fairness but also provides a necessary administrative pathway for tribes to seek reconsideration without resorting to the courts."

Several commenters stated that prohibiting unsuccessful petitioners denied under the previous regulations from re-petitioning under the 2015 regulations would be unfair given that the changes in the 2015 regulations were intended to promote consistency, efficiency, and fairness. For example, one unsuccessful petitioner (the Muwekma Ohlone Tribe) stated that the proposed process will ensure "equal protection to all tribal petitioners." Echoing that point, another unsuccessful petitioner (the Miami Nation of Indians) asserted that "all petitioners" should be allowed to avail themselves of the process set forth in the 2015 regulations. The Alliance of Colonial Era Tribes, an inter-Tribal organization, similarly stated that "all petitions" should be "measured against the same written standards," to "improve the consistency and integrity of the process as a whole."

Others asserted that the Department should allow re-petitioning because of the difficulty of satisfying the seven mandatory criteria under the previous regulations. The Tunica-Biloxi Indian Tribe, for example, stated that many unsuccessful petitioners "may not have had the resources or expertise required to meet the [Department's] evidentiary standards at the time of their initial petitions."

Several petitioners claimed that they were treated unfairly during the review of their respective petitions. Based on the allegedly unfair treatment of unsuccessful petitioners, a number of commenters expressed support for a re-petition process broader than that in the 2024 proposed rule. For example, the Steilacoom Tribe (an unsuccessful petitioner) stated that all petitioners "harmed by this broken system should have an opportunity to re-petition." Other unsuccessful petitioners shared similar comments, as did individual supporters of those petitioners.

By contrast, those opposed to re-petitioning defended the integrity of the Federal acknowledgment process. The Swinomish Indian Tribal Community explained that the process afforded to unsuccessful petitioners was "extensive, lengthy, [and] fact-intensive" and involved "an exhaustive review of facts and claims." Quoting language from the preambles of the 2022 proposed rule and 2024 proposed rules, the Eastern Band of Cherokee Indians similarly stated that the Department's previous, negative determinations are "substantively sound." The Tribe emphasized that unsuccessful petitioners had ample opportunities to address apparent deficiencies in their materials, respond to the Department's preliminary findings, and appeal their negative determinations administratively and in Federal court. The Santa Ynez Band of Chumash Mission Indians and the Morongo Band of Mission Indians likewise noted that unsuccessful petitioners had opportunities for redress through the Federal courts, and they noted that unsuccessful petitioners retain the option to seek Federal recognition through Congress. The Connecticut Towns of Ledyard, North Stonington, and Preston (Connecticut Towns) echoed that point, asserting the Department "ignore[d] that unsuccessful petitioners still have the option of seeking congressional acknowledgment."

The Connecticut Towns otherwise described the re-petition authorization process in the 2024 proposed rule as "illogical, unfair, and time-consuming." Other commenters shared that sentiment and proposed alternatives to the process. The Eastern Band of Cherokee Indians, for example, stated that, to comply with the *Chinook* and *Burt Lake* decisions, "the Department need only provide a fuller, more detailed explanation for its already sound policy" banning re-petitioning. Another commenter suggested that, instead of removing the ban, the Department should withdraw the 2015 final rule revising the regulations and reinstate the 1994 regulations.

Response: As the Department explained in the 2024 proposed rule, the Department considers fairness to unsuccessful petitioners to be a valid justification for implementing a re-

petition authorization process, particularly given the high-stakes nature of the Federal acknowledgment process. Even if the reasons for upholding the ban in the 2022 proposed rule were valid, the Department has decided to create a conditional, time-limited opportunity to re-petition based on a reconsidered policy that reflects greater consideration of the interests of unsuccessful petitioners. The Department's reconsidered policy, in turn, aligns more closely with the decisions in *Chinook* and *Burt Lake* than the policy underlying the 2022 proposed rule. Both courts suggested that fairness is a valid justification for re-petitioning, particularly given the Department's references to "reforms" made in the 2015 revision to part 83.[93] The *Burt Lake* court noted, for example, that the plaintiff in that case "persuasively contend[ed] that the only way for previously-denied petitioners to get 'fair' and 'consistent' results would be by allowing them to re-petition."[94] Additionally, "although it is true that, in the absence of a re-petition authorization process, unsuccessful petitioners could still 'seek legislative recognition if substantial new evidence develops,"[95] the Department believes that the part 83 process, as conditioned by this rule, "should continue to be an option given the Department's familiarity with the petitioner, expertise in evaluating evidence, and management of all Indian affairs, including decisions regarding Federal acknowledgment."[96]

In response to comments recommending that the Department withdraw or vacate the 2015 final rule, the Department rejects that suggestion in light of the interests in fairness mentioned above. As stated in the preamble of the 2015 final rule, there was "wide agreement by the public" that the part 83 process prior to the 2015 revision was "broken,"[97] a point that both the *Chinook* and *Burt Lake* courts highlighted.[98] Although the Department does not adopt that characterization and maintains the validity of Department's process under the previous regulations, as well as the validity of Departmental precedent, the Department is

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[93] 80 FR 37862.
[94] *Burt Lake*, 613 F. Supp. 3d at 384.
[95] 89 FR 57103 (quoting 87 FR 24916).
[96] 89 FR 57103 (citing 25 U.S.C. 2).
[97] 80 FR 37864.
[98] *Burt Lake*, 613 F. Supp. 3d at 380; *Chinook*, 2020 WL 128563, at *2.

nevertheless willing to give unsuccessful petitioners a path for arguing why reconsideration under the 2015 regulations is warranted. Furthermore, the Department considers a threshold, re-petition authorization process an appropriate way to balance interests in re-petitioning with third-party interests in keeping the ban in place. Those interests are discussed further below.

C. Additional Discussion of Third-Party Opposition to Re-Petitioning

Most federally recognized Indian Tribes and State and local government representatives that submitted comments on the 2024 proposed rule oppose re-petitioning. Numerous Tribes recommended that the Department keep in place the Department's longstanding ban on re-petitioning.

Several Tribes explained that the re-petition authorization process undermines their ability to protect their respective Tribal identities. The Shawnee Tribe, for example, commented that the appropriation of Shawnee Tribal identity by non-federally recognized groups is an ongoing problem and that "the Federal acknowledgment process provides some protection against groups . . . that make false claims" to Shawnee sovereignty and culture. Similarly, the Eastern Band of Cherokee Indians highlighted the threat posed by "six groups that have falsely and fraudulently claimed to be Cherokee and that have already undergone and completed the Part 83 process." The Tribe expressed concern about the burden that opposing re-petition requests will impose on the Tribe's resources, resources that the Tribe "should be able to utilize . . . to improve the lives of [its] citizens rather than . . . to repeatedly defend our identifies against fraudulent groups."

Several other Tribes echoed the Eastern Band of Cherokee Indians' concern about the threat that re-petitioning would pose to their limited resources. The Santa Ynez Band of Chumash Mission Indians asserted that re-petitioning would unfairly subject third parties to "the burden of responding to petitioners' arguments," even though those third parties already expended considerable resources to oppose the petitions. The Tribe also highlighted the

considerable resources that State and local governments in Connecticut expended to oppose petitions submitted by various Connecticut-based petitioners. Additionally, the Tribe highlighted the resources that several Tribes in Washington expended to monitor or oppose petitions that potentially threaten their "sovereignty, membership, and/or treaty fishing rights." The Morongo Band of Mission Indians similarly emphasized the considerable investment of "time, energy, and resources over many years" by Tribes and other third parties "to protect their legitimate interests" in safeguarding "their economies, jurisdiction, or membership."

Consistent with the concerns discussed above, the Tulalip Tribes described the 2024 proposed rule as "fatally flawed" and asserted that it "contravenes settled expectations of finality for those parties who fought—sometimes for decades—in favor of negative final determinations." The Suquamish Indian Tribe, Muckleshoot Indian Tribe, and Puyallup Tribe likewise asserted that the finality interests of third parties weigh strongly against what they perceive as "[e]ndless" opportunities to re-petition. They stated that, "[a]fter almost 50 years of decisions under the Part 83 process, States, local governments, federally recognized Indian Tribes, and the federal government have a compelling interest in repose and the finality of tribal acknowledgment decisions."

State and local government representatives in Connecticut shared similar concerns about the perceived threat that re-petitioning would pose to their interests in finality. The Connecticut Attorney General asserted that the 2024 proposed rule fails to "meaningfully consider or address any of the consequences Federal acknowledgment has on State and local communities." The commenter identified "renewed threats resulting from acknowledged tribes," including "extensive land claims, federal trust and reservation land, loss of state and local government jurisdiction and tax base, adverse environmental and land use impacts, casino development, and other issues." Connecticut's congressional delegation expressly supported the Connecticut Attorney General's comments. Other Connecticut-based

commenters (the Kent School and the Town of Kent) stated that they "have spent over three decades and hundreds of thousands of dollars reluctantly participating in DOI's acknowledgment process and a lands claim suit filed by the Schaghticoke Tribal Nation," an unsuccessful petitioner.

Numerous commenters objected to the notion that third-party interests should influence the Department's decision on whether to implement a re-petition authorization process. For example, the Muwekma Ohlone Tribe (an unsuccessful petitioner) stated in the listening session that the interests of groups denied Federal acknowledgment outweigh those of third parties and expressed support for the 2024 proposed rule. Other unsuccessful petitioners, like the Chinook Indian Nation and Eastern Pequot Indians, contended that third parties should not be allowed to exert political influence on the proposed re-petition authorization process. The Chinook Indian Nation stated that third-party involvement should be limited to commenting on re-petition requests and that the Department should prohibit "ex parte contacts or other attempts to influence the agency's decision" on a re-petition request or on a subsequently filed re-petition.

Response: The Department recognizes that third parties often expended considerable time and resources participating in the Federal acknowledgment process and agrees that third parties have significant, legitimate interests in the finality of the Department's final determinations. As explained in the 2024 proposed rule, those interests informed the Department's decision not to give unsuccessful petitioners an open-ended opportunity to re-petition that might "make[] worthless" third parties' substantial past investment.[99] Relevant here, a petitioner's disagreement with the Department's evaluation of the petitioner's claims and evidence in a previous, negative final determination is not a basis for requesting to re-petition. By maintaining the integrity of the Department's past determinations, the Department by extension recognizes the value of third-party investment in the Federal

[99] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988).

acknowledgment process, specifically, the value of third-party comments and evidence that informed those past determinations.

Although the Department's proposal in the 2022 proposed rule (which would have retained the longstanding, blanket ban on re-petitioning) would have aligned more closely with third-party interests in finality, the approach that the Department adopts in this final rule seeks to balance those interests with competing, compelling interests in re-petitioning (discussed above). The re-petition authorization process will subject prospective re-petitioners to a threshold review. By limiting the types of arguments that unsuccessful petitioners can raise in the threshold review, the Department seeks to minimize the burden on third parties that choose to participate in the process and respond to those arguments. Additionally, by imposing a limit on the amount of time that unsuccessful petitioners will have to request to re-petition, the Department seeks to account for third-party interests in finality.

By subjecting prospective re-petitioners to a threshold review, this final rule not only seeks to balance third-party interests with denied petitioners' interests but also seeks to be responsive to the *Chinook* court's "skeptic[ism] that res judicata is applicable in a situation such as this where legal standards changed between the 1994 and 2015 regulations."[100] As discussed at length in the 2022 proposed rule,[101] and as stated in the 2024 proposed rule,[102] the Department maintains that the legal standards in the 2015 regulations are not significantly different from those in the previous regulations and do not compel the Department to allow re-petitioning. However, in the interest of fairness to unsuccessful petitioners, the Department has decided to give those petitioners an opportunity to argue that specific changes warrant reconsideration of their respective negative final determinations.

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[100] *See Chinook*, 2020 WL 128563, at *9 (explaining that "res judicata does not apply when legal standards governing the issues are 'significantly different'" (citing *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 199 (D. Conn. 2006))).
[101] *See* 87 FR 24911–14.
[102] 89 FR 57105.

Finally, in response to third-party concerns about the potential consequences of Federal acknowledgment on local communities (for example, land claims, loss of tax bases, and gaming development), affected third parties will be able to avail themselves of due process afforded in connection with those specific issues.[103] A review of a re-petition request, a grant of authorization to re-petition, or even a positive final determination would not result in the adverse impacts described by third parties. In general, the part 83 process concerns only whether a group constitutes a distinct social and political entity entitled to a government-to-government relationship with the United States.[104]

D. Comments Citing Departmental Workload as a Justification for Retaining the Ban on Re-Petitioning

Several commenters expressed concern about the impact of re-petitioning on the Department's workload and ability to process petitions and re-petition requests efficiently. For example, the Burt Lake Band of Ottawa and Chippewa Indians (an unsuccessful petitioner) generally supports a re-petition process but fears that the process proposed in the 2024 proposed rule would result in significant delays. The commenter estimated that the time frame to receive a decision on a re-petition request "could approach 44 years," a time frame that would provide "insufficient justice for re-petitioners."

Among those that oppose re-petitioning, the Swinomish Indian Tribal Community commented that re-petitioning would create "an ongoing cycle of review" that would exhaust not only the resources of federally recognized Indian Tribes but also Departmental resources and delay or prevent the review of new petitions. The Shawnee Tribe similarly commented on the amount of additional work required to implement a re-petition authorization process,

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[103] *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220 (2005) (explaining that "Congress has provided a mechanism for the acquisition of lands for Tribal communities that takes account of the interests of others with stakes in the area's governance and well-being"); 80 FR 37881 (explaining that "if the newly acknowledged tribe seeks to have land taken into trust and that application is approved, state or local governments may challenge that action under the land-into-trust process (25 CFR part 151), an entirely separate and distinct decision from the Part 83 process").

[104] *See* 25 CFR 83.2 (describing the purpose of part 83).

stating that the process would "more than double[] the amount of resources required." According to the Tribe, "[t]he Department and Indian country would be better served by allocation of the Department's precious, limited resources to existing areas of need—of which there are many," as well as to the review of new and pending petitions.

The Eastern Band of Cherokee Indians likewise asserted that re-petitioning would be "unfair to pending and future petitioners who may have legitimate petitions." According to the Tribe, "[r]equiring groups with valid claims to wait their turn for review of their original documented petitions while [re-petition] requests from unsuccessful petitioners are considered would be an affront to legitimate sovereign nations whose status has not yet been recognized by the United States."

Response: The Department considers implementation of a threshold review, limiting the types of arguments that unsuccessful petitioners can raise in their re-petition requests, to be an appropriate way to address concerns about the effect of re-petitioning on the Department's workload. By allowing prospective re-petitioners to raise only certain arguments in their re-petition requests, namely, arguments relating to (1) changes in the 2015 regulations or (2) the availability of new evidence—both developments likely to postdate the date of the petitioners' previous, negative final determinations—the Department seeks to avoid the overwhelming administrative burdens that would be associated with an open-ended re-petitioning process, including the potential reopening of decades-old administrative records that "rang[e] in excess of 30,000 pages to over 100,000 pages."[105]

This final rule gives AS-IA oversight over the re-petition authorization process, in line with the 2024 proposed rule. Although AS-IA's oversight over the process might increase the workload within the Office of the AS-IA, AS-IA is in the best position to review

[105] Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW ENG. L. REV. 491, 495 (2003) (citing *Work of the Department of the Interior's Branch of Acknowledgment and Research within the Bureau of Indian Affairs: Hearing Before the S. Comm. on Indian Affs.*, 107th Cong. 2, 19-20 (2002) (statement of Michael R. Smith, Dir., Office of Tribal Servs., U.S. Dep't of the Interior)).

re-petition requests efficiently given AS-IA's expertise and experience in evaluating part 83 petitioners' claims and evidence. In response to commenters' concerns about the effect of re-petitioning on the review of new and pending petitions, AS-IA oversight will also ensure that the Department "prioritize[s] review of documented petitions over review of re-petition requests," at least initially.[106] The Department notes that prospective petitioners have had notice of the opportunity to petition for Federal acknowledgment since 1978, when the Department first promulgated regulations governing the Federal acknowledgment process, and still have a time window under this final rule to proceed through the part 83 process ahead of prospective re-petitioners.

E. Comments on the Standard Applied in the Re-Petition Authorization Process

Most of the federally recognized Indian Tribes that submitted comments on the 2024 proposed rule oppose any re-petition authorization process. However, many nevertheless suggested changes that, in their view, would improve the process, should the Department finalize it.

In particular, several of the Tribes that commented focused on the standard that the Department would apply in the Department's threshold review. Some questioned whether the standard would indeed create a "limited" or "narrow" path to re-petition, as the Department stated in the 2024 proposed rule, and argued that the standard was improperly low. For example, the Puyallup Tribe commented that the standard "throws the door wide open to re-petitioning by unnecessarily limiting the Department's ability to evaluate the truth of previously denied petitioners' allegations in support of a request to re-petition and excluding only re-petition requests that are facially frivolous." The Muckleshoot Indian Tribe echoed that comment and also asserted that the "'plausibly allege' threshold standard" in the 2024 proposed rule is lower than the standard that the Department had proposed in the 2014 proposed rule (which also would have allowed limited re-petitioning). By contrast, the

[106] 25 CFR 83.53(c).

Duwamish Tribe (an unsuccessful petitioner) described the "plausible allegation" requirement as an "undue and burdensome restriction[]."

Both the Puyallup Tribe and Muckleshoot Indian Tribe commented that the Department's reference to the "plausibly allege" standard as "akin" to that for surviving a motion to dismiss is unclear, and they requested clarification on whether the standard is the same as that for surviving a motion to dismiss or different in some respect. The Muckleshoot Indian Tribe specifically asked whether the Department "would engage in fact finding at the threshold stage."

Several Tribes suggested that the Department should adopt a different standard. For example, the Eastern Band of Cherokee Indians recommended that the Department adopt a "'preponderance of the evidence'/'more likely than not'" standard. The Swinomish Indian Tribal Community recommended that the Department adopt a "clear and convincing evidence" standard. Others recommended adoption of the standard for a new trial or relief from a judgment under Federal Rule of Civil Procedure (F.R.C.P.) 59 or 60, respectively. The Federated Indians of Graton Rancheria described that standard as stricter and, therefore, more appropriate given that "there has already been a lengthy agency review process and final determination." According to the Tribe, a standard akin to that under F.R.C.P. 59 or 60 would allow petitions to be "reopen[ed]" only in "limited situations, to be used sparingly and in extraordinary circumstances." The Puyallup Tribe and the Connecticut Attorney General similarly recommended adoption of the standard under F.R.C.P. 60 in lieu of the standard for surviving a motion to dismiss under F.R.C.P. 12(b)(6), with the Puyallup Tribe specifically citing F.R.C.P. 60(b)(6).

Finally, several commenters took issue with the discretion afforded to AS-IA under the "plausibly allege" standard in the 2024 proposed rule. The Connecticut Towns of Ledyard, North Stonington, and Preston asserted that the Department does not have the authority to allow re-petitioning (or even to acknowledge Indian Tribes) but that, if the

Department implements a re-petition authorization process, OFA is better suited to the review re-petition requests than AS-IA. The Seneca Nation of Indians likewise commented that the reviewer of re-petition requests should be OFA, not AS-IA.

Conversely, the Burt Lake Band of Ottawa and Chippewa Indians stated that an "Independent Reviewer," like an administrative law judge or retired judge, should oversee the re-petition authorization process. The commenter also recommended that "[t]he decision on whether there is a factual basis to grant an application for repetitioning [should] be shortened to 90 days" and that, "[i]f the Independent Reviewer does not decide the matter in 90 days, the application for repetitioning [should be] approved and [the] petitioner move[d] to the next step."

Response: The Department does not consider the "plausibly allege" standard in the 2024 proposed rule to be improperly low. Although the standard for obtaining authorization to re-petition in the 2014 proposed rule might seem higher because it would have required a petitioner to prove "by a preponderance of the evidence" that "[a] change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination"[107]—that is at best unclear because the 2014 proposed rule did not clarify what was meant by "warrants reconsideration."

In the 2024 proposed rule, the Department proposed alternative language—adopted here—to make the standard more precise than that in the 2014 proposed rule. Pursuant to this final rule, to warrant reconsideration, a petitioner must first plausibly allege that the outcome of the petitioner's previous, negative final determination would change to positive based on one or both of the following: (1) a change in part 83 (from the 1978 or 1994 regulations to the 2015 regulations); and/or (2) new evidence.[108] Because Federal acknowledgment requires satisfaction of all seven criteria,[109] the petitioner's re-petition

[107] 79 FR 30774.
[108] 25 CFR 83.48.
[109] 25 CFR 83.43(a); 25 CFR 83.5.

request would have to address all of the criteria that the petitioner did not satisfy. Otherwise, even if the allegations were taken as true, they would not change the previous, negative outcome and, therefore, would not justify reconsideration.

Application of a "plausibly allege" standard is appropriate. Under the standard, fact-finding in the Department's threshold review will be limited, which will help ensure that the re-petition authorization process proceeds efficiently. To the extent that assessment of a petitioner's claims and evidence requires a complex or in-depth analysis, AS-IA would reserve that analysis for the eventual evaluation of a re-petition, at which point the Department would apply part 83's "reasonable likelihood" standard.

In response to comments expressing confusion about whether the "plausibly allege" standard in the 2024 proposed rule is identical to that for surviving a motion to dismiss under F.R.C.P. 12(b)(6), the Department clarifies here that the Department intended for the standard to be slightly different, in that the Department envisioned AS-IA conducting limited fact-finding during the threshold review. For example, pursuant to § 83.55(b)(1) (as proposed and adopted here), AS-IA may refer to the administrative record created during the evaluation of a petitioner's original petition to assess the plausibility of certain, alleged facts. However, the comparison to the standard for surviving a motion to dismiss remains apt because, at a minimum, the petitioner must present allegations that, if taken as true, would change the outcome of the petitioner's previous, negative final determination to positive.

The Department does not consider application of the standard for a new trial or relief from a judgment under F.R.C.P. 59 or 60, respectively, to be a more appropriate alternative. The purpose of the threshold review is not to determine whether a petitioner's previous, negative final determination is contrary to the "clear or great weight of the evidence"[110] or is

[110] *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1367 (Fed. Cir. 1991) (explaining the standard for a new trial).

"clearly erroneous."[111] That kind of determination would require a thorough assessment of the strength of the evidence both for and against acknowledgment, better suited for the eventual evaluation of a re-petition.

In response to comments asserting that either OFA or an official other than AS-IA should be the decision-maker, AS-IA is in the best position to review re-petition requests efficiently given AS-IA's expertise and experience in evaluating part 83 petitioners' claims and evidence, as discussed above. Furthermore, AS-IA can solicit OFA's assistance throughout the process given that OFA is located within the Office of the AS-IA.[112] Finally, the Department's authority to acknowledge Indian Tribes through part 83, discussed in section I above and supported by relevant legal authorities, is well-established.[113]

F. Comments on the Conditions for Obtaining Authorization to Re-Petition

Numerous commenters submitted comments on the conditions for re-petitioning, located at § 83.48. Pursuant to that provision, as noted above, an unsuccessful petitioner would be allowed to re-petition if the petitioner plausibly alleged that the outcome of the petitioner's previous, negative final determination would change to positive based on one or both of the following: (1) a change in part 83 (from the 1978 or 1994 regulations to the 2015 regulations); and/or (2) new evidence.

1. Comments on the "Change" Condition

Commenters that oppose re-petitioning were divided on the significance of the changes to part 83 in the 2015 regulations. On the one hand, the Yuhaaviatam of San Manuel Nation contended that the Department should retain the ban on re-petitioning

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[111] *Am. Council of the Blind v. Mnuchin*, 977 F.3d 1, 5 (D.C. Cir. 2020) (explaining the standard of review of a motion filed pursuant to F.R.C.P. 60(b)).

[112] *See* 110 DM 8.4(C) (listing OFA as under the oversight of the Deputy Assistant Secretary – Policy and Economic Development, who reports to the Principal Deputy Assistant Secretary and AS-IA).

[113] *See, e.g.*, *James v. U.S. Dep't of Health & Hum. Servs.*, 824 F.2d 1132, 1139 (D.C. Cir. 1987) (requiring appellants to exhaust administrative remedies on the issue of Federal recognition prior to seeking judicial review); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001) (stating that the appellants' argument that Part 83 is invalid "because not authorized by Congress" is "clearly incorrect" and also noting that "[r]ecognition is . . . traditionally an executive function").

because the changes are "unlikely to result in any change" to the outcome of a negative final determination. On the other hand, the Kent School and the Town of Kent contended that the Department should retain the ban on re-petitioning because the changes weakened the criteria for Federal acknowledgment. The Puyallup Tribe similarly criticized the proposal to allow limited re-petitioning given what it described as "truncated" standards for satisfying criteria (b) (Community) and (c) Political Authority under the 2015 regulations (a reference to the potentially shorter time frame subject to evaluation under the 2015 regulations, beginning in 1900 instead of 1789 or "the time of first sustained contact"[114]). According to the Tribe, the Department does not have the authority to acknowledge a petitioner under the 2015 regulations if that petitioner was previously denied acknowledgment for failing to satisfy criterion (b) (Community) or (c) (Political Authority) for any time period prior to 1900.

Others commented on the provision located at § 83.48(b) in the 2024 proposed rule, which would have allowed unsuccessful petitioners to request to re-petition a second time if the Department were to revise part 83 again in the future. The Shawnee Tribe cautioned that, in light of that provision, the Department "should expect new requests for authorization to re-petition each time it revises the regulations." The Tulalip Tribes similarly stated that the 2024 proposed rule would allow "unending" re-petitioning, "as any future changes to or interpretations of Part 83 [would] allow for denied petitioners to initiate the entire process again and again."

Response: As the Department indicated in the 2024 proposed rule, the Department does not anticipate that any of the 2015 final rule's changes to part 83 will affect the outcome of the Department's previous, negative final determinations,[115] including the change in the evaluation start date.[116] However, in the interest of fairness to unsuccessful petitioners, the

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[114] 80 FR 37863.
[115] 89 FR 57102–03.
[116] *See* 80 FR 37863 (stating that "[t]he Department does not classify the start date change, from 1789 or the time of first sustained contact to 1900, as a substantive change to the existing criteria," for reasons discussed in the preamble).

Department has decided to give those petitioners a narrow path for arguing, on a case-by-case basis, why specific changes warrant reconsideration of their specific final determinations.[117] By conditioning re-petitioning in the manner set forth in § 83.48(a), this rule is responsive to the *Chinook* court's observation that some of the changes in the 2015 final rule constitute "significant revisions that could prove dispositive for some re-petitioners."[118] Additionally, it is responsive to the *Burt Lake* court's opinion that "the agency's breezy assurance . . . that nothing has changed" in the 2015 regulations is an insufficient basis to keep the ban in place.[119] Pursuant to this rule, if an unsuccessful petitioner plausibly alleges that a change in part 83 would, if applied on reconsideration, change the outcome of the previous, negative determination to positive, then the petitioner may re-petition.

In response to the comments that are expressly or impliedly critical of the provision in the 2024 proposed rule at § 83.48(b), the Department agrees that the provision risks undermining finality and has removed the provision from this final rule accordingly. If the Department decides to revise part 83 again in the future, it can decide then whether to give unsuccessful petitioners a new opportunity to request to re-petition in light of the revision.

2. Comments on the "New Evidence" Condition

The Department received many comments on the Department's proposal in the 2024 proposed rule to include the availability of new evidence as a justification for re-petitioning. As a preliminary matter, several commenters expressed confusion about what constitutes new evidence. The Shawnee Tribe commented that "the term 'new evidence' is not defined" and that "the proposed rule sets forth no standard a petitioner must meet regarding what constitutes 'new' evidence." The Swinomish Indian Tribal Community commented that, based on the description of new evidence in 2024 proposed rule, unsuccessful petitioners

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[117] *See* 25 CFR 83.48(a).
[118] *Chinook*, 2020 WL 128563, at *8.
[119] *Burt Lake*, 613 F. Supp. 3d at 384.

could argue that "new evidence" includes evidence previously submitted during the evaluation of a petitioner's original petition but allegedly not "considered by the Department."[120]

The Federated Indians of Graton Rancheria suggested that the Department refer to F.R.C.P. 59 and 60 for guidance on what constitutes new evidence. According to the Tribe, in line with the standard applied under those rules, a petitioner should have to show that the evidence "was discovered after the previous, negative final determination and could not have been discovered by the unsuccessful petitioner through the exercise of reasonable diligence."

Many commenters stated their objection to the "new evidence" condition in the 2024 proposed rule. The Eastern Band of Cherokee Indians argued that new evidence is not a valid basis for allowing re-petitioning because petitioners had notice of the criteria and evidence required for Federal acknowledgment, received technical assistance identifying evidentiary gaps in their materials, and had the opportunity to supplement or revise their petitions. Relatedly, the Suquamish Indian Tribe and the Muckleshoot Indian Tribe commented that petitioners had "unlimited time to research and assemble documentation for their claims before seeking Departmental consideration." Commenters also stated that the availability of new evidence is not a valid basis for allowing re-petitioning because, under the 2015 regulations, petitioners have the option to withdraw and resubmit their petitions if new evidence arises, pursuant to § 83.30.

Several commenters asserted that allowing re-petitioning based on new evidence would undermine finality. For example, the Seneca Nation of Indians asked rhetorically how the Department could justify "a one-time opportunity to re-petition based on 'new evidence' and not grant another opportunity to re-petition based on new evidence 10 or 20 years later." The Eastern Band of Cherokee Indians similarly expressed concern about "limitless opportunities to re-petition." The Tribe explained that if "improved technology" is the

[120] 25 CFR 83.48(a)(2) (proposed 2024).

rationale for allowing re-petitioning based on new evidence, the five-year time limit on submitting a re-petition request is arbitrary because "technology can improve in ten years or two months and will only continue to improve thereafter."

Other commenters expressed support for the "new evidence" condition. For example, the Shinnecock Indian Nation, although generally critical of the Federal acknowledgment process (particularly the evidentiary burden on petitioners), suggested that the Department should allow re-petitioning based on alleged new evidence because "[t]he search for truth must be the most important goal of the federal acknowledgment process." The Tribe commented in one of the consultation sessions that "in the Jim Crow era . . . [Tribal] records were either destroyed or [Tribes] were not even allowed to acknowledge themselves as being Indians," making it "difficult . . . to find documents" to support petitions. Another commenter similarly stated that "[c]olonial practices, including forced relocations and boarding school policies, caused many tribes to lose essential documents and evidence needed for federal acknowledgment" and that "there should be additional ways for Tribes to make up for those gaps." Finally, many commenters stated that technological advancements would help petitioners retrieve historical records.

Response: The Department considers improved technology to be a compelling justification for allowing unsuccessful petitioners to request to re-petition, particularly those denied Federal acknowledgment decades ago. Since the evaluation of those petitions, there have been numerous technological advancements that would aid petitioners in their research, like user-friendly, electronic databases containing genealogical information and tools that make old records text-searchable.

Another significant technological advancement is the digitization of countless records. Digitization has increased petitioners' ability to access and search potentially relevant records. For petitioners with limited resources, digitization will help them retrieve records that might have been cost-prohibitive to retrieve manually in the past (for example,

because of the costs associated with hiring experts, paying for travel to and from research sites, and paying for research time). As noted in the 2024 proposed rule, "[t]he application of improved technology, particularly in the context of a shorter evaluation period, might lead to the discovery of new evidence, and there is at least some possibility that the new evidence could affect the outcome of a previous, negative final determination."[121] However, for reasons stated in section III.G.1. ("Comments on the Time Limit for Submitting a Re-Petition Request") below, the Department considers a five-year time limit appropriate, notwithstanding the likelihood of further technological advancements after expiration of the five-year time limit.

In response to the assertion that new evidence should constitute only evidence that "with reasonable diligence, could not have been discovered" during the original evaluation of a petition, the Department does not consider that limitation appropriate. The lengthy administrative records associated with part 83 petitions indicate that, in general, unsuccessful petitioners exercised diligence in pursuing their respective claims. Additionally, application of the standard above would likely lead to arguments about the reasonableness of an unsuccessful petitioner's research efforts (potentially conducted decades ago), distracting the parties from the review of the evidence. Furthermore, the Department deems it appropriate to give petitioners the opportunity to argue that evidence previously discovered but not submitted during the evaluation of the petitioner's original petition is now relevant because of a change to part 83.

In response to another comment above, which noted that an unsuccessful petitioner might try to claim that evidence previously submitted during the evaluation of a petitioner's original petition constitutes new evidence because it was allegedly not "considered by the Department,"[122] the Department clarifies here that evidence submitted during the evaluation

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[121] 89 FR 57103.
[122] 25 CFR 83.48(a)(2) (proposed 2024).

of a petitioner's original petition and contained in the corresponding administrative record does not constitute new evidence. To address the potential for misunderstanding noted by the commenter, the Department has removed the language quoted above from § 83.48(a)(2), as it appeared in the 2024 proposed rule.[123] Allegations that the Department failed to consider previously submitted evidence amount to "mere criticism of a past final determination," which is "not a sufficient or appropriate basis, standing alone, to justify re-petitioning" under this final rule.[124]

3. Comments on Possible Other Conditions for Obtaining Authorization to Re-Petition

Several commenters stated that the Department should impose additional conditions on prospective re-petitioners beyond those contained in the 2024 proposed rule. For example, Connecticut's congressional delegation, which opposes a re-petition authorization process, stated that, should the Department finalize a process, "any re-petitioning should exclude those Tribes where a U.S. District Court has reviewed the denial and upheld it." The delegation stated that, in those instances, "not only has the [Department] determined the petitioner has failed to provide sufficient evidence to meet all the regulatory criteria, but an independent judicial body has also made a similar determination."

Citing the Department's proposal in the 2014 proposed rule, the Shawnee Tribe commented that the Department should condition re-petitioning on the consent of interested parties, "regardless of whether they participated in a prior proceeding involving the original petition." According to the Tribe, a third-party consent condition would "protect the vested interests of such third parties who have already sunk significant time and expense into participating in the exhaustive part 83 process and/or who have reliance interests based on the outcome of the original proceeding." The Eastern Band of Cherokee Indians likewise

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[123] *See* 25 CFR 83.48(b) (containing the relevant provision, as revised by this final rule).
[124] 89 FR 57104.

supported a third-party consent condition. Other commenters expressly opposed a third-party consent condition.

Response: That courts have consistently upheld the Department's final determinations on the merits reinforces the integrity of the Federal acknowledgment process. However, those decisions do not prevent the Department from reconsidering the final determinations if there are good reasons for doing so; agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal decisions to the extent permitted by law and supported by a reasoned explanation, even "when its prior policy has engendered serious reliance interests."[125] If an unsuccessful petitioner plausibly alleges that consideration of a change in part 83 (from the 1978 or 1994 regulations to the 2015 regulations) or new evidence would change the outcome of the petitioner's previous, negative final determination, then there is a good reason to reconsider the determination, even if previously upheld by a court.[126]

In response to the suggestion that the Department subject prospective re-petitioners to a third-party consent condition, the Department does not consider a third-party consent condition appropriate. The purpose of the part 83 process is to determine whether a group constitutes a distinct social and political entity entitled to a government-to-government relationship with the United States.[127] Third-party participation in the Federal acknowledgment process is valuable, in part, because third parties often provide arguments

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[125] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

[126] *See Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015) (explaining that "issue preclusion is inappropriate if there has been an intervening "change in controlling legal principles"); *Early v. Comm'r of Soc. Sec.*, 893 F.3d 929, 930 (6th Cir. 2018) (explaining that the "key principles" protected by res judicata, including "finality with respect to resolved applications," "do not prevent the agency from giving a fresh look to a new application containing new evidence or satisfying a new regulatory threshold"); *cf. Cal. Dump Truck Owners Ass'n v. Davis*, 302 F. Supp. 2d 1139 (E.D. Cal. 2002) (explaining that "reconsideration of a final judgment is appropriate, in part, where "the court is presented with newly-discovered evidence" or "there is an intervening change in the controlling law" (quoting *Sch. Dist. No. 1J v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993))).

[127] *See* 25 CFR 83.2; *see also* 59 FR 9287 ("Distinctness is an essential requirement for the acknowledgment of tribes which are separate social and political entities."); 25 CFR 54.3(a) (1978) (explaining the Department's intent to acknowledge as Indian tribes "groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present").

and evidence that shed light on the merits of a petition. However, the question whether a group "is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians" does not hinge on third-party support or opposition.[128]

G. Comments on the Processing of a Re-Petition Request

Numerous commenters provided comments on the procedures set forth in the 2024 proposed rule for processing a re-petition request.

1. Comments on the Time Limit for Submitting a Re-Petition Request

Commenters shared varying opinions on the five-year time limit for submitting a re-petition request. For example, the Shawnee Tribe and the Seneca Nation of Indians commented that the Department provided no explanation for the five-year time limit in the 2024 proposed rule and that the limit is arbitrary. The Tulalip Tribes, which opposes any re-petition authorization process, stated that, if the Department nevertheless implements a process, the five-year time limit should be reduced to one year. The Eastern Band of Cherokee Indians argued that "there should be no tolling [of the five-year period] pending judicial review."

Other commenters expressed support for a longer time limit, to give unsuccessful petitioners additional time to conduct research, especially given some petitioners' limited resources. For example, the Haliwa-Saponi Indian Tribe (a State-recognized Tribe in North Carolina) recommended that the time limit be increased from five years to ten years. The North Carolina Commission of Indian Affairs advocated against "any time limits for a denied petitioner to submit a request to re-petition." The Steilacoom Tribe (an unsuccessful petitioner) relatedly asserted that "[t]here should not be a moratorium on our rights to be federally recognized."

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[128] 25 CFR 83.2.

Response: In the 2024 proposed rule, as in the 2022 proposed rule, the Department noted the difficulty of imposing a time limit on the submission of requests to re-petition, particularly in light of the "new evidence" condition. The Department acknowledged that "such evidence is not static but could be discovered at any point."[129] Nevertheless, the Department considers the five-year time limit to submit a re-petition request an appropriate way to balance the petitioners' interests in using improved technology and rationing limited resources to conduct additional research with legitimate interests in finality. Like a statute of limitations, the five-year time limit "encourage[s] diligence."[130] Although it may be true that technological advancements could facilitate the discovery of new evidence after the five-year time limit, "there should be an eventual end to the . . . administrative process," as the Department explained in the final rule promulgating the 1994 regulations.[131]

In response to the recommendation that the Department not toll the five-year time limit during judicial review of a negative final determination, the Department considers tolling appropriate given that litigation can take many years to resolve. Moreover, it is unlikely that the Department will need to toll the time limit for many petitioners. The time limit for seeking judicial review has long since expired for most unsuccessful petitioners reviewed under the 1978 and 1994 regulations, and any petitioner seeking judicial review of a negative final determination after the effective date of this final rule will most likely have been reviewed under the 2015 regulations. Those petitioners, in turn, are less likely than petitioners denied in the past (under the previous versions of the part 83 regulations) to request to re-petition based on a change to part 83 or new evidence. The "change" condition does not apply to petitioners already proceeding under the 2015 regulations, and the "new evidence" condition will be of limited value to current and prospective petitioners that not only can take advantage of modern technology to discover relevant evidence but also

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[129] 89 FR 57103 (quoting 87 FR 24916).
[130] *Schweihs v. Burdick*, 96 F.3d 917, 920 (7th Cir. 1996) (citation omitted).
[131] 59 FR 9291.

withdraw and resubmit their petitions if new evidence arises during the Federal acknowledgment process, pursuant to § 83.30, as some commenters noted.

2. Comments on Third-Party Notice-and-Comment Provisions

Several commenters stated that the Department should provide notice of re-petition requests to more parties than those entitled to notice under the 2024 proposed rule. For example, the Puyallup Tribe, Suquamish Indian Tribe, and Muckleshoot Indian Tribe commented that notices provided under § 83.51 should be provided to "[a]ctive [p]articipants in [a]ny [p]revious [a]dministrative [p]roceeding or [f]ederal [c]ourt [p]roceeding [c]oncerning a [p]reviously [d]enied [p]etitioner," including any that participated as an amicus curiae or were granted formal intervention.

Additionally, several commenters stated that the 90-day time frame to comment on re-petition requests in the 2024 proposed rule should be longer. The Yuhaaviatam of San Manuel Nation highlighted the contrast between the 90-day comment period and the five-year time limit for submitting a re-petition request. The Tulalip Tribes, Puyallup Tribe, Suquamish Indian Tribe, Muckleshoot Indian Tribe, and the Connecticut Towns of Ledyard, North Stonington, and Preston commented that the time frame for submitting comments should be extended to at least 180 days, or six months. The Seneca Nation of Indians stated that the time frame should be extended to at least one year from the date of notice of the re-petition request in the *Federal Register*.

The Connecticut Towns also noted their objection to the Department's practice of withholding "personal information" contained in part 83 petitioners' materials from third parties, including personal information contained in any forthcoming re-petition requests.[132] The Connecticut Towns asserted that, before any comment period begins, the Department

[132] *See, e.g.*, 25 CFR 83.50(b) (stating that "[t]he Department will not publicly release information that is protectable under Federal law").

must ensure that "information directly relevant to the decision being made [is] made available to interested parties."

Response: The Department agrees with the commenters above that any third parties that participated in an administrative or judicial proceeding relating to a final determination on a part 83 petition, whether technically a party or not, should receive notice of any associated re-petition request. For that reason, the Department has deleted the phrase "as a party" from § 83.51(b)(2). Additionally, the Department clarifies here that OFA will also provide notice to individuals and entities that had interested-party or informed-party status under the 1994 regulations,[133] with the understanding that those individuals and entities previously "request[ed] to be kept informed of general actions regarding a specific petitioner" and presumably wish to remain informed.[134]

The Department also agrees with the commenters above that a longer comment period than that in the 2024 proposed rule is warranted to ensure that third parties have a meaningful opportunity to provide their input on re-petition requests. Accordingly, the Department extends the comment period from 90 days to 120 days, which is the amount of time that third parties have to comment on a new documented petition.[135] Based on the Department's experience processing new documented petitions under the 2015 regulations and receiving comments on those petitions, a 120-day comment period is sufficient. Additionally, the length of comment period is subject to extension for good cause.[136]

Finally, in response to the comment requesting that personal information contained in re-petition requests be disclosed prior to the beginning of the comment period, the Department has decided to implement a procedure consistent with that for processing a new documented petition under the 2015 regulations. Pursuant to that procedure, the publication

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[133] 25 CFR 83.1 (1994) (defining "[i]nterested party" and "[i]nformed party"); 59 FR 9293.
[134] 25 CFR 83.22(d)(5).
[135] *See* 25 CFR 83.22(b)(1)(iv).
[136] 25 CFR 83.8(a).

of notice in the *Federal Register*, the posting of certain petition materials to the OFA Web site (with any redactions appropriate under § 83.21(b)), and the delivery of notice to third parties occur at approximately the same time. Based on the Department's experience processing new documents petitions, that procedure gives third parties sufficient notice and a meaningful opportunity to comment, while also protecting "information that is protectable under Federal law such as the Privacy Act and Freedom of Information Act."[137]

3. Comments on the Finality of a Grant of Authorization to Re-Petition

Several commenters that opposed the Department's proposed re-petition authorization process stated that a grant of authorization to re-petition should be subject to judicial review.

Response: A grant of authorization to re-petition simply allows an unsuccessful petitioner to proceed with a new documented petition through the Federal acknowledgment process. It does not confer any substantive right on the petitioner analogous to the rights extended to newly acknowledged Indian Tribes; rather, it only results in additional due process afforded to the unsuccessful petitioner. Allowing third parties to challenge a grant of authorization would frustrate the Department's goal to promote efficiency in a process already "criticized as too slow."[138] Third parties that disagree with a decision allowing an unsuccessful petitioner to re-petition will have several opportunities after that decision to oppose the re-petition.[139]

IV. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB)

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[137] 25 CFR 83.21(b) (stating also that "[t]he Department will not publicly release information that is protectable under Federal law"); *see also* 25 CFR 83.50(b) (stating the same).
[138] 80 FR 37862.
[139] *See, e.g.*, 25 CFR 83.22(b)(1)(iv) (giving third parties the opportunity to "submit comments and evidence supporting or opposing the petitioner's request for acknowledgment" upon notice of receipt of a documented petition); 25 CFR 83.35 (giving "any individual or entity" the opportunity to "rebut or support" a Phase I negative proposed finding or Phase II proposed finding); 25 CFR 83.44 (deeming AS-IA's final determination a "final agency action" subject to judicial review).

will review all significant rules. This rule will not have an annual effect on the economy of $200 million. OIRA has determined that this rule is a significant regulatory action.

E.O. 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

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.

This rulemaking is necessary to comply with the orders of the *Chinook* and *Burt Lake* courts, both of which remanded the re-petition ban in part 83 to the Department for further consideration. It affects federally recognized Indian Tribes and a variety of stakeholders in the Federal acknowledgment process, including previously denied part 83 petitioners, State and local governments, current and prospective petitioners, and others. To date, there have been eighteen acknowledged petitioners and thirty-four denied petitioners through part 83.[140] By implementing a limited exception to the re-petition ban, the regulations promulgated in

[140] *See* Petitions Resolved, Office of Fed. Acknowledgment, https://www.bia.gov/as-ia/ofa/petitions-resolved (last visited Jan. 7, 2025).

this final rule benefit unsuccessful petitioners that previously had no avenue to re-petition for Federal acknowledgment. However, it is unclear how many of the petitioners will submit a request to re-petition or how many can meet the conditions set forth at proposed §§ 83.47 through 83.49.

The costs of the Department's re-petition authorization process include the additional workload on the Department that will stem from reviewing requests to re-petition for Federal acknowledgment and preparing decisions granting or denying authorization to re-petition. Implementation of the process also may result in an increase in the number of requests that the Department receives pursuant to the Freedom of Information Act, from federally recognized Indian Tribes and various stakeholders seeking copies of documents associated with part 83 petitions.[141] Furthermore, the process may result in an increase in litigation, particularly given that a denial of authorization to re-petition would be a final agency action under the APA. Additional costs include the time and resources that unsuccessful petitioners will have to spend reviewing this final rule and preparing re-petition requests, as well as the time and resources that others invested in the Federal acknowledgment process (including federally recognized Indian Tribes and State and local governments that oppose certain petitions) will have to spend reviewing this rule and commenting on re-petition requests. In regard to the "speculative consequences" of a positive determination on a re-petition, like the pursuit of land in trust or the pursuit of gaming on trust land, the processes relating to those actions are "entirely separate and distinct . . . from the Part 83 process," and "administrative and judicial review is available for those separate decisions,"[142] for example, under 25 CFR parts 151 and 292.[143]

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[141] *See* 87 FR 24915–16 (discussing the potential for a "marked increase" in the number of FOIA requests received as a result of the creation of a re-petitioning process).
[142] 80 FR 37880–81.
[143] *See, e.g.*, 88 FR 86222 (Dec. 12, 2023) (providing "the procedures governing the discretionary acquisition of lands into trust"); 73 FR 29354 (May 20, 2008) (establishing "a process for submitting and considering applications from Indian tribes seeking to conduct class II or class III gaming activities on lands acquired in trust after October 17, 1988").

In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may be found at https://www.regulations.gov at Docket ID BIA-2022-0001 or by searching for "RIN 1076-AF67."

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) (RFA) requires Federal agencies to prepare a regulatory flexibility analysis for rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 500 *et seq*.) to determine whether a regulation would have a significant economic impact on a substantial number of small entities.

The Department's analysis leads to a finding that this final rule will not have a significant economic impact on a substantial number of small entities (including small businesses, not-for-profit organizations, and "small governmental jurisdictions," defined in 5 U.S.C. 601 to include "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand"). The final rule minimizes the burden on unsuccessful petitioners (one type of small entity) by narrowing the scope of arguments at issue in the re-petition authorization process. Although petitioners preparing re-petition requests might incur non-hour cost burdens for contracted services, such as anthropologists, attorneys, genealogists, historians, and law clerks, the narrow scope of arguments at issue—focused on changes in part 83 and/or new evidence—would reduce the risk of petitioners incurring excessive costs for contracted services.

Additionally, by limiting the types of arguments that unsuccessful petitioners can raise in the re-petition authorization process, the final rule minimizes the economic impacts on small entities that oppose Federal acknowledgment of the petitioners and that might prepare arguments in rebuttal. Although those entities might later incur additional costs to challenge actions taken by a newly acknowledged Indian Tribe following a positive determination on a re-petition (like the pursuit of land in trust or the pursuit of gaming on

trust land), those costs would arise in processes "entirely separate and distinct . . . from the Part 83 process" at issue here,[144] as discussed above.

Finally, the limit on the amount of time that unsuccessful petitioners have to request to re-petition will help small entities participating in the Federal acknowledgment process (including small government jurisdictions) plan for the allocation and expenditure of limited resources accordingly. By contrast, an open-ended avenue for re-petitioning, with few or no limitations, would have increased uncertainty about those burdens. Additional discussion of the conditional, time-limited opportunity to re-petition created here, and the alternatives that the Department considered, is contained in sections I through III of the preamble, above.

The Department certifies that the regulations promulgated in this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required by the RFA.

C. Congressional Review Act

This final rule is does not meet the criteria set forth in 5 U.S.C. 804(2).

D. Unfunded Mandates Reform Act

This rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule would not have a monetarily 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)

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

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[144] 80 FR 37881.

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have hosted consultation with federally recognized Indian Tribes before publication of this final rule.

- Following the announcement of the Department's intent to reconsider the ban on re-petitioning in 2020, the Department held a Tribal consultation session with federally recognized Indian Tribes.
- Following the publication of the 2022 proposed rule, the Department held two Tribal consultation sessions with federally recognized Indian Tribes.
- Following the publication of the 2024 proposed rule, the Department held two Tribal consultation sessions with federally recognized Indian Tribes.

I. Paperwork Reduction Act

This final rule contains a revision to a collection of information which is currently approved under the Office of Management and Budget (OMB) Control Number 1076-0104 through February 28, 2026. The revisions have been submitted to OMB for review and

approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*.) and is available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202310-1076-001. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number:

- *Title of Collection*: Federal Acknowledgment as an Indian Tribe, 25 CFR Part 83.
- *OMB Control Number*: 1076-0104.
- *Form Number*: BIA-8304, BIA-8305, and BIA-8306.
- *Type of Review*: Revision of a currently approved collection.
- *Summary of revision/supplement*: Pursuant to this final rule creating a conditional, time-limited opportunity for denied petitioners to re-petition for Federal acknowledgment as an Indian Tribe, the Department requires prospective re-petitioners to plausibly allege that the outcome of the previous, negative final determination would change to positive on reconsideration based on one or both of the following: (1) a change in part 83 (from the 1978 or 1994 regulations to the 2015 regulations); and/or (2) new evidence. The information will be collected in the unsuccessful petitioners' respective requests to re-petition for Federal acknowledgment. The collection of information will be unique for each petitioner.
- *Respondents/Affected Public*: Groups petitioning for Federal acknowledgment as Indian Tribes and groups seeking to re-petition for Federal acknowledgment.
- *Total Estimated Number of Annual Respondents*: 2 per year, on average.
    - 1 petitioning group.
    - 1 group seeking to re-petition.
- *Total Estimated Number of Annual Responses*: 2 per year, on average.
    - 1,436 hours for 1 petitioning group.
    - 700 hours for 1 group seeking to re-petition.

- *Estimated Completion*: Time per Response: 2,136 hours.
    - 1,436 hours for 1 petitioning group.
    - 700 hours for 1 group seeking to re-petition.
- *Total Estimated Number of Annual Burden Hours*: 2,136 hours.
- *Respondent's Obligation*: Required to Obtain a Benefit.
- *Frequency of Collection*: Once.
- *Total Estimated Annual Nonhour Burden Cost*: $3,150,000.
    - $2,100,000 for contracted services obtained by 1 petitioning group.
    - $1,050,000 for contracted services obtained by 1 group seeking to re-petition.
- *Annual Cost to Federal Government*: $778,801.
    - $628,938 to review 1 petitioning group: (6,000 hours x $90.08 wage for GS-13) plus (666 hours x $132.82 for GS-15 wage).
    - $149,863 to review 1 group seeking to re-petition: (1,500 hours times $90.08 wage for GS-13) plus (111 hours x 132.82 wage for GS-15).

J. National Environmental Policy Act (NEPA)

Under NEPA, categories of Federal actions that normally do not significantly impact the human environment may be categorically excluded from the requirement to prepare an environmental assessment or impact statement. *See* 40 CFR 1501.4. Under the Department, regulations that are administrative or procedural are categorially excluded from NEPA analysis because they normally do not significantly impact the human environment. *See* 43 CFR 46.210(i). This rule is administrative and procedural in nature. Consequently, it is categorically excluded from the NEPA requirement to prepare a detailed environmental analysis. The Department also determined that the rule does not involve any of the extraordinary circumstances under a categorical exclusion that would necessitate environmental analysis. *See* 43 CFR 46.215.

K. Effects on the Energy Supply (E.O. 13211)

This final rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. Privacy Act of 1974, Existing System of Records

INTERIOR/BIA-7, Tribal Enrollment Reporting and Payment System, published September 27, 2011 (76 FR 59733), contains documents supporting individual Indian claims to interests in Indian Tribal groups and includes name, maiden name, alias, address, date of birth, social security number, blood degree, enrollment/BIA number, date of enrollment, enrollment status, certification by the Tribal governing body, telephone number, e-mail address, account number, marriages, death notices, records of actions taken (approvals, rejections, appeals), rolls of approved individuals; records of actions taken (judgment distributions, per capita payments, shares of stock); ownership and census data taken using the rolls as a base, records concerning individuals which have arisen as a result of that individual's receipt of funds or income to which that individual was not entitled or the entitlement was exceeded in the distribution of such funds.

M. Clarity of This Regulation

The Department is required by E.O. 12866 (section 1(b)(12)), 12988 (section 3(b)(l)(B)), and E.O. 13563 (section l(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This final rule meets the criteria of:

(a) Being logically organized;

(b) Using the active voice to address readers directly;

(c) Using common, everyday words and clear language rather than jargon;

(d) Being divided into short sections and sentences; and

(e) Using lists and tables wherever possible.

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 amends 25 CFR part 83 as follows:

PART 83—PROCEDURES FOR FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES

1. The authority citation for part 83 is revised to read as follows:

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 5131; 25 U.S.C. 5130 note (Congressional Findings); and 43 U.S.C. 1457.

2. In § 83.1, add in alphabetical order definitions for "Re-petition authorization process", "Re-petitioning", and "Unsuccessful petitioner" to read as follows:

§ 83.1 What terms are used in this part?

* * * * *

Re-petition authorization process means the process by which the Department handles a request for re-petitioning filed with OFA by an unsuccessful petitioner under §§ 83.47 through 83.62, from receipt to issuance of a decision as to whether the unsuccessful petitioner is authorized to re-petition for acknowledgment as a federally recognized Indian tribe. A grant of authorization to re-petition allows a petitioner to proceed through the Federal acknowledgment process by submitting a new documented petition for consideration under subpart C of this part.

Re-petitioning means, after receiving a negative final determination that is final and effective for the Department and receiving subsequent authorization to re-petition, the submission of a new documented petition for consideration under subpart C of this part.

* * * * *

Unsuccessful petitioner means an entity that was denied Federal acknowledgment after petitioning under the acknowledgment regulations at part 54 of this chapter (as they existed before March 30, 1982) or part 83.

3. In § 83.4, revise paragraph (d) to read as follows:

§ 83.4 Who cannot be acknowledged under this part?

* * * * *

(d) An entity that previously petitioned and was denied Federal acknowledgment under part 54 of this chapter (as it existed before March 30, 1982) or part 83 (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners) unless the entity meets the conditions of §§ 83.47 through 83.49.

4. Revise § 83.9 to read as follows:

§ 83.9 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, 1001 Indian School Road NW, Suite 229, Albuquerque, NM 87104.

5. Add subpart D, consisting of §§ 83.47 through 83.62 to read as follows:

Subpart D—Re-Petition Authorization Process

Sec.

Subpart D—Re-Petition Authorization Process

§ 83.47 Who can seek authorization to re-petition under this subpart?

(a) The re-petition authorization process is available to unsuccessful petitioners denied Federal acknowledgment, subject to the exceptions in paragraph (c) of this section.

(b) Any petitioner that, as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], has not yet received a final agency decision and is proceeding under the acknowledgment regulations as published in this part, effective March 28, 1994, may remain under those regulations and, if denied under those regulations, may seek authorization to re-petition under this subpart. These petitioners may also choose by [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], to proceed instead under the acknowledgment regulations, as published in this part 83, effective July 31, 2015, and to supplement their petitions, and, if the petition is denied, may seek authorization to re-petition under this subpart. Petitioners choosing to proceed under the regulations as published in this part 83, effective July 31, 2015 must notify OFA of their choice in writing by [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], in any legible electronic or hardcopy form.

(c) The re-petition authorization process is not available to the following:

(1) Unsuccessful petitioners that submit a re-petition request pursuant to this process, are granted authorization to re-petition, and are denied Federal acknowledgment a second time;

(2) Unsuccessful petitioners that submit a re-petition request pursuant to this process and are denied authorization to re-petition.

§ 83.48 When will the Department allow a re-petition?

An unsuccessful petitioner may re-petition only if AS-IA determines that the petitioner has plausibly alleged one or both of the following:

(a) A change from part 54 of this chapter (as it existed before March 30, 1982) or part 83 (as it existed before July 31, 2015) to this part 83 would, if applied on reconsideration, change the outcome of the previous, negative final determination to positive; and/or

(b) New evidence (*i.e.*, evidence not previously submitted by the petitioner) would, if considered on reconsideration, change the outcome of the previous, negative final determination to positive.

§ 83.49 How long does an unsuccessful petitioner have to submit a request for authorization to re-petition?

(a) An unsuccessful petitioner denied Federal acknowledgment prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], may request authorization to re-petition by submitting a complete request under § 83.50 no later than February 14, 2030.

(b) An unsuccessful petitioner denied Federal acknowledgment after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], may request authorization to re-petition by submitting a complete request under § 83.50 no later than five years after issuance of the negative final determination. However, if the petitioner pursues judicial review of the negative final determination:

(1) The five-year period will be tolled during any period of judicial review, from the date of filed litigation to the date of entry of judgment and expiration of appeal rights for said litigation; and

(2) Upon expiration of the appeal rights, OFA will notify the petitioner and those listed in § 83.51(b)(2) of the resumption of the five-year time limit and the date by which the petitioner must submit a request for re-petitioning.

§ 83.50 How does an unsuccessful petitioner request authorization to re-petition?

(a) To initiate the re-petition authorization process, the petitioner must submit to OFA, in any legible electronic or hardcopy form, a re-petition request that includes the following:

(1) A certification, signed and dated by the petitioner's governing body, stating that the submission is the petitioner's official request for authorization to re-petition;

(2) A concise written narrative, with citations to supporting documentation, thoroughly explaining how the petitioner meets the conditions of §§ 83.47 through 83.49; and

(3) Supporting documentation cited in the written narrative and containing specific, detailed evidence that the petitioner meets the conditions of §§ 83.47 through 83.49.

(b) If the re-petition request contains any information that is protectable under Federal law such as the Privacy Act and Freedom of Information Act, the petitioner must provide a redacted version, an unredacted version of the relevant pages, and an explanation of the legal basis for withholding such information from public release. The Department will not publicly release information that is protectable under Federal law, but may release redacted information if not protectable under Federal law.

§ 83.51 What notice will OFA provide upon receipt of a request for authorization to re-petition?

When OFA receives a re-petition request that satisfies § 83.50, 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 re-petition request in the *Federal Register* and publish the following on the OFA website:

(i) The narrative portion of the re-petition request, as submitted by the petitioner (with any redactions appropriate under § 83.50(b));

(ii) Other portions of the re-petition request, to the extent feasible and allowable under Federal law, except documentation and information protectable from disclosure under Federal law, as identified by the petitioner under § 83.50(b) or by the Department;

(iii) The name, location, and mailing address of the petitioner and other information to identify the entity;

(iv) The date of receipt;

(v) The opportunity for individuals and entities to submit comments and evidence supporting or opposing the petitioner's request for re-petitioning within 120 days of publication of notice of the request; and

(vi) The opportunity for individuals and entities to request to be kept informed of general actions regarding a specific petitioner.

(2) Notify, in writing, the parties entitled to notification of a documented petition under § 83.22(d) and any third parties that participated in an administrative reconsideration or Federal Court appeal concerning the petitioner.

§ 83.52 What opportunity to comment will there be before the Assistant Secretary reviews the re-petition request?

(a) Publication of notice of the request will be followed by a 120-day comment period. During this comment period, any individual or entity may submit the following to OFA to rebut or support the request:

(1) Comments, with citations to and explanations of supporting evidence; and

(2) Evidence cited and explained in the comments.

(b) Any individual or entity that submits comments and evidence to OFA must provide the petitioner with a copy of their submission.

(c) If OFA has received a timely objection and evidence challenging the request, then the petitioner will have 60 days to submit a written response, with citations to and explanations of supporting evidence, and the supporting evidence cited and explained in the response. The Department will not consider additional comments or evidence on the request submitted by individuals or entities during this response period.

(d) After the close of the comment-and-response period, the Department will consider the re-petition request ready for active consideration, and within 30 days of the close of the comment-and-response period, OFA will place the request on the register that OFA maintains under § 83.53(a).

§ 83.53 How will the Assistant Secretary determine which re-petition request to consider first?

(a) OFA shall maintain and make available on its website a register of re-petition requests that are ready for active consideration.

(b) The order of consideration of re-petition requests shall be determined by the date on which OFA places each request on OFA's register of requests ready for active consideration.

(c) The Department will prioritize review of documented petitions over review of re-petition requests, except that re-petition requests pending on OFA's register for more than two years shall have priority over any subsequently filed documented petitions.

§ 83.54 Who will OFA notify when the Assistant Secretary begins review of a re-petition request?

OFA will notify the petitioner and those listed in § 83.51(b)(2) when AS-IA begins review of a re-petition request and will provide the petitioner and those listed in § 83.51(b)(2)

with the name, office address, and telephone number of the staff member with primary administrative responsibility for the request.

§ 83.55 What will the Assistant Secretary consider in his/her review?

(a) In any review, AS-IA will consider the re-petition request and evidence submitted by the petitioner, any comments and evidence on the request received during the comment period, and petitioners' responses to comments and evidence received during the response period.

(b) AS-IA may also:

(1) Initiate and consider other research for any purpose relative to analyzing the re-petition request; and

(2) Request and consider timely submitted additional explanations and information from commenting parties to support or supplement their comments on the re-petition request and from the petitioner to support or supplement their responses to comments.

(c) OFA will provide the petitioner with the additional material obtained in paragraph (b) of this section, and provide the petitioner with a 60-day opportunity to respond to the additional material. The additional material and any response by the petitioner will become part of the record.

§ 83.56 Can a petitioner withdraw its re-petition request?

A petitioner can withdraw its re-petition request at any point in the process and re-submit the request at a later date within the five-year time limit applicable to the petitioner under § 83.49. Upon re-submission, the re-petition request will lose its original place in line and be considered after other re-petition requests awaiting review.

§ 83.57 When will the Assistant Secretary issue a decision on a re-petition request?

(a) AS-IA will issue a decision within 180 days after OFA notifies the petitioner under § 83.54 that AS-IA has begun review of the request.

(b) The time set out in paragraph (a) of this section will be suspended any time the Department is waiting for a response or additional information from the petitioner.

§ 83.58 Can AS-IA suspend review of a re-petition request?

(a) AS-IA can suspend review of a re-petition request, either conditionally or for a stated period, if there are technical or administrative problems that temporarily preclude continuing review.

(b) Upon resolution of the technical or administrative problems that led to the suspension, the re-petition request will have the same priority for review to the extent possible.

(1) OFA will notify the petitioner and those listed in § 83.51(b)(2) when AS-IA suspends and when AS-IA resumes review of the re-petition request.

(2) Upon the resumption of review, AS-IA will have the full 180 days to issue a decision on the request.

§ 83.59 How will the Assistant Secretary make the decision on a re-petition request?

(a) AS-IA's decision will summarize the evidence, reasoning, and analyses that are the basis for the decision regarding whether the petitioner meets the conditions of §§ 83.47 through 83.49.

(b) If AS-IA finds that the petitioner meets the conditions of §§ 83.47 through 83.49, AS-IA will issue a grant of authorization to re-petition.

(c) If AS-IA finds that the petitioner has not met the conditions of §§ 83.47 through 83.49, AS-IA will issue a denial of authorization to re-petition.

§ 83.60 What notice of the Assistant Secretary's decision will OFA provide?

In addition to publishing notice of AS-IA's decision in the *Federal Register*, OFA will:

(a) Provide copies of the decision to the petitioner and those listed in § 83.51(b)(2); and

(b) Publish the decision on the OFA Website.

§ 83.61 When will the Assistant Secretary's decision become effective, and can it be appealed?

AS-IA's decision under § 83.59 will become effective immediately and is not subject to administrative appeal.

(a) A grant of authorization to re-petition is not a final determination granting or denying acknowledgment as a federally recognized Indian tribe. Instead, it allows the petitioner to proceed through the Federal acknowledgment process by submitting a new documented petition for consideration under subpart C of this part, notwithstanding the Department's previous, negative final determination. A grant of authorization to re-petition is not subject to appeal.

(b) A denial of authorization to re-petition is final for the Department and is a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

§ 83.62 What happens if some portion of this subpart is held to be invalid by a court of competent jurisdiction?

If any portion of this subpart is determined to be invalid by a court of competent jurisdiction, the other portions of the subpart remain in effect. For example, if one of the conditions on re-petitioning set forth at §§ 83.47 through 83.49 is held to be invalid, it is the Department's intent that the other conditions remain valid.

Bryan Newland,
Assistant Secretary – Indian Affairs.
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