

Federal Tribal Recognition

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Legal Status of Tribes

- Article 1, Section 8 of the United States Constitution vests the U.S. government, with the authority to engage in relations with the tribes.
- In the 1830's, when tribal governmental authority and sovereignty was challenged, U. S. Supreme Court Chief Justice John Marshall articulated the fundamental principle of federal Indian law to the present: *That tribes possess a nationhood status and retain inherent powers of self-government.*

What does federal recognition mean?

- A federally recognized tribe is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the attached responsibilities, powers, limitations, and obligations.
- Furthermore, federally recognized tribes possess certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their relationship with the United States.
- Federal recognition also brings a strong measure of sovereign control over reservation lands. The Supreme Court ruled in the 1832 case *Worcester v. Georgia* that a tribe is free from interference by the state government whose land surrounds it (unless the federal government deems otherwise, as it has in the case of state criminal laws).
- At present, there are 566 federally recognized American Indian and Alaska Native tribes and villages.

How is Federal Tribal Status Obtained?

- Historically, most federally recognized tribes received federal recognition status through treaties, acts of Congress, presidential executive orders or other federal administrative actions, or federal court decisions.
- In 1978, the Interior Department issued regulations governing the Federal Acknowledgment Process (FAP) to handle requests for federal recognition from Indian groups whose character and history varied widely in a uniform manner. These regulations – 25 C.F.R. Part 83 – were revised in 1994 and are still in effect.

- Additionally in 1994, Congress enacted Public Law 103-454, the Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792), which formally established three ways in which an Indian group may become federally recognized:
 - By the administrative procedures under 25 C.F.R. Part 83 (FAP),
 - By Act of Congress, *or*
 - By decision of a United States court.
- The Federally Recognized Indian Tribe List Act also requires the Secretary of the Interior to publish annually a list of the federally recognized tribes in the Federal Register.

Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, Part 83 of Title 25 of the Code of Federal Regulations.

- (25 CFR Part 83)
 - The Office of Federal Acknowledgment (OFA) within the Office of the Assistant Secretary - Indian Affairs of the Department of the Interior (Department).
 - The acknowledgment process is the Department's administrative process by which petitioning groups that meet the criteria are given Federal "acknowledgment" as Indian tribes and by which they become eligible to receive services provided to members of Indian tribes.

25 CFR Part 83 (continued).

- The FAP process is rigorous, demanding and time-consuming. Exceptional anthropological, genealogical and historical research is required.
- The cases on active consideration, including those with proposed findings, have been in the process for anywhere from 2 to 9 years. Many petitions have been in the process much longer.

25 CFR Part 83 (continued).

- Since 1978, 352 groups have stated their intent to seek acknowledgment through the administrative process. “PRIMER ON FEDERAL RECOGNITION AND CURRENT ISSUES AFFECTING THE PROCESS”, Prepared for NCAI Winter Session, 2001 (updated).
 - Of this number, 265 groups have submitted only letters of intent or partially documented petitions, and are not ready for evaluation.
 - The remaining 87 have submitted completed petitions. Of this number, the Department has resolved 54 and 19 have been resolved by Congress or through other means.
- The current OFA workload consists of approximately 9 petitions under active consideration, while 5 petitions are ready and waiting for active consideration. Two resolved decisions are in litigation in Federal court and three before the Interior Board of Indian Appeals.
- Since 1980 17 tribal groups have been recognized by the petition process and 28 petitions have been denied. See <http://www.bia.gov/WhoWeAre/AS-IA/OFA/>.

25 CFR Part 83 Criteria.

- The Assistant Secretary must acknowledge the existence of the petitioner as an Indian tribe if it satisfies all of the following criteria:
 1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. § 83.7(a) (*Significant interruptions of tribal members activities such as living together, worshiping together, or meeting and making decisions for the group are not acceptable*).
 2. A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. § 83.7(b).
 3. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. § 83.7(c).

25 CFR Part 83 Criteria.

4. It submits to the BAR a copy of the group's present governing document including its membership criteria. § 83.7(d).
5. The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. § 83.7(e) *(The petitioner must provide an official membership list certified by the group's governing body. It must also submit a copy of each available former list of members based on the group's own criterion).*
6. The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. § 83.7(f). *It can meet the criteria if: (1) the petitioner can establish that it has functioned throughout history until the present as a separately autonomous tribal entity; (2) that its members do not maintain a bilateral political relationship with the acknowledged tribe; and (3) that its members have provided written confirmation of their membership in the petitioning group).*
7. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship. § 83.7(g).

Who may not apply for federal recognition?

- Tribes, organized bands, Pueblos, Alaska native villages, and communities already recognized and receiving BIA services are not eligible for the FAP process.
- Associations, organizations, corporations or groups of any character that have been formed in recent times.
- Splinter groups, political factions or groups that separate from the main body of a currently recognized tribe cannot be acknowledged under the FAP process unless the group can establish that it has functioned throughout history until the present as an autonomous tribal entity.
- Groups that are subject to Federal legislation terminating or forbidding Federal recognition as a tribe cannot be acknowledged under the FAP process. Groups that have petitioned without success cannot petition again.

Proposed CFR 25 part 83 Rule Change

- On June 21, 2013, the Department of Interior, notified tribal leader of proposed rule changes to CFR part 83 “to improve the process and maintain the integrity of acknowledgment decisions.” Comments shall be submitted by August 16, 2013. Notable rules changes include:
- Definitional changes and incorporation of precedent.
- Criteria change from being a tribal entity that has clearly functioned as an autonomous tribal entity since 1900 to 1934.

Proposed Rule Changes Cont'd.

- Allows petitioners who have been previously denied Federal acknowledgment to petition to OFA if, by a preponderance of the evidence, that a change from the previous version of the regulations to the current version of the regulations warrants reversal of the final determination.
- Updates the list of federally recognized tribes to every year instead of every three (3) years.
- Allows some tribal groups to petition under the current rules or to chose the new proposed rules.

Proposed Rule Changes Cont'd.

- An expedited process is proposed for those tribes that meet criteria contained in 83.7 (e), (f), and (g) is as follows (also creates automatic acceptance for previously acknowledged tribal groups with addition of a copy of governing documents):
 - A yet to be determined percentage of the tribal group descended from a historical tribe or group of tribes that combined or functioned as a single unit;
 - For those associate with a recognized tribal group to petition if they prove they have functioned autonomously since 1934 without significant interruption, there are not bilateral relations with the acknowledged tribal group, and the members provide written confirmation of membership in the petitioning group.
 - Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

Proposed Rule Changes Cont'd.

- Eliminates the requirement to be an identified Native American entity since 1900.
- But requires an undetermined percentage of the petitioning tribal group to have a “distinct community” since 1934 without substantial interruption (case by case basis).
 - To demonstrate “distinct community”, the required percentage of members residing within the geographical area, marriages among members, or group members maintaining distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices system, or ceremonies may be changed.

Proposed Rule Changes Cont'd.

- Defines how a tribal group demonstrates how it maintained political influence or authority over its members as an autonomous tribal group from 1934 until the present without substantial interruption.
 - The process is to be understood in the context of the history, culture and social organization of the group of how the tribal group influences its members and how it deals with outsiders as an entity. Substantial interruption is determined on a case-by-case basis.
 - There is an allowance for dealing with lost or missing data but only as it relates to the timeframe of 1934 to present.

Proposed Rule Changes Cont'd.

- Included is an expedited approval process and an expedited negative determination process.
- Other procedural changes.

Tribal Recognition by Act of Congress

- Since 1978, there has been very limited congressional involvement concerning tribes. It is considered a last resort. The Lumbee Tribe of North Carolina is a recognized tribe without federal benefits as a result of the Lumbee Act.
- Native Hawaiians