United States Department of the Interior
Bureau of Indian Affairs
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169

In Reply Refer To:
Division of Tribal Government

SEP 13 2016

The Honorable M. Brian Cladoosby
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, Washington 98257-9450

Dear Chairman Cladoosby:

In March 2016, your legal counsel requested a technical and legal review of several proposed amendments to the Swinomish Constitution and Bylaws (Constitution and Bylaws). We have completed our review; this constitutes our response. Although your request was received in March, multiple revisions were submitted through multiple venues since that time. Our review is based on the most recent submission made on June 9, 2016 via email.

The breadth of proposed amendments spans from new wording for tribal names to expansion of jurisdictional language to removal of Secretarial approval of specific governmental functions. The most immediate impression in reviewing the proposed amendments is the sheer volume of changes; thirty proposed amendments. Additionally, Proposed Amendment "A" alone makes 25 changes to the Constitution and Bylaws. The high number of changes, creating such an extensive revision of the original documents, suggests a new constitution and bylaws to avoid potential for substantial voter confusion.

With that said, we will first provide comment on each proposed amendment. We will next address an issue that was raised in May 2015 as an alternative to making numerous sweeping changes to the Constitution and By-laws outside of holding a Secretarial election for each proposed amendment.

Part I – Review of Proposed Amendments

Our analysis of each proposed amendment is included as *Enclosure 1*. We have numbered each as Items 1 through 30 for discussion purposes. Alphabetical listing of Proposed Amendments "A" through "AD" as they would appear on the ballot, which is the required practice for Secretarial elections, immediately follows the item number. Since some proposed amendments as submitted were out of sequence or not numbered, we reassigned alphabetical enumeration to them as appropriate.

Most of the proposed amendments do not run contrary to applicable law and we make suggestions for any minor changes in *Enclosure 1*. We do, however, bring the following concerns and mandatory changes to your attention:

Concerns

- Item 1 (Proposed Amendment A): While we do not find any contradiction of existing law in Proposed Amendment A, we do note it makes 25 modifications to the Constitution and Bylaws. These 25 modifications, when combined with the other 29 individually proposed amendments, create an extensive amount of change that could potentially cause voter confusion.

Mandatory Changes

- Item 2 (Proposed Amendment B): This proposed amendment expands the Swinomish territory and jurisdiction by eliminating any reference to the Executive Order of September 9, 1873. Issued in accordance with Article III of the Treaty of Point Elliott, January 22, 1855 (Treaty), the Executive Order defines the northern boundary of the Swinomish Reservation. Elimination of the northern boundary would create ambiguities in the Tribe's territory and invite conflict as the Community exercised its expanded jurisdiction. The proposed amendment runs contradictory to an existing Executive Order and, ultimately, the Treaty. This proposed amendment needs to be revised to comply with the Executive Order or withdrawn.

- Item 16 (Proposed Amendment P): Inheritance codes require approval of the Secretary. See 25 U.S.C. § 2205. This proposed amendment is contrary to existing federal law and needs to either be revised to comply or withdrawn.

The number of proposed amendments is significant and potentially confusing to the voter. Although your legal counsel has attempted to minimize the confusion by drafting a proposed voter pamphlet that explains what the proposed amendments would do, the new regulations at 25 CFR § 81.23 limit what the Election Board can include in a Secretarial Election Notice packet. 25 CFR §§ 81.23(a)(5) and (b)(6) require a two-column side by side comparison; one column showing the existing language with the other showing the proposed language. The regulations do not provide for the packet to include any commentary on what the changes would do. There is, however, nothing preventing the Tribe from separately having public information meetings with the membership to discuss the proposed changes. The revised regulations are included as ***Enclosure 2***. Please provide copies to any prospective Secretarial election board member for thorough study prior to official commencement of the election.

Part II – Alternative(s) to a Secretarial Election of over 30 Proposed Amendments

We offer two alternatives to submitting such a voluminous, potentially confusing ballot to the voters.

First, the Tribe may want to consider incorporating the proposed amendments into the existing Constitution and Bylaws and presenting it to the voters as a proposed new governing document. Although we would still recommend public information sessions, this approach would allow the members to decide with a single vote rather than having to decide on thirty different issues.

Second, in discussing an alternative to voters deciding on volumes of proposed amendments to the Constitution, it should be noted that the Tribe itself explored an alternative earlier in this process. In the spring of last year, the Tribe requested guidance from the Solicitor on the legality of removing from its Constitution language requiring Secretarial approval from the Tribe's Constitution and By-laws. More specifically, the Tribe sought advice on whether there was a distinction between (1) seeking to remove Secretarial approval language from the enumerated powers section; and (2) seeking to remove Secretarial election, ratification and approval language from the amendment article. See the letter dated May 19, 2015 to Mr. Ricky Joseph, Acting Superintendent, Puget Sound Agency, from Ms. Alix Foster, Swinomish Tribal Attorney, included as ***Enclosure 3***.

During this time, attorneys from the Office of the Regional Solicitor had a number of phone meetings with Ms. Foster centered on the Tribe's proposal to remove the Secretarial approval process from future amendments. At the time of the discussions, however, the proposed rule on the Secretarial election procedure did not clarify how tribes may remove Secretarial election requirements from governing documents. 79FR61021. The Solicitor's attorneys informed Ms. Foster that the rule was being revised and that the new rule would clarify that once tribes held a Secretarial election to remove the requirement for Secretarial approval, tribes would no longer need Secretarial approval for future amendments. Ms. Foster stated she was reluctant to recommend to the Tribe to petition for a Secretarial election on the Tribe's then-proposed amendments without a demonstration that the Tribe has proper authority to remove the Secretarial approval process.

Today, the rule governing the Secretarial election process has been revised; effective November 18, 2015. The Final Rule, published in the Federal Register at 80FR63094 (*see Enclosure 2*), clarifies that removal of the Secretarial election requirements for amendments may be accomplished through a Secretarial election. "Once the requirement for Secretarial approval is removed through a Secretarial election, Secretarial approval of future amendments is not required, meaning there will be no future Secretarial elections conducted for the tribe, and future elections will be purely tribal elections, governed and run by the tribe rather than BIA." We believe this statement and other information in the notice should address any concerns regarding a tribe's authority to remove Secretarial election requirements for amending constitutions.

Our recommended alternative to voters deciding on numerous proposed amendments to the Constitution and Bylaws is to remove the Secretarial election and approval requirement for future amendments. This one amendment would allow the Tribe to then amend and revise its governing documents through tribal elections, rather than Secretarial elections. Without the

Secretarial approval requirement, the Tribe would no longer be governed by other election-related requirements. This would perhaps allow the Tribe to make broader changes governed solely by tribal policy decisions rather than federal policy. There are, however, a few regulatory actions by the tribal governing body that would still require Secretarial approval. Those provisions that address these regulatory actions should continue to have language requiring Secretarial review.

In summary, two of the proposed amendments conflict with existing law and cannot move forward as presented. Also, the significant volume of proposed amendments is likely to create voter confusion and negatively influence the outcome of the election. At a minimum, the Tribe should conduct sufficient public information sessions to ensure all of the voting membership is well-informed on the amendments. As this may take several months, the Tribe may want to begin well before official commencement of the ninety-day election process. The Tribe may also want to present the constitution with the proposed amendments to voters as a new document requiring a single vote, rather than have the voters decide on 30 separate issues.

Ideally, we suggest the Tribe consider a Secretarial election for a single ballot issue to remove the Secretarial approval requirement for future constitutional amendments. The removal of the Secretarial approval process would allow the Tribe, through its own election process, to execute a newly revised governing document.

If you have questions or would like to schedule a time to meet with us, please contact Greg Norton, Tribal Government Specialist, at (503) 231-6723.

Sincerely,

Northwest Regional Director
Stanley Speaks

CC: Superintendent, Puget Sound Agency

Enclosure 1

Review of Proposed Amendments
to the Swinomish Constitution and Bylaws

The Tribe's proposed amendments are best demonstrated in the list of proposed amendments sent in an email attachment on May 3, 2016, labeled as "20160503_Attachment2Res" consisting of 18-pages. This review is based on that email attachment, along with the revisions sent on June 9, 2016. The 18-page list and the June 9, 2016 revisions are included herein as Attachments 1 and 2, respectively. The number of amendments equates to more than thirty proposed amendments, not including the number of changes suggested in Proposed Amendment A.

1. **Amendment A - Name changes in various sections in the Constitution and By-laws.**
    a. Name change from "Swinomish Indians" to "Swinomish Indian Tribal Community" in the Preamble, Article I, Sec. 2, and Article VI, Sec. 1(b), and By-Laws, Article IV
    b. The term "Swinomish Indians of the Swinomish Reservation of Washington" to "Swinomish Indian Tribal Community" in the Title and By-Laws Title.
    c. The term "Indians of the Swinomish Reservation" to "members of the Swinomish Indian Tribal Community" in the Preamble.
    d. The term "Swinomish Indian Reservation" to "Swinomish Reservation" in Article II, Sec. 1(a).
    e. The term "reservation" to "Swinomish Reservation" in Article VI, Sec. 1(r), Article VI, Sec. 2(a) and Art. VII, Sec. 2.
    f. The word "constitution" or term "constitution and by-laws" to "Constitution" and "By-laws" in:
        1) the Constitution: Preamble; Article IV, Sec. 4; Article VI, Secs. 1, 1(e) and (j), (2)(a) and (b), and 4; Article VII, Sec. 1; Article VIII, Sec. 1, Article IX (tribal court), Article X (amendments); and
        2) the By-laws: Article IV, Sec. 4; Article V, Sec. 6, and Article VII.

Our Comments:

The proposal to change the present wording to the new names includes making twenty-five modifications to the various sections of the Constitution and By-laws as seen above. While the changes do not present any contradictions to applicable law, these are a series of sweeping changes that would best made through a tribal election on a new Constitution and By-laws.

2. **Amendment B – Jurisdiction and Territory Changes**

Present wording:

ARTICLE I – NAME AND TERRITORY

SECTION 1. The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community.

SECTION 2. The jurisdiction of the Swinomish Indians shall include all the territory within the original confines of the Swinomish Reservation boundaries, as set forth by Executive order of September 9, 1873, in pursuance of Article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), and shall extend to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law.

Wording of proposed amendment:

ARTICLE I – NAME, TERRITORY AND JURISDICTION

SECTION 1. The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community or Tribe.

SECTION 2. Territory. The territory of the Swinomish Indian Tribal Community shall include, to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, all lands, water, property, airspace, surface rights, subsurface rights, and other natural resources

(a) in which the Tribe now or in the future has any interest, or

(b) which are owned now or in the future by the United States for the exclusive or non-exclusive benefit of the Tribe or for individual tribal members, or

(c) which are located within the original boundaries of the Swinomish Reservation in pursuance of Article II of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), notwithstanding the issuance of any existing or future patent or right-of-way.

SECTION 3. Jurisdiction. To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within

(a) its territory as defined by this Article; and

(b) the Tribe's usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas.

Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the Tribe.

Our Comments:

The proposal to modify Article I presents significant changes to this section with expansive language to the jurisdiction and territory of the Tribe. The changes do present contradictions to applicable law. Additionally, potential conflicts may arise if this amendment is enacted. The proposed amendment first defines the Tribe's territory and then secondly defines the Tribe's jurisdiction.

In the section defining territory, the proposed changes delete all the reference to the Executive Order of September 9, 1873 (Executive Order), in pursuance of Article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928). The Executive Order (Attachment 3) defines the northern boundary of the Swinomish Indian Reservation. Removal of this language is in contradiction to the Executive Order.

Next, the section on jurisdiction includes "all persons, subjects, property and activities occurring within its territory as defined by this Article." A potential expansion in territory as defined in the first section allows for a potential expansion of jurisdiction and regulatory authority as defined in the second section. If the proposed amendment is enacted, this expansion of tribal jurisdiction may lead to conflicts as the Tribe flexes its regulatory authority within an expanded tribal territory.

We suggest inserting "Name." following "**SECTION 1.**" for consistency.

3. Amendment C – Membership

Present wording:

ARTICLE II – MEMBERSHIP

SECTION 1. The membership of the Community shall consist of:

(a) All persons of Indian blood lawfully enrolled upon the Swinomish Indian Reservation and residing there June 1, 1935: *Provided*, That this section shall not affect the property rights under existing laws of the Indians of the Swinomish Reservation.

(b) All children born to any member of the community who is a resident of the reservation at the time of birth of said children.

SECTION 2. The governing body shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members, making any necessary adjustments of property rights.

Wording of proposed amendment:

ARTICLE II – MEMBERSHIP

SECTION 1. The membership of the Community shall consist of:

(a) All persons of Indian blood lawfully enrolled upon the Swinomish Indian Reservation and residing there June 1, 1935: *Provided*, That this section shall not affect the property rights under existing laws of the Swinomish Indian Tribal Community.

(b) All children born to any member of the community who is a resident of the Swinomish Reservation at the time of birth of said children.

SECTION 2. The governing body shall have the power to promulgate ordinances covering future membership and the adoption of new members, making any necessary adjustments of property rights.

Our Comments:

The proposed amendments to Article II – Membership most significantly remove the approval of the Secretary of tribal ordinances regarding future membership. The proposed amendments do not present any contradictions to applicable law. We suggest removing "Indian" from the Reservation name in "**SECTION 1.** (a)" for consistency.

4. Amendment D – Senate Election Years

Present wording:

> **ARTICLE III – GOVERNING BODY**
>
> **SECTION 2.** This senate shall consist of eleven (11) members duly elected to serve five (5) years, two being elected each year except in years ending in "0" or "5", when three shall be elected.

Wording of proposed amendment:

> **SECTION 2.** This senate shall consist of eleven (11) members duly elected to serve five (5) years, two being elected each year except in years ending in "1" or "6", when three shall be elected.

Our Comments:

The proposed amendment to Article III – Governing Body simply changes the timing of when a term ends for Tribal Senate leaders. The proposed amendments do not present any contradictions to applicable law.

5. Amendment E – Removes Inconsistency in Senate Eligibility

Present wording:

> **ARTICLE V – VACANCIES AND REMOVAL FROM OFFICE**
>
> **SECTION 1.** If a member of the senate or official shall die, resign, or cease to live on the reservation or within fifteen (15) miles of the reservation boundary, or shall be found guilty of a felony, or misdemeanor involving dishonesty in any Indian, State or Federal court, the senate shall declare the position vacant and elect to fill the unexpired term.

Wording of proposed amendment:

> **ARTICLE V – VACANCIES AND REMOVAL FROM OFFICE**
>
> **SECTION 1.** If a member of the senate or official shall die, resign, or cease to live in Skagit County west of the Interstate 5 (I-5) freeway, or shall be found guilty of a felony, or misdemeanor involving dishonesty in any Indian, State or Federal court, the senate shall declare the position vacant and elect to fill the unexpired term.

Our Comments:

The proposed amendment to Article V – Vacancies and Removal from Office modifies the boundary restrictions for eligibility for Tribal office. The proposed amendments do not present any contradictions to applicable law.

6. Amendment F – [No description of Amendment purpose.]

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers. - The senate of the Swinomish Indian Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:

(a) To negotiate with the Federal, State, and local Governments on behalf of the tribe and to advise and consult with the representatives of the Department of the Interior on all activities of the Department that may affect the Swinomish Reservation.

Wording of proposed amendment:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers. - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and the attached By-laws:

(a) To negotiate, consult, and enter agreements with other governments, entities and persons on behalf of the tribe.

Our Comments:

The proposed amendment to Article VI, Section 1 (a) primarily removes the requirement for consultation with the Secretary on matters of government-to-government relations. The proposed amendments do not present any contradictions to applicable law.

7. Amendment G – Remove Secretarial Review of Senate Action

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(b) To employ legal counsel for the protection and advancement of the rights of the Swinomish Indians, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

Wording of proposed amendment:

(b) To employ legal counsel for the protection and advancement of the rights of the Swinomish Indian Tribal Community and its members.

Our Comments:

The proposed amendment to Article VI, Section 1 (b) removes the requirement for Secretarial approval on hiring legal counsel. The proposed amendments do not present any contradictions to applicable law.

8. Amendment H – Consistency with Article VIII

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(c) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of government, provided that no tribal lands shall ever be sold, encumbered, or leased for a period exceeding that permitted by law.

Wording of proposed amendment:

(c) To authorize and execute, or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets not inconsistent with Article VIII.

Our Comments:

The proposed amendment to Article VI, Section 1 (c) allows for the governing body to have authority to execute tribal land dispositions subject to applicable federal law listed under Article VIII. The proposed amendments do not present any contradictions to applicable law.

9. Amendment I – Remove Charter Reference

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(f) To manage all economic affairs and enterprises of the Swinomish Reservation in accordance with the terms of a charter to be issued to the Swinomish Indians by the Secretary of the Interior.

Wording of proposed amendment:

(f) To manage all economic affairs and enterprises of the Swinomish Indian Tribal Community.

Our Comments:

The proposed amendment to Article VI, Section 1 (f) removes reference to terms of the Tribal charter. The proposed amendments do not present any contradictions to applicable law.

10. Amendment J – Appropriate for Public Purposes

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(g) To appropriate for salaries of tribal officials or for public purposes of the reservation any available tribal funds, provided that any such appropriation made prior to July 1, 1940, shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(g) To authorize expenditures and appropriate for public purposes of the Swinomish Reservation or the Tribe any available tribal funds.

Our Comments:

The proposed amendment to Article VI, Section 1 (g) removes language referencing appropriations made prior to July 1, 1940 and the need for Secretarial review for those prior appropriations. The proposed amendments do not present any contradictions to applicable law.

11. Amendment K – Raise Revenue & Remove Secretarial Review of Senate Action

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(h) To levy taxes upon members of the community and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the reservation.

Wording of proposed amendment:

(h) To raise revenue, including the power to levy and collect taxes, duties, fees and assessments, for public purposes of the Swinomish Reservation or the Tribe.

Our Comments:

The proposed amendment to Article VI, Section 1 (h) adds language that expands the authority of the Tribe's governing body to raise revenue, plus removes the requirement for Secretarial review. The proposed amendments do not present any contradictions to applicable law.

12. Amendment L – Exclusion

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(i) To exclude from the restricted lands of the Swinomish Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(i) To exclude from the restricted lands of the Swinomish Reservation persons subject to the Tribe's jurisdiction under ordinances.

Our Comments:

The proposed amendment to Article VI, Section 1 (i) removes the requirement for Secretarial review for ordinances to exclude persons from residing on the Swinomish reservation. The proposed amendments do not present any contradictions to applicable law.

13. Amendment M – Regulation of Law and Order

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(k) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(k) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior:

(a) governing the conduct of all persons within the territory of the Swinomish Indian Reservation;

(b) governing tribal members beyond the limits of the Swinomish Indian Reservation, including with respect to exercising tribal fishing, hunting, and gathering rights on all usual and accustomed fishing grounds and stations of the Swinomish Indian Tribal Community, on all open and unclaimed lands guaranteed by treaty for hunting or gathering and on such other lands and waters as is necessary for access to such fishing, hunting and gathering sites, and;

(c) providing for the maintenance of law and order and the administration of justice, and establishing a Tribal court and defining its duties and powers.

Our Comments:

The proposed amendment to Article VI, Section 1 (k) newly includes the requirement for Secretarial review for ordinances that govern persons conduct within the "territory" of the Swinomish Indian Reservation; tribal member conduct beyond the limits of the reservation; and the administration of the Tribal court. While the majority of the prior proposed amendments remove Secretarial review, in this instance Secretarial review would be necessary. The development of the tribal ordinances must adhere to federal and state laws that govern persons that fall outside of Tribal enforcement, and on land outside of Tribal jurisdiction. With the inclusion of Secretarial review, these proposed amendments to the Law and Order Section do not present any contradictions to applicable law.

14. Amendment N – Safeguarding Peace

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Swinomish Reservation by regulating the conduct of trade and the use and disposition of property within the reservation, provided that any ordinance directly affecting non-members of the reservation shall be subject to review by the Secretary of the Interior.

Proposed wording:

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Tribe and the Swinomish Reservation by regulating the conduct of trade and the use and disposition of property within the Reservation.

Our Comments:

The proposed amendment to Article VI, Section 1 (l) removes the requirement for Secretarial review for ordinances affecting non-tribal member on the Swinomish reservation. The amendment to Article VI (k) included Secretarial review of ordinances regarding non-tribal members conduct on the reservation. The proposed amendments do not present any contradictions to applicable law.

15. Amendment O – Subordinate Organizations

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(m) To charter subordinate organizations for economic purposes and to regulate the activities of all cooperative associations of members of the Swinomish Community.

Wording of proposed amendment:

(m) To establish and regulate subordinate organizations and agencies of the Tribe for any lawful purpose and to regulate the activities of all cooperative associations of members of the Swinomish Indian Tribal Community.

Our Comments:

The proposed amendment to Article VI, Section 1 (m) removes the term "charter" from the present wording. This removes the need to create a subordinate tribal organization through the Tribe's charter. The proposed amendments do not present any contradictions to applicable law.

16. **Amendment P – Remove Secretarial Review of Senate Action**

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(n) To regulate the inheritance of property, real and personal, other than allotted lands within the territory of the Swinomish Reservation, subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(n) To regulate the inheritance of property, real and personal, within the territory of the Swinomish Indian Tribal Community.

Our Comments:

The proposed amendment to Article VI, Section 1 (n) removes the requirement for Secretarial review for regulatory actions by the Tribe's governing body regarding the inheritance of real and personal property. The proposed amendments does present a contradiction to applicable law; because the Tribe lacks a probate code authorized under the AIPRA to govern descent and distribution of trust property within the jurisdiction of the Tribe. See 25 U.S.C. § 2205.

17. Amendment Q – Remove Secretarial Review of Senate Action

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(o) To regulate the domestic relations of members of the community subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(o) To regulate the domestic relations of persons subject to the Tribe's jurisdiction.

Our Comments:

The proposed amendment to Article VI, Section 1 (o) removes the requirement for Secretarial review for regulation of domestic relations matters by the Tribal governing body. The proposed amendments do not present any contradictions to applicable law.

18. Amendment R – Remove Secretarial Review of Senate Action

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 1. Enumerated powers

(p) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution, subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(p) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution

Our Comments:

The proposed amendment to Article VI, Section 1 (p) removes the requirement for Secretarial review of ordinances or resolutions by the Tribal governing body for appointment of guardians to persons with limited mental incapacity or youth. The proposed amendments do not present any contradictions to applicable law.

19. Amendment S – Providing for Effective Dates

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 2. Manner of Review

None.

Wording of proposed amendment:

SECTION 2.

(b) Laws, when effective. - Any resolution or ordinance, which, by the terms of this Constitution, is not subject to review by the Secretary of the Interior, shall become effective according to its terms or, if no effective date is specified, immediately upon adoption by the Senate.

Our Comments:

The proposed amendment to Article VI, Section 2 adds a second subsection which addresses when a tribal ordinance will be effective, not subject to Secretarial review. The proposed amendments do not present any contradictions to applicable law.

20. Amendment T – Additional Powers

Present wording:

ARTICLE VI – POWERS OF THE SENATE

SECTION 5. Additional powers. - The Senate of the Swinomish Indian Reservation shall exercise the following rights and powers heretofore vested in the Tribes or Bands of the Swinomish Reservation in addition to all powers already conferred or guaranteed by the Constitution and Bylaws of the Community:

(a) Zoning power. – to regulate the land use of all property within the Swinomish Reservation.

Wording of proposed amendment:

SECTION 5. Additional powers. – To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Senate of the Swinomish Indian Tribal Community shall exercise the following rights and powers heretofore vested in the Tribes or Bands of the Swinomish Reservation in addition to all powers already conferred or guaranteed by the Constitution and Bylaws of the Community:

(a) Zoning power. – to regulate the land use of all property within the Swinomish Reservation.

(b) Natural Resource Protection authority. - To develop, manage, protect and regulate the use of all the Tribe's natural resources wherever situated.

(c) Residual powers:

1. To enact laws, ordinances and resolutions necessary or incidental to the exercise of the powers set forth in this Constitution.

2. To take any and all actions necessary and proper for the exercise of the powers and duties enumerated in this Constitution and the accompanying By-laws, and for all other powers and duties now or hereafter delegated to the Senate, or vested in the Tribe by federal law or through its inherent sovereignty.

Our Comments:

The proposed amendment to Article VI, Section 5 adds language recognizing the Tribe's officers' ability to regulate and manage land use, tribal natural resources, and other regulatory powers not previously listed. The proposed amendments do not present any contradictions to applicable law.

21. Amendment U – Civil Liberties

Present wording:

ARTICLE VII – BILL OF RIGHTS

SECTION 3. Civil liberties. - All members of the community may enjoy without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

Wording of proposed amendment:

SECTION 3. Civil liberties. - All persons subject to the Tribe's jurisdiction may enjoy without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

Our Comments:

The proposed amendment to Article VIII, Section 3 replaces community members with all persons subject to the Tribe's jurisdiction. The proposed amendments do not present any contradictions to applicable law.

22. Amendment V – Rights of Accused

Present wording:

ARTICLE VII – BILL OF RIGHTS

SECTION 4. Rights of accused. Any members of the community who shall be accused of any offense shall have the right to a prompt open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than thirty days imprisonment. Excessive bail shall not be required, and cruel punishment shall not be imposed.

Wording of proposed amendment:

SECTION 4. Rights of accused. Any person subject to the Tribe's jurisdiction who shall be accused of any offense shall have the right to a prompt open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf. Trial by jury may be demanded by any person accused of any offense punishable by more than thirty days imprisonment. Excessive bail shall not be required, and cruel punishment shall not be imposed.

SOL Comments:

The proposed amendment to Article VII, Section 4 replaces community members with all persons subject to the Tribe's jurisdiction, plus replaces "prisoner" with "any person accused of any offense". The proposed amendments do not present any contradictions to applicable law.

23. Amendment [T] W – Allotted Lands

Present wording:

ARTICLE VIII – LANDS

SECTION 1. Allotted lands. - Allotted lands, including heirship lands within the Swinomish Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribal community itself. It is further recognized that under existing law, such lands may be inherited by the heirs of the present owner, whether or not they are members of the community. Likewise, it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the community either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided.

Wording of proposed amendment:

SECTION 1. Allotted lands. - Allotted lands, including heirship lands within the Swinomish Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribal community itself. It is further recognized that under existing law, such lands may be inherited by the heirs of the present owner, whether or not they are members of the community. Likewise, it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the Constitution, but the owner of restricted land may, with any approval of the Secretary of the Interior as may be required by applicable federal law, voluntarily convey his land to the community in exchange for a money payment.

Our Comments:

The proposed amendment to Article VIII, Section 1 reinforces the need for Secretarial approval under federal law for disposition of trust land. The proposed amendments do not present any contradictions to applicable law.

24. Amendment [ ] X – Tribal Lands

Present wording:

ARTICLE VIII – LANDS

SECTION 2. Tribal lands. - The unallotted lands of the Swinomish Reservation, and all lands which may hereafter be acquired by the community or by the United States in trust for the community, shall be held as tribal lands, and no part of such land shall be mortgaged or sold, unless specifically authorized by law, and then only with the consent and approval of the Secretary of the Interior. Tribal lands shall not be allotted to individual Indians, but may be leased to members of the community, or otherwise used by the community.

Wording of proposed amendment:

SECTION 2. *Tribal lands.* - The unallotted lands of the Swinomish Reservation, and all lands which may hereafter be acquired by the community or by the United States in trust for the community, shall be held as tribal lands, and no part of such land shall be mortgaged or sold, unless specifically authorized by law, and then only with any consent and approval of the Secretary of the Interior as may be required by applicable federal law. Tribal lands shall not be allotted to individual Indians, but may be leased to members of the community, or otherwise used by the community.

Our Comments:

The proposed amendment to Article VIII, Section 2 adds language of "required by applicable federal law" for sale of tribal lands held in trust by the United States. The proposed amendments do not present any contradictions to applicable law.

25. Amendment [ ] Y – Leasing of Community Lands

Present wording:

ARTICLE VIII – LANDS

SECTION 3. Leasing of community lands. - Community lands may be leased by the senate, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

Wording of proposed amendment:

SECTION 3. Leasing of community lands. – To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, Community lands may be leased by the senate.

Our Comments:

The proposed amendment to Article VIII, Section 3 replaces language of requiring Secretarial approval for the Tribe to lease tribal lands with the language of "applicable federal law". The proposed amendments do not present any contradictions to applicable law; because the Tribe has authority under Title 25 U.S.C. § 415(b) for leasing community lands regulated under a tribal ordinance.

26. Amendment [ ] Z – Acquisition of Land by Community

Present wording:

ARTICLE VIII – LANDS

SECTION 6. Acquisition of land by Community. - The community may acquire land, or interests in land, by purchase or otherwise, provided such acquisitions are in accordance with law.

Wording of proposed amendment:

SECTION 6. Acquisition of land by Community. - The community may acquire land, or interests in land, by purchase or otherwise, provided such acquisitions are in accordance with applicable federal law.

Our Comments:

The proposed amendment to Article VIII, Section 6 adds language of "applicable federal law" regarding the community acquiring land. The proposed amendments do not present any contradictions to applicable law.

27. Amendment [U] AA – [No description of Amendment purpose.]

Present wording:

None.

Wording of proposed amendment:

ARTICLE IX- THE TRIBAL COURT SYSTEM

SECTION 1. Establishment. The judicial power of the Tribe shall be vested in the Tribal Court System. The Tribal Court System shall include a Tribal Court and such other lower courts of special jurisdiction, including forums for traditional dispute resolution, as the Senate may establish by ordinance. There shall also be a Court of Appeals which shall be the court of last resort for all cases filed within the Tribal Court System.

SECTION 2. Jurisdiction. The judicial power of the courts shall extend to all cases and controversies within the jurisdiction of the Tribe, in law or equity, arising under this Constitution, the laws or customs of the Tribe, or which are vested in the tribal courts by federal law or by virtue of the Tribe's inherent sovereignty. Any case or controversy arising within the jurisdiction of the Tribe shall be filed in the Tribal Court or other appropriate forum established by the Senate before it is filed in any other court. This grant of jurisdiction shall not be construed to be a waiver or limitation of the Tribe's sovereign immunity.

SECTION 3. Appointment of Judges. The Senate shall appoint judges who shall serve for a term of four (4) years unless sooner removed for cause as provided by this Constitution or by resignation, but shall be eligible for reappointment. There shall be one Chief Judge for the Tribal Court and such Associates Judges and Judges pro tempore as may be appointed by the Senate. The Court of Appeals shall consist of a panel of three (3) judges randomly selected. No judge shall preside over a matter in the Court of Appeals if he or she presided over the same matter in the Tribal Court.

SECTION 4. Qualifications of Judges. The qualifications for judges shall be established by ordinance: Provided, that no additional requirements may be added during the tenure of a judge already in office, unless the additions or changes exempt the present judges during their term.

SECTION 5. Compensation. Judges shall receive for their services reasonable compensation that shall not be diminished during their term of office, except during any period of suspension or discipline as may be ordered by the Senate pursuant to Section 6 of this Article.

SECTION 6. Removal and Discipline of Judges.

(a) A judge shall be removed by the Senate for a final conviction in Swinomish Tribal Court of a felony as defined by ordinance, or for a conviction of any equivalent offense in a federal, state or tribal court while serving as judge, immediately effective upon issuance of the judgment of conviction.

(b) By a vote of at least seven (7) of its members, the Senate may suspend a judge charged with any criminal offense under federal, state, or tribal law pending the outcome of the trial and any appeals, and an interim judge may be appointed for the period of the suspension.

(c) By a vote of at least seven (7) of its members, a judge may be disciplined or removed by the Senate for:

(1) Any act or omission which would have resulted in ineligibility for appointment;

(2) Being under the influence of intoxicants or drugs while performing official duties;

(3) Converting tribal property or monies for personal use;

(4) Conviction in Swinomish Tribal Court of any misdemeanor as defined by ordinance or any equivalent conviction in federal, state, or tribal court while serving as judge;

(5) Desertion of office; or

(6) Violation of any applicable Judicial Code of Conduct.

(d) A judge shall be given full and fair opportunity to reply to any and all charges for which he or she may be disciplined or removed. A judge who is disciplined or removed may appeal directly to the Court of Appeals.

SECTION 7. Judicial Power. The Tribal Court System shall have the power to interpret and apply the Constitution and laws of the Tribe, and applicable federal or state law.

Our Comments:

The proposed amendment to add a new article to the Constitution does not present any contradictions to applicable law. The new article is for the purpose of establishing a separate tribal court for cases or controversies arising within the jurisdiction of the Tribe.

28. Amendment [V] AB – [No description of Amendment purpose.]

Present wording:

BY-LAWS – ARTICLE I

SECTION 3. Secretary of the senate. - The secretary of the senate shall conduct all community correspondence and shall keep an accurate record of all matters transacted at senate meetings. It shall be his duty to submit promptly to the superintendent of the jurisdiction and Commissioner of Indian Affairs copies of all minutes of regular and special meetings of the senate. He shall be privileged to vote in the Senate only in the event that he is an elected member thereof.

Wording of proposed amendment:

SECTION 3. Secretary of the senate. - The secretary of the senate shall conduct all community correspondence and shall keep an accurate record of all matters transacted at senate meetings. He shall be privileged to vote in the Senate only in the event that he is an elected member thereof.

Our Comments:

The proposed amendment to the By-laws Article 1, SECTION 3 removes the duty of the secretary of the Senate to submit Tribal Senate meeting minutes to the BIA superintendent and Commissioner of Indian Affairs. The proposed amendment does not present any contradictions to applicable law.

29. Amendment [W] AC - [No description of Amendment purpose.]

Present wording:

BY-LAWS – ARTICLE I

SECTION 4. Treasurer of the senate. - The treasurer of the senate shall accept, receive, receipt for, preserve, and safeguard all funds in the custody of the senate, whether same be community funds or special funds for which the senate is acting as trustee or custodian. He shall deposit all such funds in such banks or elsewhere as directed by the senate, and shall make and preserve a faithful record of such funds, and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody, such report being made in writing to the senate at regular meetings and at such other times as requested by the senate.

He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the senate, except when properly authorized so to do by resolution duly passed by it. The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the senate or the Commissioner of Indian Affairs, and at such other times as the senate may direct.

The treasurer shall be required to give a bond satisfactory to the senate and to the Commissioner of Indian Affairs.

The treasurer shall be present at all special or regular meetings of the senate, but shall be privileged to vote only in the event that he is an elected member of the senate.

Wording of proposed amendment:

SECTION 4. Treasurer of the senate. - The treasurer of the senate shall accept, receive, receipt for, preserve, and safeguard all funds in the custody of the senate, whether same be community funds or special funds for which the senate is acting as trustee or custodian. He shall deposit all such funds in such banks or elsewhere as directed by the senate, and shall make and preserve a faithful record of such funds, and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody, such report being made in writing to the senate at regular meetings and at such other times as requested by the senate.

He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the senate, except when properly authorized so to do by resolution duly passed by it. The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the senate or the Commissioner of Indian Affairs, and at such other times as the senate may direct.

The treasurer shall be present at all special or regular meetings of the senate, but shall be privileged to vote only in the event that he is an elected member of the senate.

Our Comments:

The proposed amendment to the By-laws Article 1, SECTION 4 removes the language requiring the Tribal Senate Treasurer give a bond and submission of audit to the Commissioner of Indian Affairs. The proposed amendments do not present any contradictions to applicable law.

***30.* Amendment [X] AD – [No description of Amendment purpose.]**

Present wording:

BY-LAWS – ARTICLE VII - ADOPTION

This constitution and by-laws attached hereto shall be in full force and effect whenever a majority of the adult Indians residing on the Swinomish Reservation voting at an election called by the Secretary of the Interior in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such constitution and by-laws, and the Secretary of the Interior shall have approved same, as provided in the act of June 18, 1934, as amended by the act of June 15, 1935.

Wording of proposed amendment:

BY-LAWS – ARTICLE VII - ADOPTION

This Constitution and By-laws attached hereto shall be in full force and effect whenever a majority of the adult Indians residing on the Swinomish Reservation voting at an election called by the Secretary of the Interior in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such Constitution and By-laws, and the Secretary of the Interior shall have approved same, as provided in the act of June 18, 1934, as amended by the act of June 15, 1935.

Further, any amendments to this Constitution and By-laws proposed after the date on which the Constitution and By-Laws were adopted shall be in full force and effect whenever a majority of the qualified voters of the Swinomish Indian Tribal Community voting at an election called by the Secretary of the Interior for that purpose, in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such amendments.

Our Comments:

The proposed amendment to the By-laws Article VII adds language regarding the effective date of adopted amendments to the Constitution and By-laws, yet removes the language requiring Secretarial approval of a ratified amendment. An amendment ratified by a Secretarial election requires Secretarial approval as a final agency action. 25 C.F.R. § 81.45. The proposed amendment does present potential contradictions to applicable law.

Attachment 1

LIST OF PROPOSED AMENDMENTS

AMENDMENT A – Name Changes In Various Sections in The Constitution And By-Laws

Present wording:

1) "Swinomish Indians"
2) "Swinomish Indians of the Swinomish Reservation of Washington"
3) "Indians of the Swinomish Reservation"
4) "Swinomish Indian Reservation"
5) "reservation"
6) "constitution" or "constitution and by-laws"

Explanation of what voting for this amendment will do:

- This amendment would change
  - The term "Swinomish Indians" to "Swinomish Indian Tribal Community" in the Preamble, Article I, Sec. 2, and Article VI, Sec. 1(b), and By-Laws, Article IV.
  - The term "Swinomish Indians of the Swinomish Reservation of Washington" to "Swinomish Indian Tribal Community" in the Title and By-Laws Title.
  - The term "Indians of the Swinomish Reservation" to "members of the Swinomish Indian Tribal Community" in the Preamble.
  - The term "Swinomish Indian Reservation" to "Swinomish Reservation" in Article II, Sec. 1(a).
  - The term "reservation" to "Swinomish Reservation" in Article VI, Sec. 1(r), Article VI, Sec. 2(a) and Art. VII, Sec. 2.
  - The word "constitution" or term "constitution and by-laws" to "Constitution" and "By-laws" in
    - the Constitution: Preamble; Article IV, Sec. 4; Article VI, Secs. 1, 1(e) and (j), (2)(a) and (b), and 4; Article VII, Sec. 1; Article VIII, Sec. 1, Article IX (tribal court), Article X (amendments); and
    - the By-laws: Article IV, Sec. 4; Article V, Sec. 6, and Article VII.

Wording of proposed amendment:

1) "Swinomish Indian Tribal Community"
2) "Swinomish Indian Tribal Community"
3) "members of the Swinomish Indian Tribal Community"
4) "Swinomish Reservation"
5) "Swinomish Reservation"
6) "Constitution" or "Constitution and By-laws"

AMENDMENT B –JURISDICTION AND TERRITORY

ARTICLE I, SEC. 2 – NAME AND TERRITORY

Present wording:

ARTICLE I-NAME AND TERRITORY

SECTION 1. The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community.

SEC. 2. The jurisdiction of the Swinomish Indians shall include all the territory within the original confines of the Swinomish Reservation boundaries, as set forth by Executive order of September 9, 1873, in pursuance of article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), and shall extend to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law.

Wording of proposed amendment:

ARTICLE I – NAME, TERRITORY AND JURISDICTION

SECTION 1. The name of this organized body shall be the Swinomish Indian Tribal Community, hereinafter called the community or Tribe.

Sec. 2. Territory. The territory of the Swinomish Indian Tribal Community shall include, to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, all lands, water, property, airspace, surface rights, subsurface rights, and other natural resources

(a) in which the Tribe now or in the future has any interest, or

(b) which are owned now or in the future by the United States for the exclusive or non-exclusive benefit of the Tribe or for individual tribal members, or

(c) which are located within the original boundaries of the Swinomish Reservation in pursuance of Article II of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), notwithstanding the issuance of any existing or future patent or right-of-way.

Sec. 3. Jurisdiction. To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within

a) its territory as defined by this Article; and

b) the Tribe's usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas.

Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the Tribe.

AMENDMENT C –MEMBERSHIP

ARTICLE II, Sections 1 and 2

Present Wording:

SECTION 1. The membership of the Community shall consist of:

(a) All persons of Indian blood lawfully enrolled upon the Swinomish Indian Reservation and residing there June 1, 1935: *Provided*, That this section shall not affect the property rights under existing laws of the Indians of the Swinomish Reservation.
(b) All children born to any member of the community who is a resident of the reservation at the time of birth of said children.

SEC. 2. The governing body shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members, making any necessary adjustments of property rights.

Wording of proposed amendment:

SECTION 1. The membership of the Community shall consist of:

(a) All persons of Indian blood lawfully enrolled upon the Swinomish Indian Reservation and residing there June 1, 1935: *Provided*, That this section shall not affect the property rights under existing laws of the Swinomish Indian Tribal Community.
(b) All children born to any member of the community who is a resident of the Swinomish Reservation at the time of birth of said children.

SEC. 2. The governing body shall have the power to promulgate ordinances covering future membership and the adoption of new members, making any necessary adjustments of property rights.

AMENDMENT D-SENATE ELECTION YEARS

ARTICLE III, SEC. 2 – GOVERNING BODY

Present Wording:

> **SEC. 2.** This senate shall consist of eleven (11) members duly elected to serve five (5) years, two being elected each year except in years ending in "0" or "5", when three shall be elected.

Wording of proposed amendment:

> **SEC. 2.** This senate shall consist of eleven (11) members duly elected to serve five (5) years, two being elected each year except in years ending in "1" or "6", when three shall be elected.

AMENDMENT E – REMOVES INCONSISTENCY IN SENATE ELIGIBILITY

ARTICLE V, SEC.1 – VACANCIES AND REMOVAL FROM OFFICE

Present wording of Article V, Sec. 1:

> **SECTION 1.** If a member of the senate or official shall die, resign, or cease to live on the reservation or within fifteen (15) miles of the reservation boundary, or shall be found guilty of a felony, or misdemeanor involving dishonesty in any Indian, State or Federal court, the senate shall declare the position vacant and elect to fill the unexpired term.

Wording of proposed amendment:

> **SECTION 1.** If a member of the senate or official shall die, resign, or cease to live in Skagit County west of the Interstate 5 (I-5) freeway, or shall be found guilty of a felony, or misdemeanor involving dishonesty in any Indian, State or Federal court, the senate shall declare the position vacant and elect to fill the unexpired term.

AMENDMENT F

ARTICLE VI, SEC. 1 and 1(a)– POWERS OF THE SENATE - NEGOTIATIONS

Present wording of Article VI, Sec. 1(a):

> **SECTION 1.** *Enumerated powers.* - The senate of the Swinomish Indian Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws:

(a) To negotiate with the Federal, State, and local Governments on behalf of the tribe and to advise and consult with the representatives of the Department of the Interior on all activities of the Department that may affect the Swinomish Reservation.

Wording of proposed amendment:

SECTION 1. *Enumerated powers.* - The senate of the Swinomish Indian Tribal Community shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and the attached By-laws:

(a) To negotiate, consult, and enter agreements with other governments, entities and persons on behalf of the tribe.

AMENDMENT G – Remove Secretarial review of Senate Action
ARTICLE VI, SEC. 1(b)– POWERS OF THE SENATE- LEGAL COUNSEL

Present wording of Article VI, Sec. 1(b):

(b) To employ legal counsel for the protection and advancement of the rights of the Swinomish Indians, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

Wording of proposed amendment:

(b) To employ legal counsel for the protection and advancement of the rights of the Swinomish Indian Tribal Community and its members.

AMENDMENT H – Consistency With Article VIII
ARTICLE VI, SEC. 1(l)– POWERS OF THE SENATE- TRIBAL LANDS

Present wording of Article VI, Sec. 1(c):

(c) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of government, provided that no tribal lands shall ever be sold, encumbered, or leased for a period exceeding that permitted by law.

Wording of proposed amendment:

(c) To authorize and execute, or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets not inconsistent with Article VIII.

AMENDMENT I- Remove Charter Reference
ARTICLE VI, SEC. 1(f)– POWERS OF THE SENATE—ECONOMIC AFFAIRS

Present wording of Article VI, Sec. 1(f):

(f) To manage all economic affairs and enterprises of the Swinomish Reservation in accordance with the terms of a charter to be issued to the Swinomish Indians by the Secretary of the Interior.

Wording of proposed amendment:

(f) To manage all economic affairs and enterprises of the Swinomish Indian Tribal Community.

AMENDMENT J – Appropriate for public purposes
ARTICLE VI, SEC. 1(g)– POWERS OF THE SENATE—APPROPRIATIONS

Present wording:

(g) To appropriate for salaries of tribal officials or for public purposes of the reservation any available tribal funds, provided that any such appropriation made prior to July 1, 1940, shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(g) To authorize expenditures and appropriate for public purposes of the Swinomish Reservation or the Tribe any available tribal funds.

AMENDMENT K – Raise Revenue and Remove Secretarial review of Senate Action
ARTICLE VI, SEC. 1(g)– POWERS OF THE SENATE—TAXATION

Present wording:

(h) To levy taxes upon members of the community and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the reservation.

Wording of proposed amendment:

(h) To raise revenue, including the power to levy and collect taxes, duties, fees and assessments, for public purposes of the Swinomish Reservation or the Tribe.

AMENDMENT L- Exclusion

ARTICLE VI, SEC. 1(k)– POWERS OF THE SENATE

Present wording:

(i) To exclude from the restricted lands of the Swinomish Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(i) To exclude from the restricted lands of the Swinomish Reservation persons subject to the Tribe's jurisdiction under ordinances.

AMENDMENT M- Regulation of Law and Order

ARTICLE VI, SEC. 1(k)– POWERS OF THE SENATE – LAW AND ORDER

Present wording:

(k) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(k) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior:

(a) governing the conduct of all persons within the territory of the Swinomish Indian Reservation;

(b) governing tribal members beyond the limits of the Swinomish Indian Reservation, including with respect to exercising tribal fishing, hunting, and gathering rights on all usual and accustomed fishing grounds and stations of the Swinomish Indian Tribal Community, on all open and unclaimed lands guaranteed by treaty for hunting or gathering and on such other lands and waters as is necessary for access to such fishing, hunting and gathering sites, and;

(c) providing for the maintenance of law and order and the administration of justice, and establishing a Tribal court and defining its duties and powers.

AMENDMENT N – Safeguarding Peace

ARTICLE VI, SEC. 1(l)– POWERS OF THE SENATE

Present wording of Article VI, Sec. 1(l):

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Swinomish Reservation by regulating the conduct of trade and the use and disposition of property within the reservation, provided that any ordinance directly affecting non-members of the reservation shall be subject to review by the Secretary of the Interior.

Proposed wording:

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Tribe and the Swinomish Reservation by regulating the conduct of trade and the use and disposition of property within the Reservation.

AMENDMENT O – Subordinate Organizations

ARTICLE VI, SEC. 1(m)– POWERS OF THE SENATE – SUBORDINATE ORGANIZATIONS

Present wording of Article VI, Sec. 1(m):

(m) To charter subordinate organizations for economic purposes and to regulate the activities of all cooperative associations of members of the Swinomish Community.

Wording of proposed amendment:

(m) To establish and regulate subordinate organizations and agencies of the Tribe for any lawful purpose and to regulate the activities of all cooperative associations of members of the Swinomish Indian Tribal Community.

AMENDMENT P – Remove Secretarial review of Senate Action

ARTICLE VI, SEC. 1(n)– POWERS OF THE SENATE- INHERITANCE

Present wording of Article VI, Sec. 1(n):

(n) To regulate the inheritance of property, real and personal, other than allotted lands within the territory of the Swinomish Reservation, subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(n) To regulate the inheritance of property, real and personal, within the territory of the Swinomish Indian Tribal Community.

AMENDMENT Q – Remove Secretarial review of Senate Action
ARTICLE VI, SEC. 1– POWERS OF THE SENATE – DOMESTIC RELATIONS

Present wording of Article VI, Sec. 1(o):

(o) To regulate the domestic relations of members of the community subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(o) To regulate the domestic relations of persons subject to the Tribe's jurisdiction.

AMENDMENT R – Remove Secretarial review of Senate Action
ARTICLE VI, SEC. 1– POWERS OF THE SENATE -- GUARDIANSHIP

Present wording of Article VI, Sec. 1(p):

(p) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution, subject to review by the Secretary of the Interior.

Wording of proposed amendment:

(p) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution

AMENDMENT S – Providing for Effective Dates
ARTICLE VI, SEC. 2.

Present wording:
None.

Wording of proposed amendment:

SEC. 2.

(b) Laws, when effective. - Any resolution or ordinance, which, by the terms of this Constitution, is not subject to review by the Secretary of the Interior, shall become effective according to its terms or, if no effective date is specified, immediately upon adoption by the Senate.

AMENDMENT T
ARTICLE VI, SEC. 5– ADDITIONAL POWERS

Present wording:

Additional powers. - The Senate of the Swinomish Indian Reservation shall exercise the following rights and powers heretofore vested in the Tribes or Bands of the Swinomish Reservation in addition to all powers already conferred or guaranteed by the Constitution and Bylaws of the Community:

(a) Zoning power. – to regulate the land use of all property within the Swinomish Reservation.

Wording of proposed amendment:

Additional powers. – To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Senate of the Swinomish Indian Tribal Community shall exercise the following rights and powers heretofore vested in the Tribes or Bands of the Swinomish Reservation in addition to all powers already conferred or guaranteed by the Constitution and Bylaws of the Community:

(a) Zoning power. – to regulate the land use of all property within the Swinomish Reservation.

(b) Natural Resource Protection authority. - To develop, manage, protect and regulate the use of all the Tribe's natural resources wherever situated.

(c) Residual powers:

1. To enact laws, ordinances and resolutions necessary or incidental to the exercise of the powers set forth in this Constitution.

2. To take any and all actions necessary and proper for the exercise of the powers and duties enumerated in this Constitution and the accompanying By-laws, and for all other powers and duties now or hereafter delegated to the Senate, or vested in the Tribe by federal law or through its inherent sovereignty.

AMENDMENT U
ARTICLE VII, SEC. 3 – BILL OF RIGHTS – RIGHTS OF ACCUSED.

Present wording:

> *Sec. 3. Civil liberties.* - All members of the community may enjoy without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

Wording of proposed amendment:

> *Civil liberties.* - All persons subject to the Tribe's jurisdiction may enjoy without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

AMENDMENT V
ARTICLE VII, SEC. 4 – BILL OF RIGHTS – RIGHTS OF ACCUSED.

Present wording:

Sec. 4: *Rights of accused.* Any members of the community who shall be accused of any offense shall have the right to a prompt open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than thirty days imprisonment. Excessive bail shall not be required, and cruel punishment shall not be imposed.

Wording of proposed amendment:

Sec. 4: *Rights of accused.* Any person subject to the Tribe's jurisdiction who shall be accused of any offense shall have the right to a prompt open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf. Trial by jury may be demanded by any person accused of any offense punishable by more than thirty days imprisonment. Excessive bail shall not be required, and cruel punishment shall not be imposed.

AMENDMENT T
ARTICLE VIII, SEC. 1 – LANDS – ALLOTTED LANDS

Present wording:

SECTION 1. *Allotted lands.* - Allotted lands, including heirship lands within the Swinomish Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribal community itself. It is further recognized that under existing law, such lands may be inherited by the heirs of the present owner, whether or not they are members of the community. Likewise, it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the community either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided.

Wording of proposed amendment:

SECTION 1. *Allotted lands.* - Allotted lands, including heirship lands within the Swinomish Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribal community itself. It is further recognized that under existing law, such lands may be inherited by the heirs of the present owner, whether or not they are members of the community. Likewise, it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the Constitution, but the owner of restricted land may, with any approval of the Secretary of the Interior as may be required by applicable federal law, voluntarily convey his land to the community in exchange for a money payment.

AMENDMENT
ARTICLE VIII, SEC. 2 – LANDS – TRIBAL LANDS

Present wording:

Sec. 2. Tribal lands. - The unallotted lands of the Swinomish Reservation, and all lands which may hereafter be acquired by the community or by the United States in trust for the community, shall be held as tribal lands, and no part of such land shall be mortgaged or sold, unless specifically authorized by law, and then only with the consent and approval of the Secretary of the Interior. Tribal lands shall not be allotted to individual Indians, but may be leased to members of the community, or otherwise used by the community.

Wording of proposed amendment:

Sec. 2. Tribal lands. - The unallotted lands of the Swinomish Reservation, and all lands which may hereafter be acquired by the community or by the United States in trust for the community, shall be held as tribal lands, and no part of such land shall be mortgaged or sold, unless specifically authorized by law, and then only with any consent and approval of the Secretary of the Interior as may be required by applicable federal law. Tribal lands shall not be allotted to individual Indians, but may be leased to members of the community, or otherwise used by the community.

AMENDMENT
ARTICLE VIII, SEC. 3 – LANDS – LEASING OF COMMUNITY LANDS

Present wording:

Sec. 3. *Leasing of community lands.* - Community lands may be leased by the senate, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

Wording of proposed amendment:

Sec. 3. *Leasing of community lands.* – To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, Community lands may be leased by the senate.

AMENDMENT
ARTICLE VIII, SEC. 6 – LANDS –ACQUISITION OF LAND BY COMMUNITY

Present wording:

SEC. 6. *Acquisition of land by Community.* - The community may acquire land, or interests in land, by purchase or otherwise, provided such acquisitions are in accordance with law.

Wording of proposed amendment:

SEC. 6. *Acquisition of land by Community.* - The community may acquire land, or interests in land, by purchase or otherwise, Provided such acquisitions are in accordance with applicable federal law.

AMENDMENT U

Present wording:
None.

Wording of proposed amendment:

ARTICLE IX- THE TRIBAL COURT SYSTEM

Section 1. Establishment. The judicial power of the Tribe shall be vested in the Tribal Court System. The Tribal Court System shall include a Tribal Court and such other lower courts of special jurisdiction, including forums for traditional dispute resolution, as the Senate may establish by ordinance. There shall also be a Court of Appeals which shall be the court of last resort for all cases filed within the Tribal Court System.

Section 2. Jurisdiction. The judicial power of the courts shall extend to all cases and controversies within the jurisdiction of the Tribe, in law or equity, arising under this Constitution, the laws or customs of the Tribe, or which are vested in the tribal courts by federal law or by virtue of the Tribe's inherent sovereignty. Any case or controversy arising within the jurisdiction of the Tribe shall be filed in the Tribal Court or other appropriate forum established by the Senate before it is filed in any other court. This grant of jurisdiction shall not be construed to be a waiver or limitation of the Tribe's sovereign immunity.

Section 3. Appointment of Judges. The Senate shall appoint judges who shall serve for a term of four (4) years unless sooner removed for cause as provided by this Constitution or by resignation, but shall be eligible for reappointment. There shall be one Chief Judge for the Tribal Court and such Associates Judges and Judges pro tempore as may be appointed by the Senate. The Court of Appeals shall consist of a panel of three (3) judges randomly selected. No judge shall preside over a matter in the Court of Appeals if he or she presided over the same matter in the Tribal Court.

Section 4. Qualifications of Judges. The qualifications for judges shall be established by ordinance: Provided, that no additional requirements may be added during the tenure of a judge already in office, unless the additions or changes exempt the present judges during their term.

Section 5. Compensation. Judges shall receive for their services reasonable compensation that shall not be diminished during their term of office, except during any period of suspension or discipline as may be ordered by the Senate pursuant to Section 6 of this Article.

Section 6. Removal and Discipline of Judges.

(a) A judge shall be removed by the Senate for a final conviction in Swinomish Tribal Court of a felony as defined by ordinance, or for a conviction of any equivalent offense in a federal, state or tribal court while serving as judge, immediately effective upon issuance of the judgment of conviction.

(b) By a vote of at least seven (7) of its members, the Senate may suspend a judge charged with any criminal offense under federal, state, or tribal law pending the outcome of the trial and any appeals, and an interim judge may be appointed for the period of the suspension.

(c) By a vote of at least seven (7) of its members, a judge may be disciplined or removed by the Senate for:

(1) Any act or omission which would have resulted in ineligibility for appointment;

(2) Being under the influence of intoxicants or drugs while performing official duties;

(3) Converting tribal property or monies for personal use;

(4) Conviction in Swinomish Tribal Court of any misdemeanor as defined by ordinance or any equivalent conviction in federal, state, or tribal court while serving as judge;

(5) Desertion of office; or

(6) Violation of any applicable Judicial Code of Conduct.

(d) A judge shall be given full and fair opportunity to reply to any and all charges for which he or she may be disciplined or removed. A judge who is disciplined or removed may appeal directly to the Court of Appeals.

Section 7. Judicial power. The Tribal Court System shall have the power to interpret and apply the Constitution and laws of the Tribe, and applicable federal or state law.

AMENDMENT V

BY-LAWS -ARTICLE I–SEC. 3 -

Present wording:

Sec. 3. Secretary of the senate. - The secretary of the senate shall conduct all community correspondence and shall keep an accurate record of all matters transacted at senate meetings. It shall be his duty to submit promptly to the superintendent of the jurisdiction and Commissioner of Indian Affairs copies of all minutes of regular and special meetings of the senate. He shall be privileged to vote in the Senate only in the event that he is an elected member thereof.

Wording of proposed amendment:

Sec. 3. Secretary of the senate. - The secretary of the senate shall conduct all community correspondence and shall keep an accurate record of all matters transacted at senate meetings. He shall be privileged to vote in the Senate only in the event that he is an elected member thereof.

AMENDMENT W

BY-LAWS -ARTICLE I–SEC. 4 -

Present wording:

Sec. 4. Treasurer of the senate. - The treasurer of the senate shall accept, receive, receipt for, preserve, and safeguard all funds in the custody of the senate, whether same be community funds or special funds for which the senate is acting as trustee or custodian. He shall deposit all such funds in such banks or elsewhere as directed by the senate, and shall make and preserve a faithful record of such funds, and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody, such report being made in writing to the senate at regular meetings and at such other times as requested by the senate.

He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the senate, except when properly authorized so to do by resolution duly passed by it. The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the senate or the Commissioner of Indian Affairs, and at such other times as the senate may direct.

The treasurer shall be required to give a bond satisfactory to the senate and to the Commissioner of Indian Affairs.

The treasurer shall be present at all special or regular meetings of the senate, but shall be privileged to vote only in the event that he is an elected member of the senate.

Wording of proposed amendment:

Sec. 4. Treasurer of the senate. - The treasurer of the senate shall accept, receive, receipt for, preserve, and safeguard all funds in the custody of the senate, whether same be community funds or special funds for which the senate is acting as trustee or custodian. He shall deposit all such funds in such banks or elsewhere as directed by the senate, and shall make and preserve a faithful record of such funds, and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody, such report being made in writing to the senate at regular meetings and at such other times as requested by the senate.

He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the senate, except when properly authorized so to do by resolution duly passed by it. The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the senate or the Commissioner of Indian Affairs, and at such other times as the senate may direct.

The treasurer shall be present at all special or regular meetings of the senate, but shall be privileged to vote only in the event that he is an elected member of the senate.

AMENDMENT X

BY-LAWS -ARTICLE VII–ADOPTION

Present wording:

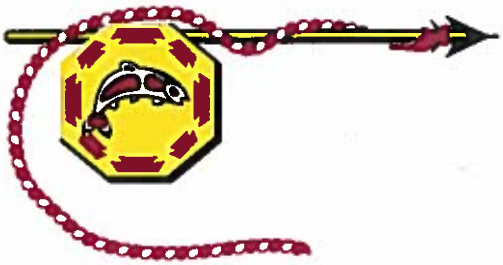
This constitution and by-laws attached hereto shall be in full force and effect whenever a majority of the adult Indians residing on the Swinomish Reservation voting at an election called by the Secretary of the Interior in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such constitution and by-laws, and the Secretary of the Interior shall have approved same, as provided in the act of June 18, 1934, as amended by the act of June 15, 1935.

Wording of proposed amendment:

This Constitution and By-laws attached hereto shall be in full force and effect whenever a majority of the adult Indians residing on the Swinomish Reservation voting at an election called by the Secretary of the Interior in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such Constitution and By-laws, and the Secretary of the Interior shall have approved same, as provided in the act of June 18, 1934, as amended by the act of June 15, 1935.

Further, any amendments to this Constitution and By-laws proposed after the date on which the Constitution and By-Laws were adopted shall be in full force and effect whenever a majority of the qualified voters of the Swinomish Indian Tribal Community voting at an election called by the Secretary of the Interior for that purpose, in which at least thirty (30%) percent of the eligible voters shall vote, shall have ratified such amendments.

Attachment 2



Office of Tribal Attorney
Swinomish Indian Tribal Community
11404 Moorage Way
LaConner, WA 98257

Memo -- Confidential

To: Greg Norton and Christina Parker

From: Alix Foster

Date: June 9, 2016

Re: Proposed Changes to Swinomish Constitution Since Review by Solicitors in 2015-- Revised.

CC: Superintendent Marcella Teters and Connie Johnston, Puget Sound Agency

In the Fall of 2015, Assistant Solicitors Christina Parker and Mary Anne Kenworthy reviewed the proposed changes to our Constitution and By-Laws. Since then, the Tribe has made changes to some of the language previously approved by them. In hopes of assisting you in your review, I have identified all of these new changes below. Many of these changes are ministerial, but a few are substantive. If the change is not identified below, it means that the language has previously been approved. I have attached a copy of the Constitution without red-lined, strikeouts. Please do not hesitate to contact me at afoster@swinomish.nsn.us or 360-708-0092 if you have any questions, concerns, or wish to understand better why the change was made.

Article I

Art. I, Sec. 2: added "applicable" before federal law and "and the sovereign powers of the Tribe" in the phrase beginning with "to the fullest extent".

Sec. 3: same

Sec. 3(b): mimicked the language in Art. VI, Sec. 1(k)(b) for consistency.

Article II

Art. II, Sec. 1 (a): changed "Indians of the Swinomish Reservation" to Swinomish Indian Tribal Community

Article VI

Sec. 1(a): shortened language

Sec. 1(i): substituted "persons subject to the Tribe's jurisdiction" for "persons legally entitled to reside therein."
Sec. 1(k): added language that had been inadvertently included in our Constitution for 30 years, but had never been voted on; and in the process tweaked the language slightly.
Sec. 1(n) struck "other than allotted lands"; substituted "Swinomish Indian Tribal Community" for "Swinomish Reservation".

Sec. 2(b): added "upon adoption by the Senate" at end of section.
Sec. 5: added "to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe" in place of "subject to applicable law" which had been the Solicitor's suggestion last year; also changed reservation to Tribal Community.

Article VII

Sec. 3: changed to "persons subject to the Tribe's jurisdiction" from members of the community".
Sec. 4: changed to "person subject to the Tribe's jurisdiction" from "members of the community" and prisoner to "person".

Article VIII

Sec. 1: changed to "any approval of the Secretary of the Interior as may be required by applicable federal law" from "the approval of the Secretary of the Interior." Deleted "or in exchange for an assignment concerning the same land or other land, as hereinafter provided."
Sec. 2: changed to "any consent and approval of the Secretary of the Interior as may be required by applicable federal law" from "the consent and approval of the Secretary of the Interior."
Sec. 3: added "to the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe"
Sec. 6: added "applicable federal" before "law."

NEW ARTICLE

ARTICLE IX- THE TRIBAL COURT SYSTEM

Section 1. Establishment. The judicial power of the Tribe shall be vested in the Tribal Court System. The Tribal Court System shall include a Tribal Court and such other lower courts of special jurisdiction, including forums for traditional dispute resolution, as the Senate may establish by ordinance. There shall also be a Court of Appeals which shall be the court of last resort for all cases filed within the Tribal Court System.

Section 2. Jurisdiction. The judicial power of the courts shall extend to all cases and controversies

within the jurisdiction of the Tribe, in law or equity, arising under this constitution, the laws or customs of the Tribe, or which are vested in the tribal courts by federal law or by virtue of the Tribe's inherent sovereignty. Any case or controversy arising within the jurisdiction of the Tribe shall be filed in the Tribal Court or other appropriate forum established by the Senate before it is filed in any other court. This grant of jurisdiction shall not be construed to be a waiver or limitation of the Tribe's sovereign immunity.

Section 3. Appointment of Judges. The Senate shall appoint judges who shall serve for a term of four (4) years unless sooner removed for cause as provided by this Constitution or by resignation, but shall be eligible for reappointment. There shall be one Chief Judge for the Tribal Court and such Associates Judges and Judges pro tempore as may be appointed by the Senate. The Court of Appeals shall consist of a panel of three (3) judges randomly selected. No judge shall preside over a matter in the Court of Appeals if he or she presided over the same matter in the Tribal Court.

Section 4. Qualifications of Judges. The qualifications for judges shall be established by ordinance: Provided, that no additional requirements may be added during the tenure of a judge already in office, unless the additions or changes exempt the present judges during their term.

Section 5. Compensation. Judges shall receive for their services reasonable compensation that shall not be diminished during their term of office, except during any period of suspension or discipline as may be ordered by the Senate pursuant to Section 6 of this Article.

Section 6. Removal and Discipline of Judges.

(a) A judge shall be removed by the Senate for a conviction in Swinomish Tribal Court of a felony as defined by ordinance or for any equivalent conviction in a federal, state, or tribal court while serving as judge, immediately effective upon issuance of the judgment of conviction.

(b) By a vote of at least seven (7) of its members, the Senate may suspend a judge charged with any criminal offense under federal, state, or tribal law pending the outcome of the trial and any appeals, and an interim judge may be appointed for the period of the suspension.

(c) By a vote of at least seven (7) of its members, a judge may be disciplined or removed by the Senate for:

(1) Any act or omission which would have resulted in ineligibility for appointment;

(2) Being under the influence of intoxicants or drugs while performing official duties;

(3) Converting tribal property or monies for personal use;

(4) Conviction in Swinomish Tribal Court of any misdemeanor as defined by ordinance or by any equivalent conviction in a federal, state, or tribal court while serving as judge;

(5) Desertion of office; or

(6) Violation of any applicable Judicial Code of Conduct.

(d) A judge shall be given full and fair opportunity to reply to any and all charges for which he or she may be disciplined or removed. A judge who is disciplined or removed may appeal directly to the Court of Appeals.

Section 7. Judicial power. The Tribal Court System shall have the power to interpret and apply the Constitution and laws of the Tribe, and applicable federal or state law.

Article X

The only change here is the numbering of the title. This used to be the former Article IX (Amendments).

By-Laws

Article VII: changed the language to reflect that elections will still be called by the Secretary of the Interior; also to read more clearly.

Attachment 3

SWINOMISH RESERVATION (PERRYS ISLAND).

EXECUTIVE MANSION, *September 9, 1873.*

Agreeable to the within request of the Acting Secretary of the Interior, it is hereby ordered that the northern boundary of the Swinomish Reservation, in the Territory of Washington, shall be as follows, to wit: Beginning at low-water mark on the shore of Sin-ilk Bay at a point where the same is intersected by the north and south line bounding the east side of the surveyed fraction of 9.30 acres, or lot No. 1, in the northwest corner of section 10 in township 34 north, range 2 east; thence north on said line to a point where the same intersects the section line between sections 3 and 10 in said township and range; thence east on said section line to the southeast corner of said section 3; thence north on east line of said section 3 to a point where the same intersects low-water mark on the western shore of Padilla Bay.

U. S. GRANT.

TULALIP OR SNOHOMISH RESERVATION.

EXECUTIVE MANSION, *December 23, 1873.*

It is hereby ordered that the boundaries of the Snohomish or Tulalip Indian Reservation, in the Territory of Washington, provided for in the third article of the treaty with the Dwamish and other allied tribes of Indians, concluded at Point Elliott, January 22, 1855 (Stats. at Large, vol. 12, p. 928), shall be as follows, to wit: Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 30 north, range 5 east, intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, 4 and 5, to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning.

U. S. GRANT.

YAKAMA RESERVATION (FISHERY).

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, November 1, 1892.

SIR: On the 19th of July last Jay Lynch, agent for the Yakama Indians, called attention to the tenth article of the treaty of June 9, 1855 (12 Stats., p. 954), which provides:

"That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township or 6 miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fishery,' which said res-

disability determination process (see § 416.1019) or the compassionate allowance process (see § 416.1002), and the initial or reconsidered determination is fully favorable to you. This paragraph will no longer be effective on November 11, 2016 unless we terminate it earlier or extend it beyond that date by publication of a final rule in the **Federal Register**; or

* * * * *

[FR Doc. 2015–26488 Filed 10–16–15; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 81 and 82

[156A2100DD/AAKC001030/ A0A501010.999900 253G]

RIN 1076–AE93

Secretarial Election Procedures

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs is amending its regulations governing Secretarial elections and procedures for tribal members to petition for Secretarial elections. This rule reflects changes in the law and the requirement that regulations be written in plain language. The rule also clarifies how tribes may remove Secretarial election requirements from their governing documents.

DATES: This rule is effective November 18, 2015.

FOR FURTHER INFORMATION CONTACT: Laurel Iron Cloud, Chief, Division of Tribal Government Services, Central Office, Bureau of Indian Affairs at telephone (202) 513–7641. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Bureau of Indian Affairs (BIA) is amending 25 CFR parts 81 (Tribal Reorganization under a Federal Statute) and 82 (Petitioning Procedures for Tribes Reorganized under Federal Statute and Other Organized Tribes), combining them into one Code of Federal Regulations part at 25 CFR part 81 (Secretarial Elections). The Secretarial elections regulations were originally adopted in 1964, and the Petitioning Procedures regulations were originally adopted in 1967. *See* 29 FR 14359 (October 17, 1964); 32 FR 11779 (August 16, 1967). The Department has not updated either of these regulations since 1981. *See* 46 FR 1668 (January 7, 1981).

A Secretarial election is a Federal election conducted by the Secretary of the Interior (Secretary) under a Federal statute or tribal governing document under 25 CFR part 81. *See Cohen's Handbook of Federal Indian Law* section 4.06[2][a]–[b], at 286–297 (Nell Jessup Newton ed., 2012). *See also Cheyenne River Sioux Tribe* v. *Andrus*, 566 F. 2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). This final rule:

- Responds to the 1988 amendments made to section 16 of the Indian Reorganization Act (IRA) (June 18, 1934, 48 Stat. 984) (25 U.S.C. 476), as amended, which established time frames within which the Secretary must call and conduct Secretarial elections;
- Provides that all elections will be handled by mailout ballot unless polling places are expressly required by the amendment or adoption article of the tribe's governing document;
- Responds to the amendments made to Section 17 of the IRA by the Act of May 24, 1990 (104 Stat. 207) (25 U.S.C. 477) under which additional tribes may petition for charters of incorporation and removes the requirement of an election to ratify the approval of new charters issued after May 24, 1990, unless required by tribal law; and
- Reflects the 1994 addition of two subsections to section 16 of the IRA by the Technical Corrections Act of 1994 (108 Stat. 707) (25 U.S.C. 476(f) & (g)) that prohibit the Federal government from making a regulation or administrative decision "that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes."

When Congress enacted the Oklahoma Indian Welfare Act (OIWA) in 1936, the language it used to guarantee the right of tribes to organize and adopt constitutions and bylaws was different from that used in the IRA. The OIWA language requires the Secretary to approve the constitution before it is submitted to the tribal membership for a vote to ratify it. These regulations reflect the difference in language between the IRA and the OIWA.

For many tribes, the requirement for Secretarial elections or Secretarial approval is anachronistic and inconsistent with modern policies favoring tribal self-governance. The rule includes language clarifying that a tribe reorganized under the IRA may amend its governing document to remove the requirement for Secretarial approval of future amendments. The Department encourages amendments to governing documents to remove vestiges of a more paternalistic approach toward tribes. Once the requirement for Secretarial approval is removed through a Secretarial election, Secretarial approval of future amendments is not required, meaning there will be no future Secretarial elections conducted for the tribe, and future elections will be purely tribal elections, governed and run by the tribe rather than BIA. Additionally, without a requirement for Secretarial approval, the constitution will no longer be governed by the other election-related requirements of the IRA, such as the minimum number of tribal voters to make an election effective. Such matters will be governed by tribal policy decisions rather than Federal ones.

Tribes with Secretarial election requirements are encouraged to remove them in furtherance of tribal sovereignty and self-determination.

The rule also clarifies that the Secretary will accept petitions for Secretarial elections only from federally recognized tribes included on the list of recognized tribes published by the Secretary pursuant to section 479a–1.

It is the policy of the Federal government to support tribal self-governance as a substitute for Federal governance to the maximum extent permitted under Federal law. This rule seeks to effectuate that policy.

II. Summary of Comments on the Proposed Rule and Responses to Comments

BIA published a proposed rule on Secretarial elections procedures on October 9, 2014. *See* 79 FR 61021. The original comment deadline was then extended to January 16, 2015. *See* 79 FR 75103. We received several comments during the public comment period and at tribal consultation and listening sessions. Several commenters stated their support for the proposed revisions to simplify and clarify the process, as well as provisions that recognize tribal self-determination and self-governance. A few commenters opposed the revisions, stating that the proposal exceeds statutory authority, establishes quasi government-to-government relationships with individuals, and includes inconsistencies. The following summarizes specific comments received and BIA's responses to those comments.

A. General

1. Application to Federally Recognized Tribes Only

Comment: One tribal commenter opposed the proposal to limit the availability of Secretarial elections to federally recognized tribes only. This commenter stated that the IRA, at 25 U.S.C. 479, allows for organization of residents of a reservation as a tribe, and that, as such, BIA is bound to allow residents to organize as a tribe under these regulations. The tribe points to several instances throughout the rule that fail to account for residents of a reservation organizing for the first time (*e.g.*, § 81.4 does not include in the definition of "petition" organization for the first time; "spokesman for petitioners" does not include an eligible voter selected by reservation residents seeking to organize for the first time; § 81.10(a)(2) allows any member to vote regardless of residence; § 81.52 limiting authority to petition to those instances where the tribe's governing document or charter of incorporation allows petitioning; § 81.57(b) requires a certain percentage of tribal members but does not include residence on reservation requirement).

Response: The final rule retains the draft rule's limitation of the availability of Secretarial elections to federally recognized tribes. The commenter is correct that, as a matter of law, a group of half-bloods on a reservation could seek to organize through a Secretarial election, even though the group is not listed as a federally recognized tribe. *See Pit River Home & Agric. Coop. Ass'n* v. *U.S.*, 30 F.3d 1088, 1096 (9th Cir. 1994). However, federal reservations currently in existence are under the jurisdiction of a federally recognized tribe. In practice, this means that it is no longer necessary to allow individual Indians residing on a federal reservation the option of requesting a Secretarial election. The Department has therefore determined that it is appropriate to limit the definition of "tribe" in the Secretarial elections regulation to listed federally recognized Indian tribes.

2. General

Comment: A few commenters stated that, where a tribe's election code is sufficient, the Secretarial elections should follow the tribe's procedures rather than the procedures in these regulations. The commenters stated that having different requirements causes unnecessary complications and that using the tribe's procedures would minimize the potential for confusion and show greater respect for tribal sovereignty.

Response: The Department agrees with the spirit in which this comment was made. The current rule included a provision, at § 81.5(d), that the election would be conducted as prescribed by the regulations unless the amendment article for the tribe's constitution and bylaws or charter provided otherwise, in which case the provisions of those documents would rule where applicable. The proposed rule omitted this provision without including a basis for its omission. The final rule reinserts this provision, with the addition that the tribal procedures must not violate Federal law. *See* § 81.2(b). This provision allows for the use of tribal election procedures. If a tribe wishes to use tribal voting procedures for a Secretarial election, it may prescribe voting procedures in its amendment article. The exception is that a tribe may not apply voting qualifications that conflict with Federal voting qualifications, such as the requirement that voters be at least 18 years of age. Federal voting qualifications continue to apply, regardless of tribal voting qualifications, because a Secretarial election is a Federal election in which Federal voting standards apply (see discussion below).

If a tribe wishes to avoid entirely the application of all Federal voting requirements, including Federal voting qualifications, the tribe may hold a Secretarial election to remove the requirement for Secretarial approval, such that all future elections would be tribal elections conducted in accordance with tribal voting procedures and substantive requirements.

Comment: A tribal commenter questioned why, in proposed § 81.2(f), a tribe would have to undergo a Secretarial election to amend a Federal charter of incorporation if the charter was ratified before the 1990 IRA amendments.

Response: Prior to 1990, the IRA required a Secretarial election for the issuance and amendment of a Federal charter of incorporation. Therefore, the amendment article of the corporate charter would have language requiring a Secretarial election. The 1990 amendments to the IRA removed this election requirement as a matter of Federal law, allowing the tribal governing body, rather than "a majority vote of the adult Indians living on the reservation," to ratify the charter. The regulations had not been updated since 1990, so they continued to include the requirement for a Secretarial election for the issuance of a Federal charter of incorporation, and the proposed rule would have carried forward that requirement. In response to the comment, the final rule removes this requirement, so that a Secretarial election is required to amend a charter only if the charter itself states that a Secretarial election is required to amend it. *See* final § 81.2(a)(6).

3. Removal of Requirement for Secretarial Election

Comment: Several tribal commenters stated their support for the provision at proposed § 81.2(h), which states that a tribe may amend its governing documents to remove the requirement for Secretarial approval. One tribe stated that this provision promotes tribal sovereignty and self-governance, allowing the tribe to have the ultimate say in whether a Secretarial election should be required. One tribe asked about the consequences to a tribe of removing the requirement for Secretarial approval of future governing document amendments.

Response: The final rule retains this proposed provision, as each tribe has the discretion to require a Secretarial

election or not in its governing documents. *See* final § 81.2(a)(8). As explained by a Federal representative at the tribal consultation sessions, removing the requirement for Secretarial approval of future amendments means that Secretarial elections will no longer be required for additional amendments to the tribe's governing document and the governing document will no longer be considered to have been adopted pursuant to a Federal statute. Of course, removing the Secretary from the amendments section does not diminish the government-to-government relationship or Federal trust responsibilities owed to the tribe. The Department encourages tribes to take such action in furtherance of tribal self-governance.

Comment: One tribal commenter asked whether a tribe that has reorganized under the IRA and wishes to remove the requirement for a Secretarial election must hold a Secretarial election to remove that requirement.

Response: The tribe must hold a Secretarial election to remove the requirement for a Secretarial election from its governing document. Final § 81.2(a)(8) addresses this issue.

Comment: One tribal commenter requested clarification in § 81.2 that removing the requirement for Secretarial approval of amendments does not mean removing the requirement for Secretarial elections.

Response: The IRA makes it clear that Secretarial approval of a tribe's organic documents is part of the Secretarial election process, not a separate action. *See, e.g.*, 25 U.S.C 476(d)(1).

B. Definitions

Comment: Two tribal commenters opposed including Solicitor opinions in the definition of "applicable law." One stated it is unclear whether "opinion of the Solicitor" includes opinions written by those in regional Solicitor offices or only M-opinions. The other stated that such opinions may provide guidance, but do not carry the force of law.

Response: The proposed rule included Solicitor opinions and Interior Board of Indian Appeals (IBIA) decisions to alert the public that the Department intends to abide by its own prior interpretations of statutes, regulations, and other primary law. In response to the concern expressed by the commenters, the final rule removes these items from the definition of "applicable law." However, the Department is bound by opinions of the Solicitor and IBIA decisions to the extent such interpretations resolve any ambiguity or vague provision of the law.

Comment: One commenter stated confusion over defining "cast" as "received" because the Secretarial Election Board would not know a ballot was spoiled before cast.

Response: No change to the proposed definition of "cast" is necessary in response to this comment because the voter must recognize a ballot is spoiled before cast and identify it as such to the Board in order to obtain a new ballot. If the voter does not recognize the ballot is spoiled, then the vote is considered cast when the Board receives it.

Comment: One commenter stated that the "Eligible Voters List" and "tribal request" should not include individuals' birthdates for privacy reasons.

Response: The Eligible Voters List, and the list provided as part of the tribal request, must include individuals' birthdates to allow the Secretarial Election Board to ascertain whether each individual is over 18 years of age and to distinguish between individuals with the same name. The Secretarial Election Board does not make these lists public; it posts only the Registered Voters List, which does not include birthdates. *See* final § 81.30.

Comment: A tribal commenter asked whether "local Bureau office" means the agency or regional office or both, and noted that "local Bureau Official" includes the Superintendent, Field Representative, or other official with delegated responsibility, stating that there is a potential for confusion.

Response: In most of Indian country, the BIA office serving as the primary point of contact between tribes and the Bureau is an Agency headed by a Superintendent. In some places, however, the primary point of contact may be a BIA Field Office; in other places, the Regional Office may serve as the primary point of contact. The terms "local Bureau office" and "local Bureau official" are used because these terms embrace all three possibilities. For this reason, no changes to these terms have been made in response to the comment.

Comment: A commenter stated that the proposed definition of "member" would not provide for tribes without written criteria for membership or for tribes that do not have formal enrollment.

Response: The final rule revises the definition of "member" to account for tribes without written criteria, by deleting the word "written." The final rule also accounts for tribes without formal enrollment by deleting "duly enrolled" and instead providing that the member must be someone who meets the criteria for membership in the tribe and, if required by the tribe, is formally enrolled. This definition signifies that there is a rebuttable presumption that the tribe's identification of its members is accurate in the list it provides of all members who will be 18 years old or older within 120 days of the tribal request. This definition also signifies that the list must, in fact, be accurate, by including all persons who meet the tribe's criteria for membership and who will be 18 years old or older within 120 days of the request (and, if the tribe's governing document's amendment article imposes additional requirements for petitioning, also meets those requirements).

Comment: A commenter stated that the definitions of "petition" and "spokesperson for the petitioners" should be revised to include circumstances in which a tribe may be adopting or ratifying a governing document for the first time.

Response: The final rule makes no change to the proposed definition of "petition" because it would already cover circumstances in which a federally recognized tribe is adopting or ratifying a governing document for the first time. The final rule makes a change to the definition of "spokesperson for the petitioners" to replace "eligible voter" to "member" in response to this comment, because the tribe would not yet have a list of eligible voters if adopting or ratifying a governing document for the first time.

Comment: A tribal commenter stated that using the same definition for "absentee ballot" and "mailout ballot" is confusing and makes it difficult to discern the difference in procedures in proposed § 81.22(f) and (g).

Response: A mailout ballot and an absentee ballot are the same types of ballots; they are identified with different nomenclature depending on whether the entire election is conducted by mail ("mailout ballot") or whether polling sites are used but individual voters submit their ballots by mail on a case-by-case basis because they are unable to vote in person at the polls ("absentee ballot"). In response to this comment, the final rule clarifies the differences between procedures for absentee ballots and mailout ballots by making the differences explicit in final §§ 81.4 and 81.22(f) and (g).

Comment: A few commenters asked why the term "Indian" is not defined in the rule. One noted that such a definition is necessary to allow groups of Indians residing on a reservation to organize.

Response: The rule does not need to define the term "Indian" because the rule does not use this term and instead

relies on whether an individual meets the criteria for membership in the tribe.

C. Provisions Applicable to All Secretarial Elections

1. Tribal Request

Comment: One commenter requested clarification on what BIA considers to be the official date the tribal request is submitted, starting the clock on the statutory deadline for holding the election.

Response: The final regulations consider the clock to start when the Bureau receives a complete tribal request, as defined in 83.4 to include the duly adopted tribal resolution or other appropriate tribal document, the exact document or amended language to be voted on, and the list of all tribal members who will be 18 or older within 120 days of the request with last known addresses, dates of birth, and voting district, if any.

2. Informal Review and Official Request

Comment: A tribal commenter stated that proposed § 81.5 should include an instruction that the local Bureau official will also review and comment on the procedures set out in the federally approved governing document.

Response: The final rule addresses this comment by clarifying in § 81.5 that Bureau officials will offer technical assistance to the tribe during an informal review.

Comment: A few commenters opposed the proposed approach of requiring the tribe to seek technical assistance from the Bureau prior to submitting a request for Secretarial election, noting that the statute provides that technical assistance should occur following submission of the request. One commenter stated that imposing a pre-submission requirement that would bar any formal requests unless and until BIA comments and a tribe or petitioners respond is unlawful. A few other commenters stated that the proposed regulations call for a quick time period in which the election may be held after the request, leaving a short turnaround time for notice, voter education and registration. One of these commenters stated that the timeframe is "unrealistic" and noted that the Board becomes "overwhelmed with workload" once the process begins.

Response: The statute requires the Secretary to call and hold an election within a certain period of time following the receipt of a tribal request for an election. *See* 25 U.S.C. 476(c) (requiring the Secretary to call and hold an election within 180 days to ratify a proposed document or revoke an existing document or 90 days to ratify an amendment to an existing document). The statute also requires that, during this time period, the Secretary provide technical advice and assistance and review the final draft of the document to determine if any provision is contrary to applicable laws. *See* 25 U.S.C. 476(c)(2).

Practically, these timeframes pose a challenge for even the most skilled and experienced of Bureau and Department personnel because there are many steps required to "call and hold" an election and require considerable responsive cooperation from tribal officials (*e.g.*, allow the tribe at least 10 days to appoint members to the Secretarial Election Board, prepare and send the Secretarial Election Notice Packet sufficiently in advance of the election date, allow time for the return of registration forms, prepare the Registered Voters List, allow for challenges to the Registered Voters List, prepare and send official ballots to voters). As some commenters pointed out, taking all these steps leaves little time to provide technical advice and assistance or review the final draft to determine if any provision is contrary to applicable laws. Further, in nearly all cases, Bureau expertise is required to perfect a request to include all necessary information and avoid inconsistencies. For these reasons, while it is not required by law or regulation, the Department strongly recommends that tribes seek an informal review from the Department to take advantage of the Bureau's and Department's accumulated experience before submitting an official request for election. This informal review will provide the Department with the time to ensure that all the necessary documents are internally consistent and as compliant as possible with applicable laws and avoid complications resulting from conflicting or noncompliant documents. Informal review reflects best practices and good governance. It helps to ensure competent and thoughtful handling of this most important of government functions and seeks to avoid inadvertent disenfranchisement of voters. While the informal review is entirely optional, and a tribe may choose instead to immediately submit a request for Secretarial election, the informal review will ultimately be more efficient by helping to ensure that the election runs as smoothly as possible and that the results are meaningful. The final rule clarifies at §§ 81.5 and 81.6 that this informal review is prior to, and separate from, the process that follows the submission of a request for election that triggers the statutory timeframes.

Comment: A commenter also noted that requiring two submissions (a pre-submission review and then the formal request) will require two tribal resolutions.

Response: No tribal resolution is required to request the informal review. The Bureau has the discretion to ask for confirmation in some form of the authority of the person requesting, however, that the request is on behalf of the tribe.

Comment: A commenter also noted that BIA is under no deadline to provide comments in the initial review.

Response: While the commenter is correct that the rule does not provide a deadline for the Bureau to assist the tribe as part of the informal review, it is in the Bureau's best interest to respond as expeditiously as possible because, at any time, the tribe could submit a formal request triggering the statutory timeframe.

Comment: A tribal commenter stated that the rule should allow the tribe to end the consultation process and require BIA to move forward in holding the election, in lieu of responding to BIA's issues.

Response: The final rule allows a tribe to end the informal review and require the Bureau to move forward in holding an election at any time by submitting a tribal request for election. For IRA elections, once a formal request for election is submitted, the Bureau will provide technical assistance, culminating in a letter that either authorizes the election with no suggestions for changes, or authorizes the election with suggestions for changes and advises the tribe of any provisions that are contrary to applicable laws. The tribe may choose to accept the suggested changes, or may choose to reject the suggested changes; in either case, the election will proceed. Note, however, that if the tribe chooses to reject the suggested changes, it risks having the Bureau disapprove of the constitution or amendment if it contains provisions that are contrary to applicable laws. The final rule clarifies this risk at § 81.7(b). For OIWA elections, once a formal request for election is submitted, the Bureau will provide technical assistance, culminating in a letter that either authorizes the election, or identifies a provision of the proposed document that is contrary to law to be addressed before the election may be authorized. *See* final § 81.46.

Comment: A commenter stated that the technical assistance provisions in proposed §§ 81.6 and 81.47 contain

similar provisions but are not worded the same.

Response: These sections in the final rule are combined in Subpart C, General Provisions, to ensure that they match. Please note that there is a substantive difference in how the Bureau handles the request depending on whether the election occurs under the IRA or OIWA because of differences in the language of the statutes. Documents adopted pursuant to the OIWA become effective upon ratification by the membership; therefore, Departmental review and approval must necessarily be completed before the election is held. Stated differently, elections under the OIWA require a Secretarial determination that the proposed document or amendment is not contrary to applicable law before the Secretary may authorize the election.

Comment: A tribal commenter stated concern that the authorizing official could reverse positions after the election results are in, by finding the proposal is contrary to Federal law even though the official did not find it was contrary to Federal law during the initial review. This commenter suggested that the determination should be made only once—when the proposal is first presented.

Response: The commenter is correct that the determination as to whether the proposal is contrary to applicable laws is made twice: when the request for election is first submitted, and then after the election. The statute requires the Department to make the determination at these points. See 25 U.S.C. 476(c)(2)(B) (when the Department reviews the tribal request) and 476(d))(when the Department determines whether to approve of the document). The Department's first interpretation of whether any provision is contrary to applicable laws is binding on the Department's later interpretation, to ensure consistency; however, it is conceivable that, between the time the Department makes its first determination to the end of the election, a change in the applicable law could occur. The Department must review the results of the election in light of whether any provision is contrary to applicable laws at the time approval is given.

Comment: A few commenters stated their support for the provision at proposed § 81.8 that the Department will defer to the tribe's interpretation of its own documents, but stated their opposition to the second sentence of proposed § 81.8 that allows the Secretary to interpret tribal law when necessary "to carry out the government-to-government relationship with the tribe." These commenters disagreed with the implication that the Secretarial interpretation of tribal law would trump the tribe's interpretation.

Response: The final rule retains the proposed language at final § 81.9, reserving the Secretary's authority to interpret tribal law when necessary. *Udall* v. *Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966), *cited in United States* v. *Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986), and in *Cal. Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). The specific provision allowing the Secretary to interpret tribal law in those rare cases when it is necessary to carry out the government-to-government relationship with the tribe incorporates IBIA precedent establishing that the Bureau should refrain from interpreting tribal law unless it must do so in order to make a decision it is required to make in furtherance of its government-to-government relationship with the tribe. *William H. Richards, et al.* v. *Acting Pacific Regional Director*, 2007 I.D. LEXIS 50, *10, 45 IBIA 187 (2007); *Sandra Maroquin* v. *Anadarko Area Director*, 29 IBIA 45 (1996), citing *Parmenton Decorah*, 22 IBIA 98. Consistent with its strong policies in favor of tribal self-governance, the Bureau will not exercise this authority to interpret tribal law lightly or often, and reserves the authority for those cases where, for example, it believes a tribe diverges from the apparent mandate of its governing document without a reasonable explanation. The Secretary must balance deference to tribes with the duty to ensure the Secretarial election includes the safeguards of any other Federal election.

3. Who May Vote in a Secretarial Election

Comment: Several tribes asked questions regarding who may vote in a Secretarial election. For example, at least one tribe asked for language stating that the tribe's governing documents may establish eligibility for voting. Another tribe asked what happens if the tribe's governing document establishes an age different from 18 years to define eligible voters.

Response: The 26th Amendment to the Federal constitution established the minimum voting age for Federal elections to be 18. Secretarial elections are Federal elections, and, as such, anyone who is 18 years of age or older and otherwise qualified is eligible to vote, even if the tribal governing document requires voters to be 21 to be eligible to vote in tribal elections. This provision is at final § 81.11. Any other eligibility qualifications that the tribal governing document imposes for voting in Secretarial elections apply.

Comment: A tribal commenter asked under what circumstances voting is limited to only the class of citizens who voted on the original tribal charter or governing document.

Response: Voting is limited to the class of citizens who voted on the original tribal charter or governing document only if the tribe's governing documents establish that limitation.

Comment: A commenter stated that proposed § 81.9 appears to allow any tribal member to vote on an amendment to a governing document, even if the governing document limits who may vote to those members who reside on the reservation.

Response: The proposed § 81.9(b)(2) and final § 81.10(b)(2) state that the member must meet the qualifications in the tribe's governing documents or charter in addition to being over the age of 18. Any restrictions in the tribe's governing document or charter on who can vote continue to apply (unless it is an age restriction, because Federal law establishes a voting age of 18). For example, if the governing document's amendments article limits the vote to those members who reside on the reservation, then only those members who reside on the reservation (and are age 18 or older) may vote.

4. Costs of Holding a Secretarial Election

Comment: One commenter requested that the rule clarify that once a tribe removes the Secretarial election requirement, the tribe must pay for all subsequent elections.

Response: The final rule clarifies in § 81.16 that the tribe is responsible for paying the costs of tribal elections.

Comment: A commenter asked whether the Bureau will pay for interpreters, audio-visual aids, or reasonable accommodations for those with impairments required by proposed § 81.12. Another commenter asked for additional detail on what covered costs would include.

Response: The final rule states that the Bureau will pay for costs of holding a Secretarial election. *See* final § 81.16. Examples of costs the Bureau will pay for are the costs of printing and mailing ballots and, if polling places are required, use of voting machines. In many cases, the Secretarial Election Board is able to arrange for facilities and services such as interpreters and audio-visual aids at no cost. In those cases where such costs are necessary, the Bureau will pay for them.

Comment: A few commenters stated that compacting and contracting tribes

should be responsible for paying for Secretarial elections only if they received compact or contract funds specifically for the purpose of conducting a Secretarial election.

Response: The final rule clarifies that a tribe will be responsible for the costs of a Secretarial election only if it has contracted or compacted for that function.

Comment: One commenter suggested the rule should require the Bureau to pay for an election requested by petition where the tribe contracting or compacting for that function refuses.

Response: If a contracting or compacting tribe that has contracted for this function refuses to pay the costs of a Secretarial election for any reason, the tribe would be in violation of the contract or compact. If necessary to meet statutory timeframes, the Regional Director may draw Bureau funds to pay for the election and seek reimbursement from the tribe.

D. IRA (and OIWA, as Applicable) Secretarial Elections

1. Secretarial Election Board

Comment: A few commenters requested that proposed § 81.19(b) clarify that, when a tribe fails to appoint two tribal members to the Secretarial Election Board, the individuals that the Local Bureau Official appoints will be tribal members.

Response: The final rule at § 81.19(c) adds that the Local Bureau Official will appoint tribal members if they are available.

Comment: A commenter stated that the Chair of the Secretarial Election Board should be a tribal member, rather than a Bureau employee.

Response: The final rule retains the requirement for the Chair to be a Bureau employee. A Federal employee is necessary for this role because a Secretarial election is a Federal election and a Federal responsibility and, as such, it is the Bureau's responsibility to fulfill the Chair duties of ensuring the Board fulfills its responsibilities and that the proper procedures are followed. In most cases, a tribe may ultimately avoid this provision in the future by amending its governing documents to remove the requirement of a Secretarial election.

Comment: A few commenters stated that where the election is being held as a result of a petition, the spokesperson for the petitioners, rather than the tribe, should appoint the two members to the Secretarial Election Board.

Response: The final rule provides that, where the election is being held as a result of a petition, the spokesperson for the petitioners may appoint one member to the Board and the tribe may appoint one member to the Board.

Comment: A commenter requested replacing "tribe" with "tribe's governing body" in § 81.19 to clarify who specifically appoints individuals to the Board.

Response: The final rule retains the term "tribe" because who speaks for the tribe may vary by tribe.

Comment: A commenter stated that the 10-day timeline is not sufficient time for the Tribe to appoint two members to the Board, and requested increasing the time to 15 days. This commenter stated that there are times of the year, such as during Tribal Council breaks, that it could be difficult to make an appointment within 10 days.

Response: Because the tribe has control over when it submits a tribal request for election and has advance notice that it will need to appoint two members to the Board and because BIA is required to move very quickly, the final rule does not increase the 10-day timeline for appointment.

Comment: A commenter asked whether the Board must conduct business at a known location so voters will know where to request a new ballot.

Response: There is no established location for the Board to conduct its business. Final § 81.40 clarifies that voters can go to the local Bureau official to request a new ballot.

2. Ballot and Submission of Ballot

Comment: A commenter stated that proposed § 81.24(f) is confusing because it implies that a voter must submit a request for a mailout ballot in addition to registering, rather than automatically receiving a mailout ballot upon registering.

Response: The final rule clarifies at § 81.24(f) the procedure required only where a voter needs an absentee ballot even though there are polling sites.

Comment: A commenter suggested that the regulations require a cover sheet describing all proposed amendments and ballots if there are several amendments to be voted on, and therefore several ballots.

Response: As proposed and final § 81.34(a) state, each proposed amendment will have a separate ballot so there may be several ballots, as the commenter notes. The final regulations adopt the commenter's suggestion for a cover sheet enumerating the ballots in final § 81.36(a).

Comment: A commenter asked what "ballot transactions" in proposed § 81.35 are. A few commenters suggested using alternative delivery methods, beyond U.S. mail, such as commercial carrier or personal delivery, to increase voter turnout. Another commenter stated that the proposal to allow voting only through U.S. mail may stifle voter participation by disallowing voters the opportunity to return registration forms and ballots in person.

Response: The final rule clarifies § 81.35 to use the word "deliveries" rather than "transactions." The final rule also adds hand-delivery as a method for submitting ballots. Other methods of delivery are not added because the regularity and uniformity of the U.S. mail allows the Bureau to better track receipt of ballots by limiting intake to one carrier.

Comment: A commenter requested that a timeline be added by which ballots must be mailed to voters, to ensure that the voters receive the ballot a minimum amount of time before the election.

Response: The final rule adds that the Board must send the ballots to registered voters "promptly upon completion" of the final list of registered voters (*i.e.*, after resolution of any challenges).

3. Eligible Voters List

Comment: A commenter stated that the tribe should have the option to request that the Board return the Eligible Voters List to the tribe for retention, to avoid opening it to the possibility of being disclosed under FOIA.

Response: Because the Secretary's determination of who can vote is based on the Eligible Voters List, the list becomes a Federal record, which is retained in accordance with Federal records schedules. While Federal documentation is subject to FOIA disclosure, it is also protected by the Privacy Act, as applicable, and tribal rolls are generally excluded from disclosure under one or both of these laws.

Comment: A commenter stated that tribes, rather than the Bureau or Board, should determine who qualifies as registered voters under tribal standards for eligibility to vote. This voter also stated that eligible voters should be determined in accordance with eligible voter qualifications in tribal ordinances.

Response: The Eligible Voters List, supplied by the tribe, is the starting point for determining who can register to vote; however, the Federal requirement that individuals must be 18 years of age or older to vote applies to Secretarial elections because they are Federal elections. The Department has a responsibility to verify the list provided

by the tribe to ensure that the rights of individual tribal members to vote in the Federal election are protected. If the amendment section of the tribe's governing document includes eligibility qualifications, the Bureau will apply those qualifications.

4. Notice

Comment: A few commenters suggested requiring the Secretarial election notice and results to be posted on the tribe's Web site.

Response: The Department encourages tribes to publicize both the notice and results, including encouraging tribes to post such information on their Web sites. Proposed and final § 81.25 require the Board to post the Secretarial election notice at the local Bureau office and tribal headquarters, and provides the flexibility for the Board to post in other public places, which may include posting on the tribe's Web site. The Board is also required to post the results at the local Bureau office, tribal headquarters, and other places listed in the Secretarial lection notice under § 81.42. The final § 81.42 also adds that the Board may publicize the election results in other ways, such as by posting on the tribe's Web site.

Comment: One commenter stated that access to information is especially needed where a large portion of the tribal voting population is located off the reservation. This commenter also stated that the information such voters receive is not always clear or complete.

Response: The regulations require the Board to send the Secretarial election notice to all eligible voters. The Bureau also encourages the tribe to provide informational meetings to members. The Board Chairman works with the tribal government, including any appointed board members, to ensure the information in the Secretarial election notice packet is as complete and as accurate as possible. For example, if an amendment is to be voted on, the packet will include a side-by-side comparison of the new and old language. The final rule adds to § 81.23 that such a comparison will be included in the packet.

Comment: A commenter stated that the lack of an accurate membership roll has disenfranchised voters and is a chronic problem. This commenter recounted experiences with Secretarial elections in the past in which mailings were returned as undeliverable.

Response: Each tribe is responsible for its own enrollment and maintaining its membership roll, if any. Tribal members are responsible for updating their addresses with the tribe. Tribes are strongly encouraged to engage in address update initiatives with members as soon as the tribe realizes it will need to eventually provide a list of eligible voters as part of an upcoming tribal request. The Department relies on the tribe's Eligible Voters List in compiling the Registered Voters List; however, in recognition that there may be inaccuracies, the regulations allow individuals the opportunity to challenge the Registered Voters List.

Comment: A commenter suggested developing internal procedures, based on input from election boards, to help ensure compliance with Secretarial election regulations.

Response: These updates to the regulations are intended to provide more explicit procedures for Secretarial elections to ensure uniformity. To the extent necessary to fully implement these revised regulations, the Department will develop handbooks or other implementing documents.

Comment: A commenter stated that the proposed requirement at § 81.22(b) for the Board to send the Secretarial Election Notice Packet at least 60 days before the election leaves too little time for the Bureau to conduct the other necessary activities, such as preparing the notice packet.

Response: The proposed rule required the packet to be sent at least 60 days before the election to ensure that voters had as much notice as possible of the election. In response to the comment that this leaves too little time on the front end for other activities, the final rule instead provides that the Board must mail the package at least 30 days before the election, but no more than 60 days before the election. This final language at § 81.22(b) adopts the timeframes set out in the current rule at § 81.14.

5. Registration

Comment: One commenter suggested editing proposed § 81.9 to clarify that the voters must meet the qualifications required by the tribe's governing documents or charter "for that particular type of Secretarial election." The commenter also stated that the section should state that, for a tribe already reorganized under Federal statute, if the tribe's governing documents or charter do not define the voting qualifications, then the tribe's election code or ordinance should apply. A few commenters stated that voting qualifications established by the tribe should apply. A tribe stated that its constitution requires amendments to be approved by a majority of tribally registered voters, but the proposed regulations require the constitutional amendments be approved by federally registered voters.

Response: The final § 81.10 incorporates the suggested edits clarifying that the voting qualifications must be required "for that particular type of Secretarial election." The final rule does not make any change to address when the tribal governing documents or charter of a tribe already reorganized under Federal statute do not define voting qualifications. In these situations, any tribal member age 18 or older may vote.

Comment: One commenter stated that voters should not have to "re-register" to vote in a Secretarial election, but that registration for a tribal election should also count as registration for a Secretarial election. The commenter stated that requiring separate registration could cause confusion, suspicion, and disenfranchisement if voters are unaware of or disinclined to comply with the registration requirement. This commenter stated that eliminating the need for separate registration would also allow Secretarial elections to be conducted at the same time as tribal elections, minimizing confusion and maximizing voter participation.

Response: Registration for a Secretarial election must be separate from registration for a tribal election because Federal voting qualifications may be different from tribal voting qualifications. The Board will work with the tribal governing body to ensure that voters are informed of the need to register specifically for the Secretarial election, separately from tribal election registration. Tribes have the option of holding a Secretarial election to remove the Secretarial election requirement if they believe the separate registration process is unnecessary or inappropriate. Indeed, tribes are encouraged to do so, consistent with the strong Federal policy favoring tribal self-governance. The proposed and final regulations recommend that Secretarial elections not be conducted at the same time as tribal elections because of the potential for confusion, given that different voting qualifications may apply.

Comment: A few commenters stated that, in the past, several tribal members failed to register for the Secretarial election. One asked how the Board can verify that every eligible member registers.

Response: The tribe provides the Board with the Eligible Voters List, and the Board then sends out the registration form to each individual on the list. While the Board will work with the tribe to inform voters of the need to register specifically for the Secretarial

election, it is up to each individual to register.

Comment: One commenter stated that the definition of "Registered Voters List," which states that the posted list will include the voting district, is inconsistent with proposed § 81.31, which states that the list will show names only.

Response: The final § 81.31 clarifies that the Registered Voters List will include both the names and, if applicable, voting districts.

Comment: A commenter stated that there should be a mechanism, even if after the fact, to challenge the removal of a name from the Registered Voters List.

Response: Both the proposed and final § 81.32 provide the opportunity to challenge the Registered Voters List prior to the election. The election occurs only after the Board has resolved challenges and finalized the Registered Voters List. If someone disputes how the Board resolved a challenge to the Registered Voters List, that person may appeal the Board's determination.

Comment: One commenter stated that if the registration of a voter is rejected, that person should be allowed to vote under supervised circumstances, rather than holding a whole new election.

Response: If a voter's registration is rejected, that person has the opportunity to challenge his or her omission from the registered voter's list. The election is not held until challenges to the Registered Voters List are decided.

Comment: One commenter stated that voters should be able to mail the registration form at the same time as the ballot, or if polling sites are used, to allow same-day registration. This commenter stated that doing so would reduce unnecessary steps, eliminate confusion, and increase voter turnout.

Response: The regulations establish a process whereby registration is completed as a first, and separate, step from voting, to allow for the compilation of a Registered Voters List prior to the election, and allow time for resolution of challenges to the Registered Voters List prior to the election. This process is designed to promote due process and confidence in the election's outcome. By combining these steps, there would be no allowance for challenges to the Registered Voters List. Allowing for challenges to the Registered Voters List after the election would delay posting of election results, because the Board would first have to review and resolve challenges, and would require tracking the source of each individual ballot, undermining anonymity, to allow the Board to extract the vote of anyone ultimately removed from the Registered Voters List. However, a tribe may request a waiver to allow for registration and voting at the same time; for example, if a tribe plans to hold an event where most of the membership is expected to be present, same-day registration and voting may be appropriate.

Comment: One commenter suggested having a universal registration form showing the address to which the ballot may be mailed.

Response: With this proposed rule, the Department submitted a request for approval under the Paperwork Reduction Act, including a universal registration form. We have revised the form to include a placeholder for the address to which the ballot may be mailed.

6. Polling Sites

Comment: A commenter opposed the proposed rule's requirement that mailout ballots be used, rather than polling places, except where the tribe's governing documents require polling sites. This commenter stated that it is unlikely that a tribe's governing document would even address whether polling sites are required. According to this commenter, the regulations should provide for more flexibility to allow a tribe to decide to use polling sites by including the decision in the tribal request. This commenter also stated the rationale for using mailout ballots is unclear, as the tribes will have to pay for mailing through contracts/compacts, and the requirement is unnecessary and could have unintended consequences. The commenter pointed out that mailout ballots may not increase voter participation in remote areas where tribal members do not retrieve mail on a daily basis or open mail from the tribe or Bureau because they receive so much of it. Another tribal commenter stated they "wholeheartedly support" the proposed rule's requirement for voting through mailout ballots, rather than polling places, because mailout ballots lessen the burden of voting, encourage greater voter participation overall, and allow voters flexibility and convenience. This commenter stated that voter participation increased by 51 percent for a tribally held referendum by mailout ballot as compared to the prior election that relied on polling places and absentee ballots.

Response: The proposed rule and final rule require the use of mailout ballots, rather than polling sites, because polling sites require more resources and because mailout ballots tend to maximize voter turnout and prevent the disenfranchisement of urban members and others who are living away, temporarily or permanently, from the reservation. The rule accounts for the fact that some tribes have governing documents with amendment articles requiring use of polling sites, providing that, in such cases, polling sites will be provided in addition to mailout ballots.

Comment: A commenter stated that their tribe's constitution refers only to a "polling site" but does not require polling sites.

Response: To be considered required, the amendments section of the tribe's governing document must require polling sites in Secretarial elections. If you have a question as to whether your tribal governing document requires polling sites, please consult with your local Bureau official.

Comment: A tribal commenter stated that voting in person would allow Secretarial elections to be held at the same time as tribal elections to increase voter turnout. Another tribal commenter stated that they agree Secretarial elections should not be scheduled at the same time as tribal elections and recounted a personal experience, in the past, where the two were held at the same time, resulting in "complete confusion between the two elections."

Response: Generally, the Department suggests avoiding holding Secretarial elections and tribal elections at the same time because the lists of registered voters are different, but final § 81.14 allows the Board to hold a Secretarial election at the same time as a tribal election as long as voters are educated as to the need for separate ballots.

Comment: One commenter stated that the requirement to notarize absentee ballots is outdated.

Response: Notarization is not required for absentee ballots. The voter must sign a certification, but there is no need for a notary.

7. Challenges

Comment: One commenter stated their support for the provision that anyone who submitted a registration form, even one that was ultimately rejected, can challenge the results of an election.

Response: The proposed rule at § 81.43 stated that "any person who submitted a voter registration form" may challenge the election results. The final rule requires that a challenger also be an eligible voter, such that only eligible voters who submitted a registration form may challenge election results. Requiring that the person be an eligible voter prevents a non-member who happens to obtain and submit a registration form from challenging the election results. Therefore, someone

who submitted a registration form but was ultimately rejected from the Registered Voters List may challenge the results only if he or she is also an eligible voter.

Comment: A commenter asked whether the 3-day time period for challenges established in proposed § 81.43 includes the day of posting.

Response: Final § 81.43 clarifies that the time period does not include the day of posting. The final rule further clarifies what is considered a "business day" by adding a definition in § 81.4.

Comment: One commenter stated that the 3-day challenge period is too short and suggested 10 calendar days instead.

Response: The final rule increases the challenge period to 5 days at § 81.43, to better accommodate filing challenges by mail. The final rule allows for 5, rather than 10, days to prevent undue delay, given that the Secretary is required by statute to issue an approval decision within 45 days of the election results.

Comment: One commenter stated that election results should not be publicized until all challenges have been resolved.

Response: Challenges to the election results must necessarily follow posting of the election results; challenges to the results generally require knowing the results. Following resolution of any challenges, the Authorizing Official's approval of the governing document or amendment is the finalization of the process.

Comment: A commenter stated that the proposed § 81.45(a) is vague, in that it states that a recount or new election may be held if a challenge is sustained and "may have an impact on the outcome of the election."

Response: The final rule clarifies that a recount or new election may be held if a challenge is sustained and the errors would invalidate the election.

Comment: One commenter stated that the rule should provide more specificity on what types of challenges merit consideration by the Board.

Response: To clarify, the Board decides challenges to the Registered Voters List prior to the election, and the Authorizing Official decides challenges to the election results after the election. The final rule does not provide any greater specificity on what types of challenges merit consideration because each challenge is fact-specific.

Comment: One commenter asked how challenges may be made and when they must be filed.

Response: Proposed and final § 81.43 set out how challenges may be made and when they must be filed.

Comment: One commenter requested that the provision that the "Secretary's approval of the documents must be considered as given" in § 81.45(e) instead state simply that the governing document or amendment "is approved."

Response: The language providing that the Secretary's approval must be "considered as given" is taken directly from the statute: "If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given." 25 U.S.C. 476(d). In other words, it shall be deemed approved by the Secretary. The statutory language is retained in the final rule.

8. Participation in the Election

Comment: A few commenters stated that the regulation should establish a threshold for participation by eligible voters in the election—either that a certain percentage of eligible voters register to vote or that a certain percentage of eligible voters vote. The requested provision would deem an election invalid if a certain percentage of the eligible voters failed to register or vote. One commenter illustrated that if there are 6,500 eligible voters, but only 100 register, and only 40 of those actually cast a ballot, the election would be valid under the proposed regulation because more than 30 percent of registered voters voted, even though less than 1 percent of the eligible voters cast a vote. Another commenter stated that often, a voter will protest by not voting rather than by submitting a "no" vote, and that the regulation disregards this form of protest by not requiring a minimum number of voters to register.

Response: The final rule does not add a minimum participation threshold for eligible voters, because it includes other provisions designed to increase voter participation (*e.g.*, all mailout packets). The Board Chair will work with the tribe to improve voter education for each Secretarial election to promote participation in the elections.

Comment: One commenter stated that there is no requirement for 30 percent participation by registered voters in the statute. This commenter stated that the tribe's governing documents should be the sole source of voter participation requirements.

Response: The requirement for 30 percent participation by registered voters is statutorily required at 25 U.S.C. 478a. Because Federal law establishes this participation requirement, it supersedes any contrary requirement in the tribe's governing documents. Therefore, if a tribe has a threshold for participation that is lower than 30 percent in their amendment article, a 30 percent threshold will be applied.

Comment: One commenter stated that a "spoiled ballot" should not be included in the tally to determine if enough registered voters voted because the vote is not counted toward the results.

Response: A spoiled ballot that has been cast indicates that a voter intended to vote, and indeed attempted to vote. To protect that intention to participate, the spoiled ballot is counted for the purpose of determining the number of registered voters who participated, even though the vote cannot count toward the results of the election because its spoiled state obscures whether the voter intended to vote for or against the proposed document or amendment.

E. Petitioning

Comment: One commenter stated that the petitioning procedures set out in proposed § 81.65 ignore statutory deadlines for holding Secretarial elections. This commenter stated that the rule should specify that the petition need not undergo the initial review, and that the petition may simply request an election by filing a completed petition with the Bureau.

Response: The IRA timeframes for calling and holding an election apply to requests by "an Indian tribe." *See* 25 U.S.C. 476(a), (c). We interpret a request by petition to be a request by the tribe. Therefore, like the commenter, we interpret the statutory timeframes as applying to election requests in the form of a petition. Nevertheless, the regulations apply the timeframes once the petition is validated, and the procedures set out in final § 81.62 for validating a petition occur before timeframes are triggered. The final rule clarifies when the petition is considered a "tribal request" that triggers the timeframes for calling and holding the election. Unlike when a tribal governing body submits a resolution requesting an election, petitioners must first undergo a review to verify the petition. This review is necessary to determine if the request is a valid tribal request.

Comment: Several commenters pointed out various points in the process where the petitioner or Bureau must rely on the tribe to provide a list of tribal members who are 18 and older. One commenter noted that in most cases, petitions do not have the support of elected tribal officials and the tribe has no incentive to assist the petitioners by providing membership lists. A commenter stated that requiring the list as part of the "tribal request" will "eviscerate" the ability of petitioners, who have a constitutional right to petition, to make a proper request for election.

• One commenter stated that petitioners do not have access to a list of all tribal members who are 18 and older because those records are maintained by the tribe, and that requiring such a list in the definition of "tribal request" effectively prevents petitioners from making a proper request for election.

• Another commenter stated that proposed § 81.60(a), which provides that the Bureau will determine how many signatures are needed on a petition, should provide some alternative to relying on the tribe to provide the current number of tribal members 18 years of age and older, in case the tribe refuses to turn over the information.

• A commenter asked how the Bureau creates its own list of members where the tribe refuses to provide an Eligible Voters List.

Response: It is not necessary for the petitioner to provide the Eligible Voters List. For each petition, the Bureau requests the Eligible Voters List from the tribe. This process has been Bureau practice and is now being codified in the regulation. Although commenters expressed concern that the tribe may refuse to provide the information, tribes generally cooperate with this request. If a tribe refused to provide the information, the Bureau will make a reasonable effort given its responsibilities and statutory requirements to coordinate with the tribe to obtain the information through some means in order to allow the Bureau to meet its statutorily mandated duties. For example, in a past occasion when a tribe refused to provide the Eligible Voters List, the Bureau conducted its own research to compile a number and then provided the tribe a certain time period to correct the number or affirm by silence.

Comment: A commenter stated that the rule should define "petitioner" to better specify how a petitioner may request a Secretarial election upon filing a petition.

Response: The final rule adds a definition for "petitioner."

Comment: A commenter stated that proposed § 81.54 provides that the Bureau will provide technical assistance to the tribe and notify the tribe of any provisions that are contrary to Federal law, rather than providing the petitioner with assistance and notifying the petitioner. Another commenter noted that the IRA requires the Bureau to provide tribes, not individual members, with technical assistance. The commenter stated that proposed §§ 81.53 and 81.54, in allowing the Bureau to provide technical assistance to petitioners, puts the Bureau in a position to advocate against the tribe's governing body in a manner potentially adverse to the tribe's best interests. A commenter also stated that the section is of concern because the Bureau has an obligation to the existing tribe, rather than to the group of petitioners.

Response: The final rule clarifies that technical assistance on a petition will be provided to both the tribal governing body and spokesperson for the petitioners. The Bureau does not provide technical assistance to petitioners to undermine tribal governments; rather, it provides technical assistance to petitioners to facilitate bringing the issue to a vote, without taking sides on the content of the vote. This approach furthers tribal self-determination because the tribe provided for the petitioning process in its governing document amendments article. Technical assistance on a petition is provided only after the Bureau has determined that the petition is valid, and represents the required percentage of tribal membership rather than any one individual who wants to challenge the tribal governing body in some way. Both the tribal governing body and petitioners benefit from this technical assistance, because it ensures that the issue is as clearly stated as possible for voters' understanding. The technical assistance provided to the petitioners is also provided to the tribal governing body as part of the Bureau's government-to-government relationship with the tribe.

Comment: A commenter suggested reducing the amount of time allowed for gathering signatures from one year to 6 months to prevent the number of signatures required under § 81.60 from changing dramatically during the petitioning process.

Response: When the tribe or Local Bureau Official provides the spokesperson with the number of signatures required for a petition, under final § 81.57 (proposed § 81.60), that number is set regardless of whether the number actually increases because more tribal members turn 18 or decreases because of tribal members passing away over the course of the year in which signatures are collected.

Comment: A commenter stated that the proposal to allow tribal members a year to gather signatures is too lengthy and is supported by no known legal authority. This commenter expressed concern that over the course of a year, a voter could change his or her decision.

Response: The final rule establishes a year to gather signatures because in some cases, the number of signatures required would require several months and possibly up to a year, to collect them all. The commenter's concern as to a signer changing his or her decision may not have considered that the original signer still has an opportunity to express his or her change of position by removing his or her signature from the petition. Ultimately, signatures on a petition represent only a request to bring the issue to a vote, rather than a decision on the question to be voted upon.

Comment: A commenter stated that proposed § 81.63(b)(2), which states that the Bureau official must provide a copy of the receipt and petition to the recognized tribal governing body, should add "if any" since the tribe may not have a recognized tribal governing body.

Response: The final rule does not add the words "if any" because they are surplusage: if there is no recognized tribal governing body for whatever reason, then there is no recognized tribal governing body to whom to provide a copy of the receipt and petition. *See* final § 81.60.

Comment: One commenter opposed the proposed requirement that 20 percent of the tribal members who are 18 or older must sign a petition for a federally recognized tribe adopting a governing document under Federal statute for the first time. *See* proposed § 81.60. That commenter stated that the 20 percent threshold relaxes requirements, and the switch from the 60 percent requirement is "concerning." Another commenter stated that the 20 percent standard could be appropriate if, at the tribe's request, the members are establishing the first governing document and thus the 20 percent standard would provide a more realistic opportunity for tribes to reorganize. This commenter stated their belief that the 60 percent requirement has never been used, thus rendering the process obsolete.

Response: The final rule lowers the current 60 percent requirement to 50 percent. The lowering recognizes that the current 60 percent requirement may never have been met, but keeps it high enough to avoid the harassment of the governments of organized tribes through frivolous petitions by a small minority of the membership. *See* final § 81.57. A lower percentage, such as the proposed 20 percent, may be appropriate for unorganized tribes.

Comment: A commenter asked for clarification on whether the percentage "of the tribal members who are 18 years of age or older" should instead be attached to eligible voters rather than the entire enrollment.

Response: The percentage requirement applies for a federally recognized tribe adopting a governing document under Federal statute for the first time; therefore, the tribe will not have a governing document imposing restrictions on who may vote beyond the baseline of being a tribal member 18 years or older.

Comment: One commenter stated that the proposed rules for petitioners place unnecessary obstacles and processes designed to thwart the efforts of petitioners.

Response: The rule is not designed to thwart the efforts of petitioners, but to balance the Secretary's duties to tribal governments and to tribal members. As mentioned above, the Bureau will provide technical assistance to petitioners and will work with the tribe to obtain necessary information that the petitioners lack.

Comment: One commenter stated that proposed § 81.56, which provides that a member of the tribe who is 18 or older may sign the petition, is misleading because the tribe's governing document may impose additional qualifications, such as residence on the reservation.

Response: The final rule clarifies that if the tribe's governing document includes additional requirements for petitioning, that are not inconsistent with Federal law such as the 26th Amendment to the Constitution, then those additional requirements also apply. *See* final § 81.53.

Comment: A commenter requested clarification on how an election request is withdrawn if the request is based on a petition. The commenter asked specifically whether the same number of people that signed the petition must agree on withdrawing.

Response: The final rule clarifies that a majority of those who signed the original petition must request the withdrawal of the petition; this is intended to prevent the spokesperson from withdrawing the petition without authority from the other petitioners to do so. *See* final § 81.18.

F. Miscellaneous

Comment: A commenter requested retaining the current § 81.5(e) in the regulations as currently published, which states "if the amendment provisions of a tribal constitution or charter have become outdated and amendment cannot be effected pursuant to them, the Secretary may authorize an election under this part to amend the documents when the recognized tribal government so requests."

Response: The final rule adds the substance of current § 81.5(e), as requested. *See* final § 81.2(c).

Comment: A commenter stated that proposed § 81.14 should clarify what a "final action" is that allows for resubmission of a conflicting proposal.

Response: The final rule provides a definition of "final agency action" to include the Authorizing Official's approval or disapproval of the election, or acknowledgment of the tribe's or petitioners' withdrawal. *See* final § 81.15.

Comment: A tribal commenter stated that proposed § 81.17, allowing withdrawal of a request for election, does not address what happens if a tribal judicial forum makes a ruling on the subject of the election.

Response: Because Secretarial elections are Federal elections, the Bureau is bound by the statutory requirements regardless of whether a tribal judicial forum makes a ruling on the subject of the election.

Comment: One commenter suggested requiring notarization of ballots to avoid ballot fraud. Another commenter objected to requiring notarization of ballots because of the inconvenience.

Response: Neither the proposed nor final rule requires notarization of ballots. Notarization of ballots is not required because it often requires money and may negatively impact voter participation, potentially resulting in disenfranchisement.

Comment: A tribal commenter requested cross-referencing 25 CFR 1.2 to allow for waivers of the Part 81 requirements, when in the best interest of the Indians, to acknowledge that such a waiver is available. This tribal commenter also stated that adding escape clauses in the regulations would help address situations that were unanticipated or where the regulations inadvertently undermine the tribe.

Response: The Secretary's regulations at 25 CFR 1.2 provide that, "the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." The Secretary's authority to waive regulations applies regardless of whether it is restated in the rule. The final rule does not address waiver, but it nevertheless exists as an option of the Secretary. The final rule does not add escape clauses because the Secretary already has the authority to waive requirements. In addition, waiving regulations is an extraordinary remedy. Pointing out the existence of that remedy in the rule might be misconstrued as suggesting that such waivers are routine.

Comment: One commenter asked whether the Bureau can unilaterally withdraw a request in 81.17, and suggested the rule provide limits on when the Bureau can withdraw.

Response: The Bureau may not withdraw a tribal request; there is no provision in the statute allowing the Bureau to do so.

Comment: A commenter stated that the statute requires submission of the tribal request to the "Area Office" and recommended changing the regulation to require filing at the Bureau's Regional Offices (the organizational successor to Area Offices).

Response: While the statute does refer to the Area Office, *see* 102 Stat. 2938, 2939, the Local Bureau Official, who is most often in the local agency office rather than the regional office, is the first point of contact for tribes and petitioners and reviews the request for validity.

III. Consultations

Efforts to revise this regulation date back to 1992, when the first consultations were held. More recently, the Department hosted tribal consultation sessions on December 1, 2009, in Anchorage, Alaska; Brooks, California, on January 12, 2010; Minneapolis, Minnesota, on January 20, 2010; Oklahoma City, Oklahoma, on January 26, 2010; Pala, California, on February 2, 2010; and Albuquerque, New Mexico, on February 4, 2010. The Department also accepted written comments on the regulations. The Department reviewed the comments and made significant changes to the draft in response to tribes' comments and suggestions. Following publication of the proposed rule in October 2014, the Department hosted additional tribal consultation sessions including a session on October 26, 2014, in Atlanta, Georgia during the National Congress of American Indians (NCAI) annual convention; on November 18, 2014, in Oklahoma City, Oklahoma; and on November 20, 2014, in Rocklin, California. The Department also held a listening session with tribes in Alaska in December 2014. Several tribes provided their input at these sessions or in writing. The final rule incorporates this input and responds to comments, above.

IV. Procedural Matters

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

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has

determined that this rule is not significant. 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 rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations and provide greater notice and clarity to the public.

B. Regulatory Flexibility Act

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It does not change current funding requirements or regulate small entities.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. Secretarial elections are funded by the BIA. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

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

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule clarifies the procedures for conducting a Secretarial election, which is a Federal election, for federally recognized Indian tribes.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

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

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have held several consultation sessions with representatives of federally recognized tribes throughout the development of this rule. Details on these consultation sessions and the comments received are described above.

I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. In accordance with 44 U.S.C. 3507(d), BIA submitted the information collection and recordkeeping requirements of the rule to OMB for review and approval. The following describes the information collection requirements in each section of the rule and any changes from the current rule.

Title: Secretarial elections (25 CFR part 81).

OMB Control Number: 1076–0183.

Requested Expiration Date: Three years from the approval date.

Summary: Section 81.6 of the revised Part 81 regulations requires the Department of the Interior to collect information from tribes that are requesting a Secretarial election. The information to be collected includes the language to be voted on, and a certified list of tribal members who will be age 18 at the time of the Secretarial election and their current addresses or a certified Eligible Voters List with addresses. Such a list with names and addresses is necessary to ensure that all eligible voters receive notice of the Secretarial election and the opportunity to register and vote in the election.

Section 81.55 of the revised Part 81 regulations requires the Department to collect information from tribal members who petition for a Secretarial election. Such petitioners are required to provide certain information in the petition, that tribal members who wish to vote in the election to register for the election, that votes be submitted via ballots. In addition, the section requires anyone wishing to challenge the results of an election to provide substantiating evidence for the challenge.

Frequency of Collection: On occasion.

Description of Respondents: Indian tribes, Indian tribal members.

Total Annual Responses: 252,041.

Total Annual Burden Hours: 64,305 (1,280 hours for tribal submissions, 63,025 hours for member submissions).

Total Annual Cost Burden: $ 110,880.

You can receive a copy of BIA's submission to OMB by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section, or by requesting the information from the Indian Affairs Information Collection Clearance Officer, Office of Regulatory Affairs & Collaborative Action, 1849 C Street, NW., MS–3623, Washington, DC 20240. You may also view the information collection request as submitted to OMB at *www.reginfo.gov*.

Comments should address: (1) Whether the collection of information is necessary for the proper performance of the Program, including the practical utility of the information to the BIA; (2) the accuracy of the BIA's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

K. Information Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

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

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

List of Subjects in 25 CFR Parts 81 and 82

Administrative practice and procedure, Elections, Indians—tribal government, Reporting and recordkeeping requirements.

For the reasons given in the preamble, under the authority of 5 U.S.C. 301 and 25 U.S.C. 2 and 9, the Department amends parts 81 and 82 of chapter I, title 25 of the Code of Federal Regulations, as follows:

■ 1. Revise part 81 to read as follows:

PART 81—SECRETARIAL ELECTION PROCEDURES

Subpart A—Purpose and Scope

Sec.

Subpart B—Definitions

Subpart C—Provisions Applicable to All Secretarial Elections

Subpart D—The Secretarial Election Process under the Indian Reorganization Act (IRA)

Subpart E—The Secretarial Election Process under the Oklahoma Indian Welfare Act (OIWA)

Subpart F—Formulating Petitions to Request a Secretarial Election

Authority: 25 U.S.C. 473a, 476, 477, as amended, and 503.

Subpart A—Purpose and Scope

§ 81.1 What is the purpose of this part?

This part prescribes the Department's procedures for authorizing and conducting elections when Federal statute or the terms of a tribal governing document require the Secretary to conduct and approve an election to:

(a) Adopt, amend, or revoke tribal governing documents; or

(b) Adopt or amend charters.

§ 81.2 When does this part apply?

(a) This part applies only to federally recognized tribes, in the circumstances shown in the following table.

If a tribe wants to . . .	And . . .
(1) Adopt a new governing document to reorganize under Federal statute.	The Federal statute requires an election before or after Secretarial approval.
(2) Adopt a new governing document to reorganize outside Federal statute.	The governing document requires approval under the Secretary's general authority to approve.

If a tribe wants to . . .	And . . .
(3) Amend or revoke a governing document adopted under Federal statute.	The Federal statute requires an election and approval for amendment or revocation.
(4) Amend or revoke a governing document adopted outside Federal statute.	The governing document requires Secretarial approval of an amendment or revocation.
(5) Ratify a federal charter of incorporation	The charter requires Secretarial approval or is being ratified under the Oklahoma Indian Welfare Act (OIWA).
(6) Amend a federal charter of incorporation	The charter requires a Secretarial election to amend.
(7) Take other action	A Federal statute or tribal law requires a Secretarial election in order to take that action.
(8) Remove the requirement for a Secretarial approval from a governing document.	A Federal statute or tribal law requires a Secretarial election in order to take that action.

(b) Secretarial elections will be conducted in accordance with the procedures in this part unless the amendment article of the tribe's governing document provides otherwise and is not contrary to Federal voting qualifications or substantive provisions, in which case the provisions of those documents shall rule, where applicable.

(c) If the amendment provisions of a tribal governing document have become outdated and the amendment cannot be effected under them, and the recognized tribal governing body requests a Secretarial election, the Bureau may authorize a Secretarial election under this part to amend the documents.

§ 81.3 Information collection.

The information collection requirements contained in this part are approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and has been assigned OMB control number 1076–0183. This information is collected when, under Federal statute or the tribe's governing documents, the Secretarial election is authorized to adopt, amend, or revoke governing documents; or adopt or amend charters. This information is required to obtain or retain benefits. A Federal agency may not collect or sponsor an information collection without a valid OMB control number.

Subpart B—Definitions

§ 81.4 What terms do I need to know?

For purposes of this part:

Absentee ballot means a ballot the Secretarial Election Board provides to a registered voter, upon request, to allow him or her to vote by mail even though polling sites are used.

Amendment means any modification or change to one or more provisions of an existing governing document or charter.

Applicable law means any treaty, statute, Executive Order, regulation, or final decision of a Federal court, which is applicable to the tribe.

Authorizing Official means the Bureau official with delegated Federal authority to authorize a Secretarial election.

Bureau means the Bureau of Indian Affairs, Department of the Interior.

Business day means a weekday (Monday through Friday), excluding Federal holidays.

Cast means the action of a registered voter, when the ballot is received through the mail by the Secretarial Election Board, or placed in the ballot box at the polling site.

Charter means a charter of incorporation issued under a Federal statute and ratified by the governing body in accordance with tribal law or, if adopted before May 24, 1990, by a majority vote in an election conducted by the Secretary.

Day means a calendar day. A Secretarial election may be held on a Saturday, Sunday or Federal holiday.

Department means the Department of the Interior.

Director means the Director of the Bureau of Indian Affairs or his or her authorized representative.

Electioneering means campaigning for or against the adoption, ratification, revocation or amendment of a proposed governing document or a charter.

Eligible voter means a tribal member who will be 18 years of age or older on the date of the Secretarial election (and, if the tribe's governing document imposes additional requirements for voting in a Secretarial election, also meets those requirements).

Eligible Voters List means a list of eligible voters, including their birthdates and their last known mailing addresses. The Eligible Voters List is compiled and certified by the tribe's governing body or the Bureau if the Bureau maintains the current membership roll for the tribe.

Federal statute means the Indian Reorganization Act (IRA), 25 U.S.C. 476, 477, as amended, the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. 503, and any tribe-specific Federal statute that requires a Secretarial election for the adoption of a governing document.

Final agency action means the Authorizing Official's approval or disapproval of a Secretarial election or acknowledgment of the tribe's or petitioners' withdrawal of a request for Secretarial election, and is final for the Department.

Governing document means any written document that prescribes the extent, limitations, and manner in which the tribe exercises its sovereign powers.

Local Bureau office means the local administrative office of the Bureau that is the primary point of contact between the Bureau and the tribe.

Local Bureau Official means the Superintendent, Field Representative, or other official having delegated Federal administrative responsibility under this part.

Mailout ballot means a ballot the Secretarial Election Board provides to a registered voter to allow him or her to vote by mail in an election conducted entirely by mail.

Member of a tribe or *tribal member* means any person who meets the criteria for membership in a tribe and, if required by the tribe, is formally enrolled.

Petition means the official document submitted by the petitioners to the Secretary to call a Secretarial election for the purpose of adopting or ratifying a new governing document, amending the tribe's existing governing document, or revoking the tribe's existing governing document.

Petitioner means a tribal member who is 18 years of age or older (and, if the tribe's governing document imposes additional requirements for petitioning, also meets those requirements), and signs a petition.

Polling site ballot means the ballot the Secretarial Election Board provides to a registered voter, allowing him or her to vote when polling sites are required by the amendment and adoption article of the tribe's governing document.

Recognized governing body means the tribe's governing body recognized by the Bureau for the purposes of government-to-government relations.

Registered Voter means an eligible voter who has registered to vote in the Secretarial election.

Registered Voters List means the list of all Registered Voters showing only names and, where applicable, voting districts.

Registration means the process by which an eligible voter signs up to vote in the Secretarial election.

Revocation means that act whereby the registered voters of a tribe vote to revoke their current governing document.

Secretarial election means a Federal election conducted by the Secretary under a Federal statute or tribal governing document under this part.

Secretarial Election Board means the body of officials appointed by the Bureau and the tribe (and the spokesperson for petitioners, as applicable) to conduct the Secretarial election.

Secretary means the Secretary of the Interior or his or her authorized representative.

Spoiled ballot means the ballot is mismarked, mutilated, rendered impossible to determine the voter's intent, or marked so as to violate the secrecy of the ballot.

Spokesperson for the petitioners or *spokesperson* means a tribal member who provides a document signed by other tribal members that provides him or her authority to speak or submit a petition on their behalf.

Tribal request means a request that includes all of the components set out in 81.6.

Tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that is listed in the **Federal Register** under 25 U.S.C. 479a—1(a), as recognized and receiving services from the Bureau of Indian Affairs.

Voting district means a geographic area established to facilitate the voting process, if required, by the amendment and adoption articles of the tribe's governing document.

Subpart C—Provisions Applicable to All Secretarial Elections

§ 81.5 What informal review is available to a tribe or petitioner when anticipating adopting or amending a governing document?

A tribe that plans to adopt or amend a governing document or a spokesperson for a petitioner may, but is not required to, submit the proposed document with a request for informal review to the Local Bureau Official.

(a) During the informal review:

(1) Bureau personnel will help the tribal government or petitioner spokesperson in drafting governing documents, bylaws, charters, amendments and revocations, explain the Secretarial election process, and provide guidance on methods for voter education, such as informational meetings.

(2) The Local Bureau Official will review the proposed document and will offer technical assistance and comments to the tribe or petitioner spokesperson, including but not limited to guidance on whether any of the provisions of the proposed document or amendment may be contrary to applicable laws.

(b) The Bureau will provide technical assistance for a petition only upon request of the spokesperson. Bureau personnel will provide a courtesy copy to the tribe's governing body of all correspondence regarding technical assistance to the petitioners. The spokesperson will be responsible for obtaining the approval of the tribal members it represents on changes to the content of the petition.

§ 81.6 How is a Secretarial election requested?

To request a Secretarial election:

(a) The tribe or petitioner must submit:

(1) A duly adopted tribal resolution, tribal ordinance, other appropriate tribal document requesting the Secretary to call a Secretarial election, or, in the absence of an existing governing document or if authorized or required by the existing governing documents, a petition that has been verified by the Bureau as having the minimum number of required signatures of tribal members; and

(2) The exact document or amended language to be voted on; and

(b) The tribe must submit a list in an electronically sortable format with names, last known addresses, dates of birth, and voting district, if any, of all tribal members who:

(1) Will be 18 years of age or older within 120 days of the date of the request; and

(2) Meet any other voting restrictions imposed by the tribe's governing document for voting in the Secretarial election.

§ 81.7 What technical assistance will the Bureau provide after receiving a request for election?

After receiving a tribal request for election under § 81.6, the Bureau will provide the following technical assistance.

(a) The Local Bureau Official will review and make a recommendation on the proposed document or amendment, prepare background information on the tribe, and submit to the Authorizing Official.

(b) The Authorizing Official must do all of the following:

(1) Review the proposed document or amendment and offer technical assistance to the tribe (and spokesperson, for petitions);

(2) Consult with the Office of the Solicitor to determine whether any of the provisions of the proposed document or amendment may be contrary to applicable law; and

(3) Notify the tribe (and spokesperson, for petitions) in writing of the results of the review.

(i) If the review finds that a provision is or may be contrary to applicable law, the notification must explain how the provision may be contrary to applicable law and list changes to the document that would be required to allow the Authorizing Official to approve the document as not contrary to applicable law.

(ii) The notification must be sent to the tribe (and spokesperson, for petitions) promptly but in no case less than 30 days before calling the election.

(iii) For IRA elections, the tribe may choose to proceed with the election without incorporating required changes, but the Authorizing Official may not approve election results ratifying provisions that are contrary to applicable law.

(iv) For OIWA elections, the Authorizing Official may not authorize a Secretarial election on any proposed document that contains provisions that may be contrary to applicable law.

§ 81.8 What happens if a governing Federal statute and this part disagree?

If a conflict appears to exist between this part and a specific requirement of the Federal statute, this part must be interpreted to conform to the statute.

§ 81.9 Will the Secretary give deference to the Tribe's interpretation of its own documents?

The Secretary will give deference to the tribe's reasonable interpretation of the amendment and adoption articles of the tribe's governing documents. The Secretary retains authority, however, to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe or when a provision, result, or interpretation may be contrary to Federal law.

§ 81.10 Who may cast a vote in a Secretarial election?

If the tribe:	Then the following individuals may cast a vote:
(a) Is reorganizing under Federal statute for the first time,	Any member of the tribe who: (1) Will be 18 years of age or older on the date of the Secretarial election; and (2) Has duly registered, regardless of residence or other qualifications contained in the tribe's governing documents or charter
(b) Is already reorganized under Federal statute,	Any member of the tribe who: (1) Will be 18 years of age or older on the date of the Secretarial election; and (2) Otherwise meets the qualifications required by the tribe's governing documents or charter for that particular type of Secretarial election; and (3) Has duly registered.
(c) Is not reorganized under a Federal statute but tribal law requires a Secretarial election.	Any member of the tribe who: (1) Will be 18 years of age or older on the date of the Secretarial election; and (2) Otherwise meets the qualifications, if any, required by the tribe's governing documents or charter for that particular type of Secretarial election, if any; and (3) Has duly registered.

§ 81.11 May a tribe establish a voting age different from 18 years of age for Secretarial elections?

No. A Secretarial election is a Federal election. According to the 26th Amendment of the U.S. Constitution, adopted July 1, 1971, all individuals 18 years of age and older must be allowed to vote in Federal elections.

§ 81.12 What type of electioneering is allowed before and during Secretarial election?

There shall be no electioneering within 50 feet of the entrance of a polling site.

§ 81.13 What types of voting assistance are provided for a Secretarial election?

If polling sites are required by the amendment or adoption article of the tribe's governing document, the Chair of the Secretarial Election Board will:

(a) Appoint interpreters;

(b) Ensure that audio or visual aids for the hearing or visually impaired are provided;

(c) Ensure that reasonable accommodations are made for others with impairments that would impede their ability to vote; and

(d) Allow the interpreter or Secretarial Election Board member to explain the election process and voting instructions. At the request of the voter, the interpreter or Board member may accompany the voter into the voting booth, but must not influence the voter in casting the ballot.

§ 81.14 May Secretarial elections be scheduled at the same time as tribal elections?

The Secretarial Election Board will, generally, avoid scheduling Secretarial elections at the same time as tribal elections to avoid confusion. If the Secretarial Election Board decides to schedule a Secretarial election at the same time as a tribal election, the Secretarial Election Board must clearly inform eligible voters of any differences between the tribal election and the Secretarial election and separate ballots must be used for each type of election.

§ 81.15 How are conflicting proposals to amend a single document handled?

When conflicting proposals to amend a single provision of a tribal governing document or charter provision are submitted, the proposal first received by the Local Bureau Official, if properly submitted as a complete tribal request, must be voted on before any consideration is given other proposals. Other proposals must be considered in order of their receipt if they are resubmitted following final agency action on the first submission. This procedure applies regardless of whether the proposal is a new or revised tribal governing document.

§ 81.16 Who pays for holding the Secretarial election?

(a) A Secretarial election is a Federal election; therefore, Federal funding will be used to cover costs. The Bureau will pay for the costs, unless the tribe has received funding for this function through contracts or self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f, *et seq.*

(b) Once a tribe removes the requirement for Secretarial approval, all subsequent elections it holds to amend the governing document are tribal elections and the tribe is responsible for the costs of those elections.

§ 81.17 May a tribe use its funds to pay non-Federal election officials?

A recognized tribal governing body may use tribal funds to compensate non-Federal personnel to respond to the needs of the tribal government in the conduct of the Secretarial election.

§ 81.18 Who can withdraw a request for a Secretarial election?

The tribe may withdraw the request for Secretarial election in the same manner in which the Secretarial election was requested. The petitioners may withdraw the request for Secretarial election by submitting a new petition, with signatures of at least a majority of the signers of the original petition, seeking withdrawal of the original petition. However, the request for a Secretarial election cannot be withdrawn after the established deadline for voter registration.

Subpart D– The Secretarial Election Process under the Indian Reorganization Act (IRA)

§ 81.19 How does the Bureau proceed after receiving a request for a Secretarial election?

(a) Upon receiving a request for a Secretarial election, the Local Bureau Official will forward the request to the Authorizing Official with any appropriate background information.

(b) The Authorizing Official will issue a memorandum to the Local Bureau official. The memorandum will do all of the following:

(1) Direct the Local Bureau Official to call and conduct a Secretarial election by one of the following deadlines:

(i) If the tribal request is to amend an existing governing document, within 90 days from the date of receipt of the request;

(ii) If the tribal request is to adopt a new governing document (including an amendment to a governing document in the nature of an entire substitute) or to revoke an existing governing document, within 180 days after receiving the request.

(2) Include as an attachment the document or proposed language to be voted upon;

(3) Include as an attachment the Certificate of Results of Election with instructions to return it after the Secretarial election. The Certificate shall read as follows:

Certificate of Results of Election

Under a Secretarial election authorized by (name and title of authorizing official) on (date), the attached [insert: Governing document and Bylaws, charter of incorporation, amendment or revocation] of the (official name of tribe) was submitted to the registered voters of the tribe and on (date) duly (insert: adopted, ratified, rejected or revoked) by a vote of (number) for and (number) against and (number) cast ballots found spoiled in an election in which at least 30 percent (or such "percentages" as may be required to amend according the governing document) of the (number) registered voters cast their ballot in accordance with (appropriate Federal statute).

Signed: _____

(by the Chair of the Secretarial Election Board and Board Members)

Date: _____; and

(4) Advise that no changes or modifications can be made to any attached document, without the Authorizing Official's prior approval.

(c) The Local Bureau Official will appoint a Bureau employee to serve as the Chair of the Secretarial Election Board and notify the tribe of the need to appoint at least two tribal members, who are at least 18 years of age, to the Secretarial Election Board. If the election is to be held as the result of a petition, then the Local Bureau Official will appoint a Bureau employee to serve as the Chair of the Secretarial Election Board and notify the tribe and the spokesperson for the petitioners of the need to appoint one tribal member each, who is at least 18 years of age, to the Secretarial Election Board. If the tribe or spokesperson for the petitioners declines or fails for any reason to make the appointment(s) by close of business on the 10th day after the date the notice letter is issued, the Chair of the Secretarial Election Board must appoint the representative(s), who are tribal members, if available, on the 11th day after the notice letter is issued.

§ 81.20 What is the first action to be taken by the Chair of the Election Board?

Within 5 days after the Secretarial Election Board representatives are appointed, the Chair must hold the first meeting of the Secretarial Election Board to set the election date.

§ 81.21 What are the responsibilities of the Secretarial Election Board in conducting a Secretarial election?

The Secretarial Election Board conducts the Secretarial election. Except as provided in § 81.43, decisions of the Secretarial Election Board are not subject to administrative appeal.

§ 81.22 How is the Secretarial election conducted?

The Secretarial Election Board:

(a) Uses the list provided in the tribal request as the basis for the Eligible Voters List;

(b) Assembles and mails the Secretarial Election Notice Packet at least 30 days, but no more than 60 days, before the date of the Secretarial election to all persons on the Eligible Voters List;

(c) Confirms that registration forms were received on or before the deadline date;

(d) Retains the completed registration form as part of the record;

(e) Develops the Registered Voters List for posting;

(f) Where the election is conducted entirely by mailout ballot, notes on a copy of the Registered Voters List, by the individual's name, the date the ballot was mailed, and the date the ballot was returned; and

(g) Where polling sites are required and an individual requests an absentee ballot, notes on a copy of the Registered Voters List, by the individual's name, the date his or her absentee ballot request was received, the date the absentee ballot was mailed, and the date the absentee ballot was returned.

§ 81.23 What documents are included in the Secretarial Election Notice Packet?

The Secretarial Election Notice Packet includes the following:

(a) Mailout Balloting:

(1) The Secretarial election notice;

(2) A registration form with instructions for returning the completed form by mail;

(3) An addressed envelope with which to return the completed registration form;

(4) If the entire document is to be amended or adopted, a copy of the proposed document including proposed language; and if applicable, a copy of the current document proposed for change; and

(5) A side-by-side comparison showing the current language to be changed, if applicable, in the left column and the proposed language in the right column.

(b) Polling Sites (if required by the amendment or adoption articles of the tribe's governing document):

(1) The Secretarial election notice;

(2) A registration form with instructions for returning the completed form by mail;

(3) An absentee ballot request form with instructions for returning the completed form by mail;

(4) An addressed envelope with which to return the completed registration form and absentee ballot request form;

(5) If the entire document is to be amended or adopted, a copy of the proposed document including proposed language; and if applicable, a copy of the current document proposed for change; and

(6) A side-by-side comparison showing the current language to be changed, if applicable, in the left column and the proposed language in the right column.

§ 81.24 What information must be included on the Secretarial election notice?

The Secretarial election notice must contain all of the following items.

(a) The date of the Secretarial election;

(b) The date which registration forms must be received by the Secretarial Election Board;

(c) A description of the purpose of the Secretarial election;

(d) A description of the statutory and tribal authority under which the Secretarial election is held;

(e) The deadline for filing challenges to the Registered Voters List;

(f) If polling sites are to be used, the date an absentee ballot request must be received by the Secretarial Election Board;

(g) A statement as to whether the Secretarial election is being held entirely by mailout ballot or with polling sites, in accordance with the tribe's governing document's amendment or adoption articles; and

(h) The locations and hours of established polling sites, if any.

§ 81.25 Where will the Secretarial election notice be posted?

The Secretarial election notice will be posted at the local Bureau office, if any, the tribal headquarters, and other public places determined by the Secretarial Election Board.

§ 81.26 How does BIA use the information I provide on the registration form?

We use the information you provide on the registration form to determine whether you will be registered for and vote in the Secretarial election. The

registration form must include the following statements:

(a) Completing and returning this registration is necessary if you desire to vote in the forthcoming Secretarial election;

(b) This form, upon completion and return to the Secretarial Election Board, will be the basis for determining whether your name will be placed upon the list of registered voters, and therefore may receive a ballot, and

(c) Completion and return of this form is voluntary, but failure to do so will prevent you from participating in the Secretarial election.

§ 81.27 Must I re-register if I have already registered for a tribal or Secretarial election?

Yes. A Secretarial election is a Federal election and you must register for each Secretarial election.

§ 81.28 How do I submit my registration form?

You must submit your registration form to the Secretarial Election Board by U.S. mail.

§ 81.29 Why does the Secretarial Election Board compile a Registered Voters List?

The Registered Voters List is a list of eligible voters who have registered and are, therefore, entitled to vote in the Secretarial election. We use this list, after all challenges have been resolved, to determine whether voter participation in the Secretarial election satisfies the minimum requirements of the tribe's governing documents and Federal law.

§ 81.30 What information is contained in the Registered Voters List?

The Registered Voters List must contain the names, in alphabetical order, of all registered voters and their voting districts, if voting districts are required by the tribe's governing document's amendment or adoption articles.

§ 81.31 Where is the Registered Voters List posted?

A copy of the Registered Voters List, showing only names and, where applicable, voting districts, must be posted at the local Bureau office, the tribal headquarters, and other public places the Secretarial Election Board designates.

§ 81.32 May the Registered Voters List be challenged?

(a) It is possible to challenge in writing the inclusion or exclusion or omission of a name on the Registered Voters List. The written challenge must be received by the Secretarial Election Board by the established deadline and include the following:

(1) The name of the affected individual or individuals;

(2) The reason why the individual's name should be added to or removed from the Registered Voters List; and

(3) Supporting documentation.

(b) If an individual failed to submit his or her registration form on time, that individual is precluded from challenging the omission of his/her name from the list.

§ 81.33 How does the Secretarial Election Board respond to challenges?

All challenges must be resolved by close of business on the third day after the date of the challenge deadline established by the Secretarial Election Board and all determinations of the Secretarial Election Board are final for the purpose of determining who can vote in the Secretarial election.

(a) If the challenge was received after the deadline, the Secretarial Election Board must deny the challenge.

(b) If the challenge was received on or before the deadline, the Secretarial Election Board will decide the challenge by reviewing the documentation submitted. Thereafter, the Secretarial Election Board will include the name of any individual whose name should appear or remove the name of any individual who should not appear on the Registered Voters List.

§ 81.34 How are the official ballots prepared?

(a) The Secretarial Election Board must prepare the official ballot so that it is easy for the voters to indicate a choice between no more than two alternatives (*i.e.*, adopting or rejecting the proposed language). Separate ballots should be prepared for each proposed amendment or a single ballot for adoption of a proposed document (with a reference to the document provided in the Secretarial election notice).

(b) The following information must appear on the face of the mailout or absentee ballot:

OFFICIAL BALLOT

(Facsimile Signature)

CHAIR, SECRETARIAL ELECTION BOARD

(c) When polling places are required by the tribe's governing document, the official ballot may be a paper ballot, voting machine ballot, or other type of ballot supporting the secret ballot process.

§ 81.35 When must the Secretarial Election Board send ballots to voters?

(a) Unless the amendment or adoption articles of the tribe's governing document require the use of polling sites in the election, the election must be conducted entirely by mailout ballots, and the Secretarial Election Board must send mailout ballots to registered voters promptly upon completion of the Registered Voters List.

(b) When the amendment or adoption articles of the tribe's governing document require the use of polling sites in the election, the Secretarial Election Board must send an absentee ballot to every registered voter who requests an absentee ballot, as long as the request is received before the Secretarial election date.

(c) All mailout or absentee ballot deliveries must be via U.S. Mail or by hand-delivery to the location identified in the Secretarial election notice before the date of the Secretarial election.

§ 81.36 What will the mailout or absentee ballot packet include?

The mailout or absentee ballot packet contains:

(a) A cover letter summarizing what the ballot packet contains and, if there is more than one ballot included in the packet, enumerating the ballots and advising voters to give consideration to each enumerated ballot;

(b) A mailout or absentee ballot (or, if several amendments are to be voted on, multiple ballots, each printed on a different colored sheet if possible);

(c) Instructions for voting by mailout or absentee ballot including the date the ballot must be received by the Secretarial Election Board;

(d) An inner envelope with the words "Mailout Ballot" or "Absentee Ballot" printed on the outside, as applicable;

(e) A copy of the proposed governing document or amendment, if the full text is not printed on the mailout ballot and if the entire document is to be amended or adopted; and

(f) A pre-addressed outer envelope with the following certification printed on the back:

I, (print name of voter), hereby certify I am a registered voter of the (name of Tribe); I will be 18 years of age or older on the day of the Secretarial election; I am entitled to vote in the Secretarial election to be held on (date of Secretarial election). I further certify that I marked the enclosed mailout ballot in secret.

Signed:

(voter's signature) _____

§ 81.37 How do I cast my vote at a polling site?

If polling sites are required by the tribe's governing document's amendment or adoption articles, the Secretarial Election Board will establish procedures for how polling site ballots will be presented and collected, including, but not limited to, paper

ballots, voting machines, or other methods supporting a secret ballot.

§ 81.38 When are ballots counted?

The ballots will be counted under the supervision of the Secretarial Election Board, after the deadline established for receiving all ballots or closing of the polls, if polling sites are required by the tribe's governing document's amendment or adoption articles.

§ 81.39 How does the Board determine whether the required percentage of registered voters have cast ballots?

The Secretarial Election Board must count the number of valid ballots and cast spoiled ballots to determine total voter participation. The Board must take the total voter participation and divide it by the total number of Registered Voters. This total is used to determine whether the percentage of Registered Voters who cast votes meets the requirements of the tribe's governing documents or Federal statute that requires at least 30 percent voter participation. For example:

(a) If there were 200 registered voters of which 75 cast valid ballots and 5 cast spoiled ballots for a total of 80 cast ballots (75 + 5 = 80). The percentage of voter participation would be determined as follows:

Total number of votes cast (80) divided by the total number registered voters (200) or 80 ÷ 200 = 0.40 or 40 percent voter participation.

(b) This example meets the Federal statutory requirement of at least 30 percent voter participation.

§ 81.40 What happens if a ballot is spoiled before it is cast?

If a ballot is spoiled before it is cast, this section applies.

(a) The registered voter may return the spoiled ballot to the Secretarial Election Board by mail or in person at the local Bureau office with a request for a new ballot before the election date. The new ballot will be promptly provided to the registered voter. The Secretarial Election Board must retain all "spoiled uncast ballots" for recordkeeping purposes.

(b) If polling sites are required, the voter may return the spoiled ballot to the polling site worker and request a new ballot. Upon receiving the new ballot, the voter must then complete the voting process. The polling site worker will mark the spoiled ballot "spoiled uncast" and record that the ballot has been spoiled. The polling site worker must retain all "spoiled uncast ballots" for recordkeeping purposes.

§ 81.41 Who certifies the results of the Election?

The Chair and all members of the Secretarial Election Board must be present during the counting of the ballots and must sign the Certificate of Results of Election.

§ 81.42 Where are the results of the Election posted?

The Secretarial Election Board must post a copy of the Certificate of Results of Election at the local Bureau office, the tribal headquarters, and at other public places listed in the election notice. The Board also has the discretion to publicize the results using additional methods, such as by posting on the tribe's Web site.

§ 81.43 How are the results of the Election challenged?

Any person who was listed on the Eligible Voters List and who submitted a voter registration form may challenge the results of the Secretarial election. The written challenge, with substantiating evidence, must be received by the Chairman of the Secretarial Election Board within 5 days after the Certificate of Results of Election is posted, not including the day the Certificate of Results of Election is posted. Challenges received after the deadline for filing challenges will not be considered. If the third day falls on a weekend or Federal holiday, the challenge must be received by close of business on the next business day.

§ 81.44 What documents are sent to the Authorizing Official?

The Chair of the Secretarial Election Board must transmit all documents pertaining to the Secretarial election to the Authorizing Official, including:

(a) The original text of the material voted on;

(b) The Eligible Voters List;

(c) The Registered Voters List;

(d) The Secretarial Election Notice Packet;

(e) Any challenges to the Secretarial election results; and

(f) The Certificate of Results of Election.

§ 81.45 When are the results of the Secretarial election final?

The Authorizing Official will review election results and challenges, if any, as follows:

(a) If a challenge alleges errors that would invalidate the election, and the Authorizing Official sustains any such challenges, the Authorizing Official must authorize a recount or call for a new Secretarial election. The Authorizing Official will take the appropriate steps necessary to provide for a recount or a new Secretarial election.

(b) If all challenges are denied or dismissed, the Authorizing Official will review and make a decision based on the following:

(1) The percentage of total votes cast was at least 30 percent, or other percentages required according to the tribe's governing document's amendment or adoption articles.

(2) The voters rejected or accepted the proposed document or each proposed amendment; and

(3) The proposed documents or amendments are not contrary to Federal law.

(c) The Authorizing Official must notify, in writing, the recognized governing body of the tribe, and the Director of the Bureau, of the following:

(1) The decisions on challenges;

(2) The outcome of the voting;

(3) Whether the proposed governing document, proposed amendment(s) or charter or charter amendments are approved or ratified, or if the proposed documents contain language that is contrary to Federal law and, therefore, disapproved; and

(4) That the decision is a final agency action.

(d) The Authorizing Official must:

(1) Forward the original text of the document, Original Certificate of Approval or Disapproval, and the Certificate of Results of Election to the tribe and a copy of all documents to the Bureau Director; and

(2) Retain, as required by the Records Disposition Schedule, a copy of all document(s) relevant to the Secretarial election.

(e) If the certified election results show that the tribal members ratified the documents, but the Authorizing Official does not approve or disapprove the governing document or amendment by close of business on the 45th day after the date of the Secretarial election, the Secretary's approval of the documents must be considered as given.

(f) The Authorizing Official's decision to approve or disapprove the governing document or amendment is a final agency action.

Subpart E—The Secretarial Election Process Under the Oklahoma Indian Welfare Act (OIWA)

§ 81.46 How does the Bureau proceed upon receiving a request for an OIWA Election if no provisions are contrary to applicable law?

If the proposed document does not contain any provision that may be contrary to applicable law, the Bureau will take the following steps.

(a) The Authorizing Official will issue a memorandum to the Local Bureau Official:

(1) Approving the proposed document or proposed amendments;

(2) Authorizing the Local Bureau Official to call and conduct a Secretarial election, within 90 days from the date of receiving the tribal request;

(3) Attaching the document or proposed language to be voted upon;

(4) Attaching the Certificate of Results of Election, with instructions to return it at the conclusion of the Secretarial election. The Certificate shall read as follows:

Certificate of Results of Election

Under a Secretarial election authorized by (name and title of authorizing official) on (date), the attached [insert: Governing document and Bylaws, charter of incorporation, amendment or revocation] of the (official name of tribe) was submitted to the registered voters of the tribe and on (date) duly (insert: adopted, ratified, rejected or revoked) by a vote of (number) for and (number) against and (number) cast ballots found spoiled in an election in which at least 30 percent (or such "percentages" as may be required to amend according the governing document) of the (number) registered voters cast their ballot in accordance with (appropriate Federal statute).

Signed: _____

(by the Chair of the Secretarial Election Board and Board Members)

Date: _____.; and

(5) Advising that no changes or modifications can be made to any of the attached documents, without prior approval from the Authorizing Official.

(b) The Local Bureau Official will appoint the Chair of the Secretarial Election Board and notify the tribe of the need to appoint at least two tribal members to the Secretarial Election Board. If the election is to be held as the result of a petition, then the Local Bureau Official will appoint a Bureau employee to serve as the Chair of the Secretarial Election Board and notify the tribe and the spokesperson for the petitioners of the need to appoint one tribal member each, who is at least 18 years of age, to the Secretarial Election Board. If the tribe or spokesperson declines or fails for any reason to make the appointment(s) by close of business on the 10th day after the date the notice letter is issued, the Chair of the Secretarial Election Board must appoint the representative(s), who are tribal members, if available, on the 11th day after the notice letter is issued.

§ 81.47 How is the OIWA Secretarial election conducted?

After the Chair of the Election Board receives the authorization of the Election, the Chair of the Secretarial Election Board will conduct the election following the procedures set out in §§ 81.19 through § 81.45 of subpart D.

§ 81.48 When are the results of the OIWA Election final?

(a) If a challenge is sustained and has an effect on the outcome of the election, the Authorizing Official must authorize a recount or call for a new Secretarial election. The Authorizing Official will take the appropriate steps necessary to provide for a recount or a new Secretarial election.

(b) If the challenges are denied or dismissed, the Authorizing Official will review and determine whether:

(1) The percentage of total votes cast was at least 30 percent, or such percentages as may be required according to the tribe's governing document's amendment or adoption articles; and

(2) The voters ratified or rejected the proposed document, proposed amendment or revocation.

(c) The Authorizing Official must notify, in writing, the recognized governing body of the tribe, and the Director of the Bureau, of the following:

(1) The decisions on challenges;

(2) The outcome of the voting; and

(3) That the proposed document, proposed amendments or revocation becomes effective as of the date of the Secretarial election; and

(4) That the decision is a final agency action.

(d) The Authorizing Official must:

(1) Forward the original text of the document, Original Certificate of Approval, and the Certificate of Results of Election to the tribe and a copy of all documents to the Director of the Bureau; and

(2) Retain, as required by the Records Disposition Schedule, a copy of all document(s) relevant to the Secretarial election.

Subpart F—Formulating Petitions To Request a Secretarial Election

§ 81.49 What is the purpose of this subpart?

This subpart establishes requirements for formulating and submitting petitions to request the Secretary to call a Secretarial election as required by the governing documents or charters of incorporation of tribes issued under the Indian Reorganization Act (IRA), 25 U.S.C. 476 and 477, as amended, and the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. 503. This Subpart may also be used by a federally recognized tribe that is adopting a governing document, under Federal statute, for the first time.

§ 81.50 Who must follow these requirements?

Any tribe meeting the criteria in paragraphs (a) or (b) of this section must follow the requirements of this subpart.

(a) A tribe whose governing document or charter of incorporation provides for petitioning the Secretary to call a Secretarial election for any of the following purposes:

(1) Amending or revoking the governing document;

(2) Amending a charter of incorporation ratified under 25 U.S.C. 477 of the IRA before May 24, 1990 where the amendments section or article specifically requires it;

(3) Amending or ratifying a charter of incorporation under 25 U.S.C. 503 of the OIWA; or

(4) Taking any other action authorized by the governing document or charter of incorporation.

(b) A federally recognized tribe, without an existing governing document, adopting a governing document under Federal statute, for the first time.

§ 81.51 How do tribal members circulate a petition to adopt or amend the tribe's governing document?

Tribal members wishing to circulate a petition to adopt or amend the tribe's governing document may submit the proposed document to the Local Bureau Official for review and comment. The Local Bureau Official may help the petitioners in drafting governing documents, bylaws, charters, amendments and revocations. The Bureau may also explain the Secretarial election process.

§ 81.52 Who may initiate a petition?

A member of the tribe who is 18 years of age or older whose tribe's governing document or charter of incorporation permits tribal members to petition the Secretary to authorize a Secretarial election.

§ 81.53 Who may sign a petition?

A member of the tribe who is 18 years of age or older may sign a petition. Where the tribe's governing document imposes additional requirements (other than age requirements) on who may petition, those requirements also apply.

§ 81.54 Who is authorized to submit a petition to the Secretary?

The petitioners must designate a spokesperson to submit the petition and act on their behalf for the petitioning process.

§ 81.55 How is the petition formatted and signed?

(a) Each page of the petition must contain:

(1) A summary of the purpose of the petition, or proposed document, or proposed amendment language;

(2) Numbered lines for each individual to print their legal name, current mailing address, date, and signature, and;

(3) The following declaration at the bottom of each page to confirm the collector was present when each signature was collected:

"I, *(Collector's Printed Name)*, hereby declare that each individual whose name appears above signed and dated the petition. To the best of my knowledge, the individual signing the petition is a member of the tribe and is 18 years or older.

(Signature of Collector)

(Notary Certification)".

(b) Each individual must print their legal name, current mailing address, date, and sign on a numbered line.

(c) Each collector must complete and sign the declaration on each page in front of a notary, who will sign and certify.

§ 81.56 Do petitions have a minimum or maximum number of pages?

A petition can have as many pages as necessary to obtain the required signatures. However, each page must have the information shown in § 81.58 of this subpart.

§ 81.57 How do I determine how many signatures are needed for a petition to be valid?

(a) For a tribe whose governing document or charter of incorporation provides for petitioning the Secretary to call a Secretarial election:

(1) The spokesperson for the petitioners may ask the tribe or the Local Bureau Official how many signatures are required.

(2) The Local Bureau Official will:

(i) Contact the tribal governing body to obtain the current number of tribal members, 18 years of age or older, to determine the number of tribal members who must sign a petition as required by the tribe's governing document; and

(ii) Notify the petitioners' spokesperson how many signatures are required and that the number is valid for 180 days from the date of this notification.

(b) For a federally recognized tribe adopting a governing document under Federal statute for the first time, the petition must have signatures of 50 percent of the tribal members who are 18 years of age or older.

§ 81.58 How long do tribal members have to gather the signatures?

Tribal members have one year from the date of the first signature to gather the required signatures.

§ 81.59 How does the spokesperson file a petition?

The spokesperson must submit the original petition to the Local Bureau Official.

§ 81.60 How does the Local Bureau Official process the petition?

(a) The Local Bureau Official must, on the date of receipt, date stamp the petition to record the Official Filing Date, and make four copies of the petition for use as follows:

(1) Posting at the local Bureau office for 30 days from the Official Filing Date, including a statement of the proposal contained in the petition and instructions for filing a challenge;

(2) Use in determining sufficiency of petition; and

(3) For viewing at the Local Bureau Office by a member of the tribe, 18 years of age or older.

(b) The Local Bureau Official must, within one week of the Official Filing Date:

(1) Provide the spokesperson written acknowledgment of receiving the petition, which contains the Official Filing Date, the exact number of signatures submitted on the petition, and the statement "The petitioners may not add or withdraw any signatures from the petition after the Official Filing Date"; and

(2) Provide a copy of the written acknowledgment of receipt and petition to the recognized tribal governing body.

(c) The Local Bureau Official must:

(1) Consult with the Office of the Solicitor to determine if any of the provisions that are the subject of the petition are or may be contrary to applicable law; and

(2) If it appears that a provision is or may be contrary to applicable law, notify the petitioner's spokesperson in writing (with a copy to the recognized tribal governing body) how the provision may be contrary to applicable law.

(d) The Local Bureau Official must promptly notify the petitioners (with a copy to the recognized tribal governing body) of any problems identified under paragraph (c) of this section at least 30 days before calling the election.

§ 81.61 How can signatures to the petition be challenged?

Any member of the tribe, 18 years of age or older, may challenge in writing the signatures appearing on the petition. The challenge must be submitted to the Local Bureau Official, within 30 days of the Official Filing Date of the petition and must:

(a) Identify the page and line on which a signature appears; and

(b) Provide documentation supporting a challenge that at least one of the following is true:

(1) A signature was forged;

(2) An individual was ineligible to sign the petition;

(3) A petition page is inconsistent or improperly formatted; or

(4) A petition page contains an incomplete or un-notarized declaration statement.

§ 81.62 How is the petition validated?

(a) The Local Bureau Official must:

(1) Confirm the petition has the required number of signatures;

(2) Indicate any signatures appearing more than once and include only one in the count;

(3) Make recommendations regarding any challenge to the validity of signatures based upon the documentation provided by the challenger; and

(4) Verify the petitioning procedures complied with this Subpart.

(5) Transmit within 45 calendar days of the Official Filing Date the original petition, challenges, and recommendations to the Authorizing Official.

(b) The Authorizing Official must within 60 calendar days of the Official Filing Date:

(1) Determine whether the petition complies with the requirements of this Subpart;

(2) Inform the spokesperson for the petitioners and the recognized tribal governing body, in writing, whether the petition is valid, the basis for that determination, and a statement that the decision of the Authorizing Official is a final agency action.

(i) If the petition is determined valid for the purposes of calling a Secretarial election, it will be deemed a "tribal request" for the purposes of this part, and the Authorizing Official will instruct the Local Bureau Official to call and conduct the Secretarial election in accordance with §§ 81.19 through 81.45 of subpart D.

(ii) If the petition is determined invalid, the Authorizing Official will notify the spokesperson for the petitioners, with a courtesy copy to the tribe's governing body, that the petition was not valid and a Secretarial election will not be called.

§ 81.63 May the same petition be used for more than one Secretarial election?

No. A petition may not be used for more than one Secretarial election. Each request for a Secretarial election requires a new petition.

PART 82—[REMOVED AND RESERVED]

■ 2. Remove and reserve part 82.

Dated: October 2, 2015.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2015–26176 Filed 10–16–15; 8:45 am]

BILLING CODE 4339–15–P

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

[Docket No. USPC–2015–01]

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The U.S. Parole Commission is adopting a final rule to apply the parole guidelines of the former District of Columbia Board of Parole that were in effect until March 4, 1985 in its parole decisionmaking for D.C. Code prisoners who committed their offenses while those guidelines were in effect.

DATES: Effective October 19, 2015.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, U.S. Parole Commission, 90 K Street NE., Washington, DC 20530, telephone (202) 346–7030. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION:

Background: The U.S. Parole Commission is responsible for making parole release decisions for District of Columbia felony offenders who are eligible for parole. D.C. Code section 24–131(a). The Commission took over this responsibility on August 5, 1998 as a result of the National Capital Revitalization and Self-Government Improvement Act of 1997 (Pub. L. 105–33). The Commission immediately enacted regulations to implement its new duties, including paroling policy guidelines at 28 CFR 2.80. 63 FR 39172–39183 (July 21, 1998). In enacting these decision-making guidelines, the Commission used the basic approach and format of the 1987 guidelines of the District of Columbia Board of Parole, but made modifications to the Board's guidelines in an effort to incorporate factors that led to departures from the guidelines. 63 FR 39172–39174. In 2000, the Commission modified the guidelines for D.C. prisoners, creating suggested ranges of months to be served based on the pre- and post-incarceration factors evaluated under the guidelines, which in turn allowed the Commission to extend presumptive parole dates to prisoners up to three years from the hearing date. 65 FR 45885–45903.

Also in 2000, the U.S. Supreme Court decided the case of *Garner* v. *Jones*, 529 U.S. 244 (2000), indicating that parole rules that allow for the use of discretionary judgment may be covered by the *Ex Post Facto* Clause of the Constitution. For over twenty years, federal appellate courts had rejected claims that the Commission's use of discretionary guidelines for parole release decisions violated the constitutional ban against ex post facto laws. As a result of the Supreme Court's decision in *Garner*, the U.S. Court of Appeals for the District of Columbia Circuit held that parole release guidelines may constitute laws that are covered by the *Ex Post Facto* Clause. *Fletcher* v. *District of Columbia*, 391 F.3d 250 (D.C. Cir. 2004) (*Fletcher II*). Following upon the *Fletcher II* decision and the decision in *Fletcher* v. *Reilly*, 433 F.3d 867 (D.C. Cir. 2006) (*Fletcher III*), the U.S. District Court for the District of Columbia (Huvelle, District Judge) held that the Parole Commission's application of its 2000 paroling guidelines for several D.C. Code prisoners violated the Ex Post Facto Clause. *Sellmon* v. *Reilly*, 551 F.Supp.2d 66 (D.D.C. 2008). Several other prisoner-plaintiffs were denied relief by the district court, which showed that not every D.C. prisoner must be reconsidered under the 1987 guidelines to avoid *ex post facto* problems. Notwithstanding that ex post facto violations must be shown on a case-by-case basis, as a matter of administrative convenience, the Commission chose to apply the same rules to all similarly situated offenders. Accordingly, the Commission enacted a rule calling for application of the 1987 D.C. Board Guidelines to any offender who committed his crime between March 4, 1985 (the effective date of the "1987 Guidelines"), and August 4, 1998 (the last day the D.C. Board exercised parole release authority) ("*Sellmon* Rule"). 74 FR 34688 (July 17, 2009) (interim rule, effective August 17, 2009) and 28 CFR 2.80(o) (November 13, 2009) (final rule).

Since the *Sellmon* decision, prisoner-plaintiffs who committed their offenses before March 1985 have sought to have the D.C. Courts find that the Commission's use of the revised 2000 parole guidelines violates the *Ex Post Facto* Clause when applied retroactively to their cases. Because of the broad discretion to grant parole which was vested in the D.C. Board of Parole under the 1972 regulations, federal courts have declined to find that Commission's use of its revised guidelines violates the *Ex Post Facto* Clause. However, the Parole Commission has decided to reconsider its use of the 2000 regulations in light of the developing case law that relates to parole guidelines and the *Ex Post Facto* Clause, and consistent with its previous decision to apply the D.C. Board of Parole's guidelines that were in effect at the time that the D.C. Code offender committed the offense, *i.e.*, the *Sellmon* rule.

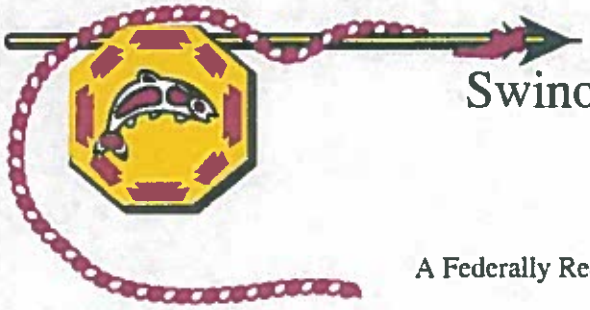
Discussion of the Rule and Public Comment: On June 15, 2015, the Parole Commission published a proposed rule in the **Federal Register** proposing new parole guidelines for D.C. Code prisoners who committed their offenses before March 3, 1985. See 80 FR 34111 (June 15, 2015). After publishing the proposed rule change, the Parole Commission received comments from 3 organizations and several private individuals. The comments were generally in favor of adopting the rule, and included additional suggestions for amendments, which are highlighted below:

Rehearings: Many commenters recommended that the rule include the provision in the D.C. Board's 1972 regulations that called for annual rehearings. The final rule restates the D.C. Board's regulation calling for annual rehearings as suggested, but includes the portion of the D.C. Board's regulation that permits the Commission to establish a rehearing date "at any time it feels such would be proper."

Statutory criteria: Many commentators recommended that the Parole Commission include a restatement of the statutory criteria for release on parole. The statutory criteria for release of D.C. Code offenders, which applies to all D.C. Code prisoners and has not changed since the 1970's, are already contained in the regulations at 28 CFR 2.73. Instead, the final rule will incorporate another section of the D.C. Board's regulations that restated the Board's discretionary authority to grant parole.

Offenses committed on March 3, 1985: Several commenters noted that the *Sellmon* rules apply to offenses after March 3, 1985, and the proposed rule would apply the 1972 guidelines to offenses before that date, leaving a void with regard to offenses committed on March 3, 1985. This suggestion was adopted and the final rule states that the

Enclosure 3



Swinomish Indian Tribal Community

Office of the Tribal Attorney
11404 Moorage Way, La Conner, WA 98257
P: 360.466.3163 F: 360.466.5309

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

May 19, 2015

RECEIVED

MAY 21 2015

BUREAU OF INDIAN AFFAIRS
PUGET SOUND AGENCY

Ricky Joseph, Acting Superintendent
Puget Sound Agency
United States Department of the Interior
Bureau of Indian Affairs
2707 Colby Avenue, Suite 1101
Everett, Washington 98201-3528

RE: Removal of Secretarial Approval and Election Language from Constitution

Dear Acting Superintendent Joseph:

On behalf of the Swinomish Indian Tribal Community, I spoke with Mary Anne Kenworthy of the Solicitor's Office some months ago concerning the Tribe's continuing desire to amend its constitution and by-laws. The Tribe began this effort back in 2003, but due to limited resources the effort languished in 2005. During that period the Tribe's attorneys worked with Ms. Kenworthy on the language of various proposed amendments. Recently, the Tribe requested that I explore further a number of legal issues with Ms. Kenworthy. To that end, I contacted Ms. Kenworthy to discuss these issues. Following our telephone conversation, I drafted and sent her the enclosed letter. Unfortunately, the letter (sent by both electronic mail and regular mail) never reached her. Since then I have learned that your Agency would prefer that the letter be directed not to the Regional Solicitor's Office directly, but rather to your agency. Please accept my apologies for this lack of protocol. I hope that the above recitation of the history of these issues explains my actions.

As I explain in the letter to Ms. Kenworthy, the question posed is: whether or not the Tribe can remove from its Constitution language requiring a Secretarial election, and ratification and approval by the Secretary of the Interior ("Secretary" or "SOI"), of future amendments to the Tribe's Constitution. I am trying to discern if there is a distinction between (1) seeking to remove Secretarial approval language from the enumerated powers section; and (2) seeking to remove Secretarial election, ratification and approval language from the amendment article. I am confident that tribes can remove the Secretarial approval language from the enumerated powers section upon holding a Secretarial election, but not as confident concerning removal of similar language (but more expansive) from the amendment article.

I have provided copies of our constitution and by-laws, the June 2004 letter from the BIA addressing this question among others (see pp. 6-7), the October 2014 Proposed regulations amending the rules for Secretarial elections (79 Fed. Reg. 61021 et seq.), and the Constitution of the Citizen Potawatomi Nation. In the attached letter to Ms. Kenworthy, I point out particular sections of each of the documents and share some of my analysis. While I did so in my telephone conversation with Ms. Kenworthy in late February of this year, I thought it might be helpful to follow up in writing. In light of Ms. Kenworthy's involvement over the years in these issues, I hope that you will see fit to continue her involvement.

Given the passage of time and that my council is meeting on June 8th, any assistance you can provide me prior to that date would be greatly appreciated.

If you have any questions, please do not hesitate to contact me at 360-708-0092 or afoster@swinomish.nsn.us.

Sincerely,

Alix Foster

cc: Brian Cladoosby