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Sequence Number: 02-13-10  
Rule ID(s): 4621  
File Date: 02/16/2010  
Effective Date: ~~05/17/2010~~

## Rulemaking Hearing Rule(s) Filing Form

*Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. TCA Section 4-5-205*

<b>Agency/Board/Commission:</b>	Commission of Indian Affairs
<b>Division:</b>	
<b>Contact Person:</b>	Mark James
<b>Address:</b>	20 <sup>th</sup> Floor L & C Tower 401 Church Street Nashville, Tennessee
<b>Zip:</b>	37243-1535
<b>Phone:</b>	(615) 532-0131
<b>Email:</b>	<a href="mailto:Mark.James@tn.gov">Mark.James@tn.gov</a>

**Revision Type (check all that apply):**

- Amendment  
 New  
 Repeal

**Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables. Please enter only ONE Rule Number/RuleTitle per row)**

Chapter Number	Chapter Title
0785-01	Recognition Criteria For Native American Indians
Rule Number	Rule Title
0785-01-.01	General
0785-01-.02	Recognition Criteria for Tennessee Native American Indian Nations, Tribes, or Communities
0785-01-.03	Procedures for Petitioning for Recognition
0785-01-.04	Changes in Membership Lists and the Roll
0785-01-.05	Administrative Review

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

## New Rules

### Chapter 0785-01 Recognition Criteria For Native American Indians

#### Table of Contents

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#### 0785-01-.01 General

##### (1) General

###### (a) Purpose

To establish criteria procedures to provide for legal recognition by the state of Tennessee of Native American Indians.

###### (b) Use of Number and Gender

As used in these Rules:

- (1) Words in the masculine gender also include the feminine and neuter genders;
- (2) Words in the singular include the plural; and
- (3) Words in the plural include the singular.

###### (c) Rule Structure

These Rules are organized, numbered, and referenced according to the following outline form:

###### (1) paragraph

###### (a) subparagraph

###### 1. part

###### (i) subpart

###### (I) item

###### I. subitem

###### A. section

###### (A) subsection

##### (2) Definitions

When used in Rules 0785-01-.01 through .05, the following terms have the meanings given below unless otherwise specified:

"Act" means Tennessee Code Annotated Section 4-34-101 et seq., Commission of Indian Affairs.

"Applicant" means Native American Indian groups applying for Nation, Tribe, or Community recognition in Tennessee.

"Commission" means the Tennessee Commission of Indian Affairs.

"List" means the updated membership list to be submitted to the Commission by applicants and recognized Nations, Tribes, and Communities.

"Nation," "Tribe," and "Community" for the purposes of these Rules, means an assembly of Indian people who are related to each other by blood or kinship and includes "band" and "clan."

"Recognized" means being acknowledged as a Native American Nation, Tribe, or Community by the State of Tennessee.

"Roll" means the official list of recognized Native American Nations, Tribes, and Communities in Tennessee.

"State" means the State of Tennessee.

Authority: T.C.A. § 4-34-103

0785-01-.02 Recognition Criteria for Tennessee Native American Indian Nations, Tribes, or Communities

- (1) Eligibility for recognition shall be determined using the following criteria:
  - (a) The applicant for recognition is indigenous to Tennessee and has been identified on a substantially continuous basis as Native American Indians throughout the history of their group;
  - (b) A majority of the applicant inhabits a particular geographic area in Tennessee or lives in a community in Tennessee viewed as Native American Indian and distinct from all other populations in the geographic area, and a majority of its members consist of individuals who have established verifiable documented descendency from an Indian tribe which has historically inhabited the State of Tennessee;
  - (c) The applicant has maintained tribal political influence or other authority over its members, or is able to demonstrate their existence as a continuous, distinct cultural entity capable of self-regulation, throughout their history until the present; and
  - (d) The membership of the applicant is composed of a majority of persons who are not members of any other North American Indian federal or state recognized tribe.
- (2) The following information shall be provided to the Commission for review:
  - (a) A copy of the applicant's present governing document and/or a statement describing in full the membership criteria and the procedures through which the group governs its affairs and members;
  - (b) A list of all known current members of the group and a copy of any available list of former members, based on the tribe's own defined criteria;
  - (c) A history of the applicant from 1900 to present (maximum of 2000 words, unless an exception is granted by the Commission) written by a professional historian or anthropologist;
  - (d) The applicant shall also submit additional information including one (1) or more of the following:
    1. Documented traditions, customs and legends that demonstrate the group's Native American Indian cultural heritage; and/or

2. Letters, statements, and documents from city, county, state, or federal authorities that document a history of tribal related business and activities that specifically address Native American Indian culture, preservation, and affairs; and/or
  3. Letters, statements, and documents from federal or state recognized tribes in and/or outside of Tennessee which attest to the Indian heritage of the group; and/or
  4. Other compelling documentation acceptable by the Commission that shows the heritage of the applicant; and
- (e) A signed and notarized statement from the officers of the applicant affirming that, to the best of their knowledge, information, and belief, the information provided is true and accurate.

Authority: T.C.A. § 4-34-103

0785-01-.03 Procedures for Petitioning for Recognition

- (1) An Application for Recognition form with appropriate instructions for completion and submission on the back shall be developed and approved by the Commission. It shall be available on request by writing to the Tennessee Commission of Indian Affairs at the address below. Complete applications and supporting documentation are to be sent to:

Tennessee Commission of Indian Affairs  
Tennessee Department of Environment and Conservation  
Office of General Counsel  
401 Church Street  
L&C Tower, 20<sup>th</sup> Floor  
Nashville, Tennessee 37243

- (2) The Commission shall appoint a Review Committee, consisting of three (3) members of the Commission, to review applications and supporting documentation for completeness and to work with applicants to achieve completeness. A record shall be maintained of all applications and appropriate information, including, but not limited to, the date received, date determined complete, date presented to the Commission and the Commission's decision. The Review Committee shall review an application within six (6) months of the submittal date.
- (3) If the application and required documentation are complete, the Committee will present the information to the Commission for review. Applicant(s) shall be notified in writing of the date, time and location of the Commission meeting at which the application is to be considered.
- (4) The Commission will either approve or deny the application within twelve (12) months of the application being determined complete by the Review Committee. The Commission may request additional information from the applicant.
- (5) The Commission will notify each applicant in writing of the Commission's decision.
- (6) Applications pending under the former Tennessee Commission of Indian Affairs may be processed using the new criteria following the effective date of these rules. Applicants shall be contacted in writing and advised accordingly. The Commission and/or the Review Committee may request the applicant to provide updated or additional information.
- (7) An applicant may, at any time prior to approval, withdraw their application and supporting documentation by writing to the Commission at the address in paragraph (1) of this Rule and may request the return of all submitted documents.
- (8) An applicant applying the recognition shall specify all submitted documentation that is to be returned to the applicant following the decision of the Commission or withdrawal by the applicant of the submitted application. All documents returned to the applicant shall be at the applicant's expense.

- (9) The roll of all approved for recognition shall be maintained current by the Commission and posted on the Commission's web site.

Authority: T.C.A. § 4-34-103

#### 0785-01-.04 Changes in Membership Lists and the Roll

- (1) Every two (2) years from their date of recognition, Nations, Tribes, or Communities recognized pursuant to the rules herein contained shall notify the Tennessee Commission of Indian Affairs of any changes in membership criteria and subsequent additions or deletions of members at the address in paragraph (1) of Rule 0785-01-.03.
- (2) Any recognized Nation, Tribe, or Community may terminate its recognition by submitting written notice to the Chairperson of the Commission. The Commission, at its next meeting, shall vote to remove the name from the roll.

Authority: T.C.A. § 4-34-103

#### 0785-01-.05 Administrative Review

Applicants (Nations, Tribes, or Communities) who disagree with the denial of their application for recognition may use the following procedure to seek a contested case hearing before the Commission pursuant to Section 4-5-223 through 225 of the Uniform Administrative Procedures Act.

- (1) When an affected applicant disagrees with the denial of an application for recognition based upon the contention that such action is an illegal application of rules and/or statutes or such action is based upon invalid rules or statutes, the applicant may petition the Commission for a declaratory order.
- (2) Upon receipt of such a petition, the Commission may convene a contested case hearing pursuant to the provisions of T. C. A. Sections 4-5-101 et seq.
- (3) The Commission may refuse to issue a declaratory order or fail to set a petition for a contested case hearing within 60 days of receipt of the petition. In either case, the affected applicant may apply for a declaratory judgment pursuant T. C. A. Section 4-5-225.

Authority: T.C.A. § 4-34-103

\* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Christine Goddard	X				
Alice Henry	X				
Tammera Hicks	X				
Charles A. Lawson	X				
James Everett Meeks	X				
Valerie Ohle				X	
Jimmie Thigpin	X				

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Commission of Indian Affairs on 01/23/2010, and is in compliance with the provisions of TCA 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 05/19/09

Notice published in the Tennessee Administrative Register on: 06/15/09

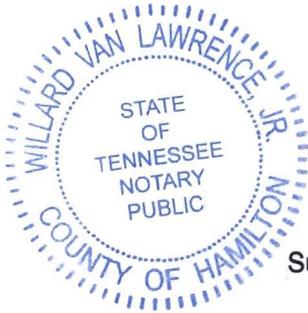
Rulemaking Hearing(s) Conducted on: (add more dates). 08/08/09

Date: 1/25/2010

Signature: Tammera Hicks

Name of Officer: Tammera Hicks

Title of Officer: Chairperson



Subscribed and sworn to before me on: 1/25/10

Notary Public Signature: Willard Van Lawrence, Jr.

My commission expires on: 2/12/11

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

RE Cooper, Jr.  
 Robert E. Cooper, Jr.  
 Attorney General and Reporter  
2-14-10  
 Date

Department of State Use Only

Filed with the Department of State on: 02/16/2010

Effective on: ~~05/17/2010~~

Tre Hargett

Tre Hargett  
Secretary of State

RECEIVED  
2010 FEB 16 PM 4:00  
SECRETARY OF STATE  
PUBLICATIONS

## Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. §4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment: Several commenters are opposed to the re-adoption of the Rules establishing recognition criteria because the rules were repealed over the commenters' objections and it left the affected parties to seek state enrollment from the Tennessee Legislature.

Response: The authority to grant recognition to a Tennessee Native American tribe currently resides only with the state legislature and the Bureau of Indian Affairs. However, because Tenn. Code Ann. § 4-34-103 grants the Commission of Indian Affairs the ability to develop criteria for recognition and to promulgate rules to effect recognition of Tennessee Native American tribes, the Commission is carrying out the duties assigned to it by the General Assembly.

Comment: Several commenters are opposed to the re-adoption of the Rules establishing recognition criteria because of a serious concern over a member of the Commission misusing private information making many feel very uncomfortable trusting giving any information to the Commission as long as this person is involved. Other commenters expressed their general distrust of the Commission as a reason to oppose adoption of these rules. Another commenter does not believe that the Commission with its current leadership should regain any duties or authority over recognition criteria.

Response: There is no mechanism within the rulemaking procedure that addresses a lack of confidence in the agency promulgating new rules.

Comment: Several commenters are opposed to the re-adoption of the Rules establishing recognition criteria because the Commission is being sunset by the Tennessee General Assembly. One commenter objected to any action taken by the Commission that closely resembles "New Business" during the time of Sunset, and considered this Rulemaking Hearing to be illegal under the Statutes of State of Tennessee.

Response: Tenn. Code Ann. § 4-29-112 states in part: "[T]ermination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity." Therefore, the Commission of Indian Affairs is authorized to carry out its duties, which include developing and enacting recognition criteria, until the date of sunset.

Comment: A commenter is opposed to the re-adoption of the Rules establishing recognition criteria because the commission, in the commenter's opinion, has a history of being ineffective in carrying out its mandates.

Response: There is no mechanism within the rulemaking procedure that addresses a lack of confidence in the agency promulgating new rules.

Comment: Several commenters believe that it is important to have recognition criteria whether or not the Commission is to be Sunset by the Tennessee General Assembly. These commenters wanted recognition to stay in the hands of Tennesseans and not with outside groups or the Legislature. In addition, these commenters believe that having good criteria protects legitimate groups from fraudulent groups being recognized.

Response: This is the primary reason why the Commission of Indian Affairs undertakes this rulemaking.

Comment: A commenter quoted paragraph (2) of Rule 0785-01-.03, which reads as follows: "The Commission shall appoint a Review Committee, consisting of three (3) members of the Commission, to review applications and supporting documentation for completeness and to work with applicants to achieve completeness. A record shall be maintained of all applications and

appropriate information, including, but not limited to, the date received, date determined complete, date presented to the Commission and the Commission's decision. The Review Committee shall review an application within six (6) months of the submittal date." The commenter said this issue affects the whole Tennessee indigenous American Indian Population. Since the Commission has issues individually, a selection of a subset of the Commission will be viewed even more critically. In the opinion of the commenter, it would seem best that the whole Commission be a part of the endeavor.

Response: The Commission of Indian Affairs maintains the ultimate authority granted by the General Assembly (Tenn. Code § 4-34-103) to create the process as contained in the proposed rules.

Comment: A commenter suggested that an appointment from the Speaker of the Tennessee House of Representatives and an appointment by the Lt. Governor to work with the Commission to maintain propriety would be most helpful in allaying the fears of those who do not trust the Commission in part or in whole.

Response: The suggestion of additional oversight over the Commission of Indian Affairs is outside the purview of the current statute (Tenn. Code Ann. § 4-34-101 et seq.) that governs the affairs of the agency. Any additional procedures or entities involved with the agency would necessarily be addressed by new legislation by the General Assembly. As such, the agency would direct the commenter(s) to their representative or senator who serves their district in the General Assembly to effect the suggested changes in the statute.

Comment: A commenter states that the need to reinstate Native American Recognition Criteria is obvious on its face and upon serious examination of the facts of economic deprivation faced by Native Americans in Tennessee. The state does not accord minority status to Native Americans residing within its borders. Artisans wishing to promote their works as Native American artwork are prohibited from doing so as a Tennessee Native American under current conditions. Programs, capable of providing support services for Native Americans that are eligible for federal assistance funding or enhancement cannot presently apply for that assistance because of the lack of state recognition criteria. Educational programs designed to augment state school systems in servicing Native American children are going without those designated federal funding dollars because Tennessee lacks state recognition criteria.

Response: The proposed recognition criteria rules, if enacted, would convey minority status of any tribes recognized by the Commission of Indian Affairs. See Tenn. Code Ann. § 4-34-202.

Comment: A commenter suggested doing away with TNNAC and their non-profit status, doing away with ACTIA and their non-profit status, and doing away completely with the Commission of Indian Affairs. The Commenter desires the establishment of a new Tennessee Counsel of Indian Affairs (like the State of Virginia) to manage recognition in Tennessee. The commenter is against the present system because of the lack of State Control, and believes that State Control is necessary to prevent system being controlled by outside sources.

Response: As previously discussed, the Commission of Indian Affairs is currently undergoing sunset review by the Joint Operations Committee and will be cease to exist as a state agency on June 30, 2010 if the agency is sunset. However, the state lacks the ability to terminate the Tennessee Native American Convention (TNNAC) or the Advisory Council on Tennessee Indian Affairs (ACTIA) or to declare the taxation status as other than what TNNAC or ACTIA have undertaken as private organizations.

Comment: A commenter suggested adding definitions to the rules for the terms "Band or Tribe," "Nation," "Community," and "Area of Known Historical Occupancy" and provide suggested language for those definitions.

Response: The Commission finds the definition in the proposed rule to be sufficient at this time.

Comment: One commenter submitted language designed to amend Title 4 of the statute.

Response: Amending state law is beyond the capability of the Commission of Indian Affairs and the Commission suggests the commenter take the suggested statutory language to the Tennessee General Assembly.

### **Regulatory Flexibility Addendum**

Pursuant to Public Chapter 464 of the 105<sup>th</sup> General Assembly, prior to initiating the rule making process as described in § 4-5-202(a)(3) and § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

(If applicable, insert Regulatory Flexibility Addendum here)

- (1) Type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, and/or directly benefit from the proposed rule:

The proposed rule would conceivably result in conferring legal minority status to citizens who are able to satisfy the necessary requirements for being recognized as members of a tribe by the State of Tennessee. The tangential connection to small business administration applications presented by the proposed rule is that of the assurances to minority-owned businesses provided by Title VI and the Civil Rights Restoration Act of 1987. These laws, through legally-required implementation protocol (TDEC and EPA name this "Fair Share Objectives"), requires local and state governments that receive federal money to establish systems of due diligence in actively soliciting the participation of minority business enterprises ("MBE's") in fulfilling government contracts. While no precise quota is required in complying with Title VI, guidance typically aims to employ the services of MBE's for at least 10 percent minority share of government contractual goods and services.

- (2) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record:

Because the Commission of Indian Affairs is prevented from using the General Fund by Tennessee Code Ann. § 4-34-105, the costs of the recognition review process will necessarily be paid by money raised by donative transfers on behalf of the Commission of Indian Affairs.

- (3) A statement of the probable effect on impacted small businesses and consumers:

Because of the possible increase in the number of minority business enterprises due to the benefits conferred by the proposed rule, it is possible that the rule could increase competition in the small business community.

- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and/or objectives of the proposed rule that may exist, and to what extent, such alternative means might be less burdensome to small business:

No alternatives are known.

- (5) A comparison of the proposed rule with any federal or state counterparts:

The proposed state rule for tribal recognition were patterned after 25 CFR 83.7.

- (6) Analysis of the effect of the possible exemption of small business from all or any part of the requirements contained in the proposed rule:

Because the proposed rule only deals with the criteria for tribal recognition, it does not apply specifically to small businesses.

## Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to TCA 4-5-226(i)(1).

- (A)** A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This rulemaking consists of a proposal to adopt Rules 0785-01-.01 through .05 of Rule Chapter 0785-01 Recognition Criteria for Native American Indians. These proposed rules are word-for-word the same as the rules that were effective on June 24, 2007 and remained in effect until they were Repealed on May 13, 2008.

- (B)** A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

The Commission of Indian Affairs is charged with the statutory duty imposed by Tenn. Code Ann. § 4-34-103(6) to “[e]stablish appropriate procedures to provide for legal recognition by the state of presently unrecognized tribes, nations, groups, communities or individuals, and to provide for official state recognition by the commission of such.”

- (C)** Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Naturally, people of Native American descent will be the only parties affected by this proposed rule. There appears to be strong support of the proposed rule from Tennessee citizens of Native American descent who wish to receive recognition for themselves and their communities. The Cherokee Nation of Oklahoma is the only federally-recognized tribe that has maintained a presence in Tennessee to oppose enactment of the recognition criteria rule. From within the state, some Native American communities and individuals have expressed opposition to the rule for a variety of stated reasons. Please refer to the public comments section for their specific concerns.

- (D)** Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

Op. Tenn. Att’y Gen. No. 07-21 (February 27, 2007) opines that the State of Tennessee has the authority to recognize tribes so long as no conflict exists between federal and state laws governing such recognition.

- (E)** An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

There is no foreseeable increase or decrease in state and local government revenues and expenditures that would result from enactment of the proposed rule.

- (F)** Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Alan Leiserson, Legal Services Director (532-0131)  
Mark James, Assistant General Counsel (532-0131)

- (G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Alan M. Leiserson  
Legal Services Director  
[Alan.Leiserson@tn.gov](mailto:Alan.Leiserson@tn.gov)

Tennessee Department of Environment and Conservation

- (H) Office address and telephone number of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Office of General Counsel  
Tennessee Department of Environment and Conservation  
20<sup>th</sup> Floor L & C Tower  
Nashville, Tennessee 37243-1548  
(615) 532-0131

- (I) Any additional information relevant to the rule proposed for continuation that the committee requests.

Although Representative Kernel, during the August 1, 2006 review of the then-existing recognition criteria rule, advised the Commission of Indian Affairs to reconsider said rule, the Commission elected by resolution to re-enact said rule at the behest of the Advisory Council on Tennessee Indian Affairs.