

*Tribal Consultation: Draft Revisions to Federal  
Acknowledgment Regulations (25 CFR 83)*

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*Morning Session  
July 23, 2013*



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Tribal Consultation  
Draft Revisions to Federal Acknowledgment  
Regulations (25 CFR 83)

Seven Feathers Casino Resort  
Canyonville, Oregon

July 23, 2013

APPEARANCES:

LARRY ROBERTS, Deputy Assistant  
Secretary - Indian Affairs

KAITLYN CHINN, Office of the Solicitor -  
Division of Indian Affairs

ELIZABETH APPEL, Office of Regulatory  
Affairs - Indian Affairs

1 TUESDAY, JULY 23, 2013

2 9:05 A.M.

3 \* \* \* \* \*

4 LARRY ROBERTS: Good morning,  
5 everyone. We're going to go ahead and get started  
6 here this morning. This is the tribal consultation  
7 session with federally recognized tribes, and then  
8 this afternoon we'll also be having a public meeting  
9 from 1:00 to 4:00.

10 I want to start off by just  
11 introducing myself. My name is Larry Roberts. I'm  
12 a member of the Oneida Nation of Wisconsin. I'm the  
13 principal deputy assistant secretary for Indian  
14 Affairs. I started at the department in September  
15 of last year.

16 I want to say thank you to the Cow  
17 Creek Tribe for hosting this consultation and public  
18 meeting session this afternoon. Unfortunately, my  
19 understanding is that representatives from the Cow  
20 Creek Tribe could not attend this morning's session,  
21 but I want to thank them for attending.

22 Before we dig into things here, I  
23 think for the structure of this morning, what we're  
24 thinking about doing is having folks go around the  
25 room and introduce themselves, since we have such a

1 small group here. Folks in the back can -- I know  
2 everyone wants to sit in the front row, and so we  
3 can all get together.

4 It looks like we have a small enough  
5 group here that we can have a good conversation this  
6 morning. This is a preliminary discussion draft,  
7 and as we'll talk about later in the PowerPoint,  
8 this is the first step toward rule making. So we're  
9 reaching out to tribes to consult very early on  
10 before we even move forward with the rule making. I  
11 also want to just let everybody know that we have  
12 coffee and drinks in the back, so please make  
13 yourselves welcome and have those sort of drinks.

14 And so what we'll do is start this  
15 morning -- if folks wouldn't mind, I'm just going to  
16 pass the microphone around here and introduce  
17 yourselves just so that we know who is here and who  
18 is attending the consultation. Thank you.

19 MARK JAMES: Mark James. I'm with  
20 Muckleshoot Indian Tribe, tribal council member.

21 VIRGINIA CROSS: Virginia Cross --  
22 (inaudible)--

23 THE REPORTER: I can't understand her.

24 LARRY ROBERTS: The microphone is on,  
25 but we have a court reporter here and she has to get

1 down your names and the tribes, so if we could just  
2 try that one more time just so that the record is  
3 clear. Because what we'll do as a result of this  
4 consultation then, and in all the consultations, is  
5 we'll put these up on our website so people can see  
6 sort of what comments were made by various tribes  
7 and the public as we're going through the process.  
8 Thank you.

9

10 MARK JAMES: Can you hear me now?

11 THE REPORTER: I can hear you.

12 MARK JAMES: Mark James, Muckleshoot  
13 Indian Tribe, Washington State.

14 VIRGINIA CROSS: Virginia Cross,  
15 Muckleshoot Indian Tribe.

16 RICHARD REICH: Richard Reich,  
17 R-e-i-c-h, tribal attorney with Muckleshoot Indian  
18 Tribe.

19 LOUIE UNGARO: Louie Ungaro,  
20 Muckleshoot Indian Tribe.

21 GARY RICKARD: Gary Rickard,  
22 R-i-c-k-a-r-d, and I'm with the Wintu Tribe of  
23 Northern California.

24 SHARON EDENFIELD: Good morning,  
25 Sharon Edenfield from the Confederated Tribe of

1 Siletz.

2 ROBERT KENTTA: Robert Kentta, Siletz  
3 tribal council and cultural resources director.

4 CLARENCE SIVERTSEN: I'm Clarence  
5 Sivertsen from the Little Shell Tribe of Chippewa  
6 Indians of Montana and first vice chair.

7 ANN LEWIS: Confederated Tribes of  
8 Grand Ronde.

9 JENNIFER BRESACK: Jennifer Bresack,  
10 staff attorney for Confederated Tribes of Grande  
11 Ronde.

12 LARRY ROBERTS: Okay. So we have a  
13 relatively small group here. It sounds like we have  
14 a couple of folks here from nonfederally recognized  
15 tribes.

16 Is there any concerns or objections  
17 with having those folks sit in this morning on the  
18 session?

19 (No response.)

20 LARRY ROBERTS: Okay. I haven't heard  
21 any concerns or objections, so we'll just go  
22 forward. Again, this is the tribal consultation  
23 session. There will also be a session this  
24 afternoon for the public. And before we get  
25 started, I want to have my folks here introduce

1 themselves and let you know where they are working  
2 within Department of Interior and their role in the  
3 regulatory process.

4                   LIZ APPEL: Hi, everyone. My name's  
5 Liz Appel. I'm with the Office of Regulatory  
6 Affairs and Collaborative Action, and we report to  
7 the assistant secretary for Indian Affairs.

8                   KAITLYN CHINN: My name is Katie  
9 Chinn. I'm a citizen of the Wyandotte Nation of  
10 Oklahoma. I'm also an attorney in the solicitor's  
11 office division of Indian Affairs.

12                   LARRY ROBERTS: Okay. So what we're  
13 hoping for this morning is for us to run through the  
14 PowerPoint, give a general overview of the  
15 preliminary discussion draft, and then really turn  
16 it over to all of you to -- because what we want to  
17 get out of this process is comments and feedback of  
18 the discussion draft, so that we can consider those  
19 comments and feedback as we're moving forward with a  
20 proposed rule.

21                   So in your packet of materials --  
22 everyone get a packet of materials as they were  
23 coming in?

24                   Okay. In that packet of materials  
25 there's a PowerPoint and we'll run through that. It

1 should take, hopefully, about 15 minutes, and then  
2 we'll turn it over to the group for comments and  
3 questions.

4 Does anyone have any opening  
5 statements that you would like to make before we get  
6 started with the PowerPoint?

7 (No response.)

8 LARRY ROBERTS: Okay. So in terms of  
9 how tribes are federally recognized, there's  
10 essentially three ways that the United States  
11 recognizes tribes. One is the judicial branch, the  
12 court decision. Congress has enacted legislation to  
13 recognize tribes. And then there's administratively  
14 the Department of Interior has recognized tribes  
15 through its processes.

16 Prior to 1978 these decisions were  
17 made by the department on a case-by-case basis. And  
18 basically tribes would submit information to the  
19 department asking to be federally recognized or  
20 saying that they had a federal relationship with the  
21 department, but we're not receiving services.

22 In 1978 the department promulgated  
23 regulations to establish a process to basically look  
24 at and consider those petitions. Those were then  
25 revised in 1994. Primarily in 1994 the department

1 looked at many of the regulations to provide a  
2 process for previous unambiguous federal  
3 acknowledgment so that if a tribe was federally  
4 acknowledged in the past, that that would be taken  
5 into account as part of this administrative process  
6 to recognize tribes.

7 Over the years, in 2000, 2005, and  
8 2008, the department has issued guidance essentially  
9 to the Office of Federal Acknowledgment, which is  
10 within the assistant secretary's office, and to  
11 petitioners in the public in terms of how the  
12 regulatory process would work. So today we have 566  
13 federally recognized tribes; of those 566 federally  
14 recognized tribes, 17 have been recognized through  
15 the process that was put into place in 1978 to the  
16 present.

17 So the need for revisions, why the  
18 department is looking at the Part 83 process now?  
19 We have heard criticisms by the public that it  
20 takes -- the process takes too long, that it's  
21 burdensome, that it's expensive, that it costs  
22 millions of dollars to go through the process.  
23 Criticisms have been that the process itself is  
24 unpredictable and that we need more objective  
25 criteria and we need more clarity in terms of what

1 proof is sufficient for the process.

2           And then, finally, there have been  
3 criticisms that the process itself is not  
4 transparent, that a petition can be submitted and  
5 then there's lack of clarity in terms of how that  
6 petition is processed as it makes its way through  
7 the department.

8           So this effort here to look at the  
9 Part 83 regulations is something that was started  
10 very early on in the Obama administration.  
11 Secretary Salazar committed in 2009, before the  
12 Senate Committee on Indian Affairs to examining ways  
13 to improve the process. In addition, the Senate  
14 Committee on Indian Affairs held an oversight  
15 hearing in 2009 in which the acting principal deputy  
16 assistant secretary testified. And at that hearing  
17 a number of senators, including Senator Dorgan,  
18 Senator Tester, and others essentially labeled the  
19 process as broken.

20           And the deputy assistant secretary  
21 testified that the department would be moving  
22 forward with a proposed rule in one year back in  
23 2009. Assistant Secretary Echo Hawk at that time  
24 had expressed his concern about the acknowledgment  
25 process during his confirmation process and that

1 they needed to look at how to improve the process.  
2 And some of the things that the department testified  
3 at that time was looking at the process to eliminate  
4 unneeded steps, to take a hard look at the  
5 standards, and to have clear standards. And  
6 basically, the department in 2009 said it would take  
7 about a year for a proposed rule and then about a  
8 year to finalize that rule.

9 In 2010, following up on that  
10 testimony before the senate committee, the  
11 department worked to consider revisions to  
12 regulations. And then in 2012, the department again  
13 testified before the Senate Committee of Indian  
14 Affairs, and at that hearing, the department  
15 identified sort of guiding principles in terms of  
16 what the department was looking at to improve the  
17 process.

18 And at that 2012 hearing Senator  
19 Barrasso and others expressed concern about the  
20 department not meeting its earlier stated timelines  
21 to improve and reform the Part 83 process.

22 So when Assistant Secretary Washburn  
23 and I joined the department last fall, this was  
24 something that the department had already put a lot  
25 of work into and a lot of effort on, in terms of how

1 to improve the process. And earlier this year, the  
2 assistant secretary testified before the House  
3 subcommittee about the process that we would be  
4 taking and where we are in terms of looking at  
5 reforms to the Part 83 process.

6 And so at that time that he testified,  
7 we had formed a work group within the Department of  
8 the Interior consisting of Liz and Katie and others  
9 from the solicitor's office, and from the assistant  
10 secretary's office, and from the Office of Federal  
11 Acknowledgment, in terms of pulling together ideas  
12 and concepts for improvement.

13 And so the goals of these revisions  
14 are sort of the function around the five goals that  
15 were set forth by the department in its 2012  
16 testimony: Basically, improving transparency,  
17 improving timeliness, improving efficiency,  
18 flexibility, and then maintaining the integrity of  
19 the process.

20 So that's a little bit of background  
21 in terms of how we got to the discussion draft that  
22 we have before us today. And in sort of broad  
23 strokes what the discussion draft proposes to do is  
24 it proposes to eliminate the letter of intent. And  
25 so for those of you who are familiar with the

1 current process under the Part 83, the initial step  
2 is for a petitioner to submit a letter to the Office  
3 of Federal Acknowledgment saying that it intends a  
4 petition for federal acknowledgment. And after that  
5 it can take years before a petitioner submits an  
6 actual documented complete petition. So one of the  
7 things that the discussion draft does is it proposes  
8 to eliminate that initial letter of intent and  
9 really start the process with an actual petition.

10           The other sort of -- and I'll talk a  
11 little bit more in detail on each of these, but some  
12 of the other overarching changes that the discussion  
13 draft proposes is to add expedited favorable and  
14 negative decisions. So that if it's clear that a  
15 petitioner doesn't meet a particular criteria, that  
16 the department essentially conserve its resources by  
17 issuing a negative decision based on a handful of  
18 criteria.

19           On the opposite end of the spectrum,  
20 if there are criteria that a petitioner satisfies,  
21 then the discussion draft proposes to have an  
22 expedited favorable finding as well.

23           The discussion draft attempts to  
24 clarify some of the criteria. We've put in  
25 placeholders in terms of asking for additional

1 objective criteria so that anyone going through the  
2 regulations can say: Okay. The regulation says X.  
3 If I don't meet X, then I know that I can't satisfy  
4 that criteria. So we want objective criteria.

5 This would -- under the current  
6 process, petitioners aren't allowed to withdraw  
7 their petitions. And I don't know that that happens  
8 a lot in federal service where you submit an  
9 application, but you're not allowed to withdraw it.  
10 And so this would -- the discussion draft allows a  
11 petitioner to withdraw their petition so long as we  
12 haven't started active consideration on it and  
13 started actually putting resources to evaluating  
14 that petition.

15 It provides for an automatic final  
16 determination in certain circumstances, and it  
17 also -- what we're looking for feedback from all of  
18 you on is who should issue the final determination.  
19 So the discussion draft leaves a placeholder.  
20 Should the assistant secretary of Indian Affairs  
21 issue the final determination, which is how the  
22 process currently works, or should the Office of  
23 Hearing and Appeals, which is a body that is  
24 independent of the department, sort of an  
25 administrative judicial body -- should they issue

1 the final decision based on information received by  
2 the department?

3           And then finally this discussion draft  
4 would eliminate the Interior Board of Indian Appeals  
5 review. To the best of my knowledge, this is the  
6 only decision that the assistant secretary makes  
7 that is actually subject to the IBIA review. And so  
8 this discussion draft would eliminate that. So that  
9 if there was, let's say, a denial of federal  
10 recognition, denial of petition, that it would go  
11 directly to federal court.

12           So quickly, as I said earlier, it  
13 eliminates the letter of intent. The process would  
14 begin by the filing of the actual petition. In  
15 terms of how we would handle this in the transition,  
16 OFA, the Office of Federal Acknowledgment would  
17 still keep the prior letters of intent based on that  
18 original filing date. If this discussion draft were  
19 finalized, we'd no longer require those in the  
20 future.

21           And then, basically, the discussion  
22 draft sets forth how we would move forward with  
23 those petitions in terms of timing and when we  
24 receive them. The process essentially works that  
25 it's first in/first out. So if you get a petition

1 in before somebody else, generally speaking, the  
2 department addresses your petition first.

3 In terms of expedited decisions, we  
4 have a discussion draft. In the discussion draft it  
5 sets forth criteria for expedited negative findings.  
6 And so those criteria would essentially be if the  
7 petitioner does not satisfy descent from a  
8 historical Indian tribe or that its members are  
9 composed primarily of members of an already  
10 federally recognized tribe, or if federal  
11 legislation prohibits us from recognizing the tribe.

12 If the petitioner was basically not  
13 able to satisfy those criteria, we would issue an  
14 expedited decision, and that decision would be  
15 issued within six months after we started active  
16 consideration of the petition. So that would be  
17 sort of a threshold cut. And if the petitioner then  
18 satisfied those three criteria -- and we would look  
19 at those for all petitioners -- if the petitioner  
20 satisfied those three criteria, then we would  
21 proceed to either a full evaluation of the petition  
22 or if the petitioner was saying, Hey, I qualify for  
23 an expedited favorable finding, we would then move  
24 forward with an expedited favorable review.

25 So the next section is for an

1 expedited favorable review, what we would look for  
2 is whether the petitioner has maintained, since 1934  
3 to the present, a reservation recognized by the  
4 state and that is continued to be held as a state  
5 reservation; or if the United States has held land  
6 for the group at any point in time since 1934.

7           And the reason that -- and you'll see  
8 in some of the other criteria moving forward, the  
9 reason that we have 1934 is that that is when the  
10 United States changed its federal Indian policy from  
11 one of allotment and assimilation to the Indian  
12 Reorganization Act and promoting tribal  
13 self-determination. And so that change in federal  
14 policy was 1934, and so the discussion draft picks  
15 that date and time.

16           If the petitioner would satisfy either  
17 one of these two criteria, then like the negative  
18 determinations, we would issue a decision within six  
19 months of beginning active consideration. If a  
20 petitioner asserted that they had a state  
21 reservation since 1334 to the present, but they  
22 actually haven't, or that the United States never  
23 held land for the group, then the department would  
24 make that determination and process the petitioner  
25 through the full process through a full evaluation.

1                   GARY RICKARD: Can I ask a quick  
2 question? If U.S. held land for a group at any  
3 point since 1934, does that also include if it was a  
4 federal court that ordered the holding of the land?

5                   LARRY ROBERTS: I think we would have  
6 to look at that. It sounds like it's pretty fact  
7 specific, but I think what the discussion draft is  
8 focused on is did the United States hold land for  
9 that group. And if it did via court order, that's  
10 something that we would consider, but that would  
11 be -- it's either we did or we didn't essentially.  
12 So if we did pursuant to court order, then we would  
13 look at that and process it appropriately.

14                   Does that make sense? I mean, if we  
15 held land for the group at any time from 1934 to the  
16 present, then they would qualify for an expedited  
17 favorable.

18                   GARY RICKARD: The court order would  
19 also satisfy that?

20                   LARRY ROBERTS: Potentially. I think  
21 we'd have to look at the specific facts of the court  
22 order, that it was held for a group, that sort of  
23 thing.

24                   Okay. So adjustments to the criteria  
25 themselves. The discussion draft deletes Criteria

1 A. And Criteria A essentially provides that the  
2 petitioner must show from 1900 to the present  
3 generally, that an external entity, a non-Indian  
4 entity, had documented that they had seen and  
5 observed the tribe. So this discussion draft  
6 deletes that criteria.

7 I think a general thought is if a  
8 petitioner meets all of the other criteria and can  
9 show community, local authority, descent from a  
10 historic tribe, but yet there was no non-Indian  
11 entity out there writing that they were observing a  
12 tribe, does that make it any less of a tribe?

13 In terms of Criteria B, which is  
14 looking at community, and Criteria C, the exercise  
15 of political authority and political influence, the  
16 criteria would be changed and set up from time of  
17 first non-Indian contact. It would move that date  
18 to 1934. Again, looking at the shift of federal  
19 policy from one of allotment and assimilation to  
20 tribal self-determination.

21 In terms of Criteria E, the descent  
22 from a historical tribe, we would essentially keep  
23 that criterion the same. We wouldn't -- the  
24 discussion draft doesn't propose moving that date up  
25 to 1934, but instead what it would allow -- right

1 now my understanding is that descent from a historic  
2 tribe would rely primarily on proof from a  
3 genealogist, and the discussion draft would allow  
4 historians and anthropologists' conclusions as  
5 evidence of descent from historic tribe.

6           And then finally the discussion draft  
7 specifically leaves placeholders in terms of the  
8 regulations provide certain criteria -- say, for  
9 example, a percentage of members are comprised  
10 descent from a historic. We left those just as  
11 placeholders to get comment from all of you in terms  
12 of what those percentages numbers should be. So for  
13 example, community, what percentage should comprise  
14 a distinct community? What percentage should reside  
15 in a specific geographic area?

16           In terms of withdrawals and automatic  
17 final determinations, the discussion draft attempts  
18 to provide flexibility of the process by allowing  
19 the petitioner to withdraw the petition at any time  
20 before the proposed finding is published.

21           If a petitioner does that, if they  
22 withdraw their petition before the proposed finding  
23 is published, then the department will cease  
24 consideration of it upon its withdrawal, but that  
25 petitioner then moves essentially to the end of the

1 list and loses its place in line of consideration.

2 In terms of automatic final  
3 determinations, the discussion draft attempts to  
4 incorporate what the department has been doing  
5 essentially by process, by practice, and that is if  
6 a proposed finding is positive, and there is no  
7 opposition or arguments opposed to the recognition  
8 from either a tribe located in the same state or  
9 from the state or local governments and no one is  
10 testing the proposed finding, then that proposed  
11 favorable finding would become automatically final.

12 One of the larger issues that we're  
13 looking for feedback on is in terms of who issues a  
14 final determination. So those of you that are  
15 familiar with the process, currently how it works is  
16 the Office of Federal Acknowledgment works with the  
17 petitioner to review the petitioner, identify ways  
18 in which the petition can be improved, and then  
19 provides the assistant secretary a draft proposed  
20 finding, the assistant secretary issues the proposed  
21 finding. Comments are then received on that. And  
22 then the assistant secretary issues a final  
23 determination, and then there's an appeals process.

24 In the discussion draft what we've  
25 essentially tried to capture is maintaining the

1 current process for a proposed finding, but then  
2 after that proposed finding is issued, asking for  
3 comment on whether that process should then  
4 transition over to the Office of Hearings and  
5 Appeals and basically having them -- the proposed  
6 finding and the materials and whatever materials are  
7 submitted by the petitioner responsive to the  
8 proposed finding and the interested parties in  
9 response to the proposed finding -- that would all  
10 transition over to an administrative law judge to  
11 review those materials, to take any sort of legal  
12 arguments or factual arguments that the parties  
13 wanted to provide. And then, essentially, the  
14 Office of Hearings and Appeals would issue a final  
15 determination.

16           And so we're looking for comment in  
17 terms of that process. We've heard some parties  
18 make comment, to the Senate committee and others,  
19 that the process is too political. And we've heard  
20 other comments on the other side, that the assistant  
21 secretary should be responsible for making these  
22 determinations, and so it's appropriate within the  
23 assistant secretary's office, and this is  
24 essentially a concept that we wanted to get public  
25 input on.

1           As I mentioned early on, the  
2 discussion draft deletes an Interior Board of Indian  
3 Appeals review of a final determination. So what  
4 that would essentially in practical effect do is  
5 once the assistant secretary issues a final  
6 decision, it would move directly to federal court if  
7 it was to be challenged.

8           So we're getting a little bit ahead of  
9 ourselves in terms of the process itself, but the  
10 discussion draft -- we thought it important to sort  
11 of lay out what rules would apply if this discussion  
12 draft were to become final to those petitioners who  
13 are currently in the process.

14           And so what the discussion draft  
15 proposes for those petitioners who are currently in  
16 the process, if they haven't reached active  
17 consideration as of the effective date of the new  
18 regulation, then they would -- if they weren't under  
19 direct consideration at the time, they would be  
20 processed under the new regulation. Anyone who is  
21 under active consideration, if and when these rules  
22 would go final, they could choose to complete the  
23 process under the new version of the regs, rather  
24 than the existing regulations.

25           And then, again, if a petitioner has

1 been denied federal acknowledgment under the  
2 existing regulations, this process provides for an  
3 opportunity to re-petition, if that petitioner can  
4 show by a preponderance of evidence that the changes  
5 from the previous version, from the existing version  
6 of the regulations, warrants reversal of a final  
7 determination. And that decision will be made by  
8 the assistant secretary or the Office of Hearings  
9 and Appeals.

10           The concept behind that is that the  
11 Senator Dorgan and others have testified that the  
12 process is broken currently. So if the process is  
13 currently broken, we want to have a narrow mechanism  
14 for those petitioners that would qualify to be able  
15 to have a fair review of their petition under the  
16 new regulations.

17           So a number of other points that we're  
18 seeking comment on -- and again -- and I should have  
19 said this at the outset, but today all of your oral  
20 comments will be made part of the record, but we  
21 would appreciate any written comments you would  
22 have, that you submit them to Liz by August 16 so  
23 that we can consider those as we're moving forward  
24 with the proposed ruling.

25           Some of the things we're seeking

1 comments on are: What definitions, if any, should  
2 be revised in the current regulations. Would a  
3 standard form of petition be helpful to petitioners?  
4 Would it be something that -- you know, again it  
5 would be optional, but would it be helpful for  
6 petitioners to have that sort of framework or  
7 guidance in terms of what a petition should include.

8 As I mentioned earlier, we're seeking  
9 comment on community. How can we make the community  
10 standard more objective and transparent? And so  
11 you'll see placeholders in the rule in terms of  
12 particular percentages, but we're also looking for  
13 comment in terms of maybe there's a standard out  
14 there that the department hasn't thought of that we  
15 should consider in terms of an objective standard  
16 for community.

17 The same thing for the other criteria,  
18 essentially, political influence and descent from a  
19 historical tribe. What objective criteria, if any,  
20 should the department include in any proposed rule  
21 as we move forward?

22 And, finally, we're looking for  
23 comments in terms of on what page limits, if any,  
24 should apply to this process, in terms of a petition  
25 itself -- not talking about the underlying

1 historical documents that would need to be submitted  
2 as part of a petition, but actually the petition  
3 itself, should we have page limits on that? Should  
4 the department impose page limits on its proposed  
5 finding. OFA's report in support of proposed  
6 finding. Any sort of arguments in response to that  
7 proposed finding. We're looking for input on how we  
8 can improve that process and make it more efficient.

9           And so with that, at the end of your  
10 materials is information in terms of where you can  
11 submit written comments. In terms of our next  
12 steps, what we're hoping to move forward with is  
13 after the public comment period closes on  
14 August 16th. We will then work internally to review  
15 those comments, prepare a proposed rule, and then  
16 that proposed rule would trigger another round of  
17 tribal consultation and comment, public comment  
18 input on the proposed rule.

19           The department would then -- after  
20 receiving the public comment input on the proposed  
21 rule, then look at those comments and decide how to  
22 move forward on a final rule. So this is -- that's  
23 the normal rule-making process as the department  
24 generally just issues a proposed rule.

25           What we're trying to do here is get

1 input very early on into these processes so that we  
2 can consider those before we put out our proposed  
3 rule. And so with that -- I don't know if Liz or  
4 Katie have anything to add at this point. I think  
5 we're happy to open it up to the floor and hear your  
6 comments.

7 LIZ APPEL: And just a reminder, if  
8 you would, before speaking, introduce yourself again  
9 for the court reporter.

10 VIRGINIA CROSS: Good morning. Thank  
11 you for coming today. My name is Virginia Cross.  
12 I'm chairperson of the Muckleshoot Indian Tribe near  
13 Seattle, Washington. We are concerned that the  
14 proposed rules would affect many of the recognized  
15 tribes drastically.

16 The proposal substantially lowers the  
17 threshold pressure for acknowledgment by eliminating  
18 portions of the existing regulation framework that  
19 limit the acknowledgment process to groups that can  
20 establish a continuous as existing functioning  
21 autonomous entities and weakening the existing  
22 criteria for acknowledgment.

23 The proposal lowers the acknowledge  
24 threshold by requiring that department view evidence  
25 presented in support of a petition in the light most

1 favorable to the petitioner, stripping the  
2 department of its ability to carefully weigh  
3 conflicting evidence.

4           These changes would lead to  
5 acknowledgment of voluntary groups of descendants  
6 who have not existed on a substantially continuous  
7 basis as tribal political entities and have neither  
8 a history of self-government, nor a clear sense of  
9 identity. Groups of descendants that have been  
10 denied acknowledgment under the existing  
11 regulations, or who will be denied, would become  
12 eligible for acknowledgment under the assistant  
13 secretary's proposal.

14           The extension of tribal recognition to  
15 these groups, which have not maintained a continuous  
16 existence as autonomous tribal political entities  
17 has the potential to redefine tribes as racial,  
18 rather than political entities. Moreover, because  
19 tribal sovereignty is based on the status of Indian  
20 tribes as sovereign political entities predating the  
21 establishment of the United States and continuously  
22 existing to the present, the proposal seriously  
23 undermines the very foundation of tribal sovereignty  
24 and poses a threat to all tribes.

25           The assistant secretary's proposal

1 appears to have been developed without input from  
2 recognized tribes and provides little explanation  
3 for the drastic changes in the acknowledgment  
4 criteria that are proposed. Many of these changes  
5 are inconsistent with long-standing department  
6 policy. Indeed a number of the proposed changes in  
7 the acknowledgment process contained in the draft  
8 proposal had been previously considered and were  
9 rejected by the department on the ground that they  
10 would undermine the essential requirement that a  
11 petitioner demonstrate historic continuity as a  
12 tribal entity.

13 We find the lack of clear explanation  
14 for the Interior Department's departure from past  
15 practices on acknowledgment very troubling. We also  
16 believe that the short consultation period provided  
17 and scheduled in the middle of summer and the  
18 inconvenient locations that have been chosen by the  
19 Department of Interior do not allow for adequate  
20 consultation with the tribes on this important  
21 proposal.

22 For example, many northwest tribes who  
23 participate in the canoe journey are presently on  
24 the canoe journey and have that obligation as a  
25 cultural right rather than being able to come here

1 today.

2           In summary, the Muckleshoot Tribe  
3 views the draft as a one-sided proposal that without  
4 explanation lowers the standards for acknowledgment  
5 in a manner that threatens the sovereignty of all  
6 tribes. The tribe believes that the current  
7 proposal should be scrapped and a new proposal  
8 developed with appropriate tribal input that  
9 preserves the existing criteria and focuses on  
10 establishing a more timely, efficient, and  
11 transparent acknowledgment in the process.

12           Given the lack of explanation provided  
13 for the major changes in the acknowledgment material  
14 recognized in the early proposal, we have a number  
15 of questions concerning the department's approach to  
16 acknowledgment and the draft proposal.

17           At this time, I'd like to introduce  
18 Richard Reich, who is our tribal attorney, who will  
19 pose those questions.

20           RICHARD REICH: Thank you, Chairwoman  
21 Cross.

22           As Chairman Cross indicated we have  
23 some serious concerns about the proposal. As the  
24 department has stated, congress has criticized the  
25 proposal in the past. The criticism, however, we

1 think procedural in nature concerns about  
2 timeliness, efficiency, transparency, not concerns  
3 about the criteria themselves. The procedural  
4 concerns, we believe, can be more readily addressed  
5 by more staffing, by clearer guidelines explaining  
6 the existing criteria, by adherence to timelines by  
7 both the department and petitioners, and by the  
8 department foregoing independent research to fill in  
9 the gaps.

10           In petitioner's research in past, the  
11 department has spent an inordinate amount of time  
12 attempting to fill in the gaps in petitioners'  
13 research. All those things we think would go a long  
14 way to addressing the concerns that congress has, in  
15 the past, expressed and we believe that the changes  
16 in the criteria that are being proposed clearly miss  
17 the mark.

18           One of the our concerns is that  
19 instead of maintaining the criteria as the assistant  
20 secretary's press release seems to suggest, in our  
21 view, there have been major changes made without a  
22 very clear explanation. I know you've given a short  
23 explanation of some of those today, but we still  
24 have some questions that would help us in addressing  
25 this further as we go along in written comments.

1                   Our understanding has been that it's  
2                   been the department's longstanding view supported by  
3                   well-settled case law that continuity of autonomous  
4                   tribal political existence is the essential core  
5                   requirement for acknowledgment of tribal status.

6                   I guess our first question is whether  
7                   the department's view of that has changed and  
8                   whether the department believes that it has the  
9                   authority, administratively, to acknowledge groups  
10                  that cannot demonstrate continuous existence as  
11                  autonomous tribal political entities.

12                  LARRY ROBERTS: I don't know that the  
13                  department's view has necessarily changed on that.  
14                  I think that one of the things that the discussion  
15                  draft is looking at and some of things that we've  
16                  heard from the public is that just because there's a  
17                  gap in the historical documentary record doesn't  
18                  mean that the tribe hasn't continued to exist. And  
19                  so I think the discussion draft tries to address  
20                  that situation.

21                  If there are other -- you know, we  
22                  welcome comments in terms of how to improve the  
23                  process, how Muckleshoot thinks -- believes that we  
24                  can improve the guidelines. That's something that  
25                  we've heard a lot about are clear guidelines,

1 clearer object criteria. I think that would be  
2 helpful.

3 In terms of more staffing, I think  
4 that it's something that we'll definitely need to  
5 take a look at. I certainly don't have to tell you  
6 all that in this time of shrinking federal budgets,  
7 that more staffing is probably going to be a  
8 challenge for the department.

9 But getting back to your original  
10 question in terms of continuity of autonomous  
11 existence, I don't think that general principle is  
12 being disavowed in this discussion draft. I think  
13 what we're looking at is how to improve the process  
14 so that it reflects both federal policy and the law  
15 and makes best use of limited resources within the  
16 department, and, quite frankly, with external  
17 communities.

18 RICHARD REICH: Given that you've  
19 indicated that the draft doesn't appear to disavow  
20 the requirement of continuity of existence, I guess  
21 the first response would be: The current  
22 regulations provide only that the group needs to  
23 show that its continuity is substantially continuous  
24 and does provide for some gaps in the evidence,  
25 though it's unclear what the nature of the gaps

1 might be.

2 I guess my concern is and why we've  
3 raised the question is, for example, the draft  
4 proposal eliminates, from Section 83.3D of the  
5 proposal, the limitation on the process to those  
6 groups that have functioned as autonomous tribal  
7 entities throughout history. That seemed to be the  
8 purpose of the '78 regulation and seemed to be the  
9 purpose of the '94 regulations.

10 And we come in this draft proposal and  
11 that basic requirement is then deleted from the  
12 draft and the time periods for groups is shortened  
13 up. In the Northwest, for example, there are  
14 voluntary organizations of descendants that were  
15 formed to pursue claims after the beginning of the  
16 twentieth century. Under this proposal, they  
17 wouldn't have to show that there was a substantial  
18 loss of tribal integrity at the end of the  
19 nineteenth century.

20 We have some other concerns here.  
21 Voluntary organizations have leaders. This proposal  
22 says that leadership -- identification leadership is  
23 sufficient to show as evidence of political  
24 authority or influence without showing that those  
25 leaders actually exercise political authority or

1 influence.

2 Can you explain the department's  
3 rationale for eliminating the requirement that the  
4 leaders identify in 83.8 have to actually exercise  
5 some political influence or authority. As I said,  
6 voluntary organizations have leaders as well as  
7 tribes that are political entities.

8 LARRY ROBERTS: I'm just flipping  
9 through the discussion draft. And 83.8 is the  
10 previous federal acknowledgment section?

11 RICHARD REICH: Yes.

12 LARRY ROBERTS: And I'm just having a  
13 hard time following where the primary changes -- I  
14 don't think that in terms of political influence and  
15 authority in C -- 83.7(C) -- most of that criteria  
16 under 1 and 2 are still unchanged. And so thank you  
17 for the comment and, you know, I'm happy to have a  
18 further discussion about this, but also encourage  
19 the tribe to submit written comments, as well, so  
20 that when we bring these back, we'll obviously have  
21 the record for our team to look at these comments, I  
22 appreciate your concern on that.

23 RICHARD REICH: The last comment I'd  
24 like to make is: Can you explain the rationale for  
25 the change in the burden of proof that now requires

1 that evidence be viewed in light most favorable to  
2 petitioner?

3 LARRY ROBERTS: Yeah. I think that  
4 was something that the work group had looked at in  
5 terms of -- again, we've heard from a number of  
6 folks that there's not enough flexibility in the  
7 process itself to account for the specific and  
8 unique histories of each tribe. And so in terms of  
9 that burden of proof and looking at that, it was  
10 almost in the context of a court proceeding, where  
11 you look at the argument in the light most favorable  
12 to the moving party in terms of evaluating that.

13 And so we're getting nods of heads  
14 from some of the work group members here. I think  
15 that -- again, this is a discussion draft. It's,  
16 you know, a concept paper, but I think that's some  
17 of the thinking behind it.

18 RICHARD REICH: I'd just say that that  
19 change gives us great cause for concern since it's  
20 suggested that all petitioner needs to do is make a  
21 prima facie case and the decision-maker is limited  
22 in the manner in which the decision-maker can weigh  
23 the evidence to determine what evidence the  
24 decision-maker finds credible.

25 LARRY ROBERTS: And, Chairwoman, I

1 just wanted to acknowledge your comments. Thank you  
2 for those comments. If you have anything that you  
3 want to give either us or the court reporter today,  
4 that doesn't preclude later written comments, but  
5 we'd appreciate your comments on that. It might  
6 help the court reporter in case she missed anything.  
7 That's up to you.

8 I also just wanted to touch upon the  
9 locations and the times and the inconvenience. I  
10 wasn't aware that canoe journey was going on during  
11 this time period when we were putting these  
12 consultations together, so I'm sorry for that -- for  
13 that conflict there.

14 We also, in terms of the locations  
15 themselves, we were trying to utilize tribal  
16 facilities as part of our consultations, and so I  
17 think as we move forward with this, there will be  
18 additional consultations on the proposed rule. I  
19 hope that will get to other parts of Indian country  
20 and hopefully we'll take your comments to heart in  
21 terms of location and trying to make something --  
22 locations where we can maximize participation,  
23 looking at, you know, the various schedules of -- I  
24 know tribe leaders are busy these days, and maybe we  
25 can piggy-back on other events where tribal leaders

1 are already attending to make that consultation more  
2 productive.

3                   ROBERT KENTTA: Thank you. Robert  
4 Kentta from the Siletz Tribal Council, Confederated  
5 Tribe of Siletz Indians. We don't have our full  
6 review prepared with our -- our final comments we'll  
7 be submitting those written comments, I'm sure,  
8 before the deadline.

9                   I appreciate the comments and concerns  
10 brought by Muckleshoot. I think many of those same  
11 issues are of concern to us. Our experience is  
12 mostly with legislative. Ourselves, we were  
13 terminated by the 1954 Western Oregon Termination  
14 Act and restored in 1977 legislatively. And  
15 subsequently, other Western Oregon tribes or groups  
16 gained recognition or restoration.

17                   In my cursory review of the discussion  
18 draft, it doesn't appear that there's enough  
19 protection of existing tribes' rights to comment and  
20 be consulted on the application, the petition.  
21 There's many issues that spring up later. Many  
22 times groups, whether legislatively or through  
23 petition or acknowledgment, identify themselves as a  
24 certain group, and once recognition is extended to  
25 them, that becomes redefined over time.

1                   There's a reassessment of their  
2 community history, of their ancestry, of their  
3 attachment to treaties or seated lands of another  
4 tribe. And so we're in the middle of many of those  
5 discussions now with our neighboring tribes. And  
6 there's a number of groups that we're aware of that  
7 are trying to either legislative or petition for  
8 acknowledgment processes.

9                   Some of the issues that -- actually,  
10 one of our Oregon congressmen asked us to speak to  
11 the -- I won't call them leadership -- some of the  
12 primary movers in a recognition effort here in  
13 Southwest Oregon, and most of them are enrolled  
14 members of a Northern California tribe. Some of  
15 them also have Southwest Oregon ancestry. And  
16 because they are enrolled with a California tribe,  
17 they're outside of their tribe service area.

18                   So the attempt is to get separate  
19 federal recognition in all of their relatives what  
20 appears to be -- the attempt is to get all of their  
21 relatives in more than one tribe where they will  
22 have their own service area, and whether they have  
23 connections in the Southwest Oregon tribal territory  
24 history or not.

25                   So our comment is that new tribes must

1 not be established when there is an existing tribe  
2 who represents those people. Petitioners must show  
3 that they have applied for enrollment and been  
4 denied recently, not being left behind for not  
5 residing within the service area for health,  
6 housing, and social services, et cetera, of the  
7 existing tribe -- there's no reason to establish  
8 recognition of a petitioning splinter group.

9           We also believe that a rigorous burden  
10 of proof must be met by the petitioners. There is  
11 somewhat of a history of unprincipled people who  
12 have no local tribal ancestry adopting the identity  
13 of local tribal groups.

14           After living in an area for several  
15 generations and petitioning for recognition, asking  
16 for donations of land, artifacts are not theirs by  
17 ancestry or right, demanding to be consulted on  
18 cultural resource issues, sacred sites management,  
19 et cetera.

20           And as part of that rigorous burden of  
21 proof, we believe that there needs to be more  
22 rigorous review of expert witness historian's  
23 testimony. There's been unchallenged statements in  
24 the past, and I think we will be taking a much  
25 tougher look and providing tougher comments on those

1 kinds of issues in the future because they lead to  
2 current-day problems.

3           In the discussion draft there's two Xs  
4 in the place where it says at least X percent of the  
5 petitioner's membership consists of individuals who  
6 descend from a historical tribe or historical Indian  
7 tribes, which combined they function as a single  
8 autonomous political entity, and that should be  
9 100 percent. I don't know why it would be anything  
10 less than that.

11           We have some concern, like Muckleshoot  
12 stated, over the dropping of the timeline beginning  
13 at 1934 with the Indian Reorganization Act. We're  
14 not sure that U.S. policy should govern this process  
15 in that timeline.

16           In the bulleted points on the  
17 PowerPoint, it mentioned about opposition from  
18 tribes within the same state. Many times tribal  
19 territories extend outside the resident state of the  
20 headquarters of the current-day tribe.

21           So that's part of that No. 1 comment  
22 of ours, that there needs to be sufficient  
23 opportunity for tribes with overlapping interest --  
24 primary interest in an area to be able to make  
25 sure that those issues are settled early in the

1 process.

2 Also in the PowerPoint there was  
3 mention of prior attempts at recognition, and it  
4 wasn't mentioned whether judicial or legislative  
5 attempts that failed, whether those hearing records  
6 or those types of things enter into the petition  
7 record.

8 LARRY ROBERTS: So do you have  
9 additional comments or --

10 ROBERT KENTTA: That's it for now, I  
11 believe.

12 LARRY ROBERTS: Okay. So a couple  
13 things in terms of the -- that is just for  
14 petitioners that have petitioned through the process  
15 itself. So if congress has terminated a tribe,  
16 they're not eligible for our process.

17 I appreciate --

18 ROBERT KENTTA: But for any tribe  
19 which wasn't terminated specifically in a  
20 legislative act, but is trying to get legislative  
21 recognition?

22 LARRY ROBERTS: That's the current  
23 framework now, that a tribe that is petitioning for  
24 recognition within the department can still go to  
25 congress and try. So that's the same now. A

1 tribe -- let's say, a tribe tries to get  
2 legislatively recognized now and the congress, for  
3 whatever reason, decides not to do so, they're still  
4 eligible for our process if they have that  
5 determination.

6 ROBERT KENTTA: My question, though,  
7 is whether that administrative record of that  
8 attempted process -- whether that enters into the  
9 petition process.

10 LARRY ROBERTS: That's information  
11 that can be submitted. Is that what you're asking?  
12 Yeah. That information gets submitted. And let me  
13 just say a couple things in terms of your comments,  
14 which I appreciate them.

15 In terms of the comment or opportunity  
16 to comment by federally recognized tribes on a  
17 particular petition, I don't think the intent of the  
18 discussion draft is to limit that in any way. And  
19 so I think that that public input is maintained in  
20 the discussion draft as it currently stands.

21 So if Siletz is suggesting more public  
22 comment, please provide those comments to us as part  
23 of this comment period so we can look at them in  
24 terms of a proposed rule, but this discussion draft  
25 doesn't intend to change the status quo on that.

1           In terms of your concern about an  
2 already existing tribe in terms of members that are  
3 already members of a federally recognized tribe,  
4 that's something that we try to address in the  
5 expedited negative determination so that those are  
6 often processed quickly, and it frees up more  
7 resources to look at those petitioners whose members  
8 aren't primarily composed of another federally  
9 recognized tribe.

10           So in terms of the comments, in terms  
11 of tribes in the same state again, that's sort of a  
12 situation where if there is a proposed favorable  
13 finding that's issued out there and no one objects  
14 within the state where that tribe is located,  
15 essentially no tribal government, state or local  
16 government objects, then it would just go to a final  
17 favorable finding.

18           And so I hear your comments in terms  
19 of sometimes there may be a petitioner in a  
20 particular part of the state where it's just right  
21 across the border of a state line and so maybe we  
22 need to look at geographic radiuses.

23           But I will say, for example, I know  
24 Senator Tester has raised the comment in terms of --  
25 you know, if a petitioner is in the plains or

1 Northwest and a tribe in Florida objects, we should  
2 be giving that weight because maybe those tribes in  
3 that area of the country know that petitioner better  
4 than a tribe that's far removed. And so we need to  
5 balance that, I think. Or that's the attempt here  
6 in this discussion draft, is to balance that.

7 ROBERT KENTTA: Thank you.

8 LARRY ROBERTS: What we could do right  
9 now, if folks want, unless folks have comments right  
10 now, we could take a short break, five to ten  
11 minutes, and reconvene.

12 If folks have additional comments,  
13 we're happy to continue that, and if folks don't  
14 have additional comments, then I think we'll just  
15 end this session early.

16 So let's reconvene at 10:20, and then  
17 we'll take it from there. Thank you all.

18 (Recess: 10:11 to 10:20 p.m.)

19 LARRY ROBERTS: So I want to be  
20 respectful of all of your time and so we will get  
21 started here.

22 So I'm going to go ahead and open up  
23 the floor in terms of additional comments on the  
24 discussion draft. And also, you know, I wanted to,  
25 again, emphasize the importance -- all of your oral

1 comments will be made part of this record as we're  
2 going forward, but please also submit written  
3 comments, especially if there are improvements to  
4 the process that you would suggest or if you believe  
5 that the process is working fine, we need to hear  
6 that as well. And so any comments on the discussion  
7 draft or the process in general are appreciated.

8 So with that, I'll open it back to the  
9 floor in terms of anyone wanting to make additional  
10 comment.

11 (Pause.)

12 SPEAKER: How is the information on  
13 the 1 o'clock meeting put out?

14 LARRY ROBERTS: The 1 o'clock meeting  
15 will essentially be relatively -- I mean, we're  
16 talking about the same discussion draft. It will be  
17 the same information essentially for the 1 o'clock  
18 meeting.

19 SPEAKER: Was there a notice put out  
20 on it, though?

21 LARRY ROBERTS: Yes. There was a  
22 notice in the Federal Register, and then there was a  
23 notice in the assistant secretary's press release.

24 (Pause.)

25 LARRY ROBERTS: Okay. Well, I

1 appreciate everyone coming and turning out, and we  
2 will be looking forward to receiving written  
3 comments. Thank you so much for attending.

4 (The Tribal Consultation was concluded  
5 at 10:24 a.m.)

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STATE OF OREGON            )  
  )    ss.  
County of Lane            )

I, Deborah M. Bonds, CSR-RPR, a Certified Shorthand Reporter for the State of Oregon, do hereby certify that at the time and place set forth in the caption, I reported all testimony and other oral proceedings in the foregoing matter; that the foregoing transcript consisting of 46 pages contains a full, true and correct transcript of the proceedings reported by me to the best of my ability on said date.

IN WITNESS WHEREOF, I have set my hand and CSR seal this 7th day of August 2013, in the City of Eugene, County of Lane, State of Oregon.



|.....  
Deborah M. Bonds, CSR-RPR  
CSR No. 01-0374

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