

Public Hearing

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PUBLIC HEARING ON THE PROPOSED
FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES
PROPOSED RULE 25 CFR 83

TRANSCRIPT OF PROCEEDINGS
HELD ON JULY 24, 2014

LOCATION: Crowne Plaza Hotel
Billings, Montana
TIME: 1:05 p.m. to 2:08 p.m.

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A P P E A R A N C E S

PANEL MEMBERS:

Larry Roberts - Deputy Assistant Secretary -
Indian Affairs

Kaitlyn Klass - Office of the Solicitor

Elizabeth Appel - AS-IS, Office of Regulatory
Affairs

PARTICIPANTS:

Clarence Sivertsen - Little Shell Tribe of
Chippewa Indians

Dana Wilson - Crow Tribe Secretary

Jason Smith - Director of Indian Affairs,
Governor's Office

AJ Not Afraid - Crow Tribe Secretary

Vicky Stephens - Representative, U.S. Senator Jon
Tester

Kris FourStar - American Indian Liaison, Senator
Walsh's office

Amanda Peterman - Tribal Liaison, Congressman
Steve Daines' office

Josh Clause - Six Killer Consulting

Gerald Stewart - Crow Legislative Branch

Karen Ketcher - Cherokee Nation

Marcus Red Thunder

Cheryl A. Belcourt - MHA Nation of Tribal Leaders
Council

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1 WHEREUPON, the following proceedings were had:

2 * * * * *

3 MR. ROBERTS: So I think we're going to
4 go ahead and get started. I think we'll start off
5 with introductions here, and I know we have at
6 least one representative from the Crow Nation here
7 and would ask Crow Nation if they can give an
8 invocation to start this meeting after we've had
9 introductions. So my name is Larry Roberts. I'm
10 from the Oneida Nation of Wisconsin, and I'm
11 Principal Deputy Assistant Secretary for Indian
12 Affairs.

13 MS. KLASS: I'm Katie Klass. I work in
14 the Solicitor's Office, and I'm a citizen of the
15 Wyandotte Nation.

16 MS. APPEL: Hi, everyone. I'm Liz Appel.
17 I'm the Director of the Office of Regulatory
18 Affairs, and I report to the Assistant Secretary
19 for Indian Affairs.

20 KRIS FOURSTAR: I'm Kris FourStar with
21 Senator John Walsh's office.

22 GERALD STEWART: Good afternoon. My name
23 is Gerald Stewart. I'm with the Crow Legislative
24 Branch.

25 AJ NOT AFRAID: Good afternoon, everyone.

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1 Again, welcome to Crow Country, Secretary of Crow
2 Tribe. And at this time, I would also mention,
3 when you do the invocation, I'll respectfully
4 request Gerald Stewart do it on our behalf.

5 CLARENCE SIVERTSEN: I'm Clarence
6 Sivertsen, First Vice Chair of the Little Shell
7 Tribe, Chippewa Indians of Montana.

8 JOSH CLAUSE: I'm Josh Clause. I am a
9 citizen of the Mohawk Nation, and I'm with
10 Sixkiller Consulting.

11 AMANDA PETERMAN: I'm Amanda Peterman,
12 and I am the tribal liaison for Congressman Steve
13 Daines.

14 KAREN KETCHER: Karen Ketcher, Cherokee
15 Nation.

16 [PRAYER BY GERALD STEWART]

17 MR. ROBERTS: Thank you very much. So in
18 terms of the format for this afternoon, if it's
19 all right with everyone, what we're going to do is
20 we're going to start with just a PowerPoint
21 presentation. It takes about 20 minutes to sort
22 of give an overview of the Proposed Rule, and then
23 we'll open it up for public comment and questions.

24 Okay, so everyone should have in their
25 materials this handout of the PowerPoint itself,

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1 and so we want to give a little bit of background
2 in terms of the public acknowledgement process and
3 how we got to the proposed rulemaking and how
4 we're moving forward.

5 So as most folks are aware, there are
6 generally three ways in which a tribe can become
7 federally recognized. One is through a federal
8 district court decision, one is by congressional
9 legislation, and then administratively by the
10 Department of Interior.

11 And so prior to 1978, the Department
12 reviewed requests for Federal recognition on sort
13 of an ad-hoc basis as the issue arose.

14 In 1978, we published the Part 83
15 regulations to provide a uniform process for
16 Federal acknowledgment.

17 In 1994, we revised those regulations and
18 updated them, allowing for primarily previous
19 Federal acknowledgment to be added as an
20 enhancement to the process. And then we issued
21 guidance over time from 2002, 2005, and 2008
22 internally on how to implement those regulations.

23 And so, of the 566 federally recognized
24 tribes that we have, 17 have gone through the
25 Federal acknowledgment process. The other 549

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1 have been recognized in other ways, either by the
2 Department or by Congress or through judicial
3 court action.

4 So why are we looking at revising the
5 Part 83 process? We've heard for a long period of
6 time that the process has been criticized as
7 broken: That it's too long, that it's burdensome,
8 that it's expensive, that it's unpredictable, that
9 it's applied differently to different petitioners
10 the same criteria, and that it's not transparent.

11 So it's been a topic of discussion before
12 the Senate Committee of Indian Affairs and the
13 House Natural Resources Committee for some time.

14 In 2009, when Secretary Salazar was
15 Secretary of the Department of Interior, he
16 testified before the Senate Committee on Indian
17 Affairs, and at that time was asked if he would
18 look at ways to improve the Part 83 process. And
19 so he committed to the committee at that point in
20 time that the Department would look at it.

21 In 2010, the Department started working
22 internally on how to revise the process, how to
23 improve it. And in 2010, the Department again
24 testified before the Senate Committee of Indian
25 Affairs and estimated that it would take about a

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1 year from 2010 to get out a Proposed Rule by the
2 Department.

3 So the Department again testified in 2012
4 before the Senate Committee on Indian affairs, and
5 at that time there were members of the committee
6 that asked why we hadn't made -- met that
7 deadline, why we hadn't gotten the Proposed Rule
8 out within a year. And the Department testified
9 that they were continuing to work on a Proposed
10 Rule, and the Department identified guiding
11 principles of transparency, of timeliness,
12 efficiency, flexibility, and integrity.

13 And so shortly after the Department's
14 testimony in 2012, Assistant Secretary Washburn
15 and I joined the Department, and one of the first
16 things Secretary Salazar asked for him to do was
17 to carry forward this rulemaking and get it across
18 the finish line. And so we again convened a team
19 within the Department, and basically, it's a team
20 of folks from the Solicitor's Office, from the
21 Office of Federal Acknowledgment, and from the
22 Assistant Secretary's Office, to put together a
23 Discussion Draft.

24 And so we issued a Discussion Draft about
25 a year ago, and we had tribal consultations and

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1 public meetings in July and August of last year,
2 received a lot of extensive comments on that
3 Discussion Draft. And so from the Discussion
4 Draft, we reviewed all those comments, we -- the
5 team of folks that I just sort of mentioned from
6 the various offices got together, reviewed those
7 comments, and from there we issued the Proposed
8 Rule.

9 And so before issuing the Proposed Rule,
10 we circulated it to OMB for review, and so they
11 send it out to other federal agencies for their
12 review, and we published it on May 29th in the
13 Federal Register. We released it to the public on
14 May 22nd. Comments are due next Friday,
15 August 1st. I'm expecting that -- we've received
16 a number of requests for an extension of time with
17 that comment period, and so I'm hoping that either
18 while we're here talking about the rule today or
19 shortly thereafter, we'll have some news on how
20 we're moving forward in response to those requests
21 for an extension of time.

22 So briefly, the Proposed Rule revisions
23 in our overview, I'm going to talk a little bit
24 about the revisions that we're making in the
25 process or proposing to make. The revisions that

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1 we are proposing to make to actual criteria,
2 clarifications with regard to the various aspects
3 of the regulations, previous Federal
4 acknowledgment, and burden of proof. We're not
5 changing those, but we're trying to provide more
6 clarity.

7 In terms of -- we're also allowing
8 limited re-petitioning in certain circumstances,
9 and we're proposing to provide an additional
10 notice to everyone. So in terms of the proposed
11 rule and process, the process now starts with a
12 Letter of Intent. And essentially, what that
13 means is, any group or petitioner that wants to
14 receive Federal acknowledgment, they start that
15 process by sending in a simple letter saying, "We
16 intend to submit an application at some point in
17 the future."

18 We have lots of Letters of Intent. We
19 have a lot of Letters of Intent that are never
20 followed up on, and so in many cases we don't
21 receive materials from the petitioners, we don't
22 receive a complete application, in some
23 circumstances all we receive is that letter, and
24 we have a number of addresses that have gone out
25 of date, we can't find them anymore. So we're

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1 proposing to eliminate that step in the process
2 and start, as we start nearly every other federal
3 process, which is by a complete application.

4 In terms of how we go about our review,
5 we're proposing to go through a phased review of
6 the process because we have seven criteria to be
7 recognized as a tribe through the process. You
8 have to satisfy all seven criteria. If you fail
9 one, you can't be recognized under the
10 regulations, and so we're proposing a phased
11 review where we would start by looking to see
12 whether the petitioner is Indian, whether they
13 have descent from a historic tribe, genealogy.

14 If they -- if they meet that criterion,
15 we would then look at some of the other criteria
16 at the outset. For example, if a tribe has been
17 terminated, Congress has passed legislation
18 forbidding us from recognizing that group.
19 They're not eligible for the process. And so
20 looking at some of those initial criterion and
21 trying to get out faster decisions for those
22 petitioners that don't satisfy those.

23 Let's say we have a petitioner that
24 satisfies some of those initial criteria, then we
25 would move to look to see whether the petitioner

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1 satisfies community and political authority, which
2 are two of the criteria that take more work for
3 both the petitioner, the Department, and third
4 parties in terms of documentary evidence and
5 resources.

6 And one of the things that we're looking
7 at, and we'll talk a little bit about this when
8 we're talking about the substantive criteria, but
9 we're looking at whether if a petitioner held a
10 state reservation or the United States has held
11 land for the group at any point in from 1934 to
12 the present for if the United States has held land
13 for the group or if the petitioner has held a
14 state reservation continuously from 1934 to the
15 present, that those would satisfy both criterion
16 (b), which is community, and (c), political
17 authority.

18 So in terms of the process as it works
19 now, we issue a Proposed Finding. And if the --
20 and then we issue that Proposed Finding and it's
21 available for public comment.

22 And so what we're proposing in this rule
23 is that if the Proposed Finding is positive and we
24 don't receive any comments, any substantive
25 comments that are negative to the proposed

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1 favorable finding, that we would just go ahead and
2 make that proposed favorable finding final for
3 purposes of the Department.

4 If we issue a Proposed Finding and it's
5 negative, what we're proposing is that we -- that
6 the petitioner may elect to have a hearing before
7 an administrative judge, and that administrative
8 judge would provide a recommended decision to the
9 assistant secretary.

10 Third parties could intervene in that
11 hearing if the petitioner asks for one, and so --
12 and then after that hearing, the assistant
13 secretary, based on the recommendations and the
14 evidence in that -- from that hearing and from the
15 Proposed Finding, would make a Final
16 Determination. Where right now, as the process is
17 currently configured, the assistant secretary's
18 Final Determination is subject to administrative
19 appeal to the Interior Board of Indian Appeals,
20 we're proposing to eliminate that step in the
21 process. It's the only decision by the assistant
22 secretary that is subject to IBIA appeal, and so
23 it would be final for the Department. If anyone
24 wanted to challenge that decision, they could file
25 suit directly in federal court.

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1 With regard to the hearing on the
2 negative Proposed Finding, the Office of Hearings
3 and Appeals, which is separate from the Assistant
4 Secretary's Office, it's independent within the
5 Department, it's within the Secretary of
6 Interior's Office, they would -- they would
7 preside over those hearings under the Proposed
8 Rule. And they have issued their own rule, a
9 Proposed Rule that essentially is a civil
10 procedure how they would conduct that hearing.
11 And so one of the questions that they've asked as
12 part of their rulemaking is what level of
13 administrative judge should preside over that
14 hearing? Should it be an interior law judge who
15 has the most level of independence within the
16 Office of Hearings and Appeals, should it be an
17 administrative judge who reports to the Office of
18 Hearings and Appeals' director and routinely
19 serves on appellate matters but is more closely
20 supervised, or should it be an attorney designated
21 by the Office of Hearings and Appeals' director,
22 which is more closely supervised than the
23 administrative judge?

24 So in terms of other revisions to the
25 process, we're providing that a petitioner may

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1 withdraw their petition at any time prior to a
2 Proposed Finding. If the petitioner would choose
3 to do so, then they're hopeful we'll cease
4 consideration of the petition, but they would lose
5 their place in line in terms of consideration.
6 When they -- when they resubmit their petition,
7 they would have to basically start at the end of
8 the line of all of the petitions that would be
9 pending.

10 Right now we have approximately 13
11 petitions pending, complete petitions pending
12 before the Department, to give you a sense of sort
13 of our workload.

14 We're also proposing that the Department
15 post on its website those portions of the petition
16 and other materials such as reports by the Office
17 of Federal Acknowledgment and other reports
18 submitted that are releasable under federal law.
19 So we're not talking about releasing information
20 that is subject to the Privacy Act or under the
21 federal laws that would protect personal
22 information from being disclosed.

23 So in terms of the criteria themselves,
24 we're proposing some changes to the substantive
25 criteria. Right now under the existing rules we

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1 have criterion (a), and what that requires is that
2 the petitioner show that they have been identified
3 by external observers from 1900 to the present,
4 and usually requires something in writing. So it
5 could be state records, it could be newspaper
6 articles, it could be anything that was sort of
7 created by third parties identifying that group as
8 a tribe, as a community from 1900 to the present.

9 What we're proposing to do is to replace
10 that criterion with a new criterion. And the
11 thought behind it is this, is that we may have a
12 petitioner that satisfies all of the other
13 criteria, they may satisfy and show community,
14 that they're exercising political authority, that
15 they're Indian, they descend from a tribe, and
16 that they've been identified as Indian. They may
17 satisfy all those criteria of being a tribe under
18 our regulations, but a third party may not have
19 been out there writing down about it. Does that
20 make that group any less of a tribe just because
21 the state or newspaper wasn't writing about them?

22 So what we've proposed to do is to change
23 that and require petitioners to provide a brief
24 narrative with evidence that demonstrates their
25 existence prior to 1900. Because we're not --

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1 we're not recognizing new tribes that came into
2 existence in the 1940s and the 1950s and the
3 1960s. We're not recognizing new tribes. We're
4 recognizing existing tribes. And so this should
5 be a criterion that for legitimate tribes that
6 have been in existence, they should be able to
7 satisfy, you know, where -- be able to tell where
8 did they come from prior to 1900.

9 For those groups that came into existence
10 in the '60s and '40s and '90s and ten years ago,
11 it's going to be -- it should be an impossible
12 hurdle for them to satisfy this if they just
13 recently came into existence. And "recently" is
14 relatively speaking. I'm talking about since 1900
15 to the present. And so that's the proposal for
16 (a).

17 We've heard comments throughout the
18 public hearings and tribal consultations that this
19 brief summary with evidence needs to be clarified,
20 fleshed out a little bit, and so that's something
21 that we'll be taking a closer look at based on
22 those comments.

23 In terms of criteria (b), community, and
24 (c), political authority, we're proposing on using
25 a start date from 1934 to the present. Currently, 17

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1 what we use as a start date for both community and
2 political authority is from 1789, the founding of
3 the United States or the time of first sustained
4 contact, whichever is later. And so we're
5 proposing 1934 for three reasons. One reason is
6 that it is consistent with federal policies. So
7 prior to 1934, as many of you know in the room,
8 federal policy was, you know, at war with tribes,
9 entering into treaties with tribes, there was
10 allotment and assimilation policies, and it wasn't
11 until 1934 that the United States, passing the
12 Indian Reorganization Act as a federal policy to
13 promote tribal self-determination and promote
14 tribal governments. And so we're proposing that
15 1934 start date for both (b) and (c).

16 As a factual matter, we have been running
17 the Federal acknowledgment process, the Part 83
18 process, for almost 40 years. We've never had a
19 situation where a group that we had denied has
20 satisfied the criteria, all the criteria of being
21 a tribe from 1934 to the present but failed prior
22 to that. So we've never had a group make up
23 its -- make it up and satisfy our criteria from
24 1934 to the present but they didn't have that
25 evidence before that. They've always failed both

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1 time periods. And so as a factual matter, we
2 think that 1934 is a good starting date based on
3 our past administration.

4 And then the final issue is just that as
5 you go back later in time, all of this is -- all
6 of this -- the whole process is based on documents
7 and evidence and documents for the most part, in
8 large part, I'll put it that way. We do rely on
9 oral histories in some situations. But the
10 further back in time you go, the harder it is to
11 find those documents sometimes. And so for
12 efficiency's sake, we're proposing a 1934 start
13 date as well.

14 In terms of the state reservation, I
15 mentioned that a little bit earlier. If a group
16 has maintained a state reservation from 1934 to
17 the present, that would satisfy (b) and (c). Or
18 if the United States has held land for the group
19 at any time since 1934 to the present, that would
20 also satisfy (b) and (c).

21 In terms of without substantial
22 interruption, right now the criteria as we apply
23 it we require petitioners to satisfy the criteria
24 over time without substantial interruption, and
25 we've never really defined what is "without

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1 substantial interruption." And that's -- you
2 know, we're looking for a document, if there's a
3 lack of documents for various time periods. And
4 so in some decisions we've applied every ten years
5 we'll look and see if there's evidence every ten
6 years. In other cases, we've allowed greater
7 periods of time, up to like 27 years of lack of
8 documentary evidence. And so we are defining in
9 the Proposed Rule as "without substantial
10 interruption" as generally less than 20 years,
11 unless a petitioner can show extraordinary
12 circumstances as to why that should be greater.

13 In terms of criterion (e), descent, we
14 are proposing that the petitioner must provide
15 evidence that at least 80 percent of their members
16 descend from a historic tribe. And let me explain
17 that 80 percent. That is not a new requirement.
18 It's a new requirement in our regulations, but in
19 practice that's a requirement that we have been
20 applying over time. And it's not that 20 percent
21 of the members can be non-Indian; it's that we
22 have to have documentary evidence for at least
23 80 percent of the members that they are Indian.
24 There might not be documents for every single
25 member. We're requiring at least 80 percent

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1 provide that proof for the group. And that's
2 something that we have been utilizing over the
3 course of the Federal acknowledgment process since
4 1978.

5 Some of the other things that we're
6 proposing with regard to (e) is that if the
7 Department has prepared a tribal-specific roll or
8 Congress has directed us to prepare a tribal-
9 specific roll, we are going to essentially own
10 those federal documents and start from that roll
11 forward.

12 If a petitioner does not have a specific
13 tribal roll prepared by the Department, then what
14 we're going to do is, under the Proposed Rule, is
15 we're going to start from whatever the most
16 reliable evidence is prior to 1900 and move
17 forward. That's consistent with other decisions
18 that we've made in the past where we have evidence
19 from 1870, 1880, 1890, 1900. We have evidence of
20 genealogy, Indian, and we move forward from there.

21 In other cases, we've had that good
22 evidence but we've continued to go back in time to
23 time of first contact. And so the proposal here
24 is to, if we have reliable evidence, we move
25 forward from that. We start from there and move

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1 forward as long as it's prior to 1900.

2 Criterion (f), membership, we've heard a
3 lot about our process takes so long that some
4 petitioners have lost membership to other
5 federally recognized tribes, that some of their
6 members are eligible for dual -- eligible for
7 enrollment in federally recognized tribes within
8 their group. So what we've proposed in the rule
9 is if they have submitted a Letter of Intent since
10 the least 2010, they filed that, then we're not
11 going to penalize that group for any loss of
12 members that they've had since 2010 since our
13 process is taking so long.

14 In terms of criterion (g), which is
15 Congressional termination, right now we have the
16 requirement on the petitioner to prove that they
17 haven't been terminated. We're going to put that
18 onus on the Department to show that the group has
19 been terminated and is not eligible for the
20 process. We're shifting the burden, essentially,
21 to the Department.

22 In terms of previous Federal
23 acknowledgment, we're not attempting to make any
24 substantive changes to this part of the rule.
25 We're trying to clarify it and make it consistent

22

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1 with our actual practice. So there are no
2 substantive changes to this part of the rule.

3 And also, with regard to burden of proof,
4 the burden of proof is still "reasonable
5 likelihood." We're not changing the burden of
6 proof. We are updating it based on Supreme Court
7 cases.

8 And then in terms of re-petitioning, we
9 have, over the course of the last roughly
10 40 years, we've denied approximately 30
11 petitioners, and so we've proposed a limited
12 circumstance for re-petitioning, and it works sort
13 of like this. Essentially, if someone -- if a
14 group has been denied through the process and
15 third parties have challenged that denial and are
16 challenging that decision, let's say, and
17 prevailed. So let's say the Department,
18 hypothetically, said "We're going to recognize
19 this tribe," and we had sued over it, either
20 administratively or in federal court, and that
21 challenger prevails, then the petitioner would
22 need to get that third party's consent before they
23 could ask to be reconsidered under the process.

24 If they get the consent or there are no
25 third parties that have challenged the Final

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1 Determination and prevailed, then it's still not
2 an open-door policy; it's not a free-for-all.
3 Basically, then, the petitioner would have to go
4 before an administrative judge and they would have
5 to show to that judge, demonstrate one of two
6 things: Either that a change in the regulations
7 warrants reconsideration, or that the Department
8 misapplied the burden of proof and that that
9 misapplication warrants reconsideration.

10 If a federal judge decides either of
11 those two things, then the petitioner is allowed
12 to restart the process from the beginning.

13 In terms of notice, under the Proposed
14 Rule we're making some changes, like I said
15 earlier, we're trying to provide broader notice.
16 And so we're going to provide notice, we're going
17 to acknowledge receipt of the petition within
18 30 days. Within 60 days, we're going to do a
19 number of things that we already do. We're going
20 to publish notice in the Federal Register, we're
21 going to notify the governor and the attorney
22 general in the state, we're going to continue to
23 notify other recognized tribes or any other
24 petitioners that may have a historical or present
25 relationship with that petitioner or otherwise may 24

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1 be considered to have a potential interest in that
2 determination, we're going to continue to notify
3 those tribes and other groups. And then in
4 addition to that, we're proposing to notify every
5 single federally recognized tribe within the state
6 and any federally recognized tribe within a
7 25-mile radius if the petitioner is located, let's
8 say, close to state boundaries.

9 The next slide talks about the type of
10 notice and the times of when we will provide
11 notice to the petitioner and the informed parties.
12 And so it sort of lays out here, you know, time
13 extensions we're going to provide notice, when we
14 start reviewing the petition we're going to
15 provide notice, all the different areas where
16 we're going to provide notice under this
17 structure.

18 And so comments on the Proposed Rule are
19 due August 1st, next week. Comments on the Office
20 of Hearings and Appeals' Proposed Rule is due
21 August 18th. You can e-mail them at that website.

22 And in terms of next steps, basically,
23 we're going to utilize the process that we used
24 before on the Discussion Draft, we're going to
25 review all the comments, look those over, and then 25

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1 come up with a Final Rule that we hope to publish
2 sometime in the near future.

3 And so when that Final Rule would go out
4 sort of depends on the number of comments we
5 receive and the complexity of those comments as we
6 work through them.

7 So with that, I will turn it all over to
8 you for any comments or questions you may have.

9 CLARENCE SIVERTSEN: Good afternoon. My
10 name is Clarence Sivertsen. I am the Vice-
11 Chairman of the Little Shell Tribe of Chippewa
12 Indians of Montana. I want to thank you for this
13 opportunity to address you today on the subject of
14 the proposed new rules to govern Federal
15 acknowledgment. This is a matter of utmost
16 importance to my Tribe and many other Tribes. We
17 commend you for the undertaking of this process,
18 something that has been needed for many years. We
19 will be submitting much more extensive written
20 comments on the proposed regulations.

21 Before getting into our specific history
22 with the process, I think it's important to
23 understand what is at issue with federal
24 recognition. My Tribe's inherent rights are at
25 issue here; it is fundamental that the regulations

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1 do not create tribes or convey sovereignty to
2 tribes. The international community, including
3 the United States, through the adoption of the
4 United Nations Declaration on the Rights of
5 Indigenous Peoples recognizes the inherent rights
6 of indigenous peoples, without any requirement
7 that they first be recognized. The Declaration
8 acknowledges that indigenous peoples have suffered
9 from historic injustices such as a result of,
10 inter alia, their colonization and dispossession
11 of their lands, territories and resources. This
12 is certainly true of the Little Shell experience
13 and that many other Indian tribes of the United
14 States. To allow bureaucratic processes to
15 further deny our rights is inconsistent with the
16 special trust obligations which the federal
17 government owes the indigenous peoples of this
18 country, with substantive law, both domestic and
19 international, and with international standards
20 relating to indigenous peoples.

21 Federal recognition must be reviewed
22 against this backdrop of inherent rights and
23 historic injustice which has prevented my Tribe
24 from the full enjoyment of those rights for a
25 century or more. Federal recognition, while not

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1 necessary to a tribe's existence or to its
2 inherent sovereignty, is nevertheless important to
3 the full exercise of sovereign rights, to the
4 receipt of the full range of federal benefits and
5 to the dignity and respect owed to all indigenous
6 peoples. It is an injustice to withhold that
7 recognition, and the acknowledgment regulations
8 should be designed to end, not perpetuate this
9 injustice or the colonialism which underlies this
10 injustice.

11 As an example, in section II, the
12 Exploration of the Rules, the statement is made
13 that the proposed regulation recognized 1934 as a
14 key date because that is the date of the Indian
15 Reorganization Act, which represented a sea change
16 in Federal policy that promoted tribal governments
17 by providing a framework that would make it easier
18 for the Federal Government to interact with the
19 tribe as an independent sovereign nation. Given
20 that statement, it seems inappropriate in section
21 83.2(d) to state that federal recognition subjects
22 the Indian tribe to the same authority of Congress
23 and the United States as other federally
24 recognized tribes. That is hardly treatment as an
25 independent sovereign nation. It represents the

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1 type of colonial attitude which the regulations
2 should avoid. Perhaps more appropriate would be a
3 statement that recognition means that the Congress
4 will deal with the tribe under its Commerce Clause
5 and other powers as it does with other tribes.

6 With that as background, I would like to
7 say a few words about our situation. My tribe is
8 presently not federally recognized, even though we
9 have had treaty relations with the federal
10 government and are recognized as a Tribe by the
11 State of Montana, and all the Tribes in Montana.
12 There is no legitimate question about whether we
13 are a Tribe. We have a petition for recognition
14 pending. That it is still pending, is in itself a
15 telling fact, since the Little Shell Tribe first
16 sent a letter to the Bureau of Indian Affairs
17 petitioning for federal acknowledgment in 1978.
18 To put that in perspective, the process has
19 spanned all or part of five decades and is not
20 over yet. It has cost well over \$2 million, and
21 that is surely at the low end of the costs some
22 tribes have incurred in going through the process.
23 Many of our elders have passed on waiting for
24 justice to be done.

25 We were a buffalo hunting tribe, often on 29

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1 the move. Nevertheless, we submitted over
2 60,000 pages of documentation to support our
3 petition, and that has not been enough. After
4 22 years of effort, on July 14th of 2000, Kevin
5 Grover, the Assistant Secretary of Indian Affairs,
6 signed a Proposed Finding of Federal
7 Acknowledgment for the Little Shell Tribe of
8 Chippewa Indians of Montana. After summarizing
9 the evidence under each of the criteria, the
10 Assistant Secretary concluded that the petitioner
11 should be acknowledged to exist as an Indian
12 tribe.

13 Assistant Secretary Grover noted that the
14 regulations had to be applied in a flexible manner
15 taking into account our Tribe's unique history and
16 the devastating poverty which led people to call
17 us garbage dump Indians, and other uncomplimentary
18 names. Our ancestors avoided contact with the
19 dominant society because that contact subjected
20 them to open and blatant discrimination. They
21 survived as a migratory people off the official
22 radar screen. By its nature, this lifestyle does
23 not produce the paper trail required by the overly
24 paper-driven recognition process.

25 The Assistant Secretary adopted a

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1 flexible, common sense approach called for by the
2 regulations themselves to make his favorable
3 preliminary finding.

4 Notwithstanding the favorable proposed
5 finding, the Tribe and its lawyers and consultants
6 spent countless additional hours working to
7 strengthen the petition even further prior to the
8 Final Determination. Nevertheless, amazingly and
9 disturbingly, on November 3rd, 2009, the Acting
10 Principal Deputy, Assistant Secretary of Indian
11 Affairs, published in the Federal Register a Final
12 Determination against my Tribe, reversing the
13 favorable Proposed Finding. This was done despite
14 the fact that no negative comments were received
15 and that the state of Montana, all affected local
16 governments, and all Montana tribes, as well as
17 others, supported our recognition.

18 We appealed the negative finding to the
19 Interior Board of Indian Appeals and supplemented
20 the record with hundreds of pages of new material
21 and analysis. This process took several more
22 years. The Interior Board of Indian Appeals ruled
23 against us, but did refer several legal questions
24 to the Secretary of the Interior. The Secretary
25 of the Interior sent our petition back to the

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1 Assistant Secretary for Indian affairs for
2 reconsideration. During this time, the process to
3 amend the regulations was initiated and the
4 Assistant Secretary then granted our request that
5 our reconsideration of the Final Determination be
6 suspended until after enactment of any new
7 regulations governing acknowledgment of Indian
8 tribes. That is where matters now stand, and
9 obviously the process to revise the regulations
10 governing acknowledgment is of the utmost
11 importance to us. This brief summary of my
12 Tribe's experience gives you an idea of what an
13 ordeal the present regulations put tribes through.

14 As you have recognized in embarking on
15 the process of promulgating new rules, it is clear
16 that the process is broken; it is too costly, time
17 consuming and complex. The process cannot be
18 saved by minor tweaks to the present regulations
19 and in that regard, we are pleased that the
20 proposed regulations contemplate some major
21 revisions. Some of these proposed major changes
22 are changes that we have urged for years in
23 documents filed with the Office of Federal
24 Acknowledgment, with the Interior Board of Indian
25 Appeals, with the Secretary of Interior, and in

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1 testimony before the Senate Committee on Indian
2 Affairs, so we are appreciative that our words
3 have not totally fallen on deaf ears, but are
4 disappointed that some have been ignored, and
5 overtly gone against.

6 First, we have argued that criterion (a),
7 requiring recognition by outsiders of an Indian
8 entity on a regular basis since 1900 should be
9 eliminated and the proposed regulations somewhat,
10 but not entirely agree with that proposal. The
11 proposed regulations require a brief narrative and
12 evidence supporting the narrative of the tribe's
13 existence at some point during historical times,
14 which is any time up to and including 1900. This
15 is still troubling the proposed regulations
16 provide little guidance on what evidence a tribe
17 must provide to support its brief narrative. It
18 also seems to contradict the statement in the
19 explanation of the proposed changes that the
20 Department maintains that is logical to deduce
21 that a tribe in existence when the Indian
22 Reorganization Act was passed was in existence
23 historically. Why then the lingering criterion in
24 (a)? It should be totally eliminated.

25 Second, as noted previously, we received 33

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1 a policy preliminary finding and then a negative
2 final determination despite the fact that no
3 substantial negative comments were received and
4 despite our submission of volumes of additional
5 evidence supporting our petition. This is
6 arbitrary and capricious on its face. We note
7 with satisfaction that the proposed regulations
8 provide for an automatic positive final
9 determination if the preliminary determination is
10 positive and no negative comments are received
11 from the relevant state or local government or
12 from any recognized tribe in the state where the
13 petitioner is located. This is a common sense
14 change required by law and is welcomed. If
15 adopted, it should lead to automatic recognition
16 of the Little Shell Tribe.

17 Third, we have argued that criteria (b),
18 community, and (c), political influence, must be
19 modified. We have previously suggested 1934, the
20 year of passage of the Indian Reorganization Act
21 as a much better time period on which to focus,
22 although even the Indian Reorganization Act itself
23 contemplated action to be taken after that time
24 which would result in recognition. We note with
25 satisfaction that the proposed regulations focus

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1 on 1934 and contemplate changes in what must be
2 shown to establish (b) and (c) and what type of
3 evidence will establish what does need to be
4 shown. We will have more to say on these matters
5 in written comment.

6 Fourth, as we pointed out in our comments
7 on the discussion draft regulations, there are
8 parts of the existing process that violate due
9 process. In the case of Little Shell, three weeks
10 of onsite interviewing of 71 people occurred at
11 the end of the process, and the Tribe was not
12 given a chance to review and comment on these
13 interviews before the Final Determination. The
14 Tribe had to do a FOIA request and pay nearly
15 \$5,000 to get the documents for the appeal to the
16 Interior Board of Indian Appeals. It put the
17 Tribe in a much different position to try and
18 overturn a decision than to be able to argue a
19 point before a Final Determination. Despite our
20 having raised it in our comments on the discussion
21 draft regulations, the proposed regulations do not
22 address investigations conducted between the close
23 of the proposed findings comment period and the
24 final determination. That is an important defect.
25 As the explanation in connection with the proposed 35

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1 regulations recognizes, petitioners should have
2 before them all information considered by OFA and
3 have a chance to comment on that information.

4 Fifth, the proposed regulations attempt
5 to simplify matters for tribes who can show
6 acknowledgment of previous existence. That is a
7 salutary principal. We suggested that the
8 regulations be amended to make clear that only
9 previous federal acknowledgment of existence be
10 required for a tribe to avail itself of this
11 lesser burden. We are disappointed that our
12 comments were turned on their head and the
13 proposed regulations make clear that for previous
14 federal acknowledgment, not only acknowledgment of
15 existence, but also a previous government-to-
16 government relation must be shown. This is a bad
17 proposal. The entire point of the regulation is
18 to demonstrate that a tribe exists and a
19 government-to-government relationship will
20 automatically flow from that. So if previous
21 federal acknowledgment of the tribe's existence is
22 shown, the lesser burden should apply.

23 The proposed regulations do address the
24 need for a hearing, and that is a very positive
25 development, as is the elimination of the Interior 36

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1 Board of Indian Appeals as we found that process
2 very unhelpful substantively and it delayed us
3 several years.

4 Finally, for those petitioners who have
5 received a final and effective negative
6 determination, we strongly support the provision
7 in the draft regulation that allows re-petitioning
8 if the petitioner can make a showing that being
9 reconsidered under the new regulations would lead
10 to a different outcome.

11 And we will have more to say on these and
12 other matters in our written comments. And I
13 thank you for your time and your attention.

14 MR. ROBERTS: Thank you for your
15 comments. If anyone has -- for example, I know
16 you were reading from some of your comments. If
17 you want to submit those for the record, you're
18 more than welcome to, or not. It's up to everyone
19 in terms of if they are reading something into the
20 record.

21 DANA WILSON: Good afternoon. For the
22 record, I'm Dana Wilson, Vice Chairman of the Crow
23 Tribe. I have a letter that I'd like to read;
24 it's important.

25 "Dear Assistant Secretary Washburn, I am 37

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1 writing in support of the Department of the
2 Interior's Proposed Rule on Acknowledgment of
3 Indian Tribes 25 CFR Part 83, as well as in
4 support of federal recognition for the Little
5 Shell Tribe of Chippewa Indians of Montana. The
6 Crow Nation, along with other Montana tribes, has
7 believed for some time that the Little Shell is an
8 Indian tribe and should be recognized as such.
9 The failure of Little Shell to achieve federal
10 recognition through the current administrative
11 process shows the inadequacy of that process. It
12 has been overly burdensome, excessively expensive,
13 and unfair to tribes attempting to obtain federal
14 acknowledgment. We believe that the Little Shell
15 determination was wrongly decided, and we believe
16 the federal acknowledgment process is in need of
17 reform.

18 For these reasons, we strongly support
19 the Department's proposed rules to revise the
20 federal acknowledgment regulations in 25 CFR Part
21 83 to make them more efficient and fair in general
22 and a provision that would allow Little Shell to
23 re-petition in particular. We also strongly
24 support federal acknowledgment of Little Shell
25 Tribe of Indians, whether through an

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1 administrative process or by legislation as soon
2 as possible. We thank you for the opportunity to
3 participate in the Department's rulemaking
4 process. Sincerely, Darrin Old Coyote, Chairman
5 of the Crow Nation."

6 JASON SMITH: Good afternoon. My name is
7 Jason Smith. I'm Director of Indian Affairs for
8 the Governor's Office from Montana. I would like
9 to submit a letter that Governor Bullock has
10 stated on behalf of the Little Shell
11 acknowledgment, federal acknowledgment. He is in
12 whole support of this rulemaking process and
13 expeditiously. I'll just submit my comments.

14 AJ NOT AFRAID: Good afternoon. And
15 again, for the record, AJ Not Afraid, Secretary
16 Crow Tribe. I just have two questions. A
17 personal question as to the Office of Appeals and
18 Hearings. Is that staffed as a whole separate
19 department?

20 And then question two is, what is the --
21 could you give us some background as to the
22 criteria, if you could elaborate on the purpose of
23 the land occupation?

24 MR. ROBERTS: Sure. So with regard to
25 the Office of Hearings and Appeals, that is

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1 independent from the Assistant Secretary's Office.
2 It's under Secretary Jewell. But even though
3 they're placed in the Office of the Secretary,
4 they're independent as well. And so they hear all
5 of the administrative hearings that we -- that we
6 have internally. So when, for example, a regional
7 director makes a decision to take land into trust
8 for Crow Nation, someone appeals that, then it
9 goes to the Interior Board of Indian Appeals,
10 which is in the Office of Hearings and Appeals.

11 So what we're proposing is that this
12 hearing not go to the Interior Board of Indian
13 Appeals, but it be within the Office of Hearings
14 and Appeals because they run different hearings
15 regularly, so that's sort of what they're used to
16 doing.

17 With regard to the second question, what
18 was that again?

19 AJ NOT AFRAID: Land occupation.

20 MR. ROBERTS: Land occupation, right. So
21 what we proposed in the Proposed Rule is that, you
22 know, if the group has maintained a state
23 reservation from 1934 to the present or the United
24 States has held land for the group at any point in
25 time since 1934, that's based on the criteria that 40

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1 the Department used shortly after the Indian
2 Reorganization Act was passed, Felix Cohen, who
3 was at the Department of Interior at the time and
4 sort of viewed as the leader in Federal Indian
5 law, he -- they put together a handbook, and one
6 of those criteria was -- so for example, they
7 would look if a group wasn't federally recognized,
8 they would look to see, Do they have a treaty?
9 Did they have certain things?

10 And one of the five things that they
11 looked at was, Did the group have collective
12 ownership in land? And that could be dispositive
13 of recognizing that tribe. And so we have
14 proposed the state reservation or if the United
15 States has held land in trust sort of to capture
16 that idea, that if a group has collective rights
17 in land, that we should recognize them and that
18 should count under just the two criteria,
19 community and authority, political authority.

20 AJ NOT AFRAID: Thank you, sir. May I
21 also comment on the land question? Being said as
22 such, how is it that the government can require
23 through the due process that criteria yet in
24 Little Shell's case? Obviously they were
25 transported to another area. So when you talk

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1 even aboriginal, territory or aboriginal rights,
2 it preexists those days. And you can correct me
3 if I'm wrong, but I do feel that the criteria
4 makes it difficult for the Little Shell to qualify
5 for that, understanding the circumstances.

6 MR. ROBERTS: So what we're proposing for
7 the land is that there's a lot of different ways
8 that a group can satisfy community and political
9 authority. They don't have to have collective
10 ownership of land. They can show those by other
11 means as well. There's a lot of other different
12 factors that they could use to satisfy those
13 criteria. What we've said is just that in the
14 Proposed Rule, if they have, let's say, a
15 reservation or if the United States has held land
16 for them at any point in time from '34 to present,
17 then that automatically satisfies those criteria.
18 We don't have to look at other factors in (b) or
19 (c).

20 But that wouldn't mean that if a group
21 never had collective ownership in land -- or not
22 collective ownership, but if the group never had a
23 state reservation, let's say from 1934 to the
24 present or the United States never held land for
25 that group, that wouldn't mean that they couldn't

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1 satisfy those criteria. They can satisfy them in
2 other ways.

3 AJ NOT AFRAID: Thank you, Assistant
4 Secretary.

5 VICKY STEPHENS: Sorry; I'm a runt. I
6 have two items. My name is Vicky Stephens, and I
7 am a representative of U.S. Senator Jon Tester,
8 who also happens to be Chairman of the Indian
9 Affairs Committee.

10 And it's a greeting and he says, "Thank
11 you for inviting me to share a few words, and
12 thank you for joining me and committing to see the
13 Little Shell Tribe of Chippewa Creek federally
14 recognized. With all our voices combined, we can
15 make this a reality.

16 As soon as I was elected to the United
17 States Senate, the first bill I introduced
18 proposed to give Little Shell the federal
19 recognition they deserve. As Chairman of the
20 Senate Indian Affairs Committee, we recently
21 passed that bill. At the same time, the Interior
22 Department is making significant steps to improve
23 the tribal recognition process. I will keep
24 working with Secretary Jewell to streamline the
25 process, and I will continue to push my bill

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1 through the Senate so tribes no longer have to
2 wait. Please feel free to contact my office at
3 any time with questions, comments, or concerns,
4 and thank you for partnering with me to make sure
5 Little Shell gets the federal protections they
6 deserve. Respectfully, Jon Tester, United States
7 Senator."

8 I also was asked to read a support -- or
9 a letter from Commissioner Monica Lindeen, who is
10 the State Auditor of Montana. And she says,
11 "Please consider this letter in support of federal
12 recognition for the Little Shell Tribe of the
13 Chippewa Indians of Montana when making your
14 deliberations. Montana has long recognized the
15 Little Shell Tribe. I have met with the Little
16 Shell Tribal Council and members on multiple
17 occasions, most recently last January when I
18 traveled the state to talk with our American
19 Indian communities about how the new healthcare
20 reforms impact them.

21 For decades, the Little Shell Tribe has
22 been seeking federal recognition. Their
23 persistence and dedication can be credited to
24 their strong community organization, respect for
25 their rich history, commitment to preserve their

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1 unique culture, and care for their members well
2 being. This tribe deserves the same access to
3 resources, tools for cultural preservation,
4 education, healthcare, and land that all federally
5 recognized tribes receive.

6 It's particularly important to weigh the
7 impact of federal recognition on their access to
8 healthcare. The Affordable Care Act grants
9 federally recognized tribal members special
10 benefits to increase their access to quality
11 affordable healthcare. I've seen how life
12 changing these benefits can be for our Indian
13 communities. The Little Shell Tribe deserves the
14 same access that the rest of Montana's tribes
15 currently have. Thank you for your consideration.
16 Sincerely, Monica J. Lindeen, Commissioner of
17 Securities and Insurance, Montana State Auditor."

18 MR. ROBERTS: Thank you.

19 KRIS FOURSTAR: Good afternoon. For the
20 record, my name is Christopher FourStar with
21 Senator John Walsh. I am his American Indian
22 liaison. The senator's comments are, "Senator
23 Walsh strongly supports federal recognition for
24 the Little Shell Tribe. Federal recognition of
25 the Little Shell Tribe is long overdue. Senator

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1 Walsh has gone on record with Assistant Secretary
2 Washburn regarding his support of the proposed
3 rule change and will gladly do it again as part of
4 the public comment process." Thank you.

5 MR. ROBERTS: Thank you.

6 AMANDA PETERMAN: Good afternoon. Amanda
7 Peterman, Tribal Liaison for Congressman Steve
8 Daines. "Dear Assistant Secretary Washburn, I
9 welcome you to Montana, and I thank you for your
10 thoughtful attention to this very important matter
11 to Montana, especially members of the Little Shell
12 Tribe. It is very disappointing the Little Shell
13 Tribe continues to struggle for the federal
14 recognition from the Department of Interior it
15 undoubtedly deserves. Federal recognition for the
16 Little Shell Tribe is supported by our entire
17 Montana delegation, local counties, and other
18 Montana Tribes already recognized. I urge the
19 Department to complete this Tribe's recognition it
20 deserves. I am happy the new rule makes some
21 improvements. I urge the Department to continue
22 transparent communications with tribes throughout
23 this process.

24 In the meantime, I continue to urge
25 support for my bill, H.R. 2991, which would

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1 federally recognize the Little Shell Tribe. I
2 continue to urge the House Natural Resources
3 Committee to consider and pass my bill as I
4 believe the legislation would give the Committee
5 another opportunity to provide oversight over the
6 federal recognition process and provide the Tribe
7 final recognition it deserves. I appreciate the
8 support from our Senators on this bill as well.

9 I look forward to gaining more
10 clarification about this new rule and hope you
11 sincerely take into consideration any tribal
12 concerns. I look forward to working with you on
13 this broken, burdensome tribal recognition
14 process. Sincerely, Steve Daines, Member of
15 Congress."

16 MR. ROBERTS: Thank you. So while we
17 have a little break in comments here, I just
18 wanted to let you know that while we've been
19 meeting here, I have a little bit of an
20 announcement in terms of the extension request
21 that we received from a number of folks, and I
22 just wanted to let you know that we will be
23 announcing an extension. We will be announcing
24 that, but we're going to be announcing it tomorrow
25 and details will follow as part of that

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1 announcement. But we will be announcing an
2 extension of the comment period tomorrow.

3 Okay, are there any other comments? Okay
4 well, I thank you all for attending, and I thank
5 the Crow Nation for hosting us here in their
6 territory, and safe travels home.

7 [PUBLIC HEARING CONCLUDED AT 2:08 P.M.]

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