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

Morning Session
July 23, 2013
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
TUESDAY, JULY 23, 2013

9:05 A.M.

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

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

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

Before we dig into things here, I think for the structure of this morning, what we're thinking about doing is having folks go around the room and introduce themselves, since we have such a
small group here. Folks in the back can -- I know
everyone wants to sit in the front row, and so we
can all get together.

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

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

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

VIRGINIA CROSS: Virginia Cross --

(inaudible) --

THE REPORTER: I can't understand her.

LARRY ROBERTS: The microphone is on,
but we have a court reporter here and she has to get
down your names and the tribes, so if we could just try that one more time just so that the record is clear. Because what we'll do as a result of this consultation then, and in all the consultations, is we'll put these up on our website so people can see sort of what comments were made by various tribes and the public as we're going through the process. Thank you.

MARK JAMES: Can you hear me now?

THE REPORTER: I can hear you.

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

VIRGINIA CROSS: Virginia Cross, Muckleshoot Indian Tribe.

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

LOUIE UNGARO: Louie Ungaro, Muckleshoot Indian Tribe.

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

SHARON EDENFIELD: Good morning,
Siletz.

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

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

ANN LEWIS: Confederated Tribes of Grand Ronde.

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

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

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

(No response.)

LARRY ROBERTS: Okay. I haven't heard any concerns or objections, so we'll just go forward. Again, this is the tribal consultation session. There will also be a session this afternoon for the public. And before we get started, I want to have my folks here introduce
themselves and let you know where they are working within Department of Interior and their role in the regulatory process.

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

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

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

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

   Okay. In that packet of materials there's a PowerPoint and we'll run through that. It
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should take, hopefully, about 15 minutes, and then we'll turn it over to the group for comments and questions.

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

(No response.)

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

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

In 1978 the department promulgated regulations to establish a process to basically look at and consider those petitions. Those were then revised in 1994. Primarily in 1994 the department
looked at many of the regulations to provide a process for previous unambiguous federal acknowledgment so that if a tribe was federally acknowledged in the past, that that would be taken into account as part of this administrative process to recognize tribes.

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

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

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

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

And the deputy assistant secretary testified that the department would be moving forward with a proposed rule in one year back in 2009. Assistant Secretary Echo Hawk at that time had expressed his concern about the acknowledgment process during his confirmation process and that
they needed to look at how to improve the process. And some of the things that the department testified at that time was looking at the process to eliminate unneeded steps, to take a hard look at the standards, and to have clear standards. And basically, the department in 2009 said it would take about a year for a proposed rule and then about a year to finalize that rule.

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

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

So when Assistant Secretary Washburn and I joined the department last fall, this was something that the department had already put a lot of work into and a lot of effort on, in terms of how
to improve the process. And earlier this year, the assistant secretary testified before the House subcommittee about the process that we would be taking and where we are in terms of looking at reforms to the Part 83 process.

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

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

So that's a little bit of background in terms of how we got to the discussion draft that we have before us today. And in sort of broad strokes what the discussion draft proposes to do is it proposes to eliminate the letter of intent. And so for those of you who are familiar with the
current process under the Part 83, the initial step is for a petitioner to submit a letter to the Office of Federal Acknowledgment saying that it intends a petition for federal acknowledgment. And after that it can take years before a petitioner submits an actual documented complete petition. So one of the things that the discussion draft does is it proposes to eliminate that initial letter of intent and really start the process with an actual petition.

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

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

The discussion draft attempts to clarify some of the criteria. We've put in placeholders in terms of asking for additional
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objective criteria so that anyone going through the regulations can say: Okay. The regulation says X. If I don't meet X, then I know that I can't satisfy that criteria. So we want objective criteria. This would -- under the current process, petitioners aren't allowed to withdraw their petitions. And I don't know that that happens a lot in federal service where you submit an application, but you're not allowed to withdraw it. And so this would -- the discussion draft allows a petitioner to withdraw their petition so long as we haven't started active consideration on it and started actually putting resources to evaluating that petition.

It provides for an automatic final determination in certain circumstances, and it also -- what we're looking for feedback from all of you on is who should issue the final determination. So the discussion draft leaves a placeholder. Should the assistant secretary of Indian Affairs issue the final determination, which is how the process currently works, or should the Office of Hearing andAppeals, which is a body that is independent of the department, sort of an administrative judicial body -- should they issue
the final decision based on information received by
the department?

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

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

And then, basically, the discussion
draft sets forth how we would move forward with
those petitions in terms of timing and when we
receive them. The process essentially works that
it's first in/first out. So if you get a petition
in before somebody else, generally speaking, the department addresses your petition first.

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

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

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

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

If the petitioner would satisfy either one of these two criteria, then like the negative determinations, we would issue a decision within six months of beginning active consideration. If a petitioner asserted that they had a state reservation since 1334 to the present, but they actually haven't, or that the United States never held land for the group, then the department would make that determination and process the petitioner through the full process through a full evaluation.
GARY RICKARD: Can I ask a quick question? If U.S. held land for a group at any point since 1934, does that also include if it was a federal court that ordered the holding of the land?

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

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

GARY RICKARD: The court order would also satisfy that?

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

Okay. So adjustments to the criteria themselves. The discussion draft deletes Criteria
A. And Criteria A essentially provides that the petitioner must show from 1900 to the present generally, that an external entity, a non-Indian entity, had documented that they had seen and observed the tribe. So this discussion draft deletes that criteria.

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

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

In terms of Criteria E, the descent from a historical tribe, we would essentially keep that criterion the same. We wouldn't -- the discussion draft doesn't propose moving that date up to 1934, but instead what it would allow -- right
now my understanding is that descent from a historic tribe would rely primarily on proof from a genealogist, and the discussion draft would allow historians and anthropologists' conclusions as evidence of descent from historic tribe.

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

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

If a petitioner does that, if they withdraw their petition before the proposed finding is published, then the department will cease consideration of it upon its withdrawal, but that petitioner then moves essentially to the end of the
list and loses its place in line of consideration.

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

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

In the discussion draft what we've
essentially tried to capture is maintaining the
current process for a proposed finding, but then after that proposed finding is issued, asking for comment on whether that process should then transition over to the Office of Hearings and Appeals and basically having them -- the proposed finding and the materials and whatever materials are submitted by the petitioner responsive to the proposed finding and the interested parties in response to the proposed finding -- that would all transition over to an administrative law judge to review those materials, to take any sort of legal arguments or factual arguments that the parties wanted to provide. And then, essentially, the Office of Hearings and Appeals would issue a final determination.

And so we're looking for comment in terms of that process. We've heard some parties make comment, to the Senate committee and others, that the process is too political. And we've heard other comments on the other side, that the assistant secretary should be responsible for making these determinations, and so it's appropriate within the assistant secretary's office, and this is essentially a concept that we wanted to get public input on.
As I mentioned early on, the discussion draft deletes an Interior Board of Indian Appeals review of a final determination. So what that would essentially in practical effect do is once the assistant secretary issues a final decision, it would move directly to federal court if it was to be challenged.

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

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

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

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

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

Some of the things we're seeking
comments on are: What definitions, if any, should be revised in the current regulations. Would a standard form of petition be helpful to petitioners? Would it be something that -- you know, again it would be optional, but would it be helpful for petitioners to have that sort of framework or guidance in terms of what a petition should include.

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

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

And, finally, we're looking for comments in terms of on what page limits, if any, should apply to this process, in terms of a petition itself -- not talking about the underlying
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historical documents that would need to be submitted as part of a petition, but actually the petition itself, should we have page limits on that? Should the department impose page limits on its proposed finding. OFA's report in support of proposed finding. Any sort of arguments in response to that proposed finding. We're looking for input on how we can improve that process and make it more efficient.

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

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

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

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

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

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

The proposal lowers the acknowledge threshold by requiring that department view evidence presented in support of a petition in the light most
favorable to the petitioner, stripping the
department of its ability to carefully weigh
conflicting evidence.

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

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

The assistant secretary's proposal
appears to have been developed without input from recognized tribes and provides little explanation for the drastic changes in the acknowledgment criteria that are proposed. Many of these changes are inconsistent with long-standing department policy. Indeed a number of the proposed changes in the acknowledgment process contained in the draft proposal had been previously considered and were rejected by the department on the ground that they would undermine the essential requirement that a petitioner demonstrate historic continuity as a tribal entity.

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

For example, many northwest tribes who participate in the canoe journey are presently on the canoe journey and have that obligation as a cultural right rather than being able to come here.
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In summary, the Muckleshoot Tribe views the draft as a one-sided proposal that without explanation lowers the standards for acknowledgment in a manner that threatens the sovereignty of all tribes. The tribe believes that the current proposal should be scrapped and a new proposal developed with appropriate tribal input that preserves the existing criteria and focuses on establishing a more timely, efficient, and transparent acknowledgment in the process.

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

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

RICHARD REICH: Thank you, Chairwoman Cross.

As Chairman Cross indicated we have some serious concerns about the proposal. As the department has stated, congress has criticized the proposal in the past. The criticism, however, we
think procedural in nature concerns about
timeliness, efficiency, transparency, not concerns
about the criteria themselves. The procedural
commards, we believe, can be more readily addressed
by more staffing, by clearer guidelines explaining
the existing criteria, by adherence to timelines by
both the department and petitioners, and by the
department foregoing independent research to fill in
the gaps.

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

One of the our concerns is that
instead of maintaining the criteria as the assistant
secretary's press release seems to suggest, in our
view, there have been major changes made without a
very clear explanation. I know you've given a short
explanation of some of those today, but we still
have some questions that would help us in addressing
this further as we go along in written comments.
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Our understanding has been that it's been the department's longstanding view supported by well-settled case law that continuity of autonomous tribal political existence is the essential core requirement for acknowledgment of tribal status.

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

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

If there are other -- you know, we welcome comments in terms of how to improve the process, how Muckleshoot thinks -- believes that we can improve the guidelines. That's something that we've heard a lot about are clear guidelines,
clearer object criteria. I think that would be helpful.

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

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

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

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

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

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

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

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

   RICHARD REICH: Yes.

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

   RICHARD REICH: The last comment I'd like to make is: Can you explain the rationale for the change in the burden of proof that now requires
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that evidence be viewed in light most favorable to petitioner?

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

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

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

    LARRY ROBERTS: And, Chairwoman, I
just wanted to acknowledge your comments. Thank you for those comments. If you have anything that you want to give either us or the court reporter today, that doesn't preclude later written comments, but we'd appreciate your comments on that. It might help the court reporter in case she missed anything. That's up to you.

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

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

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

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

In my cursory review of the discussion draft, it doesn't appear that there's enough protection of existing tribes' rights to comment and be consulted on the application, the petition. There's many issues that spring up later. Many times groups, whether legislatively or through petition or acknowledgment, identify themselves as a certain group, and once recognition is extended to them, that becomes redefined over time.
There's a reassessment of their community history, of their ancestry, of their attachment to treaties or seated lands of another tribe. And so we're in the middle of many of those discussions now with our neighboring tribes. And there's a number of groups that we're aware of that are trying to either legislative or petition for acknowledgment processes.

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

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

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

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

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

And as part of that rigorous burden of proof, we believe that there needs to be more rigorous review of expert witness historian's testimony. There's been unchallenged statements in the past, and I think we will be taking a much tougher look and providing tougher comments on those
kinds of issues in the future because they lead to
current-day problems.

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

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

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

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

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

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

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

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

I appreciate --

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

LARRY ROBERTS: That's the current framework now, that a tribe that is petitioning for recognition within the department can still go to congress and try. So that's the same now. A
tribe -- let's say, a tribe tries to get legislately recognized now and the congress, for whatever reason, decides not to do so, they're still eligible for our process if they have that determination.

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

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

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

So if Siletz is suggesting more public comment, please provide those comments to us as part of this comment period so we can look at them in terms of a proposed rule, but this discussion draft doesn't intend to change the status quo on that.
In terms of your concern about an already existing tribe in terms of members that are already members of a federally recognized tribe, that's something that we try to address in the expedited negative determination so that those are often processed quickly, and it frees up more resources to look at those petitioners whose members aren't primarily composed of another federally recognized tribe.

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

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

But I will say, for example, I know Senator Tester has raised the comment in terms of -- you know, if a petitioner is in the plains or
Northwest and a tribe in Florida objects, we should be giving that weight because maybe those tribes in that area of the country know that petitioner better than a tribe that's far removed. And so we need to balance that, I think. Or that's the attempt here in this discussion draft, is to balance that.

ROBERT KENTTA: Thank you.

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

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

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

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

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

So I'm going to go ahead and open up the floor in terms of additional comments on the discussion draft. And also, you know, I wanted to, again, emphasize the importance -- all of your oral
comments will be made part of this record as we're going forward, but please also submit written comments, especially if there are improvements to the process that you would suggest or if you believe that the process is working fine, we need to hear that as well. And so any comments on the discussion draft or the process in general are appreciated.

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

(Pause.)

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

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

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

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

(Pause.)

LARRY ROBERTS: Okay. Well, I
appreciate everyone coming and turning out, and we will be looking forward to receiving written comments. Thank you so much for attending.

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

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Public Meeting

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
TUESDAY, JULY 23, 2013

2:05 P.M.

* * * * *

LARRY ROBERTS: All right. Good afternoon, everyone. We're going to go ahead and get started here this afternoon for this public meeting on the discussion draft of the Part 83 regulations.

My name is Larry Roberts. I'm a member of the Oneida Nation of Wisconsin, and I'm the principal deputy assistant secretary for Indian Affairs. I started at the department in September of last year, and I want to just start off by saying thank you to Cow Creek Tribe for hosting this consultation.

I'm going to let Liz and Katie introduce themselves, and then we're going to basically move forward with a PowerPoint that some of you in the audience have already heard, and then from there, we'll open it up to questions in terms of -- so I'm going to let Liz and Katie introduce themselves.

LIZ APPEL: Hi. I'm Liz Appel. I'm with the Office of Regulatory Affairs, Collaborative
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Action, which is under the office of the assistant secretary of Indian Affairs.

KAITLYN CHINN: My name is Katie Chinn. I'm a citizen of the Wyandotte Nation of Oklahoma. I also work in the solicitor's office in the Division of Indian Affairs.

LARRY ROBERTS: Okay. So does everyone in their materials have a copy of the PowerPoint? So we're going to go through that. It should -- judging on the pace this morning, it will probably take about 20 minutes -- 20 minutes to a half an hour, and then we'll move forward with comments.

So just in terms of background for purposes of acknowledging and recognizing government relationship with tribes, there's essentially three ways in which the government can acknowledge a tribe. There's acknowledgments through the judicial branch, through the congressional branch and federal legislation and by the department itself, administratively.

Prior to 1978 the department, in terms of its acknowledgment of a tribe, would approach those on a case-by-case basis. There were no regulations prior to 1978. In 1978, the department
adopted final regulations that lay out the process for acknowledgment.

   In 1994 those were amended. Certain changes, such as previous unambiguous federal acknowledgment were incorporated into regulations. And then since those changes in 1994, the department has issued guidance from time to time basically providing guidance to the Office of Federal Acknowledgment, petitioners and the public, in terms of how the process would move forward.

   Of the 566 federally recognized tribes today, 17 of those have been recognized through the department under the Part 83 process. So in terms of why we're looking at the process and sort of the genesis of the discussion draft, we've heard from a number of folks that have criticized the process as being broken. The Senate Committee of Indian Affairs had a hearing with that title itself in terms of the Part 83 process being broken.

   Some have criticized the process as being too long, burdensome, expensive, unpredictable in its results, and not transparent. And so the department has heard those criticisms. And when the Obama administration took office, Secretary Salazar committed to examining ways to improve the process
in 2009 in an oversight hearing with the Senate Committee of Indian Affairs.

Later that year, in November of 2009, the department testified that it would be putting out proposed changes of the Part 83 process in one year. The department acknowledged the need to revise the process and said that they were going to look at elimination of unnecessary steps, that the department was going to take a hard look at the standards, and that they thought it would take approximately one year from 2009 to put out a proposed rule and then another year to issue the final rule.

So in 2010 the department spent a lot of time developing potential improvements to the Part 83 process. In 2012 the department again testified before the Senate Committee of Indian Affairs and identified guiding principles in terms of what it would look at in terms of improving the process. And some of those guiding principles were transparency, timeliness, efficiency, flexibility, and integrity.

At that 2012 hearing before the Senate Committee of Indian Affairs, a number of members of the committee criticized the department for not
having adhered to its earlier testimony before the committee about the proposed rule and a final rule.

So last fall when the assistant secretary and I joined the department, this was one of the issues that had been at the department for some time. There had been a lot of work on attempting to improve the process internally. And so what we did when we joined the department is we built off the good work that those folks had already done, but also convening a smaller group of folks from the Office of Federal Acknowledgment, the solicitor's office, and the Indian Affairs office to develop potential approaches to improve the Part 83 process.

And so the discussion draft that we're here to talk about today builds off of all of that work from over the years, from 2010 to the present. So broad brush -- and I'll talk about these in a little bit more detail in the following slides -- but a number of changes that the preliminary discussion draft sets forth is eliminating a part of the process where it provides for the petitioner to submit a letter of intent.

The discussion draft sets forth processes for expedited favorable and negative
decisions. It attempts to clarify some criteria. It provides a mechanism for petitioners to withdraw after from the process, where before the withdrawal would have to occur before a proposed finding was issued.

It provides for automatic final determinations under certain circumstances. Examines -- we're actually looking for public input as far as who should issue the final determination, whether that should be the assistant secretary, as it currently stands, or whether it should be the Office of Hearings and Appeals.

And then, finally, the discussions draft eliminates review of the Interior Board of Indian Appeals -- or the need for the appeals process there.

So in terms of the letter of intent, the idea would be that the process would no longer begin with a petitioner submitting just a letter stating their intent to petition, but the process would actually start once a petition is submitted by the group.

In terms of processing dates, we would still keep those petitioners that have submitted a letter of intent. Those dates would still hold, but
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that basically we would continue to operate on a
first in/first out basis in terms of when a petition
is complete and ready for review.

In terms of expedited decisions, the
discussion draft suggests a process for expedited
denials, and those would be -- essentially once a
complete petition was in, we would review the
petition to see whether the petition satisfies
Criteria E, descent from a historic Indian tribe; F,
that its membership is comprised principally of
members who are not already members of other
federally recognized tribes; and G, that the group
isn't subject to federal legislation terminating or
forbidding that relationship.

If a petitioner failed any of those
three criteria, the discussion draft proposes an
expedited negative finding within six months after
active consideration. If the petitioner meets these
three threshold criteria, then it would be evaluated
under a full evaluation of petition or expedited
favorable process, if the petitioner is asserting
that it satisfies those standards.

The expedited favorable would be done
basically if the two criteria we have in the
discussion draft that we're seeking comment on, or
if the petitioner has maintained since 1934 a reservation recognized by the state and continues to hold that reservation, or if the United States has held land for the group at any point in time since 1934. Those would be a basis for expedited favorable decision.

And like an expedited negative determination, an expedited favorable would be issued within six months of active consideration. And if the petitioner does not satisfy the criteria or doesn't assert that they're entitled to an expedited favorable finding, then we would undertake a full evaluation of the petition.

In terms of adjustments to the criteria, the discussion draft proposes the leading criteria, A, which provides for external observers to identify the group as a tribe from 1900 to the present.

In terms of special Criteria B, and Criteria C, the analysis would -- it's proposing to change that time period from instead of time of first non-Indian contact from 1934 to the present to reflect the change in federal Indian policy with the enactment of the Indian Reorganization Act.

In terms of Criteria E, we're not
changing the time period for that, but we are allowing additional means of evidence to prove descent from historic tribes. So if -- right now we rely primarily on genealogists, and this would allow historians and anthropologists' conclusions as evidence of descent from a historic Indian tribe.

And as you'll see in the discussion draft, we've literally left placeholders for certain criteria to get public input on what those criteria should be. And so those are depicted as just basically a double XX on those points, and we're looking for input from the public as to what that should be. And we're also looking for input from the public in terms of what other objective criteria should be included within the process.

In terms of withdrawals, we have clarified in the discussion draft that a petitioner may withdraw a petition before a proposed finding is published. OFA would then cease consideration of that petition, but the consequence of withdrawing the petition would be it would be then placed in the bottom of the list, in terms of priority, and so the petitioner would lose their position there.

In terms of automatic final determinations, this is something that we're -- the
discussion draft is attempting to incorporate existing agency practice, which is if the proposed finding is positive and we don't receive comments from anyone in opposition to arguments or evidence of opposition to acknowledgment then typically those are moved to a final favorable finding.

This would specifically provide that if a federally recognized tribe located in the same state as the petitioner or the state or local government did not submit comments in opposition, then it would go to a final favorable finding.

In terms of who issues the final determination, we're seeking comment. In terms of the current practice, the Office of Federal Acknowledgment works on the draft and provides it to the assistant secretary. The assistant secretary issues both the proposed finding and the final determination.

In the discussion draft we're attempting to keep that primary process where the assistant secretary would issue the proposed finding. And what we're asking for comment on is once that proposed finding is issued, should the assistant secretary maintain review and issue the final determination, or should the process then
shift to the Office of Hearings and Appeals, and
then the parties, whether it be the petitioner or
local tribes or local governments or the public --
should they then submit their materials and
responses and proposed finding to the Office of
Hearings and Appeals and the Office of Hearings and
Appeals issue a final determination.

So we're looking -- there's literally
brackets in our discussion drafts so you can comment
on what approach makes sense or maybe there are
other approaches out there that the public can come
up with in terms of increasing the transparency and
the integrity of the process itself.

Finally, the discussion draft deletes
the review of the assistant secretary's
determination by the Interior Board of Indian
Appeals. The consequence of that deletion or that
step would be if there is either a favorable finding
or a negative finding, that any party wants to
appeal, that appeal would go directly to federal
district court.

In terms of if we issue a final rule
that would modify the process, the discussion draft
attempts to address how the rules would apply to
petitioners currently in the process. So if the
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discussion draft or some version of it -- if we
issue a final rule here, the new version would apply
to anyone who hasn't reached active consideration
and anyone who was under active consideration at
that time that chooses to leave the process under
the new regulation, they could file a new document
and petition.

And then finally, if a petitioner that
has been denied federal acknowledgment under the
current regulations, they are -- the discussion
draft provides an opportunity for that petitioner to
re-petition. If it proves to the assistant
secretary or the Office of Hearings and Appeals --
that's sort of open here in the discussion draft --
by a preponderance of the evidence that a change
from the new version of the rights, whatever those
are, from the older version, would warrant a
reversal of the final determination. They would
then be allowed to re-petition.

So those are sort of broad-brush
changes. I should say we're also seeking -- we're
seeking comments on the entire discussion draft.
And some of the areas that we'd like to highlight
for folks is, you know, what definitions, if any,
should be revised and if they should be revised,
ideas and concepts in terms of how they should be revised. Should the department issue a standard form for petitioners? Would that be helpful? Should it be made optional, so that there is some sort of template that petitioners can use if they want to use one?

In terms of -- we're also, as I mentioned earlier, seeking comment on the criteria and objective standards that we could include in the criteria that are not already there in terms of community. And we've left placeholders there in terms of what percentage should reside in a geographic area, what percentage of marriages should be between group members, those sort of things.

In terms of political influence and authority, again, we're looking for objective standards and criteria there. And in terms of descent, E, descent from a historic tribe, again, any objective standards or percentages of criteria that the department should be utilizing in a revised regulation.

We're also looking for comment on page limits. Should the petition be limited to a certain number of pages, not including actual primary source documents. But should there be page limits on the
proposed finding? And should there be page limits basically throughout the process? Sort of like if there was before the Office of Hearings and Appeals or federal court, a lot of times, you would -- plaintiffs and defendants would have page limits in terms of their arguments and briefings.

Comments are due on the draft rule on August 16th. You can email them or mail them. Please get them in by the 16th. Our next steps are to review the comments that were received from these public meetings and from the tribal consultations and then move forward with a proposed rule.

We would then go through another round of tribal consultations and public comment and then issue a proposed rule in the Federal Register. I should note that the preliminary discussion draft -- what we've done is redline the existing rule that was published in 1978 and then revised in 1994. We now have within the federal government a plain language requirement, where we have to post our regulations in plain language.

And so my sense is that as we're going through the rule-making process, we may have to put this format into a plain language format. So it will be in the form of a question, that sort of
thing, so it's easier for the public and petitioners to understand the rule itself.

So with that, I will open it up to any questions and comments. And when and if you do make questions or comments, please introduce yourselves for our court reporter and speak slowly and clearly so that she can get down your name and where you're from. That would be helpful.

GARY RICKARD: Gary Rickard for Wintu Tribe of Northern California. You said the difference between the redline and the black lines in the preliminary draft was that the redline is the new proposed? Because I don't see it that way.

LARRY ROBERTS: Right. So the black text is the existing rule as it stands now, and the redline markings are the proposed changes in the discussion draft. And there are some changes in the discussion draft that are literally just moving -- reorganizing various parts of the sections. And so we've tried to put them -- where we've done that, we've tried to capture that in brackets to make clear that we're just moving this particular definition or this particular subsection into this other subsection.

And we're actually asking for comment
on that. Does that make sense or does it make the rule more confusing? But the redline is the suggested changes.

SPEAKER: May I just drop this off?

SONNIE RUBIO: (Speaking in native language) Thank you for this day. My name is (native language). The village site in Crescent City, Ee-ju-let, California. And our council met and kind of -- we just went over this so I'm going to read it. I can leave it with the secretary, as well, because I have a copy.

We're Petition No. 85 with the government. We are active status at this time. And we proposed to stay with the current process right now. We've been with OFA for over 30 years. We've lost three generations already in our group. And with our history of many villages in Del Norte County, California, we've been transported everywhere from Eureka all the way up to Siletz, Oregon where our original area is in Oregon and California.

And our villages were massacred at that time, and we're still here today. And it was three generations ago that this happened within my family, at Ee-ju-let. And losing three generations
with our tribe now -- you know, it's a long process
and it's kind of hard when in the beginning, when
tribes were trying to survive during the first
contact with the non-American Native American. And
so we tried to survive the best we can.

My family itself has been in one area
for 105 years already in the same village site. We
can reach over and touch you. We own our village
site. We pay taxes on it. And so this is just the
history of just one village site and there's many
more that were massacred in Del Norte County itself.

Our understanding with -- we got a
letter from OFA and we're supposed to have -- they
stated to have potential revisions on Part 83, but
to recognize tribes it was potential for
improvements of Part 83. And our questions that we
have as a tribal council -- we have eight that sit
on tribal council at this time.

Why consult with recognized tribes?
What is the time limit for all of this? And when
will petitioners receive -- to be able to attend
open meetings. We didn't know that we could attend
this meeting at this time. It was the federally
recognized tribes that came to us and stated, you
know, "Go to this meeting." And these are people
who are recognized by the government already. So we were glad that we did hear something because in our letter, it didn't say anything at all.

Also, after the proposed rules comes the formal comment period and then last the publication of the final rule. So it doesn't give the nonrecognized tribes an opportunity to speak about this, who are already with the government, you know, in active status. It doesn't give us an option to do anything either way. We have to abide by what the government is saying already.

And also we're given the option to suspend consideration and may later decide to resume the process when it left off regarding the rule making, so it doesn't matter. Even -- you know, we chose not to come to the new session of this because we already know the flaws as they are now, but we're just trying to deal with the government to the best of our ability and do that.

Also, the department will allowance its new rule. So when the new rule happens, they're going to come back to us already because all of this was done. And that will give us the opportunity, what it is that the government says we have to do, to continue on to be recognized. We have not seen a
draft as we are looking at it right now, but
federally recognized tribes have already seen the
draft.

And so to me that left us out again
for not being able to respond to the government.
All we could respond to is when the OFA said, "You
can suspend your consideration." You know, that's
all we were told. But recognized tribes were given
the opportunity to August 16th.

Our tribe, Tolowa Nation, they told us
we had to respond July 30th so that didn't give us
no time at all to see a draft, look at a draft, to
figure out anything of what was happening because we
have to abide by what you say.

And then also, you know, our
generations with our people were -- we're still
here, you know, and (native language) on trauma.
Our ancestors suffered a lot of hurt. Thank you.

LARRY ROBERTS: Thanks. So I want to
just clarify a couple of points for you on some of
the remarks here. One is in terms of the OFA letter
and notice of the consultations.

On the OFA letter, what OFA has done
is we've asked them to send letters to all the
petitioners that are in the active status, and I
believe the petitioners that are in the
ready-and-waiting status to send them a letter
basically letting them know that, Hey, we're looking
at the rule making and please let us know at your
earliest convenience -- I think it was like the end
of July -- you know, whether you want to proceed
with your active consideration or whether you want
this rule-making process -- whether you want to put
it on hold.

You know, some of the comments that we
got back were fair comments, which was: We haven't
even seen a draft, so how can you ask us to decide
whether to put something on hold or not?

And then the point of the letter was
not to put a date certain by which each petitioner
had to make a determination whether to do so or not,
but to provide those petitioners the option that,
Hey, this is going on, we don't know how the process
is going to move forward. We don't know how long
it's going to take, but if for whatever reason, you
want to follow this process and would prefer to
suspend your application, you could do so -- your
petition.

In terms of these consultations and
the discussion draft itself, we posted that
information in the Federal Register. And I know maybe some folks don't follow the Federal Register, but we've also posted it on the Bureau of Indian Affairs website, in terms of the consultation dates and the discussion draft. You can download it there. And I think as we moved forward with the proposed rule, that these are helpful comments that you've given us in terms of how we can do better outreach.

In terms of the deadline, the August 16th deadline applies to everyone, federally recognized tribes, petitioners, the public -- we're looking for everyone's comments -- and that deadline is August 16 for everyone.

In terms of why we are consulting with federally recognized tribes, President Obama issued an executive order requiring consultation with federally recognized tribes on issues that involve Indian country, and that builds off an earlier executive order from -- issued during the Clinton administration, and that's why we are consulting with federally recognized tribes. But we've also -- given the interest from both petitioners and the public, we want to have these forums as well.

We invite comment in terms of how
we're doing in consultation and public meetings. We had a tribal consultation this morning with federally recognized tribes. There were a couple of people from nonfederally recognized tribes that were here. And we asked the group if anyone objected that they sit in on that consultation, and there were no objections, and so we moved forward. So if there are ways that we can improve, not only the tribal consultation process, but the public component of this in our proposed rule-making, we would urge you to send your ideas to us by the August 16th deadline.

And so we'll look internally, in terms of how we can do a better job of circulating the discussion drafts and the proposed rules to the public, so that everybody is working on the framework, but that's why we've tried to put a bolt on this, that public comments -- just get them in by August 16th and we'll consider them.

LIZ APPEL: Under the current deadline, petitioners who are on active consideration, according to the regulations, you would have the option of going under the old regulations or the new regulations.

SONNIE RUBIO: Yeah. We stated that
to OFA, that we chose to stay with the current one right now, because our understanding from the letter is it doesn't matter if we go for or against, it's what OFA is going to make the final decision on all the comments. Then it will be brought back to us, where we're going from that point, so we chose to stay with the old one.

LARRY ROBERTS: Thank you --

SAMI JO DIFUNTORUM: Hi, my name is Sami Jo Difuntorum. I'm with the Butte Valley Indian Community, and first I'd like to thank you for having this meeting and giving us the opportunity to show up and share our opinions with you on the proposed regulations.

My family descends from the Kewkahekke band of Shasta Indians from Upper Klamath River Canyon, and I support the proposed changes. I'll submit a very detailed written comment in writing, but my observation -- I volunteer for my tribe for probably over 30 years, maybe more than that. I hate to do the math.

My observation over the years is that nonfederally recognized tribes, particularly the ones in California that I'm more familiar with, really lack the resources and sophistication to
navigate the current process, so I think that the change is long overdue, and we support the changes. We'll submit written comments that are fairly detailed before the August 16th cutoff. And also, I wanted to thank you for the opportunity to provide comment and having a public meeting. I think that's it.

CLARENCE SIVERTSEN: Good afternoon, everyone. My name is Clarence Sivertsen. I'm the first vice chairman of the Little Shell Tribe of Chippewa Indians of Montana. I want to thank you for this opportunity to address you today on the subject of consideration of revisions of the federal acknowledgment regulations. This is a matter of utmost importance to my tribe and many other tribes. We commend you for undertaking this process, something that has been needed for many years.

My tribe is presently not federally recognized, even though we've had treaty relations with the federal government. We have a petition for recognition pending which has not yet received a final and effective determination, as it is now pending before the Secretary of the Interior, on referral from the Interior Board of Indian Appeals.

The fact that it is not yet final and
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effective is amazing, given that the Little Shell Tribe first sent a letter to the Bureau of Indian Affairs petitioning for federal acknowledgment in 1978. To put that in perspective, the process has spanned all or part of five decades and is still ongoing. It has cost well over $2 million, and that is surely the low end of costs for the process.

It is clear that the process is broken. It is too costly, time consuming, and complex. The process cannot be saved by minor tweaks to the present regulations. In that regard, we are pleased to note that the preliminary discussion draft regulations contemplate some major revisions. Some of these proposed major changes are what we have argued for in documents filed with the Office of Federal Acknowledgment, with the IBIA, and with the Secretary of Interior, and in testimony before the Senate Committee on Indian Affairs, so we are appreciative that our words have not fallen on deaf ears.

First, we've argued that Criteria A should be eliminated. That criterion requires recognition by outsiders of an Indian entity on a regular basis since 1900. That cannot possibly be a mandatory criterion, at most it can be evidence of
existence as a tribe. Imagine that a tribe meets all of the substantive requirements to be a tribe. Can it be true in this day and age that the tribe would not exist because outsiders did not recognize that they were not looking at just the individual Indians, but an Indian entity? Essentially, this criterion requires interaction between outsiders and the tribal community sufficient to produce a document identifying the tribal community every ten years.

In the case of the Little Shell, the final determination against recognition recognizes that there were many references from 1900 to 1935 to landless Indians, breeds garbage dump Indians, and other uncomplimentary names, but concludes that there were not references to Indian entities and that therefore the criterion was not met. Little Shell ancestors have avoided contact with the dominant society because that contact subjected them to open and blatant discrimination. They survived as a migratory people off the official radar screen. By its nature, this lifestyle does not produce the paper trail required by Criteria A. Nor, if the subjective requirements of the regulations are met, can lack of identification by outsiders render a
tribe a nontribe? We're very pleased to see that our argument has apparently been accepted in that Criteria A is proposed to be deleted.

Second, we note that on July 14, 2000, Kevin Gover, the assistant secretary of Indian Affairs signed a proposed finding for federal acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana. After summarizing the evidence under each of the criteria, the assistant secretary concluded that the petitioners should be acknowledged to exist as an Indian tribe.

On November 3, 2009, the acting principal deputy assistant secretary of Indian Affairs published in the Federal Register a final determination against recognition of the Little Shell Tribe of Chippewa Indians of Montana, thereby reversing the favorable proposed finding. This was done despite the facts that no negative comments were received and that the State of Montana, all effective local governments, and all Montana tribes, as well as others supported recognition. We've argued repeatedly that to reverse the favorable proposed finding in the absence of any negative comments in response to the finding is arbitrary, capricious, and contrary to law.
We note that the draft regulations propose changing the regulations to provide for an automatic positive final determination if the preliminary determination is positive and no negative comments are received from relevant state or local government or from any recognized tribe in the state where the petition is located. This is a common sense change required by law and is welcomed.

We've also argued that Criteria B, community, and C, political influence, must be modified. At present they required proof of community and political influence from historic times to the present. It's unduly burdensome. The BIA requires proof of relationships -- in the case of community, relationships among tribal members -- and in the case of political influence, relationships between tribal members and their political leaders.

Self-identification of leaders and oral tradition are not sufficient for a tribe to carry its burden of proof. There must be a documentary evidence or alternatively statistics -- example, on marriage rates -- from which the BIA is willing to presume the existence of interaction.

Obviously, such documents are not
likely to exist for a tribal community that survived historically in the traditional way, and in modern times, by avoiding the dominant society. We were largely a buffalo hunting tribe throughout much of our history, and despite producing tens of thousands of documents, we have been told it's not enough. Much of our difficulty in meeting the unreasonable criteria is owing to federal policy toward and treatment of us. Yet rather than taking into account, it's held against us.

The process is too paper driven and extends over too long a period of time. We have previously suggested 1934, the year of passage of the Indian Reorganization Act, when congress and the executive actively addressed issues of tribal existence in a comprehensive way, and but for the lack of funds for tribal lands would have recognized the Little Shell tribe, as a much better time period on which to focus, although even there, the IRA itself contemplated action to be taken after that time which would result in recognition.

We note with satisfaction that the draft regulations focus on 1934 and contemplate changes in what must be shown to establish B and C, and what type of evidence will establish what does
need to be shown. We will have more to say on these matters in our written comments.

        Fourth, there are parts of the process that violate due process. In the case of Little Shell, three weeks of on-site interviewing of 71 people occurred at the end of the process, and the tribe was not given a chance to review and comment on these interviews before the final determination. The tribe had to do a FOIA request and pay nearly $5,000 to get the documents for the appeal to the IBIA. It puts the tribe in a much different position to try and overturn a decision than to be able to argue a point before final determination.

        The draft regulations do not address this issue, and that is a defect which we will address in written comments within the comment period. The draft regulations do address the need for a hearing, but once again, do not go far enough, in that the calling of OFA staff for testimony and cross-examination is discretionary. We will also submit comments on this issue.

        Fifth, the regulations attempt to simplify matters for tribes who can show acknowledgment of previous existence. Unfortunately, the regulations confuse and conflate
previous existence with a government-to-government relation. If previous existence is established, that should be sufficient to allow a petitioner to avail itself of the lower standards to establish other criteria. We will submit written comments on this issue also.

These proposed changes, and other proposed changes we will suggest in writing, will make the process more reasonable, time- and money-wise, and will allow the flexibility needed to do right by the unrecognized tribes of this country.

Finally, it has come to our attention that other petitioners who do not have a final and effective determination have been offered the option of choosing to have their petitions suspended pending adoption of the new regulations. The draft regulations provide they can re-file under the new regulations if that's their choice. That offer has not been made to my tribe, but that is what is provided by the draft regulations and we should be given the same option.

We should be treated equally with other petitioners whose petitions are not yet final and effective. For those petitioners who have received a final and effective negative
determination, we strongly support the provision in the draft regulations that allows re-petitioning if the petitioner can show that being recognized under the new regulations would lead to a different outcome.

And I thank you for your time and your attention.

ROBERT KENTTA: Robert Kentta from Siletz Tribe. I can't remember if in the morning discussion, in the part where it's talking about expedited favorable finding, if that criteria, that the U.S. has held land for the group at any point in time since 1934, whether that's specifically land held for the group or whether it can include individual allotment lands or other lands not specifically held for the group itself.

LARRY ROBERTS: Right now the discussion draft is for group individuals.

ROBERT KENTTA: Thanks.

SONNIE RUBIO: We will be able to hear what the recognized tribes recommended as well somewhere on the internet or where do you --

LARRY ROBERTS: So what we'll do is, once we get a transcript of these meetings, including the tribal consultations, as a matter of
course those go up on our website. And so that way both federally recognized tribes and the public, petitioners, they can see what concepts and ideas were being discussed at the other consultations and other public meetings. And so I think our -- if I remember correctly, our last tribal consultation and public meeting is August 5th -- I believe it's either the 5th or the 6th, so about ten days before the public comment period closes. I don't know that we will have the transcripts up on the website that quickly, but they'll certainly be able to see the comments being made before the proposed rule goes out.

(Pause.)

LARRY ROBERTS: Well, I think what we'll do is for those of you were here this morning, we'll do the same thing. At this point we'll take about a ten-minute break, come back around 2:00, 2:05, and get restarted. If folks have any comments, that will give a little time to think through things and we'll see you back in about ten minutes. Thanks.

(Recess: 1:53 to 2:03 p.m.)

LARRY ROBERTS: All right. So if there's no additional comments here, we appreciate
everybody coming today, but we're -- we don't have any additional comments, so we're going to wrap it up and let everybody be on their way home.

So anyone here have additional comments?

(Pause.)

Okay. Well, thank you for attending today, and we hope that we'll be able to get the transcript up on our website soon. Thank you. Safe travels home.

(The Tribal Consultation was concluded at 2:04 p.m.)
STATE OF OREGON  
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County of Lane   
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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 36 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 8th 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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