

In The Matter Of:

*Department of the Interior, Office of the Assistant
Secretary, Indian Affairs*

Proposed Rule - 25 CFR 82

January 30, 2020

Federal Acknowledgment of Alaska Native Entities

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DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY
INDIAN AFFAIRS

FEDERAL ACKNOWLEDGMENT OF ALASKA NATIVE ENTITIES
PROPOSED RULE - 25 CFR 82

TRIBAL CONSULTATION

Taken: Thursday, January 30, 2020

Place: Raven Landing Center

1222 Cowles Street

Fairbanks, Alaska 99701

Appearances:

Lee Fleming - Director
Office of Federal Acknowledgment

Kyle Scherer - Deputy Solicitor

John-Michael Partesotti - Attorney-Advisor
Office of the Division of Indian Affairs

Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action

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1 P R O C E E D I N G S

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3 10:24 A.M.

4 (On record.)

5 MS. APPEL: Good morning. This is Liz Appel
6 with the Office of Regulatory Affairs and Collaborative
7 Action reporting to the Office of the Assistant Secretary
8 for Indian Affairs. And I'm here with John-Michael
9 Partesotti, an Attorney-Advisor From the Office of the
10 Solicitor, Division of Indian Affairs; Kyle Scherer, the
11 Deputy Solicitor; and Lee Fleming, the Director of the
12 Office of Federal Acknowledgement.

13 And we have no tribal representation at this
14 meeting, so we are opening and closing the record for this
15 Tribal Consultation in Fairbanks. We will proceed with a
16 public meeting in a few minutes.

17 10:24 A.M.

18 (Off record.)

19 10:25 A.M.

20 MS. APPEL: Good afternoon. And welcome to
21 the public meeting, the first public meeting session for
22 Federal Acknowledgement of Alaska Native Entities, our
23 Proposed Rule to be located at 25 CFR, Part 82.

24 My name is Liz Appel. I'm the Director of the
25 Office of Regulatory Affairs and Collaborative Action

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1 under the Assistant Secretary for Indian Affairs.

2 And I'll have our other panelists introduce
3 themselves.

4 MR. PARTESOTTI: Good morning. John-Michael
5 Partesotti. I'm the Attorney-Advisor in the Office of the
6 Solicitor at the Division of Indian Affairs in the
7 Department of the Interior.

8 MR. SCHERER: Kyle Scherer, Deputy Solicitor
9 for Indian Affairs. Thank you very much for coming.

10 MR. FLEMMING: Lee Fleming, Director of the
11 Office of Federal Acknowledgement. And good morning,
12 everyone.

13 MS. APPEL: It's nice that we have a small
14 crowd here today. We're not going to reference you --
15 introduce yourself.

16 MR. WILLIS: Hi. Good afternoon. Michael
17 Willis. I'm an attorney with Hobbs, Straus, Dean & Walker
18 based in Washington, D.C. And I am here at a public
19 meeting on behalf of the Qutekcak Native Tribe of Seward
20 and the Kungank Tribe of Dillingham, Alaska. Thank you
21 very much.

22 MS. APPEL: Thank you.

23 So what our plan for today is, is I will run
24 through our PowerPoint presentation which explains some of
25 the background of how we got here and the content of this

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1 rule. And if you want to interrupt at any time with
2 questions or anything, feel free to.

3 Okay. Some background. In 1934, Congress, of
4 course, enacted the Indian Reorganization Act, the IRA,
5 that authorized Tribes to organize for their common
6 welfare, but most sections were inapplicable to Alaska
7 Natives.

8 So in 1936, Congress enacted additional
9 legislation, what's known as the Alaska IRA, which allows
10 groups of Indians in Alaska who were not previously
11 recognized as Bands or Tribes by the U.S. to organize
12 under the IRA to become eligible for some of the IRA
13 benefits as long as they could demonstrate a "common bond"
14 of occupation or association or residence within a
15 well-defined neighborhood, community, or rural district.
16 And that language is straight from the Alaska IRA.

17 The Department has regulations (indiscernible)
18 in the 1934 IRA at Part 83 that established a process and
19 criteria for groups to be federally acknowledged as Indian
20 Tribes, but there's currently no regulatory process
21 through which Alaska entities are acknowledged under the
22 Alaska IRA "common bond" standard as Tribes. So this
23 Proposed Rule will establish that regulatory process.

24 Today the Department has approved the
25 organization of more than 70 entities under the Alaska IRA

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1 "common bond" provision, but those approvals have all been
2 case-by-case determinations relying on the 1937
3 instructions and other guidance contemporaneous with the
4 Alaska IRA.

5 Yes.

6 MR. WILLIS: Good afternoon. I have a
7 question about the 75 recognized as the Alaska IRA. And
8 my question is, within those 70 entities, I am of the
9 understanding from previous conversations with the
10 Department of the Interior that the view that the Native
11 Village of King Salmon and the Sunaq Tribe of Kodiak were
12 recognized or organized pursuant to an affirmation or
13 re-affirmation and not pursuant to the Alaska amendment to
14 the IRA.

15 Is that the correct understanding? Or would
16 you consider the Native Village of King Salmon and the
17 Kodiak Tribe of Sunaq as Alaska IRA entities?

18 And this is based on the 2000 -- you know, the
19 December 2000 affirmation letter of Kevin Gover, which was
20 then reconsidered and reaffirmed by Neal McCaleb in 2002.

21 MR. FLEMMING: I'm not sure if those two are
22 included in this statistic, but those were decisions made
23 by Assistant Secretary Kevin Gover in 2000.

24 MR. WILLIS: Okay. Thank you.

25 MS. APPEL: The Department began the process

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1 of looking at whether to establish Alaska IRA regulations
2 in the summer of 2018, and has held multiple tribal
3 consultations, public meetings through the spring of 2019.
4 Most of the input we received questioned whether we need
5 an Alaska-specific regulatory process, and several
6 representatives of currently recognized Tribes were
7 concerned that a new regulatory process might affect their
8 existing federal recognition as Tribes in Alaska.

9 And nearly all urged the Department to issue
10 final decisions on any outstanding Alaska IRA requests
11 prior to implementing any regulation or guidance for the
12 Alaska IRA acknowledgement process.

13 The Department's responses to this input -- as
14 for the need for an Alaska-specific regulatory process,
15 the Department determined that a formal process is needed
16 to effectively carry out the Alaska IRA, and that the
17 process that's existing in Part 83 does not account for
18 the Alaska IRA "common bond" standard.

19 There's no effect on the size of currently
20 recognized Tribes in Alaska or elsewhere. And as for
21 consideration of pending petitions or requests, the
22 Department determined it will not consider any
23 acknowledgement petitions submitted by Alaska Native
24 entities under the Alaska IRA during this rulemaking.

25 If the rule is finalized, then Alaska Native

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1 groups that have previously submitted petitions would need
2 to revise or resubmit the petitions in conformance of the
3 final rule.

4 The Proposed Rule published on January 2nd and
5 the proposed new regulatory process for federal
6 acknowledgement under the "common bond" standard in the
7 Alaska IRA it, of course, applies only to groups that are
8 not currently recognized. So any group that's not
9 currently on the list of federally recognized Tribes that
10 BIA publishes annually in the Federal Register does not
11 impair or otherwise affect the existing rights and
12 authorities of already-recognized Alaska Native Tribes,
13 and any Alaska Native entity that's acknowledged under
14 this Proposed Rule would be eligible to receive all
15 services available to federally recognized Tribes.

16 The Proposed Rule would be located at Part 82,
17 if finalized. In large part it incorporates the process
18 and requirements that are in the existing Part 83, which
19 is the 1934 IRA recognitions, but there are important
20 distinctions to account for the Alaska IRA "common bond"
21 standard set up in the statute.

22 The first is that the proposed Part 82 would
23 require descent from an Alaska IRA-eligible entity as
24 opposed to Part 83, which requires descent from a
25 historical Indian Tribe.

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1 The start date for evidentiary standards in
2 the Proposed Rule would be the date that the Alaska IRA
3 was enacted, May 1st, 1936. And it's under the current
4 Part 83. The start date is 1900.

5 Likewise a period to satisfy the evidentiary
6 criteria would be measured from 1936 to the present under
7 the Proposed Rule, whereas under the current Part 83, it
8 is measured from 1900 to the present.

9 And then finally the proposed Part 82 does not
10 include the review of previous federal acknowledgement
11 claims that is available in the current Part 83.

12 The proposed Part 82 also clarifies that
13 Alaska Native entities who want to hold a secretarial
14 election under Part 81 first gain federal recognition.
15 And this is consistent with past Department practices
16 which have focused on organizing entities capable of
17 establishing government-to-government relations with the
18 federal government. And it's also consistent with the
19 IRA, Alaska IRA, and Part 81.

20 MR. WILLIS: Good afternoon. Thank you.
21 Excuse the interruption.

22 I just wanted to flag one comment with respect
23 to that particular slide that Ms. Appel just walked
24 through. And I'll talk more about this in my comments
25 when the opportunity presents itself.

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1 This is an issue that I think the
2 interpretation of this is consistent with the IRA, the
3 Alaska IRA, and Part 81. There may be differences, and it
4 would be important, and I'd like to gain more
5 understanding of the perspective given that the Alaska IRA
6 statutory term refers to Tribes not previously recognized
7 being organized pursuant to -- so in terms of just our
8 reading of the statute, we have the view that federal
9 recognition under the Alaska IRA is not required prior to
10 organization of Part 81.

11 I understand that Part 81 made changes
12 recently that may not have accounted for the Alaska IRA.
13 But just in terms of our perspective on statutory
14 interpretation, that's just a position that our law firm
15 has taken and advised our clients on. I'll share that
16 more with you as we go forward. But just to flag that was
17 an issue that we see and still have a difference of
18 opinion on.

19 MS. APPEL: Under the Proposed Rule, the
20 Office of Federal Acknowledgement would review the Alaska
21 IRA petitions and make a recommendation to the Assistant
22 Secretary for Indian Affairs. Currently under the ad hoc
23 process, the Office of the Solicitor takes the lead in
24 reviewing petitions or requests. So this would be a
25 change under the Proposed Rule.

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1 And the proposal is based on OFA's composition
2 of anthropologists, historians, and genealogists who
3 review -- are able to review under the current Part 83
4 petitions in accordance with their professional standards.
5 And that professional expertise helps safeguard the
6 uniform application of the Alaska IRA in accordance with
7 best practices within their fields and helps ensure that
8 the Department's decisions will be accorded due deference
9 by reviewing courts.

10 And as I've mentioned before, OFA's work is
11 submitted to the assistant secretary, who then issues a
12 final decision.

13 The Proposed Rule is broken into three
14 subparts. Subpart A is just the general that covers
15 definitions and overall purpose.

16 The second subpart B addresses criteria for
17 federal acknowledgement, which includes the substantive
18 evidentiary and factual requirements that petitioners must
19 demonstrate.

20 And then Subpart C addresses the process for
21 federal acknowledgement, and the process for obtaining a
22 hearing from an administrative law judge. And again, the
23 assistant secretary makes the final determination.

24 So we're going to delve into the contents of
25 the Proposed Rule here, so do you have any questions or

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1 comments before we do that?

2 Some of the significant definitions in the
3 Proposed Rule include the term "Alaska IRA-eligible
4 entity." That is defined as an entity that as of May 1st,
5 1936, was not recognized by the federal government as a
6 Tribe; was organized on the basis of a common bond of
7 occupation, association, or residence; and was comprised
8 of members descending from Indians in Alaska.

9 So as part of the documented petition, the
10 petitioner has to submit a claim of an Alaska IRA-eligible
11 entity from which it will demonstrate that it descends.
12 And the Proposed Rule further defines each of those
13 constituent requirements.

14 "Common bond" is defined as "Clearly defined
15 common interest shared and acted upon by a group of Alaska
16 Natives, distinguishable from other groups or
17 associations."

18 And the Proposed Rule delves further into the
19 federal government's interpretation of what a common bond
20 is at 82.21(a)(5).

21 Other definitions: Indians in Alaska or
22 Alaska Native is essentially taken from the definition of
23 Indian in the IRA, which states that "For the purposes of
24 the Act, Eskimos and other aboriginal peoples of Alaska
25 are considered Indians."

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1 And then "membership list" is defined as a
2 list of all known current members of the petitioner,
3 including their full name, date of birth, and current
4 residential address.

5 In the "Scope and Applicability" section, the
6 Department lists entities that it will not acknowledge
7 under the rule, including any entity that's already
8 petitioned for and been denied federal acknowledgement
9 under Part 83, the 1934 IRA regulations; any entity that
10 petitions and is denied acknowledgement under this
11 eventual final Part 82; any entity that's located outside
12 of Alaska; any entity that was recognized as a Tribe by
13 the federal government on or before May 1936; or was
14 recognized by the federal government through some other
15 means and is included on the list of federally recognized
16 Tribes after 1936.

17 And any entity that petitions and is denied
18 acknowledgement under the eventual final Part 82 would not
19 be eligible for acknowledgement under Part 83 either.

20 The evaluation of the criteria in the proposed
21 rules is the same as the Part 83 process in that the
22 standard of proof is the "Reasonable likelihood of the
23 validity of the facts relating to each criterion."

24 And it "Requires that the existence of
25 community" -- which is the second criterion -- "and

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1 political and influence and authority" -- which is the
2 third criterion -- "be demonstrated on a substantially
3 continuous basis." So that means that overall continuity
4 had to have been maintained even though there may have
5 been interruptions or periods where there is no or limited
6 evidence.

7 The second mandatory criteria track are those
8 criteria that are in the current Part 83 with
9 modifications to address the Alaska IRA provisions.

10 So the first criterion, A is: "Identification
11 as an Alaska Native entity on a substantially continuous
12 basis since 1936."

13 B: The community standard, the entity has to
14 show: "Comprised a distinct community from 1936 to the
15 present."

16 C: Political influence/authority, the entity
17 must show it exercised political influence and authority
18 over its members from 1936 to the present.

19 And then -- and those first three are part of
20 the Phase 2 review, which we'll go into later. The second
21 four are in the Phase 1 review. Those are:

22 "Governing document describing membership
23 criteria and current governing procedures."

24 Criterion E, which is demonstration of
25 "Members' descent from the Alaska IRA-eligible entity that

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1 existed in 1936."

2 F: The "Petitioner's membership must not be
3 composed principally of persons who are members of another
4 Tribe."

5 And then G is the only one that the
6 Department -- the Department approves rather than the
7 petitioner governing the (indiscernible) approved, and
8 that is that there is "No legislation that has terminated
9 or forbidden the federal relationship."

10 The process for federal acknowledgement begins
11 when an entity submits the documented petition to OFA
12 explaining how it meets the criteria. And then when OFA
13 begins review, it provides public notice and begins a
14 Phase 1 review where it examines the second four criteria.

15 It then issues findings on those criteria and
16 proceeds to the Phase 2 review, which are the first three
17 criteria. And then it chooses a proposed finding on those
18 three criteria. And ultimately the assistant secretary
19 issues a final determination.

20 And that's just a high-level overview of the
21 process. There's more detail in the Proposed Rule.

22 At each phase technical assistance is
23 available from OFA. And the petitioner has the option for
24 a hearing before an administrative law judge if they
25 receive a negative proposed finding. That administrative

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1 law judge would make a recommendation to the assistant
2 secretary, who would then review the recommendation as
3 well as OFA's findings and issue a final determination.
4 And if the final determination is negative, of course, the
5 petitioner could then also proceed to appealing to the
6 federal court.

7 As for the time line, the process begins when
8 an entity submits a Document of Petition. And then OFA
9 begins its review of the petition when its workload
10 allows. And at that point it provides public notice that
11 it's beginning the review. And within six months of
12 providing a public notice, OFA will issue a Phase 1
13 proposed finding. And within six months of the deadline
14 to issue that Phase 1 proposed finding, it will issue a
15 Phase 2 proposed finding.

16 So there are standards in there to ensure that
17 the process proceeds in a timely manner.

18 Acknowledgement occurs when the petitioner
19 receives positive final determination. And at that point,
20 the petitioner is a federally recognized Tribe and will be
21 included on the next list of federally recognized Tribes
22 and is published in the Federal Register.

23 As for next steps, we're currently in the
24 comment period on the Proposed Rule, and we have a
25 teleconference consultation and public meeting on February

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1 6th remaining. The comment deadline is March 2nd, and
2 comments may be e-mailed to consultation@bia.gov, or
3 submitted through the other methods that are listed in the
4 Proposed Rule in the Federal Register.

5 Once the comment deadline occurs and we've
6 received all the transcripts from consultations and public
7 hearings, the Department will review the comments and make
8 changes to the Proposed Rule as appropriate. And the plan
9 is to then publish a final rule in the Federal Register.

10 Do you have any questions or additional
11 comments? Anyone?

12 MR. FLEMMING: I'm good.

13 MS. APPEL: Okay. Well, thank you so much for
14 joining us today, and we will return this afternoon for
15 the second portion of our public meeting. And you're
16 welcome to join us then, too.

17 So thank you. I'll close the record.

18 10:50 A.M.

19 (Off record.)

20 10:51 A.M.

21 MS. APPEL: Okay. I'm re-opening the record.
22 We do have some comments. So I will pass the mic.

23 MR. WILLIS: Yeah. I've already introduced
24 myself, I understand. But let me just say my name is
25 Michael Willis. I'm an attorney with Hobbs, Straus, Dean

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1 & Walker based out of Washington, D.C.

2 Since 2007, I've represented the Qutekcak
3 Native Tribe of Seward. Since 2008, the Kungank Tribe of
4 Dillingham. Both of these clients have requested to
5 organize under the Alaska amendment to the IRA. They've
6 made those requests long before my work with them began.
7 The Qutekcak Native Tribe made a request in 1993, the
8 Kunganks in 2001.

9 My own personal work on Alaska IRA issues
10 began in the late 1990s when I was part of the team of
11 Hobbs, Straus, Dean & Walker attorneys that worked on the
12 Alaska IRA recognition and the reorganization requests of
13 the Native Village of King Salmon, which, in the
14 discussion earlier, I know it was recognized by Assistant
15 Secretary Gover in 2002. And then there was a
16 reconsideration at which point Assistant Secretary Neal
17 McCaleb reaffirmed or confirmed the 2000 decision to
18 recognize the Native Village of King Salmon.

19 So I'm here to share my perspective and
20 experience working with the IRA as an attorney, as well as
21 the particular views of the Qutekcak Native Tribe and the
22 Kungank Tribe. They aren't necessarily joint comments;
23 they are the shared positions in terms of some of the
24 framework and the approach. Each of them has different
25 experiences and evidentiary materials to show that I think

1 will be more appropriate for the written comments to
2 discuss some of the evidentiary standards and processes
3 and raise specific questions about those.

4 But for now I'll just share some initial
5 thoughts to say, you know, that I very much appreciate the
6 Department's interest and concern. And moving forward
7 with that process, it's clear that it's transparent, and
8 we rely on -- there's clearly been a lot of work and a lot
9 of thought brought into this. There have been
10 consultations and been efforts.

11 So I think from a sharing perspective of the
12 views of our clients and from my perspective on a legal
13 analysis, hopefully provide understanding where our
14 clients are coming from and build a basis for working
15 forward. We certainly want to have a reliable,
16 consistent, timely, and, you know, lawful process to
17 achieve the final determinations in the pending petitions
18 at this point.

19 To start I'm going to say that, you know, the
20 Alaska amendment to the IRA does continue to raise to the
21 specific statutory standard, the "common bond" standard,
22 and this is apropos in groups of Native Alaskans not
23 previously recognized that need to organize in the IRA.

24 The language and the statute. Groups of
25 Indians in Alaska not heretofore recognized as Bands or

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1 Tribes, but having a common bond of occupation or
2 association or residence in a well-defined neighborhood,
3 community, or a rural district may organize to adopt
4 constitutions and bylaws, et cetera, under the revision of
5 the (indiscernible - background noise).

6 As you noted in the presentation, the
7 Department has relied upon the standard in the past to
8 organize and recognize many other Alaska groups. You
9 identified 70, a (indiscernible) number. That sounds
10 accurate to my perspective so that you won't have that
11 (indiscernible).

12 And from our view, Congress has not done
13 anything to remove the standard that's applicable to
14 groups of Alaska Natives who are not heretofore
15 recognized. And that in the prior consultations on the
16 topic that you identify, I think the Tribes and Tribal
17 organizations in Alaska that have participated indicated
18 that you, the Alaska IRA, and the "common bond" standard
19 as still existing are still important to respect and
20 continue.

21 I mentioned that the Qutekcak and Kungank
22 Tribes have been pending for a long time. They put
23 together documentation, fairly extensive documentation.
24 You know, as Mr. Fleming probably recognizes, the
25 documentation probably isn't a substantial sum of

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1 materials you would see his own part be free. But in
2 terms of the experience of compiling materials and work
3 over a period of time, the Qutekcaak Native Tribe and the
4 Kungank Tribe think they have provided substantial
5 documentation in accordance with the instructions and
6 guidance that the Department of the Interior has provided
7 them in the past, beginning most specifically following
8 their initial requests and then the subsequent
9 communications that said, "Here's what we need from you
10 based on our technical assistance."

11 And our concern, as I identified in the
12 comment, is we certainly want to proceed in a manner where
13 the standard and the (indiscernible) that Congress uses is
14 indeed lawful and consistent with the statute. We have
15 concerns of that. That's not the case in light of the
16 statute's specific terms regarding organization of Tribes
17 not previously recognized. There's not a requirement of
18 recognition prior to organization, but there's a "common
19 bond" standard once established from its organization.

20 And ultimately, you know, the view of our
21 clients and the positions we have taken is that we think
22 it's very appropriate for the Department to continue under
23 the statutory mandate to come up with procedures that are
24 necessary for you-all to rely upon in making
25 determinations under the common bond" standard, and we

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1 want to see that put in place. We would much rather see,
2 in the interest of fairness and the ongoing investment
3 that our clients have put forward, to continue to review
4 those under the existing practice on a case-by-case
5 mechanism that's been used with specific evaluation
6 according to the "common bond."

7 I raised the Sunaq of Kodiak and King Salmon
8 illustrations, looking back at that process, which, I
9 think, you know, Lee Fleming and about half of the Office
10 of Federal Acknowledgement provided very specific feedback
11 and comments on whether those petitioners met the Alaska
12 IRA standard, and indeed in memos that are documented and
13 were presented publicly identify what the views, from
14 OFA's perspective, were shortcomings in those
15 applications. And as noted, there was a time
16 consideration, and Assistant Secretary Gover acted to --
17 under his authority as assistant secretary to recognize as
18 opposed to continue that from the IRA perspective.

19 While not producing midway what that has done
20 ultimately is to simply to say there seems to be a
21 communication mechanism in process that was working where
22 OFA was evaluating an IRA request based on the statutory
23 standard and shared perspectives for consideration by the
24 assistant secretary.

25 Not to say that the system is not broke, don't

1 fix it, but there are some very important precedents to
2 rely on and -- particularly prior to the 2000 decision,
3 which may have taken a different turn. I think our
4 clients feel that maybe they've been hindered or hampered
5 by the Department's reluctance to proceed on a
6 case-by-case basis to pursue determinations of their own
7 evaluation, perhaps because of some of the views of what
8 happened in 2000. But that's a speculation, and I'd like
9 to understand better from you-all. I think it will be
10 helpful moving forward.

11 I'm not going to spend too much time talking
12 about the legal analysis of our view, but we do perceive
13 that, as currently framed, the Proposed Rule would not
14 likely pass the arbitrary and capricious test and not due
15 Chevron deference.

16 Just a couple reasons. Well, we've already
17 identified. But there is some interpretation of the
18 "common bond" standard, and that's a very interesting
19 language as you put out in the definition, "What is the
20 'common bond' standard?" "How does it apply?" You've got
21 some clear terms.

22 But the way it's portrayed is the "common
23 bond" standard applies only to the 1936 entity. And once
24 that's established, that's where, essentially, what is the
25 Part 83 process kicks in. And to work with a continuation

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1 based on Subpart 83 concepts from 1936 to present, I'm not
2 convinced that that plays out consistent with the statute
3 and its terms about Tribes heretofore previously not
4 recognized.

5 And we're quite concerned that the case law
6 that generally recognizes the Department's acknowledgement
7 authority as being quite broad. And it's discussed in the
8 preamble, I think, fairly in terms of the authority of the
9 Department to make recognition decisions based on its
10 authority under, you know, 25 USC Section 2 or Section 9.

11 But unlike some of the other contexts for
12 acknowledgement, we do have a specific standard that
13 Congress has to look into. And we're not convinced that
14 the general authority that the Department of the Interior
15 has and operates under Part 83 necessarily allows a
16 superimposition of Part 83 on the Alaska IRA "common bond"
17 standard. Issues for further discussion and evaluation
18 and debate. But that's our perspective going in.

19 The other side deals with how the Department
20 is characterizing its prior precedent or its prior action
21 on this. From our view, you know, Congress didn't --
22 since the time of enactment in 1936, the Department has
23 applied the "common bond" standard. You cite the 1937
24 instructions, we think, as contemporaneous interpretation
25 of the Alaska IRA.

1 It's extremely important material. It
2 describes how Alaska Native groups not recognized should
3 be organized for the purpose of the IRA. There are
4 subsequent legal opinions on specific cases that
5 constitutes what groups meet or don't meet the "common
6 bond" standard, and what sort of terms there are. And, of
7 course, the very significant part of it is there are many
8 IRA constitutions that the Department has approved and
9 authorized secretarial actions based on membership
10 criteria in those constitutions that rely upon the "common
11 bond" standard as well.

12 So there's a breadth of past practice that the
13 Department indeed acknowledges in the preamble and
14 identified it. Very well acknowledged. We're not
15 convinced, again, whether the departure from that to
16 proceed with this rule meets the arbitrary and capricious
17 test in terms of a departure from prior precedent.

18 Fully recognizing the needs for consistency,
19 reliability, uniformity, we question whether this approach
20 accomplishes those objectives. I think the case-by-case
21 determination based on existing efforts and actions have
22 done so. Procedurally there may be more for
23 clarification, time frames, what the roles of various
24 offices are, how they evaluate the standard. And there
25 seems to be some very good approaches presented in the

1 evidentiary terms or procedures. I think those are very
2 helpful.

3 Again, I question whether it's a regulatory
4 term that's viable on a vehicle basis given this working
5 as a pretty significant turn of course where some 70
6 Alaska Native entities have been processed pursuant to the
7 case-by-case determination approach, and you're left with
8 two pending petitioners who are going to see something
9 very different than everyone else, even though they have
10 submitted requests at time periods and in a dialogue with
11 the Interior that seemed very consistent with what was
12 done with the prior petitioners, from our understanding of
13 the history and the background. So we questioned about
14 consistency here and uniformity.

15 I also think it's really -- I'd like you-all
16 to hear, and I think it's very important. I mentioned
17 earlier that both the Qutekcak Native Tribe and Kungank
18 Tribe have invested significant resources based on its
19 prior guidance and communication that they had with the
20 Interior.

21 Since I've been involved in 2008, it's been a
22 very active process in different time periods. There have
23 been periods where it's quiet, and there have been periods
24 where there's a lot of back-and-forth; there's a lot of
25 questions; there's a lot of considerations. And we fully

1 respect the Department's view. Everything's been
2 consistent, reliable, a uniform approach going forward.

3 And from our part as the attorneys working on
4 behalf of our clients, and on behalf of our clients, we
5 feel like we've done what we can to support the Department
6 to operate within its existing framework, and to come up
7 with decisions that are defensible and reliable and
8 uniform.

9 And I think that -- you know, the guidance you
10 refer to, some of it's been submitted, but the material
11 they relied on in terms of the 1996 instructions and
12 specific guidance based on the technical assistance that
13 was provided by the Department of the Interior and the BIA
14 as to what's needed to move forward. And then there's
15 also some clarification. I think it's important in 2012,
16 in response to Senator Murkowski's questions from that
17 hearing based in November of 2009 in which she asked the
18 Department, "Please clarify how Alaska Native Tribes are
19 to be recognized in this day and age where there has not
20 been recognition of Alaska Natives lately."

21 And the understanding of Tribes and Tribal
22 organizations and potential petitioners in Alaska is that
23 the Alaska IRA is the mechanism by which the Tribe with a
24 "common bond" of either occupation, association, or
25 residence in a well-defined community is the basis for

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1 organization and subsequent recognition.

2 Their response came a few years later, but in
3 the form of a letter from Assistant Secretary
4 Echelbaugh (ph) in which it was explained, yes, we've got
5 a whole group of Alaska Natives not heretofore recognized
6 that can demonstrate a "common bond" under the IRA from
7 1936 to present, but hadn't passed the mechanism for them
8 to organize. If they can't meet that, there's Part 83.
9 And there's another mechanism as well.

10 But I think -- and that was an important
11 clarification. And again, that's a very active process of
12 both of our clients investing a lot of resources and time
13 to clarify and address how they meet the Alaska IRA
14 "common bond" standard, and to address the questions that,
15 you know, those of you in the Department have asked for
16 clarification.

17 They received some, you know, feedback, mostly
18 in the form of questions. "We need to understand this."
19 "We need to understand that." Not entirely understanding
20 what all considerations on your end have been in -- or
21 certainly in one of those internal communications that
22 have happened. But the intent is to provide the
23 Department with the information it needs to achieve
24 decisions based on the "common bond."

25 And, you know, in light of that, the ideas

1 here -- and, you know, the most traumatic comments and/or
2 appease for the regulations is if a new rule is approved,
3 any pending petitions will essentially start over. Right?
4 We're going to start from scratch.

5 Both Qutekcak and Kungank received
6 communications in the -- and in the last administration
7 (inaudible), this is an issue, like getting through the
8 process. It's a wonderful idea. This is in the line if
9 there's a process that's going to come to completion at a
10 date certain. Or it would seem to be. And then it would
11 continue with it's between presidential administration or
12 not. Those questions, political questions, are probably
13 irrelevant for what the priorities are. But for our
14 clients and their experience, it's been kind of a -- you
15 know, work with the assistant secretary that's there and
16 address those comments to the extent possible.

17 So at the end of the last administration, both
18 of our clients received notice that they would be issued a
19 final decision taking a position on the eligibility under
20 the Alaska IRA. The final decision never came, but the
21 understanding was that there were some unresolved
22 issues -- and a lot of issues resolved, and some
23 unresolved issues, and this is the opportunity -- there
24 would be an opportunity to move forward to see if there
25 could be a closing of those unresolved issues, whether

1 unfavorably or favorably, but with something of a connect
2 to wrap it up and be done and have some finality. That's
3 really the important part of this, is that you're looking
4 for finality, and our clients certainly want finality
5 instead of what they all describe as being in limbo for
6 decades. And that's not a very satisfying place to be.

7 Finally, I'm just going to add that -- you
8 know, that as, you know, we see (indiscernible) from the
9 participation here. There was consultation that the
10 Department did. There was participation from many Tribes
11 and Tribal organizations previously. As I see it, without
12 the published comments, seven of the eight comments, as
13 you can (indiscernible) appropriately in the preamble,
14 said, "Hey. Focus on getting these tiny petitions
15 resolved before focusing on a new rule." That's in --
16 that was a comment of seven of the eight. The eighth has
17 since indicated no new processes necessary without
18 commenting on the pending petitions.

19 They came from various regions. The
20 (indiscernible) First (indiscernible) Nation from Bethel,
21 and then the association of those council presidents came
22 from Chugachmiut and Chugach, Alaska; Wrangell Cooperative
23 Association; Tlingit and Haida about their positions.
24 Native American Rights Fund and National Congress of
25 American Indians had joint comments.

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1 I'm not sure what happened with Kawerak's
2 comments in the Bering Strait Region. I understood they
3 had submitted comments, but I don't -- for whatever
4 reason, they didn't make it into the Web site or perhaps
5 accepted for the record for one reason or another. I
6 don't know. I just know they did submit them as well.

7 So to kind of wrap up, as a path forward, we
8 really view this as that the Department really determines
9 it has to follow the regulations on the "common bond"
10 standard that it really worked to incorporate its prior
11 precedent and work on really interpreting the statutory
12 revisions. It also acknowledged and recognized that the
13 statute does say "A Tribe not previously recognized can
14 organize and then be recognized" as opposed to requiring
15 recognition first and then the organization under Part 81.

16 I understand that's what Part 81 is saying
17 now, but I question whether there needs to be some kind of
18 acknowledgement that the statute says something different.

19 We do view, as a matter of equity, fairness,
20 consistency, conformity, and even finality that the
21 Department should resolve the existing pending petitions
22 based on the same procedures on a case-by-case evaluation
23 under the statutory terms. We would think that's the way
24 to proceed. The pending petitions that have already been
25 in here.

1 I know the Part 83, when it was revised, the
2 notion was the pending petitioners could choose one or the
3 other. I would think it would be reasonable for those who
4 have participated up to now say, "Well, we'd rather go
5 with the ad hoc basis and proceed that way if -- rather
6 than start from scratch under new criteria and
7 reformatting and redoing the materials we submitted."

8 So that's our view. Of course, we'll follow
9 up with written comments and various insight about the
10 possibility of having further dialogue with you-all. You
11 know, having Lee Fleming here to present his view and his
12 deep understanding of the Part 83 process, how that
13 intersects and proceeds with this new mechanism --

14 But I think we would like to see time lines,
15 procedures, mechanisms established to ensure getting to
16 finality, and having consistency and uniformity, but very
17 much consistent with the IRA statutory terms and the
18 Department's actions and precedent. We acknowledge that
19 that's including the specific instructions they have
20 provided -- the Department has provided to our individual
21 petitioners as well.

22 So I will leave it at that. And in the
23 written comments we'll certainly want to raise questions
24 about how this evidentiary standard might be applied and
25 how it plays out for the individual Tribes. But this is

1 going to be an overarching, shared perspective on the
2 process and the standards that our clients share.

3 So thank you very much for your time and for
4 the hard work you've done on this. And as I say, I think
5 it really is valuable and you have key elements in that,
6 although we disagree on certain aspects of the statutory
7 interpretation and the precedential interpretation. But
8 we greatly appreciate a process going forward that can
9 resolve and can reach final determinations on behalf of
10 these pending petitioners.

11 Thank you very much.

12 MS. APPEL: Thank you.

13 Do you have any -- any of you want to share?

14 MR. SCHERER: Thank you very much for your
15 comments. Something that I would at least like to respond
16 to now, and Mr. Fleming can elaborate.

17 I do believe while you were correct that when
18 Part 83 was revised, there was an opportunity for a
19 petitioning group to select which version or which
20 iteration of Part 83 they would move forward under.

21 When Part 54 was originally promulgated in
22 1978, the Department's position was that pending
23 applications -- and I believe there were approximately
24 40 -- would need to resubmit under the new Part 54.

25 MR. WILLIS: I understand. Thank you.

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1 MR. PARTESOTTI: Hi. I just wanted to say
2 that I really appreciate your comments and your time
3 coming up here to share them with us.

4 I also just want to emphasize that we note in
5 the preamble that we're very eager to hear the comments,
6 written comments that echoed the ones that you shared with
7 us about whether there are alternative mechanisms or
8 processes that exist to which the Department can or should
9 evaluate the Alaska IRA petitions outside of Part 83. And
10 so we look forward to reviewing anything that you submit
11 to us.

12 Thanks again.

13 MR. WILLIS: Thank you.

14 MR. FLEMMING: And I also appreciate your
15 comments about having a process that has clarity,
16 transparency, reliability, consistency, timely, lawful,
17 uniformity, defensibility, and finality. And that's our
18 desire for what this Proposed Rule is about. And those
19 were the similar principles that were presented when we
20 went through the 2015 revisions to Part 83. So I
21 appreciate that.

22 MR. WILLIS: Thank you.

23 MS. APPEL: Are there any other comments or
24 questions?

25 All right. Thank you, again, for your

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1 comments and for joining us today.

2 I will close out the Public Meeting Part 1 in
3 Fairbanks. Thank you.

4 11:17 A.M.

5 (Off record.)

6 1:41 P.M.

7 MS. APPEL: Good afternoon. This is Liz Appel
8 from the Office of Regulatory Affairs and Collaborative
9 Action in the Office of the Assistant Secretary for Indian
10 Affairs.

11 I have with me John-Michael Partesotti from
12 the Office of the Solicitor; Kyle Scherer who is Deputy
13 Solicitor; and Lee Fleming, Director of the Office of
14 Federal Acknowledgement. And we have one public
15 participant here in our public meeting, the afternoon of
16 January 30th in Fairbanks.

17 Our public participant has indicated there are
18 no additional comments. So we are closing the record
19 unless -- last chance. So we'll be closing out the
20 record. Thank you.

21 1:42 P.M.

22 (Off record.)

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C E R T I F I C A T E

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

I, Crystal D. Thompson-Bartlett, Court Reporter and Notary Public duly commissioned and qualified in and for the State of Alaska, do hereby certify that the foregoing proceedings were taken electronically before me and thereafter reduced to typewriting by me or at my direction.

That the foregoing transcript is a full, true, and correct transcript of the proceedings, including questions, answers, objections, statements, motions, and exceptions, made and taken at the time of the foregoing proceedings.

That all documents and/or things requested to be included with the transcript of the proceedings have been annexed to and included with said proceedings.

That I am not a relative or employee or attorney or counsel of any of the parties in these proceedings, nor a relative or employee of such attorney or counsel, and that I am not financially interested in said proceedings or the outcome thereof.

IN WITNESS WHEREOF, I have set my hand and affixed my Notarial Seal this 26th day of February 2020.

CRYSTAL D. THOMPSON-BARTLETT
Notary Public for Alaska
My commission expires: 9/15/2022

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