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2
3 U.S. DEPARTMENT OF THE INTERIOR
4 OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS
5

6 TRIBAL CONSULTATION
7 ON
8 FEDERAL ACKNOWLEDGMENT OF ALASKA NATIVE ENTITIES
9 PROPOSED RULE - 25 CFR 82
10

11 EGAN ROOM, CENTENNIAL HALL
12 JUNEAU, ALASKA
13 JANUARY 28, 2020
14 10:00 A.M.
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1 TUESDAY, JANUARY 28, 2020

2 10:00 A.M.

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4 MS. APPEL: Good morning. Welcome
5 to the tribal consultation on our proposed rule for
6 Federal Acknowledgment of Alaska Native Entities.
7 My name is Liz Appel. I'm with the Office of
8 Regulatory Affairs and Collaborative Action under
9 the Assistant Secretary for Indian Affairs, and I'll
10 let our panelists introduce themselves.

11 MR. PARTESOTTI: Good morning. My
12 name is John-Michael Partesotti, and I'm an Attorney
13 Advisor in the Division of Indian Affairs at the
14 Department of the Interior.

15 MR. SCHERER: Hello, everyone.
16 Kyle Scherer, Deputy Solicitor for Indian Affairs.

17 MR. FLEMING: And I'm Lee Fleming,
18 Director of the Office of Federal Acknowledgment.
19 Thank you for coming.

20 MS. APPEL: We have a small enough
21 group here, if you all want to introduce yourselves
22 too.

23 MS. BENNETT: Good morning. My
24 name is Helene Bennett. I am the manager for Tribal
25 Operations and Self-Governance with Tlingit & Haida.

1 MS. GATTI: Good morning. I'm
2 Heather Gatti. I'm Special Assistant to President
3 Peterson for Tlingit & Haida.

4 MR. PETERSON: Good morning and
5 welcome to Juneau. I'm Richard Peterson, President
6 of Tlingit & Haida.

7 MS. PATA: And good morning. I'm
8 Jackie Pata. I'm the Second Vice-President for
9 Tlingit & Haida.

10 MS. APPEL: Thank you.

11 So I think our plan is to run
12 through the PowerPoint presentation that we have
13 here, and I will do that to give an overview of the
14 proposed rule. And we have our folks from the
15 Solicitor's Office and the Office of Federal
16 Acknowledgment to answer any of your questions.

17 In your packet that you got when
18 you signed in, there's the "Dear Tribal Leader"
19 letter and a copy of the proposed rule that was
20 published on January 2nd, and a copy of the
21 presentation as well.

22 So this is our first in-person
23 consultation on the proposed rule. We'll be having
24 a public meeting this afternoon. And then on
25 Thursday we'll be in Fairbanks and also have a

1 tribal consultation and a public meeting there.
2 And then we'll also have a teleconference so that
3 anyone who is unable to make the in-person
4 sessions, traveling in the winter in Alaska, can
5 call in on the teleconference.

6 So since we have such a small
7 group today, feel free to interrupt with questions
8 as I'm going through this presentation, if I can
9 get the slides to move forward. Okay.

10 So for some background, you
11 probably all know that in 1934, Congress enacted
12 the IRA, the Indian Reorganization Act, and that
13 authorized tribes to organize for their common
14 welfare. But most sections of the IRA were
15 inapplicable to tribes in Alaska, so in 1936
16 Congress enacted what we call the Alaska IRA. And
17 that legislation allows groups of Indians in Alaska
18 who are not already recognized by the federal
19 government as tribes to organize under the IRA and
20 become eligible for IRA benefits.

21 And they can do that as long as
22 they demonstrate a common bond of occupation or
23 association or residence within a well-defined
24 neighborhood, community, or rural district. And we
25 call that colloquially the "common bond" provision.

1 For the 1934 IRA provisions we
2 have the regulations at Part 83 in the Code of
3 Federal Regulations, and that sets out the process,
4 criteria, and appeal procedures for how the federal
5 government acknowledges Indian tribes.

6 So while we have that for the 1934
7 IRA, there is no parallel for the 1936 Alaska IRA
8 in the regulations. So there's nothing -- while
9 Alaska entities can go through the Part 83 1934 IRA
10 process, there's no regulatory process if they want
11 to be acknowledged under that common bond standard.

12 To date the department has
13 approved the organization of more than 70 entities
14 under the Alaska IRA common bond provision, and
15 those have all been made through case-by-case
16 determinations, relying on 1937 instructions and
17 other Alaska IRA contemporaneous guidance and
18 previous Alaska IRA determinations.

19 So the department started to seek
20 input from tribes in the summer of 2018 on whether
21 a regulatory framework is needed for this Alaska
22 IRA acknowledgment process and criteria, and
23 several consultations and public hearings were held
24 through the spring of 2019.

25 The input we received mostly was

1 questioning whether we really need a regulation for
2 the Alaska-specific process. There was also a
3 concern as to whether a regulation would affect
4 tribes that are already recognized, and the
5 proposed regulation would not. And nearly all
6 commenters urged the department to move forward
7 with the final decisions on any outstanding
8 requests for acknowledgment under the Alaska IRA
9 while this rule-making process, if we ultimately
10 underwent it, proceeded.

11 So the department, in reviewing
12 that input, determined that there is a need for a
13 formal process to effectively carry out the Alaska
14 IRA, because the formal process set out in the
15 Part 83 regulations does not account for that
16 common bond standard that's stated in the Alaska
17 IRA.

18 As I mentioned before, there's no
19 effect on the status of currently recognized
20 tribes. And as far as any pending petitions for
21 acknowledgment under the Alaska IRA, the
22 department, under the proposed rule, will not
23 consider any acknowledgment petitions submitted by
24 Alaska Native entities under the Alaska IRA during
25 the rulemaking. And if the rule is finalized,

1 Alaska groups that previously submitted petitions
2 would then have to resubmit their petitions to
3 conform to the provisions in the final rule.

4 The proposed rule published
5 January 2nd of this year, and it would establish a
6 proposed new process through which Alaska Native
7 entities could become federally recognized,
8 federally acknowledged under the common bond
9 standard in the Alaska IRA. The proposed rule
10 would apply only to groups not currently on the
11 list of federally recognized tribes that the
12 department publishes each year.

13 The rule would not impair or
14 otherwise affect the existing rights and
15 authorities of any Alaska Native tribe that's
16 already recognized. And any Alaska Native entity
17 acknowledged under this proposed rule, if
18 ultimately finalized, would be eligible to receive
19 all the services available to other federally
20 recognized tribes.

21 While the rule for the federal
22 acknowledgment process that's currently in effect
23 is at Part 83, the proposed rule would put the
24 Alaska IRA federal acknowledgment process and
25 criteria in Part 82.

1 So, in large part, the proposed
2 rule, the Part 82, incorporates the requirements
3 and procedures for federal acknowledgment that are
4 in the current rule Part 83, but there are a
5 limited number of important distinctions that
6 reflect the Alaska IRA.

7 First is for demonstrating
8 genealogical and political descent. The proposed
9 rule requires descent from an Alaska IRA-eligible
10 entity, as compared to Part 83 which requires
11 descent from an historical Indian tribe.

12 The start date for showing
13 evidence of the entity under the proposed rule is
14 the date of the Alaska IRA enactment, May 1, 1936,
15 and under Part 83 you have to start showing
16 evidence as of 1900. Likewise, the period that you
17 have to show that you meet the criteria for under
18 the proposed Part 82 dates from 1936 to the
19 present, as opposed to 1900 to the present.

20 And then the fourth major
21 distinction between the proposed rule and the
22 current Part 83 process is that the proposed rule
23 has no review of previous federal acknowledgment
24 claims. So in the current Part 83 process, if a
25 petitioner can show that the federal government

1 recognized them at some prior date as an Indian
2 tribe, they can begin their start date as of the
3 date of that previous federal acknowledgment and
4 show, from that date forward, that they meet all
5 the criteria. But that's not in the proposed rule.

6 So just to give an overview,
7 another piece of this proposed rule is with regard
8 to secretarial elections. The proposed rule
9 establishes that the Alaska Native entities seeking
10 to hold a secretarial election under Part 81 would
11 first have to gain federal recognition to do that.
12 And this is consistent with past practices which
13 have focused on having the organizing entity
14 capable of establishing that government-to-
15 government relationship with the United States and
16 is also consistent with the IRA, Alaska IRA, and
17 Part 81, the secretarial election regulations.

18 As far as who reviews petitions,
19 it would be the Office of Federal Acknowledgment,
20 which Lee is director of. And that office has
21 several experts -- anthropologists, historians,
22 genealogists -- who are all civil servants who use
23 their professional expertise to review petitions.
24 And then ultimately the final decision would be
25 issued by the Assistant Secretary for Indian

1 Affairs.

2 The contents of the proposed rule
3 include general provisions, which is the overall
4 purpose, definitions, et cetera; then the criteria
5 for federal acknowledgment; and then the process
6 for federal acknowledgment. So we are going to
7 delve into each of these, and feel free to stop me
8 at any time if you have questions.

9 So some of the important
10 definitions to note are "Alaska IRA-eligible
11 entity," and the proposed rule defines that as an
12 entity that, as of the date of the Alaska IRA
13 enactment, was not recognized by the federal
14 government as a band or tribe, so not already a
15 federally recognized tribe; was organized on the
16 basis of a common bond of occupation, association,
17 or residence; and was comprised of members
18 descending from Indians in Alaska.

19 As part of the documented
20 petition, the petitioner has to submit a claim that
21 there is an Alaska IRA-eligible entity from which
22 it descends, and the proposed rule further goes
23 into each of those requirements.

24 So "common bond" is another
25 important definition. A common bond requires a

1 clearly defined common interest shared and acted
2 upon by a group of Alaska Natives, distinguishable
3 from other groups or associations. And there is a
4 lot more detail that the proposed rule goes into as
5 far as the department's interpretation of what a
6 common bond is and what an Alaska Native entity
7 would have to demonstrate in order to show that
8 common bond.

9 So the definition of "Indians in
10 Alaska" or "Alaska Native" is taken from the
11 legislation, and it includes terms that Congress
12 used back in 1934. It's adopted from the
13 definition of "Indian" provided in the IRA which
14 states that for the purposes of that Act, Eskimos
15 and other aboriginal peoples of Alaska are
16 considered Indians.

17 "Membership list" is defined as a
18 list of all known current members of the petitioner
19 and must include each member's full name, date of
20 birth, and current residential address.

21 The scope and applicability
22 section of the rule provides that the department
23 will not acknowledge under the rule any entity
24 that's already petitioned for and been denied
25 federal acknowledgment under Part 83, so we're not

1 establishing an alternate route for a group that
2 has already been denied under the existing Part 83
3 regulations.

4 It will not acknowledge an entity
5 that petitions and is denied acknowledgment under
6 the eventual final Part 82. So an entity can't
7 petition under Part 82, ultimately receive a
8 negative final determination, and then repetition.

9 Any entity that's located outside
10 of Alaska cannot use the Part 82 process, and any
11 entity that was recognized as a band or tribe by
12 the federal government on or before May 1st, 1936,
13 or was recognized by the federal government through
14 some other means and included on the list after
15 May 1, 1936; so basically any already-recognized
16 tribe.

17 Any entity that petitions and is
18 denied acknowledgment under the final Part 82 would
19 not then be able to petition under Part 83, so
20 that's the flip of what I was talking about
21 earlier.

22 Evaluation of mandatory criteria
23 happens the same way as in the Part 83 process, in
24 that the standard of proof is reasonable likelihood
25 of the validity of the facts relating to each

1 criterion, and it requires that the existence of
2 community and political influence and authority be
3 demonstrated on a substantially continuous basis.
4 So the petitioner must show that overall continuity
5 has been maintained, even though there may be
6 interruptions or periods where evidence is absent
7 or limited.

8 The proposed Part 82 has seven
9 mandatory criteria, just as Part 83 does. The
10 important distinctions between Part 83 are, as I
11 mentioned before, the 1936 date rather than 1900,
12 and descent from an Alaska IRA-eligible entity that
13 existed in 1936.

14 I feel like I'm missing another
15 important distinction, but we'll get there.

16 The process is very similar also
17 to the Part 83 process, in that the petitioner
18 submits a documented petition describing how it
19 meets criteria (a) through (f). DOI does its own
20 review of criterion (g), which is whether
21 legislation forbids a government-to-government
22 relationship.

23 And then once the Office of
24 Federal Acknowledgment begins review, it provides
25 public notice that it's beginning review. It first

1 examines the second half of the criteria, (d),
2 whether the entity has provided a governing
3 document; (e), whether the entity has shown descent
4 from an Alaska IRA-eligible entity since 1936; (f),
5 that the entity has unique membership; and then
6 (g), whether there is any legislation that forbids
7 or terminated the government-to-government
8 relationship.

9 So at the end of that review, the
10 Office of Federal Acknowledgment issues a finding
11 on those criteria only. That's the Phase I
12 finding. OFA then examines the first three
13 criteria, which are really the more, I think,
14 labor-intensive criteria -- the identification,
15 community, and political influence authority
16 criteria -- and then issues a Phase II proposed
17 finding. AS-IA, the Assistant Secretary for Indian
18 Affairs, reviews those findings and issues a final
19 determination.

20 At each phase of this process, OFA
21 provides technical assistance to the entity upon
22 request, and there are opportunities for appeals if
23 the proposed finding is negative. The petitioner
24 can object to the proposed finding and seek a
25 hearing before an administrative law judge. That

1 administrative law judge would then make a
2 recommendation to the Assistant Secretary, who
3 would consider that recommendation and OFA's
4 proposed finding and issue a final determination.
5 And then once the Assistant Secretary issues a
6 final determination, there is the possibility of
7 appeal to federal court.

8 As far as the timeline of how this
9 moves along, the documented petition starts the
10 process, whenever the entity submits it. And then
11 whenever the Office of Federal Acknowledgment has
12 the opportunity in its workload, it begins review
13 and provides notice. And then within six months of
14 providing the public notice, the Office of Federal
15 Acknowledgment will issue a proposed finding on
16 Phase I. Within six months of that, OFA will then
17 issue a Phase II proposed finding.

18 Acknowledgment happens when a
19 petitioner receives a positive final determination
20 from the Assistant Secretary, and the petitioner
21 would then be a federally recognized tribe and
22 included on the next list of the federally
23 recognized tribes published in the Federal
24 Register.

25 This is the last slide, but I feel

1 like I missed mentioning something major. Oh. In
2 the criteria, obviously you have to show the common
3 bond, that you meet the common bond standard. I
4 think that's what I was missing on that slide.

5 MS. PATA: So if I could -- first
6 of all, I apologize. I have to leave to a doctor's
7 appointment. I couldn't reschedule.

8 But I wanted to make a quick
9 comment or ask a quick question, and that had to do
10 with the common bond. So one of the things that I
11 see that is different -- and you're likely to hear
12 from President Peterson that our tribe supports
13 this proposed rule -- but, you know, one of the
14 problems that some of our communities have
15 experienced under the IRA, Alaska IRA provision, is
16 that there would not necessarily be a direct
17 descendency of membership from Alaska Natives.

18 And so my question is -- I like
19 the language about a common bond. I like the whole
20 provision about Alaska Natives. But once a tribe
21 becomes recognized, are there limitations to their
22 membership, or is the membership determined by the
23 tribes themselves?

24 So we've experienced in our
25 communities where, under the IRA provision, because

1 it was not as clear in the communities -- well,
2 clear, but that as long as you were an American
3 Indian, that you could become a member of the
4 Alaska IRA, and now the Native Alaskan membership
5 is marginalized.

6 And so I'm just curious. Is
7 that -- you know, does the common bond flow
8 through, or does it stop at the point of
9 recognition and the tribe just determines?

10 MR. SCHERER: So an essential
11 element of sovereignty is the ability of the tribe
12 to determine its own membership, you know. And
13 consistent with how we move forward with Part 83,
14 the membership list needs to sort of demonstrate
15 lineal descent from the historic tribe -- in this
16 case, the historic entity that would otherwise be
17 IRA-eligible.

18 There is Supreme Court precedent,
19 U.S. v. Rogers, that has stated that Congress'
20 plenary power only extends over Indians such that
21 there might be a limitation on the inclusion in
22 membership of individuals who lack Indian descent.

23 MS. PATA: Correct, but you made it
24 clear that in the common -- you know, in the
25 recognition under this new proposed rule, that you'd

1 be looking for those that are groups of Alaska
2 Natives. And so if their membership has to be
3 direct descendents of Alaska Natives, would that
4 create a classification of membership, or does
5 that -- or not? I guess . . .

6 MR. FLEMING: Well, what we
7 envision is -- it's like taking a camera shot on
8 May 1st, 1936.

9 MS. PATA: At that moment in time.

10 MR. FLEMING: At that moment in
11 time.

12 MS. PATA: That's what I figured.
13 Yes.

14 MR. FLEMING: And if the
15 individuals are together under this common bond, you
16 have that clear definition of who is associated with
17 that common bond on May 1st, 1936. And then the
18 group must show, then, descent of the current
19 members going back to that May 1st, 1936, listing of
20 members.

21 MS. PATA: Got it.

22 MR. FLEMING: And so the current
23 membership list -- when the group is acknowledged,
24 and if they meet all the seven criteria, then that
25 current membership list becomes the tribe's base

1 roll from which future members are derived. So
2 that's why it's important to have clear definition
3 at the start -- May 1st, 1936. See how the current
4 members descend from that entity in 1936, but also
5 there's the continuity of social and political
6 existence from 1936 to the present.

7 MS. PATA: Thank you.

8 MR. FLEMING: That's consistent
9 with how we've done it in Part 83, and the only
10 difference is that if you can show the common bond
11 in Alaska, you're given almost a 36-year evidentiary
12 break.

13 MS. PATA: Right.

14 MR. FLEMING: Which is like two
15 generations.

16 MS. PATA: Which is definitely
17 appreciated for Alaska, so definitely appreciated.
18 I want to thank you for the work and the
19 clarification. I appreciate it. Thank you.

20 MR. FLEMING: Thank you, Jackie.

21 MS. APPEL: Any other questions or
22 comments at this point?

23 MR. PETERSON: Thank you. Again,
24 Richard Peterson. I'm President of Tlingit & Haida.
25 The Central Council of Tlingit & Haida Indian tribes

1 of Alaska is just going into its 85th year. We'll
2 have our tribal assembly this April. And we're one
3 of the few tribes in Alaska that aren't an IRA
4 tribe. We're actually enacted by an act of
5 Congress. I think most of you know that. Of
6 course, I think it was in 1994, when Ada Deer put
7 out her list of federally recognized tribes in
8 Alaska, and she omitted Tlingit & Haida. And we had
9 to have a lawsuit and fight our way back and get our
10 recognition back. So this issue is near and dear to
11 our hearts.

12 We are in support, and I think one
13 of the things that our vice-president, Jackie Pata,
14 was pointing out of relevance is Tlingit & Haida's
15 enrollment is only Tlingits and Haidas, so no other
16 Alaska Native groups or American Indians can
17 enroll. They have to have direct lineal descent
18 from our original rolls. So just kind of an
19 interesting fact.

20 I think, again, we are excited to
21 see this opportunity, though. I know that, you
22 know, in Alaska, the great state of Alaska, 229
23 federally recognized tribes may seem like a lot.
24 There's still some out there who are unrecognized,
25 so I want to commend you folks for this work, the

1 administration, for having this happen.

2 Now, I also think it's great that
3 you're making the rounds. It's winter in Southeast
4 Alaska, though, so I'm not surprised to see a low
5 turnout just because of that. It's a little bit of
6 a scary time for our village communities to commute
7 to Juneau. And as some of you may know, our ferry
8 service is almost all but halted for the first time
9 in our last 50 years, so travel is very cumbersome.

10 So I want you to -- I only say
11 that so you don't feel disappointed or think it
12 wasn't worth coming to do these. I think that
13 turnout would have been better. And we'll do our
14 part to share some of this on social media to make
15 sure that people are reminded that there's a
16 comment period and they can submit those by e-mail,
17 because I think you'll see overwhelming support for
18 this effort.

19 So I'm not going to hang around
20 all day, but I did want to be here to make these
21 comments and let you know that Tlingit & Haida is
22 very supportive of this effort and to see more
23 inclusivity for all of our tribes.

24 My only thing is, when you come to
25 do these, check in the community for tribally owned

1 venues. This could have supported our tribe.
2 Sometimes that's just an oversight, so I'm not
3 hammering you on that, but it's just something for
4 future reference. If you come in, we have a far
5 more beautiful hall. We have the best audio/video
6 in town.

7 Thank you. Gunalchéesh.

8 MS. APPEL: Thank you. Just for
9 the record, I'm pretty sure we did check first for
10 the Elizabeth Peratrovich Hall, because we have had
11 past consultations there. Thank you for your
12 comments.

13 And I also want to remind everyone
14 and I encourage you to share the opportunity for
15 joining the consultation by teleconference that
16 we're having on February 6th. That number and
17 passcode is listed in the materials.

18 But if you have any questions or
19 comments in the meantime, feel free to contact any
20 of us or e-mail consultation@bia.gov. That's also
21 where we'll be accepting comments, as well as at
22 the locations listed in the Federal Register. And
23 the comment deadline is March 2nd, so there's still
24 a little bit of time to pull together written
25 comments for anyone interested in doing that.

1 After the March 2nd deadline, our
2 plan is to review all the comments and the
3 transcripts and meet internally to make changes
4 that are appropriate in response to the comments
5 and address comments, and then ultimately publish a
6 final rule in the Federal Register. And once that
7 happens, typically there's a 30-day lag before the
8 rule becomes effective, but at that point the
9 process would be in place for Alaska Native
10 entities seeking federal acknowledgment.

11 So that's all I have. Are there
12 any other questions or comments?

13 Well, thank you for coming today,
14 and we really appreciate it. And we hope that we
15 get some -- you're welcome to also call in to the
16 teleconference so that we can hear some more voices
17 for people who weren't able to travel today, but we
18 really appreciate you heading out in this weather.
19 Thank you.

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21 (Tribal Consultation concluded at 10:52 a.m.)
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C E R T I F I C A T E

S T A T E O F A L A S K A)
FIRST JUDICIAL DISTRICT) Ss.

I, LYNDA BARKER, Registered Diplomate Reporter and Notary Public duly commissioned and qualified in and for the State of Alaska, do hereby certify that the foregoing proceedings were taken stenographically 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 5th day of February, 2020.

LYNDA BARKER, RDR,
Notary Public for Alaska
My commission expires:
5/6/2020