U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS

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

EGAN ROOM, CENTENNIAL HALL
JUNEAU, ALASKA
JANUARY 28, 2020
10:00 A.M.
TUESDAY, JANUARY 28, 2020

10:00 A.M.

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

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

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

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

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

MS. BENNETT: Good morning. My name is Helene Bennett. I am the manager for Tribal Operations and Self-Governance with Tlingit & Haida.
MS. GATTI: Good morning. I'm Heather Gatti. I'm Special Assistant to President Peterson for Tlingit & Haida.

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

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

MS. APPEL: Thank you.

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

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

So this is our first in-person consultation on the proposed rule. We'll be having a public meeting this afternoon. And then on Thursday we'll be in Fairbanks and also have a
tribal consultation and a public meeting there. And then we'll also have a teleconference so that anyone who is unable to make the in-person sessions, traveling in the winter in Alaska, can call in on the teleconference.

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

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

And they can do that as long as they demonstrate a common bond of occupation or association or residence within a well-defined neighborhood, community, or rural district. And we call that colloquially the "common bond" provision.
For the 1934 IRA provisions we have the regulations at Part 83 in the Code of Federal Regulations, and that sets out the process, criteria, and appeal procedures for how the federal government acknowledges Indian tribes.

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

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

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

The input we received mostly was
questioning whether we really need a regulation for
the Alaska-specific process. There was also a
cconcern as to whether a regulation would affect
tribes that are already recognized, and the
proposed regulation would not. And nearly all
commenters urged the department to move forward
with the final decisions on any outstanding
requests for acknowledgment under the Alaska IRA
while this rule-making process, if we ultimately
underwent it, proceeded.

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

As I mentioned before, there's no
effect on the status of currently recognized
tribes. And as far as any pending petitions for
acknowledgment under the Alaska IRA, the
department, under the proposed rule, will not
consider any acknowledgment petitions submitted by
Alaska Native entities under the Alaska IRA during
the rulemaking. And if the rule is finalized,
Alaska groups that previously submitted petitions would then have to resubmit their petitions to conform to the provisions in the final rule.

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

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

While the rule for the federal acknowledgment process that's currently in effect is at Part 83, the proposed rule would put the Alaska IRA federal acknowledgment process and criteria in Part 82.
So, in large part, the proposed rule, the Part 82, incorporates the requirements and procedures for federal acknowledgment that are in the current rule Part 83, but there are a limited number of important distinctions that reflect the Alaska IRA.

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

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

And then the fourth major distinction between the proposed rule and the current Part 83 process is that the proposed rule has no review of previous federal acknowledgment claims. So in the current Part 83 process, if a petitioner can show that the federal government
recognized them at some prior date as an Indian tribe, they can begin their start date as of the date of that previous federal acknowledgment and show, from that date forward, that they meet all the criteria. But that's not in the proposed rule.

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

As far as who reviews petitions, it would be the Office of Federal Acknowledgment, which Lee is director of. And that office has several experts -- anthropologists, historians, genealogists -- who are all civil servants who use their professional expertise to review petitions. And then ultimately the final decision would be issued by the Assistant Secretary for Indian
The contents of the proposed rule include general provisions, which is the overall purpose, definitions, et cetera; then the criteria for federal acknowledgment; and then the process for federal acknowledgment. So we are going to delve into each of these, and feel free to stop me at any time if you have questions.

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

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

So "common bond" is another important definition. A common bond requires a
clearly defined common interest shared and acted upon by a group of Alaska Natives, distinguishable from other groups or associations. And there is a lot more detail that the proposed rule goes into as far as the department's interpretation of what a common bond is and what an Alaska Native entity would have to demonstrate in order to show that common bond.

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

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

The scope and applicability section of the rule provides that the department will not acknowledge under the rule any entity that's already petitioned for and been denied federal acknowledgment under Part 83, so we're not
establishing an alternate route for a group that has already been denied under the existing Part 83 regulations.

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

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

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

Evaluation of mandatory criteria happens the same way as in the Part 83 process, in that the standard of proof is reasonable likelihood of the validity of the facts relating to each
criterion, and it requires that the existence of community and political influence and authority be demonstrated on a substantially continuous basis. So the petitioner must show that overall continuity has been maintained, even though there may be interruptions or periods where evidence is absent or limited.

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

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

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

And then once the Office of Federal Acknowledgment begins review, it provides public notice that it's beginning review. It first
examines the second half of the criteria, (d), whether the entity has provided a governing document; (e), whether the entity has shown descent from an Alaska IRA-eligible entity since 1936; (f), that the entity has unique membership; and then (g), whether there is any legislation that forbids or terminated the government-to-government relationship.

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

At each phase of this process, OFA provides technical assistance to the entity upon request, and there are opportunities for appeals if the proposed finding is negative. The petitioner can object to the proposed finding and seek a hearing before an administrative law judge. That
administrative law judge would then make a recommendation to the Assistant Secretary, who would consider that recommendation and OFA's proposed finding and issue a final determination. And then once the Assistant Secretary issues a final determination, there is the possibility of appeal to federal court.

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

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

This is the last slide, but I feel
like I missed mentioning something major. Oh. In the criteria, obviously you have to show the common bond, that you meet the common bond standard. I think that's what I was missing on that slide.

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

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

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

So we've experienced in our communities where, under the IRA provision, because
it was not as clear in the communities -- well, clear, but that as long as you were an American Indian, that you could become a member of the Alaska IRA, and now the Native Alaskan membership is marginalized.

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

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

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

MS. PATA: Correct, but you made it clear that in the common -- you know, in the recognition under this new proposed rule, that you'd
be looking for those that are groups of Alaska Natives. And so if their membership has to be direct descendents of Alaska Natives, would that create a classification of membership, or does that -- or not? I guess . . .

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

MS. PATA: At that moment in time.

MR. FLEMING: At that moment in time.

MS. PATA: That's what I figured.

Yes.

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

MS. PATA: Got it.

MR. FLEMING: And so the current membership list -- when the group is acknowledged, and if they meet all the seven criteria, then that current membership list becomes the tribe's base
roll from which future members are derived. So that's why it's important to have clear definition at the start -- May 1st, 1936. See how the current members descend from that entity in 1936, but also there's the continuity of social and political existence from 1936 to the present.

MS. PATA: Thank you.

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

MS. PATA: Right.

MR. FLEMING: Which is like two generations.

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

MR. FLEMING: Thank you, Jackie.

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

MR. PETERSON: Thank you. Again, Richard Peterson. I'm President of Tlingit & Haida. The Central Council of Tlingit & Haida Indian tribes
of Alaska is just going into its 85th year. We'll have our tribal assembly this April. And we're one of the few tribes in Alaska that aren't an IRA tribe. We're actually enacted by an act of Congress. I think most of you know that. Of course, I think it was in 1994, when Ada Deer put out her list of federally recognized tribes in Alaska, and she omitted Tlingit & Haida. And we had to have a lawsuit and fight our way back and get our recognition back. So this issue is near and dear to our hearts.

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

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

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

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

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

My only thing is, when you come to do these, check in the community for tribally owned
venues. This could have supported our tribe. Sometimes that's just an oversight, so I'm not hammering you on that, but it's just something for future reference. If you come in, we have a far more beautiful hall. We have the best audio/video in town.

Thank you. Gunalchéesh.

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

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

But if you have any questions or comments in the meantime, feel free to contact any of us or e-mail consultation@bia.gov. That's also where we'll be accepting comments, as well as at the locations listed in the Federal Register. And the comment deadline is March 2nd, so there's still a little bit of time to pull together written comments for anyone interested in doing that.
After the March 2nd deadline, our plan is to review all the comments and the transcripts and meet internally to make changes that are appropriate in response to the comments and address comments, and then ultimately publish a final rule in the Federal Register. And once that happens, typically there's a 30-day lag before the rule becomes effective, but at that point the process would be in place for Alaska Native entities seeking federal acknowledgment.

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

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

(Tribal Consultation concluded at 10:52 a.m.)
CERTIFICATE

STATE OF ALASKA )

FIRST JUDICIAL DISTRICT ) Ss.

I, LYNDIA 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.

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

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