

Tribal Consultation

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TRIBAL CONSULTATION ON THE PROPOSED
FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES
PROPOSED RULE 25 CFR 83

TRANSCRIPT OF PROCEEDINGS
HELD ON JULY 24, 2014

LOCATION: Crowne Plaza Hotel
Billings, Montana
TIME: 8:34 a.m. to 10:07 a.m.

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A P P E A R A N C E S

PANEL MEMBERS:

Larry Roberts - Deputy Assistant Secretary -
Indian Affairs

Kaitlyn Klass - Office of the Solicitor

Elizabeth Appel - AS-IS, Office of Regulatory
Affairs

EASTERN BAND OF CHEROKEE:

Terri Henry
Perry Shell
Tunney Crowe
Dennis Taylor
Brandon Jones

CHEROKEE NATION:

Karen Ketcher

CROW TRIBE:

Dana Wilson
Melissa Holds the Enemy

GOVERNOR'S OFFICE OF INDIAN AFFAIRS:

Jason Smith

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I N D E X

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Dennis Taylor.....	22-24, 69-71
Karen Ketcher.....	24, 33-38, 47-49, 71
Perry Shell.....	39-44, 71-73

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1 WHEREUPON, the following proceedings were had:

2 * * * * *

3 MR. ROBERTS: Okay, good morning,
4 everyone. We're going to go ahead and get
5 started. And before we get started, I'm just
6 going to pass this microphone around so that
7 everyone can introduce themselves. We have a
8 small group here today, and so I just want to make
9 sure that everyone introduces themselves and says
10 who they're here on behalf of.

11 TERRI HENRY: Good morning, everyone. My
12 name is Terri Henry. I am the Tribal Council
13 Chairwoman for the Eastern Band of Cherokee
14 Indians.

15 DENNIS TAYLOR: Good morning. Dennis
16 Taylor, Eastern Band of Cherokee Indians, Vice
17 Chairman Tribal Council.

18 TUNNEY CROWE: Tunney Crowe, Eastern Band
19 of Cherokee Indians, Tribal Council.

20 BRANDON JONES: Good morning. Brandon
21 Jones, Tribal Council for the Eastern Band of
22 Cherokee Indians.

23 KAREN KETCHER: Karen Ketcher, Cherokee
24 Nation of Oklahoma.

25 MR. ROBERTS: So getting started this

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1 morning, I guess I would start off with a couple
2 of things. One is that Assistant Secretary
3 Washburn wishes he could be here. He had planned
4 to be here at this consultation. This was
5 scheduled in coordination with the Tribal Interior
6 Budget Committee, the advisory committee on our
7 interior budget, and so he had to testify
8 yesterday before the Senate Committee of Indian
9 Affairs, so he is unable to attend here today, but
10 he will be attending the consultation at Mashbee,
11 so I wanted to address that.

12 And then the other thing I want to
13 address at the outside is, a number of tribes,
14 including the Eastern Band here, has made requests
15 for an extension of time in terms of the comment
16 period, and a number of offices within the
17 Congress have made similar requests. And so I
18 don't have anything to announce today with regard
19 to that request. If I receive information, either
20 during this consultation or during the public
21 meeting today, I will let you know. Otherwise, I
22 know that the deadline is coming up next Friday.
23 We're trying to get a decision made at Interior as
24 soon as possible, and so as soon as I know
25 something, I will let you all know.

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1 So for purposes of the consultation here
2 this morning, I'm going to run through a
3 PowerPoint and then open it up for questions and
4 comments. And I'm happy to have a dialog in terms
5 of the Proposed Rule itself.

6 So Liz is going to be sort of flipping
7 through the PowerPoint here. If you want to
8 follow along, it's in your handout, or you can
9 just follow on the screen.

10 Basically, I'll go through the
11 background. By way of background, we have a
12 number of ways that tribes can be recognized by
13 the U.S. Government, either through a federal
14 court decision, by congressional action/
15 congressional legislation, or administratively by
16 the Department of Interior.

17 Prior to 1978, the Department approached
18 acknowledgment on an ad-hoc basis, basically, as
19 groups requested to be recognized.

20 In 1978, the Department promulgated
21 regulations to establish the uniform process.
22 That's what we're here consulting about today.

23 In 1994, those regulations were revised,
24 primarily to include previous acknowledgment as a
25 factor within the acknowledgment process itself.

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1 And then in 2000, 2005, and 2008, the
2 Department issued guidance for internal processing
3 changes. So for example, the Department issued
4 guidance prior to, I believe it was 2005 or 2008,
5 the Department had been examining groups from the
6 time of first sustained non-Indian contact to the
7 present. Under one of those guidance documents,
8 the Department said, "We're going to change that
9 to 1789 to the present." So there's been various
10 implementation guidance issued over the years.

11 In terms of the --

12 TERRI HENRY: Excuse me. So kind of the
13 bright-line was from 1789, the year 1789 to
14 present?

15 MR. ROBERTS: So prior to that guidance
16 being issued in 2000 or -- do you guys know when
17 that guidance was? It was like 2005, 2008 time
18 period.

19 TERRI HENRY: Okay.

20 MR. ROBERTS: In one of those guidance
21 documents, there was a change from rather than
22 time of first sustained non-Indian contact to
23 1789. So first sustained non-Indian contact could
24 be earlier than 1789, but the Department decided
25 to look at it from 1789, the formation of the

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1 United States, to the present.

2 TERRI HENRY: Okay.

3 MR. ROBERTS: That's just an example of
4 some of the guidance documents.

5 And I guess I should say, you know, we
6 have a small group here, so I'm happy -- in the
7 past we've sort of gone through the PowerPoint and
8 then had questions. But I guess I'm happy to
9 entertain the questions as we go through the
10 slides, if that's what you all would prefer.

11 And I would just ask, I know we've been
12 joined by a gentleman here. Can you, sir, can you
13 just tell us who you are and who you're with?

14 UNIDENTIFIED GENTLEMAN: I'm with the
15 Crow Tribe. I don't know if I'm at the right
16 place.

17 MR. ROBERTS: I'm sorry?

18 UNIDENTIFIED GENTLEMAN: I'm with the
19 Crow Tribe. I don't know if I'm at the right
20 place. They said Crowne Plaza. Then I seen some
21 Indian-looking people coming up this way, so I
22 kind of followed them.

23 MR. ROBERTS: Are you here for the
24 Federal recognition regulations?

25 UNIDENTIFIED GENTLEMAN: I don't know,

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1 but I thought there was some type of budget type.

2 MR. ROBERTS: That was yesterday. That
3 was yesterday, sir.

4 UNIDENTIFIED GENTLEMAN: Okay. Public
5 comment, is there like public comment taken after
6 this afternoon?

7 MR. ROBERTS: There is for Federal
8 recognition, but not for the budget.

9 UNIDENTIFIED GENTLEMAN: Okay. All
10 right, I think I'll go ahead and go. Sorry about
11 that.

12 MR. ROBERTS: Nope. Just want to make
13 sure you're in the right place.

14 All right, so many have criticized the
15 process as being broken: It takes too long, that
16 it's burdensome, that it's expensive, that it's
17 unpredictable, that the criteria are not being
18 applied uniformly under the existing regulations,
19 and that it's not transparent.

20 And so in 2009, Secretary Salazar
21 testified before the Senate Committee of Indian
22 Affairs, and one of the questions he was asked was
23 whether he would look at the Part 83 process for
24 improvement. And he committed to examining ways
25 to improve that process.

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1 And so in 2010, the Assistant Secretary,
2 Solicitor's Office, Office of Federal
3 Acknowledgment, they all started working on
4 preparing the revisions to the Part 83 process.

5 In 2010 I believe, the Department again
6 testified before the Senate Committee of Indian
7 Affairs, and the Department was asked when we
8 would issue proposed regulations on the Part 83
9 process. And at that point, the Department
10 testified that they hoped to get out proposed
11 regulations within a year of 2010.

12 So in 2012, the Department again
13 testified on the Federal acknowledgment process,
14 and the members of the committee basically asked
15 the Department, you know, "You had committed to
16 putting out proposed rules a year ago. Where are
17 you in the process? Why haven't proposed rules
18 been issued?"

19 And the Department identified guiding
20 principles, which are set forth in this PowerPoint
21 below: Transparency, timeliness, efficiency,
22 flexibility, but maintaining the integrity and the
23 standards of the process.

24 So shortly after that hearing in 2012
25 where those principles were laid out, the

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1 assistant secretary and I joined the Department,
2 and Secretary Salazar at that point told the
3 assistant secretary that this was a high priority
4 for the Department, they hadn't made as much
5 progress as they had hoped, and that, you know,
6 the secretary passed on to the assistant secretary
7 with making progress on this issue.

8 So in 2013, the assistant secretary
9 testified before the Native American Affairs
10 Subcommittee, the House Resources Committee,
11 talked about that, the Department was going to
12 issue a Discussion Draft in the summer of 2013 and
13 would have tribal consultations and public input
14 on that Discussion Draft. That was issued in
15 June. We held public meetings and tribal
16 consultations in July and August of 2013. We
17 received over 350 comments from roughly over 2,000
18 individuals or tribes, both governments.

19 And from those comments, we worked on
20 developing a Proposed Rule. And so as part of
21 both the Discussion Draft and the Proposed Rule,
22 we convened a team of people within the
23 Department, folks from the Solicitor's Office like
24 Katie Klass who's with us today, folks from the
25 Assistant Secretary's Office like Liz Appel, folks

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1 from the Office of Federal Acknowledgment, to go
2 through, not only preparing the Discussion Draft,
3 but also going through all of the comments and
4 forming a work group to go through all the
5 comments that were received on the Discussion
6 Draft to prepare the Proposed Rule.

7 So that team reviewed all the comments,
8 we rewrote the Part 83 regulations to be just the
9 plain language requirements of OMB, we submitted
10 the rule to OMB, they distributed it to all the
11 different federal agencies, and then we issued the
12 Proposed Rule in the Federal Register on May 29th.
13 We released it on May 22nd.

14 Comments are currently due next week
15 Friday, but again, as soon as I know something
16 about an extension, I will let you know, because I
17 know it's a topic of interest. And we're not --
18 we want to get that information out as soon as
19 possible.

20 In terms of an overview in terms of the
21 rule itself, so we'll first touch upon sort of the
22 primary revisions to the process, the revisions
23 and clarifications to the criteria, clarification
24 of previous federal acknowledgment, clarifications
25 to the burden of proof, allowances for

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1 re-petitioning under limited circumstances, and
2 then additional notice requirements.

3 So in terms of the revisions to the
4 process and eliminating -- one of the things that
5 we have is -- in terms of the process itself, is
6 the Letter of Intent, which some of you may be
7 familiar with, where a group can just submit a
8 letter that says, "I'm going to -- this group is
9 going to submit an application," and we may never
10 see any additional information from them ever
11 again.

12 Our website will list all of those
13 letters that we've received. A lot of them are
14 bad addresses, we've either received incomplete
15 additions or nothing at all. And so we're
16 proposing to eliminate the Letter of Intent
17 process, that step in the process, I should say,
18 and start with the application, similar to how we
19 start our other processes in the Department for
20 approvals.

21 We're also proposing a phased review of
22 petitions, basically trying to get expedited
23 decisions out in a more timely fashion. So in the
24 past, we've issued decisions on all seven
25 criteria. And, you know, a group to be recognized 13

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1 as a tribe under this process has to satisfy all
2 seven criteria. If they fail one, they can't be
3 recognized. And so what we're proposing is that
4 we start the review process looking at a handful
5 of criteria first, and if they fail those, issuing
6 a proposed negative finding just on those to save
7 everybody time and resources.

8 And so what we would start with is
9 descent from a historic tribe, the genealogy, are
10 they Indian; and if they're not, issuing an
11 expedited decision saying, you know, "You can't be
12 recognized under this process."

13 If they satisfy criterion (e), then we
14 would look at some of the other criteria under the
15 Proposed Rule, and that would be criterion (a),
16 which we're proposing to change, but I'll touch
17 upon that soon in the next few slides, and then,
18 have they been terminated? If so, they're not
19 eligible for our process. We have to abide by
20 federal law. Are they a splinter group? Are they
21 already part of a federally recognized tribe? If
22 so, we're not recognizing splinter groups. We're
23 not recognizing spinoffs if they're not eligible.
24 We're not suggesting we change that. We're just
25 in the processing to issue more timely decisions,

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1 we would address those criteria at the outset.

2 Then, let's say we have a petitioner that
3 satisfies all of those initial criteria, then we
4 would look at criterion (b), community, and (c),
5 political authority. Because those are the
6 criteria that are more resource intensive in terms
7 of documentary evidence and time that we need to
8 take a look at those.

9 So we've had comments at other tribal
10 consultations in terms of how those criteria
11 should or shouldn't be looked at for expedited
12 decisions. It's something that we're seeking
13 comment on, and it may make sense to move some of
14 those criteria to either earlier in the decision
15 process. So we're open to comment on -- we're
16 open to comment on all of this, but that's one of
17 the things we're looking at, is, "How can we have
18 a more streamlined process?"

19 In terms of the Proposed Finding, how it
20 typically works now for the existing rule is we
21 issue a Proposed Finding, that's put out there for
22 public comment, it's put out there for -- and then
23 we review those comments and issue a Final
24 Determination.

25 What we're proposing under the rule in

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1 terms of process is that, if we issue a Proposed
2 Finding that's positive and that there are no
3 comments with substantive opposition to that
4 recognition, that we would issue a Final
5 Determination that's positive.

6 And that's -- we've done that in the
7 past. And so again, if we receive no comments, no
8 substantive comments in opposition, we would move
9 forward with just basically issuing that Federal
10 Register notice that the proposed favorable
11 decision is not final.

12 If the proposed favorable decision is
13 negative -- and so let me back up. If the
14 proposed favorable is positive and we receive
15 negative substantive comments, then we're going to
16 continue with our current practice, which is to
17 review those and then move forward with a Final
18 Determination.

19 If the Proposed Finding is negative, what
20 the Proposed Rule provides is an opportunity for
21 the petitioner to ask for a hearing before the
22 Office of Hearings and Appeals before an
23 administrative judge. And third parties could
24 then intervene in that hearing.

25 The judge doesn't decide the petition

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1 itself. What the judge would decide is a
2 recommended decision to the assistant secretary as
3 part of that process. We've -- so the purpose of
4 the hearing is to sort of narrow the issues in the
5 dispute and have a third-party judge weigh that
6 evidence and make a recommendation to the
7 assistant secretary. The assistant secretary,
8 under the Proposed Rule, remains the final
9 decisionmaker for the Department.

10 One of the things that we propose
11 changing is that, as it currently stands right
12 now, when the assistant secretary makes a decision
13 on a Final Determination, that is subject in
14 limited respects to the Interior Board of Indian
15 Appeals' review. And what we've proposed in the
16 Proposed Rule is to eliminate that final review by
17 the IBIA. It's the only decision that the
18 assistant secretary makes that is subject to IBIA
19 review, and parties go directly to federal court.

20 In terms of the hearing on a negative
21 Proposed Finding, the Office of Hearings and
22 Appeals has proposed basically civil procedures
23 for how that hearing would be conducted. The
24 Office of Hearings and Appeals is separate from
25 the Assistant Secretary's Office, so they have

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1 their own Proposed Rule out there on those civil
2 procedures of how a hearing would be conducted.

3 One of the questions that they've asked
4 in their Proposed Rule is who -- if we end up
5 having a hearing process, who should preside over
6 that hearing? Should it be an administrative law
7 judge? And it all relates to the level of
8 independence of the administrative judge. So
9 should it be an administrative law judge who is
10 most independent within the Office of Hearings and
11 Appeals? And the Office of Hearings and Appeals
12 is within the Secretary's Office, not the
13 Assistant Secretary's Office, and it's independent
14 from the Department. So should it be an
15 administrative law judge? Should it be an
16 administrative judge who reports to the Office of
17 Hearings and Appeals' director, and so therefore
18 has a little bit more supervision? Or should it
19 be an attorney who is designated by the Office of
20 Hearings and Appeals' director who reports
21 directly to the director itself? And so there are
22 three sort of options there that they're looking
23 for feedback on or any other ideas that folks
24 have.

25 And then the other question they've asked 18

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1 is, the Office of Hearings and Appeals judge's
2 decision, the recommended decision to the
3 assistant secretary, what should that look like?
4 Should be it limited to the hearing record?
5 Should third parties be able to provide additional
6 information that wasn't before the Office of
7 Federal Acknowledgment before a Proposed Finding?
8 Those sorts of questions.

9 So in terms of further revisions to the
10 process, we're providing for a petitioner who can
11 withdraw a petition at any time, but it has to be
12 before the Proposed Finding is issued, is
13 published. And if they withdraw their petition,
14 the consequence of that is that when they resubmit
15 that petition, they lose their place in line, so
16 they go to the end of the line in terms of
17 resubmitting their petition if they withdraw it.

18 The other revisions to the process is, we
19 are proposing to put more of the information of
20 the petition directly on the Internet itself to
21 the extent allowed by law. So if the Privacy Act
22 prohibits some things or what have you, we're not
23 going to release that information. But right now,
24 we provide notice to tribes and the public about
25 the petition itself. We're trying to get those

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1 materials on the Internet so people have easy
2 access to those.

3 So in terms of the criteria themselves,
4 so with criterion (a) as it currently stands, it
5 requires external identification of the group from
6 1900 to the present. And so how we've applied
7 that in the past is, essentially, third parties,
8 whether it be a state, a local government, a
9 newspaper, an anthropologist, somebody external to
10 the tribe had to identify that tribe from 1900 to
11 the present and write something, basically put it
12 in writing in terms of that.

13 And so the proposal basically says, "If a
14 group satisfies all of the other six criteria:
15 That they've been exercising political authority,
16 that they're a community, that they're Indian,
17 they haven't been terminated, that they've been in
18 existence, it doesn't matter whether a third party
19 has written about them or not. Does that make
20 them any less of a tribe if they satisfy all those
21 other characteristics?

22 So what we've proposed instead for
23 criterion (a) is, we're not creating tribes in
24 this process; we're not recognizing tribes that
25 haven't existed. We're requiring them to provide

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1 a narrative of their existence as a tribe prior to
2 1900 with evidence. And so, it's essentially a
3 requirement of a "Tell us where you come from,
4 because we're not making up tribes. We're not
5 interested in recognizing tribes that are made
6 up."

7 So that should be a criteria that should
8 be able to be satisfied by legitimate tribes. It
9 should be a really difficult criteria for those
10 petitioners that have come into existence in the
11 1940s, the 1950s, 1960s, 1970s, '80s and '90s. It
12 should be very difficult for them to satisfy that
13 criteria, because they need to show their evidence
14 and their history as a tribe prior to 1900.

15 And I will say, we say "a brief summary,"
16 and we've gotten some comments at other tribal
17 consultations and public meetings that says,
18 "Well, what does that mean?"

19 And what we've said before is that, it's
20 not intended to be a treatise or a multi-volume
21 treatise of history, but you know, we need ideas
22 from you all in terms of how that should be
23 clarified.

24 So you know, we've heard that it needs to
25 be clarified, and while that's a helpful comment

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1 to hear that it needs to be clarified, you know,
2 specific ideas as to how it should be clarified or
3 whether it should be changed at all are, you know,
4 things that -- is why we're going through this
5 process. Sir?

6 DENNIS TAYLOR: Dennis Taylor, Eastern
7 Band of Cherokee. Again, thanks for allowing us
8 to ask some questions. And you know, I think the
9 question was asked as well about the brief
10 narrative. Have we determined what the brief
11 narrative is going to consist of? Is it just one
12 page? Ten pages?

13 You know, for instance, the Eastern Band,
14 we have a long line of history. I mean, we're in
15 the history books; we're in textbooks. What is a
16 "brief narrative"? Has it been decided yet?

17 MR. ROBERTS: It hasn't been decided, and
18 that's kind of what we're asking for your input
19 on. So I don't know -- I don't know that the
20 Department has -- I don't know that the Department
21 has said, "Oh, a one-page would be sufficient,"
22 but it's something that we need clarity from you
23 all.

24 So I understand that -- you know, I think
25 we all understand that it could be clarified,

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1 right, and I guess what I'm trying to provide is
2 the thought behind the suggestion, which is, the
3 narrative shouldn't take, you know, years and
4 years and years and decades to develop and
5 millions of dollars to put together. It shouldn't
6 be binders upon binders. But it should be
7 something that is, you know, with evidence saying,
8 "This is who we are; this is where we come from."

9 DENNIS TAYLOR: Just a for instance, in
10 North Carolina where we're from, there's a tribe
11 back home in North Carolina that pre-1934 has, you
12 know, claimed to be Cherokee for 40 years, and two
13 or three other tribes prior to that as well before
14 1934. So how serious could you take a brief
15 narrative, you know, from a petitioner as claiming
16 to be four or five different tribes between 1904
17 and 1934? So you know, those are some types --
18 some of the issues that we have with a brief
19 narrative.

20 MR. ROBERTS: So what I would encourage
21 is -- and we encourage this in all of our rule
22 makings. And for those of you, I don't know if
23 you were at TIBC at the time when we were talking
24 about contracts, court costs, and otherwise,
25 but -- and I appreciate your comment on this

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1 matter, but what we need is a specific
2 recommendation. Because we can hear your comment
3 and say, "This needs to be clarified," and -- but
4 that's going to leave it to the team to write what
5 that should look like as opposed to what Eastern
6 Band of Cherokee thinks that should be written to
7 look like.

8 DENNIS TAYLOR: And I think after final
9 consultations, I believe that we will be sending
10 those responses in.

11 MR. ROBERTS: Perfect.

12 DENNIS TAYLOR: Thank you.

13 MR. ROBERTS: So --

14 KAREN KETCHER: Karen Ketcher, Cherokee
15 Nation. It says that this is required, so the
16 brief narrative is required; it's not a maybe
17 thing; it is required for a pre -- for pre-1900?

18 MR. ROBERTS: That's right. Yep, all
19 seven of these are required. And I guess, I mean,
20 I cover this a little bit later in the discussion,
21 but I'll just address it right now, and that is,
22 we'll talk a little bit about notice later in the
23 discussion, but one of the things that we've tried
24 to do in the Proposed Rule is broaden notice,
25 provide more notice than what we're typically

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1 providing right now under the existing rule.

2 So under the existing rule, let's say
3 there is a group and they claim to be Cherokee for
4 whatever reason. Under the existing rules and
5 under the Proposed Rules, under both rules, the
6 existing and the proposed, we still would provide
7 notice to the federally recognized Cherokee tribes
8 of that petition and get their input on it. And
9 so that's not -- that's not changing.

10 We've heard at some consultations that
11 the way that the regulation is written, they were
12 concerned that we were somehow limiting notice. I
13 think some of that has to do with the change in
14 the plain language of it. But as we stated at
15 earlier consultations and public meetings, our
16 intent is to broaden notice. And so if there's
17 anything in there, in the Proposed Rule, that you
18 think somehow limits the notice that's provided,
19 we need to hear that, because that's not our
20 intention at all.

21 So getting back to the mandatory
22 criteria, and they're all mandatory, criterion
23 (b), community, we are proposing in the Proposed
24 Rule that we start our analysis from 1934 to the
25 present. And there's two reasons for that --

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1 three reasons for that. One is that prior to
2 1934, the United States had a number of different
3 policies, war with tribes, treaties with tribes,
4 allotment and assimilation with tribes. 1934 is
5 when Congress passed the IRA. It's probably the
6 first time in federal history where the Congress
7 is supporting tribal governments and
8 self-determination, so there's the policy aspect
9 of the IRA.

10 And then from a practical standpoint,
11 we've been running the Part 83 process for
12 approximately 40 years. We've never had a
13 situation where a failed petitioner has failed the
14 criteria prior to 1934 but satisfied all the
15 criteria after 1934. We've never had that
16 situation, and so we're proposing moving forward
17 from 1934 to the present.

18 And the third factor is that we think
19 that that will provide more efficiency and
20 timeliness than looking at the record as a whole.

21 Some of the other things with criterion
22 (b) in community, we're requiring that at least
23 30 percent show a distinct community for each time
24 period. Under the regs, I believe it's
25 predominant -- predominant portion, which is less

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1 than objective, I guess. And so we didn't pull
2 the 30 percent out of thin air. The 30 percent is
3 from the Indian Reorganization Act, and it's the
4 percentage of numbers that need to vote on a
5 constitution. So we're clarifying that
6 attendance, students at Indian boarding schools,
7 can be acceptable evidence of community. We've
8 relied on that in certain decisions in the past,
9 so we're trying to make that consistent.

10 And we're also saying that if the group
11 has maintained a state recognized reservation from
12 1934 continuously to the present, or the United
13 States has held land for the group at any point
14 since 1934, that that will satisfy both criterion
15 (b) and criterion (c).

16 And so I want to be clear that we're not
17 talking about state recognition, because
18 there's -- we've heard throughout the
19 consultations and public meetings and input on the
20 Discussion Draft that there's all different types
21 of ways in which states do that, and so we're not
22 talking about state recognition. What we're
23 talking about is tribal -- or collective ownership
24 of land basically, and that basically comes from
25 Felix Cohen's criteria from the Department of

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1 Interior when they were implementing the IRA in
2 the '40s. We're not talking about ownership for
3 an individual. We're talking about collective
4 rights to land. And that is one of the things
5 that the Department looked at when they were
6 implementing the rule -- or implementing or
7 looking at whether to recognize the tribe on an
8 ad-hoc basis; they looked at collective ownership
9 in land.

10 So what we talked about for the 1934 to
11 the present and state reservation or U.S. held
12 land at any point since 1934, those would satisfy
13 both (b) and (c), is the proposal.

14 The other thing is that we're -- so a
15 petitioner has to show these criteria -- satisfy
16 these criteria without substantial interruption.
17 That's what the regulation says. And so we've
18 heard that that's unclear. What does "without
19 substantial interruption" mean? And the
20 Department has applied that differently throughout
21 the course of the Part 83 regulations, and so
22 sometimes we've applied it as ten years without
23 substantial interruption, and we're talking about
24 documentary evidence without substantial
25 interruption; sometimes we've applied it for as

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1 much as 27 years, 28 years.

2 And so what we've proposed in the
3 Proposed Rule is not more than 20 years unless
4 there is some significant justification for that.
5 And so that's something that we need comment on as
6 well.

7 In terms of criterion (e), descent, we're
8 trying to again sort of codify existing practice.
9 So under existing practice, if a petitioner has
10 evidence that 80 percent of their members descend
11 from a historic tribe prior to 1900, that that
12 satisfies criterion (e). It doesn't mean that a
13 group can have 20 percent non-Indians. What it
14 means is that 80 percent of that group has to have
15 documentary evidence showing their descent. And
16 that's how we've applied it over the course of
17 administrating the Part 83 regulations.

18 In terms of something in terms of new
19 parts of the rule for criterion (e), we are
20 proposing that we allow descent to be traced from
21 a roll, a tribal-specific roll, prepared either by
22 the Department or at the direction of Congress.
23 So we're not talking about a roll of California --
24 for example, there was a roll of California
25 Indians. We're not talking about a California

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1 Indian roll. We're talking about a tribal-
2 specific roll. So if there were a tribal-specific
3 roll for a specific tribe in California, we're
4 basically proposing to own those federal records
5 as part of that.

6 If the group doesn't have a roll that was
7 either prepared at the direction of Congress or
8 prepared by the Department, then what we're asking
9 for is evidence -- whatever the reliable evidence
10 is prior to 1900. And so this is attempting to
11 provide consistency of how we've applied the
12 process over time.

13 So for some decisions, for example, we've
14 relied on evidence from 1880, 1890, 1900, and
15 moved forward from that evidence believing that
16 that is good evidence. In other cases, we've had
17 evidence from, say, 1880, 1890, and we've gone
18 back in time to time of first contact. And so
19 going back in time from evidence that we already
20 feel is good evidence is more costly, takes more
21 time, and so that's the proposal, essentially, is
22 to use the most reliable evidence prior to 1900
23 and move forward from there.

24 TERRI HENRY: Can I ask you a question
25 about that?

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1 MR. ROBERTS: Yeah, sure.

2 TERRI HENRY: In the -- when you're
3 talking about using reliance on the most -- or
4 having reliance on the history before 1900, you've
5 got Wikipedia, and anybody can write anything on
6 Wikipedia, and so how are you going to verify
7 that?

8 MR. ROBERTS: So we're talking about
9 reliable evidence, and so we're talking -- you
10 know, yeah, Wikipedia is out there, but also
11 Ancestry's out there, right, and they have the
12 federal record of censuses of, I think, Indian
13 censuses and non-Indian censuses. And so we're
14 not -- we're not relying on -- we're relying on
15 reliable evidence. I don't think Wikipedia would
16 be reliable evidence. We're talking about
17 historical documents showing that these folks --

18 TERRI HENRY: I just wanted to clarify,
19 because we are in this Internet age and anybody
20 can write anything and publish it Online, so I
21 just wanted to make sure.

22 MR. ROBERTS: Yeah, and we're not
23 changing the evidence that we would rely upon.
24 We're just saying, if we have reliable evidence at
25 a point in time, whether it's 1850, 1860, 1890,

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1 move forward from that as opposed to going back in
2 time for decades or a hundred years to confirm
3 what we think is reliable.

4 In terms of criterion (f), membership, as
5 I mentioned before, we're not recognizing splinter
6 groups. We're not recognizing groups that have
7 splintered from a federally recognized tribe. But
8 we have heard through the consultations and public
9 meetings and on the Discussion Draft that some
10 petitioners have said, you know, "We have our
11 enrollment in our non-federally recognized tribe.
12 Some of our members are eligible for enrollment in
13 both non-federally recognized tribes and
14 recognized tribes, eligible for both. And that
15 because the Department's process has taken so
16 long, that, you know, there may be college
17 benefits, scholarship benefits, real-life benefits
18 that our members are -- they don't want to leave
19 our group, but the process is taking so long, you
20 haven't recognized us, they have no other choice
21 but to enroll in that federally recognized tribe.
22 And if we were recognized, our people would come
23 back to us, but your process is causing this
24 splintering. There wasn't a splintering before
25 that."

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1 So what we put in the Proposed Rule to
2 address that is, if a petitioner has filed a
3 Letter of Intent prior to 2010, that we wouldn't
4 hold that against them if their membership leaves
5 that group after 2010. We wouldn't hold that
6 against them as a result of our process. That's
7 the proposal.

8 With regard to criterion (g),
9 congressional termination, obviously, if the group
10 has been terminated, we don't have any authority
11 to recognize them. And so, but the burden right
12 now is on the petitioners to show -- to prove the
13 negative essentially, that they haven't been
14 terminated. We're proposing to shift the burden
15 on the Department to show that they have been
16 terminated and that the Department would make that
17 decision.

18 KAREN KETCHER: Can we go back a moment
19 to membership?

20 MR. ROBERTS: Yes.

21 KAREN KETCHER: Let me understand you
22 correctly. In the old recognition process, if you
23 were eligible for membership in another federally
24 recognized tribe, then you would not -- if those
25 members of that group were eligible for membership 33

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1 in another federally recognized tribe, then that
2 was one of the criteria, that you couldn't be
3 eligible for membership.

4 Well, now what we're saying is if you're
5 eligible for membership in the other non-federally
6 recognized tribe and you're eligible in the
7 federally recognized tribe, then they can come and
8 petition or they can come in and make an
9 application? Because always before I don't think
10 you were -- if -- it's like a splinter group.

11 MR. ROBERTS: So, and I'll -- and Katie
12 and Liz can weigh in on this as well, but my
13 understanding of it is that, so we've had several
14 tribes that we've recognized through the process,
15 Poarch Band of Creek Indians, right. I don't know
16 whether they are eligible, whether their members
17 were eligible for a membership or not, but at some
18 point prior to 1900, right, they had their own
19 government essentially and their own tribe, and so
20 I don't think -- so the Department recognized
21 them, so I don't think we viewed them as a
22 splinter group.

23 KAREN KETCHER: For example, I know of
24 one group in Oklahoma that applied for recognition
25 but they were denied because their members were

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1 eligible for another -- for membership in another
2 tribe there in Oklahoma.

3 MR. ROBERTS: Okay.

4 KAREN KETCHER: And that was the reason
5 they were denied. So if this is -- if this is the
6 position that we're going to take now, that you
7 can -- that group could come back in and apply for
8 federal recognition and meet the criteria because
9 they've had, you know, they had membership, they
10 met all the other criteria, it was just the one
11 that they were eligible for membership in another
12 federally recognized tribe.

13 MR. ROBERTS: Okay. I don't think
14 we're -- so -- and Liz and Katie can correct me,
15 but I don't think the Department's trying to
16 change the splinter group criterion. What we're
17 basically trying to say is that there were
18 petitioners that had been in the process way
19 before and they've been -- so quite frankly, we've
20 heard it from Michigan groups in Michigan said,
21 "Look, we've been petitioning for how long?
22 Decades, many years, and we're losing our
23 membership because of your process."

24 And what we've basically said is that,
25 "If you've had" -- and it's a proposal, so we need 35

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1 to have this dialog; we need to have comments.
2 We're trying to provide -- we're trying to address
3 that situation where their argument is that
4 through no fault of their own, our process is
5 taking -- if we had a more timely process, if we
6 had a process that could make a decision within a
7 decade, they wouldn't be in this situation.

8 And presumably, we're not changing --
9 we're not changing the recognition standards
10 there. So I guess I would assume they would be
11 recognized, right, and that they would satisfy the
12 criteria.

13 I think what we're just trying to say is,
14 "If you've submitted your Letter of Intent by 2010
15 and from 2010 to the present you've lost 10
16 percent of your membership because of these real-
17 life situations, we're not going to hold that
18 against you." And I don't know if Liz or Katie
19 want to add?

20 MS. APPEL: Yeah, just to clarify.
21 Rather than being eligible for membership, the
22 criterion is that the petitioner's membership has
23 to be composed principally of members who are not
24 already members of a federally recognized tribe.
25 So as Larry was saying, this is to -- that

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1 criterion is staying against the splintering of
2 currently federally recognized tribes, and this
3 will just be an exception where they filed before
4 2010.

5 KAREN KETCHER: I'm trying to get this
6 clear in my mind. For instance, the five
7 civilized tribes in Oklahoma, their tribal
8 constitutions, all of them, their membership is
9 based on descendancy from the 1906 Dawes
10 Commission roll. So within, for example, the
11 tribe that I mentioned earlier that had applied
12 for federal recognition, all of these five tribes,
13 their constitutions require that, that you're a
14 descendent from the Dawes Commission.

15 Well, these people in this community in
16 this group actually descended from people on that
17 1906 Dawes Commission roll, so they were eligible
18 for membership in the tribe. If -- and they were
19 denied, because I guess you would call them a
20 splinter group. That may have been why they were
21 denied, because they were a splinter group.

22 And I don't understand the difference in
23 other tribes that are in very similar situations
24 that, for instance, there's two within the
25 Cherokee Nation: The Shawnees and the Delawares.

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1 Both of them have obtained federal recognition but
2 through different means than the Federal
3 acknowledgment process.

4 MR. ROBERTS: Okay, so I don't think
5 we're -- I don't think we're intending to change
6 the substantive criteria of this, in terms of
7 we're not recognizing splinter groups.

8 I think -- I think, you know, we have
9 your comments here today, but I think we need you
10 guys -- you all know the best of your communities,
11 and you need to help us understand
12 substantively -- I think -- I hope you understand
13 sort of what the intent was, which is we've heard
14 from petitioners who, you know, basically they've
15 been in the process for a very long time and
16 they're losing -- as a recent phenomenon, they're
17 losing members.

18 So I think in Michigan basically, you
19 know, they had their members and one group was
20 talking about how they've had their membership
21 initially change in the last year or two,
22 basically said, "We're only going to provide
23 scholarships to federally recognized tribes," and
24 so they said, you know, "We need to account for
25 how long our process is taking."

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1 So we're not trying to change that
2 substantive criteria, and we will definitely take
3 that back to the Department and, you know, we need
4 to clarify that.

5 MS. KLASS: So in addition to the
6 membership criteria, we also have the political
7 authority criteria, so the petitioner needs to
8 have been operating, you know, politically
9 independently since 1934. So they're kind -- they
10 work together, those two criteria.

11 MR. ROBERTS: So before we get to your
12 question, we've had someone join us, and I just
13 want them to introduce themselves for the record,
14 because this is only open to federally recognized
15 tribes.

16 MELISSA HOLDS THE ENEMY: Good morning.
17 My name is Melissa Holds The Enemy. I am managing
18 attorney for the Crow Tribe.

19 PERRY SHELL: Good morning. Perry Shell,
20 Tribal Council, Eastern Band of Cherokee Indians.
21 I have a couple of questions.

22 You know, this attendance at boarding
23 school, that's going to be -- the proposal is that
24 that be recognized as criteria to be recognized as
25 a federally recognized tribe, but anyway, does

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1 that include -- we had a boarding school of
2 Cherokee, and I know there was some of these
3 groups now that have not been recognized that had
4 attended that went there as well.

5 We also had Bureau of Indian Affairs or
6 Bureau of Indian Education, whatever it was,
7 Department of War, War Department or whatever it
8 was, operated Indian schools on our reservation
9 that were basically had other non-Indians went
10 there. I know Mr. Hatley was a non-Indian that
11 operated a school in my community. His children
12 and others attended that were non-Indian. You
13 know, and I think that -- I don't know if that
14 criteria -- that needs to be verified whether or
15 not they were Indian or not if they went there.
16 The records that were kept and the way things were
17 done is different than it is now.

18 And I don't envy what you all are trying
19 to do here, but I don't know that in itself should
20 be considered as criteria for membership because
21 you went to an Indian boarding school or you went
22 to a Bureau of Indian Affairs operating school.
23 There were a lot of non-Indians that went to those
24 schools at one time or another. I know Mr.
25 Hatley, Winston Hatley, he's an old man now, like

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1 90 years old, came back and formed a union. And
2 there were others, you know, that have done this.
3 But I question that.

4 I question, too, we talked about having a
5 narrative prior to 1900, a brief narrative. You
6 mentioned ten pages. That's not been decided.
7 But the petitioning group, like Terri said
8 earlier, could write whatever they want to write
9 in ten pages and hit on what they want to hit.
10 There has to still be an investigation, I believe,
11 into whether or not what all they're leaving out,
12 what all is being said by who, it should not be
13 easy. It should be hard. And you say, well, you
14 need to hear from us on this, but it's your own
15 Department that's in this situation, that got
16 yourselves in this situation. And I don't know
17 how much of this situation, as far as taking
18 30 years, is the responsibility -- or I guess you
19 can say "blame" or whatever you want to use, on
20 the petitioning group who's not getting a
21 favorable decision, they keep on drawing it out,
22 drawing it out, rework based on whatever. You
23 know, I think that that's part -- politics is also
24 part of why some of these groups get extended for
25 years and years and years as well. It's not

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1 necessarily because of the criteria things that
2 you have or the decisions that you made. I think
3 a lot of arguments are being made with it, and I
4 think that a lot of that responsibility lies with
5 that group. If they're not getting a favorable
6 decision, they keep trying to add other things as
7 well.

8 I would like to see this expedited and
9 put into transparent, flexibility, integrity, all
10 of those words you use right there, but I think
11 integrity is key. I think you need to go back and
12 check very closely. We have researched court
13 records of other petitioning tribes and looked
14 further than just what it said about their rolls
15 were from the white, old Baptist Church down here
16 next to whatever creek. You know, you need to go
17 further than that. You need to look at court
18 records, marriage records, and see what they
19 identify themselves as in court, under oath, what
20 their race is, or what their background is.

21 Lots of times you'll find what they put
22 on their roll has to be investigated. And if it
23 does take some time to get to the truth, that's
24 what's key here, I believe, also.

25 But just one on this, "Well, they've got

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1 to go back and bring all these documents and cases
2 and cases." This has to be hard to give them this
3 level of recognition.

4 This part about 80 percent, what you're
5 going on now, that makes no sense to me.

6 80 percent, that means 20 percent don't have to be
7 any Indian -- Native American descendency to be on
8 a roll?

9 MR. ROBERTS: No, sir. That's not --

10 PERRY SHELL: That's just what they're
11 recognizing?

12 MR. ROBERTS: No, sir. So as I
13 mentioned, it's documentary proof that at least
14 80 percent of the group is Indian. And that's
15 been applied by the Department, I believe, since
16 the inception of the Part 83 process.

17 PERRY SHELL: Say again.

18 MR. ROBERTS: I think throughout the Part
19 83 process. This is not --

20 PERRY SHELL: Part 83, when does that go
21 back to?

22 MR. ROBERTS: Well, that's 1978.

23 PERRY SHELL: Yeah. Maybe that's wrong
24 too. Maybe you relook at that. Figure if you go
25 from a roll, you should have been Indian -- should

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1 have been Native American a hundred percent if
2 that's who you're basing your -- you know, to me
3 it makes no sense. My wife's not Native American,
4 you know. I don't know. I don't see 20 percent,
5 8 out of 10. Should be a hundred percent.

6 Anyway, you all might relook at that rule
7 as well, you know. Anyway, thank you.

8 MR. ROBERTS: Thank you. I just wanted
9 to touch upon the comments on Indian boarding
10 schools. Just because -- just because someone
11 attended an Indian boarding school, that's not
12 satisfying the criteria. That's not what we're
13 proposing. What we're proposing is that that can
14 be evidence that we can look at. It's not
15 determinative.

16 And I don't know, Katie, if you want to
17 talk a little bit about this issue about any
18 boarding schools and how that relates to
19 community?

20 MS. KLASS: It's important to note that
21 the Proposed Rule, in addition to asking for
22 evidence of attendance at the schools, it also
23 points out that the kids going to the schools need
24 to be coming from the same geographic area. So
25 it's not just attendance at the schools; it's also 44

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1 coming from an area where they can have community,
2 same geographic area.

3 MR. ROBERTS: So it's not determinative,
4 it's not a, "You show that your students went to a
5 boarding school, therefore it satisfies criterion
6 (b)." That's not how it's written. It's just
7 evidence that we can look at.

8 TERRI HENRY: And I just want to kind of
9 further discuss that. My name is Terri Henry,
10 Eastern Band of Cherokee. That one, to me, is
11 problematic simply because of the fact that we
12 know that, for instance, our -- the group that we
13 have consistently been fighting against in North
14 Carolina has been the Lumbees. And we know that a
15 substantial group that went to the Indian boarding
16 schools, in fact, they were at ABCAI a couple
17 years ago, Larry, if you recall, there was a whole
18 effort to have that whole process recognized, and
19 they went to Haskell, things like that. And so we
20 have -- it's problematic for us because when you
21 look from what we know from where we are and us
22 existing where we've been for thousands of years,
23 we would have known other Indians around us. And
24 so I appreciate your comments on the notice part,
25 because I think that's going to be a critical

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1 factor. But when you look at Indian diplomacy
2 prior to contact, we would have known every Indian
3 in our area, right, and we would have known the
4 Indians far away because we rely on trading with
5 them, we might have went to war with them, we
6 might have done who knows what with them, hunted
7 in the same grounds.

8 So I guess what, you know, when we're
9 thinking about the Lumbees for instance, and I'm
10 just going to say it because that's who our --
11 this fight is with historically, is that we also
12 know that they pulled the Tuscaroras in.

13 Now, the Tuscaroras were actually in the
14 Piedmont section of North Carolina, and the
15 Tuscarora Nation picked itself up and went to New
16 York, and whoever was left there has now been
17 subsumed into this Lumbee group. And so I don't
18 think that, you know, perhaps the -- I don't think
19 that the Tuscaroras probably comprise 80 percent
20 of that Lumbee roll. But I -- but I also don't
21 think that, you know, to me, that would be an
22 upsidedown equation. And so, you know, whether or
23 not the Tuscaroras, and I don't know this history
24 myself, but whether or not the Tuscaroras, who
25 remained, did as we did after their removal. We

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1 kept ourselves in a governance, political unit of
2 governance, and in fact, had come together to
3 create a constitution in the late 1800s after the
4 removal, after the soldiers had left, and have
5 maintained ourselves as a political entity.

6 I don't know what they did over there,
7 but certainly, they have been subsumed into this
8 other roll that I understand they can now -- they
9 can now not separate themselves from.

10 And so you know, it really, I think,
11 makes it problematic, makes this 80 percent and
12 this boarding school thing, it makes it really
13 problematic. Because maybe they were Tuscaroras
14 who went to the boarding schools, but then they
15 get counted as Lumbee. So you know, to me that's
16 problematic to consider that as evidence.

17 MR. ROBERTS: Okay.

18 KAREN KETCHER: Karen Ketcher, Cherokee
19 Nation. I just need clarification on Katie's
20 statement that if they attended a boarding school,
21 they lived within the community, that didn't mean
22 that they were -- that they had to be Indian
23 living in the community; is that what you're
24 saying? That they just had to live in the
25 community?

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1 MR. ROBERTS: So I guess these are
2 getting a little bit conflated. We're still -- I
3 mean, we're not interested in recognizing groups
4 that aren't Indian.

5 KAREN KETCHER: Yeah, and I understand
6 that. But the statement that she made was that as
7 long as they lived in the community and attended
8 that boarding school. You know, I know in
9 Oklahoma there were missionaries, there were
10 Indian agents, there were various other people
11 that lived in the community with the Indian people
12 that their children attended the boarding school
13 but they were not Indian. So are you saying those
14 people are going to be able to --

15 MR. ROBERTS: No, we're not saying that.

16 KAREN KETCHER: No? So in other words,
17 they do need -- they do need to be Indian?

18 MR. ROBERTS: Yes.

19 KAREN KETCHER: Because I know a judgment
20 was awarded to one of the tribes in Oklahoma
21 simply because the government paid for those
22 non-Indian children to go to the boarding schools.

23 MR. ROBERTS: Right. No, they have to be
24 Indian.

25 KAREN KETCHER: So they do have to be

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1 Indian?

2 MR. ROBERTS: Right.

3 KAREN KETCHER: They have to live in the
4 community, but they also have to be Indian?

5 MR. ROBERTS: Right. So going back to
6 the PowerPoint -- is everyone okay with moving on?

7 Okay, in terms of previous Federal
8 acknowledgment, we're not trying to -- the intent
9 here is not to make any substantive change to
10 previous Federal acknowledgment. Our intent here
11 is to make it clear as to how we've actually been
12 applying it. So we'd request your comments on
13 this if you see it alternately, but the intent is
14 not to make any substantive change with that.

15 Same thing with burden of proof; we're
16 not changing the burden of proof. It has always
17 been "reasonable likelihood." We're trying to
18 clarify that based on Supreme Court cases. And so
19 if for whatever reason you think that's a change
20 from -- how we put it is changing it substantively
21 in some way, shape, or form, we need to know that
22 as well, because we're not proposing a substantive
23 change to the burden of proof. We're not
24 proposing to change that.

25 In terms of re-petitioning, so it's a

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1 multi-step process. It's not an "Open the flood
2 gates and everyone gets to re-petition" if this
3 rule goes into effect.

4 So here's how it works -- how it's
5 proposed to work, is that we've had roughly 30
6 groups that have been denied through the Federal
7 acknowledgment process, and before they can be
8 reconsidered, they have to show a few things. One
9 is, if a third party had litigated against that
10 group, either administratively or in court,
11 federal court, and prevailed, then before they
12 could even take the next step of the process, they
13 would have to get the consent of that third party
14 that won in litigation. So it is respecting the
15 rights of third parties that prevailed in
16 litigation either administratively or in federal
17 court.

18 Let's say you have a petitioner that was
19 denied and there were no third parties that
20 litigated and prevailed against them. It's still
21 not an open door free-for-all. We have a couple
22 of steps here process. And so what that
23 petitioner would need to do is, they would need to
24 go to the Office of Hearings and Appeals before a
25 judge, and they would need to show that either a

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1 change between the existing regulations or
2 whatever the new regulations are, that that
3 warrants reconsideration, or they would have to
4 show that the Department misapplied the burden of
5 proof in the earlier decision that warrants
6 reconsideration.

7 If they make this showing before a
8 hearing judge on one of these two things and the
9 hearing judge agrees, what that means is that that
10 group can then restart the entire process. And
11 all the process that we're going to talk about, in
12 other words, all that -- they basically start from
13 the beginning. So that's how it's framed.

14 So for example, and I'll give this
15 example to folks. We proposed 1934 in (b) and
16 (c), for example, okay. We've just said that all
17 of the groups that have been denied have failed
18 both post -- pre-1934 and post-1934. So just
19 because we're looking at 1934 forward in and of
20 itself wouldn't be a basis for reconsideration
21 because they've already failed post-1934.

22 So the '34 date isn't a substantive
23 change. It's all of those groups that have failed
24 both pre- and post-1934. So they would have to
25 show either that there was a substantive change in

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1 the other parts of the criteria other than the
2 1934 date to the court that would say this
3 warrants reconsideration, or they would have to
4 show that the wrong burden of proof was applied.
5 That's the proposal. We need comments on it.

6 Again, sort of the civil procedure
7 process, how those hearings would be run, the
8 Office of Hearings and Appeals has issued a
9 Proposed Rule on that.

10 In terms of notice, I talked a little bit
11 about it. We're going to talk a little bit more
12 about how we're trying to expand notice.

13 TERRI HENRY: Mr. Roberts?

14 MR. ROBERTS: Yeah, sure.

15 TERRI HENRY: I just want to ask. You
16 gave, in the previous light you gave two
17 scenarios. One was that if the petitioner lost
18 the case, the third party would have something to
19 say; and the other one was that if there was no
20 case at all. What if the petitioner in the court
21 case wins? What's the scenario for that? Does
22 the third party still have to have the right to
23 speak to that enroll -- that acknowledgment?

24 MR. ROBERTS: So I think if the third
25 party won -- or if the petitioner won?

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1 TERRI HENRY: Yeah, if the petitioner
2 won.

3 MR. ROBERTS: They would be recognized
4 already, so they're not --

5 TERRI HENRY: Okay. I just wanted to
6 clarify because you gave the two scenarios, and I
7 just wanted to make sure.

8 MR. ROBERTS: Yeah. I mean, they would
9 be one of the 17 tribes that would be recognized
10 for the processes if they won in court.

11 TERRI HENRY: Okay.

12 MR. ROBERTS: So in terms of notice,
13 we're still proposing to acknowledge receipt of
14 the application within 30 days. Within 60 days
15 we're going to publish notice in the Federal
16 Register, and we're going to post the material
17 that we can post under federal law on the website.
18 We're going to continue to notify the governor and
19 the attorney general in the state, we're going to
20 continue to notify any other recognized tribe and
21 any petitioner that appears to have historical or
22 present relationship with the petitioner or may
23 otherwise have a potential interest in the
24 acknowledgment determination. We're going to
25 continue to do that. That's what we do now.

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1 We're not proposing any change in that.

2 But over and above that, what we're
3 proposing is now we're going to notify any other
4 federally recognized tribe within the state,
5 whether they meet this or not, the thing I just
6 talked about, that last bullet. We're going to
7 notify all tribes in the state and we're going to
8 notify all tribes within the -- federally
9 recognized tribes within a 25-mile radius of where
10 that petitioner is located, in case it's something
11 where it crosses a state boundary.

12 So for example, let's say there was a
13 petitioner in Wyoming and, you know, there might
14 be tribes in Montana that are relatively close by
15 that would want notice of that. So that's what we
16 propose, is to provide them notice as well if
17 they're within a 25-mile radius.

18 The next slide just sort of talks about
19 all of the different notice we're going to provide
20 in terms of the time frames when we begin review,
21 when we issue Proposed Finding, when we grant time
22 extension, when the Secretary begins to review the
23 decision, when we issue Final Determination. So
24 all of those different -- those are basically
25 steps in the process of where we're proposing to

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1 provide notification.

2 So comments are due next Friday. We, as
3 I said to start things off, we've heard a lot of
4 requests for the extension of the deadline. As
5 soon as I know something about that, I will let
6 folks know. If it happens today, I'll let them
7 know either while we're sitting here today or this
8 afternoon. Otherwise, I know we're trying to make
9 a decision as soon as possible, so I would --
10 we're going to try to provide notice, probably
11 issue a press release, we'll probably issue a
12 Federal Register notice letting everybody know
13 sort of how we're proceeding, and so we'll get
14 that information out as soon as we can.

15 Comments on the Office of Hearings and
16 Appeals' proposal is due August 18th. You can
17 e-mail comments to consultation@bia.gov.

18 And then sort of the next steps of the
19 process is, we'll reconvene our team at the
20 Department from the Solicitor's Office, from the
21 Office of Federal Acknowledgment, from the
22 Assistant Secretary's Office. That team will
23 review all of the comments. The Proposed Rule's
24 going to change. It's not going to look like it
25 looks now. It's a Proposed Rule. We need all of

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1 the comments. We're going to take into account
2 those comments, and then we're going to move
3 forward with the Final Rule.

4 So that's sort of -- you know, timelines,
5 it all depends on the extent and nature of the
6 comments we receive.

7 So open up for questions or statements?
8 I know we've been taking questions as we've been
9 going through, but I'm happy to --

10 TERRI HENRY: I'm going to go ahead and
11 make a statement.

12 MR. ROBERTS: Okay.

13 TERRI HENRY: So I think Eastern Band has
14 been on the record for every single consultation,
15 and we know there's one more and we'll be on the
16 record for that one as well. You know, we have --
17 we are Eastern Band of Cherokee Indians. We're
18 located in western North Carolina where we have
19 nearly 15,000 tribal members. We've lived -- and
20 we've lived there since the time ending the war.
21 We have a living language, a culture, a history
22 and ways that have survived wars, treaty making,
23 the removal period, allotment, and other
24 Federal -- the actions that tried to eradicate our
25 government and turn our Cherokee people into

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1 non-Indians.

2 We have struggled and fought, and many of
3 our people have died to preserve our separate
4 identity as Cherokees. We hold our separate
5 Cherokee language and culture to be sacred, and
6 our people are still willing to fight to preserve
7 it, and that's why we're here.

8 We know that there are a lot of people
9 who claim to be Cherokee. We know that in the
10 southeast, our experience is that that there's
11 over a hundred groups out there claiming to be
12 Cherokees in some way or another. This is one of
13 our biggest battles, is to try to address that and
14 deal with that in a way that, you know, makes some
15 sense to us. We also know that history has
16 played -- history of the United States, in
17 particular the removal period, has played against
18 us in this battle, and that's why we struggle. We
19 spend a lot of resources on trying to address
20 these issues within the southeast. We've got
21 states in, like, Georgia, even North Carolina
22 where we're from, but also Tennessee, Alabama,
23 various places that recognize state -- that state
24 recognized groups of Cherokee people calling
25 themselves Cherokees. We have problems with that. 57

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1 There are three Cherokee tribes. And in my
2 opinion, if any one -- if you're a Cherokee and
3 you can prove yourself, it's kind of to the point
4 that Ms. Ketcher was making, you can connect to
5 one of those three tribes. That's what, in my
6 opinion, folks should do.

7 We believe that these proposed
8 regulations really water down what the intent of
9 Federal recognition is. Even though I heard you
10 say you're not trying to do that, but it's very
11 problematic for us, and the reason is, because
12 we've had this -- we've been engaged in this
13 battle for many years, and so the fact that
14 petitioning groups -- you know, I like what I hear
15 on your presentation that they have to demonstrate
16 a continuous history. What I don't like is these
17 bright lines of time, the time frames, the dates
18 that are drawn. Because we believe that a
19 historical tribe is a historical tribe. And there
20 are -- this is America. There are no new tribes
21 out there, you know. And so we feel that if you
22 are in a historical tribe at the founding of this
23 nation, and even prior to that, because many
24 tribes had relations with the monarchs of Europe;
25 you know, in the northeast it was the English, the 58

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1 Brits; and in the south in the Louisiana/Texas
2 area would have been either the French or it would
3 have been the Spanish; and so in the northwest, it
4 gets, you know, a little -- maybe the fringe on
5 the northern side because of Canada.

6 But anyway, we feel that, you know, there
7 should be no new tribes. There should be no new
8 tribal people out there. Everybody should be
9 accounted for by now.

10 The piece -- Vice Chairman Taylor had
11 discussed the piece about the brief narrative. We
12 find that very problematic for the obvious
13 reasons. The Cherokees, we have -- we feel like
14 we have a pretty substantial footprint on the
15 history of America. Whether you like the Marshall
16 Trilogy or not as a foundation of the Federal
17 Indian Law, it is what it is. Our tribe, the
18 Cherokees, were arguing at a disadvantage, in my
19 opinion, at the time arguing in a foreign court
20 for its existence, for its right to be where it
21 was, and we still lost.

22 So when the Cherokee Nation was removed,
23 for us Eastern Band, we stayed where we were. We
24 stayed in our ancestral territory because that was
25 important to us, and we kept ourselves politically 59

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1 organized as a government in that area, and we can
2 demonstrate that. I don't think anybody would
3 question us on that.

4 And as I was stating earlier, tribes --
5 historically, we would have known who our
6 neighbors were. You know, we knew the Creeks, we
7 traded with them; we knew the Choctaw, we traded
8 with them, we fought with them, you know all of
9 these things that were recognizing each other's
10 existence, we did with all of those groups even in
11 the north.

12 We have -- we are considered an Iroquoian
13 language, which means that we have relations with
14 our brothers and sisters in the north with the six
15 nations, and so we knew who these people were, and
16 they knew who we were.

17 I think what our primary concerns are
18 that, you know, as I stated, we know -- I heard --
19 I hear you when you say you're not out to try to
20 recognize splinter groups, and we are trying to
21 prevent that as well; that's our goal, --

22 MR. ROBERTS: Okay.

23 TERRI HENRY: -- for those reasons. And
24 so the piece -- the piece about the final decision
25 about the Department will be more political and

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1 less merit based, I think we want to be very clear
2 that the decisions by the Department should be
3 made on merit and not on politics. We feel like
4 that ten-page or, you know, the brief narrative,
5 to me, to us, it kind of lends itself to somebody
6 making a political decision. Congress would be
7 picking up the phone or somebody picking up the
8 phone and calling saying -- putting pressure on a
9 political appointee. And that's -- we don't --
10 we're not going to support that.

11 MR. ROBERTS: Okay.

12 TERRI HENRY: Did you have a comment?

13 Because I --

14 MR. ROBERTS: I just want to clarify, and
15 maybe I misspoke at our earlier tribal
16 consultation, but I'm trying to say, you know, I
17 thought I said, you know, more than ten pages with
18 evidence. I mean, that's what's in the Proposed
19 Rule. It's with evidence. So we also hear you
20 and recognize that that criteria needs to be
21 firmed up, it needs to be clarified, and needs to
22 be -- you know, I don't -- none of us, Kevin
23 Washburn, myself, we're not interested in
24 recognizing illegitimate tribes. We agree it
25 should be hard, it should be rigorous, we should

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1 have high standards, but it shouldn't take decades
2 and millions of dollars to do that.

3 TERRI HENRY: And we agree with that as
4 well. So once it's turned in, it's the bureau's
5 process so we don't really know, we're not part of
6 that process, but we agree we feel like it should
7 be all of those things and all of the goals that
8 you are trying to achieve.

9 I do have a couple comments. I made some
10 notes on your PowerPoint. State reservation. In
11 most places those are going to be like state
12 parks, I think, but I would be very cautious about
13 that. For one thing, I personally believe that a
14 state does not have the authority constitutionally
15 to recognize a tribe, that only the Federal
16 Government has that. And for a state to be
17 recognizing a tribe in any state, I don't care
18 where it's at, I feel like is a violation of the
19 Constitution. So a state reservation, to me, by
20 extension is to me -- because states have such
21 varying criteria or lack of criteria, you know,
22 it's all based on political -- on the political
23 constituency.

24 So let me give you an example. At the
25 end of June, the state of Tennessee issued an

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1 apology to Indian people. I went to it to
2 witness. I found out about it 12 hours before it
3 was supposed to happen. So I got, literally at
4 7 o'clock in the morning, got in the car and drove
5 to Nashville. So I wasn't on the list of
6 dignitaries to be present. But so I sat up in the
7 balcony and watched. And without having a better
8 way to say it, I was embarrassed because I felt
9 like it was a circus. And they -- you know, there
10 was a lot of folks sitting down there with regalia
11 on, feathers, I mean, the whole shebang. You've
12 seen them; you know what I'm talking about. And,
13 you know, the legislators, the senators, the state
14 legislators who were actually there sponsoring the
15 bills, talking about how wonderful a day this was,
16 well, yeah, but it was a very solemn day as well.

17 And so the way that it went, everybody
18 was really happy and, you know, kind of, you know,
19 whatever. It just really struck me as a circus.
20 And to me, the state of Tennessee, Councilman
21 Shell had gone to Tennessee and actually fought
22 groups that claimed to be Cherokee, so he knows
23 that state house better than I do, but I felt like
24 it was just an opportunity for that state to open
25 the door and start doing state recognition.

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1 When I listened to the comments of those
2 state legislators talking to their constituents
3 who were in the audience who had pushed for this,
4 it really made me think, "My God, here we go
5 again. We're going to have another battle in
6 another state. This is going to cost us more --
7 continue to cost us money and resources that we
8 would otherwise like to devote to our people who
9 have diabetic and denture needs, healthcare needs,
10 roads," and things that the Bureau, that we talked
11 about in the Bureau yesterday, right, okay.

12 So I just wanted to make a comment about
13 that on the record, because I was very -- it
14 disturbed me.

15 MR. ROBERTS: Yeah.

16 TERRI HENRY: Okay. And I know you can't
17 control that, but I just wanted to share that with
18 you as something that I witnessed.

19 The piece about the 1934, I understand
20 that you're looking at that because that's when
21 the Congress, as you stated, that's when Congress
22 recognized -- took to take advantage of
23 recognizing Indians, taking us out of the
24 Department of War, and bringing us over into a
25 more civilized way of being. That's a diplomatic

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1 thing. I think that that was a matter of
2 diplomacy. That's why government-to-government is
3 about diplomacy.

4 When you look at the way the United
5 States is dealing with President Putin and Russia
6 in the current crisis that we've got going on
7 right now, those are diplomatic things that happen
8 in the world, and we are no different than that as
9 governments-to-tribes, but we are just within the
10 contiguous boundaries of the United States. So we
11 look at those as diplomatic exchanges, and that's
12 what this is today, and we appreciate that.

13 Let's see here. I appreciate the
14 comments that you guys -- that you're going to
15 expand the notice, because we would certainly like
16 to be noticed on any groups claiming to be
17 Cherokee regardless of what state they're in,
18 because we know that there's Cherokees everywhere,
19 and --

20 MR. ROBERTS: And that should be
21 happening now. So for whatever reason the Eastern
22 Band isn't getting that notice, which I think you
23 all are, that should be happening now.

24 TERRI HENRY: Okay. Let's see here. And
25 again, you know, we've talked -- you've heard our

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1 comments about this brief narrative. You know,
2 you've made the comments about that, so I'm just
3 walking through the list of things here on these
4 pages.

5 Let's see here. Talked about -- oh, when
6 I was talking about the Lumbee roll and
7 Tuscaroras, I also wanted to highlight, bring to
8 your attention, if you aren't already aware of it,
9 in Minnesota around 1997, '8 or '9, there was a
10 case that was litigated. I believe it went to the
11 Supreme Court, talking about Indian kids in
12 boarding schools and the non-Natives that went to
13 that boarding school as well. And so it had to do
14 with that tribe getting resources, their resources
15 restored for their education monies. So I would
16 ask you to just make a note of that and take a
17 look at that. I can't recall if that was just a
18 State Minnesota Supreme Court case or a United
19 States Supreme Court case.

20 MR. ROBERTS: So we're not familiar with
21 that. Maybe the other folks on our team are, but
22 if that's something that -- if you make sure it's
23 in the written comments so that we have it, that
24 would be great.

25 TERRI HENRY: And my point about that is

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1 that -- as best I can recall, that case, what that
2 case was talking about, was that the state -- the
3 government set up a school -- gave the tribe money
4 for the school but the tribe allowed the
5 non-Indians, the people in the area, to send their
6 kids to that school as well, and I just don't want
7 that to get confused about the boarding school
8 issue, and that's really what that -- I'm trying
9 to make a point of that.

10 MR. ROBERTS: Gotcha.

11 TERRI HENRY: Okay. Let's see here.

12 Will you be putting a website up that would be
13 able -- for the transparency part of this so we
14 can see where we stood on -- where any petitioner
15 stood on any -- in the process?

16 MR. ROBERTS: So we've talked about that.
17 I think that that is definitely a -- it's not in
18 our Proposed Rule, right, but we need comments on
19 that. Some of the things that the group has
20 thought about, and I think actually give some
21 credit to Liz is -- actually, Liz deserves
22 probably 95 percent of the credit in terms of this
23 whole process here; she's keeping the trains on
24 track and that sort of thing. But one of the
25 things she was talking about is, you know, could

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1 you have any -- or we were talking about is, could
2 you have something like a, when you go to the
3 airport and you see sort of a status of your
4 flights, like, where are they, the process, could
5 we have a website like that that basically shows
6 the status of where they are in the process.

7 TERRI HENRY: Right. And then the last
8 comment is that we know that Congresswoman
9 McCollum and Congressman Cole has made a request
10 to the Agency for an extension of time and more
11 locations, and I wanted to ask you guys, why did
12 you flip the time on this meeting here?

13 MR. ROBERTS: Because we had the Tribal
14 Budget Advisory Committee here, and so we wanted,
15 if there were any tribal leaders that were staying
16 over from that advisory committee, you know, that
17 needed to go home maybe in the afternoon, it would
18 be easy for them to attend the morning session.

19 TERRI HENRY: I was just wondering if
20 folks might have -- because everyplace else it was
21 not the federally recognized tribes first but the
22 state groups, and so I just wondered if that might
23 have messed people up.

24 MR. ROBERTS: No, it was to accommodate
25 those folks who had already traveled and could

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1 leave earlier.

2 TERRI HENRY: Okay. Well, I just wanted
3 to say that our, you know, like we stated already,
4 that our footprint, our Cherokee footprint, is
5 preceded on the landscape of America, and we have
6 a very vested interest in what you all do because
7 we have so many groups that are claiming to be
8 Cherokee. And then, of course, we have our
9 friends in the east, the Lumbees, that call
10 themselves Cherokee for many years, and we have,
11 you know, fought them as well.

12 And so I'm going to step down and ask any
13 of my council members if they have any additional
14 comments that they'd like to make?

15 DENNIS TAYLOR: Dennis Taylor, Vice
16 Chairman, Eastern Band of Cherokee Indians.

17 Chairwoman Henry pretty much covered
18 everything, as she usually does, so I'm going to
19 keep my comments brief.

20 Again, thank you for your time. You
21 know, our main concern in this whole proposed new
22 rule is lowering these standards for Federal
23 acknowledgment and become a federally acknowledged
24 tribal government. The Tribe of the Eastern Band
25 has always supported an expedited, transparent,

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1 and efficient process. I think we've done it by
2 resolutions of tribal council, we've sent letters
3 to the Bureau of Indians affairs, Department of
4 Interior. We just -- we do not want to have the
5 standards lowered. As she said, on a day-to-day
6 basis, whether it's back home or we're traveling
7 around the country, you know, every day we hear
8 "I'm Cherokee. My great grandmother was Cherokee,
9 Indian princess."

10 You can go Online right now, and there's
11 probably 30-plus groups, close to 40, claiming to
12 be Cherokee today. You know, as the chairwoman
13 said, we do have the living language, culture, and
14 history, and we feel it to be sacred to our
15 people. Our forefathers, our elders have fought
16 and died over our identity, which is our culture
17 and history and our language.

18 And we feel like if the standards are
19 lowered and these petitioners, these other groups,
20 these 30 other groups can claim to be Cherokee,
21 once they're recognized, they may take our culture
22 and steal it, water it down, or destroy it, you
23 know, and that is our main concern.

24 You know, going around the country in the
25 last six years, I've always heard "The

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1 acknowledgment process is too long, too
2 cumbersome, and not fair." But my question is, is
3 it fair to us? We've been recognized since 1962.
4 Is it fair to the other 500-plus tribes around the
5 country that had to go through the same process?
6 I don't think so. All we're asking for is to not
7 lower the standards, and that's basically it.
8 Again, thank you for your time.

9 MR. ROBERTS: Thank you.

10 TERRI HENRY: Thank you.

11 MR. ROBERTS: Anyone else that wants to
12 make comments?

13 KAREN KETCHER: Karen Ketcher, Cherokee
14 Nation of Oklahoma. The Cherokee Nation echos
15 those concerns that the Eastern Band echoed. We
16 do have written comments; we will be submitting
17 those. We will also submit our recommendations as
18 to the criteria that's needed for the historical
19 information that's needed pre-1900. We will --
20 we'll try to submit anything that's needed to
21 justify our position that we do not believe the
22 standards need to be lowered.

23 MR. ROBERTS: Okay. Is there anyone
24 else?

25 PERRY SHELL: I'll be quick. Perry

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1 Shell, Tribal Council, Eastern Band of Cherokee
2 Indians. I appreciate you all doing this and
3 understand why you're doing it, and I've said this
4 before, but I'm going to say it again. You know,
5 the pre-1900 history, the Federal Government,
6 General Winfield Scott, Andrew Jackson, they had
7 no trouble recognizing the Cherokee, the Choctaw,
8 the Creek, the Chickasaw, the Seminole, and the
9 others when it was the policy of the nation to
10 move all the Indians east of the Mississippi west
11 of the Mississippi, take our land, take everything
12 we had for themselves. So they had no trouble
13 recognizing us, you know.

14 How you can overlook the amount of people
15 that are petitioning now for recognition,
16 especially the tribe as big as 55,000 or more, I
17 don't see how they were a tribe then. And they --
18 you know, we say 1900, but you'll find no mention
19 of them in 1900 by the name they go by now from
20 that group, and others as well.

21 You know, if you want to find them, you
22 can go to the Library of Congress and you'll find
23 our tribes there all over the place. That's why I
24 say it's so important to verify whatever evidence
25 is given. Verify it, see if it is actually

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1 factual, go into the records. We have to a
2 certain extent, and you will find that there are a
3 lot of contradictions to what was said.

4 Anyway, we'll give our written response
5 to a lot of this to our position of this at a
6 later time. Thank you for your time.

7 MR. ROBERTS: Thank you.

8 MS. KLASS: I just want to highlight,
9 under the Proposed Rule, OFA is still permitted to
10 go ahead and do additional research beyond what's
11 given to them by a petitioner.

12 MR. ROBERTS: Anyone else want to make
13 comments? I think otherwise, we're going to close
14 this session and -- okay. Just state your name
15 and affiliation for the record.

16 MELISSA HOLDS THE ENEMY: Okay. Melissa
17 Holds The Enemy. I am the managing attorney for
18 the Crow Tribe, and I actually just dropped in per
19 the direction by our tribal chairman. Being that
20 our reservation is just right outside of Billings,
21 about a 45-minute drive, he asked me to drop in
22 and just kind of, you know, see and listen in and
23 report back to our tribal leaders. So I just
24 wanted to thank each and every one of you for
25 being here and, you know, listening and kind of

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1 gaining some insight as to what this is all about.

2 And thank you for being here.

3 MR. ROBERTS: Okay. Well, if there are
4 no objections, we'll end this tribal consultation,
5 and I appreciate you all joining us here this
6 morning, and see you this afternoon.

7 [TRIBAL CONSULTATION CONCLUDED AT 10:09 A.M.]

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