

NWX DOI BUR OF INDIAN AFFAIRS

**Moderator: Kevin Washburn
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12:30 pm CT**

Man: Standing by - at this time all lines are open. If you'd like to mute your line please press star 6 - to unmute it press star 6 again. Today's conference is being recorded - if you have any objections please disconnect at this time. And now I'd like to turn the meeting over to Mr. Kevin Washburn. Sir, you may begin.

Kevin Washburn: Thank you Ted and I want to welcome everybody to this first teleconference Tribal Consultation for our Federal Acknowledge Reg Reform effort. Again, this is Kevin Washburn Assistant Secretary for Indian Affairs and I have (Katie Klass) here with me and Larry Roberts will be joining us soon and (Amanda Begay) from our Office of Regulatory Affairs is here with us as well.

I am - will be proceeding through a PowerPoint - set of PowerPoint slides and those are actually - for those of you who are sitting in front of a computer you can reach this PowerPoint by going on our website at bia.gov and if you go onto our website at bia.gov - that homepage - over on the right there's a box that says Federal Acknowledgement Regs - it's one of our regulatory efforts or initiatives. And you can click on that box and after you've clicked on that

box you will see a list of PDFs on the next page and the bottom PDF is - on the list - is the PDF that I will be going through today with the PowerPoint slide. And so, again, that's bia.gov if you want to follow along and you can reach the PowerPoint.

I'm going to be going through this PowerPoint - it will probably take about 20 minutes. I'm going to invite my colleague (Katie Klass) to jump in anytime she likes and if there are questions and that sort of thing as we go we've opened up the lines so that you can participate.

Let me say to those of you on the phone - and so you can ask a question while we're proceeding if you like.

Let me say this is the first of two Tribal Consultation sessions. The next one will be on Wednesday of this week at 1:30 and then in September - on September 3rd and September 5th we will have public meetings on these regs. So this meeting is for Tribal Representatives and it is a tribal government consultation process. So at this meeting it's not open to the public - it's open to leaders - or representatives for Federally recognized Indian tribes. So I think what I'd first like to do is ask to figure out who do we have on the lines for a little bit of context on our behalf.

So I would ask each of the representatives of Federally recognized Indian tribes - and that's all that we should have on the line - each of you to identify yourself. Who do we have on the line representing Indian tribes?

Chief (Dwayne Yellow Feather the Third Shepherd): Chief (Dwayne Yellow Feather the Third Shepherd) (Okansas) Wampanoag tribe.

Kevin Washburn: Right - thank you so much. Who else do we have? I know we've got a few other open lines - so. I see - we can see that there are other lines being used and we have the phone numbers, but maybe those people have us on mute. If you could turn your phone off mute and identify yourselves we'd be grateful.

Woman: (Unintelligible).

Kevin Washburn: Well our operator has put us - insured that they could speak - okay. Okay - (Ted), are you still on the line? Okay - well I think - I guess we can go ahead and continue. At this point (Dwayne) maybe we should just hang-up and have a telephone conversation with you because assuming no one else comes on the line it's - I think you're our only representative.

Part of the reason for this is so that - we often do keep a transcript of the things that are said here so we can get everybody's comments, but - so let's go ahead and continue and (Dwayne) I think you were on when I said this, but feel free to go on your computer on bia.gov and pull up the PowerPoint that I'm about to present. Again, it'll take about 20 minutes and it'll just kind of walk through the basics of our process here.

Chief (Dwayne Yellow Feather the Third Shepherd): Okay.

Kevin Washburn: So there are several different ways the United States government may acknowledge or recognize an Indian tribe. One of them is through the courts - through a Federal Court decision that has been brought by a party seeking, you know, that recognition in some sort of context. Another way is through congress - when congress passes a law that is formally recognizes a tribe or sometimes in the context of settlement. And then finally administratively - and that's a determinant - a determination by my office - the Secretary of Indian Affairs and that's the process that we are talking about today.

That's the process that began around 1978 - it was formalized. It began before that time, but before 1978 the Assistant Secretary for Indian Affairs reviewed on an ad-hoc basis petitions by groups seeking Federal acknowledgement as Indian tribes and decided, again, on an ad-hoc basis, but in 1978 the Assistant Secretary for Indian Affairs published regulations to establish a uniform process for review of these kinds of petitions.

And in 1994 those regulations were revised and the criteria were not changed, but the discussion of the effect of previous acknowledgement was added at that time. And then in 2000, 2005 and 2008 the department issued guidance that changed the internal processes for how we proceed that guided our handling of these petitions.

Of the 566 Federally recognized Indian tribes 17 of them have been recognized through this processed called the Part 83 process and, you know, far more have been recognized through other mechanisms obviously.

We have heard for years that the process is broken and we've heard that far and wide. And, again, for more than a decade people have complained that it takes too long. That's it's too burdensome. That it is inefficient. That it's expensive and that's it's unpredictable. We've heard several different reasons or (unintelligible) that it's unpredictable.

One is that the interpretation of criteria we have heard is arbitrary and criteria are interpreted in different ways in different times. We've heard unpredictable claims that the level of proof that has been sufficient in one case has been different from another and so that we've been arbitrary in that respect. And we've heard that people complain that the results are unpredictable as well.

We've also heard that our process is not transparent enough. And so we are - those are sort of the basis for us taking up this effort. And we started this effort - well the administration started this back in 2009 - Secretary Ken Salazar - then Secretary Ken Salazar committed to examining ways to improve the process. (Unintelligible) is there a question?

Okay - and do you know what - we have all the lines open. So if any one of you wants to speak feel free to. On the other hand if you aren't going to speak and you want to put your line on mute feel free to do that too. And we did ask for people to identify themselves and name the tribe that they were representing. If there's anybody else that has gotten on the line that would like to do so we'd appreciate it. Has anybody been added to the line since we've started?

Woman: (Unintelligible) some names there now.

Kevin Washburn: For those of you on the line we've got (Dwayne Yellow Feather the Third Shepherd) - anybody else that's joined the line could you identify yourself and let us know which tribe you represent?

(Shirley Bouton): I'm (Shirley Bouton) and I represent the SIT (Scatacook) Indian tribe.

Kevin Washburn: All right.

(Gene Felcky): Yes, (Gene Felcky) (Scatacook) tribal nation.

Kevin Washburn: Okay - let me just say - thank you for being on this call. This is actually not the call for - this is a call - a Federal tribal consultation with Federally recognized Indian tribes. We anticipated that this would primarily be - and

well solely members of or representatives of Federally recognized Indian tribes that would be participating on this call and that we would have public meetings at a later date on September 3rd and September 5th. Are there any other members of Federally recognized Indian tribes on the call? Any representatives of Federally recognized Indian tribes?

Woman: God damn it.

Kevin Washburn: All right - well I'm not going to - I'm happy to proceed. We - the Federally recognized tribes are entitled to have a meeting in which they are the only ones with the Federal Government. And so if a member - a representative of a Federally recognized Indian tribe wishes to have this, you know, a consultation with only Federally recognized Indian tribes present they can, you know, we would respect that. We don't mind having other people involved as long as tribes don't object to that.

So what I will do is continue, but - and allow those who want to be on the line to be on the line, unless we get an objection in which case we would shut it down to just representatives of Federally recognized Indian tribes.

So let me tell you how this came about. Secretary Ken Salazar committed to examining ways to improve the process in 2009. And in 2010 the Assistant Secretary - the then Assistant Secretary and this office and the (unintelligible) office and the Office of Federal Acknowledgement worked on draft revisions to Part 83.

In 2012 one of the representatives of this office, (Brian Newlin), identified guiding principles for ways to improve the process and in 2013 - after I had been confirmed in this position - I promised to release a discussion draft. And we worked on that discussion draft from the time I got here in October of

2012 really through the spring. And on June 21 of 2013 we released a discussion draft, which had been developed by a working group of people that included several representatives from around the department to examine what the potential changes were to meet the guidelines that we - some guiding principles that we had sought to meet. And the goals of the discussion draft were to address some of the criticisms that we had heard previously.

First of all, transparency. We wanted to make the petitioning process more easily understood. Timeliness - we wanted to make sure that petitions moved through the process on a much more fast manner - or much quicker manner. We wanted to be more efficient. We wanted to be mindful of limited resources to insure that tribes didn't need millions and millions of dollars to go through this process.

We also sought to increase flexibility. We - tribes each faced different circumstances and we wanted to insure that the unique history of tribal communities could be accounted for. We also sought to insure the integrity of the decisions. We wanted to maintain the accuracy and the integrity and the decisions we make. In other words we want to do all of these other things involving transparency, timeliness, efficiency and flexibility, but not at the expense of rigger or integrity. We need to make sure that the process is exceedingly rigorous and that we get accurate decisions.

So we distributed the discussion draft in June 2013 and July and August of 2013 we had public meetings and tribal consultations on this discussion draft. And we ultimately received over 350 comment submissions - plus more than 2000 form letters and or signatories to those comment submissions. So 350 different substance submissions with many times that number of people who signed on to those submissions.

So we then took those comments and started working through them. And through - in working through them we developed our proposed rule that we now have out on the street. That's been published in the Federal register - it was published in the public register on May 29, 2014 and we are not in the comment period and the comment period will run until September 30, 2014. It had originally been set to expire on August 1 because we extended that comment at the request of numerous interested persons who wanted to have more time to comment.

So we developed this proposed rule, again, from a discussion draft. We reviewed all the comments received on the discussion draft and made changes to address some of those comments. We also rewrote the rule to meet the plain language requirements that is now required for rule makings - including putting it in a question and answer format and organizing it in a clear way.

We submitted the rule to the OMB for review as required by Executive Order 12866 and then we, again, published it in the Federal register on May 29, 2014.

So let me give an overview of the proposed rule. The proposed rule makes numerous changes. One of them - one of the changes revises the process that we go through in the acknowledgement process. It makes revisions and clarifications to criteria. It clarifies the effect of previous Federal acknowledgement. It clarifies the burden of proof and allows for re-petitioning under very limited circumstances and it adds additional notice requirements.

So let me go through the proposed rule revisions to process. First of all, we eliminated the letter of intent requirement. So now the process doesn't begin until there's a completed documented petition that's filed. Not simply a letter

saying we're interested in proceeding, but an actual complete documented petition.

The next revision is that we changed to a phased review process. So phase one of the process is a review of whether the Descent Criteria E is met. That is are these people descended from an Indian tribe - a historical Indian tribe.

The next phase - the new portion of phase one is to review whether Criteria A, D, F and G are met. Then we would proceed to phase two. Phase two, A, we would proceed on only if the petitioner searched that this applied - it's whether a state reservation exists or the US has held lands and trusts for the petitioning groups since 1934. And phase 2, B, we would review for community and political influence and authority, which is criteria on B and C. The goal with these revisions is to increase transparency, timeliness and efficiency.

The next portion of the revision is to - the proposed findings issued by the office of Federal acknowledgement - we would - we are revising the comment period on proposed findings. If a proposed finding is (unintelligible) positive and no comments are received from certain parties the new would basically transform that proposed finding automatically into a positive final determination. And that would increase timeliness and efficiency in essence by not, you know, sort of wasting time with a period in which no one has commented.

If the proposed finding is negative then a petitioner may elect a hearing before an OHA judge - an Office of Hearing and Appeals judge. And the Office of Hearing and Appeals judge makes recommended decision to my office as to how to proceed. The idea here is to increase the transparency of the process and the fairness and integrity of the process.

The next step would be a final determination issued by the - my office - the Office of the Assistant Secretary for Indian Affairs. The Assistant Secretary of Indian Affairs final determination is final for the department. That means that there would not be any review before the Interior Board of Indian Appeals and it means that instead there would be immediate review in Federal District Court under the APA - the Administrative Procedures Act - so to allow parties to get quicker review by Federal courts.

Further revisions to the process - including how the hearing process on a negative proposed finding - and we have proposed procedures for the Office of Hearing and Appeals to follow on that negative proposed finding hearing.

And one of the questions we have is who should preside over a hearing and who should issue the recommended decision with regard to this proposed negative finding. One option is an Administrative Law Judge and the advantages of that - of the Administrative Law Judge or some features of that position is that they are independent of supervision and they routinely conduct hearings at the department.

Another option is rather than an Administrative Law judge would be an Administrative judge. An Administrative judge is not quite as independent as an ALJ - the Administrative judges report to the Office of Hearing and Appeals Director. They routinely serve on appellate boards and so they routinely do preside over proceedings, but they don't conduct hearings routinely as an ALJ does.

The third option is an attorney designated (unintelligible) by the Hearing and Appeals Director. And such an attorney reports also to the Office of Hearing and Appeals Director and may have less experience or no experience

conducting hearings in this kind of context. But those are the - sort of the three different possibilities of who could preside over a hearing on a negative proposed finding.

The other question we have is whether the OHA judges decision - whether it should be limited to the hearing record or whether evidence can be considered. So we are interested in (unintelligible) views on all of these questions that we have just mentioned.

We have other proposed revisions to the process. One of them is the petitioner may withdraw its petition at any time before the proposed finding is published. At that time the Office of Federal Acknowledgement would cease consideration of that petition upon that withdraw.

If a petition was re-submitted though the petition would be placed at the bottom of the numbered register and would not regain its initial priority number. So, in other words, if you do - you may withdraw your petition at anytime, but if you do that you go to the back of the list. And the idea there is to give more flexibility to tribes, but not - but also to, you know, keep sort of the efficiency of the process and not impose unfairness on other parties or on the department itself.

The other - one of the other revisions is the department would post to the internet those portions of the petition and the proposed finding and reports that are releasable under Federal Law. The idea here is to be more transparent - we would not release a personal information that's not releasable under Federal Law, but we would release upon the website - on the internet those things that are releasable so that it's fully available to anybody with an interest in these issues.

Now those are - that's an overview of most of the revisions to the process. Now I will move to the revisions to the criteria. And let me say, first, the revisions to the criteria are not intended to be significant. They are actually intended to be sort of just a modification that are largely in line with what we've done as practice matter already. And the idea is to reduce any arbitrariness that people have seen in the process.

The first change to the criteria that is being proposed in the proposed rule is to Criterion A. Currently it requires that external observers identify the petitioner as "Indian." And external identifications as a practice matter have been required from 1900 to the present, every 10 years. We've heard lots of criticism of that criteria because we have heard that tribes have felt that it's unfair to require that kind of identification (unintelligible) by external observers at a time when they were sort of discouraged from making themselves known and in fact encouraged to go underground.

So we've heard that that criterion has been unfair in the way (unintelligible). (Unintelligible) that criterion, but we have proposed is a native of petitioner's existence as a tribe prior to 1900 and external identification evidence can still be provided to support this or other criteria, but the idea here is we need the petitioning group to explain its history in a, you know, fairly coherent and extensive manner. And that's what we will - would ask for at that for Criterion A.

We also have proposed some changes to Criterion B - the community criterion. Analysis of this criteria would be from 1934 to the present. In other words the parties would have to show the existence of community since 1934 to the present and that's not to say that it didn't exist before 1934 - we anticipate in every circumstance that it will have existed since before 1934, but we understand that - we believe that no one will be able to meet the period

from 1934 to the present if they weren't able to meet that beforehand. So the 1934 to the present period - 80 years serves as sort of the surrogate for all of history and will help us to establish, you know, understand whether there is a real community there.

We - the criterion would require that at least 30% of the members show distinct community for each time period that we consider. And one of the pieces of evidence that would be allowed is attendance of students at Indian boarding school because that is a relevant evidence as to who the Federal Government determines to be an Indian tribe. (Unintelligible) some evidence.

This criterion - by the way - under our proposal would be met if the State reservation had been maintained since 1934 or the U.S. had held land at any point since 1934.

Okay - we've also made proposed changes to Criterion C, which involves the political influence and authority. Like Criterion B this criterion would be considered from 1934 to the present - that would be the period for which we would analyze whether there was political and influence and authority within the petitioning group. And this likewise would be met if State reservation had been maintained since 1934 or the US had held land at any point since 1934.

Our proposed rule would also define - without substantial interruption to be less than 20 years. That - in other words the parties would have to show that there hadn't been a period greater than 20 years where the political influence and authority or community had been interrupted. The goal of all of these criteria changes would be to increase transparency, increase timeliness, increase efficiency, but also increase flexibility, again, all without interfering with the integrity or the rigors of the process.

We would also propose changes to Criterion E - descent. And under the new proposed version of Criterion E 80% of the people in the petitioning group must descend from a tribe that existed in historical times. And let me just say that this - what this means is we expect that everybody would be descended from a tribe that existed in historical times, but it's sometimes difficult to prove 100% of every single person because there may be a document missing.

This means that we - that 80% figure is selected because perfection is difficult to achieve in human endeavors, but we would - but this allows to insure that the vast majority would be able to meet this. And by the way this as the rule of thumb is what we use now. This is kind of the Offices of Federal Acknowledgement recognizes that perfection is (unintelligible) achieve and so this is the rule of thumb for how we have, you know, behaved already.

And this allows descent to be traced from a role prepared by the department or at the direction of Congress and if there is none then it would be from the most recent pre-1900 evidence of the historical tribe. So that would just clarify, largely, how we interpret this Criterion E.

The next proposed change is involving Criterion F - involving membership. This one insures that petitioners that file by 2010 and then had members joining other Federally recognized tribes for services are not penalized because their members, you know, joined an existing Federally recognized tribe. What we've heard from tribes is that some people are entitled to membership in more than, you know, more than one group and a petitioning group we've heard complaints that they've lost members because they were enroll able elsewhere because the process took so long.

And so what this means is that as long as the petitioner is filed by 2010 they won't be penalized by having members that went ahead and joined another

Federally recognized tribe. They won't be penalized in their acknowledgement process.

Criterion G is another proposed change. We have - Criterion G involves congressional termination and it shifts the burden to the Department to show that a petitioner was terminated by congress. As - well the underlying principle here is that the Department - the President, you know, the Administration cannot recognize a group as an Indian tribe if that group has already been terminated by Congress because Congress has plenary authority in Indian affairs.

So this is the manner by which how we go about determining that - whether the Administration has authority - the Office of Federal Acknowledgement has authority to go ahead and recognize a petitioner and that means that this - that we bear the burden - the Federal Government bears the burden - not petitioning group - the Federal Government (unintelligible) determine whether a petitioner was terminated by Congress previously.

So we also are dealing with the issue of previous Federal acknowledgement. And I had been joined by Deputy Assistant Secretary Larry Roberts and I think I'm going to ask him to talk about this one - in part because I want a little bit of a break, but also it has been a team effort among very many of us and I'm going to be - I have a flight later today to travel out to Indian country so I'm going to - may have to leave this before the end of the session is over and if that's the case then Mr. Roberts will take over, but I'd like to get him involved on the call. So Mr. Roberts will you read the - will you (unintelligible) what you know about the...

Larry Roberts: Sure - so with regard to the previous Federal acknowledgement it appears that the current rule was unclear and so we've tried to clarify the rule consistent

with actual practice and how the department has applied it so we're not proposing any substantive change to previous federal acknowledgement. And so if tribes and tribal leaders feel that there is a substantive change we need to know that because that is not what we're intending here. We're just intending to clarify that.

Same thing with the next slide - the burden of proof. We're not intending to change the burden of proof. We're clarifying it based on Supreme Court precedent, but again if there are comments that feel like we are changing the burden of proof we need to have those during the comment period.

With regard to re-petitioning I want to be - I think the Department wants to be clear about re-petitioning is very narrow. It's not - not everyone that has petitioned in the past is going to be eligible to re-petition.

It is a two-step process and, again, it's going to be relatively uncommon for groups to be able to be allowed to be re-petitioned, but the way that the proposed rule has been drafted is that if there have been any third parties that have challenged a final determination and prevailed in either administrative litigation or federal litigation on that then the group that was denied as a result of that administrative or federal litigation would need to get the consent of those third parties. If there is no third party then it's - or if the third party consents it's still not automatic allowing for re-petitioning.

The petitioner would need to show under the proposed rule to an Office of Hearings and Appeals judge that by preponderance of the evidence that a change in the regulations warrants reconsideration or that the burden of proof was misapplied in the final determination and that warrants reconsideration. If an OHA judge - an Office of Hearings and Appeals judge finds that either of

those two limited criteria were satisfied then the petitioner would be allowed to restart the process entirely from the beginning.

With regard to the notice of petitions we are - the proposed rule attempts to provide greater notice to Federally recognized tribes and the public of petitions. So on slide 19 there are a number of things that we already - the Department already does to provide notice.

We are proposing that we would put the petitioners narrative and any other Federally releasable documents on the Office of Federally Acknowledgements website and that in addition to the notice we already provide to the Governor and the Attorney General of the State and also to any other recognized tribes or petitioners that appear to have a historical or present relationship with the petitioner or may otherwise be considered to have a potential interest in the acknowledgement determination - in addition to all that we already do now we would also propose to provide notice to any Federally recognized tribe within that state or within a 25 mile radius of the petitioner if it, for example, across state lines.

We would also - the next slide - sets forth all of the different times frames within the process - all of the different points in the process where we would provide notice both to the petitioner and to all of the informed parties. So when also begins a review of the petition, when the proposed finding is issued - when any time extensions are granted - when the Assistance Secretary's Office begins review and when a final determination is made. As the Assistant Secretary mentioned earlier - the comment deadline has been extended and I'm going to turn it back over to the Assistant Secretary.

Kevin Washburn: Thank you Larry - so comments on the proposed rule or the comment period has been extended to end on September 30, 2014. So that means the people

still have well over a month - almost a month and a half to get their comments in. Comments on the portion of this that deals with the office of hearing and appeals is also been extended to September 30, 2014. And so people have plenty of time to get their comments in.

The best way - we prefer email and the email preferred methods is to make comments and you an email us at consultation@bia.gov - that is consultation@bia.gov. And the next steps after that - after September 30 our next steps would be to review those comments - make changes as appropriate and presumably determine whether to continue - to go forward.

Ultimately to publish a final rule in the Federal Register and the final rule, of course, would not become effective immediately. The law generally requires that it's not effective until 30 days after it's been published in the Federal Register.

So that's the process that we anticipate going forward. And that's a brief overview of the changes - so I - at this point we will be opening it up for comments from anyone who is a representative of a Federally recognized Indian tribe. So (unintelligible) the lines for those comments. If you could identify your name and your tribe if you'd like to make a comment or a question.

Chief (Dwayne Yellow Feather the Third Shepherd): Yes, this is Chief (Dwayne Yellow Feather the Third Shepherd) from the (Okansas) Wampanoag tribe. The members of the colonial are tribes in Northeast United States. I have a question. What about the tribes that are on probationary status? Will they have a chance to become legitimate under these new rules? And also tribes that have committed criminal acts and have been convicted. Are they still allowed to apply for Federal recognition?

Kevin Washburn: Chief, you're not a representative of a Federally recognized Indian tribe - so there's a time for you to participate in this process, but that would be on a future call. We will be having comments open to the public - that is anyone that is not a Federally member - representative of a Federally recognized Indian tribe on September 3rd and September 5th. And that would be the appropriate time for you to weigh-in, make your comments or questions known.

Chief (Dwayne Yellow Feather the Third Shepherd): Oh - I apologize - I didn't hear anyone else acknowledge that they were Federally recognized so I thought it would be...

Kevin Washburn: That's right - yes, the purpose for all these Federal employees gathered right now is to hear from Federally recognized Indian tribes. There's a time to hear from the public as well, but we have - resources involved in this and so now is the time for us to hear from representatives from Federally recognized tribes. Is there a member of any Federally recognized tribe or representative of such a tribe that would like to ask a question or make a comment? Any members or representatives of Federally recognized Indian tribes that would like to participate in this tribal consultation. All right - going, going, going - going once, going twice - all right.

If there's no representatives of Federally recognized Indian tribes who have an interest in asking a question or being heard then we are going to go ahead and conclude this formal tribal consultation. There will be another formal tribal consultation on Wednesday of this week - another opportunity for representatives from Federally recognized Indian tribes to engage with us on this proposed rule and then there will be public sessions on September 3rd of 2014 and September 5th of 2014 - both of those at 1:30 PM Eastern time and

that will be more of an open opportunity for any other members of the public to engage in discussion on the rule.

So we will go ahead and conclude this tribal consultation. I appreciate everybody that has listened and for those of you who want to participate that are not representatives of Federally recognized Indian tribes you can do so on September 3rd or September 5th. Thank you everybody - goodbye.

Coordinator: This concludes today's conference. Thank you for your participation - you may disconnect at this time.

END