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

AFTERNOON SESSION
JULY 15, 2014

1 TRIBAL CONSULTATION
2 FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES
3 PROPOSED RULE 25 CFR 83

4
5 Bureau of Indian Affairs
6 911 NE 11th Avenue
7 Portland, Oregon
8 July 15, 2014

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APPEARANCES:

LARRY ROBERTS, Principal Deputy
Assistant Secretary - Indian Affairs

ELIZABETH APPEL, Assistant
Secretary - Indian Affairs

STEPHEN L. SIMPSON, Office of the
Solicitor - Division of Indian Affairs

Stanley Speaks, Regional director

1 TUESDAY, JULY 15, 2014

2 1:04 P.M.

3 * * * * *

4 LARRY ROBERTS: So we're going to go
5 ahead and get started this afternoon. It's
6 about a little after 1:00. My name is Larry
7 Roberts. I'm the Deputy Assistant Secretary for
8 Indian Affairs, Department of Interior. With me
9 is Liz Appel, Department of the Office of
10 Regulatory Affairs, and Steve Simpson from the
11 Solicitor's Office. And also we have the
12 regional director with us as well and I would
13 love for you, sir, to give a few opening remarks
14 and get started.

15 STANLEY SPEAKS: Thank you, Mr. Roberts.
16 And we were hoping that we would have a better
17 turnout. I'm not sure what's happening.
18 Perhaps it's been a long time, you know, getting
19 into this process and making some
20 recommendations and so forth. So that may be
21 part of the reason that we don't have -- And
22 there may be others coming in a little bit
23 later.

24 But I want to welcome you here and to
25 the Northwest regional office. And I know how

1 critical, how important this really is, to, you
2 know, to our tribes. We've worked with the
3 Bureau. You have been involved with a lot of
4 tribes and in fact over the years that I have
5 worked with Bureau of Indian Affairs. There
6 have been a number of tribes that have been
7 recognized by the federal government. And it's
8 been a slow, long process. So hopefully we're
9 going to see at least some proposed, revised
10 regulations that will speed the process up and
11 make things better for those tribes that really
12 should be recognized.

13 So it's a pleasure to have you here,
14 Larry, and also Stephen and Elizabeth. Glad to
15 have you here.

16 So, Larry, I am going to turn it over to
17 you. Thank you.

18 LARRY ROBERTS: Thank you. Okay. So
19 everyone should have a packet of materials, a
20 PowerPoint that we're going to go over this
21 afternoon. It will take us about roughly
22 20 minutes to go through the PowerPoint and then
23 we'll open it up for public comment from
24 everyone here today.

25 So just in terms of background and

1 process-wise, there's three ways in which the
2 federal government can recognize tribes:
3 Through judicial court decisions, through the
4 congressional action and then administratively
5 by the Department of the Interior.

6 Prior to 1978 the Department looked at
7 recognition of tribes on an ad hoc basis and
8 then in 1978 we promulgated the Part 83
9 regulations that we are working under today.
10 Those regulations were revised in 1994 and added
11 primarily a section for previous acknowledgment
12 and then the department since 1994 has issued
13 guidance from time to time in 2000, 2005 and
14 2008. And so of the 566 federally recognized
15 tribes, 17 have been recognized through the Part
16 83 process.

17 The Department has heard over time that
18 the process has been criticized, has been
19 broken, that it takes too long, that it's
20 burdensome, expensive, that it's unpredictable,
21 that we need more objective criteria and that
22 it's not transparent.

23 So by way of background, in 2009
24 Secretary Salazar testified before the Senate
25 Committee of Indian Affairs and committed to

1 looking at ways to improve the Federal
2 Acknowledgment Process of the committee. In
3 2010 the Department internally looked at ways to
4 revise and update the Part 83 process and we
5 testified at that time before the Senate
6 Committee of Indian Affairs that we, our goal
7 was to issue a proposed rule within a year.

8 In 2012 the Department again testified
9 before the Senate Committee of Indian Affairs
10 and basically identified guiding principles or
11 goals that are set forth on the PowerPoint here
12 in terms of reforms to the process.

13 And shortly after that hearing, that
14 fall, Assistant Secretary Washburn and I joined
15 the Department. And the Assistant Secretary in
16 2013 promised to release a discussion draft,
17 which I know some of the tribes that are here
18 today submitted comments on the discussion
19 draft. And so I think you're well aware of that
20 process where we had tribal consultations and an
21 extended comment period.

22 That comment period took us over the
23 course of last summer, and based on all those
24 comments, we developed the proposed rule that
25 we're talking about today. And that proposed

1 rule was circulated to OMB, which in turn
2 circulated it to the other federal agencies
3 within the federal family for review. And that
4 was issued in May of this year and we have a
5 comment deadline of August 1st of this year.

6 So in terms of sort of highlights in
7 terms of changes in the proposed rule, we'll
8 talk first a little bit about process and then
9 about the criteria themselves and then
10 clarification on certain portions of the
11 regulation, previous federal acknowledgment, the
12 burden of proof and then a little bit about
13 re-petitioning and how we improved the notice
14 requirements in the proposed rule.

15 So in terms of revisions to process, the
16 proposed rule eliminates the current step in the
17 process, which is a letter of intent. I think
18 in terms of letters of intent we have hundreds
19 of those on file, many of those have they ever
20 been followed up on other than the, a simple
21 letter.

22 In terms of complete petitions pending
23 before the Department, I believe we have 13.
24 And so we're proposing in the proposed rule to
25 start the process with a complete petition

1 similar to how we start other application
2 processes.

3 We've incorporated a phased review in
4 the proposed rule to provide more timely
5 decisions. And so as many of you know, a
6 petitioner has to satisfy all seven criteria.
7 And so we've proposed a phased approach that
8 looks first at whether the group satisfies
9 criterion (e), descent. And if they do not
10 satisfy that criteria at the outset, we would
11 issue a proposed negative finding.

12 If the group would satisfy criterion
13 (e), then we would look at the other criterion
14 are met, such as (a), (d), (f) and (g), such as
15 if the group has been terminated by federal
16 legislation, they are not eligible for the Part
17 83 process. So we would issue proposed negative
18 decisions in those decision.

19 If the petitioner satisfied those
20 criteria, we would then look to criterion (b)
21 and (c) and with regard to community and
22 political authority. We would look to see at
23 that last step whether they meet those criteria.

24 In terms of the process and how it's
25 currently operated in terms of a proposed

1 finding, OFA, the Office of Federal
2 Acknowledgment, issues a proposed finding.
3 There's a comment period on proposed finding.
4 We are maintaining that current approach in the
5 proposed rule.

6 Some of the things that we are
7 suggesting in the proposed rule is if proposed
8 finding is positive and there are no comments
9 in, no substantive comments in opposition, then
10 the Assistant Secretary would just issue a
11 final, positive final determination. And that's
12 consistent with past practice.

13 In terms of if the proposed finding is
14 negative, the proposed rule offers an
15 opportunity for the petitioner to have a hearing
16 before the Office of Hearings and Appeals and
17 third parties could intervene in that hearing.
18 And then the Office of Hearings and Appeals
19 judge would make a recommendation to the
20 Assistant Secretary for a final decision. The
21 final decision-making authority under the
22 proposed rule remains with the Assistant
23 Secretary, just as it remains today.

24 We are having minor technical issues.
25 Can everyone -- Is there any objection to just

1 following along with this paper copy of the
2 PowerPoint? All right. I think we're good.

3 All right. So the other thing that the
4 proposed rule is, approach is taking is that the
5 Assistant Secretary's determination is final for
6 the Department. There will be no review by the
7 IBIA; rather, parties could go directly to
8 federal court to challenge a negative decision
9 or a positive decision.

10 In terms of hearings on the negative
11 proposed finding, the Office of Hearings and
12 Appeals, which is separate from the Assistant
13 Secretary's office, has issued a proposed rule
14 that is essentially civil procedure for those
15 hearings. And one of the questions that the
16 Office of Hearings and Appeals has asked for
17 comment on is whether the official that would
18 preside over this hearing should be an
19 administrative law judge, which is independent,
20 probably the most independent within the Office
21 of Hearings and Appeals, or should there be not
22 an administrative law judge but an
23 administrative judge who reports to the Office
24 of Hearings and Appeals director. They
25 routinely serve on appellate boards, or should

1 it be an attorney that is directed to hold the
2 hearing by the Office of Hearings and Appeals
3 director?

4 The other question that they've asked is
5 whether the recommended decision should be
6 limited to the hearing record or whether that
7 record should be expanded.

8 In terms of process-wise, the proposed
9 rule provides that petitioner may withdraw a
10 petition at any time prior to the proposed
11 finding being published. If they do withdraw
12 their petition, OFA would not cease
13 consideration and they would essentially lose
14 their place in line for consideration.

15 In terms of transparency and greater
16 public outreach, the Department is proposing to
17 post to the internet those portions of the
18 petition, the proposed finding and any other
19 materials that we receive or prepare that are
20 releasable under federal law so that it's easily
21 accessible on the internet.

22 In terms of criteria with regard to
23 criterion (a), which currently provides
24 identification by third parties from 1900 to the
25 present, we've suggested replacing that

1 criterion with a requirement that the petitioner
2 provide a narrative of its existence as a tribe
3 prior to 1900. External identification can
4 still be used for support of that brief
5 narrative, but it is, it's a requirement that is
6 substantive in terms of providing that summary
7 and that evidence but also something that for
8 tribes that have had a long existence and a long
9 continuous existence should be relatively,
10 relatively obtainable or meetable for those
11 tribes that can establish that.

12 In terms of criterion (b), community,
13 and criterion (c), political influence and
14 authority, the proposed rule proposes looking at
15 these two criteria from 1934 to the present.
16 And there's two reasons for that. The first
17 reason is it's based on the Indian
18 Reorganization Act and the passage of the Indian
19 Reorganization Act.

20 Congress has changed its policy from one
21 of allotment and assimilation to supporting
22 tribal self-determination. And the other basis
23 for that is that in the roughly 40 years that
24 the Department has utilized the Part 83 process,
25 there hasn't been a situation where a petitioner

1 has satisfied the criteria from 1934 to the
2 present but failed to satisfy those criteria
3 prior to 1934.

4 In terms of criteria (b), community,
5 we're suggesting that at least 30 percent of the
6 petitioner show a distinct community for each
7 period of time. That 30 percent is based on the
8 30 percent requirement in the Indian
9 Reorganization Act or action on a tribal
10 Constitution.

11 We are clarifying that attendance of
12 students at Indian boarding schools is
13 acceptable evidence. We have used that evidence
14 in the past in certain decisions. And then we
15 are also providing that if a group has
16 maintained a state recognized reservation from,
17 continuously from 1934 to the present or if the
18 United States has held land for the group at any
19 point since 1934, that either one of those
20 collective land holdings would satisfy criterion
21 (b) and (c).

22 We are defining "without substantial
23 interruption" to be generally less than
24 20 years. In the past the Department has
25 applied various time frames, anywhere from ten

1 years to at least 27 years in terms of gaps.
2 And so we are proposing the proposed rule that
3 it generally be less than 20 years.

4 With criterion (e), descent, we are
5 codifying existing practice that 80 percent must
6 prove descent from a tribe that existed in
7 historical times prior to 1900 and we are
8 providing that descent may be traced if Congress
9 has directed the Department to prepare a tribal
10 roll, a tribal-specific roll or that the
11 Department has prepared a tribal-specific roll,
12 that we are allowing descent to be traced from
13 that roll.

14 Otherwise if there is not a roll
15 directed by Congress or a departmental-specific
16 roll, that we are allowing any of the most
17 recent evidence prior to 1900 that is reliable.

18 With regard to (f), membership, we're
19 ensuring that petitioners who file by 2010 and,
20 if they filed letters of intent by 2010 and if
21 they have had members join other federally
22 recognized tribes during that time, that we
23 would not penalize that group because our
24 process has taken some period of time to go
25 through.

1 In terms of criterion (g), congressional
2 determination, right now the way we treat
3 termination is the burden is on the petitioner
4 to show that they haven't been terminated. The
5 proposed rule will shift the burden to the
6 Department to show that the petitioner has been
7 terminated by Congress.

8 In terms of previous federal
9 acknowledgment, we've heard that the current
10 rule is unclear. And so we haven't tried to
11 make any substantive changes to the previous
12 federal acknowledgment. We've tried to clarify
13 the rule to conform with existing practice.

14 With regard to the burden of proof, we
15 are maintaining the burden of proof. It's still
16 reasonable likelihood we are clarifying it based
17 on Supreme Court precedent.

18 In terms of re-petitioning,
19 re-petitioning is not open free-for-all in that
20 not everyone will be allowed to repetition.
21 First off, if a group has been denied through
22 the process and has been, third parties have
23 litigated that issue, that recognition issue,
24 either administratively or before a federal
25 court and that third party has prevailed, then

1 that group would need the consent of the third
2 party that had prevailed in that litigation
3 before they could move to the next step.

4 The next step is that, that if there was
5 no third-party challenge that had prevailed,
6 then the next step would be the petitioner would
7 need to go before the Office of Hearings and
8 Appeals judge and prove one of two things. They
9 would have to prove either that a change in the
10 regulations warrants reconsideration or that the
11 Department misapplied the burden of proof and
12 that warrants reconsideration. And if a
13 previously denied petitioner had satisfied one
14 of those two things to an OHA judge, then they
15 could restart the process all over again.

16 In terms of notice of petitions, much of
17 this is not new, but we have made some changes
18 to the previous notice of petitions. So we're
19 setting forth that we're going to acknowledge a
20 receipt within 30 days and within 60 days we're
21 going to publish receipt in the Federal
22 Register.

23 As I had mentioned earlier, we are going
24 to post the materials on the website. We are
25 going to continue to notify the governor and the

1 attorney general of the state. We are going to
2 notify all federally recognized tribes within
3 the state or within a 25-mile radius if it's
4 across state lines. And we are going to
5 continue to notify any other recognized tribe or
6 any petitioner that appears to have some
7 relationship with the petitioner. We are going
8 to continue that current practice.

9 In terms of what notice we're going to
10 provide, we're going to provide notice of when
11 OFA begins its review of the petition. We are
12 going to provide notice of when OFA issues its
13 proposed finding, when the Assistant Secretary
14 granted any time extensions, when the Assistant
15 Secretary begins review of the petition and when
16 the final determination is issued.

17 So comments on the Part 83 proposed rule
18 are due August 1st, 2014. Comments on OHA's
19 procedural rule are due August 18th. You can
20 send those comments on the rule to
21 consultation@BIA.gov.

22 And next steps in our process is after
23 we've finished tribal consultations and public
24 meetings and after the comment period closes,
25 we'll then review all the comments that we've

1 received and move forward with a final rule in
2 the Federal Register.

3 So with that I think we've had a couple
4 of folks join us. I just want to make sure
5 before we get any further in the consultation
6 that everyone here is either elected official of
7 a, an official of a federally recognized tribe
8 or their staff. Is there anyone that is not a
9 tribal official or their staff that's here
10 today?

11 Okay. So with that I open it up for
12 comments.

13 UNIDENTIFIED SPEAKER: I'm -- This is
14 for a short person here. I would think it would
15 be helpful if there were some tribal
16 representatives in your group up there. You
17 wouldn't want a bunch of tribal people making
18 decisions about nontribal, imperception, if
19 that's all it is. It would be more human and
20 inviting to see a tribal person up there.

21 LARRY ROBERTS: So I'm sorry. I sort of
22 improperly introduced myself. My name is
23 Lawrence Roberts. I'm a member of the Oneida
24 Nation of Wisconsin and serve as the Deputy
25 Assistant Secretary of Indian Affairs under

1 Assistant Secretary Washburn.

2 UNIDENTIFIED SPEAKER: Thank you, sir.

3 I can appreciate that. Something about this
4 whole process doesn't seem fair. We're being
5 told what is going to occur without much input
6 except this opportunity here until after the
7 facts, after the decisions, et cetera. It's
8 almost as though we are going to get lost in
9 chaos in a bureaucracy in doing this procedure.

10 You know, we're older than America. You
11 should know that, being from Wisconsin. And to
12 go back just to 1934 is unacceptable. It's
13 unacceptable to the Suquamish Tribe where Chief
14 Seattle is buried.

15 Again, we're older than America. My
16 grandfather's grandfather was Jacob Wihaulchu
17 (phonetic). He lived to be 112 years old. He
18 was last chief of the Suquamish Tribe. That's
19 when the world was flat and that's where my
20 bloodline goes to.

21 He was a signer with Chief Seattle, who
22 signed for the Duamish, Suquamish and Allied
23 tribes where he is buried and where it states
24 where he signed that Point Elliott Treaty for
25 the tribes.

1 In the case of the people in my area,
2 the closest tribe to Seattle named after that
3 chief, because he helped the white settlers from
4 starving and dying in the cold winter, are
5 Suquamish Muckleshoot. I have Muckleshoot blood
6 if I have Duamish blood. I've got Suquamish
7 blood that goes back where Chief Seattle's wife
8 was, Duamish, Seattle.

9 There gets to a point that all of this
10 time passed. All these things have occurred.
11 And they've taken out a woman at my tribe who is
12 registered Suquamish and make her the figurehead
13 ploy or whatever to speak for the people that
14 want to be the Duamish Tribe. That to me is
15 incredibly unacceptable. A person of my tribe,
16 what have they told her? What are they doing
17 for her? What is the underlying factor of a
18 tribe when almost all of the people left to
19 Muckleshoot, seven band to the white river,
20 Suquamish, the people of clear blue water.

21 And it seems like in recent times more
22 so than 20 years gone by the push is harder. Is
23 that for monetary value? That's what it seems
24 like in appearance, not perception.

25 I don't want to see someone steal my

1 culture, my neighbors, the Muckleshoot culture,
2 but that's what's occurring if the tribes aren't
3 involved until after the decision is made.

4 A little bit of humor, but not, is this
5 what it means to my council, my chairman and my
6 tribe. The chairman's out on the canoe journey,
7 a cultural experience from youth to elders. He
8 wanted me to come down here and he said, after I
9 sent him a text that I'm going to come down
10 here -- I am going to take my hat off so I don't
11 appear so radical, although I am. Little humor
12 for you. I'm not as ornery as I look, but I can
13 be.

14 I told him I was going to come down here
15 radical. And the response from the chairman, an
16 educated man, "put your mean face on." And it
17 wasn't meant out of that context. The culture
18 is more important to him to go on with the
19 youth, and I'm glad I'm there to back him up and
20 come down here.

21 It's almost as though whatever tribes
22 get recognized, that shouldn't you ask the
23 neighboring tribes more questions than making a
24 decision off of just comments here and letters
25 there, and somehow that can be accomplished?

1 There's a place in Seattle where they built all
2 these football fields. This is simplistic.
3 (Inaudible.) And nobody would use fields. It's
4 the most diverse community in the nation.
5 There's 52 languages down there.

6 They built the wrong kind of fields.
7 They built football fields. They changed it to
8 soccer and they were scheduled a year out.

9 The concept of different people getting
10 the input, simplistic as that example of when I
11 was a manager with the City of Seattle, is how
12 ideal this isn't going to work as good as we can
13 and it's not going to be an effective use of
14 dollars, of community, and you might have to
15 double the size of our BIA. Because there's
16 needs. And if you're allowing people, in one
17 process without much recourse for people that it
18 affects, what happens next?

19 It's like somebody comes back over,
20 over, over again and they don't get the answer
21 they want to hear. Well, let's get some money.
22 Let's get some backing and we'll go back over
23 and over and over again. You might be tired of
24 me, hearing that, you must be tired of a lot of
25 people from years and years of it.

1 And I hope that your thoughts, process,
2 decision, builds a better tomorrow for Indian
3 people because we're getting better now and our
4 kids are getting educated. Our elders are
5 getting taken care of. But what you may create
6 is something worse for everyone. And I mean
7 that from a brain that works civil service, from
8 a laborer up to a regional manager for 32 years,
9 somebody with a bloodline back to (inaudible)
10 times and I take offense of people using our
11 tribal members as a figurehead to speak for them
12 that are registered in our tribe. Thank you.

13 LARRY ROBERTS: Thank you.

14 CHARLOTTE WILLIAMS: Good afternoon.
15 I'm Charlotte Williams and secretary of the
16 Muckleshoot Tribal Council and I represent the
17 Muckleshoot Indian Tribe today. And the tribe
18 appreciates the opportunity to consult with the
19 Department on its proposal to revise the
20 regulations governing the acknowledging of
21 groups and sovereign Indian tribes.

22 The Muckleshoot Tribe agrees that the
23 acknowledgment process can be improved in the
24 areas of timeliness, efficiency and transparency
25 of the decision-making process. And some of the

1 proposed changes in the regulations address the
2 issues, such as the phased review in the
3 proposed, proposal to post documented petitions
4 for acknowledgment on the internet. The tribe
5 generally supports these procedural
6 improvements.

7 However, the tribe strongly objects to
8 the proposed changes to existing acknowledgment
9 criteria. The Department's proposal would be
10 dramatically change the criteria and undermine
11 the integrity of the acknowledgment process.
12 The tribe also objects to changes in the
13 regulations that would erect significant
14 barriers to meaningful participation in the
15 acknowledgment process by currently recognized
16 tribes that may be affected by the Department's
17 determinations and the definition of the burden
18 of proof proposed by the Department.

19 Tribes are recognized as social,
20 political communities that have continuously
21 existed, predating the foundation of the United
22 States. Tribal sovereignty and governmental
23 authority are based on the continuous historical
24 existence of tribes as autonomous political
25 entities.

1 The proposed regulations weaken the
2 distinction between Indian tribes and ethnic and
3 social communities by eliminating the
4 requirements that groups seeking recognition
5 demonstrate their continuous existence as
6 political and social communities since the
7 establishment of the United States or first
8 sustained non-Indian contact. As a result, the
9 regulations undermine the foundations of tribal
10 sovereignty.

11 The stated purpose of the regulation is
12 to establish that an Indian tribe has existed
13 continuously. The proposed regulations abandon
14 the core requirement that groups seeking
15 acknowledgment demonstrate the continuous
16 historical existence and have the potential to
17 redefine tribes as racial rather than political
18 entities.

19 These fundamental changes in the
20 criteria proposed by the Department are
21 inconsistent with longstanding Department
22 policy. Such changes have been previously
23 considered and were expressly rejected by the
24 Department. And indeed, the Muckleshoot Indian
25 Tribe questions whether the Department has the

1 authority to acknowledge the tribal status of a
2 group that cannot demonstrate continuous
3 existence as an autonomous tribal entity
4 throughout history.

5 There are many other provisions of the
6 proposal that the tribe questions and we will
7 address in its written comments. In my comments
8 today I would like to focus on two areas of
9 particular concern, the barriers created by the
10 proposal to meaningful participation by
11 recognized tribes that may be affected by an
12 acknowledgment determination and the proposed
13 definition of the burden of proof as less than a
14 preponderance of the evidence but more than a
15 mere possibility.

16 The current regulations provide states,
17 local government and recognized tribes that may
18 be affected by an acknowledgment of termination
19 will be considered interested parties with the
20 right to fully participate in the acknowledgment
21 process, including the right to offer evidence
22 and argument on the merits of a petition and to
23 seek reconsideration by the BIA and/or the
24 Secretary of the Interior.

25 The proposed regulations eliminate all

1 the current provisions, allowing potentially
2 affected recognized tribes the opportunity to
3 participate as interested parties based on the
4 historical relationship with petitioning groups
5 in a stark breach of the Department's trust
6 responsibility to consider the impacts of its
7 actions on recognized tribes.

8 The new regulations also erect other
9 affirmative barriers for meaningful and
10 effective participation by potentially affected
11 tribes, state and local governments. The new
12 regulations substantially reduce the time
13 available to comment on proposed findings,
14 provide an insufficient time to respond to a
15 record of proposed finding that may have taken
16 years to prepare. The new regulations eliminate
17 provisions allowing an interested party the
18 right to seek an on-the-record meeting with the
19 Department to inquire into the reasoning,
20 analysis and factual basis for a proposed
21 finding.

22 The new regulations eliminate the right
23 of the potentially affected tribe to seek
24 reconsideration by the IBIA or Secretary and
25 deny a potentially affected tribe the right to

1 seek a hearing before the ALJ on material issues
2 of disputed fact. They leave a potentially
3 affected tribe with no opportunity to seek
4 review of erroneous determination within the
5 Department as provided in the current
6 regulations or as allowed the petitioner under
7 the proposed regulations.

8 The Department's proposing to divide the
9 burden of proof necessary to satisfy the
10 acknowledgment regulations as more than a mere
11 possibility but less than a preponderance of the
12 evidence in an inappropriate standard of review
13 upon which to base a decision as important as
14 acknowledgment. Application of such a standard
15 denies OFA and the Assistant Secretary the
16 opportunity to weigh relevant evidence and to
17 utilize their expertise in evaluating petitions.

18 Significantly, their standard required
19 the Department to acknowledge groups that in
20 objective review of evidence had concluded more
21 likely than not do not meet the acknowledgment
22 criteria.

23 The elimination of provisions allowing
24 the affected tribes meaningful participation as
25 interested parties, the barriers to effective

1 participation created by the new regulation and
2 the burden of proof proposed by the Department
3 raise significant due process concerns, in
4 addition to questions regarding the Department's
5 fulfillment of its trust responsibility to
6 recognize tribes that may be affected by the
7 Department's acknowledgment determinations.

8 As I indicated earlier, the Muckleshoot
9 Tribe has a number of other significant concerns
10 regarding the proposed regulations, which the
11 tribe will address in written comments in
12 addition to this oral comment in the written
13 version of the tribe's statement that it's
14 submitting today. However, prior to submitting
15 our written comments, we have some questions,
16 the answers to which will allow Muckleshoot and
17 other interested entities to more effectively
18 respond to the Department's proposal. And with
19 me today is counsel for the tribe, who will go
20 over some of the questions with you now.

21 RICHARD REICH: Thank you for the
22 opportunity to appear today. I think that what
23 we might make better use of our time is to let
24 the other elected representatives speak first
25 and then as time permits, we have a number of

1 questions that we would hope that the Department
2 might be able to answer, they could clarify the
3 proposal and provide us all a better basis to
4 comment, if that would be okay. And I can hand
5 up a copy of tribal (inaudible) statement in
6 writing and it also includes the questions that
7 we would like to go over later.

8 LARRY ROBERTS: Okay. Great. And
9 before we move on, I just want to address one of
10 the things, and that is the concern that somehow
11 the proposed rule is changing the opportunity
12 for input from federally recognized tribes
13 during the process. That's not our intent at
14 all in changing the level of input in the
15 process. And so comments on that and
16 specifically where you think that we have
17 changed that would be helpful.

18 Now, we have changed the, as I mentioned
19 in the overview, the IBIA review at the end of
20 the process after a decision is made by the
21 Assistant Secretary. We have eliminated that.
22 But the, that decision is the only decision that
23 the Assistant Secretary makes that's currently
24 subject to IBIA review. And so we're trying to
25 treat this decision consistently with all

1 decisions by the Assistant Secretary.

2 So I just want to address the points you
3 were making about somehow limiting tribal input,
4 federally recognized tribal input into a
5 specific decision, the intent of our rights is
6 not, of our proposal is not to do that. So look
7 forward to seeing where that can be clarified to
8 make it consistent in any written comments or
9 however the tribe would like to provide that
10 information.

11 DENNIS TAYLOR: My name is Dennis
12 Taylor. I serve as the vice chairman for the
13 Eastern Band of Cherokee. It's been federally
14 recognized since 1868.

15 Our reservation is in western North
16 Carolina, in the great Smoky Mountains. We have
17 a living language, culture, heritage that has
18 survived wars, treaty makings, Trail of Tears
19 and other government actions trying to eradicate
20 our tribal government and turn our Indian people
21 into nonIndians.

22 Through those hard times, our ancestors,
23 our forefathers have fought and died to preserve
24 our culture and our heritage. Our culture and
25 our heritage is our identity. That defines us.

1 That is who we are.

2 Through those -- And today as tribal
3 leaders, got two more here today with me, we
4 know how beautiful it is to be a Cherokee
5 Indian. We hold our languages and our heritage
6 and our culture sacred. It's sacred to our
7 people. Right now there's a total of, there's
8 30-some groups of people claiming to be Cherokee
9 around the country, trying to seek federal
10 recognition and become a fairly recognized or
11 tribal government. And if -- What we're afraid
12 of is if we lower the standards to the
13 recognition process, these groups cannot only
14 steal our identity or water down our identity,
15 but destroy our identity.

16 The last five or six years that I've
17 been on the council, travelling around the
18 country, I've heard the process is too long, too
19 cumbersome, not fair. But is it fair, would it
20 be fair to those other 500-plus fairly
21 recognized tribes out there if we lower the
22 standards for these other tribes? We have, we
23 went through the process. They went through the
24 process. The Eastern Band of Cherokees, we
25 support an expedited process, transparent,

1 efficient process. But we do not want the
2 standards lowered. That's all we're asking.
3 Excuse me. Thank you.

4 TUNNEY CROWE: Good afternoon. My name
5 is Tunney Crowe. I'm one of the tribal council
6 members of the Eastern Band of Cherokees out of
7 Cherokee, North Carolina. Listened to what my
8 colleague said there. We are, you know, our
9 tribe agrees that, with the standards there,
10 that they don't need to be lowered. We have got
11 a lot of groups throughout the United States
12 from North Carolina to out here to California
13 there is about 35 different tribes or people
14 that are claiming to be Cherokee and wanting to
15 be federally recognized.

16 Thinking about that and thinking about
17 where we came from, we're part of our original
18 group of Cherokee that remained in North
19 Carolina when the Trail of Tears happened and
20 our tribe was moved, removed from there and sent
21 to Oklahoma, we were the ones who get out there.
22 So we've still got our living language, our
23 culture. Like you said, it's very sacred to all
24 of us. That's who we are. We don't want these
25 other folks trying to steal our identity.

1 You got some of the changes, 1934, I
2 think, you know, if we need to go back farther
3 than 1934, whenever we're deciding on who is who
4 with the tribes there. 1934 gives you a
5 baseline, but we've been around, we've had
6 archaeologists come in and do dig sites on our
7 reservations for different projects and stuff.
8 That dates us back 10,000 years ago. We know
9 that our people were there prior to that.

10 So, you know, this does come from our
11 heart when we come and give a statement in front
12 of you all, letting you know who we are and what
13 we're about. And it's real, you know, it's
14 close to our heart knowing that we're given an
15 opportunity to give input on the process here.
16 And that's what we're here for today.

17 So we appreciate the time and look
18 forward to hearing back from you all. And I
19 know that we have requested that the times be
20 extended to go into, deeper into Indian country,
21 into Oklahoma and the Southwest. We haven't
22 heard anything back yet on that. But we're also
23 going to be turning in a, some written
24 documentation for you all, too. Thank you.

25 BO CROWE: Good afternoon. My name is

1 Bo Crowe, (inaudible) council. (Inaudible) to
2 experience a proposed chain to open the doors to
3 groups that claim to be Cherokee as well as any
4 other tribe. For an example, there's a group in
5 North Carolina, the Lumbee Tribe. They claim to
6 be Cherokee Tribe before 1934. They
7 self-obtained state recognition from the state
8 of North Carolina as Cherokee Tribe during this
9 era and sought federal recognition as a
10 Cherokee. Before 1934, also before 1934 the
11 group now calls itself Lumbee. They claim to be
12 two other, different tribes.

13 In the case of Lumbee, with the other
14 tribal groups, the proposed rule would remove
15 any consideration of this issue that is directly
16 relevant to whether the group is legit,
17 historical tribe. For petitioner that would
18 make it become the third largest tribe in the
19 country. The stakes are higher for this roll.

20 The Eastern Band supports change to make
21 the process more transparent and efficient, but
22 dramatic change is proposed and this rule would
23 finalize, lessening the status of established
24 federal acknowledgement to the Indian Nation.
25 Thank you.

1 LARRY ROBERTS: Thank you.

2 JIM CRANE: Good afternoon. My name is
3 Jim Crane. I'm attorney with the law firm of
4 Lande Bennett Blumstein here in Portland. We
5 represent the Columbia River Crab Fisherman's
6 Association, which I'll refer to as the CRCFA.

7 LARRY ROBERTS: I am sorry. I am going
8 to have to cut you off right there. This is a
9 tribal consultation. We had a public meeting
10 this morning. This is just for tribal
11 officials.

12 JIM CRANE: Thank you very much, I
13 apologize for taking your time.

14 LARRY ROBERTS: You're free to submit
15 comments in writing. And if you have any
16 written comments right now, we can certainly
17 take those. Save you some time.

18 JIM CRANE: We are planning on
19 submitting written comments.

20 LARRY ROBERTS: Okay. Thank you.

21 JAMES BELLIS: Good afternoon. My name
22 is Rick Bellis. I'm lead counsel for the
23 Suquamish Tribe. There's a few additional
24 comments we'd like to make this afternoon. I'd
25 like to leave you with a written copy of them.

1 Before I begin, I think the Suquamish
2 Tribe would like to join with the Muckleshoot
3 Tribe in requesting that you extend the period
4 for comments on these regulations. And we'd
5 also like to join in the Eastern Cherokee Band's
6 request that more meetings be held in different
7 parts of the country as well.

8 The Suquamish Tribe has been an active
9 participant in the Part 83 proceedings for many
10 years. We have expended enormous financial and
11 staff resources participating in this process,
12 which has been in place for nearly 40 years.
13 These proposed revisions to Part 83 are a
14 significant departure from the past 40 years and
15 raise fairness issues.

16 Suquamish supports any revisions that
17 promote procedural efficiencies; however, the
18 proposed provisions go far beyond procedural
19 improvements and instead result in much lower
20 standards necessary to obtain recognition and
21 favor previously denied petitioning groups.
22 Moreover the proposed changes negatively impact
23 the rights and interests of currently recognized
24 tribes.

25 LARRY ROBERTS: I am sorry to interrupt

1 you for one second.

2 But this is a closed meeting, sir.

3 I'm sorry.

4 JAMES BELLIS: That's fine. I
5 appreciate that. The Suquamish Tribe's main
6 concerns with the proposed revision, not our
7 only concerns but the main ones are the 1934
8 review date for criteria (b) and (c). As we
9 state in our written comments to the draft
10 regulation, the change to the review date is a
11 significant departure from the past 40 years of
12 practice. Petitioners and interested parties
13 have proceeded in good faith under the current
14 rules. The position advanced by the Department
15 and implicitly agreed to by Congress is an
16 applicant must establish proof of a continuous
17 political existence since at least 1900. The
18 Department has consistently represented that the
19 existing standards for federal recognition will
20 not change by adopting the proposed revisions,
21 but that the proposed revisions will simply
22 streamline the review process. In Suquamish's
23 view, the proposed provisions liberalize the
24 existing standard by lowering the required proof
25 and do nothing to streamline the application

1 process.

2 The proposed revisions do not include
3 any provisions or guidance that disqualifies an
4 organization of descendants of a historic tribe
5 that formed between 1900 and 1934 from being
6 granted federal recognition. The revisions
7 create an irrefutable presumption that a group
8 of Native descendants that that existed in 1934
9 continuously existed as a separate tribal entity
10 between the date of first sustained contact,
11 which in the Puget Sound area is approximately
12 1824, and 1934, and that such a group is the
13 successor to the historic tribe based only on
14 the genealogical ancestry of members of the
15 petitioning group.

16 Such a presumption creates opportunity
17 for mischief. If the rules and standards keep
18 changing, there is no end point to how many
19 times the petitioning group can make a run at
20 federal recognition.

21 When the rules were first published in
22 1978, there was minimal financial incentive for
23 petitioning group to undertake the rigorous
24 efforts necessary to secure federal
25 acknowledgment. And, in fact, there are many

1 (inaudible) to try to do this. Now many
2 petitioning groups have partnered with backers
3 who have a financial interest in helping the
4 groups secure federal acknowledgment. In
5 addition, the GAO recently reported that there
6 are over 400 groups who were identified as,
7 quote, nonfederally recognized tribes, end
8 quote, of which over 300 have filed letters of
9 intent with the Office of Federal Recognition.
10 That's a lot of groups you folks are going to
11 have to talk to.

12 Diminishing the burden of proof no doubt
13 will result in many more groups. Some with
14 financial backers who are not interested before
15 the enactment of the Indian Gaming Regulatory
16 Act in 1988 occupying significant federal time,
17 resources, as well as interested party time and
18 resources for many years to come. One Suquamish
19 council member asked, are they trying to create
20 another Indian Claims Commission? There needs
21 to be an ending to this.

22 If the Department is determined to
23 depart from the at least 40 years of past
24 practice and liberalize the review date to 1934,
25 this change should be for new claimants only.

1 Petitioners who have been denied under the 1978
2 or 1994 regulation should not be allowed another
3 opportunity to be considered under the revised
4 liberalized regulations.

5 I would also like to talk about the
6 limitation on interested party rights. We think
7 that it's a significant change, though you folks
8 argue this is the only decision of the secretary
9 that gets appealed from the IBIA. We think if
10 we go direct to district court, as you said and
11 as the regulation propose, that the tribes will
12 lose, any tribe is affected by determination if
13 it recognizes another tribe. We'll have almost
14 no standing. There's no standing created in
15 these regulations for such an affected tribe.
16 And we would be dealing with basic, basic
17 standards of review. They are almost
18 insuperable. We want to raise an issue
19 ourselves.

20 The proposed regulations eliminate the
21 designation of tribes as interested parties with
22 rights to comment on proposed findings.
23 Affected tribes will not be able to seek a
24 reconsideration of a decision. Instead,
25 interested tribes only have the right to comment

1 on positive determinations and must do so within
2 a short time frame.

3 Finally, if an affected tribe can
4 establish standing, the only option available to
5 it is to appeal positive determination to the
6 district court under an APA review standard.
7 I.e., that the Secretary's positive
8 determination was arbitrary and capricious or
9 contrary to law. That's what we're worried
10 about. That's a tough one to climb.

11 This right to appeal is no right at all.
12 Federal courts give great deference to the
13 discretionary determinations of an agency,
14 especially one that is vested with broad
15 discretionary authority by Congress. As the
16 federal courts have already determined, the
17 Assistant Secretary has broad discretion to
18 promulgate regulations and apply the regulations
19 to the specific facts in a matter. We reference
20 you to Miami Nation of Indians versus Babbit,
21 887 F. Supp. 1158, Northern District of Indiana,
22 1995.

23 It would be almost impossible for an
24 interested party to successfully challenge a
25 positive determination applying an arbitrary and

1 capricious standard. Removing the opportunity
2 to comment on proposed findings makes meaningful
3 opportunity to provide input really
4 non-existent.

5 We thank you for the opportunity to
6 express the Suquamish Tribe's views and concerns
7 regarding these two factors of the rulemaking.
8 Once the Department finishes its series of
9 consultations, we will submit formal written
10 comments that express our views in more detail
11 and take into account the information that has
12 arisen during the consultation process, which is
13 I believe one of the things that the Muckleshoot
14 Tribe would like to engage in a dialogue with
15 you on. And we certainly would like to hear
16 that dialogue as well.

17 I hope that the Department will
18 seriously consider our comments as it moves to
19 finalize this rule. I thank you for your time
20 today.

21 LARRY ROBERTS: Thank you.

22 RICHARD REICH: If there are no other
23 elected tribal officials that would like to
24 comment, at this point, I'd like to, there are a
25 number of questions that we had that would help

1 us inform our comments and to make sure that the
2 Muckleshoot Tribe in putting together its
3 comments, understand the Department's proposal
4 and really understand the Department's
5 rationale.

6 My name, by the way, for the record, is
7 Richard Reich, R E I C H. I'm an attorney and I
8 am in-house counsel for the Muckleshoot Indian
9 Tribe.

10 In 1994, when the acknowledgment
11 regulations were last amended, the Department
12 stated that the amendments were not intended to
13 result the acknowledgment of petitioners that
14 would not have been acknowledged under the 1978
15 regulations. The current proposal to revise the
16 regulations does not include a similar
17 statement.

18 Our first question is, is it fair for us
19 to conclude that the proposed amendments would
20 lead to acknowledgment of groups that would not
21 be acknowledged under the current regulations?

22 And if that's correct, I guess it would
23 be helpful for us to understand the Department's
24 rationale for changing the criteria in a way
25 that would allow groups to be recognized under

1 this proposal that wouldn't have been recognized
2 under the '78 or '94 regulations.

3 LARRY ROBERTS: So I think one of the
4 things the Department is trying to do is provide
5 consistency in the application of its
6 regulations. So we're not -- We're wanting to
7 maintain the integrity of the process. We do
8 not want to recognize nonlegitimate tribes.

9 But one of the things that we've heard
10 over the course of applying the rules is that we
11 have been inconsistent in the application of
12 those rules. And so we are trying to provide
13 objective criteria in the rules.

14 And one of the things that we are
15 looking at with regard to the 1934 date for two
16 of the criteria is easing the administrative
17 burden on everyone in the review of these since
18 we've never had a situation where a group can
19 make itself up as a tribe from 1934 to the
20 present but not exist as a tribe prior to that.

21 And so the intent is to provide
22 consistency throughout our regulations. Would
23 more tribes be recognized under the proposed
24 rule than the existing rules? I think that's,
25 you know, that's hard to answer. I think the

1 answer is that we're trying to provide
2 consistency because we have heard from some
3 groups that groups that have been recognized
4 through the process of Part 83, that they are
5 similarly situated and yet they have not been
6 recognized and that we have inconsistently
7 applied the rules. So we're trying to provide
8 objective rules built on past decisions for
9 federal law or federal policy in going forward
10 with our review. So that's --

11 RICHARD REICH: Would it be fair to ask
12 whether the Department has prepared an analysis
13 of how the change, the proposal would affect
14 past decisions or would have affected past
15 decisions?

16 LARRY ROBERTS: We have not. We have
17 done an analysis on how it would lessen the
18 administrative burden for paperwork purposes,
19 but no, we have not done that analysis.

20 RICHARD REICH: In the past the
21 Department has I think repeatedly stated that
22 continuity of autonomous tribal existence was
23 the essential or core requirement of the
24 acknowledgment process.

25 Does the Department believe it has

1 authority to acknowledge groups as sovereign
2 Indian tribes that are unable to establish
3 substantially continuous existence as autonomous
4 tribal entities from the establishment of the
5 United States or first sustained contact?

6 LARRY ROBERTS: I think as a practical
7 matter we have through the Part 83 process. So
8 I think if you look at acknowledgment decisions
9 of the 17 recognized groups, I don't think the
10 Department has gone back to 1789 for every
11 single petitioner.

12 RICHARD REICH: Excuse me. Or first
13 sustained contact, whichever is later.

14 LARRY ROBERTS: Yeah. That I don't
15 know. What I can say is that we are, we're not
16 looking at recognizing groups that came into
17 existence in the '30s and the '40s and the '50s
18 and the '60s and the '70s and '80s and the '90s.
19 We're not looking to acknowledge those groups.
20 And while the focus is on 1934 on two of the
21 criteria or other criteria that are prior to
22 1900.

23 RICHARD REICH: Thank you. If evidence
24 comes to the Department's attention that a
25 petitioning group did not constitute community

1 before 1934 or did not exercise tribal political
2 influence or authority before 1934, basically
3 criterias (b) and (c), will the Department
4 consider that evidence relevant under the
5 proposed regulations?

6 LARRY ROBERTS: That's not something
7 that's in the proposed rule. But if that's
8 something that Muckleshoot feels that the
9 regulation should look at, we're open to hearing
10 that comment essentially.

11 RICHARD REICH: Thank you. The proposed
12 regulations do not appear to require any showing
13 that the group identified as having tribal
14 existence during the historical period before
15 1900, that's criteria (a), is the same as the
16 petitioner. How does the Department propose to
17 ensure the petitioner is in fact successor in
18 interest to the historical group identified
19 under criteria (a) and is there anything more
20 than lineal descent required?

21 LARRY ROBERTS: So I would actually flip
22 that question around to you all. We're not
23 going to have, I mean, one of the reasons that
24 we're seeking comment is, you know, if, first of
25 all, I would say yes, we're looking at the same

1 group from 19, otherwise it doesn't make sense.
2 Right. It's the same group from 1900, prior to
3 1900. It's not a different tribal entity.

4 So, but if there's ways that we can
5 clarify (a) or that you think (a) should be
6 clarified, you know, we'd welcome those comments
7 because we need, we need substantive comments in
8 terms of how that can be clarified.

9 RICHARD REICH: Well, my next question
10 may go into that. The current regulations
11 require that a group seeking the benefit of
12 previous federal acknowledgment must have been
13 identified as the same entity that was
14 previously acknowledged. That's in the current
15 25 CFR, section 83.8.

16 What's the -- That requirement,
17 specifically that language, specifically
18 eliminated from the new proposal. Is there a
19 reason for that?

20 LARRY ROBERTS: So I'm going to let
21 Stephen or Elizabeth chime in on this. But my
22 understanding of the previous federal
23 acknowledgment is that we are not proposing any
24 substantive changes to that previous federal
25 acknowledgment provision. So if that is not in

1 the proposed rule and you think that that is
2 substantive, we would welcome that comment
3 because I'm just stating for the record we're
4 not, we're not intending to make any substantive
5 changes to previous federal acknowledgment.

6 RICHARD REICH: Thank you. We do
7 believe it's substantive and we will be
8 commenting to that effect because the language
9 is dropped from the new proposal that requires
10 that the petitioning group show that it is in
11 fact the same group. So it sort of gets back to
12 my question is something more required or
13 something more intended. And I think it was
14 under the current regulations than simply
15 showing lineal descent, these people are
16 descendants of the historical tribe, in fact,
17 the group that's seeking is the same group, not
18 that they're simply descendants. And that's
19 sort of the issue.

20 The current regulations governing
21 previous acknowledgment require that the group,
22 that the government action constituting previous
23 acknowledgment be, quote, clearly premised on
24 identification of the tribal political entity
25 and indicating clearly the recognition or

1 relationship between the entity and the United
2 States. That's in the definitional Section 25
3 CFR, section 83.1 and 83.8. That language is
4 also dropped from the propose the regulations
5 that describes the kind of action that will
6 constitute previous acknowledgment.

7 Can you indicate what the reason for
8 that is or is the answer essentially the same as
9 the last one?

10 LARRY ROBERTS: That answer is
11 essentially the same. And maybe the language is
12 a little different because we put the regulation
13 in plain language format. So it's something
14 that we'll take a look at and we're interested
15 in comments as to why you think that is a
16 substantive change.

17 RICHARD REICH: And we would think it's
18 a substantive change because our understanding
19 is the current regulations require that the
20 action is claimed in the previous federal
21 acknowledgment be clearly and unambiguously an
22 action recognizing the group as a governmental
23 political entity. In the past there have been a
24 number of, for example, appropriation statutes
25 that have been (inaudible) people that have

1 named various groups or claim statutes that
2 allowed the historic descendants, the
3 descendants of a group to bring claims on the,
4 on a historic tribe. And the Department has
5 taken the position that those kind of acts are
6 not clear and unambiguous previous federal
7 recognition. So I think for our part and I
8 think our comments will reflect that we think
9 that kind of language is necessary and
10 appropriate.

11 The reasonable likelihood standard or
12 definition proposed by the Department was
13 adopted by the Supreme Court in connection with
14 challenges to jury instruction in criminal
15 matters. Is it fair to conclude that the
16 proposed definition of reasonable likelihood
17 requires the Department to acknowledge groups or
18 petitioners that more likely than not do not
19 meet one or more criteria for acknowledgment if
20 it's less than more likely than not?

21 LARRY ROBERTS: So I would say on this
22 one we're not, we're not changing the reasonable
23 and likelihood standard. So if there is, if --
24 And let me be clear about that. We're not
25 changing the standard in this regulation. And

1 so if you feel that the Supreme Court precedent
2 that we're relying on to clarify that is wrong
3 in some way, shape or form or you think that we
4 misstated the standard to what it is, you know,
5 I welcome those comments. But, you know, we're
6 not, we're not proposing a change to the
7 standard itself.

8 RICHARD REICH: We understand that the
9 reasonable likelihood standard is one in
10 existing regulations. However, we believe the
11 Department has implemented that standard and as
12 a practical matter in a way different than the
13 Supreme Court used it in the case that you
14 referred to. So I think from our perspective
15 this is, in fact, a change.

16 And I guess my question though is a
17 different one. My question was simply isn't the
18 Department's current intention to interpret that
19 standard in a way that requires the
20 acknowledgment of groups that more likely than
21 not do not meet the criteria? Because that
22 seems to me the plain language impact for that
23 definition.

24 LARRY ROBERTS: Okay. You're asking it
25 in sort of a, you're putting it in negative

1 context. So I would, you know, one of the
2 things that we've heard is that we're not, we
3 haven't applied the standard consistently
4 throughout the course implementing the Part 83
5 regulations. So we want to make that
6 consistent. And, you know, the standard is as
7 it's laid out in the proposed rule. And we
8 don't feel it's a substantive change. I hear
9 you, that you think it is a substantive change
10 and you're welcome to comment on why you think
11 (inaudible) the standard.

12 RICHARD REICH: Thank you. Is the
13 Department aware of any other federal agency
14 that uses a similar standard in making
15 determinations of eligibility for federal
16 government programs or any judicial proceedings
17 in which the reasonable likelihood standard is
18 defined by the Department is applied to render a
19 decision on the merits or is this unique?

20 LARRY ROBERTS: Like I said, we're not
21 trying to change the standard. So I don't know.
22 We're not changing the standard that's been on
23 the books. It may have been applied
24 inconsistently by the Department, but we're not
25 trying to change the standard that's been on the

1 books since 1978.

2 RICHARD REICH: The current regulations
3 discussing the reasonable likelihood standard
4 state, quote, a petitioner may be denied
5 acknowledgment if the evidence available
6 demonstrate that it does not meet one or more of
7 the criteria. The petitioner may also deny if
8 there's insufficient evidence that meets one or
9 more criteria. That's question number six on my
10 question list.

11 That language seems to be weeded from
12 the proposal. Is there a reason for that or
13 rationale for that and does the Department
14 consider that language inconsistent with the
15 proposed definition?

16 LARRY ROBERTS: The short answer is I
17 don't know.

18 RICHARD REICH: Okay. Fair enough.
19 This gets back to the question of interested
20 parties.

21 LARRY ROBERTS: Where are you now?

22 RICHARD REICH: I'm going down to eight.
23 I skipped six. So let's go down to eight.

24 LARRY ROBERTS: Okay.

25 RICHARD REICH: The current regulations

1 allow currently recognized state and local
2 governments to seek reconsideration. And that's
3 before the Secretary of the Interior as well as
4 the IBIA, and to seek hearings before an ALJ on
5 disputed issues of material fact. Both the
6 petitioner and the interested parties can do
7 that.

8 Can you explain why in the new proposal
9 where there's an opportunity for a hearing
10 before an ALJ, only a petitioner and
11 noninterested parties can ask for that?

12 LARRY ROBERTS: Yeah. So what we're
13 proposing under the regulation is to,
14 essentially if it is a proposed favorable
15 finding, to continue the current process, which
16 is allowing for comment on that proposed
17 favorable finding. If it is a proposed negative
18 finding, we are proposing essentially more
19 process than a hearing on that negative
20 determination. It doesn't, it's not required, a
21 hearing is not required on the negative
22 determination. And so third parties can
23 intervene if there is a hearing. But at the end
24 of the day it's looking at providing that
25 process for those denials, those negative

1 decisions.

2 RICHARD REICH: Just as a comment,
3 you've stated that the intent is not to change
4 the opportunity for interested parties,
5 particularly existing recognized tribes
6 participate in the process. But the definition
7 of interested parties has been removed from the
8 regulations. And here's one of the examples
9 where existing recognized tribes have an
10 opportunity in the process to seek a hearing
11 before an ALJ on any positive determination.
12 They don't have that opportunity under these new
13 regulations. So that's one --

14 LARRY ROBERTS: That's at the end of the
15 process though.

16 RICHARD REICH: Well, it's at the end of
17 the process, but now they have no opportunity
18 anywhere in the process. They also have an
19 opportunity under the consisting regulations, as
20 Secretary Williams stated, to ask for a meeting
21 on the record with the Department, just like
22 petitioner does after there's a proposed
23 finding. They don't have that opportunity
24 either. So there are a number of changes.

25 The other changes are the dropping of

1 definition and the dropping of the provisions
2 that the IBIA has interpreted as very liberally
3 allowing participation by recognized tribes
4 simply based on their factual connection, which
5 is not the same as the standard for judicial
6 intervention, which an ALJ might require. So I
7 think there are substantial changes and we'll be
8 commenting on those.

9 LARRY ROBERTS: Okay.

10 RICHARD REICH: And I think my last
11 question goes to the provisions relating to
12 state-recognized reservations, but more from our
13 area, since we don't have any state-recognized
14 reservations, to the provisions that applaud
15 that indicate that criteria begin to see our
16 maps if a group has had land held in trust
17 collectively or in a group since 1934. And in
18 the Northwest and elsewhere reservations are
19 established or enlarged by treaty, executive
20 order or historic tribes. Many members of those
21 historic tribes integrated in the reservation
22 communities which are recognized by the United
23 States as tribes. Others did not. Under the
24 proposed regulations petitioners will be
25 considered as demonstrating both community and

1 political influence and authority without any
2 additional evidence if the United States has had
3 land in trust for the petitioner or petitioner's
4 collective ancestors at any time between 1934
5 and the present.

6 So the question is are these proposed
7 provisions intended to apply to petitioners'
8 proposed descendants of historic tribes for whom
9 reservations were established but who do not
10 associate with the reservations and who are not
11 part of the currently recognized tribe located
12 on the reservations established for that
13 historic tribe?

14 LARRY ROBERTS: So let me I guess
15 address it this way, and that is if your, and
16 let's, I know, that Muckleshoot has said it's
17 composed of a number of different tribes;
18 correct?

19 RICHARD REICH: Muckleshoot is composed,
20 they're Duamish in Muckleshoot just as
21 Councilman Lewis indicated in Suquamish. There
22 are the Muckleshoot and the historical record
23 will show both the Suquamish reservation and the
24 Muckleshoot reservation were established for
25 Duamish people. It will show them in Northwest

1 that the Tulalip reservation was established for
2 the Snohomish people. There are other examples.

3 LARRY ROBERTS: Okay. So in those broad
4 examples, the intent of this provision is not
5 to, we're not changing the current reservations
6 at all. So the reservation is held for the
7 Muckleshoot tribal government and its people, as
8 the Suquamish reservation is held for the
9 Suquamish reservation and its people. The
10 intent of this is those are federally recognized
11 tribes and federally recognized reservations.
12 Those will not qualify or weren't intended to
13 under the proposed rule.

14 So I think you should, I think it would
15 be helpful to have those comments because our
16 intent is, you know, land that is held
17 collectively for a particular group specifically
18 at some point in time by the United States from
19 1934 to the present.

20 So it wouldn't -- So, in other words,
21 you have a reservation for in the Muckleshoot
22 reservation it's governed by the Muckleshoot
23 Tribe now. That would not, that's not
24 intended --

25 RICHARD REICH: That would not provide a

1 bootstrap for one of the historic groups for
2 whom, to come along and say we've met (b) and
3 (c).

4 LARRY ROBERTS: That's right. That's
5 not the intent of the proposed rule.

6 RICHARD REICH: And I think from our
7 perspective it would be helpful if the
8 Department would clarify that. I would point to
9 another reservation in Washington that's not
10 Muckleshoot's real concern, but the Ozette
11 reservation. There's a reservation the United
12 States holds there is no tribe for that
13 reservation and there's a 1950 Solicitor's
14 Opinion to the effect that there is no Ozette
15 tribe to, for which the United States holds that
16 reservation. Interesting issue.

17 LARRY ROBERTS: You're adding to my list
18 of issues.

19 RICHARD REICH: I think it's something
20 you might want to take a look at. Thank you for
21 your time. Thank you for answering my
22 questions. Thank you.

23 LARRY ROBERTS: Thank you.

24 WILSON PIPESTEM: Good afternoon.
25 Wilson Pipestem, here with the Eastern Band of

1 Cherokee Indians.

2 Just a couple of questions. One, how
3 does the Department see its trust responsibility
4 with regard to this rulemaking? It's a little
5 bit different than a rulemaking related to, say,
6 the changes in leasing regulations for federally
7 recognized tribes.

8 So if you think about the trust
9 obligation to the United States to the Indian
10 tribes, in this case I'm presuming that means
11 federally recognized Indian tribes, as some
12 would define it as the duty to protect tribal
13 governments and in this case is expressed by the
14 Eastern Band, their culture, their different way
15 of life that's unique to the Cherokee people,
16 I'd just like to know what does that mean in
17 real terms with regard to the Department? Does
18 that just mean we get consultation or it seems
19 like it would make an impact on what the rule
20 would look like with regard to the ability of
21 the Eastern Band in the tribes participate in
22 any kind of rulemaking appeals that sort of
23 thing.

24 But how do you -- Do you, one, do you
25 believe that there is a trust obligation in this

1 rulemaking; and then, two, existing federally
2 recognized tribes; and then I guess is there a
3 trust obligation or some obligation to
4 nonfederally recognized groups? I'm trying to
5 help, I'm trying to rationalize that so we can
6 appropriately comment.

7 LARRY ROBERTS: So I think like every
8 rulemaking we take on we have a trust obligation
9 to federally recognized tribes. I haven't
10 thought about the trust obligation to
11 nonrecognized tribes. It seems -- or
12 nonrecognized groups.

13 Philosophically for those 17 groups have
14 gone through the process, they've always been
15 tribes. So we have some trust obligation to
16 those legitimate tribes. And so, but I think
17 our trust obligation in this rulemaking is
18 similar to any other rulemaking that we take on.

19 WILSON PIPESTEM: Well, what about the
20 relationship between the United States and the
21 federally recognized tribes with regard to their
22 ability to participate in appeals and the
23 process all the way through? Some of the
24 questions have been asked today would seem that
25 part of that obligation would mean that the

1 existing tribes would be able to have an
2 opportunity to participate at every level of
3 that, as Eastern Band leadership said today,
4 there's a number of groups that are Cherokee.
5 We've been -- This is our second -- We've heard
6 from three groups claiming to be Cherokee groups
7 so far just in two consultations.

8 So if the Department were to take one of
9 those or all three up or however many Cherokee
10 groups there are up for consideration, it would
11 seem like the existing federally recognized
12 Cherokee tribes should have a significant role
13 or say in that because you are, I believe you
14 have a trust obligation to tribes as a
15 protecting entity for their separateness and
16 their culture and that sort of thing. It's not
17 simply, this is kind of a Reed Chambersesque
18 argument, by the way.

19 LARRY ROBERTS: I guess I look forward
20 to Eastern Band's comments on process. Because
21 we're not trying to change the substantive input
22 that exists in the process now. I know that
23 there's focus on the IBIA hearing after the
24 fact. The proposed rule, as I said before, is
25 something we look at. This is the only decision

1 by the Assistant Secretary that's not subject to
2 that. So we propose not taking that out, but
3 there may be very legitimate reasons as to why
4 it should remain in. And so I think that that's
5 why we have these consultations and that's why
6 we need the input from tribes on that.

7 WILSON PIPESTEM: So one other issue I
8 want to raise again is the pre 1934
9 identification of the tribe and the continuous
10 existence of any group that petitions, says
11 they're a federally recognized, to be a
12 federally recognized tribe, particularly in the
13 Southeast. There's so much history that
14 happened there pre 1934 where the groups that,
15 many of them either aren't of any Indian
16 ancestry at all, I believe that certainly
17 exists, but those who do have Indian ancestry
18 basically gave up their tribal relations with
19 one another or any sort of governance. The
20 brief narrative requirement in the new
21 regulations would essentially say that they
22 don't really have to demonstrate their
23 historical tribe. The brief narrative is a, I
24 think a brief narrative I'm thinking, whatever
25 that means, it's probably not very much

1 information and there's really no standard to
2 which you're holding the brief narrative.

3 So am I right about that, there's not a
4 standard to that -- If somebody submitted ten
5 pages and said, here's who we are, is that just
6 accepted on its face to be the case particularly
7 where there's a lot of evidence to the contrary?

8 LARRY ROBERTS: No. I think the brief
9 narrative require, I mean, in the criterion (a)
10 requires evidence as well. And so obviously
11 during the engagement on a proposed finding,
12 once we got that petition in, I mean, we would
13 contact federally recognized tribes that, as we
14 do now that we receive this petition, you know,
15 and provide comment on it.

16 So no, it's not standard lists. It is
17 something that, you know, we have heard and you
18 have heard because we've been in other
19 consultations, it's something that deserves
20 further clarification.

21 And so, you know, we would, you know, we
22 welcome further clarification on that and
23 suggestions for clarification, but it's
24 essentially intended to, you know, we're not,
25 and I've said this at every, every session,

1 we're not making up or creating tribes that
2 didn't exist and that came into existence in the
3 1940s and 1950s and 1960s. (a) is, you know,
4 tell us your history. Where did you come from?
5 You didn't just pop up in 1934 as communities.
6 You have to prove through evidence and a short
7 summary where you come from, which should be
8 relatively easy for legitimate tribes, as all of
9 you have said in this room.

10 WILSON PIPESTEM: Okay. Thank you very
11 much.

12 LARRY ROBERTS: Any other comments this
13 afternoon?

14 Well, I appreciate you all attending
15 this session. You know, we issue proposed rules
16 because we need input from all of you in terms
17 of putting together a strong final rule. So
18 thank you for taking the time today, and I
19 encourage you to submit comments by the
20 deadline.

21 I've heard each of your requests for an
22 extension of the comment period. We will take
23 that back to the Department. We have heard
24 requests from Eastern Band of Cherokee earlier
25 and we'll consider that and get some information

1 out on an approach on whether we're going to
2 extend the comment period as soon as we can.
3 Thank you all.

4 (Recess at 2:35 p.m.)

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C E R T I F I C A T E

I, Aleshia K. Macom, a Certified Shorthand Reporter for Oregon, do hereby certify that at the time and place set forth in the caption hereof I reported in Stenotype all oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and that the foregoing transcript, pages 1 to 68, both inclusive, constitutes a full, true and accurate record of all proceedings had, and of the whole thereof.

Witness my hand and CSR stamp at Vancouver, Washington, this 22nd day of July, 2014.

Aleshia K. Macom
ALESHIA K. MACOM
Certified Shorthand Reporter
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