

NWX-DOI-BUR OF IND AFFAIRS (US)

Moderator: Larry Roberts
August 20, 2014
12:30 pm CT

Coordinator: Welcome and thank you for standing by. At this time all participants are in a listen-only mode. During the question and answer session please press Star 1 on your touch-tone phone. Today's conference is being recorded. If you have any objections you may disconnect at this time. And now I'll turn today's meeting over to Larry Roberts. Thank you sir, you may begin.

Larry Roberts: Good afternoon everyone. This is Larry Roberts, Deputy Assistant Secretary for Indian Affairs. Thank you for joining this tribal consultation with federally recognized tribes. With me today or on the table we have Lee Fleming, the Director of the Office of Federal Acknowledgment, (Katie Klass) from the (Solicitor's) Office, (Liz Appel) from our Office of Regulatory Affairs and (Amanda Begay). And the assistant secretary should be joining us shortly, hopefully within the next 15 minutes to a half hour.

This is a consultation with federally-recognized tribes and so we will only be taking questions from representatives of federally recognized tribes. It's closed-press and we will be having two public consultations the week of I believe it's September 3 and September 5, a call-in. And so for purposes of today's consultation what we're going to do is we're going to go through a

PowerPoint that you can find at www.bia.gov. When you go the BIA Web site at bia.gov there is a button on the right hand side of the Web site that points you to the Part 83 proposed rule. And when you click on that button there is a link there to a PowerPoint on the federal acknowledgement rules, and so - or the proposed rule.

And so we'll go through that PowerPoint. It should take roughly 30 minutes and then we'll open up the lines for any questions from federally-recognized tribes. And I'm not going to talk the whole time. The assistant secretary will be joining us and I'll also be handing it off to (Liz Appel) and (Katie Klass) to go through some of the PowerPoint so that folks are not tired of listening to my voice during this call.

So by way of background there are a number of ways in which the federal government can acknowledge or recognize Indian tribes, through a federal court decision, congress can recognize tribes through passing legislation and then administrative we have the Part 83 process and determination by assistant secretary. Prior to 1978 the department reviewed requests for federal acknowledgement on an ad hoc basis and in 1978 the department put in regulations to establish a uniform process to review those petitions.

In 1994 the regulations were revised, the criteria were not changed but there was a section that provided for previous federal acknowledgement to be added. In 2000, 2005 and 2008 the department published guidance on internal processing changes and of the 566 federally-recognized tribes 17 have been recognized through the Part 83 process. And so one of the reasons that we're looking at - that we've issued the proposed rule to revise the process is that it has been criticized externally by many as broken and some of the criticisms are that the process takes too long, that it's burdensome, that it's expensive, that it's unpredictable, not consistent and that it should be more transparent.

So in 2009 Secretary Salazar testified before the Senate Committee on Indian Affairs, and at that committee hearing the committee asked him to look at ways to improve the process and at that point in time he committed to examining ways to do that.

In 2010 the department started working on draft revisions to the Part 83 process and in 2010 the department testified before the committee - the Senate Committee on Indian Affairs essentially saying that they hoped to promulgate regulations within a year of proposed changes for the process. In 2012 the department again testified before the Senate Committee of Indian Affairs and we received questions from the committee in terms of why hadn't we moved forward with a proposed rule and at that hearing the department identified guiding principles or goals that the department was working on to improve the process.

In 2013 Assistant Secretary Washburn was confirmed by the senate in the fall of 2012 and shortly after his confirmation we again continued to work on reforms to the Part 83 process. And so in 2013 Assistant Secretary Washburn testified before the House Natural Resources Subcommittee on Indian Affairs explaining that we would be issuing a discussion draft. That discussion draft was issued in June of 2013 and was developed by a group of folks that are - their offices are represented around the table today but a group of folks from the Assistant Secretary's office, from the Office of Federal Acknowledgement and the (Solicitor's) Office.

And so the goals of that discussion draft were looking at ways to make the petitioning process more easily understood to increase transparency, to look at ways to increase timeliness, efficiency, flexibility to account for the unique histories of tribal communities and yet maintain the integrity of the process and maintain high standards. So in the summer of 2013 the department held a

number of public meetings and tribal consultations on the discussion draft and as a result of that we received over 350 comments from over 2,000 commenters and what we did is we reviewed those comments, a team of folks from the (Solicitor's) office, from the Office of Federal Acknowledgement and from the assistant secretary's office. They reviewed those comments and made changes, re-wrote the regulations as they are not to meet plain language requirements and then we submitted the rule to OMB for review and published the proposed rule on May 29 of this year.

And so we initially had a comment deadline of August 1 but we've extended that comment deadline to September 30, 2014. So with regard to the proposed rule itself I'm going to talk a little bit about revisions to the process and then I'm going to turn it over to (Liz) to talk about revisions and clarifications for the criteria and then I'm going to turn it over to (Katie Klass) to talk about the clarifications, the previous federal acknowledgement clarifications with the burden of proof and then the allowance for re-petitioning and additional notice requirements.

So with regard to revisions to the process one of the things that the proposed rule does and that we're seeking comment on is right now the process provides for all petitioners to submit a letter of intent and that letter can be a simple one-page letter essentially saying that the group intends at some point in the future to submit a petition. And so one of the things that we've proposed in the proposed rule is to start the process by when the group submits a complete application sort of like how we do with other processes here at the department.

In terms of review and revisions to the process the proposed rule proposes a phased review where we would look at the petition and the seven criteria but we would look at them in a particular order because every petitioner needs to

satisfy all seven criteria and if they fail on one of the criteria that can be alone a basis for disapproval. So the proposed rule proposes that the department review or that (OFA) review whether descent from a historical tribe, criterion E, is met.

And if the petitioner cannot show that that criterion is met then we would issue a proposed negative determination. If that criterion E was met then the department would next review criterion A which (Liz) will talk about in a few minutes here. It's a slightly - it's a revised version of A. But we would also look at B, F and G, whether they have a governing document, whether they have been terminated and cannot be recognized or not eligible for the process.

If the group meets all of those initial criterion then we would move to phase two and we would look to see whether they satisfy the criteria for community and political influence or authority. One of the things that the proposed rule provides is that if the group has held a state reservation from 1934 until the present or the United States has held land for the group at any point since 1934 that those two criterion - those facts would satisfy criterion B and C.

So the other things that we've proposed in terms of revisions to the process are that (OFA) as it currently stands the assistant secretary issues a proposed finding. The proposed rule would have the Office of Federal Acknowledgement issue a proposed finding, there would be a comment period just as we have now under the existing process and if the proposed finding is positive and we don't receive any comments, substantive comments from state and local governments challenging the proposed finding then the proposed finding would become final.

And that's consistent with other decisions in the past where we've issued a proposed finding, haven't received any negative comments and have moved

forward with issuing just a final determination. If the proposed finding is negative one of the changes that the proposed rule provides is that if it is negative then the petitioning group may elect a hearing before the Office of Hearings and Appeals -- a judge there -- and that that judge would make a recommended decision to the assistant secretary.

So final determination would still be made by the assistant secretary as it is currently under the current process but we would eliminate any further review by the Interior Board of Indian Appeals. The assistant secretary's decision will be final for the department just as the assistant secretary's decision is final on any other decisions that he makes for the department.

And then basically parties that would want to challenge that decision would be able to seek review in federal district court. In terms of hearings on a negative proposed finding before the Office of Hearings and Appeals one of the questions that has been presented for the public that we would like to get input from the public on specifically is who should preside over a hearing and who should issue a recommended decision. Should it be an administrative law judge who is probably the most independent within the Office of Hearings and Appeals? Should it be an administrative judge who reports to the Office of Hearings and Appeals director but routinely serves on (appellate court) matters or should it be an attorney that's designated by the Office of Hearings and Appeals director?

And so that's a question as to what sort of administrative judge should we have as part of this process. And another question would be for what (unintelligible) should we have that process on proposed negative findings. And then the other question we have is should the basis for the Office of Hearing and Appeals judge's decision be limited to the hearing record. The proposed rule provides that the petitioner may withdraw the petition at any

time before the proposed finding is published. OFA would then cease consideration upon withdrawal but if a petition is resubmitted that petitioner would lose its place in line and basically be placed at the end of the line in terms of consideration.

The other revisions is that the department would post to the internet those portions of the petition, the proposed finding reports, anything basically that OFA would receive as part of this process that is release-able under federal law that's not subject to the Privacy Act. We would endeavor to put those materials on the internet. So at this point we're going to transition a little bit and talk about the proposed rule criteria and I'm going to have (Liz Appel) from our Office of Regulatory Affairs walk through some of those proposed changes.

(Liz Appel): Okay, currently there are seven criteria that a petitioner must meet in order to become federally-recognized and under the proposed rule there would also be seven criteria. There is significant change to the fourth criteria, criterion A. Currently this requires that external observers identify the petitioner as an Indian entity and those external identifications are required approximately every 10 years. The proposed rule would delete that requirement and while that evidence could still be submitted in support of the other criteria the new criterion A would instead require a narrative of the petitioner's existence as a tribe before 1900.

And that narrative we've had some comments in past consultations about the narrative and possibly defining better what that narrative should consist of. We're anticipating that it wouldn't be a treatise it would be - but we would like more comment on how to better specify that. The first criterion is to show we're not creating new tribes, we need some narrative of their existence historically prior to 1900 but it seemed appropriate to delete the current

external identification requirement because no petitioner to date has been denied solely on that requirement.

So criteria B, community, and criterion C, political influence and authority, the proposed rule would change the time period for analysis so that the analysis is conducted from 1934 to the present. And that 1934 date was chosen because that is the Watershed Legislation, the Indian Reorganization Act when the federal government changed its relationship to federal tribes, to Indian tribes.

And again similar to the criterion A no tribe has met - that has been recognized through the Part 83 process has met this criterion from B or C from 1934 to the present but failed prior to 1934. So this proposed change would we believe reduce the administrative burden and increase the efficiency. Other changes to B criteria for community are that in an effort to establish a more objective standard it would require at least 30% of the membership to show distinct community for each time period and it would also allow attendance of students at Indian boarding schools as acceptable evidence indicating community.

And as the Deputy Assistant Secretary pointed out before if a petitioner has maintained a reservation -- a state reservation -- since 1934 or if the US held land at any point for the petitioner since 1934 then that would be - that would be sufficient evidence in support of the community and political influence and authority criteria. An additional change related to these criteria is that the phrase without substantial interruption would be defined to be less than 20 years.

And that is how it's been looked at as a general matter so that's codifying past practice. With regards to criterion E, descent, the proposed rule would

establish that 80% of the members must descend from a tribe that existed in historical times which is defined as pre-1900. And this again codifies past practice. Eighty percent has been required in past decisions. That doesn't mean that 20% can be non-Indians, it just means that 80% must have the documentation available. And criterion E requires descent. It allows descent to be traced from a (unintelligible) prepared by the department or at the direction or congress or if such (rule) is not available then whatever the most recent evidence prior to 1900 would be.

There has been in the proposed rule a change to criterion F, membership. We heard in consultations and hearings on the discussion draft that petitioners because - because the petitioning process was taking so long some of their members enrolled in federally-recognized tribes that they were also eligible for membership in. So we've added to the membership criterion that if the petitioner filed the petition or letter of intent by 2010 and then their members joined a federally recognized tribe in order to obtain services then that petitioner won't be penalized as far as those members are concerned.

And finally criterion G, congressional determination, right now the onus is on the petitioner to show that they have not been terminated by congress and the proposed rule would instead shift that burden to the department so the department would have to show if the petitioner was terminated by congress. All right so the proposed rule does not seek to change previous federal acknowledgement but instead we intended to just clarify the current application.

So to gain acknowledgement under the previous federal acknowledgement process a petitioner first has to meet criteria A, B, E, F and G which are tribal (unintelligible), government documentation, descent, membership and congressional termination. And then next the petitioner has to establish that

they were previously acknowledged which they can do by showing treaty relation, by showing that they were denominated a tribe by an act of congress or an executive order or that they were treated by the federal government as having collective rights and tribal lands or funds.

And once they establish that they were acknowledged in the past they have basically a tweaked community and political authority criteria process. So either they show community at present and then a demonstration of substantially continuous historical identification by authoritative knowledgeable external sources of leaders or governing (bodies to exercise) political influence or authority together with one other form of evidence of political authority or they show community and political authority from last acknowledgement (unintelligible).

We also sought to clarify the burden of proof rather than change it; it's still reasonable likelihood. We looked to Supreme Court precedents for a better definition of what reasonable likelihood means and clarified that it means more than a mere possibility that does not require more likely than not. The proposed rule also allows for re-petitioning in limited circumstances. Two things are required for a petitioner to be able to re-petition. First if there were third parties involved in an (unintelligible) reconsideration for a federal court appeal those third parties have to consent to the re-petitioning and then beyond that the petitioner has to prove by preponderance of the evidence to an OFA judge either that a change in regulations warrants a consideration or a misapplication of the burden of proof.

The way that a petitioner will go about demonstrating its eligibility for re-petitioning is by (unintelligible) through OFA and then OFA will (unintelligible). The proposed rule also maintains all of the notice given to petitioners and informed parties that exist in the current regulations but adds

to that notice. So under the proposed rule once OFA receives the petition and acknowledges receipt of the petition within 30 days and then within 60 days it publishes notice of receipt in the federal register, posts the petition's narrative and other information on the OFA Web site, notifies the governor and the attorney general of the state, also notifies any federally-recognized tribes within the state or a 25-mile radius and then also notifies any other tribes or petitioners with potential interest.

And then beyond that the proposed rule provides for lots of notice to petitioners and informed parties and that notice comes when OFA begins review of the petition, when OFA issues the proposed findings, when the assistant secretary grants any timing extensions, when the assistant secretary begins the review of the petition and when the assistant secretary issues a final determination.

Larry Roberts: Okay, so this is Larry Roberts again. We've been joined by Assistant Secretary Washburn and we are just wrapping up in this part of the presentation. We're going to open it up for comments in just a minute but I wanted to let everyone know that as I mentioned before we've extended the comment period to September 30 and also the Office of Hearings and Appeals has a proposed rule out there on the hearing process which is generally the rules of civil procedure for how they would conduct a proposed hearing.

Both of those comments deadlines are September 30. You can submit comments via e-mail at consultation@bia.gov. And then next steps is once the comment period closes our team of folks from the Office of Federal Acknowledgement, from the (Solicitor's) office and from the assistant secretary's office will again reconvene and start reviewing those comments and then we'll move forward as appropriate. A final rule would not become

effective for at least 30 days after any publication. So with that I'll turn it over to Assistant Secretary Washburn.

Kevin Washburn: Thank you Larry and thanks everybody on the phone. I think that now is the time to proceed to - to allow people to make comments or questions, raise questions and we can proceed that way. I thank everybody for being on the consultation. Does anybody have any comments they'd like to make?

Man: Operator, (unintelligible).

Coordinator: This is the operator. For questions or comments from the phone lines press Star 1. Please unmute your line and record your name to be introduced. Again press Star 1 please. If you'd like to withdraw the request you may press Star 2. Thank you, one moment for your first question. We do have our first question from (Shirley Boughton). Your line is open and state your tribe please.

(Shirley Boughton): My tribe is Schaghticoke Indian Tribe of Connecticut but I am not yet federal-recognized so I don't know if I'll be able to be heard.

Kevin Washburn: (Shirley) this is Kevin Washburn. We talked about this on Monday (unintelligible). This is the call for the tribal consultation with federally recognized Indian tribes and (unintelligible).

(Ms. Boughton): Right and that's what I understand and that's why I stated that.

Kevin Washburn: No, I appreciate that. And so we would be delighted to hear from you during the public comment period on September 3 or September 5.

(Ms. Boughton): Yes.

Kevin Washburn: Thank you.

(Ms. Boughton): Thank you.

Coordinator: Thank you. Again for any questions or comments press Star 1 please. We're showing no questions at this time.

Kevin Washburn: All right, let's wait just a moment just in case people are formulating them or are slow to come off mute or something like that.

Larry Roberts: Well one purpose of these calls is sort of an educational function and so we hope that this might have stirred some interest in making comments and there's still more than a month in which to submit comments to us on this rule. So for those of you who are on the call and interested in making comments please feel free to do so. We would love to hear from you to our e-mail address at consultation@bia.gov if you've got comments about any part of the rule and if there are no questions we'll go ahead and close. Anybody have a final question or a comment? All right, well I think I will gavel this thing to a close.

I'm grateful to our staff here for presenting the information and thank you for those on the other end of the line for participating in the consultation and there will be public comment periods, two consultations, two meetings, teleconferences on September - one on September 3 at 1:30 and one on September 5 at 1:30 to get further public comments on this rule and we will look forward to those and in the meantime like I said feel free to submit written comments at any time.

And tribes can participate in those if - on those calls if they are interested in doing so. They are part of the public as well. All right, again thanks to

everybody here and thanks everybody on the phone and we will go ahead and conclude. Thanks everybody.

Coordinator: Thank you for your participation. Again that does conclude today's conference. You may disconnect at this time.

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