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AUTHORIZATION, STANDARDS, AND PROCEDURES FOR WHETHER, HOW, AND WHEN INDIAN TRIBES SHOULD BE NEWLY RECOGNIZED BY THE FEDERAL GOVERNMENT: PERSPECTIVE OF THE DEPARTMENT OF THE INTERIOR

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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OVERSIGHT HEARING ON "AUTHORIZATION, STANDARDS, AND PROCEDURES FOR WHETHER, HOW, AND WHEN INDIAN TRIBES SHOULD BE NEWLY RECOGNIZED BY THE FEDERAL GOVERNMENT: PERSPECTIVE OF THE DEPARTMENT OF THE INTERIOR."

Tuesday, March 19, 2013
U.S. House of Representatives
Subcommittee on Indian and Alaska Native Affairs
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to notice, at 11:02 a.m., in room 1324, Longworth House Office Building, Hon. Don Young [Chairman of the Subcommittee] presiding.

Present: Representatives Young, Mullin, Daines, LaMalfa, Hanabusa, Cárdenas, Ruiz, and Faleomavaega.

Also Present: Thompson; Napolitano, and Huffman.

Mr. YOUNG. The Subcommittee will come to order. The Chairman notes the presence of a quorum. The Subcommittee on Indian and Alaska Native Affairs is meeting today to hear testimony from the perspective of Department of the Interior concern in recognition of Indian Tribes.

Under Committee Rule 4(f), opening statements are limited to the Chairman and the Ranking Member of the Subcommittee, so we can hear from our witnesses more quickly. However, I ask unanimous consent to include any other Members' opening statements in the hearing record, if submitted to the clerk by the close of business today.

[No response.]

Mr. YOUNG. Hearing no objections, so ordered. I will ask also unanimous consent—and I don't know where they are—but that when they get here, the gentlelady from California, Ms. Napolitano, the gentleman from California, Mr. Thompson, and the gentleman from California, Mr. Huffman, be allowed to sit on the dais and ask questions.

STATEMENT OF THE HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. YOUNG. In the year 2012 the Subcommittee held an oversight hearing regarding Federal recognition of Indian Tribes. But the Department did not make a witness available. Because the perspective of the executive branch is so important, today we are holding what may be considered part two of that hearing. Our witness today is Assistant Secretary for Indian Affairs Kevin Washburn. Though he has been in his position for nearly 6 months, it is Mr.

Washburn's first opportunity to testify before the Subcommittee. I do welcome him today.

Last year, my opening statement set forth a few facts concerning Federal recognition of the Tribes. They are worth briefly mentioning again. Tribal recognition is one of the most solemn issues this Committee deals with. It has impacts on the Federal budget, on the Government's trust responsibility on other recognized Tribes, and on States and their political subdivision. In effect, the legal rights of many individuals, both Indian and non-Indian, who reside or do business in any reservation.

Historically, Tribes have been recognized pursuant to the Acts of Congress, treaties and Executive orders. In modern times, however, the Bureau of Indian Affairs has extended recognition to two new Tribes without clear instruction for Congress. This is inconsistent with the precedents established by the Supreme Court, which held that Congress possesses power over Indian Affairs, not the executive branch, which, in tribal areas, is limited solely to performing actions specified by Congress.

Much of the controversy surrounding the number of recognition and fee-into-trust action made by the BIA may be traced to the failure of the Agency to act according to the specific directions from the Congress. The Department of the Interior has its own perspective. And today I am pleased to welcome the new Assistant Secretary to provide it for the members of the Committee on how they believe.

I look forward to the witness, and now recognize the Ranking Member for 5 minutes.

[The prepared statement of Mr. Young follows:]

PREPARED STATEMENT OF THE HONORABLE DON YOUNG, CHAIRMAN, SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

On June 27, 2012, the Subcommittee held an oversight hearing regarding Federal recognition of Indian tribes, but the Department did not make a witness available. Because the perspective of the executive branch is so important, today we are holding what may be considered Part Two of that hearing.

Our witness today is the Assistant Secretary for Indian Affairs, Kevin Washburn. Though he has been in his position for nearly 6 months, it is Mr. Washburn's first opportunity to testify before the Subcommittee.

Last year, my opening statement set forth a few facts concerning Federal recognition of tribes. They are worth briefly mentioning again.

Tribal recognition is one of the most solemn issues this Committee deals with. It has impacts on the Federal budget, on the Government's trust responsibility, on other recognized tribes, and on States and their political subdivisions. It affects the legal rights of many individuals—both Indian and non-Indian—who reside or do business in Indian reservations.

Historically, tribes have been recognized pursuant to Acts of Congress, Treaties, and Executive orders. In modern times, however, the Bureau of Indian Affairs has extended recognition to new tribes without clear instructions from Congress.

This is inconsistent with the precedents established by the Supreme Court, which has held that Congress possesses "plenary" power over Indian Affairs. Not the executive branch, which in the tribal arena is limited solely to performing actions specified by the Congress.

Much of the controversy surrounding a number of recognition and fee-to-trust actions made by the BIA may be traced to the failure of the agency to act according to specific direction from the Congress.

The Department of the Interior has its own perspective and today, I am pleased to welcome the new Assistant Secretary to provide it for the benefit of the members of the Subcommittee.

STATEMENT OF COLLEEN W. HANABUSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Ms. HANABUSA. Thank you, Mr. Chairman. I am pleased to return to this Subcommittee in the 113th Congress as its Ranking Member. And I, of course, look forward to working with you, Mr. Chairman, and with the Indian Country on a variety of pressing issues, including Federal recognition and the administrative acknowledgment process, which we will examine here today.

I would like to first welcome Assistant Secretary Washburn to the hearing. Your testimony is important, not only for the groups who seek to confirm a nation-to-nation relationship with the United States through the administrative process, but also for existing federally recognized Indian Tribes, their governments, and State and local communities who may be impacted by Federal recognition of the new Indian Tribes. And thank you for being here today.

In this Subcommittee's hearings on Federal recognition process in the 112th Congress, we heard testimony from three groups who are seeking Federal recognition. These groups are either actively seeking acknowledgment through the administrative process, or failed to meet the acknowledgment criteria and now, therefore, seeking recognition through legislative or judicial decree, or both of them. These groups testified to their experiences as the Office of Federal Recognition petitioners, and the message was quite clear: The system is broken.

They testified to the high cost to gather information and present a successful petition, the length of time petitioners must wait to learn their status, and the lack of transparency with which the OFA received, reviewed, and advanced their petitions.

The witnesses also testified that the recognition criteria do not take into account, or are even hostile to, their unique historical circumstances. They were very clearly frustrated, tired, and dismayed by their experiences.

As a Member from Hawaii, I have led the legislative efforts in the House to achieve Federal recognition for Native Hawaiians. I understand how difficult the process of Federal recognition is, and recognize that the regulatory barriers to achieving Federal status for petitioning groups are many. That is why I support meaningful reform to the OFA process that takes into account suggestions from all interested parties, the general public, federally recognized Indian Tribes, and petitioning groups, for reforms to administrative acknowledgment that improve OFA's transparency, timeliness, efficiency, and flexibility.

The last revisions to the regulatory process found at 25 CFR part 83 were made in 1994. It is well past time to revisit the regulations and identify changes that can be made to expedite the process, make it less financially burdensome, and more transparent for petitioning groups, some of whom have been waiting decades for a decision from OFA.

I look forward to hearing the Administration's testimony on when, not whether, reform can be made in the near term. Thank you, Mr. Chairman. I yield back.

[The prepared statement of Ms. Hanabusa follows:]

PREPARED STATEMENT OF COLLEEN W. HANABUSA, RANKING MEMBER, SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

Thank you, Mr. Chairman.

I'm pleased to return to the Subcommittee in the 113th Congress as its Ranking Member. I look forward to working with you, Mr. Chairman, and with Indian country on a variety of pressing issues, including Federal recognition and the administrative acknowledgment process which we will examine today.

I'd like to first welcome Assistant Secretary Washburn to the hearing. Your testimony is important not only for the groups who seek to confirm a nation to nation relationship with the United States through the administrative process, but also for existing federally recognized Indian tribes, their governments, and State and local communities who may be impacted by Federal acknowledgment of new Indian tribes. Thank you for being here today.

In this Subcommittee's hearing on the Federal acknowledgment process in the 112th Congress, we heard testimony from three groups who are seeking Federal recognition. These groups are either actively seeking acknowledgement through the administrative process or failed to meet the acknowledgement criteria and are therefore seeking recognition through legislation or judicial decree (or both).

These groups testified to their experiences as Office of Federal Acknowledgment (OFA) petitioners, and the message was quite clear: the system is broken. They testified to the high cost to gather information and present a successful petition, the length of time petitioners must wait to learn their status, and the lack of transparency with which the OFA received, reviewed and advanced their petitions. The witnesses also testified that the recognition criteria do not take into account—or are even hostile to—their unique historical circumstances. They were very clearly frustrated, tired and dismayed by their experiences.

As a Member from Hawaii, I have led legislative efforts in the House to achieve Federal recognition for Native Hawaiians. I understand how difficult the process of Federal recognition is, and recognize that the regulatory barriers to achieving Federal status for petitioning groups are many. That is why I support meaningful reform to the OFA process that takes into account suggestions from all interested parties—the general public, federally recognized Indian tribes and petitioning groups—for reforms to administrative acknowledgment that improve OFA's transparency, timeliness, efficiency and flexibility.

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Mr. YOUNG. I thank the good lady. Now we will hear from our witness, who is Kevin Washburn, the Assistant Secretary of Indian Affairs, Department of the Interior. He is accompanied by Lawrence Roberts, Deputy Assistant Secretary for Indian Affairs. It is my understanding Mr. Washburn will provide a formal statement, and Mr. Roberts will assist him in answering specific questions.

And, as a witness, Mr. Washburn, you know you have a 5-minute rule, but I am pretty lenient if you would like to continue, because I do think this is an important hearing. That goes along with the answers. I will rap the gavel if the other guys get a little bit too long, because there are other people waiting.

But you will have that—watch the red lights, make sure you push your button that says "talk"—I guess you have a button down there, or at least one on front. And that is how we will conduct this hearing. And with that, I welcome you here, and I have high hopes for your testimony and your performance on your job. You are up.

STATEMENT OF KEVIN K. WASHBURN, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY LAWRENCE ROBERTS, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. WASHBURN. Thank you, Chairman Young. It is a real honor to be here. And Ranking Member Hanabusa, and members of the Committee, this is my first appearance before this Committee. And again, it is a real honor. I would note that Chairman Young I have met with more than any other Member of Congress so far, and that has also been a real honor. Grateful to have that support. I have a lot to learn, and I am anxious to learn from all of you.

I am a member of the Chickasaw Nation, the same Tribe as Tom Cole, who has become a close friend. And his mother was both my House Representative in the State legislature of Oklahoma, and then later my Senator. And so I have a long relationship with the Coles.

I currently serve as Assistant Secretary for Indian Affairs, and I am learning about the acknowledgment and recognition process. I do, as the Chairman noted, have Deputy Assistant Secretary Larry Roberts with me here today, who is a member of the Oneida Tribe of Wisconsin. And we are happy to talk about acknowledgment efforts. I have brought Mr. Roberts because he is my principal deputy, he is my number one assistant, and he has been tasked largely with overseeing our work group.

We have put together a work group to look into Federal acknowledgment issues, because these issues are so important. And we do intend to recommend changes to the process. The group has been meeting, I believe they have had five or six meetings so far, and we are looking at everything related to the process with an effort toward making recommendations.

We have seen Mr. Faleomavaega's proposed legislation, and we have looked to it for ideas into how we reform the process. And we certainly are interested in input from each of you, as that process goes forward.

As you know, this is one of the most important things we do. It is an important responsibility. We have a government-to-government relationship with American Indian Tribes, and we have to identify those Tribes in order to exercise that relationship properly.

The Department of the Interior has recognized Tribes in an ad hoc process from 1961 to 1978, recognized about 10 Tribes that hadn't been sort of routinely recognized before that.

From 1978 to the present, through the Part 83 process, we have recognized approximately 17 Tribes. And Congress, during the same time, has recognized around 31 Tribes. So you actually do more work in this area, or about as much work as we do. And so we share that responsibility, and we are happy to work with you. We are always pleased when Congress takes the lead and is willing to recognize Tribes, because it is certainly your responsibility as well, and we are happy to work with you on that.

Approximately 34 tribal groups have been denied recognition through our process since the Part 83 process was created in 1978.

We have identified several standards that we would like to pursue, and ensuring that we do a good job in reforming our efforts.

Transparency, making sure that everybody knows what we are doing, and understands the reasons therefor, is very important. Transparency is important in all forms of government, and nowhere as much as here, where it is such a high-stakes process.

Timeliness is obviously very, very important. We have sometimes heard from you that people are dismayed about how long the process takes. And that is not all on our end, some of that is because Tribes don't have the resources to hire experts and that sort of thing. But it is something that we are concerned about.

Efficiency. Obviously, the process has become more and more and more expensive over the years, and that is not necessarily a good use of the resources, for this process to take up resources from poor communities.

Finally, flexibility. We feel like we need to make sure we have adequate flexibility in the process. And so we will be looking with those key factors in mind about how to reform the process.

I will tell you, more important than any of these, is just simple, the matter of justice. We have to come to just results, and results that people trust, that the American public trusts. And so, those are the things that will guide us as we work to come up with efforts to reform the Part 83 process. And we are looking very intently at that process.

We have constructed a team within the Department which involves both people who have been around this area for a long, long time, and some newer people, so that it gets a fresh look by people that don't have fixed ideas about how things need to come forth. We hope to have a discussion draft that we will begin to roll out and consult with your staff and with Tribes, hopefully before the summer, or during the summer, if not before the summer. And we will then proceed, hopefully, to a rulemaking process in which we will come up with a final rule to replace Part 83 or to adjust Part 83.

I think that is probably enough. Thank you, Mr. Chairman.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF KEVIN K. WASHBURN, ASSISTANT SECRETARY, INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR

Good morning Chairman Young, Ranking Member Hanabusa, and Members of the Subcommittee. My name is Kevin Washburn, and I am a member of the Chickasaw Nation of Oklahoma, and currently serve as the Assistant Secretary—Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Department's views on Federal acknowledgment of Indian tribes.

Implications of Federal Acknowledgment

The acknowledgment of the continued existence of another sovereign entity is one of the most solemn and important responsibilities undertaken by the Department. Federal acknowledgment permanently confirms the existence of a nation-to-nation relationship between an Indian tribe and the United States.

The decision to acknowledge an Indian tribe often involves input from a number of parties including other Indian tribes and State, and local governments. Once federally acknowledged, the tribe is generally eligible for Federal services and programs and other rights as recognized by Federal law. In 1994, Congress confirmed that Federal agencies must not make distinctions among federally-acknowledged tribes.

Background of the Federal Acknowledgment Process

The Department's process for acknowledging an Indian tribe is set forth at 25 CFR Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." (Part 83 Process) This process provides for the Assistant Sec-

retary to make a decision on whether to acknowledge a petitioner's nation-to-nation relationship with the United States. These regulations include seven "mandatory" criteria, by which a petitioner must demonstrate that:

(a) It has been identified as an American Indian entity on a substantially continuous basis since 1900;
(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
(c) It has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
(d) It has provided a copy of the group's present governing document including its membership criteria;
(e) Its membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;
(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian Tribe; and,
(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

The Department considers a criterion satisfied if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. This consideration does not mean that the Department applies a "preponderance of the evidence" standard to each petition. A petitioner must satisfy all seven of the mandatory criteria in order for the Department to acknowledge the existence of a group as an Indian tribe.

The Office of Federal Acknowledgment (OFA) is located with the Office of the Assistant Secretary—Indian Affairs and makes acknowledgment recommendations to the Assistant Secretary. OFA is currently staffed with a Director, an administrative assistant, four anthropologists, four genealogists, and four historians. Generally, a team composed of one professional from each of these three disciplines reviews each petition.

Recent Actions Under the Acknowledgment Process

The Department has issued 12 decisions on acknowledgment petitions since 2009. These include five proposed findings and seven final determinations. Of these final determinations, the Department issued a positive decision acknowledging the Shinnecock Indian Nation in New York. The six negative final determinations were as follows:

- October 27, 2009 final determination not to acknowledge the Little Shell Tribe of Chippewa Indians of Montana (#31).
- March 15, 2011 final determination not to acknowledge the Juaneno Band of Mission Indians, Acjachemen Nation (#84A).
- March 15, 2011 final determination not to acknowledge the Juaneno Band of Mission Indians (#84B).
- April 21, 2011 final determination not to acknowledge the Choctaw Nation of Florida.
- March 23, 2012 final determination not to acknowledge the Central Band of Cherokee.
- September 9, 2012 final determination not to acknowledge the Brothertown Indian Nation (#67).

Since the establishment of the Part 83 Process in 1978, the Department has issued 53 final determinations and 7 reconsidered final determinations. Overall, the Department has federally recognized 17 Indian tribes and denied 34 groups.

The Department currently has nine petitions under active consideration, and four petitions awaiting active consideration. In addition, 265 groups have submitted only letters of intent or partially documented petitions, and are not ready for evaluation.

In the foreseeable future, the following proposed findings may be issued:

- Southern Sierra Miwuk.
- Muscogee Nation of Florida.
- Meherrin Indian Tribe.
- Piro-Manso-Tiwa.
- Pamunkey Indian Tribe.

Recent Actions in Addition to the Acknowledgment Process

The Part 83 Process is used by the Department to acknowledge Indian tribes that "are not currently acknowledged as Indian tribes by the Department." The Department may also reaffirm a nation-to-nation relationship with tribes by rectifying pre-

vious administrative errors by the Bureau to omit a tribe from the original Federal Register list of entities recognized and eligible to receive services from the Bureau of Indian Affairs or by resolving litigation with tribes that were erroneously terminated.

Early in the first term of President Obama's Administration, then Assistant Secretary Echo Hawk committed to consider requests for the reaffirmation of tribal status for those tribes that were not included on previous lists of federally recognized tribes due to administrative error. After a careful review of information submitted over a period of years, Assistant Secretary Echo Hawk reaffirmed the government-to-government relationship between the United States and the Tejon Indian Tribe in December 2011. The Tejon Indian Tribe had been omitted from the 1979 list of Indian tribes due to a unilateral administrative error on the part of the United States.

In 2009, the Department, working with the Department of Justice, entered into an agreement as part of the settlement of litigation to restore the United States government-to-government relationship with the Wilton Rancheria. The Wilton Rancheria had been erroneously terminated by the United States under the California Rancheria Act of 1958, Pub. L. No. 85–671, *amended by* Pub. L. No. 88–419. The settlement agreement, and the corresponding court order, provides that the Wilton Rancheria is restored to the same status it enjoyed prior to the distribution of its trust assets, and that the Tribe is entitled to any of the benefits or services provided or performed by the United States for Indian tribes.

Principles Guiding Improvements in the Federal Acknowledgment Process

Some have criticized the Part 83 Process as expensive, inefficient, burdensome, intrusive, less than transparent and unpredictable. The Department is aware of these critiques and, as we have previously indicated, we are reviewing our existing regulations to consider ways to improve the process to address these criticisms. Based upon our review, which includes consideration of the views expressed by members of Congress, former Department officials, petitioners, subject matter experts, tribes and interested parties, we believe improvements must address certain guiding principles:

- **Transparency**—Ensuring that standards are objective and that the process is open and is easily understood by petitioning groups and interested parties.
- **Timeliness**—Moving petitions through the process, responding to requests for information, and reaching decisions as soon as possible, while ensuring that the appropriate level of review has been conducted.
- **Efficiency**—Conducting our review of petitions to maximize Federal resources and to be mindful of the resources available to petitioning groups.
- **Flexibility**—Understanding the unique history of each tribal community, and avoiding the rigid application of standards that do not account for the unique histories of tribal communities.

We have created an internal workgroup that is closely examining these suggestions and developing options to improve Part 83. The workgroup is also considering processes to implement 25 U.S.C. § 473a, also known as the Alaska amendment to the Indian Reorganization Act (IRA) of 1934, which provides that groups of Indians in Alaska not recognized prior to 1936 may organize under the IRA if they satisfy certain criteria.

The Department is working toward a goal of distributing a discussion draft of the Part 83 regulation this Spring. We plan to make the discussion draft available to the public for comment, to consult with federally recognized tribes and to meet with non-federally recognized groups for their input. Following this first round of consultation and public input, we will further revise the draft to address comments received and then prepare a proposed rule for publication in the Federal Register. This will open a second round of consultation and the formal comment period to allow for further refining of the regulations prior to publication as a final rule. The timing for publication of a final rule depends upon the volume and complexity of comments and revisions necessary to address those comments, but our ultimate goal is to have a final rule published in 2014.

Conclusion

I would like to thank you for the opportunity to provide my statement on the Federal acknowledgment process. I will be happy to answer any questions the Subcommittee may have.

Mr. YOUNG. Thank you, Mr. Washburn. I appreciate it. And, as customary, I am going to recognize the Ranking Member first for questions, comments, whatever she would like to talk about.

Ms. HANABUSA. Thank you, Mr. Chairman. Secretary Washburn, you laid out the timetable, which I am interested in. You said that some time during the summer you anticipate rolling out the draft to us, and then engaging in rulemaking process after that.

When do you anticipate starting the rulemaking process?

Mr. WASHBURN. Madam Ranking Member, that will depend on kind of the comments that we get back. If we have a proposal at the front end that is acceptable to people, it could happen sooner. If we really have to go back and really rethink things, it will take a little bit longer.

We kind of came into this with the idea that it probably takes 2 years, if everything goes well, to accomplish this sort of thing, because of all the steps that need to happen in the process. And we would love to have it done faster than that, but we also want to be careful to get it right, because we have talked about doing this for more than a decade, and it is time to get it done. We want to get it done right this time.

And so we hope you will be patient with us, but we certainly want to move as expeditiously as possible.

Ms. HANABUSA. Mr. Secretary, there is also another schedule, which is that, it is a 4-year term for the President. So, more than likely, it is a 4-year term for yourself. So, given that fact, I mean, you might want to take more time, and we might want to take more time, but it would be, I think, a great disservice to those who have been waiting for these changes since probably around 1994 to then tell them it may take 4 years or it may take 3 years, and then we are not able to avail themselves of the process under those who, in essence, are creating it.

So, is 2 years the best estimate you have, in a perfect world situation?

Mr. WASHBURN. I think that is fair to say. Let me tell you that we came in talking about this and ready to work on it from the moment we started. Mr. Roberts started about a month before I did, and had an interest in this area. I heard a lot about it during my confirmation process, and from former assistant secretaries, and several of them said, "I wish that I had gotten that done." And we knew that, to get it done, we needed to focus on it early.

And so, we have started from day one working on this issue. And we do hope that we can get it done in 2 years so we can move on to other important matters.

Ms. HANABUSA. And how many petitions are presently pending? And what happens to them while you are engaging in this potential rulemaking process which may take place as early as summer, but may take 2 years? What is going to happen to them?

Mr. WASHBURN. Well, we have talked about what to do with those—certainly we hope to make improvements in the process. And so one of the issues is, do we force people to go through a process that is currently being renovated? And I have lived in a house while it was being renovated, and that was not a pleasant experience. And so there may be groups that would like to sort of stay their petition while we make improvements to the process.

We don't want to force people to do that, but we have talked about giving them the option to place a pause on their petition, so that they can see if the criteria could change, and they may prefer the criteria that come out in the future, if we make changes to the criteria. And so we want to leave the flexibility in the process so that they may do that if they wish to do so.

I should have the number of pending petitions here before me. I believe we have 9 on active status, we have 4 on ready status, and 265 groups that have submitted partial petitions, such as a letter of intent, but which have not fully completed their applications.

Ms. HANABUSA. Mr. Secretary, one of the issues that we have faced in this Committee is the Carcieri decision. And of course, the magical year there is 1934. And, given the fact that we still do not have the Carcieri fix—that is something I know that the Chairman and I would like to see done—what are the chances that, once your new process comes in, that you are going to actually create two classes of Indian Tribes? I mean the pre-Carcieri ones who met the deadlines, and the ones who are now, post-Carcieri.

Mr. WASHBURN. Well, Madam Ranking Member, that is a real risk. That is a real problem, frankly. Until Congress can fix that Carcieri decision, that is what happens. And we, frankly, currently have two classes of Tribes. And we would like to treat all Tribes the same, and we have asked Congress for a clean Carcieri fix. But until we get that, we are going to have some Tribes that are recognized for whom we can take land into trust, and other Tribes that are recognized for whom we cannot take land into trust.

There is a real risk that a lot of the Tribes that we recognize going forward will not have the power to take land into trust, since they likely were not under our jurisdiction in 1934.

Ms. HANABUSA. Thank you, Mr. Chairman. I yield back.

Mr. YOUNG. And we will have a second round, if you wish to do so.

Mr. Mullin.

Mr. MULLIN. Thank you, Chairman Young. It is a privilege to be on this Committee. I tell you, as a Cherokee myself, it comes with a lot of pride. And Assistant Secretary Washburn, I know it is a pleasure, again, to meet with you. The Chickasaw Nation has been a good friend of mine.

And I know it is an honor for you to be sitting in this position. I know it carries a lot of pride that you get to take care of the country and your Nation at the same time, and even your family. And I feel that pride, literally, every day when I get up and I get to realize I am representing our constituents and so many Native Americans that live inside my district. You know we have the largest number of Native Americans in the country in my district.

And so, I want to make sure that what we do, going forward, that we do it right. And a big concern that we have inside our community is the way that Tribes are being recognized. Obviously, there has been a strong spike of individual Tribes looking for recognition, especially after the gaming law came out. And the way they are being confirmed is something that I believe has a cloud that surrounds it.

What I would like to understand is, what is the process you feel like is going forth, where we can make sure everybody is on the

same page, and the questions that so many Tribes are putting out there right now, where some Tribes take 3 years to be confirmed and some Tribes have been trying for 20 years. How can we make it look like there is a more even playing field?

Mr. WASHBURN. Thank you, Congressman. And it was a pleasure to meet with you a couple of weeks back. And I am grateful for your service on this Committee and for your interest in these issues. It is important for you, given your constituency, to be engaged on these issues. We want to be energetically engaged in ensuring that things move expeditiously for each Tribe, each group that puts in an application or a petition for Federal recognition.

As a practical matter, the times do vary quite a bit. Partially, that is because of resources available at the tribal level, among the groups. Do they have the resources to buy the expert witnesses that they need, the anthropologists, the ethnologists, the historians, to make this happen? Or do they not have those resources. And so, often times we have received a petition or a letter of intent, but the full application hasn't been prepared for many years.

We endeavor to provide technical assistance to groups, but there are limits to the technical assistance that we can provide, because we actually are sort of the judges of their petitions. And so it is up to the group to sort of meet the burden. And so, we do know that is an issue. We think timeliness is very, very important. And we endeavor to move in a timely way.

As I said in response to the Ranking Member, there is a risk that we will slow down just a little bit here, as we reconfigure the process. As we look at Part 83, we may want to put some petitions that otherwise would be due for a decision on hold so that we can make sure that the process is as fair as possible. Because, as you said, there is a lot of cloudiness around this.

And one thing we have already learned is just our looking at the process is a good opportunity for education. Mr. Roberts and I both have raised these issues with the National Congress of American Indians. We have been very pleased to see them very engaged on these issues. Several groups that have recently gone through the recognition process successfully have been engaged in those discussions with us, which is heartwarming, because there is nothing in it for them, they have already come through the process, and they made it through a difficult process already, but they have, nevertheless, said, "Here are some things that we see as problems with this process, and we encourage you to address them."

So, we will be taking input from wherever we can, and certainly from all of you, if you are willing to give it to us. And we will endeavor to move as expeditiously as we can.

Mr. MULLIN. Well, I look forward to working with you. As a Cherokee, as I said, I want to not just be an ear, but also be a voice. And so, when we are speaking about ancestries, some petitions that I might be of assistance with, please use my office. And we look forward to working with you. Thank you so much.

Mr. WASHBURN. Thank you, Congressman.

Mr. MULLIN. Mr. Chairman, I yield back.

Mr. YOUNG. I thank the gentleman. The gentleman from American Samoa.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. As a member of the Samoan Tribe, I just wanted to welcome Assistant Secretary Washburn, and I'm very appreciative of your most eloquent statement and understanding of the issue.

Mr. Secretary, I really hope that you will not delay the process. This is over 15 years we have been kicking this issue for so long. It is really sad.

I can think of my good friend and dear sister, Ms. Locklear, sitting there. The most populous Indian Tribe east of the Mississippi, over 60,000 Lumbees who have tried to be recognized for the last 100 years because of racism and bigotry and all the different things. And we are part of the mess. And they are still not recognized as a Tribe, and yet fully recognized by the State of North Carolina for all these years.

I tell you we have held how many hearings, we have had how many Administration officials testify, whether agree or disagree, this is not a Republican or Democratic issue. This is an issue that really needs to be righted for the wrong that has been committed. We all know the process is administrative. There has been no congressional statutory mandate that makes the process—and hence—let me tell you. The gentleman who testified 15 years ago, Mr. Chairman, right in that chair that you sit in, Mr. Secretary, he is the one that drafted the regulation, seven criteria that these Tribes had to fulfill before they can be federally recognized. You know what he said? Even he would not have been able to be recognized after going through the process of these seven criteria that they had to come through, it is just so ridiculous.

I know a couple times we have introduced legislation, maybe in doing so by statutory, the situation now is, it is done by regulation. And the fear that I have, Mr. Chairman, is that you know what happens to regulations? The Administration can change it, with or without our approval.

And I just wanted to ask you, when you say that it will be some time around the summer before you make a recommendation, what more information do you need to come up with some good recommendations? Like I said, it is already on the record, pros and cons and I know the Administration has always resisted having a congressional mandate or statute. This is not just Republican; Democrats, as well, and maybe because of the strong influence of the bureaucracy that we have downtown who don't want changes. They like to continue making these recommendations by having some overnight experts who are anthropologists.

I had a member of the Lumbee Indian Tribe testify that they wanted to find out what kind of teeth you had so that they could say, "Well, maybe you do look like an American Indian because of your teeth structure." I mean this is so ridiculous. But that is the kind of process that the poor Indian Tribes have been subjected to.

I know my time is up, but I would like your comment. Do you think that maybe summer is a little too long? I am sure that we can get the Congressional Research Service to give you all—I can tell you we have the records, we have the information. So what more do we need to—I am sorry, Mr. Secretary. I just hate to see this issue studied to death. We have the information. Could you please comment on this?

Mr. WASHBURN. Yes, Congressman. And let me say thank you for your own leadership on looking at these issues, and offering some real constructive solutions, because you have actually offered legislation on numerous occasions in the past, and there have been a lot of efforts to reform. We are moving as fast as we can.

It is a real honor to appear here. And so I would like to share that honor with my Deputy Assistant Secretary, who is a little bit closer to this issue than I am. So maybe he could talk a little bit about the timing and our timeline for this.

Mr. FALEOMAVAEGA. I have 29 seconds more. Go ahead, please. Quick.

Mr. ROBERTS. Thank you, Congressman. We are actively looking at all of the materials that you are discussing right now, in terms of the vast records that this body has put together, in terms of reform. And so, we want to put out a discussion draft this spring. We are not going to get everything right, we are going to need——

Mr. FALEOMAVAEGA. A few more seconds——

Mr. YOUNG. The gentleman will yield. You don't have that much time, but I will let him answer the question. I am not going to cut him off, OK? Go ahead, sir.

Mr. ROBERTS. Well, we are moving as quickly as possible, and we hope to get a discussion draft out this spring, so that everyone can take a look at it. Input can be provided very quickly so that, once we get a sense of what we have gotten right and what we have gotten wrong, that we can then move ahead with proposed rulemaking.

And so, I thank you for this leadership on this issue, and I thank you for building a record that we are looking at internally to build off of all the good work that this Committee has done.

Mr. FALEOMAVAEGA. Thank you, Mr. Chair.

Mr. YOUNG. I would like to make one comment. If I remember, my poor mature mind, I think we passed it out of this Committee twice, passed the House twice, and it went to the dark hole on the other side. So it would be helpful if we could do this administratively, if possible. And I do agree we should get it right, but some of these areas have been held up a long time.

Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. Thank you for appearing today, Mr. Washburn. I will try and whistle through this here.

You did mention there was currently nine pending reaffirmation requests that have their full application in, and then four partial? But the tally number is 265 letters of intent. And is that a normal backlog, or is that a recent spike, as was mentioned a while ago here, or——

Mr. WASHBURN. I don't believe that it is a spike. We have seen Tribes, I think have a little bit more success documenting their petitions in recent years, because there have been people willing to finance those petitions. Gaming has changed this process just a little bit. By no means do all of them seek to engage in gaming. And many of them had petitions in before gaming was known to any of us. But gaming has had the effect of giving some Tribes a little bit more resources to document their petitions.

Mr. LAMALFA. OK, thank you. When certain entities have sought recognition under the Part 83, do you think it is proper if they have

been denied that recognition in the past, or the recent past, with perhaps a cleaner process, that they should even be allowed to request a new reaffirmation since BIA's Office of Federal Acknowledgment has already determined that the petitioners do not meet the qualifications? How do you see that process?

Mr. WASHBURN. Well, I would hate to answer that strongly. It is something we are looking at because generally, when someone has been denied, that should be a decision that stands. There may be some exceptions to that, though, and so that is something that we are looking at. If we change the criteria, for example, it might lead some people to believe that an injustice has occurred, if someone was denied under more rigorous criteria and we make them more lenient, then they may say, "Well, that is not fair."

And so, those are the kinds of things we have to be cognizant of as we look to maybe slightly modify the criteria.

Mr. LAMALFA. Do you have a figure in the numbers we just mentioned here, the 265 intent or the 9 plus the 4 that have a whole or partial petition in, that have been previously denied? Do you have a figure on that?

Mr. WASHBURN. I don't believe so. The way our process works is we may sometimes put out a proposed finding of denial. And that proposed finding of denial may cause them to provide us more information that changes the final finding to an approval.

Mr. LAMALFA. I guess that would apply to final findings, then.

Mr. WASHBURN. That is right.

Mr. LAMALFA. Do you have many of those, currently in the pipeline that are——

Mr. WASHBURN. I don't believe so. I don't believe so, Congressman. I believe these are all sort of fresh, if you will, fresh applications, fresh petitions.

Mr. LAMALFA. OK. Getting more into the, I guess, unwieldy term of art "reservation shopping" that comes up a lot, it appears there is kind of an inconsistency in policy with the proposed gaming facilities. A concern comes up there is a 25-mile radius with impact to other existing Tribes where a proposed one may go in, yet in other criteria the impact will be assessed over a 50-mile area, 50-mile radius.

And so, what do we do about that inconsistency, because, again, in the wide-open spaces from my neighborhood, 25 miles is next to nothing for travel, so there has been 50-mile criteria looked at as well. What would your Department think about an impact that might be occurring just outside of a 25-mile radius? Say, 30, or within that 50 of existing Tribes who have gone through the process and then a new proposal would come up within that zone. Is that right, or is that fair? And what would your Department be doing to try and make that right?

Mr. WASHBURN. Well, Congressman, to some degree, these bright lines that we have created—25 miles, for example—are arbitrary. They just are. And 26 miles is outside of that zone. We, to some degree, just to make this process manageable, we have to create some bright guidelines. So we will follow the law and our regulations when we look at these matters of taking land into trust for Tribes for gaming.

But I will tell you that, at least informally, we hear from people outside the 25-mile zone, and we are happy to do so.

Mr. LAMALFA. Does that have any binding on the decision?

Mr. WASHBURN. I wouldn't say it has—it may not be binding, but it is certainly something that we take into consideration. These are, in large part, discretionary matters on our part. And we do pay attention to the views of people, even if they aren't strictly within the 25 miles.

Mr. LAMALFA. Mr. Chairman, with your indulgence, I have one more quick one, if you don't mind. Thank you.

The past practice has been when there is litigation involved until—if litigation is going on, the practice of the Department has not been to try and solve these issues until the litigation is over with. And we are seeing that perhaps that isn't the case any more. What is the defined practice of your organization on allowing litigation to be settled before a determination is made on the lands involved?

Mr. WASHBURN. Well, my staff and my lawyers will yell at me for saying anything at all, since these do involve matters in litigation. But let me just say that the Hatch Act decision that came out last year changed our views about these things, because we had previously stayed our hand on taking land into trust while litigation was pending, largely because once we took the land into trust we took the view that we were immune from suit at all, and so that we would essentially moot out that case. And so, to allow the case, allow the courts to hear the case, we had to stay our hand.

Now, with the Hatch Act decision decided, it does not appear that was correct. And so it appears that courts can continue to hear the case, and can continue to make a ruling on the merits, even if we have already taken the land into trust. And so, our inclination is that self-stay, if you will, is not necessary any longer, in light of Hatch Act.

Mr. LAMALFA. Thank you. I have nothing to yield back. Thank you.

Mr. YOUNG. Thank you. Mr. Ruiz.

Dr. RUIZ. Thank you, Mr. Chairman. Mr. Secretary, it was a pleasure to meet you yesterday in my office. And good luck with this work. I know it is very important, not only for many Tribes throughout, but it is also very important for our country that we get it right.

As I mentioned to you before, there are two very important things that I look for in a process that will recognize new sovereign Nations. And that is, one, sovereignty, and two is success. With sovereignty comes respect, and also comes responsibility, responsibility for themselves and responsibility for their surrounding communities, and responsibility to have great relationships with us and everybody else in the surrounding communities, and responsibilities to have those relationships with each other.

The other is success. And we mentioned earlier about making sure that we set up a process that will set them up for success and not for failure. Success for self-reliance, success for development of social, economic, cultural, and political progress in Indian Country. And so, with that, I appreciate your efforts, and you can count on

my office to assist in whatever way possible to help you achieve that.

My first question is, do you believe that any Federal administrative process which confers Federal recognition as a Tribe should require the individuals petitioning, to demonstrate Indian ancestry? And to what extent would that qualify?

Mr. WASHBURN. Well, absolutely. Part of the determination here is to determine whether this is an Indian Tribe. And so, Indian ancestry is an important touchstone, and is included within our criteria. So, we have taken that in the past as one of the criteria. We are looking at the criteria. I am kind of doubtful that is one that we would change. I think that is probably still exceedingly important to our process. But we are looking at the criteria, and we would be happy to have input about any changes you think regarding those factors might be necessary.

Dr. RUIZ. To what extent do you look into, I mean, what will satisfy the criteria, as it stands now?

Mr. WASHBURN. May I ask Mr. Roberts to address that?

Dr. RUIZ. Yes, absolutely.

Mr. ROBERTS. Sure. We look at descent from a historic Tribe or descent from Tribes that have combined, and that function. So a lot of the Tribes that we have recognized through the process will show descent through a very high percentage: 99, 98, 95 percent descent from a historic Tribe. So that is sort of how we have looked at it in the past.

And I know that in legislation that this body has considered in terms of reforming the process, that has maintained a component. We have heard some folks advocate that be a way to be more efficient in the process is to have that be a first look. And if a group can't satisfy that first take, then some would advocate, well, then expedite that denial and move resources to the other petitioners.

Dr. RUIZ. OK.

Mr. ROBERTS. And so, it is something that we have heard about and that we are looking at.

Dr. RUIZ. One more question in the hopes that it will go back around another turn, because I have others. But what if more than one splinter group or faction of a Tribe is seeking reaffirmation for the same tribal identity? And on what basis would the Bureau of Indian Affairs decide to choose which group would be reaffirmed as that Tribe, and which would not, if that is an issue?

Mr. WASHBURN. I am going to ask Mr. Roberts, Chairman, if that is OK, to answer that question as well. Thank you.

Mr. ROBERTS. Essentially, the Department issued guidance on this issue in 2008, in terms of how the Department will generally look at issues where a petitioner has splintered somewhere during the process. And so, in the process where they are petitioning for acknowledgment, where they have submitted the petition, OFA looks at whether the leadership dispute there is such that OFA cannot move forward with its expertise and resources. And the guidance there that was put out in 2008 essentially provides OFA some discretion to essentially put that on hold, if the leadership dispute is such that they just can't work with that petitioner.

In the ready stage, again, once the petition has been completed and they are ready to be actively considered by OFA, the guidance

suggests that OFA should advise the two groups that this division may result in the subgroups not being able to meet the criteria and encouraging them to move forward collectively.

Dr. RUIZ. Thank you very much. I appreciate your answers, and I really do appreciate all the work that you are doing.

Mr. WASHBURN. Thank you, Congressman.

Mr. YOUNG. Thank you, sir. Mr. Daines?

Mr. DAINES. Thank you, Mr. Chairman. Thank you, Mr. Secretary, for being here. As you know, I am a new Member from Montana. As you probably know, in the State of Montana, I represent an entire State, like our Chairman has an entire State, I represent seven federally recognized Indian reservations. And there is one Tribe, the Little Shell Tribe, that has been fighting for Federal recognition, literally, for decades. This is about 4,500 members of this Tribe; about 3,500 live in Montana.

And I serve with two Senators who are Democrats. I am a Republican. And our delegation has offered legislation to recognize this Tribe for several years, and Congress has had several hearings. To my knowledge, the BIA has issued a final determination denying Little Shell's Federal recognition and the Tribe has made an appeal. It has now reached, I guess, what is called active consideration in the Interior Board of Indian Appeals.

Now, I know that I am the new guy on the block here. But it seems if we can't settle the Little Shell Tribe's recognition, an effort that Montana, including our two Democratic Senators, my predecessor, Republican Denny Rehberg, our State Government, the local community, and myself all support, I am not sure what else the BIA needs to know on it.

It seems the Federal recognition process, as it affects the Little Shell Tribe, is clearly in need of some reform, hence the purpose of this hearing. In 2000, the BIA had stated in the Federal Register that the Little Shell Tribe had met all 7 criteria for Federal recognition. I realize this was a proposed decision, was not final. But 10 years later, after the Little Shell Tribe provided 10,000 pages of paperwork, the BIA revoked the position findings, citing, "A different weighing of the facts, which resulted in a deviation from precedent."

Now, the folks back home in Montana think that is a lot of paperwork for a negative outcome. As I said earlier, my colleagues in the delegation from Montana have pressed the Administration on behalf of Little Shell several times. In fact, in 2011 there was a hearing on Senator Tester's bill to recognize the Tribe in the Senate Indian Affairs Committee. At that point the BIA had revoked its positive proposed finding for the Little Shell Tribe, and the Tribe had filed for an appeal at the Interior Board of Indian Appeals, yet again spending more time and money fighting for something that should have been settled perhaps decades ago.

I guess, in light of this long history, what would you say is needed, in terms of reform to this process, because I think the Little Shell Tribe is looking at this process, and I think the lawyers are winning right now, but the Tribe is not.

Mr. WASHBURN. Congressman, thank you for that, that input. And I will tell you that it was similar statements by Senator Tester during my confirmation process that convinced me that this was a

process that desperately needed a careful looking at. And that is a big part of the reason that we are, indeed, looking to reform the system, and to see what improvements we can make to it.

The Little Shell matter, I gather, is in litigation. And so I am precluded from talking about it specifically. But I will tell you again that is one of the issues that caused me to think that there is something broken here that we need to take a look at. And we are endeavoring to do so.

Mr. DAINES. And perhaps setting the Little Shell as maybe a case study here of something demonstrating the need for reform, what reforms are you thinking about? I mean, I am glad you are here as part of the solution now, to address this problem. But what reforms need to be made that might help address the Little Shell? Not specifically, but it is an example?

Mr. WASHBURN. Well, let me say this. You raised one important issue yourself. The first few Tribes that went through this process gave us a couple inches of documents. And nowadays, we get truckloads of documents with regard to each one of these Tribes. And some people believe that there is a sort of a justice in there. How come one Tribe got recognized with 2 inches of documents, and nowadays it takes several linear feet worth of documents to get recognition, or even to get denied recognition?

And so, those are the kinds of issues that we are looking at. We want to put the people through a process that is rigorous enough to get to the right result, but not so onerous that it causes a lot of wasted effort. And you are right, we don't want to be providing a full employment act for lawyers. We want to be getting worthy Tribes through the process.

So, the Deputy Assistant Secretary might have a few additional comments, if that is OK with the Chairman and Congressman, to suggest things that we are looking at.

Mr. ROBERTS. And I think, generally speaking, it is exactly what the Assistant Secretary said. I mean we are looking at everything fresh. And we are looking at how can we make the process more efficient, more timely, how can we make the process more workable for petitioners, how can we make it transparent. We have heard from both the Congress and the public-at-large that sometimes there is a view out there that they are not applied objectively.

And so, we are looking at it all, essentially. And I think the discussion draft will provide a good sense of our first take on it.

Mr. YOUNG. I thank the gentleman, and there will be another round. I believe, yes, we should do so.

Mr. Cárdenas.

Mr. CÁRDENAS. Thank you very much, Mr. Chairman. A question to the Assistant Secretary. It has been stated by the Bureau of Indian Affairs that reaffirmation corrects administrative mistakes that were made which left Tribes off the list of federally recognized Tribes. How would the Department define a mistake in this context?

Mr. WASHBURN. Congressman, I gather that there is litigation regarding that general issue. And so I probably shouldn't speak too much to that issue.

I will say a little bit. As you know, we have sort of the regular Part 83 administrative process, then we have this sort of other

process that some people view as sort of an end-around to the regular process. And I have to say I have concerns about using a different process than the primary process. The Department has used this other end-around process only very rarely in history. Since we have had the Part 83 process in place, there have been only 5 or 6 occasions that other process has been used. And I think that is probably the right answer, that it should be used rarely, if at all.

And so, I probably shouldn't say any more than that, but I would say that it should be very rare that this administrative error type approach would be used, because we do have a regular process that maybe needs to be reformed, but is the one that most people have to go through.

Mr. CÁRDENAS. So, therefore, the Department somehow and some way in the past has acknowledged that there is such a thing as a mistake. But at this time the Department doesn't feel comfortable defining what a mistake is?

Mr. WASHBURN. Well, again, the matter is in litigation, so I feel like I shouldn't say too much. But certainly, I will tell you that the process of creating the tribal list in the first place, after Congress passed the Tribal List Act in 1994, it was an imperfect process. It involved people who had been involved in Indian Affairs kind of scratching their heads and trying to come up with all of the names that should go on that list.

And there have been a few occasions where Tribes with a lengthy history of past dealings with the United States were left off that list. And, indeed, those Tribes had a continuing government relationship with the United States. And in those circumstances, those Tribes should have been listed on the tribal list, and so, the mistake is when you leave off someone that has had a steady, continuous pattern of dealing with the United States, and a continuous governmental relationship with the United States over a long period of time. If they were not on the list, then that would be a mistake.

Mr. CÁRDENAS. Well, it is unfortunate that the amount of time that it takes for sovereignty to be officially recognized, leaves people in limbo. And that sovereignty really is the key, in 99.9 percent of the cases, to be able to have some semblance of order so that self-reliance can take place.

And, in the meantime, we have tremendous poverty. In the meantime, we have tremendous issues with groups of people who, without that recognition, I wouldn't want to say lost, but certainly are not in a good place, and not in a place where they can actually, again, have self-reliance take place.

I have another question. How does a group request a petition, or petition the BIA to reaffirm them as a federally recognized Tribe? Is there an official form or application? What is the formal process?

Mr. WASHBURN. Well, that is a fairly ad hoc process. And, like I said, it has been very rare to have happened. And so, no, we don't encourage people to use that process, so we don't have a form. It has happened on rare occasions. And it is by every means the exception and not the regular course of business. And so we don't have a regular form that we use for that. And we steer most people toward the Part 83 process.

Mr. CÁRDENAS. So when you receive a request from a tribal group to be affirmed, what does the BIA do after that moment?

Mr. WASHBURN. Well, may I ask Deputy Assistant Secretary Roberts to respond to that question?

Mr. ROBERTS. As the Assistant Secretary said, this issue generally is in litigation, so we are limited in terms of what we can say. But, I mean, generally speaking, the question that you are asking is does the Department have a process for correcting a mistake. That depends on the mistake, right?

So, lots of people just generally, even outside the acknowledgment process, can say the government made a mistake on a particular issue. It is going to depend on the specific facts of that issue. And so, in the context of an administrative error here, the Department looks both at the materials provided, but also internally to reach the right result.

Mr. CÁRDENAS. Thank you, Mr. Chairman.

Mr. YOUNG. I thank the gentleman. Mrs. Napolitano.

Mrs. NAPOLITANO. Well, thank you, sir.

Mr. YOUNG. Well, you are welcome. You are sitting there. Ask a question.

Mrs. NAPOLITANO. OK.

Mr. YOUNG. You have 5 minutes. I am recognizing you because you are on the Committee as a whole, and the other two gentlemen next to you are not. Now, I will recognize them next time.

Mrs. NAPOLITANO. Well, I appreciate your courtesy, Mr. Chairman. And it is good to see Mr. Roberts and the gentleman. I have sat through a lot of hearings on Indian affairs and looking at the team and the composition.

But how many Tribes were recognized last year. Can you give me a number? Generally? Ballpark?

Mr. WASHBURN. Last year—well, maybe one. This is a fairly rare event.

Mrs. NAPOLITANO. I know that, that is why I am asking. That is OK, let it go. I would like to have it, maybe give us some idea. But we do need more clarity and disclosure in the process for especially the new Members. I have the one Tribe that I have been dealing with that has been hanging fire for at least 4 years that I have been working on it. And coming to find out there were several factions that I did not know about. It would have been nice to have the agency tell us that there were other factions. But I don't know whether that is one of the reasons why they have not been recognized.

And even though I asked for something in writing back in July of last year, I have had conversations with several of the members of the agency, and I understand what they are trying to do, but even though they say the team says there is no more information needed, they are still hanging fire. And we need to know what we need to do to either have the factions come together, and tell them that this is a requirement—maybe that is one of the things you need to put into, is that factions become united, instead of separately trying to vie for the ability to have a casino or to have gaming. To me that is important. And maybe you can answer that.

Mr. ROBERTS. Sure, Congresswoman. Thank you for the question. And I appreciate your patience. We met very shortly after I started

at the Department in September. And I thank you for your patience on this issue. It is something that we are looking at very closely. We do hope to update your office soon. I know you have been waiting for some time, and that is probably not heartening to you. We do have folks working on this issue, and we are hoping to provide an update and some of that clarity very soon.

Mrs. NAPOLITANO. I appreciate that. The other issue that I have a very great concern are your water settlements. Can they be defined as government's legal liability, no more, no less? I mean it is in the Constitution, Mr. Kildee used to remind us every time there was a meeting on tribal issues. And can you explain why the settlements are important, why BIA is supportive? And what guarantee can you provide these agreements between the Tribes and Federal Government will be a BIA priority?

Mr. WASHBURN. Thank you, Congresswoman. I would say that, absolutely, legal liability is sort of the touchstone for what causes us to get involved in a tribal water rights settlement. You are from the West, so I don't need to tell you how important water is, and how important having rights adjudicated and clarified is.

Mrs. NAPOLITANO. And the answer is?

Mr. WASHBURN. The answer is, well, absolutely, it is important that we support Indian water rights settlements. I am sorry, if there was a yes or no question, you can give it to me again and I will try to answer——

Mrs. NAPOLITANO. Well, no. I just want to be sure that you are making that a priority.

Mr. WASHBURN. Oh, absolutely.

Mrs. NAPOLITANO. It is a BIA priority.

Mr. WASHBURN. Yes. No, absolutely. I was in New Mexico on Thursday to sign a water rights settlement that you had passed, that this Congress has passed, for four Pueblos in New Mexico.

I have been working on these issues personally quite a bit since I have been at the Department. We had the Navajo and Hopis in for some negotiations at the end of the year.

Mrs. NAPOLITANO. Would it be possible, sir—let me interrupt, because my time is running out—to get a list of those water settlements, so this Committee knows what is hanging, so we have an idea? Because those are real critical, for some of the Tribes to have settlement.

Mr. WASHBURN. Absolutely. We can share with you a list of the ones that we are actively working on, Congresswoman. Thank you.

Mrs. NAPOLITANO. Thank you. And then the other area that is real critical for me is the rate of suicide amongst Tribes. What are you doing about it? Because the last time I asked, there was very little being done about it.

Mr. WASHBURN. Well, we have been working very closely with the IHS and SAMSA, as well, another government agency, on these issues. And we have issued a report relatively recently about this particular problem in Indian Country. And we are all ears to this, this is one of the most important problems we worry about. And honestly, child suicide makes all the other issues look unimportant in comparison.

Mrs. NAPOLITANO. But what is being done? I mean again, I would like to have a copy of that report to this Committee. Because

these are affecting every Tribe that we have within our jurisdiction, or at least have that we know of. And we want to be sure that you work more collaboratively with the Members of Congress who are trying to outreach and trying to help the Tribes get those services to them on tribal land.

Mr. WASHBURN. Well, let me say we would be delighted to collaborate with you, absolutely, and we will endeavor to do so. This is a public health problem and, to a large degree, the public health problems in Indian country have been handed to the IHS, the Indian Health Service. But we work very closely on this, because this is such an important problem that it affects everything.

So we tend to try to work closely with the IHS on these issues, but we would be delighted to collaborate with you more, and so we can reach out to you to talk about ways to do that.

Mrs. NAPOLITANO. Please, yes. And it is not just trying, it is getting it done.

Mr. WASHBURN. Thank you.

Mrs. NAPOLITANO. And one last question that can go for the record, and that is——

Mr. YOUNG. Make it quick.

Mrs. NAPOLITANO [continuing]. Energy—real quick? You gave everybody else a few seconds, so give me a few, please.

Mr. YOUNG. Yes, well, I recognized you, so go ahead and do it.

Mrs. NAPOLITANO. Thank you. Are any Tribes that may be having some of the renewables on their land? It would be nice to know, so that other Tribes that ask us for information, that we know who has been doing it.

Mr. WASHBURN. OK. Now——

Mrs. NAPOLITANO. For the record.

Mr. WASHBURN. Yes, we would be happy to do that. We do have several Tribes, including the Moapa Band in Southern California, that have been very good making major developments in renewable energy on Indian land.

Mrs. NAPOLITANO. It would be great to refer some of the Tribes to get information, instead of reinventing the wheel. Thank you, Mr. Chairman.

Mr. YOUNG. Thank you. Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Chairman, and thank you for allowing me to join you today.

Mr. Secretary, I am here on the issue of restoration, tribal restoration for Tribes that have been terminated. And I have a very parochial interest in this, one particular Tribe, and we have talked about this, who is attempting to get recognized. And I agree with the Chairman, and we are on record in a letter to Interior regarding who has the authority to restore a Tribe. And clearly, it is Congress. And I don't think you disagree with that. Is that correct?

Mr. WASHBURN. I believe you have the authority to do so, absolutely.

Mr. THOMPSON. And given that, what is your position on encouraging Tribes or working with Tribes or suggesting that Tribes try and circumvent that constitutional or that congressional authority by going through the courts?

Mr. WASHBURN. Well, I have been known to say, "So, sue me" at some point, whenever people disagreed with what I was telling them, but I wouldn't characterize that as an effort to——

Mr. THOMPSON. So you don't encourage Tribes seeking restoration to sue the Department of the Interior in court?

Mr. WASHBURN. No, I don't. Again, I might have said, "So sue me," but I don't view that as a gilded invitation to do so.

Mr. THOMPSON. I think this particular one that I am dealing with came before you.

So what are you doing? What do you do to both discourage this, and to work to make sure that you take every step necessary not only to discourage this practice, but to defend both the Administration and Congress against such suits?

Mr. WASHBURN. Well, I am a former DOJ lawyer, as is Mr. Roberts here, and when we were working for the United States as lawyers, we litigated aggressively. And I count on my lawyers now to litigate aggressively on my behalf. I am also just a naturally competitive kind of guy, and I like to win. And so, when someone sues me, I tend to want to win the lawsuit, you know.

Mr. THOMPSON. Is that what is happening in regard to this particular suit that is in Napa and Sonoma County?

Mr. WASHBURN. I can't comment on matters in litigation. But I will say that I have done——

Mr. THOMPSON. I am not asking you to comment on matters in litigation. I am asking you to tell us if you are vigorously opposing this lawsuit?

Mr. WASHBURN. I am sorry, Congressman. What I have done with regard to this matter is I have met personally with you and Mr. Daley, and I have met with numerous of your constituents to hear their concerns. I have met with Diana Dillon, who is a Napa County Supervisor. I have met with Larry Florin, the intergovernmental affairs person at Napa County, Minh Tran, the County Council——

Mr. THOMPSON. Notwithstanding that is appreciated, but is your Department actively and vigorously opposing this particular lawsuit?

Mr. WASHBURN. I believe it is, but again, I shouldn't be speaking about matters in litigation. But yes, I believe it is litigating——

Mr. THOMPSON. Apparently earlier in your testimony you mentioned that you are creating this working group.

Mr. WASHBURN. Yes, sir.

Mr. THOMPSON. Are local governments included in this?

Mr. WASHBURN. Well, the working group at this point is purely internal to the Department. However, once there is a discussion draft, we would be delighted to hear the input of any local community groups or counties or cities, municipalities, or States that were interested in speaking to us.

We have a formal responsibility to consult especially with Tribes, because we are the Indian Affairs branch of government. But——

Mr. THOMPSON. My time is running out, but I would appreciate it if you could at least explore that. I think that they are impacted. They are one of the most heavily impacted communities of interest in these decisions. That is why I believe Congress should exercise

their authority and responsibility in dealing with this, so everybody's concerns can be met.

And then one of my colleagues mentioned the need to deal with the poverty amongst the Tribes and I think the term was "these large groups of people." On this particular Tribe that I have an interest in, this particular case, it has been hard to define how large that group of people actually is. And could you share with us the names of the tribal members involved in this particular case, so we have some idea as to how many people we are talking about?

Mr. WASHBURN. Congressman, I don't have that information with me. And it is a matter in litigation, so I mostly am in listening mode on that. But I would be happy to consult with my lawyers and see if we can get you a list of the parties in the case.

Mr. THOMPSON. I think it would answer a lot of questions as to whether or not this is a legitimate effort to deal with a group of people, or this is merely to try and get into the community for other reasons. Thank you, Mr. Chairman. Thank you. I yield back.

Mr. YOUNG. I thank you. Mr. Washburn, you have held up well, we have been pretty good, but I am going to ask you a question. As you are writing this proposal to reform, do you think there will be any legislation needed?

Mr. WASHBURN. We don't intend to be drafting a bill for you all. We intend to be drafting a regulatory reform effort for us. And so——

Mr. YOUNG. But in doing that—what I am saying, in doing that, do you think that you will have the authority to do what you are suggesting, without legislation?

Mr. WASHBURN. Yes, Chairman, we do.

Mr. YOUNG. OK.

Mr. WASHBURN. We think that we have the authority to, under long-standing laws, to do this. There wasn't specific legislative authorization for Part 83. We did it under very general authorities that have existed for many, many decades. And we will be acting under that same general authority here.

Mr. YOUNG. OK. There was a question about Carcieri. My knowledge, the BIA has not found any Tribe except the Narragansett not to be recognized under the Federal jurisdiction of 1934. Is that correct, Mr. Roberts?

Mr. ROBERTS. [No response.]

Mr. YOUNG. See, you mentioned there were two different standards now, one in Carcieri, pre-Carcieri, and then one after the court decision in Carcieri. To my knowledge, there has only been one Tribe that has not been recognized.

Mr. WASHBURN. Well, let me say that we haven't—this decision, we have been working with the decision. And we have been trying to figure out what the extent of Carcieri is, to which Tribes does it apply. And that has been a case-by-case type analysis. And I can't tell you which ones we have found do have a Carcieri problem and which of them don't.

I will tell you the context when this arises is usually when a Tribe seeks to put land into trust. And when that happens, we now conduct an analysis under the Carcieri case to determine whether that is an issue or not. When we find that there is a problem, in any part of the land-into-trust process, it frequently does not result

in a denial, because it results in a Tribe's merely withdrawing its application. And so, we don't actually get to a decision, often times.

Mr. YOUNG. OK. Because I am very much involved in the Carcieri, and I plan on having a bill on the Floor. It may not be clean. I don't know why anybody has the idea of a clean bill, because we have a different standard in Alaska. And so I am not going to undo Alaska, although some people may want me to do it, but I am not going to do that.

And I just want to bring up that last question for you. You don't have any plans of arbitrarily recognizing a Tribe without going through a process, do you?

Mr. WASHBURN. No. We endeavor always not to act arbitrarily.

Mr. YOUNG. OK, because that did happen in Alaska, 227 Tribes were created by the stroke of a pen by Executive order, trying to destroy the real Tribes. And there were reasons for it back in those days, but that did occur. Now I have 227 Tribes that are really basically 10 Tribes. And I can't undo that, but I don't suggest you do that any time future. I would like to see a process set forth so a Tribe knows really what has to be done, and why the refusal was made by not doing everything. It is not a one size fits all. That I won't deny.

And it is always fun to me, for the members of this Committee, 50 years ago we had very few Tribes. Now everybody wants to be part Indian. That is always sort of exciting to me, to see this happen. And I am related to this, so I know what I am talking about, it even happened in my State. And it is a good thing, but also a bad thing, because some people now are trying to say, "Well, we are a Tribe, because we want to have a piece of land, and my uncle owned it. By the way, we want to build a casino on it." And that is not fair to the other Tribes, either. That demeans their real responsibility.

Now, we will go back to the second round. Mrs. Ranking Member?

Ms. HANABUSA. Thank you, Mr. Chairman. Following up with what the Chairman basically was talking about, do you see any way that you can fix the Carcieri situation just by regulation?

Mr. WASHBURN. Madam Ranking Member, no. We will never be able to address the Carcieri situation by regulation. We certainly will endeavor not to apply that case any broader than it deserves to be applied, or any narrower than it deserves to be applied. But we don't anticipate that we can solve it entirely by regulation.

Ms. HANABUSA. Following up on what the Chairman was speaking to, which is that how many Tribes fall in this sort of like this area where they may have been recognized post-1934, and therefore, based on Carcieri, does not have the rights, of course, to Indian country, and having lands taken into trust by yourself.

Now, do you have any idea as to how many Tribes are in that category?

Mr. WASHBURN. No, we don't. We have done a case-by-case analysis each time we have gotten a land-into-trust application. We have to do it sort of for our work. We haven't done a broader survey to figure out sort of generally who falls into which category. And, frankly, it is extremely time-consuming.

The Carcieri case has put an enormous burden on the staff at the Department of the Interior, because we now have to conduct a fairly extensive historical legal analysis any time they wish to try to take land into trust for a Tribe. So we haven't sort of done it generally, as regard to 566 different Tribes, or the 300-plus that are outside of Alaska. We have just kind of been going about our business. And it has added a huge burden to our business that we go through already.

Ms. HANABUSA. Well, let me ask it this way. Of the ones that have taken your time and it has been time consuming and you have done the analysis, how many have you come up with the decision that you could not take their lands into trust?

Mr. WASHBURN. Madam Ranking Member, I don't have that figure at hand. I will tell you that it hasn't been very many. We haven't had the decision, really, that long. And you know, Tribes didn't spring, for the most part, from thin air. Most Tribes that we work with regularly were around in 1934. That is just the facts for most of the Tribes.

And so, I wouldn't anticipate that it would be very, very many. But it is an issue that we have to carefully consider any time we take land into trust.

Ms. HANABUSA. You said something very interesting, because we are trying to figure out how to best proceed as a result of the Carcieri decision. You said most Tribes have been around since or before 1934. Now, that is a different statement to me than a Tribe that is federally recognized.

So, are you saying that, as the Secretary in charge, that if a Tribe was in existence prior to 1934, was around before 1934, that somehow that would then satisfy the requirement of being federally recognized? Because I think we are being trumped on this phrase, "federally recognized."

Mr. WASHBURN. Madam Ranking Member, you are a good lawyer. I would tell you that, and I should have spoken with a little bit more precision, frankly, even under our Part 83 process, we are only recognizing the existence of a group that has proven it has been around sort of since time immemorial, basically.

So, it is every Tribe, in essence, has been around, was around in 1934. So the more narrow question that Carcieri poses is, were they under Federal jurisdiction in 1934? And given the trust responsibility, we think that most of them were under our jurisdiction, or our responsibility in 1934. What the recognition process does is it finds those Tribes that, while they were a distinct group as of that time, were not sort of having specific interactions with the Federal Government regularly at that time. And that is the difference.

Ms. HANABUSA. And so, a Tribe like you just described could arguably fulfill the Carcieri definition of being there since 1934, recognized not in a sense of being stamped or anything like that, but notwithstanding under your jurisdiction. And as long as you make the distinction that the Tribe is somehow, would be under your jurisdiction, that they would then satisfy Carcieri, because Part 83 really just determines whether the Tribe can be recognized. Am I understanding you correctly?

Mr. WASHBURN. I think that is fair to say. But having said all of that, we really would like to see Congress act to address the decision, address the Carcieri decision.

Ms. HANABUSA. Thank you. I yield back.

Mr. YOUNG. We intend to do that. Mr. LaMalfa?

Mr. LAMALFA. Thank you, Mr. Chairman, for a follow-up. I just wanted to drill down a little bit more on the zones between Tribes or prospective Tribes.

When you have a Tribe with lands that are in one location that are in trust already, and they are seeking to take another piece of property into trust that is over 50 miles away, again, there has been a lot of controversy about that. So, wouldn't it be appropriate, instead of maybe looking at that 25-mile radius, that when you have an existing trust land, seeking new trust land, that there is a consultation with other Tribes that are already in existence with full recognition to have that consultation in that 50-mile zone of the new prospective trust land?

Mr. WASHBURN. Congressman, it is a reasonable idea to suggest that, maybe that should be the rule. That is something that we have—I have sort of been wrestling with in the Department. And, I hear you.

One of the things that we have been wrestling with is what are the right connections to that land that they are seeking to take into trust. Certainly some sort of historical connection makes some sense. Certainly considering the views of the local communities makes some sense.

And that is not the formula that you proposed is not unreasonable to say that if you go a certain distance away, from existing lands, maybe you should talk to the Tribes between those two distances, or something like that. I think that is not an unreasonable suggestion, and we will take that back as we make these kinds of decisions. We make these decisions very much on a case-by-case basis. And so I will take that back. Again, it is a good suggestion.

Mr. LAMALFA. Thank you. We realize that one size doesn't fit all here, but you do have folks making the gaming decisions and establishing a facility there perhaps, and then you have a surprise that may pop up from way beyond what a reasonable assessment would have been, and it can wreck things for maybe both sides and the business decisions that would be made.

So, it seems like just a sense of fairness and as much as you can achieve consistency as you can somehow apply it across the board would certainly move a long ways toward a fairness and a lot less controversy. So we do appreciate that.

Mr. WASHBURN. Thank you, Congressman.

Mr. YOUNG. I thank the gentleman's comment. One of the problems we have, and I think the Department has, is the predatory concept of one Tribe preying on another Tribe's investment. And, truthfully, that is inappropriate, especially if they bought a piece of land and they are trying to put it in a trust to build a casino right next door. Because the market is not that thick, even in California. So that is something we have to think about.

The gentleman from American Samoa, you have any other questions, comments, suggestions? Try to stay on the subject, both of

you, on the subject of recognition. A lot of other things we have we talk about, but we have other hearings——

Mr. FALEOMAVAEGA. I would say, Mr. Chairman, I am going to try very earnestly to stay within the subject.

Mr. Secretary, I understand that we currently recognize 566 Tribes. And it is my understanding, and this is years ago, I think there are approximately 100 Tribes in the State of California alone that have not been recognized. Is that true?

Mr. WASHBURN. I don't have the exact figures on that, Congressman. I believe that there are roughly 102 recognized Tribes in the State of California. And I am not sure how many groups that are petitioning are from the State of California. But I know it is a fair number, and that wouldn't strike me that that seems incorrect. Seventy-nine I am told by my staff.

Mr. FALEOMAVAEGA. Could you submit for the record, I would be very curious, how many Tribes throughout the country that are recognized by their given States, but have not been given Federal recognition? Can you submit that for the——

Mr. WASHBURN. We would be happy to do that, Congressman. And I will tell you that, in our reform efforts, that is one of the things that we are looking at. If a State can recognize a Tribe, should that carry some weight in our process? And it hasn't in the past. So——

Mr. FALEOMAVAEGA. The gentlelady from Hawaii had mentioned something about the 1934—I believe that is the Dawes Act. Is that—seems to be the ground rule, where an applicant Tribe makes an application to the BIA for recognition. In other words, if you were not on the rolls, or as a recognized or not recognized, this is the cutoff date, so to speak, to give you an access to the process of applying for recognition?

Mr. WASHBURN. Congressman, that is a criteria that my Deputy Assistant Secretary has done a fair bit of thinking about, and so I am going to ask him to respond to your question.

Mr. ROBERTS. It is not a cutoff point for the acknowledgment process, but I think just looking at the history of Federal-tribal relationships, that 1934 time period may be very important, because that is when this Congress passed the Indian Reorganization Act, and was affirmatively looking for Tribes to reorganize, essentially, under that Act and restore the hundreds of thousands of acres of land that was lost.

And so, that time period you see a lot of activity, historically, between the Federal Government and Tribes. And so I think that is an important time period that we are looking at, but it is not a cutoff date.

Mr. FALEOMAVAEGA. Well, that was one of the problems with the Dawes Act was it wiped out millions and millions of acres that supposedly belonged or owned by the several Tribes throughout the country. And assimilation was the policy then.

One of the critical criteria for recognition would be a group that is indigenous to the country, the United States? I mean an indigenous group. Would that qualify you to apply for recognition?

Mr. WASHBURN. Well, anybody can apply, Congressman. That is one of the facts, is that anybody can apply. We——

Mr. FALEOMAVAEGA. So that would include Native Hawaiians?

Mr. WASHBURN. Well——

Mr. FALEOMAVAEGA. They are truly an indigenous group, exactly like the American Indians and the Native Alaskans.

Mr. WASHBURN. There are a tremendous number of similarities, absolutely. And——

Mr. FALEOMAVAEGA. Similarities? They are truly an indigenous group from the State of Hawaii.

Mr. WASHBURN. Well, I am sorry. What I meant to say there are tremendous similarities to mainland groups with Hawaii. They share challenges with regard to retaining their native languages and retaining important aspects of their culture and their religion. And those commonalities are overwhelming with other American Indian groups.

Mr. FALEOMAVAEGA. In your opinion, would Native Hawaiians qualify, if they were to apply for recognition?

Mr. WASHBURN. I don't believe——

Mr. FALEOMAVAEGA. Provided they fulfill all the seven criteria, of course.

Mr. WASHBURN. Well, I don't believe that we believe that we have the authority to recognize Native Hawaiians through the Part 83 process.

Mr. FALEOMAVAEGA. Why not? They are indigenous, just like Native American Indians, Native Alaskans.

Mr. WASHBURN. Congressman, it is a matter that we believe we would need legislation to be able to proceed down that road. Our regulations now leave out Native Hawaiians. And so we are not able to consider Native Hawaiians under our current regulations.

Mr. FALEOMAVAEGA. I look forward to getting your draft, discussion draft by this spring, hopefully.

Mr. WASHBURN. Thank you, Congressman.

Mr. FALEOMAVAEGA. Thank you.

Mr. YOUNG. The lady from California.

Mrs. NAPOLITANO. Thank you, Mr. Chairman. And going on to the Chairman's—touching upon the gaming issue, are all the Tribes currently seeking recognition? Or how many of them actually are interested because of the ability for them to establish gaming within their tribal land?

Mr. WASHBURN. Well, Congresswoman, I would say the word "because" is probably way too strong. I would——

Mrs. NAPOLITANO. Incentivize, then.

Mr. WASHBURN. Well, it may be certainly a factor. But my sense is that people who are seeking Federal recognition are doing so in good faith because they believe they are an American Indian Tribe, and that economic development is one of the things that they would like to do with recognition as a sovereign nation. But I think we take everybody on good faith, that this isn't about gaming, it is about being a sovereign nation.

Mrs. NAPOLITANO. Well, how far back, then, do we begin to look at driving some of these Tribes to seek recognition based on the ability for them to establish gaming? Because that has only been the last couple of decades, right? So that maybe we know that some of those Tribes really want the recognition because they are owed the recognition, not because they now feel that they can benefit by having the gaming capability?

Mr. WASHBURN. Well, I think that is exactly right, that most Tribes, many Tribes have been in the process, or many groups have been in this process since long before gaming came about. And I think that gaming has been a resource for some of them. The possibility of conducting gaming has helped them attract investors who can help them with their petitions. But for many or most of them, it is not about gaming, primarily. It is about recognition.

Mrs. NAPOLITANO. In reporting, in the request that I had made to you about telling us which Tribes and now he is asking by State, can you date them, when they first started seeking recognition? And that might be helpful to us in being able to determine one versus the other.

The recognition for the one Tribe that I have been following for a while has different factions. How do you deal with that? Do you pull them together and tell them to get their act together and work as one? Because I did not find out until afterwards that there were several factions. In fact, five. And I was working with one. The second one asked me to swear in the council, and yet I had no idea that they were split.

Mr. WASHBURN. It is something that we, again, look at the 2008 guidance that we put out in the Federal Register as sort of our guidepost. But it is also sort of case by case, right?

So, if there are different factions and it is just not feasible for us to process a petition, we tell them all that. And hopefully that will encourage some sort of collaboration on the petition. But it really is a case-by-case basis. And we do follow the guidance. But it is something that, again, that we will need to take a closer look at. Because we probably could provide more clarity through regulations.

Mrs. NAPOLITANO. Well, it almost would touch upon Chairman Young's ability to say that the 500-some-odd Tribes—or only, what, 10 Tribes—be able to narrow it down, and be able to say to all of them, "You need to work as one," and make your job easier, make our job easier, too.

Do you notify—OK. The question on the factions. Can you tell whether or not all the factions are appealing to you for recognition? Because, as far as I know, only two of them have. I don't know about the others. And that leaves us at a disadvantage, as to how do we deal with it.

Mr. ROBERTS. Yes. I can't speak to the specifics of the matter that you have in mind. But I think, in general, when we do learn of a split we reach out to all of the groups that we know of.

Mrs. NAPOLITANO. OK. Well, this idea of them coming in separately, it creates more work for you and more of a headache for us.

Mr. Chairman, I would like to submit some questions for the record later. Thank you.

Mr. YOUNG. Without objection, everybody can submit questions for the record.

I am going to ask one last question, and then we are going to get out of here, if that is OK with the Ranking Member.

Mr. Secretary, the Department is on record as stating that Congress has long recognized the Department's power to recognize the Tribes under the three provisions of law: Section 2 and 9 of Title 25, and Section 1457 of Title 43 of the U.S. Code.

My question is, what are the standards and criteria set forth in these provisions of law for the Secretary to determine when to recognize a Tribe? Mr. Roberts?

Mr. WASHBURN. Why don't I take that one, Chairman?

Mr. YOUNG. Oh, good.

Mr. WASHBURN. They don't provide any timelines, frankly. They don't contain any timelines. We have to——

Mr. YOUNG. I said—no, that is right. There is no standards and criteria, is there? That is what I meant to ask.

Mr. WASHBURN. No, there are no standards and criteria. It is just under our—we have the responsibility to provide services to Tribes. And so, to do that, we have to know who the Tribes are. And so that has sort of been the analysis. That is not an elegant way to express it, but that is why we believe we have the power to determine whether a group is a Tribe or not.

Mr. YOUNG. Well, my concern is that without statutory authority, this is the reason I asked that question earlier, and criteria for the recognition, the Supreme Court could eventually find that BIA's so-called Part 83 process is illegal. Mr. Roberts, you are the lawyer. So are you, too, by the way. I forgot.

Now, you follow what I am saying? I remember when Carcieri came up. Tribes said, "Oh, don't worry. The Supreme Court will never agree to that." Well, they did. And that is why we are in this pickle right now. And what makes you think, without statutory authority, that someone else couldn't file suit via Carcieri too, and find out everything in 1983 would not be legal?

Mr. ROBERTS. First off, while we are both attorneys, the Department did make us check our bar licenses at the door in these policy decisions.

Mr. YOUNG. Very good. But that makes you better. But go ahead.

[Laughter.]

Mr. ROBERTS. The Department has, since the advent of the regulations, we have relied on Section 2 and Section 9 providing general authority. The courts where this has been litigated, and the issue of whether our regulations are lawful, the courts have affirmed that we do have the authority under this.

So, I suppose a court, I guess, could always decide otherwise. But we have had a good track record and a number of different circuits in defending our decisions.

Mr. YOUNG. So you don't think you need any legislation process to make sure you are legal?

Mr. ROBERTS. At this point in time we are not asking for that——

Mr. YOUNG. OK. That is all I needed to know. I want to thank the witnesses for participating for an hour-and-a-half, and of course the Members for being here.

And I would make one suggestion, Mr. Washburn. Communicate with the Minority and Majority staff members on where you are going on this reform. So let us help you. I think that would be very beneficial on both sides of the aisle, instead of someone getting all excited later on, "They didn't consult with us." So I offer that as a suggestion.

With that, this Committee is adjourned.

[Whereupon, at 12:32 p.m., the Subcommittee was adjourned.]

[Additional Materials Submitted for the Record]

PREPARED STATEMENT SUBMITTED FOR THE RECORD BY THE KNUGANK TRIBE

The Knugank Tribe (Knugank) appreciates the opportunity to submit this written testimony to the House Subcommittee on Indian and Alaska Native Affairs, for the record of its March 19, 2013 Oversight Hearing on Federal Recognition.

Knugank is an Alaska Native community in South-central Alaska whose members share a common association and residence in our current location that goes back to 1894. Although the name of the community has changed over time (Kanakanak, Dillingham, Nelsonville, Old Dillingham, Olsonville, and Knugank), our location has been the same. Knugank, under our corporation name, Olsonville, was listed on the Department of the Interior's list of federally recognized tribes in 1988. In 1993, we were omitted from that list, an error that to this date has not been corrected.

Knugank members have long been acknowledged by the Federal Government as Alaska Natives, and have received Federal services as such since well before the Alaska Native Claims Settlement Act (ANCSA) was passed into law. Our Tribe has continued serving its members through social programs; cultural heritage activities; and by maintaining dialogue with the Federal Government, other tribes in our region and with State and local authorities to advance our shared interests. Critical activities include our efforts to correct the BIA's erroneous termination of our federally-recognized tribal status and to protect our tribal cemetery from accelerating riverbank erosion and encroachment by the City of Dillingham.

This testimony concerns the frustrating lack of recourse our Tribe has experienced in seeking to remedy historical errors that revoked our tribe's federally recognized status. We respectfully ask the Committee to encourage the Department of the Interior to acknowledge and act on its authority to restore our Federal recognition outside of the 25 CFR Part 83 process, including authority to correct errors and omissions as well as its authority under the Alaska Amendment to the Indian Reorganization Act (Alaska IRA).

When Congress decided that Alaska Native land claims should be settled in the ANCSA, it provided that a community had to have 25 members in order to be considered an "Alaska Native Village". Native Villages were made eligible for an ANCSA village corporation and permitted select land in the area they had historically used. Unfortunately, The ANCSA enrollment process led to a great deal of confusion amongst the Native population. As a result of a miscount of our membership during ANCSA enrollment we were deemed to be only 24 members and thus too small to be a Native Village. The 1970 Federal census listed only 33 Native residents in Olsonville (Knugank), but that was because some of our children were away at school and others were temporarily away from the village. The ANCSA enrollment failed to include all Native residents of the village and several members of our community were mistakenly enrolled in a different village corporation or simply enrolled as at-large members of the regional corporation and not associated with any village. With only 24 members enrolled, Olsonville was established as a "Native Group" under ANCSA and not a Native Village.

The miscount had serious consequences for our Tribe. As a Native Group, we were entitled to a much smaller land selection than Native Villages and had to wait longer to make our selection. By the time we were able to make a land selection under ANCSA, all the land around Knugank had already been selected, including the Knugank cemetery which is at the very heart of our village and our tribal identity.

Knugank has never been terminated by Congress and, therefore, continues to be a tribe. In 1993, the Assistant Secretary made a mistake by removing Knugank (Olsonville) from the list of federally recognized tribes. We have called on the Office of the Assistant Secretary to confirm and/or restore Federal recognition of our Tribe by adding Knugank to the list of federally recognized tribes in the State of Alaska. In the alternative, we also submitted a petition in June 2012 to organize as a Tribe pursuant to the Alaska Amendment to the Indian Reorganization Act (Alaska IRA), 25 U.S.C. § 473a. In extending the IRA to Alaska, Congress stated:

> "That groups of Indians in Alaska not recognized prior to May 31, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title."

Former Assistant Secretary for Indian Affairs Larry Echo Hawk recently confirmed the continuing authority of the Alaska IRA in a January 31, 2012, letter to

Senator Lisa Murkowski, which we append to this written testimony for inclusion in the record. Longstanding practice and precedent under the Alaska IRA provide for the Bureau of Indian Affairs (BIA) to authorize the organization of tribes in Alaska based on their showing of a "common bond of occupation, or association, or residence" that was established prior to 1936. Knugank

Restoring Knugank's Federal recognition would enable us to preserve and maintain our community identity as well as allow us to offer our members, particularly our young people, the benefits of tribal membership that are due them as Alaska Native people without forcing them to forsake their heritage by joining another tribe. For instance, federal recognition means we could assist our members in improving their housing, and may make it possible for us to obtain resources to protect our village, particularly the cemetery, from further erosion. We attach our recent letter to the City of Dillingham, Alaska, which demonstrates the seriousness of the threats facing our Cemetery and the challenges we face in addressing them. The Alaska Federation of Natives (AFN), Bristol Bay Native Association (BBNA), Bristol Bay Area Health Corporation (BBAHC) and tribes in our region all recognize Knugank as a tribe and have been supporting our effort to restore federal recognition of our tribal status.

Knugank extends our appreciation to the Senate Committee on Indian Affairs for holding the oversight hearing. We respectfully urge the Committee to remind the Department of its authority, responsibility, and Congressional directive under the Alaska IRA to take action on tribal recognition outside the Part 83 process in cases like ours.

PREPARED STATEMENT SUBMITTED FOR THE RECORD BY THE QUTEKCAK NATIVE TRIBE

The Qutekcak Native Tribe (QNT) appreciates this opportunity to submit written testimony to be included in the record for the Subcommittee on Indian and Alaska Native Affairs' March 19, 2013 Oversight Hearing on Federal Recognition. QNT is a community of Alaska Natives in Seward, Alaska that has been active since 1886 and has had a formalized tribal government since 1972.

Like other tribes in Alaska, we serve our 298 members by providing community services, promoting economic self-sufficiency, and carrying out Federal programs under the Indian Self-Determination Act using funds passed through the regional non-profit Chugachmiut. We also sponsor a renowned dance and drum program through which our Elders pass on our cultural values and practices to our youth. We have also established the Alaska Native Archive jointly with the Seward Municipal Library. Unfortunately, however, we carry out the responsibilities of a tribe without enjoying any of the benefits of Federal recognition.

Tribes in Alaska have been recognized in a number of ways: pursuant to the statutory criteria set forth in the Alaska Amendment to the Indian Reorganization Act (the Alaska IRA), by being named in the Alaska Native Claims Settlement Act (ANCSA), through specific recognition by Congress, and through administrative confirmation by the Assistant Secretary for Indian Affairs. Not one of the 229 Federal recognized tribes in Alaska has been recognized pursuant to the Part 83 regulatory process.

The members of Qutekcak share a common association and location that has lasted over a hundred years. Despite our eligibility for recognition and our efforts over several decades, as a result of historical circumstances and administrative errors and delays, QNT has not been afforded the Federal recognized tribal status we deserve.

In 1971, the Alaska Native Claims Settlement Act (ANCSA) established Native Alaskan corporations for the purpose of administering land claims settlement funds. Many of those ANCSA-created entities have since been granted the benefits of recognized tribal status. One provision of the ANCSA enabled groups of Native people in primarily non-Native cities and towns to form urban corporations. Although Seward Natives expected to benefit from that provision, when ANCSA was finalized only four such urban corporations were created: Juneau, Kodiak, Sitka, and Kenai. Similarly situated communities, including our Native community in Seward, were unfairly left out. QNT was also left off of the list of federally Recognized Tribal Entities in Alaska when it was published in 1993, with no explanation.

Since 1993, QNT has expended significant time, energy, and resources seeking to have the Federal Government correct its error of not including QNT within ANCSA or on the 1993 and subsequent BIA lists of recognized tribes. In 1993, we submitted a petition to the Bureau of Indian Affairs (BIA) to adopt a tribal constitution under the Alaska IRA. The Alaska IRA provides statutory authority for the Department

of the Interior (the Department) to organize Alaska Native tribes that have not otherwise been extended Federal recognition. Under Section 1 of the Alaska IRA, Congress provided:

> That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C.A. § 473a, May 1, 1936, c. 254, § 1, 49 Stat. 1250.

After submission of three formal requests to organize under the Alaska IRA and years of meetings, letters and legal briefings to address questions from the Department as to the scope of agency authority under the Alaska IRA , QNT was encouraged in January 2012, when then Assistant Secretary for Indian Affairs Larry Echo Hawk responded to inquiries from Senator Lisa Murkowski with a letter reaffirming that "a group that can establish its existence in 1936 with 'a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district' could seek to be organized under the Alaska Amendment to the IRA." Assistant Secretary Echo Hawk's letter stated that the Part 83 process was available to Alaska Native tribes as an alternative means to obtain Federal recognition, if the Alaska IRA criteria do not apply to the group. (We attach a copy of the Assistant Secretary's January 31, 2012, letter for the hearing record).

Mr. Echo Hawk's letter affirmed the Department's long-espoused the view that meeting the eligibility criteria to organize under the Alaska IRA would provide a basis for recognition, and that Alaska tribes need not petition for consideration under the 25 CFR Part 83 process unless the group does not meet the Alaska IRA criteria. When the Federal Acknowledgment Procedures issued in 1978, the Department expressly stated that those regulations would not apply to Alaska IRA-eligible groups: "The [Part 83] regulations . . . are not intended to apply to groups, villages, or associations which are eligible to organize under the Alaska Amendment of the Indian Reorganization Act (25 U.S.C. 473a) or which did not exist prior to 1936." 43 Fed. Reg. 39361 (1978). In the 1988 Federal Register Notice announcing the Native Communities within Alaska that were recognized and eligible to receive services from the BIA, the Department stated that:

> "applying the criteria presently contained in Part 83 to Alaska may be unduly burdensome for the many small Alaska organizations. Alaska, with small pockets of Natives living in isolated locations scattered throughout the State, may not have extensive documentation on its history during the 1800's and early 1900's much less earlier periods commonly researched for groups in the lower-48 . . . insistence on [producing such documentation] for those Alaska groups might penalize them simply for being located in an area that was, until recently, extremely isolated."

53 Fed. Reg. at 52833 (1988).

Mr. Echo Hawk's letter provides fresh confirmation of the established Department interpretation that Section 1 of the Alaska IRA has not been repealed and remains valid law. In 1993, the Solicitor of the Department of the Interior explained that while Section 19 of the ANCSA revoked Section 2 of the Alaska IRA authorizing the creation of reservations in Alaska, "ANCSA did not revoke the village IRA constitutions . . . [n]or did it repeal the authority in Section 1 of the Alaska amendment of the IRA for the Natives to reorganize and adopt constitutions." Governmental Jurisdiction of Alaska Villages Over Land and Nonmembers, Op. Sol., M–36975 at 39 (Jan. 11, 1993).

The federally Recognized Tribes List Act ("List Act"), enacted in 1994, also did not affect the Alaska IRA. The List Act requires the Secretary to annually publish a "list of all Indian tribes eligible for the special programs and services provided by the United States to Indians because of their status as Indians." It does not specifically mention the Alaska IRA, nor is the Alaska IRA mentioned in the List Act's legislative history. Overall, the legislative history evidences no intent for the List Act to limit the Secretary's authority to recognize tribes. In fact, the List Act's legislative history states that the Act is not intended to change the status of Alaska Native tribes, but requires that the "Secretary continue the current policy of including Alaska Native entities on the list of federally recognized Indian tribes which are eligible to receive services." See H.R. Rep. No. 103–781 (1994).

In light of the statutory authority and recognition criteria set forth in the Alaska IRA and the Department's stated policy, QNT hopes its documented tribal history

and request to organize under an IRA constitution will finally correct the government's past errors of omission in not listing QNT as a federally recognized tribe. When we first submitted an Alaska IRA petition in 1993, the BIA's technical assistance letters raised no concerns about QNT's eligibility under the statute. BIA correspondence, however, was sent to the wrong address and we did not receive file copies for several years. In light of a 3 year time lapse, the BIA advised that we should submit a new request. Unfortunately, when we resubmitted our petition, the BIA sent our documents to the Branch of Acknowledgment and Research even though our petition was submitted under the Alaska IRA and not 25 CFR Part 83. We wrote to BIA objecting to its mishandling of our IRA petition by placing it with the BAR/OFA, but our small Tribe had limited resources to mount a renewed effort to pursue recognition. It was not until 2008 that we had sufficient resources to submit a third petition. At that time, we resubmitted a fully revised Alaska IRA petition, complete with an ethnohistorical report.

While Mr. Echo Hawk's January 2012 letter offers some encouragement that the Department will act upon QNT's request to organize under the IRA, we are concerned that the departure of the Assistant Secretary may stall our progress and add to the already extensive delays we have endured. The continuing delay adversely impacts our ability as a tribe to provide for the needs of our members, and maintaining the ongoing process is a constant and heavy strain on our limited resources.

Federal recognition would enable our Tribe to expand our services to our members and would enable us to utilize the other Federal programs open only to federally recognized tribes. We have support for our recognition effort from the city of Seward; tribes and Native organizations in the Chugach region, including Chugach Alaska Corporation; Chugachmiut, and the Alaska Federation of Natives. Congress provided the Department with statutory authority to act on our petition to organize as a tribe, but the Agency has not done so.

In his January letter, Assistant Secretary Echo Hawk observed that Congress passed the Alaska IRA in order to account for "Alaska's unique circumstances." The Part 83 process does not account for these unique circumstances, as the Department has acknowledged in the past. Accordingly, the Department should exercise its clearly delegated authority under the Alaska IRA for the organization of groups of Alaska Natives not previously recognized, but "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district. The Qutekcak Native Tribe is simply seeking to be treated the same as other similarly situated tribes in Alaska. Thirty years is too long to wait.

We appreciate the opportunity to share our testimony with the Subcommittee. We ask the Subcommittee acting in its oversight capacity and through its Chairman to encourage the Department to review and act upon QNT's request to organize under the Alaska IRA consistent with statutory authority and Department precedent.

LETTER SUBMITTED FOR THE RECORD FROM LARRY ECHO HAWK

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY.
WASHINGTON, D.C., JANUARY 31, 2012.

Honorable LISA MURKOWSKI,
United States Senate,
Washington, DC 20510.

Dear Senator Murkowski:

Thank you for your letter of June 23, 2011, posing two questions about the recognition process for Alaskan tribal entities. Your letter inquires about the Alaska Amendment to the Indian Reorganization Act, 25 U.S.C. § 473a (IRA), and the Department's acknowledgment regulations, 25 CFR Part 83, as the means by which Alaskan tribal entities are recognized as tribes. I apologize for the delay in responding to your letter.

You note that there are currently 229 Alaska native entities listed in the October 1, 2010 Federal Register Notice "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." The acknowledgment process of Alaska Native tribes and villages has a long and unique history, as described below.

When the tribal entities list was first published in 1982, it was qualified as a "preliminary list." See 47 Fed. Reg. 53,130, 53,133 (Nov. 24, 1982). Efforts to clarify the list were unsuccessful and numerous Alaska Native villages appealed being left off the 1986 list, which resulted in the Department modifying the list significantly in 1988 to include Alaska Native villages and Alaska Native Claims Settlement Act

(ANCSA) corporations and other tribal organizations that would not otherwise be considered tribes. See 53 Fed. Reg. 52,829, 52,832 (Dec. 29, 1988). Unfortunately, the revisions to the list did not resolve the questions related to tribal status of the Native villages and, indeed, may have made them more complicated. As a result, the Solicitor issued a comprehensive opinion on the "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," M–36975 (Jan. 11, 1993, as supplemented Jan. 19, 1993). In response to the Solicitor's Opinion, the Department published a revised list of tribal entities for Alaska, the preamble to which recounts the significant history of the Alaska portion of the list. See 58 Fed. Reg. 54,364 (Oct. 21, 1993). The authoritativeness of the current list has most recently been confirmed by the Alaska Supreme Court in *McCray* v *lvanolBay Village*, No. S–13972, 2011 Alas. LEXIS 136 (Alaska Dec. 9, 2011).

Turning to your specific question as to the applicability of the IRA to Alaska, the IRA as originally enacted in 1934 applied to Alaska, but had limited effect because of the absence of reservations similar to those in the contiguous 48 States. Recognizing Alaska's unique circumstances, Congress amended the IRA in 1936 to account for those circumstances. For the contiguous 48 States, Section 16 of the IRA, 25 U.S.C. § 476, gave any tribe or tribes residing on one reservation the right to reorganize and adopt a constitution for self-government. Since there were few reservations in Alaska, Congress amended the IRA to provide in part:

> that groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, *may organize* to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

(emphasis added) 49 Stat. J250: 25 U.S.C. § 473a.

Thus, a group that can establish its existence in 1936 with "a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" could seek to be organized under the Alaska Amendment of the IRA.

If the Alaska Amendment of the IRA does not apply to the group because the group was not in existence in 1936, there are several alternatives. First, the group could seek special clarifying legislation similar to that passed for the United Keetoowah Band of Cherokee Indians (Act of August 10, 1946; 60 Stat. 976) or the Central Council of the Tlingit and Haida Tribes (Act of Nov. 2, 1994; 108 Stat. 4793). Second, in the alternative, the group could consider forming a "tribal organization" within the meaning of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(l), for purposes of managing Federal services and benefits available to Alaska Native people. A third possibility may be the acknowledgment process under the Department's regulations, 25 CFR Part 83. One of the requirements of that process is the need to show a continuous existence as a community from historical times to the present. See 25 CFR § 83.7(b).

We hope these comments have been helpful to you in understanding the Department's position. If you have any further questions please do not hesitate to contact us.

Sincerely,

LARRY ECHO HAWK,
Assistant Secretary, Indian Affairs.

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