



SANDRA DAY O'CONNOR COLLEGE OF LAW

A R I Z O N A S T A T E U N I V E R S I T Y

INDIAN LEGAL CLINIC P.O. BOX 877906 TEMPE, AZ 85287-7906
TEL: (480) 727-0420 FAX: (480) 727-9270

**Testimony before the Senate Committee on Indian Affairs
Oversight Hearing on Recommendations for Improving the
Federal Acknowledgment Process**

**Patty Ferguson-Bohnee
Director of Indian Legal Clinic
Clinical Professor of Law
April 24, 2008**

Good morning Mr. Chairman and members of the Committee. My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at (“Clinic”) at the Sandra Day O’Connor College of Law at Arizona State University. Thank you for the opportunity to present an analysis and recommendations on the federal acknowledgment process. Last semester, I was contacted by a staff member of the Committee requesting the Indian Legal Clinic to analyze the current federal acknowledgment process (“FAP”).

A preliminary analysis with proposed recommendations are attached hereto. I would like to recognize those students who prepared the attached preliminary analysis: Alejandro Acosta, Jerome Clarke, Tana Fitzpatrick, Chia Halpern, Mary Modrich-Alvarado, and M. Sebastian Zavala.

The Clinic found that although the criteria for federal acknowledgment have not changed, the burden for the meeting the acknowledgment criteria has increased. This burden includes both the amount of evidence required to prepare a petition and the standards for interpreting criteria. While, the burden has always been on the petitioner, unrecognized tribes with few or little resources have little assistance in preparing a successful petition.

Another thing that has not changed since the inception of the process is that unrecognized tribes stuck in the system still lack resources, health care and the ability to participate in federal programs, one of the purposes behind creating a process for federal acknowledgment. In nearly thirty years, the OFA has only decided forty acknowledgment cases. The Department fails to issue decisions within its regulatory framework, and it is really unknown how long it will take to evaluate all the petitions that may be presented to the Department. The backlog in petitioners results partly on the lack of funding to fully staff an acknowledgment office, lack of funding and assistance for petitioners to complete the process, and the increased evidentiary burdens on the process. There exist few resources to assist a petitioner in preparing a petition so that even if the OFA follows the framework, the quality of the petition and the future of the tribe could be impacted not by its lack of meeting the requirements, but by its inability to produce the required documentation and analysis. This lack of funding to petitioners also impacts the efficiency of the review process by OFA because of the additional time it takes to review information that is not compiled, organized, and analyzed in a professional manner.

A reasonable solution for the process must be undertaken to ensure that petitions are processed more timely. Congress has options—(1) allow the current process to continue under a fully-funded staff; (2) create a commission/task force/peer review committee to either replace or assist the OFA in the evaluation process; (3) implement sunset provisions at various stages of the process to ensure that timeframes are respected; or (4) take no action and receive increased requests for federal acknowledgment from petitioners or potential petitioners. Any of the first three suggestions require substantial funding allocations. To improve productivity under the current process, researchers should be assigned to regions, whereby they can obtain familiarity and expertise to improve the efficiency of the process. More transparency and access to information without going through FOIA is also needed. Petitioners and third parties should be able to obtain copies of the FAIR database in a timely manner without submitting FOIA

requests. Once documents are uploaded onto the FAIR database, the nonprivate information should be segregated, and copies of the cd-roms should be able to be copied and provided at minimal cost. In one instance, a request for the FAIR database by a researcher was denied, though the Department provided an opportunity for the researcher to purchase the documents at a cost of approximately \$5,000, not to mention the time required by OFA if the researcher pursues the request.

There are some unrecognized tribes that cannot participate in the FAP, and others who may have circumstances preventing them from ever meeting the FAP criteria. While Congress cannot spend all of its time evaluating whether a group is an Indian tribe, Congress has the power to extend recognition to Indian tribes and should step in and evaluate petitioners who cannot petition through the FAP.

I am happy to answer any questions the Committee may have.



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PRELIMINARY ANALYSIS AND RECOMMENDATIONS
ON THE FEDERAL ACKNOWLEDGEMENT PROCESS

I. Background

The Federal Acknowledgment Process provides one avenue for unrecognized tribes to obtain federal status as a tribe eligible for services. Other avenues include federal court recognition, and congressional legislation. The federal acknowledgment process developed from a recognized need by the Department of Interior that there were a number of tribes seeking federal status and that a process needed to be implemented to address these requests.

As of April 18, 2008, the OFA has a staff includes twenty-two individuals and currently has three vacancies.¹ The staff includes three fully-staffed research teams comprising of a cultural anthropologist, a genealogical researcher, and an historian.² The three vacancies would comprise an additional research team when hired.³ In addition to these research teams, OFA staff include eight independent contractors who primarily deal with data processing, one computer programmer, one Senior Federal Acknowledgment Specialist, two FOIA managers, and three researchers who enter data into the Federal Acknowledgment Information Resource (“FAIR”) system.⁴

¹ Telephone Interview with Linda Clifford, Secretary, Office of Federal Acknowledgement, in Washington, D.C. (April 18, 2008).

² Id.

³ Id.

⁴ Id.

Included in this analysis is a brief backdrop of the American Indian Policy Review Commission, which tackles issues of unrecognized tribes, and the development of the FAP. The analysis then focuses on funding and timeliness issues which permeate the reintroduction of bills to change the FAP. The final section of the analysis reviews proposed recommendations to the process.

A. The American Indian Policy Review Commission

In 1975, Congress established the American Indian Policy Review Commission (“AIPRC”) during the era of Indian Self-Determination, which followed the era of termination.⁵ This was a time of Indian activism, with confrontations between American Indians and federal authorities at Wounded Knee, in Washington D.C. and in Washington State.⁶ Though it was the era of Indian self-determination, corporations, uranium producers, coal companies, ranchers, oil and gas developers, and private developers lobbied Congress for control over Indian land and resources.⁷ When introducing the Joint Resolution in the House in August 1974, Representative Meeds stated that there was only “one Indian problem which is composed of lesser, specific problems which are interrelated, and which impact upon one another.”⁸ He believed that past legislation was “piece-meal” and future legislation needed to be comprehensive.⁹ Congress agreed and

⁵ Public Law 93-580, 88 Stat. 1910 (1975) (establishing the American Indian Policy Review Commission). Between the 1950s and 1960s, Congress terminated approximately 110 tribes. *See* Cohen’s Handbook of Federal Indian Law at 163 (2005 Ed.).

⁶ American Indian Studies Center University of California, Los Angeles, New Directions in Federal Indian Policy: A Review of the American Indian Policy Review Commission, (1979).

⁷ Id. 10.

⁸ Id. 8.

⁹ Id.

found the need to conduct a comprehensive review of Indian affairs similar to the Meriam Report conducted in 1928.

The AIPRC was charged with conducting this comprehensive review of the federal-tribal relationship “in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians.”¹⁰ Included in the AIPRC’s charge was the duty to examine “the statutes and procedures for granting federal recognition and extending services to Indian communities and individuals.”¹¹

The Commission was comprised of six members of Congress, three from the House and three from the Senate, and five Native American leaders.¹² The House and Senate members of the Commission, through a majority vote, selected the Native American members of the Commission.¹³ The AIPRC congressional members identified over 200 individuals who could be effective in lobbying Congress and had experience in Washington D.C. politics.¹⁴ The Commission included one member from an urban area, one member from an unrecognized tribe, and three from federally recognized tribes.¹⁵

¹⁰ Public Law 93-580, Preamble, 88 Stat. 1910 (1975).

¹¹ Public Law 93-580, § 2(3), 88 Stat. 1910, 1911 (1975).

¹² American Indian Policy Review Commission, Final Report Appendixes and Index, Vol. 2 of 2, 4 (1977). Earlier attempts to pass similar legislation called for a larger commission membership and more funding.¹²

¹³ Id. at 4-5 and Public Law 93-580.

¹⁴ New Directions in Federal Indian Policy at 12-13; Public Law 93-580. Tribes received a memorandum asking for their input and nominations for who should be appointed to the Commission. Controversy surrounded the selection of the five Natives who were to serve on the Commission. New Directions in Federal Indian Policy, 12. Some Native Americans complained that the Congressional appointments were not made with enough Native input. Id. at 21.

¹⁵ Public Law 93-580, 88 Stat. 1910-11 (1975).

The congressional members selected were Ada Deer, John Borbridge, Louis Bruce, Adolph Dial, and Jake White Crow as the Indian commissioners.¹⁶

Two members of the AIPRC were personally involved in recognition efforts for their respective tribes. Ada Deer successfully lobbied for Menominee restoration to federal recognition.¹⁷ Adolph Dial, a Lumbee, was considered the most representative of unrecognized tribes. He was known for constantly fighting for federal recognition and federal support, both for his tribe and in general.¹⁸

The AIPRC established eleven task forces to study major issues affecting tribes.¹⁹ Each task force was composed of three members, two of whom had to be Native American.²⁰ The three task force members established the task force's basic plan. Each task force held hearings across the nation and had one year to investigate issues and to compile a report.²¹

One issue tackled by the AIPRC was the need for federal recognition of all tribes not currently recognized. Prior to the 1970s, federal statutes authorizing services for Native American communities and reservations refer to "Indians" for eligibility.²² These statutes were broad and did not place limits on which "Indians" were eligible for services.²³ In the 1970s, many statutes began requiring tribes to be recognized by the federal government before tribes and their members could receive services and

¹⁶ New Directions in Federal Indian Policy, 13.

¹⁷ Id. at 13.

¹⁸ Id.

¹⁹ Id. at 14. Nine of the eleven task forces were required by the authorizing legislation. Public Law 93-580, § 4, 88 Stat. 1910, 1912 (1975).

²⁰ Public Law 93-580, § 4, 88 Stat. 1910, 1912 (1975)

²¹ New Directions in Federal Indian Policy, 21;

²² Felix Cohen, Cohen's Handbook of Federal Indian Law 153 (2005 Edition).

²³ Id. at 153.

participate in Indian programs.²⁴ Issues related to federal recognition of tribes were included in Task Force Nine, Task Force Ten, and the Final Report.

1. Task Force Ten Report

Task Force Ten was charged with responsibility of addressing the issues of terminated and non-federally recognized tribes.²⁵ The chairman was JoJo Hunt (Lumbee), and members John Stevens (Passamaquoddy) and Robert Bojorcas (Klamath), all members of non-recognized or terminated tribes.²⁶ The task force identified its study as informational and noted that the study should be considered the beginning of an effort by Congress, the Executive Branch, and the American public to correct mistakes made against non-federally recognized and terminated Indians.²⁷ Task Force Ten conducted case studies of Oregon tribes, New England tribes, North Carolina tribes, tribes in Washington State, the Pascua Yaqui in Arizona, and the Tunica-Biloxi-Ofo-Avoyel community in Louisiana.²⁸ Research was conducted through questionnaires that were submitted to Indian groups and tribes, as well as through hearings, interviews, and site visits.²⁹

The task force stated that the concern over appropriations by both Congress and the Executive Branch had determined Indian affairs, and as a result, federal services, programs, and benefits were often denied to terminated and non-federally recognized

²⁴ Id. at 154.

²⁵ Final Report Appendixes and Index, 8.

²⁶ Id. at 17.

²⁷ American Indian Policy Review Commission, Report on Terminated and Nonfederally Recognized Indians, (1976) 4.

²⁸ Id. at 17-209.

²⁹ Id. at 1716-1722.

Indians.³⁰ The task force recommended that Congress direct all federal departments and agencies to serve all Indians, regardless of their status.³¹ The funding issue was acknowledged in the Task Force Ten Report, and the report suggested that Congress appropriate enough money for the departments and agencies to provide services to all Indians.³² The task force also proposed that Congress establish a fund for terminated and non-federally recognized tribes to obtain choice of counsel in order to address any problems affecting these tribes.³³

2. Task Force Nine

Task Force Nine researched and made recommendations in the areas of revision, consolidation, and codification of laws.³⁴ The task force's goal was to provide recommendations for Congress to establish a special body to codify its recommendations, which would be headed and staffed by Indian attorneys.³⁵

The Task Force Nine Report proposed devising statutory standards governing federal recognition.³⁶ The task force requested that Congress develop criteria for federal recognition for Indian groups that have been previously denied recognition.³⁷ The report suggested that Congress explain that there are a number of Indian groups who have been denied federal recognition because they lack treaties or other contact with federal

³⁰ Id. at 1696.

³¹ Id. at 1701.

³² Id. at 1701.

³³ Id. at 1702.

³⁴ Peter S. Taylor, Yvonne Knight and F. Browning Pipestem served as members of Task Force Nine. American Indian Policy Review Commission, Final Report Task Force No. 9, Vol. 1 of 2, (1976) I.

³⁵ Id. at IV.

³⁶ Id. at 100.

³⁷ Id. at 46.

authorities.³⁸ Some of these groups benefited from congressional funding in the areas of educational grants and manpower training programs.³⁹

Task Force Nine proposed that Congress should acknowledge that its refusal to recognize tribes is based on a lack of resources and appropriations for tribes already recognized, as well as a lack of clear legislative guidelines for federal recognition. The task force also suggested that Congress emphasize its commitment to provide a means for federal recognition along with enough funds for the newly recognized tribes, while not reducing funding for tribes already recognized.⁴⁰

The report suggested that Congress adopt “Congressional Findings and Declaration of Policy,” which included certain findings such as clarifying federal, tribal, and state relations.⁴¹ Task Force Nine recommended that Congress restate its plenary power over tribes, including the authority to withdraw recognition of tribes.⁴² Task Force Nine also addressed the restoration of tribes to federally recognized status and the need for Congress to clarify that Congress clarify that the termination policy was “an ill conceived policy.”⁴³

3. AIPRC Final Report

The AIPRC issued its final report to Congress in 1977.⁴⁴ Anti-Indian sentiment was on the rise during this time period. Although Representative Meeds was the primary

³⁸ Id. at 30.

³⁹ Id. at 44.

⁴⁰ Id. at 30, 46.

⁴¹ Id. at 27.

⁴² Id. at 28.

⁴³ Id. at 27, 29.

⁴⁴ Id. at III. The AIPRC Final Report was to be issued in 1976, which was a congressional election year. However, there was a split in the AIPRC between those who

sponsor of the AIPRC legislation in the House, he wrote the dissent in the AIPRC final report

The AIPRC Final Report included a special section on unrecognized and terminated tribes.⁴⁵ The AIPRC found that many tribes were terminated or not recognized because of past federal policies.⁴⁶ At the time of the report, the AIPRC identified that 130 tribes had not been recognized because of bureaucratic oversight.⁴⁷ The final report explained that all tribes should benefit from a relationship with the United States and that a federal policy should be equitably applied to all tribes.⁴⁸

Recommendations for federal recognition were proposed by the AIPRC. First, the AIPRC suggested that Congress clarify its intent by adopting a concurrent resolution that provides a policy to recognize all tribes as eligible for benefits and protections.⁴⁹ Second, the AIPRC recommended that Congress adopt a set of criteria that a special office within the Bureau of Indian Affairs could oversee.⁵⁰ The AIPRC recommended the following seven factors for determining recognition:

- A. Evidence of historic continuance as an Indian tribal group from the time of European contact or from a time predating European contact.
- B. The Indian group has had treaty relations with the United States, individual states, or preexisting colonial/territorial government. “Treaty relations” include any formal relationship based on a government’s acknowledgment of the group’s separate or distinct status.

continued to support Indian self-determination and those who opposed increases in BIA funding and other improvements to Indian support programs. Id. at 17.

⁴⁵ Id. Ch. 11.

⁴⁶ American Indian Policy Review Commission, Final Report, Vol. 1 of 2, 8 (1976).

⁴⁷ Id. at 8.

⁴⁸ Id. at 8, 37.

⁴⁹ Id. at 37.

⁵⁰ Id. at 480-483.

- C. The group has been denominated as an Indian tribe or designated as “Indian” by an Act of Congress or executive order of State governments which identified the governmental structure, jurisdiction, or property of the group in a special relationship to the State government.
- D. The Indian group has held collective rights in tribal lands or funds, whether or not it was expressly designated a tribe.
- E. The group has been treated as Indian by other Indian tribes or groups. This can be proved by relationships established for crafts, sports, political affairs, social affairs, economic relations, or any intertribal activity.
- F. The group has exercised political authority over its members through a tribal council or other such governmental structures which the group has defined as its form of government.
- G. The group has been officially designated as an Indian tribe, group, or community by the Federal government or by a state government, county government, township, or local municipality.⁵¹

In applying the factors, the report suggested that the United States have the burden of proof that an Indian group does not meet the criteria for federal recognition.⁵²

The Commission also recommended that Congress develop an office independent from the BIA to assist tribes petitioning for Federal recognition.⁵³ The office would contact all known unrecognized tribes, provide technical and legal assistance and receive their petitions.⁵⁴ The office would also decide if the group was eligible as a tribe for federal services and programs.⁵⁵ The decision would “be decided on the definitional factors . . . intended to identify any group which has its roots in the general historical circumstances all aboriginal peoples on this continent have shared.”⁵⁶ The petitioner was

⁵¹ Id. at 480.

⁵² The criteria were similar to that “developed and applied” by federal officials after enactment of the Indian Reorganization Act. Cohen, 155.

⁵³ Id. at 38.

⁵⁴ Id. at 38.

⁵⁵ Id. at 38.

⁵⁶ Id. at 38.

assumed to meet the requirements unless the government could articulate a reason that the petitioner did not meet the requirements. Within one year, after holding hearings and investigations, the office would be required to explain any rejection in a written document stating the tribe's failure to establish one of the seven factors.⁵⁷ In the AIPRC's proposed process, the government had the burden of proving that the petitioner did not meet one of the seven factors and therefore should not be considered a tribe.⁵⁸ The decision could be appealed to a three-judge federal district court. If the group was determined to be a tribe, the government would be required to immediately provide benefits and services to the tribe, and Congress would need to provide the relevant agencies additional appropriations.⁵⁹

The AIPRC's proposed criteria and procedures identified the need to recognize tribes and attempted to formulate a process by which all non-federally recognized tribes could obtain recognition with little expense and burden.

B. The Federal Acknowledgment Process

On August 24, 1978, after an extensive notice and comment period, the Bureau of Indian Affairs, Department of Interior promulgated "Procedures for Establishing that an American Indian group exists as an Indian tribe" requiring a petitioner to meet the following seven mandatory different criteria in order to obtain acknowledgment:⁶⁰

- a) A statement of facts establishing that the petitioner has been identified from historical times until the present times, on a substantially continuous basis.

⁵⁷ *Id.* at 38.

⁵⁸ *Id.* at 39.

⁵⁹ *Id.* at 40.

⁶⁰ 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361, 39363 (1978).

- b) Evidence that a substantial number of petitioning group members live in an area/community that is viewed as Indian or distinct from other populations in the area and members of the petitioning group descend from an Indian tribe “which historically inhabited a specific area.”
- c) A statement of facts establishing that the petitioner has maintained tribal political influence over its members as an autonomous entity throughout history until the present.
- d) A copy of the group’s present governing document, or statement describing the membership criteria, and also the groups governing procedures.
- e) A list of all known current members of the group and previous membership lists based on the tribe’s own defined criteria.
- f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.
- g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

Barbara Coen, an Attorney-Advisor at the Department of the Interior (“DOI”) identified that “[t]he primary impetus for formalizing the decision-making process concerning tribal status was to increase in the number of petitions from groups throughout the United States requesting that the Secretary of the Interior official acknowledge them as Indian tribes.”⁶¹ During the mid to late 1970s, there was increased judicial pressure highlighting the need for the DOI to reexamine the role of the federal government in protecting “Indian Tribes.”⁶² This pressure came in the form of Circuit Courts holding that were recognizing inherent and delegated rights of descendants of

⁶¹ Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 491 (2003).

⁶² Id. at 492-493 (citing United States v. Washington, 385 F. Supp. 312, 379 (W.D. Wash. 1974)), aff’d, 520 F.2d 676 (9th Cir. 1975), cert denied, 423 U.S. 1086 (1976) (holding an unrecognized Indian group was entitled to usufructory rights because they were successors to a treaty tribe); Joint Tribal Council of Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir. 1975) (holding the Indian Trade and Intercourse Act applied to all tribes regardless of federal recognition).

tribes merely for begin descendant of tribes.⁶³ DOI's position was that, "a tribe is not a collection of persons of Indian ancestry, unless their ancestors are part of a continuously existing political entity," separating racial groups from political entities.⁶⁴ Thus, the Department set out to promulgate rules with the essential requirement that, "the group has existed continuously as a community with retained powers."⁶⁵

II. The Current Administrative Process

A. Increased Burden on Petitioners

Since the time of its inception in 1978, the administrative criteria have not changed but the burden on petitioners to establish the criteria has increased. While the petitioners' burden of proof, "reasonable likelihood," seems low, the evidence required to meet this standard has appeared to increase. An example of this shift is evidenced by the more-detailed analysis required by petitioners and the OFA. Petitioners earlier in the process produced less documents, and it took fewer pages, i.e. less time, to evaluate petitions. The initial regulations anticipated a much shorter process than the current administrative process.

The Tunica-Biloxi Indian tribe first requested governmental assistance in protecting their rights, essentially the need for a trust relationship, in 1826.⁶⁶ It filed a petition for acknowledgment in 1978.⁶⁷ In 1980, the Department issued a positive

⁶³ Id.

⁶⁴ Coen at 497.

⁶⁵ Id. at 496.

⁶⁶ Tunica Biloxi Letter of Intent, available at
<http://www.indianz.com/adc20/Tbt/V001/D002.PDF>.

⁶⁷ 44 Fed. Reg. 116 (1979).

proposed finding and a technical report totaling seventy-eight pages.⁶⁸ The technical report included a tribal history beginning in 1694,⁶⁹ an anthropological report,⁷⁰ and information on the tribe's traditional culture and history,⁷¹ from 1826 to the present.⁷² The tribe submitted a demographic report,⁷³ a genealogical report⁷⁴ and documentation,⁷⁵ and membership criteria.⁷⁶ The Assistant Secretary of Indian Affairs recognized the tribe in July 1981.⁷⁷ The Tunica-Biloxi tribe was one of the first petitioners to go through the process after the BIA promulgated the acknowledgment regulations in 1978. There were only four comments submitted, all in support of Tunica-Biloxi's recognition.⁷⁸

Although the Tunica-Biloxi provided the necessary information to become federally recognized, the burden has become far more onerous for tribes. While the Tunica-Biloxi petition was relatively small and the technical report was only seventy-eight pages, the United Houma Nation, Inc. submitted approximately 19,100 pages in non-private information, and the technical report and proposed finding issued in 1994 was 449 pages.⁷⁹ Similarly, the earlier cases reviewed by the DOI resulted in less-extensive technical reports, the proposed finding documents for the Grand Traverse Band

⁶⁸ Proposed findings document, <http://www.indianz.com/adc20/Tbt/V001/D005.PDF>, retrieved April 18, 2008.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 28.

⁷¹ *Id.* at 31.

⁷² *Id.* at 51.

⁷³ *Id.* at 65.

⁷⁴ *Id.* at 73.

⁷⁵ *Id.* at 77.

⁷⁶ *Id.*, 78.

⁷⁷ Final Determination for Federal Acknowledgment of the Tunica-Biloxi Tribe of Louisiana, 46 Fed. Reg. 38411 (1981).

⁷⁸ *Id.*

⁷⁹ Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney Saks Tierney (Nov. 7, 2005).

of Ottawa Indians were 74 pages issued in 1979, and Jena Band of Choctaw proposed finding documents were 161 pages issued in 1980. Later proposed finding documents, such as the Burt Lake Band of Indians proposed finding issued in 2004 and the Huron Potawatomi in 1995, exceed 400 pages.

In November 2001, the General Accounting Office (GAO) prepared a report analyzing the FAP. The GAO found that only 55 of the 250 petitions for recognition contained sufficient documentation to allow them to be considered and reviewed by the OFA staff.⁸⁰ The GAO indicated that it may take up to fifteen years to resolve petitions currently awaiting active consideration based on the OFA's past record of issuing final determinations.⁸¹ The regulations however, assume a final decision will be issued approximately two years from the point of active consideration.⁸² The GAO reported that the BIA experienced an increase workload and backlog from the large amounts of documentation submitted by the petitioners.⁸³ The BIA staff reported that the petitions under review are becoming more detailed and complex as petitioners and interested parties commit more resources to the process.⁸⁴

1. Response by Congress

Congress has introduced numerous bills to address concerns with the burdens identified in processing petitions, but no bill addressing a scheme to recognize tribes has passed. Congress has given the DOI opportunities to formulate a solution, but the solutions have not solved the myriad of issues associated with the process.

⁸⁰ Indian Issues: Improvements Needed In Tribal Recognition Process, U.S. General Accounting Office, Nov. 2001.

⁸¹ Id. at 15.

⁸² Id. at 16.

⁸³ Id.

⁸⁴ Id.

In response to the GAO report, Senator Dodd introduced two bills to address concerns highlighted in the report. Senate Bill S.1392⁸⁵ and Senate Bill 1393⁸⁶ were introduced during the 107th Congress and referred to the Senate Committee on Indian Affairs. Both bills provided more resources for all participants in the FAP, in particular the bill provided funding for local governments that have an interest in a petition.⁸⁷ S. 1392 proposed to change the burden of proof from “reasonable likelihood” to “more likely than not.”⁸⁸ S. 1392 provided formal, on the record administrative adjudicatory hearings, to test the burden of proof.⁸⁹ The BIA, however, opposed both S. 1392 and S. 1393 at a hearing before the Senate Committee on Indian Affairs in 2002.⁹⁰ The BIA opposed any alteration of the criteria used to analyze petitions, including significant changes to the types of evidence and the burden of proof required.⁹¹

Senator Campbell also sought to address issues related to the process when he introduced S. 297 (“Campbell Bill”). The Campbell Bill would (1) provide a statutory basis for the acknowledgment criteria that have been used by the Department of Interior since 1978; (2) provide additional and independent resources to the Assistant Secretary-Indian Affairs (AS-IA) for research, analysis, and peer review of petitions; (3) provide additional resources to the process by inviting academic and research institutions to participate in reviewing petitions; and (4) provide much-needed discipline into the mechanics of the process by requiring more effective notice and information to interested

⁸⁵ S.1392, 107th Cong. (2002).

⁸⁶ S. 1393, 107th Cong. (2002).

⁸⁷ S.1392, 107th Cong. (2002); S. 1393, 107th Cong. (2002).

⁸⁸ S.1392, 107th Cong. (2002).

⁸⁹ S. 1393, 107th Cong. (2002).

⁹⁰ S. Hrg. 107-775, 107th Cong. 43 (2002).

⁹¹ Id.

parties to the process.⁹² The Campbell Bill also proposed changes to some of the criteria in the regulations. The bill required a showing of continued tribal existence from 1900 to the present, rather than from first sustained contact with the Europeans as provided in 25 C.F.R. Part 83.7(b) and (c).⁹³ If an Indian group demonstrates by a reasonable likelihood that the group was, or is a successor in interest to a party to one or more treaties, that group must show their existence from when the government expressly denies services to the petitioner and its members.⁹⁴ The bill allowed the petitioner to seek judicial review in the federal district court for the District of Columbia and also called for an Independent Review and Advisory Board in order to give the AS-IA a useful secondary peer review.⁹⁵

Revising the date to prove the social and political requirement of 25 C.F.R. Part 83(b) and (c) from historical times to the present could be beneficial. Congress may consider moving the date to either 1850 or to the date the state in which petitioner descends becomes a member of the United States of America. 1900 may work for some petitioners, but as evidenced in some proposed findings, some periods in the 1900s are unavailable and the extra fifty years could assist petitioners so that the proper inferences as to continuing social and political community can be made. Changing the date from first sustained contact, which in some cases can be difficult to decide, could reduce the burden for both the DOI and the petitioner. Searching historical records of France, Spain, and England is extremely burdensome and in some cases unavailable. Some research requires the use of translators and the hope that the documents are accessible. While colonial research during periods of rule by other counties can still be used to prove

⁹² Id.

⁹³ S. 297, 108th Congress (2003).

⁹⁴ Id.

⁹⁵ Id.

descent from a historic tribe, it is not necessary to prove historical and political community. It makes more sense to evaluate a tribe's social and political status from the date in which the United States would have begun to have relations with the tribe.

This Congress, Representative Faleomavaega introduced H.R. 2837 ("Faleomavaega Bill") to improve the recognition process.⁹⁶ The major concerns inspiring Representative Faleomavaega to propose the legislation readdressed the concerns addressed in the Campbell Bill: (1) petitioning tribes were stuck in the system without finality for more than 20 years; (2) tribes must spend excessive sums of money to produce the documentation required by the process; (3) the criteria are too vague and overly subjective; (4) documentation accepted as proof for one tribe is not accepted for another; and (5) the system is inherently biased, leaning heavily toward denying recognition.⁹⁷ One of the major proposals included in Representative Faleomavaega's bill was to establish a Commission on Indian Recognition setting forth procedures for an Indian group to submit letters of intent and a petition to the Commission requesting federal recognition as an Indian tribe.⁹⁸ The purpose of this Commission would be to effectively transfer the federal recognition process from the OFA to the Commission.

2. Response by DOI

The Department of the Interior immediately voiced concerns about the enactment of HR 2837. Assistant Secretary Artman agreed with establishing the criteria for acknowledgment through legislation rather than regulation because it would affirm the Department's authority and give clear Congressional direction as to what the criteria

⁹⁶ H.R. 2837, 110th Cong. (2007).

⁹⁷ Id.

⁹⁸ Id.

should be.⁹⁹ However, he testified that the bill would lower the standard for acknowledgment by requiring a showing of continued tribal existence from 1900 to present and that the legislation could result in more limited participation by parties such as states and localities.¹⁰⁰

In 1994, the AS-IA took final action on a rule revising the procedures for establishing that an American Indian group exists as an Indian tribe.¹⁰¹ The 1994 revisions meant to clarify requirements for acknowledgment and define clearer standards of evidence.¹⁰² During the public comment period of the rule a comment was made regarding the general burden of evidence. One of the provisions included a reduced burden of proof for petitioners demonstrating previous Federal acknowledgment.¹⁰³ Procedural improvements included an independent review of decisions, revised timeframes for actions, definition of access to records, and an opportunity for a formal hearing on proposed findings.¹⁰⁴ With the revisions the Department attempted to improve the quality of materials submitted by petitioners, as well as reduce the work required to develop petitions.¹⁰⁵ This was hoped to provide a faster and improved process of evaluation.¹⁰⁶

The reasonable likelihood standard is the burden provided for in the regulations. The Proposed finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana states, “although there is no specific evidence in the documentary

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ 59 Fed. Reg. 9280 (Feb. 25, 1994).

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

record in this case for every time period, the evidence as a whole indicates . . . petitioner is a tribe.” In the Little Shell decision, the BIA stated that it is not bound by its previous decisions because, “departures from previous practice on these matters are permissible and within the scope of the existing acknowledgment regulations.”¹⁰⁷ This seems to differ from the 2000 internal changes where the AS-IA indicated that the Office would rely on past decisions as “precedents” because the “existence of a substantial body of established precedents now makes possible this more streamlined review process.”¹⁰⁸

The BIA relied upon the “reasonable likelihood” standard to determine that a petitioner was externally identifiable for a 35-year period and found in favor of the tribe.¹⁰⁹ This seems contrary to later application of the standard of “unambiguous prior federal acknowledgment.”¹¹⁰ One plausible explanation for a differing interpretation in the standards is the changing of the Assistant Secretary. The reasonable likelihood standard was developed and utilized by Neal McCaleb, while the unambiguous standard was used by Kevin Gover.

B. The Current Process is not Timely

The current process does not adhere to the timeframes set forth in the regulations, not do petitioners with completed petitions have a clear indication of when their petitions may be considered. Many have criticized the process for the delay in reviewing, evaluating, and issuing a decision.

¹⁰⁷ Id.

¹⁰⁸ 65 Fed. Reg. 7052, 7053 (2005).

¹⁰⁹ Id.; see also Reconsidered Final Determination for Federal Acknowledgement of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002) (explaining that tribe met the criteria of 83.7(a) as modified by 83.8 by showing federal recognition in 1878 and 1880).

¹¹⁰ Proposed Finding Against Federal Acknowledgement of the Steilacoom Tribe of Indians, 65 Fed. Reg. 5880 (Feb. 7, 2000).

In 2000, the AS-IA changed internal procedures for processing petitions for federal acknowledgment as an Indian tribe, and clarified other procedures in order to reduce the delays in reviewing petitions.¹¹¹ The revised procedures did not change the acknowledgment regulations.¹¹² The changes provided a different means of implementing the existing regulations. The backlog resulting in delays of several years for petitions concerned the AS-IA.¹¹³ The AS-IA found the demands on the time of the OFA continued to reduce the proportion of time available for evaluation of petitions.¹¹⁴ Examples of the demand on the OFA included: (1) petitioners and third parties frequently requesting an independent review of acknowledgment final determinations by the interior board of Indian Appeals (IBIA), requiring the OFA to prepare the record and responses to issues referred by the IBIA; (2) responding to litigation in at least five lawsuits concerning acknowledgment decisions; and (3) the substantial number of Freedom of Information Act (FOIA) requests requiring the OFA to copy the voluminous records of current and completed cases.¹¹⁵

During the SCIA hearing for the Campbell Bill in 2004, the BIA supported a more timely decision making process, but expressed concern that the factual basis required to render a favorable decision should not be lessened.¹¹⁶ The BIA was also not in favor of narrowing the role of interested parties.¹¹⁷ At the hearing, two former AS-

¹¹¹ 65 Fed. Reg. 7052 (Feb. 11, 2000).

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ S. Hrg. 108-534, 108th Cong. P. 52-56.

¹¹⁷ Id.

IA's Neal McCaleb and Kevin Gover testified.¹¹⁸ They identified three problems in the current process: (1) the length of time and duplicative research required of petitioners to participate in the process have slowed the process considerably; (2) the exclusive reliance of the AS-IA on the OFA staff, due to the complexity and volume of research required of petitioners, has resulted in unnecessary friction and perceived irrationality in recognition decisions; and (3) the extent, frequency, and duplicative nature of FOIA requests to the BIA for documents submitted to or accumulated by the BIA pursuant to petitions resulted in a "churning" of document submissions and re-distributions by way of FOIA requests; this churning, in turn, has resulted in a diversion of key, technical staff from their intended roles as analysts.¹¹⁹

In 2005, Representative Pombo introduced H.R. 512 in the House of Representatives. The main purpose of the bill was to require prompt review by the Secretary of the Interior of the long standing petitions for federal recognition of certain Indian tribes.¹²⁰ The bill tried to reform the current process by setting forth a process for potentially eligible tribes to opt into expedited procedures so they can be considered eligible for recognition.¹²¹

An example of the need for clarity in the time frame is found in the case of the Muwekma Ohlone (hereinafter "Ohlone").¹²² The Ohlone have occupied the San Francisco Bay Area since pre-Columbian times. The Ohlone were recognized by the Department of the Interior ("DOI") in the early 20th Century, but since then have been

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ H.R. 512, 109th Cong. (February 2, 2005).

¹²¹ Id.

unable to achieve federal recognition. The Ohlone waited over a decade to for the DOI to conclude their review of the petition for recognition.¹²³ With no DOI decision in sight, the Ohlone filed suit against the Secretary of the Interior and the ASIA to compel the government to set a date by which consideration of the petition must be concluded.¹²⁴ The Ohlone case illustrates the need for clear time frames in the federal recognition process. Therefore, any redrafting of the federal recognition process may eliminate many costly lawsuits and timely appeals if it included a clear timeline for the DOI to follow in the process.

The Tribe's process began in 1989 when tribal officials forwarded a letter of intent to file a petition with the Branch of Acknowledgement and Research (hereinafter "BAR").¹²⁵ In 1995, the Ohlone submitted a petition for acknowledgment as a federally recognized tribe.¹²⁶ The following year, the BAR notified the Ohlone that as they claimed, the DOI had previously recognized them as the Pleasanton or Verona Band.¹²⁷ The tribe then wrote to Assistant Secretary Ada Deer requesting, "clear and concise time tables and responses," to their petition.¹²⁸ In 1996, 1997 and 1998, the BAR continued to request additional information from the Ohlone, which the tribe complied with promptly.¹²⁹ In 1998, the DOI informed the Ohlone that they were being placed on the "ready for active consideration list," and would be evaluated after the South Sierra

¹²³ Muwekma Tribe v. Babbitt, 133 F. Supp.2d 42 (D.D.C. 2001).

¹²⁴ Id. at 43.

¹²⁵ Id.

¹²⁶ Id. at 44.

¹²⁷ Id.

¹²⁸ Id. at 45.

¹²⁹ Id.

Miwok Nation petition.¹³⁰ Yet another year passed, and the petition was not reviewed. In 1999, Assistant Secretary Kevin Gover identified that there were ten tribes ahead of the Ohlone on the “ready” list, and fifteen tribes currently under “active consideration.”¹³¹ While the government claimed the petition would be heard within two to four years, the Ohlone estimated that at the current rate, it could have been twenty years before its petition was adjudicated.¹³²

Pursuant to the Administrative Procedures Act (hereinafter “APA”), the Ohlone filed a complaint in the District of Columbia District Court against Secretary of the Interior Babbitt and Assistant Secretary Kevin Gover to compel the BIA to conclude the consideration of their petition.¹³³ The Ohlone were granted summary judgment, and the court, “directed the defendant to propose . . . a schedule for ‘resolving’ the plaintiff’s petition.”¹³⁴ The District of Columbia Circuit Court clearly articulated that the ruling did not, “intend to mandate that the agency act within a prescribed time frame at this point.”¹³⁵ Following the court order, the BIA submitted a “fast-track” policy for tribes like the Ohlone.¹³⁶ While the policy would place tribes that had prior federal recognition after 1900 in an expedited process to be placed on the active consideration list, there was no provision guaranteeing that the process would end any sooner than the current

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Id. at 46.

¹³⁵ Id. see also Muwekma Tribe v. Babbitt, 133 F.Supp.2d 30, 41 (D.C. Cir. 2000).

¹³⁶ “[T]he BIA would agree to place promptly on active consideration any petitioner on the Ready list which establishes . . . under 25 C.F.R. Part 83.8 that is had prior or Federal recognition after 1900 and that its current members are representative of and descend from that previously recognized tribal entity...” Id.

process.¹³⁷ The final court order directed the BAR to issue a final determination of the Ohlone petition by March of 2002.¹³⁸ In September of 2002, the Department issued a determination denying the Muwekma Ohlone federal recognition. This order resulted in the OFA reprioritizing its cases to address the Ohlone petition.

The Ohlone case shines light on the need for timeliness in the recognition process. Other litigation also results in similar reprioritization, which affects petitioners awaiting acknowledgment decisions. First, the statutory limits of when a tribe will be placed on the active consideration list is not visible. Second, the actual time a tribe will spend on the active list is undetermined.

C. Lack of Resources

A major obstacle to any resolution of the current backlog in the FAP is the lack of resources allocated to both the OFA and petitioning tribal groups. Funding is essential to carry out the provisions of the FAP. The lack of funding impacts all aspects of the process. Without funding for the petitioners, petitioners are unable to meet the increased burden required under the FAP. Without sufficient funding for the OFA or some other regulatory body, researchers are unable to focus on one petitioning group in order to complete an analysis within the specified time frames.

1. Funding for the OFA

¹³⁷ The Ohlone pointed to the cases pending in 2001, like the United Houma Nation who had been waiting 9 years on active consideration, the Duwamish Indian Tribe who had been waiting 8 years, and the Chinook Indian Tribe who had been waiting 6 years. *Id.*

¹³⁸ *Id.* at 51.

In fiscal year 2008, the Department of the Interior (“DOI”) operated on a \$15.8 billion annual budget.¹³⁹ For fiscal year 2009, the President requested \$2.3 billion for Indian Affairs, a net decrease of \$105.4 million from fiscal year 2008.¹⁴⁰ About 95 percent of the budget authority is provided through current appropriations for discretionary programs.¹⁴¹ In addition, the President requested \$311,000 for new tribes, recently federally acknowledged tribes. These funds are used by the new tribes for efforts such as tribal enrollment, tribal government activities, and developing governing documents.¹⁴²

In November 2001, the United State Government Accountability Office (“GAO”) reported that the “BIA’s tribal recognition process was ill equipped to provide timely responses to tribal petitions for federal recognition.”¹⁴³ In addition to the backlog of petitions, the technical staff had an increased burden of administrative responsibilities which reduced their availability to evaluate petitions.¹⁴⁴ The staff had an increased burden of responding to Freedom of Information Act (“FOIA”) requests related to petitions.¹⁴⁵ In response to the GAO Report, the Department of Interior adopted a

¹³⁹ Department of the Interior Quick Facts, available at <http://mits.doi.gov/quickfacts/facts2.cfm>.

¹⁴⁰ The United States Department of the Interior Budget Justifications and Performance Information, Fiscal Year 2009, Indian Affairs at 13, available at http://www.doi.gov/budget/2009/data/greenbook/FY2009_IA_Greenbook.pdf (last visited April 18, 2008).

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (statement of Robin M. Nazarro) (2005); GAO, Indian Issues: Improvements Needed in Tribal Recognition Process, GAO-02-49 (2001).

¹⁴⁴ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (2005) (statement of Robin M. Nazarro).

¹⁴⁵ Id. at 6.

strategic plan.¹⁴⁶ Even with the implementation of the strategic plan, the GAO testified in 2005 that it will take “years to work through the existing backlog of tribal recognition petitions.”¹⁴⁷

Additional appropriations have assisted in reducing the burden on technical staff in responding to administrative matters. Additional appropriations in fiscal years 2003 and 2004 provided OFA with resources to hire two FOIA specialists/record managers and three research assistants who work with a computer database system.¹⁴⁸ The GAO found that the contractors freed the professional staff of administrative duties resulting in greater productivity.¹⁴⁹

Despite these changes, the process is still in need of additional funding. This funding need is acknowledged in GAO Reports, by a former Assistant Secretary of Indian Affairs, and by at least two former researchers in the Department of Interior. Former researchers in the Bureau of Acknowledgment and Research (“BAR”) testified that the lack of resources is a fundamental problem in the process.¹⁵⁰ In October 2007, Dr. Steven Austin, a former anthropologist in the BAR, testified before the House Committee on Natural Resources that the OFA lacks efficiency due to inadequate funding and resources.

The Executive [Branch] did not plan well or adjust to changing realities as the number of petitioners increased beyond its ability to respond to them, and the Legislative [Branch] failed to appropriate enough resources (money and

¹⁴⁶ See Dep’t of Interior, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GAO REPORT 2-3 (2002).

¹⁴⁷ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. 9 (2005) (statement of Robin M. Nazarro).

¹⁴⁸ Id. at 8.

¹⁴⁹ Id.

¹⁵⁰ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. (2007) (statements of Steven L. Austin, PhD, and Michael L. Lawson, PhD).

personnel) to get the job done. I remember how difficult it was for our Branch Chief to give testimony in Congress about the acknowledgment process, primarily to respond to concerns about why the process was moving so slowly. Her superiors at the BIA always told her that she could not ask for, or even imply the need for, additional money for the acknowledgment program. The one investment that could have made a difference in the speed with which petitions were resolved was more money to hire an adequate number of researchers and support staff, and to provide more technical assistance to petitioners and interested parties. Even when asked directly by Members of Congress if the BAR needed more funding she was not allowed to reply in the affirmative. I do not know if the OFA's Director is still under instructions not to be direct about the need for more resources, but it is something the Congress should be sensitive to as it determines what to do next.¹⁵¹

Former Assistant Secretary Kevin Gover acknowledged that the Department was advised not to disclose its funding needs with regards to OFA.¹⁵²

Additional funding is needed for more research teams. Due to the number of petitioners and lack of available staff, the same research team was assigned to a petitioning group in: Michigan, California, and Louisiana at the same time in various stages of the process. Dividing researchers into regions can improve efficiency because a researcher will develop an expertise in a certain region. A researcher will have to become familiar with each region or locality to understand and grasp the political, social, and cultural influences that may have impacted a tribe during a particular time period. For example, the term mulatto, griffe, or free person of color, may have different meanings in each region during different time periods. Further, by focusing research, analysis, and review in certain regions, researchers may be more familiar with the types of research available and conduct a faster and more efficient review because of their familiarity with a region.

¹⁵¹ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 4 (2007) (statement of Steven L. Austin, PhD).

¹⁵² Interview with Kevin Gover, Professor of Law, Sandra Day O'Connor School of Law, in Tempe, AZ (Oct. 23, 2007).

We understand the annual budget processes ultimately determine the amount of funding for all agencies, including OFA. Certainly, we also know that the funding amounts are not acceptable given the backlog of petitions. There needs to be more disclosure of what is truly needed by OFA since it conducts the day-to-day operations of the FAP.

3. Funding for Petitioners

In order to increase efficiency, funding is required for both the OFA and for petitioners throughout the entire process. While a few petitioning tribes have obtained funding from developers, not all petitioners have this option nor would some petitioners relinquish control over the submission process. Status clarification grants from the Administration for Native Americans under the Department of Health and Human Services are no longer available to petitioning entities, and there are no other sources of federal monies available for petitioning tribes.

In 2007, Dr. Michael Lawson, a former historian in the Bureau of Acknowledgment and Research, testified before the House Committee on Natural Resources that the vast majority of unrecognized tribes lack the physical and financial capability to fully prepare a petition to be submitted under the FAP.¹⁵³ He noted that unrecognized tribes tend to be small with few resources.¹⁵⁴

No petitioner has ever been successful in gaining acknowledgment without significant professional help from scholarly researchers, lawyers, and others. Yet, it has become increasingly difficult for petitioners to obtain the funding necessary to sustain professional help.¹⁵⁵

¹⁵³ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 3 (2007) (statement of Michael Lawson, PhD).

¹⁵⁴ Id.

¹⁵⁵ Id.

The criteria, as implemented, require that a petitioning tribe obtain expert analysis by genealogists, historians, and anthropologists. In addition to lawyers, some tribes need archaeologists, demographers, linguists, or other experts to prepare a comprehensive petition. Petitioners lacking financial resources have few options. The lack of financial resources and availability to pay professionals is not a consideration of the FAP.

The current scheme rests the entire research and preparatory process on mostly poor, unfunded tribal groups. Prior to 2000, the BAR staff were allowed to conduct research on petitions and did conduct substantial additional research on petitions.¹⁵⁶ In 2000, the Assistant Secretary of Indian Affairs (“AS-IA”) revised the internal procedures for processing petitions directing OFA that it is neither expected nor required to locate new data in any substantial way.¹⁵⁷ Further, the revised internal procedures prohibited the OFA from requesting additional information from the petitioner or third party after a petitioner was placed on active consideration and the OFA was directed not to consider any material submitted by any party once the petitioner’s case went on active status.¹⁵⁸ Put another way, the AS-IA wanted to ensure that the OFA merely evaluated the arguments presented by the petitioner and third parties to make a determination as to whether the evidence submitted demonstrated that the petitioner met the criteria.¹⁵⁹ The revised internal procedures also noted that petitioners had the burden to analyze the data submitted on their behalf and that the OFA did not bear the burden to analyze such data, even if the data supported the criteria. The changes attempted to ensure that the

¹⁵⁶ Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000).

¹⁵⁷ *Id.*

¹⁵⁸ 65 Fed. Reg. 7052, 7053 (Feb. 11, 2000).

¹⁵⁹ 65 Fed. Reg. 7052 (Feb. 11, 2000).

petitioner and third party submissions during the comment period, not additional OFA research, addressed any deficiencies in the petition.¹⁶⁰

In 2005, the Associated Deputy Secretary of the Interior issued revised internal regulations superseding the 2000 internal regulations.¹⁶¹ Three of revisions address potential funding burdens of the petitioner. First, the 2005 regulations removed the limitation on research by the OFA staff imposed by the 2000 revised internal procedures.¹⁶² The 2005 notice allowed some flexibility the OFA staff to undertake some research analysis beyond the arguments and evidence presented by the petitioner or third parties at the discretion of the Department.¹⁶³ This change may have limited benefits to the process if the OFA continues to be behind in evaluating petitioners because the regulation is applicable “only when consistent with producing a decision within the regulatory time period.”¹⁶⁴

Another key change in the 2005 internal regulations is the opportunity for petitioners to submit materials within a sixty day time period once a petition is placed on active status. The reality of this provision is that petitioners whose comment period has been closed for some time will need to spend the two months updating membership rolls and data during the time period in which the comment period closed and when the petition was placed on active status. This process includes printing the necessary two copies for OFA and mailing them to Washington D.C. within the two month period. For

¹⁶⁰ Id.

¹⁶¹ Office of Federal Acknowledgment; Reports and Guidance Documents, 70 Fed. Reg. 16513 (March 31, 2005).

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ 70 Fed. Reg. 16513, 16514 (March 31, 2005).

petitioners who rely on volunteers and lack adequate resources, two months may be insufficient to update and copy a decade of information.

3. Federal Acknowledgment Bills addressing Resources

Representative Faleomavaega recognized the severe financial burden on petitioners as a factor in introducing H.R. 2837, “The Indian Tribal Recognition Administrative Procedures Act”, in the 110th Congress (“Faleomavaega Bill”).¹⁶⁵ Some tribes must spend “huge sums of money – as much as \$8 million – to produce the mountains of documentation required by the process.”¹⁶⁶ In response to this burden, the Faleomavaega Bill proposes monetary assistance to tribal petitioners through the Health and Human Services.¹⁶⁷ These grants would assist petitioners in (1) conducting the research necessary to substantiate documented petitions under the Act; and (2) preparing documentation necessary for the submission of a documented petition under the Act. However, there is no specific amount enumerated in this section. The bill authorizes appropriations to the Secretary of the Health and Human Services to fund petitioners in researching and documenting petitions in the amount necessary for each of fiscal years 2008 through 2017.¹⁶⁸

Similar efforts to include grant funding for petitioners were included in bills sponsored by Senators Campbell and McCain.¹⁶⁹ Senator Campbell introduced S. 297 during the 108th Congress (“Campbell Bill”). The Congressional Budget Office

¹⁶⁵ H.R. 2837, 110th Cong. (2007).

¹⁶⁶ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. (2007) (statement of Representative Nick J. Rahall, II, Chairman, House Comm. on Natural Resources).

¹⁶⁷ H.R. 2837, 110th Cong. § 17 (2007).

¹⁶⁸ Id. § 19.

¹⁶⁹ S. 297 § 6(b), 108th Cong. (2003).

("CBO") estimated that ten new petitions would be filed each year, and assumed that grants of \$200,000 would be awarded per petition for petitioners and third-parties. Under this assumption, CBO estimated a total cost of \$1 million in 2005 and \$2 million annually thereafter for an estimated cost of \$9 million over the 2005-2009 period.

Both the Campbell Bill and the McCain Bill addressed the FAP funding issue. In the Tribal acknowledgment and Indian Bureau Enhancement Act of 2005 sponsored by Senator McCain ("McCain Bill"), \$10 million was contemplated for fiscal year 2006 and each fiscal year thereafter.¹⁷⁰ The Campbell Bill included a funding authorization for the FAP in the amount of \$5,000,000 for each of the fiscal years 2004 through 2013.¹⁷¹ The CBO estimated that implementing the Campbell Bill would cost \$44 million over the 2005-2009 budget periods, subject to the appropriation of the necessary amounts.¹⁷² CBO also acknowledged that enacting the bill would not affect direct spending or revenues.¹⁷³ Furthermore, S. 297 contained no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act ("UMRA") and would impose no direct costs on state, local, or tribal governments.

In addition to ensuring funding for petitioners, interested parties, and the regulatory body, the Campbell Bill proposed to create and fund the Federal Acknowledgment Research Pilot Project.¹⁷⁴ The project would have made available additional research resources for researching, reviewing, and analyzing petitions for

¹⁷⁰ S. 630, 109th Cong. (2005)

¹⁷¹ *Id.*

¹⁷² S. REP. NO. 108-403 (2004).

¹⁷³ *Id.*

¹⁷⁴ S. 297, 108th § 6(c)(1) (2003)..

acknowledgment received by the Assistant Secretary of the Bureau of Indian Affairs.¹⁷⁵ This project would have authorized the appropriation of \$3 million for each of fiscal years 2004 through 2006 to provide grants to institutions that participate in a pilot project designed to help DOI review tribal recognition petitions.¹⁷⁶ CBO estimated that implementing this provision would cost \$6 million during 2005-2006.¹⁷⁷

C. Independent Commission Proposals

The process for unrecognized Indian tribes to gain federal recognition is problematic as perceived by interested parties, petitioners, and third parties. Current issues with the process include the length of the process, the possibility of duplicative research, and the “exclusive reliance on the Assistant Secretary.”¹⁷⁸ The FAP needs “greater transparency, consistency and integrity,” in addition to “funding and technical expertise.”¹⁷⁹

Independent commissions are proposed to potentially cure the ineffective regulatory process surrounding the FAP. The creation of an independent commission may relieve reliance upon the Assistant Secretary, who is overburdened with many responsibilities.¹⁸⁰ Independent commissions are proposed in the hope that petitioner’s claims may experience shorter waiting periods throughout the several stages in the FAP.¹⁸¹ Similar to the expertise currently found in the OFA, individuals on the independent commission could produce well-reasoned and carefully-decided decisions,

¹⁷⁵ S. 297, 108th § 6(c)(1) (2003).

¹⁷⁶ S. REP. NO. 108-403 (2004).

¹⁷⁷ Id.

¹⁷⁸ 108 S. Rpt 403, Oct. 11, 2004.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

especially if the individuals possess knowledge in the areas of history, federal Indian law and policy, anthropology, and genealogy.¹⁸² Former AS-IA Kevin Gover believes that the current OFA process goes into too much research in approving a petition.¹⁸³ “I believe [the regulations] call for an evaluation of the petition, the application of a standard of proof that is included in the regulations, and then move on.”¹⁸⁴ Any process, however, should include funding for petitioners in preparing claims for acknowledgment.

1. Prior Bills Proposing an Independent Commission

Independent commissions have been proposed in at least two ways. First, in H.R. 2837, proposed by Representative Faleomavaega, the FAP would be completely removed from the Bureau of Indian Affairs and transferred to an “Independent Commission on Indian Recognition.”¹⁸⁵ The Faleomavaega Bill establishes an independent commission that would “review and act upon documented petitions submitted by Indian groups that apply for Federal recognition.”¹⁸⁶ The Commission would include three members appointed by the President, with the “advice and consent of the Senate.”¹⁸⁷ When making appointments, the President would consider recommendations from Indian groups and tribes, and also “individuals who have a background or who have demonstrated expertise and experience in Indian law or policy, anthropology, genealogy, or Native American history.”¹⁸⁸ The Faleomavaega Bill outlines a process, including a timeline, for setting a

¹⁸² Id.

¹⁸³ Federal Acknowledgment Process Reform Act, S. Hrg. 108-534, S. 297, Apr. 21, 2004, pg. 64.

¹⁸⁴ Id.

¹⁸⁵ 2007 H.R. 2837, June 22, 2007.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

preliminary and adjudicatory hearing after the submission of a petition to the Commission.¹⁸⁹

Senator McCain also proposed an “Independent Review and Advisory Board” in 2003. This board would assist the Assistant Secretary of Indian Affairs with decisions regarding evidentiary questions.¹⁹⁰ This board would serve in an advisory capacity to the Assistant Secretary by peer reviewing federal acknowledgment decisions.¹⁹¹ The purpose for the Independent Review and Advisory Board is to “enhance credibility of acknowledgment process as perceived by Congress, petitioners, interested parties and the public.”¹⁹² The ASIA would appoint the nine individuals to the board.¹⁹³ Three would have a doctoral degree in anthropology; three a doctoral degree in genealogy; two a juris doctorate degree; and one would qualify as a historian.¹⁹⁴ Preference would be given to those individuals with a background in Indian policy or Indian history.¹⁹⁵

Independent commissions have been criticized for several reasons. It has been suggested that any independent commission should be funded upfront and fully functioning quickly.¹⁹⁶ Furthermore, former AS-IA Kevin Gover suggests that individuals selected to serve on the commission should have backgrounds in different areas of expertise.¹⁹⁷

¹⁸⁹ Id.

¹⁹⁰ Federal Acknowledgment Process Reform Act of 2003, S. 297, S. Hrg. 108-534, Apr. 21, 2004, pg. 34.

¹⁹¹ Id.

¹⁹² Id.

¹⁹³ Id. at 35.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id. at 55.

¹⁹⁷ Id. at 63.

The roles and duties of an independent commission should be clearly defined, which is fundamental to an effective recognition process. In past bills, the roles of an independent commission were not clearly defined.¹⁹⁸ This is essential so that the commission knows its duties in the FAP and it does not do duplicate research already involved in the process.¹⁹⁹ Timelines should also be outlined in order to have an effective independent commission, and thus, a more effective process. Finally, depending on the structure of the commission, a process should be established in the event there are disagreements between the OFA decisions and the commission.²⁰⁰

2. Structuring a Successful Independent Commission

Perhaps one way to improve the FAP is to consider whether an independent commission should be politically appointed. If individuals are politically appointed, it will be by the President and by the Senate, as proposed in the Faleomavaega Bill.²⁰¹ If individuals are politically appointed, this may encourage “fresh eyes” to review claims. On the other hand, this may affect the use of precedence in decisions because new independent commissions may review claims using different standards. Whether the positions are politically appointed or approved by the Assistant Secretary, the qualifications of the individuals fulfill their duties on the independent commission should be seriously considered in order to encourage the positive perception of the independent commission, the OFA, the Assistant Secretary and the Bureau of Indian Affairs.

Another way to improve the process is deciding whether to include in-house counsel to work with the commission. The Campbell Bill required two of the nine

¹⁹⁸ Id. at 83.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ Indian Tribal Federal Recognition Administrative Procedures Act, 2007 H.R. 2837.

individuals on the independent commission to possess a juris doctorate.²⁰² In-house counsel may work well in an advisory capacity to the independent commission due to the legal training that individuals possessing a juris doctorate receive. In-house counsel may also be an excellent resource for advising petitioners about the evidence needed when providing a thorough claim.

It is unclear whether an independent commission will be more effective in implementing regulations than the OFA, depending on the structure and duties of the OFA and the independent commission. First, an independent commission should speed up the process of reviewing petitions, and not create an entire new process that will, in the end, only slow down the current process.²⁰³ Perhaps giving incentives to the Assistant Secretary, OFA, and the independent commission could produce results within a given time period to “create a sense of urgency” in determining the status of petitions.²⁰⁴

Second, the OFA and an independent commission should be encouraged to work together in creating a more efficient process. Conceivably, the OFA could work with administrative requirements, such as FOIA requests, requests by petitioners for reconsideration of recognition, and lawsuits filed by discontented parties.²⁰⁵ Then, an independent commission’s tasks could include: (1) reviewing the substance of a petitioner’s claim, (2) providing all interested parties with information earlier in the process so that petitioners, third parties, or any interested party can be more informed and

²⁰² Federal Acknowledgment Process Reform Act of 2003, 2003 S. 297 § 6(a)(2).

²⁰³ Federal Acknowledgment Process Reform Act, S. 197, Hearing April 21, 2004, 49.

²⁰⁴ Indian Issues, Improvements Needed in Tribal Recognition Process, GAO-02-49, 16 (2001).

²⁰⁵ Id.

able to fully comply with the regulation's requirements for a petition or to comment on a petition, or (3) fulfilling all tasks in the regulatory process in a timely, efficient manner

III. Recommendations

It seems clear from the DOI's past hearing testimony that it is in agreement that the current FAP needs some reform. The disagreement is the extent of reform. Any modification of the criteria or standard of proof under the FAP concerns the Department because the Department has a trust responsibility to the existing federally acknowledged tribes. The responsibility entails providing current government resources and services to the acknowledged tribes. If the standard for acknowledgment lessens and more tribes are recognized, that takes away from the resources allocated to the current acknowledged tribes. The Department's testimony claims to hold the FAP in top priority, but there is an inherent conflict of interest built into having the Department decide the fate of a petitioning tribe.

S.297 and H.R. 2837 offer reforms such as the creation of an independent commission, a sunset provision, and a Freedom of Information Act provision. These reforms are to the procedures of the federal acknowledgment provisions. In a recent interview between the Arizona State Indian Legal Clinic and former AS-IA, Kevin Gover, the discussion focused on amending the procedural aspects of the federal acknowledgment regulations. Mr. Gover acknowledged the need for reform of the regulations, however he stressed that a successful bill must focus on the procedures of the regulations not the seven mandatory criteria for acknowledgment. The issue is whether proposed procedural or substantive changes are practical and whether their implementation makes the acknowledgment process more effective and efficient.

A. Summary of Recommendations

- As evidenced in the fiscal years 2003 and 2004, the appropriation for additional staff to help with administrative needs helps the OFA to be more efficient, but it is not sufficient. Additional funding is needed for more teams. At present, due to the number of petitioners and lack of available staff, one research team may be assigned to a petitioner in Michigan, California, and Louisiana at the same time in various stages of the process. Employing enough teams so that a researchers can develop
- If the commission is created, the proposed legislation should specify an initial budget for the Commission. In order to determine the amount needed, it is recommended that the Committee request the Government Accountability Office (GAO) to determine an estimate of startup costs.
- Adequate funding for petitioning groups should be appropriated either through the Department of Health and Human Services or some other forum. Providing funding to petitioners will ease the OFA's burden in reviewing the documentation because the petition will likely be more organized, fully analyzed, and more responsive to the criteria. Without assistance to the petitioners in preparing petitions, many petitioning groups will likely not have sufficient resources to complete the process.
- Appropriate sufficient funding to create region-specific research teams. Creating teams that are familiar with certain areas and allowing them to focus their time on those areas may increase the timeliness of the petitions.
- Consider revising the social and political requirement of 25 C.F.R. Part 83(b) and (c) from historical times to the present to 1850 or the year in which the petitioner's state was admitted to the United States.

B. Additional Recommendations Regarding Task Force/Commission/Peer Review Committee

Congress could decide to keep OFA while creating a commission, task force, or peer review committee to aid OFA in the current backlog. As an alternative, OFA could serve in the area of technical assistance to a commission to ensure that petitioners are informed early in the process and to make sure that petitions are reviewable. Creating a commission that replicates the current practice, without adequate funding, however is not useful.

- The creation of an independent commission/task force, or peer review committee could provide a positive impact on the federal acknowledgement process; (defer to Senate to decide the establishment, authority, and placement of an appropriate entity) The commission could either be independent or serve as a peer review committee lessening the burden on OFA and increasing the efficiency of an acknowledgment process. The decision as to where the commission, task force, or peer review committee should be determined by Congress.
- Whether an independent commission is a “peer review” committee to the Assistant Secretary, or an entirely new entity replacing the Assistant Secretary’s role in FAP the duties of an independent commission should be clearly defined within a bill.
- An independent commission consisting of individuals with a variety of diverse backgrounds may produce decisions that are well-rounded and thoroughly reviewed.
- A politically appointed independent commission may create positive changes in the process because new individuals will review petitions; however, reliable precedence should be taken into consideration.
- An internal deadline for each step in the regulatory process should be established, in order to ensure that decisions produced by the independent commission are timely and efficient.
- To ensure that decisions are timely and effective, incentives or goals of the independent commission, OFA, or Assistant Secretary should be established.
- Open lines of communication between the independent commission and petitioners should be created, either through a more transparent review process during the consideration of petitions or through review or adjudicatory hearings.
- A bill providing financial support, such as travel reimbursement or funding for a fully functional commission, should be included within the bill.
- If the independent commission/task force is not created, the AS-IA, and Senate staff, with the aid of the GAO, should analyze an appropriation amount to fund additional resources for OFA. The detailed budget analysis should make a suggestion for the amount of additional staff needed within OFA and justification for the positions.
- Congress should consider implementing sunset provisions throughout the stages of the process, whether the process is administered by OFA or a commission.