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RECOMMENDATIONS FOR IMPROVING THE FEDERAL ACKNOWLEDGEMENT PROCESS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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THURSDAY, APRIL 24, 2008

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:21 a.m. in room 562, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. Next we will go to a hearing on the Federal acknowledgment process. I thank all my colleagues for being here today for the business meeting.

The Federal acknowledgment process is, as all of us know, very difficult and controversial. Mr. Artman, if you would be willing to allow us to do this, I would like to call you to the witness table. We have two additional witnesses; with your permission, I would like all three witnesses to appear at the table.

We will be hearing from Mr. Carl Artman, who is the Assistant Secretary for Indian Affairs; Patricia Ferguson-Bohnee, a clinical professor of law and Director of Indian Legal Clinic, Sandra Day O'Connor College of Law, Arizona State University; and Anthony Rivera, Jr., the Chairman of the Juaneño Band of Mission Indians in California.

I am going to wait just a moment while the room clears. I will make a couple of comments, but let me call first on the Vice Chairman of the Committee, Senator Murkowski.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman.

I appreciate the short order that we have conducted the business meeting in. I think there were some good things on the agenda, certainly, the nomination of Mr. McSwain, good to get that through.

I am pleased that we are holding the hearing this morning on the recommendations for improving the Federal acknowledgement process. I want to welcome you, Mr. Rivera, I know you have traveled some ways to be here. But also, your Tribe's ongoing, truly decades-long experience with this administrative recognition proc-

ess at the OFA, we appreciate your trials, if you will, and your willingness to be here this morning.

Mr. Chairman, since 1978, the BIA Office of Federal Acknowledgement and its predecessor agency have reviewed and resolved over 60 petitions for Federal recognition. Unfortunately, this is only about 20 percent of the nearly 330 petitions that have been submitted by the tribal groups for Federal recognition. We know that the process takes just too long. And this is for almost every group that has been through the process.

The current administrative recognition process is seen by many of our tribal applicants, as well as those of us here in Congress, as excessively burdensome. Given the current backlog of acknowledgment petitions at the Department, it is therefore hardly surprising that some groups seek the legislative recognition rather than the administrative route, just as we have seen with the Lumbee here. It is my hope that this hearing will provide us with some acceptable ways to improve the process. I think some of us feel that imposing specific deadlines and adopting standardized criteria to the OFA's regulatory process would help things a great deal.

I do appreciate that the Department has a difficult job when it comes to determining which groups should get recognized, which should not. I know it is often much easier for us to sit here and criticize a decision than it is to make one. So I am here with an open mind, especially to listen to our witnesses' hopefully constructive recommendations and comments. Again, I appreciate the length that people have traveled to be here and your willingness to hold the hearing, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman. Just a real quick remark. First of all, I appreciate the panelists being here today and appreciate your time.

I would just say that, kind of dovetailing on the remarks that have already been made, at this point in time, I think the process is too long. I think when the Senator from Alaska talks about criteria and deadlines, I don't think that is something any of us want to do. But the fact is, we need to do it to push the process along, I would certainly consider myself.

But I think the bottom line is that we have to, you have to do a better job in making decisions in a timely manner. Whether those are yeses or noes, they have to be made. Delaying is not an option. We have a tribe in Montana that hopefully we will have a decision out on this summer. I look forward to that decision on the Little Shell.

But the truth is, they have been at it for 30 years. That is a little too long. And that is an understatement, by a large margin.

So thank you for being here, and I look forward to hearing what you are doing to improve the process and what you see in the future as the process entailing to expedite, and still do a thorough job, but just moving through the process in a timely manner, I guess is a better term. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester, thank you very much.

This is a very challenging area for this Committee and for the Congress, because we have a number of tribes coming to the Congress saying, give us recognition. Well, the fact is, this Congress, no Congress really, has the capability to do the kind of work and investigation that is necessary to make good decisions.

That is why in 1978 there was a process established at the Department of the Interior, and it required a tribe to prove substantially continuous tribal existence since historical times. It sets out seven criteria they have to meet. I am told that petitioning groups have to put together material that sometimes fills an entire room, and at a great deal of cost.

The frustration of the groups is something I understand. There are a good many tribes who have been at this 15, 20, 25 years, some longer, trying to work through the process at the Department of the Interior. My own view is the process at the Department of Interior doesn't work. That is not a judgment of mine about the merits of the decisions. I don't have a basis for deciding whether you make the right decisions or the wrong decisions.

But I do think that there should be some capability for a tribe to make its case in a reasonable period of time. Is it five years? I don't know. But it is not 30 years. So what we are trying to do today is to see how does this process work, how can it be improved, what has happened recently to improve it, and how can we rely on this process to take the burden off us of having tribes come to this Committee and say, we want recognition because the recognition process doesn't work at Interior. We can't allow this to continue any more. This has to work at Interior.

The Lumbee Tribe was different. As you note, Assistant Secretary Artman, the Lumbee Tribe couldn't go to Interior. It is the only tribe with a bill pending before the Senate that is prevented from going to Interior. My preference would be to say, let's let it go to Interior and require you in two years to make a judgment. So we passed out the Lumbee bill.

But this is a serious problem we have to correct. How do we make this system at Interior work? We are not going to force you to say yes or no; we shouldn't do that. We shouldn't involve ourselves in individual cases. That should be left to historians and anthropologists and genealogists, et cetera. We don't have that in this Committee, but you do, or you have the capability of accessing these petitions.

So I appreciate the three witnesses coming to our Committee. I am interested in hearing their testimony. We will ask some questions and my hope is that we will hear that there is some significant progress being made.

Mr. Artman, we, Senator Murkowski; Senator Tester; myself and other members of this Committee, approved your nomination after that position had been empty, vacant, for over two years which is shameful in my judgment. I am glad you are there. Your leadership now has to give us the opportunity to make progress on these issues. So you have great opportunities and great challenges, and this Committee is partly responsible for your being there. We appreciate that you are there and that you come here today to describe those issues to us.

You may proceed.

STATEMENT OF HON. CARL J. ARTMAN, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. ARTMAN. Thank you, Senator Dorgan, members of the Committee. I am here to provide the Administration's statement on the Federal acknowledgement process under 25 C.F.R. Part 83, and the changes we are undertaking to expedite that process.

Acknowledgement of the continued existence of another sovereign entity is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgement enables that sovereign entity to participate in Federal programs for Indian tribes and acknowledges a government-to-government relationship between an Indian tribe and the United States.

Acknowledgment carries with it privileges and immunities. The Part 83 regulations require groups to establish that they have had a substantially continuous tribal existence and have functioned as autonomous entities throughout history until present. Under the Department's regulations, petitioning groups must demonstrate that they meet each of the seven mandatory criteria. Since the promulgation of the Department's Federal acknowledgement regulations, the Department has issued 101 decisions to date.

The Department has taken several actions to expedite and clarify the Federal acknowledgement process. Some of these required changes to our internal workload process, and some will require changes to the regulations. Internal changes include OFA's instituted changes in its review of a documented petition to help speed up the review process.

We revised the FAIR computer data base, allowing OFA researchers to make efficient use of their time. OFA is revising its Guidelines for Petitioners and the Guidelines for Petitioner Reviewers. These guidelines will assist the petitioners, interested parties and the researchers to better understand what the Department expects and what the regulations require to provide more clarity in their submissions.

Our goal is to continue to improve the process, so that all groups seeking acknowledgement can be processed and completed within a set time frame. We are considering various ideas for improving the Federal acknowledgement system, such as recommending a waiver of the recommendations to move to the front of the ready, waiting for active consideration list groups that can show residence and association on a State Indian reservation continuously for the past 100 years, or groups that voted on the Indian Reorganization Act in 1934, if the groups appear to have met subsections (e), (f) and (g) of the Part 83 regulations.

Another is to limit the number of technical assistance reviews and impose a time period for petitioner response to a technical assistance review letter to move the petitions along at a faster rate; creating more concise decision documents to speed the process and improve the public's ability to understand the decision; issuing negative proposed findings or final determinations based on a single criterion which would speed the work and maximize the use of researcher time; clarifying the "first sustained contact" provision to

ease the burden of petitioners and reduce time-consuming research into colonial histories.

Reviewing the regulations to provide for a sunset provision of 15 years for the Federal acknowledgment process. This 15-year sunset provision would include deadlines for groups to submit letters of intent, petitioners to complete the documented petitions, for the Department to issue technical assistance letters, petitioning groups to respond to technical assistance review letters, a deadline for the Department to issue proposed findings and a deadline for the Department to provide comment and response period and final determinations.

The regulations are only under review now. If we go forward with those, they will of course go through with the process of consultation and comment period. This 15-year sunset provision would not include a post-final determination reconsideration process before the IBIA, the Interior Board of Indian Appeals, or litigation under the APA.

I would like to thank you for the opportunity to speak to you today about our acknowledgement process and I look forward to your questions.

[The prepared statement of Mr. Artman follows:]

PREPARED STATEMENT OF HON. CARL J. ARTMAN, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am submitting the Administration's statement on the process that the Federal Government follows when it receives a petition from a group seeking federal acknowledgment as an Indian tribe under 25 C.F.R. Part 83 and changes we are undertaking to expedite this process.

Implications of Federal Acknowledgment

The acknowledgment of the continued existence of another sovereign entity is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment enables that sovereign entity to participate in Federal programs for Indian tribes and acknowledges a government-to-government relationship between an Indian tribe and the United States.

These decisions have significant impacts on the petitioning group, Tribes and the surrounding communities, and Federal, state, and local governments. Acknowledgment carries with it certain privileges and immunities, including a government-to-government relationship with the federal government and partial exemptions from state and local government jurisdictions, and the ability of newly acknowledged Indian tribes to undertake certain economic opportunities.

Newly acknowledged Indian tribes are eligible to receive Federal health and education services for its members, to have the United States take land into trust that will not be subject to state taxation or jurisdiction, and to operate a gaming facility under the Indian Gaming Regulatory Act once it has met the conditions of that Act.

Background of the Federal Acknowledgment Process

The Federal acknowledgment process set forth in 25 C.F.R. Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," allows for the uniform and rigorous review necessary to make an informed decision on whether to acknowledge a petitioner's government-to-government relationship with the United States. The regulations require groups to establish that they have had a substantially continuous tribal existence and have functioned as autonomous entities throughout history until the present. Under the Department's regulations, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

(a) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;

(b) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

(c) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(d) provide a copy of the group's present governing document including its membership criteria;

(e) demonstrate that 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) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and

(g) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. A petitioner must satisfy all seven of the mandatory criteria in order for the Department to acknowledge the continued tribal existence of a group as an Indian tribe.

The Federal acknowledgment process is implemented by the Office of Federal Acknowledgment (OFA). OFA is currently staffed with a director, a secretary, three anthropologists, three genealogists, and three historians. A team composed of one professional from each of the three disciplines reviews each petition. Additionally, OFA has a contract that provides for three research assistants and three records management/Freedom of Information Act specialists, as well as one Federal acknowledgment specialist and one computer programmer for the Federal Acknowledgment Information Resource (FAIR) database system.

OFA's current workload consists of six petitions on active consideration and ten fully documented petitions that are ready, waiting for active consideration. OFA describes its workload according to when an application is ready for review and when it makes a proposed or final determination.

Improvements to the Federal Recognition Process

The Department has taken several actions to expedite and clarify the Federal acknowledgment process. Some of these required changes to internal workload processes to eliminate backlogs and delays and some will require amendments to the regulations.

Since the last hearing before this Committee on Federal Acknowledgment in September 2007, the Department has made several decisions on petitions.

- Around the time of the last hearing, the Department's final determination to acknowledge the Mashpee Wampanoag Tribe had just become final and effective for the Department.
- In October 2007, the Department made a final determination not to acknowledge the St. Francis/Sokoki Band of Abenakis of Vermont. This determination became final and effective for the Department on October 1, 2007.
- On November 26, 2007, the Department issued two proposed findings for the Juaneño Band of Mission Indians, Achachemen Nation (Petitioner #84A), and the Juaneño Band of Mission Indians (Petitioner #84B) and published notice on December 3, 2007, starting 180-day comment periods for both of these California petitioners and interested parties.
- On January 28, 2008, the final determinations to not to acknowledge the Nipmuc Nation (Hassanamisco Band) and the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians of Massachusetts became final and effective for the Department.
- On March 12, 2008, the Department issued a negative final determination on the Steilacoom Tribe of Indians.

The Department just conducted two day-long formal technical assistance meetings on April 17 and 18, 2008, for the Juaneño Petitioners #84A and #84B.

OFA has instituted a change in its review of a documented petition in order to help speed up the review process. We have a genealogist review the petition first, followed by the historian and anthropologist. The genealogist's advance work, prior to the petition going on the "active" list, prepares the way for the other professionals during the active review process.

We revised the FAIR computer database. FAIR provides OFA researchers with immediate access to the records, and the revised version speeds up the indexing of

documents and allows for more data review capabilities, allowing OFA researchers to make efficient use of their time.

OFA modified its contract to include a computer programmer to complete and to maintain FAIR and to design the final version of FAIR 2.0 to allow for electronic redaction of documents under the Freedom of Information and Privacy Acts. In addition, OFA has started the process to purchase a heavy duty scanner, new computers, printers, and software for faster scanning and work.

The OFA is revising its "Guidelines for Petitioners" and the "Guidelines for Petitioner Researchers." These guidelines will assist petitioners, interested parties, and researchers to better understand what the Department expects and what the regulations require in order to provide more clarity in submissions. Better prepared submissions will speed up the evaluations and prevent potential deficiencies in the petitions.

In the "Guidelines for Researchers," OFA will provide a recommended format for petitioners to use to point to the specific evidence in their submission that meets the criteria for specific time periods. OFA also will recommend that petitioners present their genealogies in a common format used by genealogists (GEDCOM) and provide membership lists in an electronic database.

Our goal is to continue to improve the process so that all groups seeking acknowledgment can be processed and completed within a set timeframe. We are considering various ideas for improving the Federal acknowledgment system such as:

- Recommending a waiver of the regulations to move to the front of the "Ready, Waiting for Active Consideration" list groups that can show residence and association on a state Indian reservation continuously for the past 100 years or groups that voted on the Indian Reorganization Act (IRA) in 1934, if the groups appear to have met subsections (e), (f), and (g) of 25 C.F.R. §83.7.
- Limiting the number of technical assistance reviews and imposing a time period for petitioner response to a technical assistance review letter to move petitions along faster.
- Creating more concise decision documents to speed the process and improve the public's ability to understand the decision.
- Issuing negative proposed findings or final determinations based on a single criterion which would speed work and maximize use of researcher time.

Clarifying the "first sustained contact" provision of 25 C.F.R. §83.7(b) & (c) to ease the burden on petitioners and reduce time-consuming research into colonial histories.

- Hiring additional professional researchers.
- Revising the regulations to provide for a sunset provision of 15 years for the Federal acknowledgment process. This 15-year sunset provision would include deadlines for: (1) groups to submit letters of intent, (2) petitioners to complete their documented petitions, (3) the Department to issue technical assistance letters, (4) petitioning groups to respond to technical assistance review letters, (5) the Department to issue proposed findings, (6) the Department to provide comment and response periods, and (7) the Department to issue final determinations. This 15-year sunset provision would not include the post-final determination reconsideration process before the Interior Board of Indian Appeals or litigation under the Administrative Procedure Act.

Thank you for the opportunity to provide my statement on the Federal acknowledgment process. I will be happy to answer any questions the Committee may have.

The CHAIRMAN. Mr. Assistant Secretary, thank you very much.

I am going to ask the other two witnesses to testify, and then we will have questions.

Mr. Rivera, who is Chairman of the Juaneño Band of Mission Indians in California, as I understand it, you will provide recommendations. You have a petition that is under review and you are going to give us your perspective as someone who is going through this process. You may proceed, and your entire statement will be part of the record.

STATEMENT OF HON. ANTHONY RIVERA, JR., CHAIRMAN, JUAÑENO BAND OF MISSION INDIANS, ACJACHEMEN NATION

Mr. RIVERA. Very well. [Greeting in native tongue.]

Good morning, Chairman Dorgan, Vice Chairman Murkowski, and distinguished members of the Committee, I am Anthony Rivera and I am Chairman of the Juaneño Band of Mission Indians, Acjachemen Nation in California, petitioner on active status in the Office of Federal Acknowledgement.

It is my honor to appear before you today to discuss the Tribe's 26-year experience with the administrative process in the Interior Department's Office of Federal Acknowledgement. You do have my prepared statement, and I hope that you have an opportunity to review it. But I would like to spend just a few minutes to emphasize a couple of the major points relating to the acknowledgement process as far as our experience is concerned.

The Acjachemen Tribe has been in the process for the last 26 years, since 1982, of our letter of intent submission. We are one of about seven petitioners on the active consideration list. We are not talking 700, we are only talking 7 petitioners who are actively being considered by the Office of Federal Acknowledgement.

In our case, an acknowledgement has been made and a proposed finding, which was issued, which demonstrates that there was in fact a historic Acjachemen Tribe in the area of San Juan Capistrano, California. That allows us to proceed forward with the evidence on the next stage.

With this experience, this 26-year experience that we have in this process, we offer the following improvements and discussion points to the acknowledgement process. Two points, first of all, the delay issue. There are numerous delay issues, one of which takes place in the "ready" status portion. In our case, we had a removal from ready status which delayed our petition for moving into active approximately 13 years. The letter of intent assessment process, that means new petitioners who are submitting letters of intent to engage the process, needs some work on how you assess that these are capable and qualified petitioners, some of which compete with petitioners who have already sent in a letter of intent.

And then of course, the active status movement, there has to be movement with those seven petitions in the active status. That leads to the second issue, and that is the petitioners, including ours, in the active status portion of the recognition process.

The numerous extensions, which are granted in the active status portion of the acknowledgement process, need to be regulated a little bit more. The regulations state that after 12 months, a proposed finding is to be issued on the evidence which has been submitted up to that point, after which the Assistant Secretary has the discretion of an approximately 180-day extension if it is needed.

Our petition and our case, we have experienced approximately seven extensions, not requested by the Tribe, but by the Department, which causes further and further delay of the process. We understand some of the reasons for the extension needs, many of which have to do with the need for resources and funding, to be able to concentrate on the various different elements of the process here.

The Tribe has experienced, since our proposed finding has been issued after seven extensions, we have been experiencing progress, which we are pleased with. We have conducted, with the Office of Federal Acknowledgement, technical assistance meetings which have been very beneficial to understanding what evidence is required, so that they can do their portion of the process.

Finally, we would like to suggest that our petition particularly be a test case or a, we offer that we can assist in some of these recommendations a little further perhaps at another time or during our question and answer to help you understand what really needs to be done with this extensive experience we have.

Finally, as the Committee has stated, the unnecessary delays need to cease and action needs to take place. These petitions need to move. Once the active petitions move, including ours, then the petitions that are ready for active can move and also take place.

I am happy to take any questions that you have on that.

[The prepared statement of Mr. Rivera follows:]

PREPARED STATEMENT OF HON. ANTHONY RIVERA, JR., CHAIRMAN, JUANEÑO BAND OF MISSION INDIANS, ACJACHEMEN NATION

Good morning Chairman Dorgan, Vice Chairman Murkowski, and distinguished members of the Committee. My name is Anthony Rivera, Jr. and I am the Chairman of the Juaneño Band of Mission Indians, Acjachemen Nation.

It is my honor to appear before you today to discuss the Tribe's experience with the administrative process in the Interior Department's Office of Federal Acknowledgment (OFA).

At the outset I want to say that we have experienced real delays with the OFA that have prejudiced the Tribe and its members in a number of ways.

We have lost many elders in the nearly three decades we have been in this process. We are not a wealthy people and we have had to scrape together enough money to locate documents, hire professionals, and do the necessary travel that this process requires.

Our first contact with Europeans came in the 18th century when the Spanish occupied what they called "New Spain" in Alta California. Spanish missionaries went on to establish a series of mission churches along the west coast from San Diego to Monterrey. The historical lands of the Tribe are in and around what was and is the Mission San Juan Capistrano, located just south of Los Angeles and north of San Diego.

My Tribe's efforts to be recognized by the U.S. Government began many decades before there was an OFA. Indeed, throughout much of the 19th and 20th centuries my Tribe has worked hard to regain this status.

However, since acknowledgment regulations were promulgated in 1978, my Tribe has pursued federal recognition through this administrative process. I would like to walk you through our progress since it illustrates areas that are in dire need of reform.

1. In August 1982, our Tribe submitted its Letter of Intent for acknowledgment. We were designated Petitioner #84.

2. The Tribe then worked hard to prepare and submit a fully documented petition that satisfied the evidentiary requirements of the regulations. We met with BIA staff and addressed the shortcomings it had identified in our petition.

3. In 1993, after reviewing the thousands of pages of genealogical, anthropological, and historical evidence that we had submitted, the Branch of Acknowledgment and Research (BAR)—the predecessor to the OFA—determined that our evidence was sufficient and accordingly placed our petition on the "ready, waiting for active consideration" list. Up to this point, our progress in the acknowledgment process was not problematic.

4. However, in May 1995, the BAR unjustifiably and without opportunity for appeal, removed our petition from the "ready, waiting for active consideration" list.

5. In February 1996, we were returned to the "ready, waiting for active consideration" list but a month later our petition was re-assigned #84A and another group which submitted a new letter of intent was assigned petitioner #84B.

6. It would take my Tribe, the original petitioner 84, almost 10 years to regain our position at the head of the "ready, waiting for active consideration" list.

7. My Tribe's petition finally went on "active consideration" in September 2005. The Department treated the other group, #84B, in essence, as a co-petitioner and placed it on the "active consideration" list in September 2005 along with my Tribe.

8. More than two years later, in November 2007, the OFA issued a Proposed Finding on our petition. We are currently preparing an evidentiary response to those areas in our petition which OFA considers deficient.

Since the late 1980s, this Committee has reviewed a series of reforms to the acknowledgment process. Today I will focus on procedural difficulties the Tribe has experienced and want to state up front that I am limiting my comments to procedural deficiencies in the process, *i.e.* how petitioners and evidence are handled. I do not believe this hearing to be the appropriate forum for discussing the factual foundation of my Tribe's history and continuity.

Being Removed from "Ready" Status. OFA made a fundamental mistake by removing our petition from "ready" status and we are still feeling the impact of this decision 13 years later. The OFA received an application from a disgruntled member of the Tribe who disagreed with the results of the most recent tribal election. Rather than deferring to the Nation's political process, the OFA chose to give legitimacy to the other group. Rather than spend time reviewing this application, which would have demonstrated its illegitimacy, the OFA insinuated it into the process and processed it in tandem with my Tribe's petition. This has caused us severe problems that continue to this day. So while OFA routinely states that it defers to the internal political workings of petitioning groups, in fact it does get involved and often to the detriment of the group involved.

Serial Extensions by OFA to Issue Proposed Finding (PF). The regulation at 25 CFR 83 provides that one year after going on active status, the OFA is required to issue a Proposed Finding. The regulation authorizes an additional 180-day period of time which may be granted by the Assistant Secretary—Indian Affairs. In our case the OFA/AS–IA/Department granted to itself no fewer than 7 extensions before issuing a Proposed Finding.

Most significantly, these procedural difficulties caused my Tribe to lose more than 10 years, and we have had to spend considerable resources updating our petition, including additional documentation and evidence. The fact that the Department accorded a newly-created group co-petitioner status has meant that every step of the active consideration stage has taken longer because the Department is dealing with two petitioners, not one. We maintain that a factual finding on my Tribe's governing procedures in 1995 could have quickly resolved the identity of the legitimate petitioner and saved the Department and all parties considerable time, effort, and expense.

For this Committee it is indeed tempting to want to comprehensively reform a process it believes to be badly broken. I urge you to continue to focus on reform and to tackle those elements of the process that can be reformed and bring relief to other petitioners that find themselves in the same position we have been since 1982. I respectfully offer the following recommendations to improve the process.

- Starting with this Committee's recommendation, the Congress should provide the OFA with sufficient resources and funding to accomplish their mission, including informal technical assistance sessions with petitioners before any filing is made to guide them on the process.
- Likewise, the Committee should require OFA to provide periodic progress reports on Active Status petitions and should hold OFA and the Assistant Secretary accountable for developing proper policy for Tribes to be treated fairly.
- OFA should not be authorized to remove petitioners from the queue without procedural safeguards, including notice to the petitioner, an opportunity to comment on the proposed action, and some appeals process so that the removal decision can be reviewed by a higher authority.
- OFA should formalize and promulgate a policy of non-interference in the internal political and electoral workings of petitioning groups. OFA's decision in 1995 that resulted in the insinuation of another group has caused years of delay, additional costs to the Nation and the U.S. government, and enormous administrative problems for us as the petitioner.

- OFA should have the decision-making flexibility to secure reasonable extensions of time within which to issue Proposed Findings. But that flexibility should not be open-ended and should not allow for the kind of delays we experienced in waiting for our Proposed Finding.

I intend to submit for the record additional thoughts and recommendations based on our experience and thank you again for the opportunity to appear before you this morning. I would be happy to answer any questions you might have at this point.

The CHAIRMAN. Mr. Rivera, thank you very much for your testimony.

We will now hear from Patty Ferguson-Bohnee, Clinical Professor of Law and Director of the Indian Legal Clinic at the College of Law at Arizona State University. You may proceed.

STATEMENT OF PATTY FERGUSON–BOHNEE, CLINICAL PROFESSOR OF LAW AND DIRECTOR, INDIAN LEGAL CLINIC, SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY

Ms. FERGUSON-BOHNEE. Thank you, Mr. Chairman.

My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University.

The Clinic was requested by a staffer of the Senate Committee to analyze the Federal acknowledgement process and to provide some insights. I would like to recognize my students who are here today who prepared the preliminary analysis that I have attached as part of our testimony and hopefully can be submitted for the record. Those students are Alejandro Acosta, Jerome Clarke, Sebastian Zavala, Chia Halpern and Tana Fitzpatrick. This has been a great experience for them and we appreciate the opportunity to present the students' analysis.

I would like to touch on a few of the highlights in their analysis that focus on issues the students have identified in the process. The initial intent of the process was not to create an extremely burdensome requirement for petitioners, but to provide an avenue for unrecognized tribes to request official recognition.

In 1978, the American Indian Policy and Review Commission identified 130 tribes that had not been recognized. The initial regulations were offered in an attempt to help those individual tribes through the process.

The four issues that the students have identified should be addressed if there is any hope for meaningful reform. These issues include the lack of resources, timeliness, the increased burden on petitioners and the lack of access and transparency.

The first issue of resources permeates the entire process. The resource issue includes both funding for the Office of Federal Acknowledgement and funding for petitioners. We understand that OFA's efficiency, the Office of Federal Acknowledgement's efficiency is impacted by the amount of resources that are allocated to the process.

Without sufficient funding the Office is unable to employ the requisite number of staff and research teams to administer an efficient process. We have reviewed testimony and spoken to past researchers who were in the office, and a past assistant secretary, who have identified that yes, there is indeed a need to increase the staff

within the office and to employ more research teams if the petitions are able to be evaluated in a timely manner.

The second resource issue is funding for the petitioners. Many of the petitioners lack necessary resources to complete petitions and to hire the necessary experts to compile the research and analyze the data. There are currently no funding mechanisms to assist petitioners in the process. Initially petitioners could submit petitions in any readable format, and now petitioners must analyze all data submitted, and it is a truly onerous burden for mostly poor, unfunded tribes.

The second issue is the issue of timeliness which has been addressed. And this issue, we believe, also derives from the lack of resources. We believe that there should be realistic time lines for the petitioners and we also believe that the Office should follow these time lines that are identified in the process.

In addition, the amount of time it takes to complete the process should not be as long as it currently is. I think that you have already identified this issue.

The third issue is the increased burden for petitioners. Since its implementation there have been few petitioners who have actually completed the process. There seems to be an increased burden by requiring more evidence than was initially required for those petitioners who completed the process in the first five years.

Also, there seems to be a change in the burden of proof. There seems to be a higher burden of proof than was required in the initial regulations, and the reasonable likelihood standard which indicates there should be a low burden and should allow for inferences has been interpreted to mean conclusive proof or a higher burden. In addition, there are some provisions within the acknowledgement process that are unknown to petitioners as to how they are to be interpreted. So there should be some clarity in that respect.

The fourth issue is the lack of access to documents and the lack of transparency. I would like to note that now the Office has a website which is accessible to petitioners or any researchers or anyone who wants to review this information on the internet or online. This was previously unavailable for a number of years. This is now currently online and provides some information about petitioners.

But one issue that we would like to point out is that FOIA requests that are submitted by petitioners are sometimes unnecessary. It seems that petitioners should not have to submit FOIA requests to obtain information that is contained in their files that the Department is reviewing, because these requests take a long time to receive a response to.

The recommendations by the students are to identify a time frame by which petitions should be decided and then to provide sunset provisions for each stage of the process. The second recommendation is to assess the funding needs that correspond with this time frame that Congress or the Office may propose, so that petitions can be timely processed. Such funding needs would include the staff needed to administer the petitions, and funding for petitioners, so that the petitioners can provide the necessary information to be evaluated by the staff.

Another recommendation would be to employ sufficient staff so that researchers can be assigned to regions and can develop famili-

arity in those regions. This may increase the efficiency of the process.

Also, the students reviewed the possibility of implementing a commission or task force to either administer the process or to serve as a peer review or task force working in conjunction with the Office so as to lessen the burden of the administrative tasks that are undertaken during the petition processes.

Most of the recommendations that the students identified are procedural and not substantive. There is one substantive recommendation which deals with 25 C.F.R. Part 83(b) and (c), proving social and political community from historical times to the present. The students identified that Congress should consider, or the OFA should consider changing the time period from either 1850 to the present or from the time in which the petitioner's State was admitted to the Union. This would reduce the burden on both the petitioner and the Office. The petitioners would still need to prove descent from historical tribe or tribes, but it would lessen the burden of all of the research that must be undertaken in order to provide information.

I am happy to answer any questions that you may have.

[The prepared statement of Ms. Ferguson-Bohnee follows:]

PREPARED STATEMENT OF PATTY FERGUSON-BOHNEE, CLINICAL PROFESSOR OF LAW AND DIRECTOR, INDIAN LEGAL CLINIC, SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY

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 the Sandra Day O'Connor College of Law at Arizona State University. Thank you for the opportunity to present an analysis of 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 federal acknowledgment process. The student-attorneys in the Clinic have prepared a preliminary analysis and proposed recommendations, which I attach hereto. I would like to recognize those students who assisted in the preparation of 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 the 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 decided only forty-one acknowledgment cases. The Department fails to issue decisions within its framework, and it is really unknown how long it will take to evaluate all of the petitions that may be presented to the Department. The backlog in petitions results partly from the lack of funding to fully staff an acknowledgment office, the 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 its 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 needed 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 so that 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 that 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.

Thank you for allowing the Clinic to review and provide comments on the federal acknowledgment process. I am happy to answer any questions that the Committee may have.

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PRELIMINARY ANALYSIS OF AND RECOMMENDATIONS ON THE FEDERAL ACKNOWLEDGEMENT PROCESS

I. BACKGROUND

The Federal Acknowledgment Process provides one avenue for an unrecognized tribe to obtain federal status as a tribe eligible to receive services from the Bureau of Indian Affairs ("BIA").[1] Other avenues include federal court recognition and congressional legislation.[2] In the 1970s, the Department of Interior ("DOI" or "Department") identified that there were an increased number of tribes seeking to clarify their federal status and that it needed to implement a process to address these requests; this resulted in the creation of what is now referred to as the Federal Acknowledgment Process ("FAP"). Since its inception in 1978, only forty-one tribes have completed the FAP.

This preliminary analysis includes an overview of the American Indian Policy Review Commission's examination of unrecognized tribes and the development of the FAP. The analysis then focuses on four issues hindering the process: increased burdens, timeliness, lack of resources, and lack of transparency. The analysis also includes a

[1] The Federal Acknowledgment Process refers to the administrative process by which unrecognized tribes can seek recognition from the Department of the Interior under 25 C.F.R. Part 83. Tribes receiving a positive final determination are placed on the list of tribes eligible to receive services from the BIA. This list should be published annually. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454 §§ 103-104, 108 Stat. 4791 (codified at 25 U.S.C. § 479a to 479a-1 (2008)).

[2] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454 § 103, 108 Stat. 4791 (codified at 25 U.S.C. § 479a (2008)).

review of legislative proposals addressing these four issues with the FAP. The final section of the analysis includes recommendations on the process for federal acknowledgment.

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.[3] 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.[4] Although 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.[5] In 1974, when introducing the joint resolution in the House of Representatives that authorized the creation of the AIPRC, 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."[6] He believed that past legislation was "piece-meal" and future legislation needed to be comprehensive.[7] Congress agreed and found the need to conduct a comprehensive review of Indian affairs similar to the Meriam Report conducted in 1928.

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[3] Pub. L. No. 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 163 (Nell Jessup Newton et al. eds., 2005).

[4] UCLA AMERICAN INDIAN STUDIES CENTER, NEW DIRECTIONS IN FEDERAL INDIAN POLICY: A REVIEW OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION 115 (1979).

[5] Id. at 10.

[6] Id. at 8.

[7] Id.

Congress charged the AIPRC 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."[8] 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."[9]

The AIPRC was comprised of six members of Congress, three from the House of Representatives and three from the Senate, and five Native American leaders.[10] The House and Senate members of the AIPRC, through a majority vote, selected the Native American members of the AIPRC.[11] The AIPRC congressional members identified over 200 individuals who could be effective in lobbying Congress and had experience in Washington D.C. politics.[12] The AIPRC included one member from an urban area, one member from an unrecognized tribe, and three from federally recognized tribes.[13] The congressional members selected Ada Deer, John Borbridge, Louis Bruce, Adolph Dial, and Jake White Crow as the Native American commissioners.[14]

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[8] Pub. L. No. 93-580, Preamble, 88 Stat. 1910 (1975).
[9] Pub. L. No. 93-580, § 2(3), 88 Stat. 1910, 1911.
[10] 2 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT APPENDIXES AND INDEX 4 (1977). Earlier attempts to pass similar legislation called for a larger commission and more funding.
[11] Id. at 4-5; Pub. L. No. 93-580.
[12] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 12-13; Pub. L. No. 93-580. Tribes received a memorandum requesting their input on the nominations' process. Controversy surrounded the selection of the five Native Americans who were to serve on the AIPRC. Id. at 12. Some Native Americans complained that the congressional appointments were not made with enough Native American input. Id. at 21.
[13] Pub. L. No. 93-580, 88 Stat. 1910-11.
[14] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 13.

Two members of the AIPRC were personally involved in recognition efforts for their respective tribes. Ada Deer successfully lobbied to restore the Menominee Tribe's federal status.[15] 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.[16]

The AIPRC established eleven task forces to study major issues affecting tribes.[17] Each task force was composed of three members, two of whom had to be Native American.[18] 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.[19]

One issue tackled by the AIPRC was the need for federal recognition of all unrecognized tribes. Prior to the 1970s, federal statutes authorizing services for Native American communities and reservations refer to "Indians" for eligibility.[20] These statutes were broad and did not place limits on which "Indians" were eligible for services.[21] In the 1970s, many statutes began requiring tribes to be recognized by the federal government before tribes and their members could receive services and participate in Indian programs.[22] During this time, the Department received an increased number of

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[15] Id.
[16] Id.
[17] Id. at 14. The authorizing legislation created nine of the eleven task forces. Pub. L. No. 93-580, § 4, 88 Stat. 1910, 1912.
[18] Id.
[19] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 21.
[20] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 153.
[21] Id.
[22] Id. at 154.

requests to recognize tribes.[23] Issues related to federal recognition of tribes were included in Task Force Nine's Final Report, Task Force Ten's Final Report, and the AIPRC Final Report.

1. Task Force Ten Report

Task Force Ten was charged with the responsibility of addressing the issues affecting terminated and unrecognized tribes.[24] Chairman JoJo Hunt (Lumbee) and members John Stevens (Passamaquoddy) and Robert Bojorcas (Klamath) of Task Force Ten were all members of unrecognized or terminated tribes.[25] 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 unrecognized and terminated Indians.[26] Task Force Ten conducted case studies of Oregon tribes, New England tribes, North Carolina tribes, Washington tribes, the Pascua Yaqui in Arizona, and the Tunica-Biloxi-Ofo-Avoyel community in Louisiana.[27] The task force conducted research through questionnaires that were distributed to Indian groups and tribes, as well as through hearings, interviews, and site visits.[28]

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,

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[23] Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39361 (1978); see also, Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 492 (2003).
[24] 2 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT APPENDIXES AND INDEX 8 (1977).
[25] Id. at 17.
[26] AIPRC, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 4 (1976).
[27] Id. at 17-209.
[28] Id. at 1716-1722.

programs, and benefits were often denied to terminated and unrecognized Indians.[29] The task force recommended that Congress direct all federal departments and agencies to serve all Indians, regardless of their status.[30] Acknowledging that increased funding would be required to provide services to newly-recognized and restored tribes, Task Force Ten suggested that Congress appropriate enough money for the departments and agencies to provide services to all Indians.[31] The task force also proposed that Congress establish a fund for terminated and unrecognized tribes to obtain their choice of counsel in order to address any problems affecting them.[32]

2. Task Force Nine Report

Task Force Nine researched and made recommendations in the areas of revision, consolidation, and codification of laws.[33] 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.[34]

The Task Force Nine Report proposed that Congress devise statutory standards governing federal recognition.[35] The task force requested that Congress develop criteria for federal recognition for Indian groups that had been previously denied recognition.[36] 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

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[29] Id. at 1696.
[30] Id. at 1701.
[31] Id.
[32] Id. at 1702.
[33] Peter S. Taylor, Yvonne Knight and F. Browning Pipestem served as members of Task Force Nine. 1 AIPRC, FINAL REPORT TASK FORCE NO. 9 LAW CONSOLIDATION, REVISION, AND CODIFICATION (1976).
[34] Id. at IV.
[35] Id. at 100.
[36] Id. at 46.

federal authorities.[37] Some of these groups benefited from congressional funding in the areas of educational grants and manpower training programs even though they were not considered federally-recognized tribes.[38]

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 suggested that Congress emphasize its commitment to provide a means for federal recognition along with adequate funds for the newly recognized tribes, while not reducing funding for tribes already recognized.[39]

Task Force Nine urged Congress to adopt "Congressional Findings and Declaration of Policy," which included certain findings regarding the clarification of federal, tribal, and state relations.[40] Task Force Nine recommended that Congress restate its plenary power over tribes, including its authority to withdraw federal recognition of tribes.[41] The task force also addressed the need for Congress to restore terminated tribes to federally-recognized status and to clarify that the termination policy was "an ill conceived policy."[42]

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[37] Id. at 30.
[38] Id. at 44.
[39] Id. at 30, 46.
[40] Id. at 27.
[41] Id. at 28.
[42] Id. at 27, 29.

3. AIPRC Final Report

The AIPRC issued its final report to Congress in 1977.[43] Anti-Indian sentiment was on the rise during this time period. Although Representative Meeds was the primary sponsor of the AIPRC legislation in the House, he wrote the dissent in the AIPRC Final Report.[44]

The AIPRC Final Report included a chapter 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 tribe's lack of status was not based on equity or justice.[48]

The AIPRC proposed recommendations to resolve the status of unrecognized tribes. First, the AIPRC suggested that Congress clarify its intent by adopting a concurrent resolution that provided a policy to recognize all tribes as eligible for benefits and protections.[49] Second, the AIPRC recommended that Congress adopt the following seven criteria 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.

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[43] The AIPRC Final Report was to be issued in 1976, a congressional election year. The report was issued later because there was a split in the AIPRC between those who continued to support Indian self-determination and those who opposed increases in BIA funding and other improvements to Indian programs. UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 15-17.
[44] 1 AIPRC, FINAL REPORT 567-612 (1977).
[45] Id., ch. 11.
[46] Id. at 8.
[47] Id. at 8.
[48] Id. at 8, 37, 480.
[49] Id. at 37.

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.

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 identifying 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.[50]

Under the AIPRC's proposed process, the government had the burden of proving that the Indian group did not meet the one of the seven criteria.[51]

To evaluate the petitions, the AIPRC recommended that Congress develop an office independent from the BIA to assess petitions.[52] The office would contact all known unrecognized tribes, provide technical and legal assistance and review the petitions.[53] The office would decide if the group was eligible as a tribe for federal

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[50] Id. at 482.
[51] Id. at 39, 482-483. The criteria were similar to that "developed and applied" by federal officials after enactment of the Indian Reorganization Act. See id. at 477; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 155.
[52] 1 AIPRC, FINAL REPORT at 38, 481-482.
[53] Id. at 38.

services and programs.[54] 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."[55] Within one year from the date of the tribe's petition, the office would hold hearings and investigations and issue a decision. The office would be required to provide a written explanation of a tribe's failure to establish one of the seven factors.[56] This decision could be appealed to a three-judge federal district court. If the tribe's status was affirmed, 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.[57]

The AIPRC attempted to formulate a process by which all unrecognized tribes could obtain recognition with little expense and burden. Congress did not adopt the AIPRC's recommended procedures for federal recognition. Approximately fifteen months after the AIPRC Final Report was issued, the Department finalized procedures for establishing that a group exists as an Indian tribe.

B. THE FEDERAL ACKNOWLEDGMENT PROCESS

1. Initial Regulations

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."[58] This pressure came in the form of federal circuit courts recognizing

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[54] Id. at 38.
[55] Id. at 38.
[56] Id. at 38, 480-483.
[57] Id. at 40.
[58] Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 491, 492-493 (2003) (citing United States v. Washington, 385 F. Supp. 312, 379 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir.

that descendants of tribes possessed inherent and delegated rights.[59] 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.[60] Prior to the development of agency regulations, the DOI evaluated requests on an ad hoc basis. The DOI began receiving an increased number of requests to recognize tribes, and it had no system to evaluate petitions.[61] Thus, the Department set out to promulgate rules with the essential requirement that, "the group has existed continuously as a community with retained powers."[62]

On August 24, 1978, after an extensive notice and comment period, the Department promulgated " Procedures for Establishing that an American Indian group exists as an Indian tribe" requiring a petitioner to meet the following seven mandatory criteria in order to obtain acknowledgment:[63]

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

b) Social Community: 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."

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)).

[59] Id.

[60] Coen at 497.

[61] Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361 (1978).

[62] Coen at 496.

[63] 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361, 39363.

c) Political Community: 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) Government Structure: A copy of the group's present governing document, or statement describing the membership criteria, and also the groups governing procedures.

e) Membership List: 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 is its members, the subject of congressional legislation which has expressly terminated or forbidden the federal relationship.

The purpose of the regulations was to provide an "equitable solution to a longstanding and very difficult problem."[64] Barbara Coen, an Attorney-Advisor at the Department identified that "[t]he primary impetus for formalizing the decision-making process concerning tribal status was the increase in the number of petitions from groups throughout the United States requesting that the Secretary of the Interior officially acknowledge them as Indian tribes."[65]

2. 1994 Regulations

In 1994, sixteen years after the enactment of the initial FAP regulations, the Assistant Secretary of Indian Affairs ("AS-IA") took final action on a rule revising the procedures for establishing that an American Indian group exists as an Indian tribe ("1994 Regulations").[66] The 1994 Regulations sought to clarify the FAP requirements

[64] 43 Fed. Reg. 39361.
[65] Coen at 492.
[66] 59 Fed. Reg. 9280 (Feb. 25, 1994).

and define clearer standards of evidence.[67] One of the changes to the FAP made by the 1994 Regulations was a reduced burden of proof for petitioners demonstrating previous federal acknowledgment.[68]

Procedural improvements in the 1994 Regulations 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.[69] With the revisions, the Department attempted to improve the quality of materials submitted by petitioners, as well as to reduce the work required to develop petitions. The hope was to provide a faster and improved process of evaluation.[70]

II. THE CURRENT ADMINISTRATIVE PROCESS

A. ISSUE ONE: 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," is a low evidentiary burden, the evidence necessary to meet the criteria has increased—requiring petitioners to exceed the "reasonable likelihood" standard provided in the FAP.

To meet this increased burden of proof, petitioning groups must provide more documentation and analysis than required in the initial regulations. Former AS-IA Kevin Gover testified that the Office of Federal Acknowledgment ("OFA") seeks historical

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[67] Id.
[68] Id.
[69] Id.
[70] Id.

truths when evaluating petitions, a more intense standard than what is called for in the FAP.[71]

Even though the AIPRC proposed regulations, the initial regulations, and the current regulations anticipate that a Proposed Finding would be issued one year after a petition was placed on active status,[72] the DOI took less time to evaluate petitions earlier in the process than the current administrative process. Tribes whose petitions were analyzed earlier in the process produced less documents, and it took fewer pages, i.e., less time, to evaluate petitions. This shift is demonstrated by comparing the evidentiary requirements and analysis of petitioners throughout the years.[73]

The Tunica-Biloxi Indian Tribe's experience, for example, differs from those of petitioners currently in the process. The Tunica-Biloxi first requested governmental assistance in protecting its rights, essentially the need for a trust relationship, in 1826.[74] The tribe filed a petition for acknowledgment in 1978, and its petition was placed on active status in February 1979.[75] In 1980, the Department issued a positive proposed finding and a technical report totaling seventy-eight pages.[76] The technical reports

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[71] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 64 (2004) (statement of Kevin Gover, former AS-IA).

[72] 25 C.F.R. Part 54.9(f), 43 Fed. Reg. 39361, 39364; 1 AIPRC, FINAL REPORT 38; 25 CFR Part 83.10(h).

[73] There is no explicit evidentiary burden of proof identified in the initial regulations. See 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361.

[74] Letter of Intent from Tunica Biloxi Tribe, to United States Department of the Interior (September 7, 1826), available at http://www.indianz.com/adc20/Tbt/V001/D002.PDF.

[75] 44 Fed. Reg. 116 (1979); BUREAU OF INDIAN AFFAIRS, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 73 (1980), available at http://www.indianz.com/adc20/Tbt/ V001/D005.PDF.

[76] Memorandum from Comm'r of Indian Affairs, to Asst. Sec'y Indian Affairs (Dec. 4, 1980), available at http://www.indianz.com/adc20/Tbt/V001/D005.PDF; BIA,

included a history report, an anthropological report, a demographic report, and a genealogical report.[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. The BIA recognized the Tunica-Biloxi through the FAP in July 1981.[78] It took the BIA three years to resolve the Tunica-Biloxi Indian Tribe's petition for federal acknowledgment. There were only four comments submitted, all in support of Tunica-Biloxi's recognition.[79]

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,[80] the United Houma Nation, Inc. submitted approximately 19,100 pages in non-private information, [81] and the technical report and proposed finding issued in 1994 totaled 448 pages.[82] Similarly, the earlier cases reviewed by the BIA resulted in less-extensive technical reports; the proposed finding documents issued in 1979 for the Grand Traverse Band of Ottawa Indians totaled seventy-three pages, and the Jamestown Band of

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TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA.

[77] BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 7, 8, 28, 65, 73.

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

[79] Id.

[80] BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 7-85.

[81] Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

[82] BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST THE UNITED HOUMA NATION, INC. (1994), available at http://www.indianz.com/adc20/Uhn/V002/D007.PDF.

Clallam Indians' proposed finding documents issued in 1980 totaled eighty-four pages.[83] Later decisions, such as the Burt Lake Band of Indians proposed finding issued in 2004 and the Huron Potawatomi proposed finding issued in 1995, exceed 400 pages.[84] The BIA reported in 2002 that administrative records, at that time, ranged in excess of 30,000 pages to over 100,000 pages.[85]

Proposed Bills to Reduce the Substantive Burden

In 2003, Senator Campbell introduced S. 297 ("Campbell Bill"), which proposed changes to some of the substantive criteria.[86] The Campbell 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).[87] Under the proposed bill, 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.[88]

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[83] Memorandum from Acting Deputy Comm'r of Indian Affairs, to Asst. Sec'y (Oct. 3, 1979) (attaching technical reports supporting proposed finding of Ottawa and Chippewa Indians), available at http://www.indianz.com/adc20/GTB/V001/D005.PDF; Memorandum from Acting Deputy Comm'r of Indian Affairs, to Asst. Sec'y (May 16, 1980) (attaching technical reports supporting proposed finding of Jamestown Band of Clallam Indians), available at http://www.indianz.com/adc20/Jct/V001/D005.PDF.

[84] BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF THE BURT LAKE BAND OF OTTAWA AND CHIPPEWA, INDIANS, INC. (2004), available at http://www.indianz.com/adc20/BLB/V001/D004.PDF; BUREAU OF INDIAN AFFAIRS, PROPOSED FINDING HURON POTAWATOMI, INC. (1995), available at http://www.indianz.com/adc20/Hpi/V001/D005.PDF.

[85] Coen at 495 (citation omitted).

[86] Federal Acknowledgment Process Reform Act of 2003, S. 297, 108th Cong. (2003).

[87] Id.

[88] Id.

Revising the date from which petitioners must prove the social and political requirements of 25 C.F.R. Part 83(b) and (c) from historical times to the present to a later date could be beneficial for both the OFA and the petitioners. Congress should consider moving the date to either 1850 or to the date the state in which petitioner descends becomes a member of the Union. 1900 may work for some petitioners, but as evidenced by 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 determine, 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 countries can still be used to prove descent from a historic tribe, it is not necessary to prove social 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.

In 2007, Representative Faleomavaega introduced H.R. 2837 ("Faleomavaega Bill") to improve the recognition process.[89] The bill defines historical times as a period dating from 1900. 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)

[89] H.R. 2837, 110th Cong. (2007).

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 towards denying recognition.[90]

The DOI voiced concerns about Faleomavaega Bill. AS-IA Carl 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 should be.[91] 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.[92] He did not, however, provide an explanation in his written testimony as to why the proposed changes should not implemented other than that the changes deviate from the Department's current practices.

B. ISSUE TWO: THE CURRENT PROCESS IS NOT TIMELY

The current process does not adhere to the timeframes set forth in the regulations, nor do petitioners with completed petitions have a clear indication of when their petitions will be considered. Many have criticized the process for the delay in reviewing a petition, evaluating a petition, and issuing a decision.

The backlog resulting in delays of several years for petitions concerned the AS-IA.[93] In 2000, the AS-IA changed its internal procedures for processing petitions for

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[90] Id.
[91] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 5 (2007) (statement of Carl J. Artman, AS-IA).
[92] Id.
[93] 65 Fed. Reg. 7052 (Feb. 11, 2000).

federal acknowledgment as an Indian tribe, and clarified other procedures in order to reduce the delays in reviewing petitions.[94] The revised procedures did not change the acknowledgment regulations but provided a different means of implementing the existing regulations.[95]

The AS-IA found the demands on the OFA's time continued to reduce the proportion of available time to evaluate petitions.[96] Examples of the demand on the OFA included: (1) petitioners and third parties frequently requesting an independent review of final determinations by the Interior Board of Indian Appeals ("IBIA"), requiring the OFA to prepare the record and to respond to issues referred by the IBIA; (2) the OFA 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.[97]

During a hearing on the Campbell Bill in 2004, the BIA supported a more timely decision-making process, but objected to a lessening of the factual basis required to render a favorable decision.[98] At the hearing, two former AS-IAs, Neal McCaleb and Kevin Gover, testified.[99] 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

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[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 48-51, 56 (2004) (statement of Aurene Martin, Deputy AS-IA).
[99] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 52-56 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).

OFA staff, due to the complexity and volume of research required of petitioners, has resulting 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 redistributions by way of FOIA requests; this churning, in turn, resulted in a diversion of key, technical staff from their intended roles as analysts.[100] Former AS-IA McCaleb and former AS-IA Gover expressed frustration with relying solely on OFA's recommendations for acknowledgment decisions and supported the creation of a independent body to offer a second opinion on controversial matters.[101]

The Muwekma Ohlone ("Ohlone") case exemplifies the need for clarity in the time frames. The Ohlone have occupied the San Francisco Bay Area since pre-Columbian times. The DOI recognized the Ohlone in the early Twentieth Century, but the tribe has been unable to achieve federal recognition. It took DOI over a decade to conclude its review of the Ohlone petition.[102]

The Ohlone filed a letter of intent to file a petition for federal acknowledgment in 1989.[103] In 1995, the Ohlone submitted a petition for acknowledgment as a federally recognized tribe.[104] The following year, the Bureau of Acknowledgment and Research ("BAR")[105] notified the Ohlone that the DOI had previously recognized the tribe as the

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[100] Id.
[101] Id. at 53, 55.
[102] Muwekma Tribe v. Babbitt, 133 F. Supp.2d 42 (D.D.C. 2001).
[103] Id.
[104] Id. at 44.
[105] The Bureau of Acknowledgment and Research is the predecessor to the Office of Federal Acknowledgment.

Pleasanton or Verona Band. The tribe then wrote to AS-IA Ada Deer requesting "clear and concise time tables and responses" for the petition process.[106] In 1996, 1997 and 1998, the BAR continued to request additional information from the Ohlone, and the tribe complied. In 1998, the Ohlone was placed on the "ready for active consideration list," and was notified that it would be evaluated after the South Sierra Miwok Nation petition.[107] Another year passed, and the petition was not reviewed. In 1999, AS-IA Kevin Gover identified that there were ten tribes ahead of the Ohlone on the "ready" list, and fifteen tribes under "active consideration."[108] While the government claimed the petition would be heard within two to four years, the Ohlone estimated that it could have been twenty years before its petition was adjudicated.[109]

Frustrated with the timeliness of the FAP, the Ohlone filed suit against the Secretary of the Interior and the AS-IA to compel the Department to set a date by which consideration of its petition must be concluded.[110] The court granted summary judgment to the Ohlone and "directed the defendant to propose . . . a schedule for 'resolving' the plaintiff's petition."[111] On appeal, the D.C. Circuit Court found that the ruling did not, "intend to mandate that the agency act within a prescribed time frame at this point."[112]

Following the court order, the BIA submitted a "fast-track" policy for tribes like the Ohlone.[113] Under the fast-track policy, tribes with prior federal recognition after

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[106] Muwekma Tribe, 133 F. Supp.2d at 45.
[107] Id.
[108] Id.
[109] Id.
[110] Id. at 43.
[111] Id. at 46.
[112] Id.; see also Muwekma Tribe v. Babbitt, 133 F.Supp.2d 30, 41 (D.C. Cir. 2000).
[113] "[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

1900 are placed on an expedited path for consideration. The policy did not guarantee that the expedited process would end any sooner than the process for those who lacked previous acknowledgment.[114]

The court directed the DOI to issue a final determination of the Ohlone petition by March 2002.[115] In September 2002, the Department issued a determination denying the Muwekma Ohlone federal recognition. Because of the court order in the Muwekma case, the OFA was required reprioritize its caseload to address the Ohlone petition. Other litigation also results in similar reprioritization, which affects petitioners awaiting acknowledgment decisions.

The Ohlone case shines light on the need for timeliness in the recognition process. First, when a tribe will be placed on the active consideration list is not apparent. Second, the actual time period that a tribe will spend on the active list is undetermined. Any redrafting of the federal recognition process may eliminate costly lawsuits if the redraft includes clear timelines for the OFA to follow.

In November 2001, the General Accounting Office ("GAO") prepared a report analyzing the FAP, including the inability of the BIA to provide timely evaluations of completed petitions.[116] The GAO found that "the process does not impose effective

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recognition after 1900 and that its current members are representative of and descend from that previously recognized tribal entity . . ." Id.

[114] The Ohlone pointed to the cases pending in 2001, like the United Houma Nation who had been waiting nine years on active consideration, the Duwamish Indian Tribe who had been waiting eight years, and the Chinook Indian Tribe who had been waiting six years. Id.

[115] Id. at 51.

[116] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49 (Nov. 2001).

timelines that create a sense of urgency."[117] The GAO noted that only 55 of the 250 petitions for recognition contained sufficient documentation to allow them to be considered and reviewed by the OFA staff.[118] The GAO indicated that it may take up to fifteen years to resolve the completed petitions awaiting active consideration based on the OFA's past record of issuing final determinations.[119] The regulations assume a final decision will be issued approximately two years from the point of active consideration, but the GAO found that at least two of the thirteen active petitions had been on the active consideration list for over ten years.[120] Ten additional petitions were completed and awaiting placement on the active consideration list.[121] The GAO reported that the BIA experienced an increased workload and backlog from the large amounts of documentation submitted by the petitioners, but the number of staff to evaluate petitions had decreased.[122] The GAO found that petitions under review are becoming more detailed and complex as petitioners and interested parties commit more resources to the process.[123]

In 2005, Representative Pombo introduced a bill in the House of Representatives to require prompt review by the Secretary of the Interior of the long-standing petitions for federal recognition of certain Indian tribes.[124] The bill tried to reform the FAP by setting forth a process for potentially eligible tribes to opt into expedited procedures so they

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[117] Id. at 3.
[118] Id. at 17.
[119] Id. at 15-16.
[120] Id. at 17.
[121] Id.
[122] Id. at 3, 16.
[123] Id. at 16.
[124] H.R. 512, 109th Cong. (February 2, 2005).

could be considered eligible for recognition.[125] To date, no progress has been made on identifying realistic time frames for petitioners.

C. Issue Three: 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 the substantive analysis of petitions preventing review within the specified time frames.

1. Funding for the OFA

For fiscal year 2008, the DOI operates on a $15.8 billion annual budget.[126] For fiscal year 2009, the President requested $2.3 billion for Indian Affairs, a net decrease of $105.4 million from fiscal year 2008.[127] About ninety-five percent of the budget authority is provided through current appropriations for discretionary programs.[128] In addition, the President requested $311,000 for new tribes, i.e., 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.[129]

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[125] Id.
[126] Department of the Interior Quick Facts, available at http://mits.doi.gov/quickfacts/facts2.cfm.
[127] 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.
[128] Id.
[129] Id.

In 2001, the GAO reported that the "BIA's tribal recognition process was ill equipped to provide timely responses to tribal petitions for federal recognition."[130] In addition to the backlog of petitions, the technical staff had an increased burden of administrative responsibilities which reduced their availability to evaluate petitions.[131] The staff had an increased burden of responding to FOIA requests related to petitions.[132] In response to the GAO Report, the DOI adopted a strategic plan.[133] Even with the implementation of the strategic plan, in 2005, the GAO estimated that it will take "years to work through the existing backlog of tribal recognition petitions."[134]

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.[135] The GAO found that the contractors freed the professional staff of administrative duties resulting in greater productivity.[136]

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[130] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (statement of Robin M. Nazarro) (2005); INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49 (2001).
[131] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (2005) (statement of Robin M. Nazarro).
[132] Id. at 6.
[133] See DEP'T OF INTERIOR, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GAO REPORT 2-3 (2002).
[134] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. 9 (2005) (statement of Robin M. Nazarro).
[135] Id. at 8.
[136] Id.

As of April 18, 2008, the OFA staff consists of twenty-two individuals, but has the funding capacity to employ three additional researchers.[137] There are currently three fully-staffed research teams; each team includes a cultural anthropologist, a genealogical researcher, and an historian. The three vacancies would comprise an additional research team when hired.[138] In addition to these research teams, OFA employs 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.[139]

Despite these changes, the process needs additional funding. This funding need is acknowledged in GAO Reports, by former AS-IAs,[140] and by at least two former BAR researchers. Former BAR researchers testified that the lack of resources is a fundamental problem in the process.[141] 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 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.

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[137] Telephone Interview with Linda Clifford, Secretary, Office of Federal Acknowledgement, in Washington, D.C. (April 18, 2008).
[138] Id.
[139] Id.
[140] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 52-64 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).
[141] 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).

> 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.[142]

Former AS-IA Kevin Gover also acknowledged that the Department was advised not to disclose its funding needs with regards to OFA.[143]

In 2004, former AS-IAs Neal McCaleb and Kevin Gover testified about the lack of resources dedicated to the OFA and the overall lack of resources for the BIA.[144] McCaleb explained that the lack of resources for the BIA creates a tension because the tribal advisory committee making recommendations to the BIA on funding priorities do not want to sacrifice funding for programs operated by the BIA for federally-recognized tribes in exchange for more funding for the OFA.[145] Funding for OFA is, therefore, a low priority for the BIA.[146]

Hiring additional staff to analyze petitions could increase the overall efficiency of the process. Additional funding is needed for more research teams. Creating more research teams would allow teams to develop expertise in a region resulting in greater efficiency and reducing the backlog of petitioners. Due to the number of petitioners and

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[142] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 4 (2007) (statement of Steven L. Austin, PhD).
[143] Interview with Kevin Gover, Professor of Law, Sandra Day O'Connor School of Law, in Tempe, AZ (Oct. 23, 2007).
[144] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 61-62, 64 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).
[145] Id. at 61-62
[146] Id. at 64

lack of available staff, the same research team was simultaneously assigned to petitioning tribes in Michigan, California, and Louisiana who were in various stages of the process.

By dividing researchers into regions, a researcher will develop an expertise in a certain region thereby improving the overall efficiency of the process. For each petition, 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 terms "mulatto," "griffe," or "free person of color," may have different meanings in each region during different time periods. By focusing research, analysis, and review in certain regions, researchers may become more familiar with the types of research available and conduct a faster and more efficient review because of their expertise within the region.

We understand that the annual budget processes ultimately determine the amount of funding for all agencies, and the funding of 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. Because the OFA is not a funding priority, and the BIA has not made a commitment to allocate sufficient funds from its budget to the OFA, creating an independent commission with sufficient appropriations to handle the petition requests may result in an efficient resolution of the problems associated with the FAP.

2. 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 BAR, 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.[147] He noted that unrecognized tribes tend to be small with few resources.[148]

> 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.[149]

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.[150] In 2000, the AS-IA revised the internal procedures for processing petitions by advising OFA

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[147] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 3 (2007) (statement of Michael Lawson, PhD).
[148] Id.
[149] Id.
[150] Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000).

that it is neither expected nor required to locate new data in any substantial way.[151] 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.[152] 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.[153] 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 petitioner and third party submissions during the comment period, not additional OFA research, addressed any deficiencies in the petition.[154]

In 2005, the BIA issued revised internal regulations superseding the 2000 internal procedures for processing petitions.[155] Three 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 internal procedures.[156] The 2005 notice allowed flexibility for the OFA staff to undertake some research beyond the arguments and

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[151] Id.
[152] Id. at 7053.
[153] Id. at 7052.
[154] Id.
[155] Office of Federal Acknowledgment; Reports and Guidance Documents, 70 Fed. Reg. 16513 (March 31, 2005).
[156] Id.

evidence presented by the petitioner or third parties at the discretion of the Department.[157] This change may have limited benefits to the process if the OFA's timelines are not followed because the provision is applicable "only when consistent with producing a decision within the regulatory time period."[158]

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 years will need to spend the two months updating membership rolls and data between the time period in which the comment period was 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 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.[159] Some tribes must spend "huge sums of money – as much as $8 million – to produce the mountains of documentation required by the process."[160] In response to this burden, the Faleomavaega Bill proposes monetary assistance to tribal petitioners through grants funded by the Department of

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[157] Id.
[158] OFA Reports and Guidance Document, 70 Fed. Reg. at 16514.
[159] H.R. 2837, 110th Cong. (2007).
[160] 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).

Health and Human Services.[161] These grants would assist petitioners in (1) conducting the research necessary to substantiate documented petitions; and (2) preparing documentation necessary for the submission of a documented petition. No specific amount is enumerated in this section. The bill authorizes appropriations to the Secretary of the Department of Health and Human Services to fund petitioners in researching and documenting petitions in the amount necessary for each fiscal year between 2008 and 2017.[162]

In 2001, Senator Dodd introduced two bills to address the funding concerns highlighted in the 2001 GAO Report, Senate Bill 1392[163] and Senate Bill 1393.[164] Both bills were referred to the Senate Committee on Indian Affairs. Senate Bill 1393 provided more resources for all participants in the FAP, including funds for local governments that have an interest in a petition.[165] Under Senate Bill 1393, grants of up to $500,000 per fiscal year could be awarded to a tribe or local government.[166]

Similar efforts to include grant funding for petitioners were included in bills sponsored by Senators Campbell and McCain.[167] 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

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[161] H.R. 2837, 110th Cong. § 17 (2007).
[162] Id. § 19.
[163] Tribal Recognition and Indian Bureau Enhancement Act of 2001, S. 1392, 107th Cong. (2001).
[164] A bill to provide grants to ensure full and fair participation in certain decisionmaking processes at the Bureau of Indian Affairs, S. 1393, 107th Cong. (2001).
[165] S. 1393, 107th Cong. § 1 (2001).
[166] S. 1393, 107th Cong. § 1 (2001).
[167] S. 297, 108th Cong. § 6(b) (2003).

thereafter.[168] Senator Campbell introduced S. 297 during the 108th Congress ("Campbell Bill"). The Campbell Bill included a funding authorization to carry out the provisions of the bill for each of the fiscal years 2004 through 2013.[169] The Congressional Budget Office ("CBO") estimated that implementing the Campbell Bill would cost $44 million over the 2005 to 2009 budget periods, subject to the appropriation of the necessary amounts.[170] The 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, the 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 to 2009 budget periods.[171]

In addition to ensuring financial support for petitioners, interested parties, and the regulatory body, the Campbell Bill proposed to create and fund the Federal Acknowledgment Research Pilot Project.[172] The project would have made available additional research resources for researching, reviewing, and analyzing petitions for acknowledgment received by the AS-IA.[173] This project would have authorized the appropriation of $3 million each year for fiscal years 2004 through 2006 to provide grants to institutions that participate in a pilot project designed to help DOI review tribal

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[168] S. 630, 109th Cong. (2005)
[169] S. 297, 108th Cong. § 6(b)(4).
[170] S. REP. NO. 108-403 (2004).
[171] Id.
[172] S. 297, 108th § 6(c)(1) (2003).
[173] Id.

recognition petitions.[174] The CBO estimated that it would cost $6 million between 2005 and 2006 to implement this provision.[175]

D. ISSUE FOUR: LACK OF TRANSPARENCY

The FAP lacks transparency, leaving petitioners unaware as to how the criteria may be applied to their petitions. The 2001 GAO Report found that the "basis for BIA's recognition decisions is not always clear."[176] The GAO explained that

> [W]hile there are set criteria that petitioners must meet to be granted recognition, there is no clear guidance that explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate a tribe's continued existence over a period of time—one of the key aspects of the criteria. As a result, there is less certainty about the basis of recognition decisions.[177]

The GAO found that the guidelines provided petitioners a basic understanding of the FAP, not constructive notice of how the evidence would be applied to the criteria.[178]

Petitioners lack guidance as to how the OFA interprets the regulations. Dr. Steven Austin identified that the OFA does not always apply the scholarly standards of the disciplines in evaluating petitions. For example, the method to calculate endogamy rates in analyzing petitions by the OFA were not based on the social scientists who had written extensively in this area; instead, the OFA informed Dr. Austin in a technical assistance meeting that it would use an entirely different method that was not supported by the profession.[179] If the OFA does not rely on standards in the profession, it should

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[174] S. REP. NO. 108-403 (2004).
[175] Id.
[176] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49, 2 (Nov. 2001).
[177] Id. at 2-3.
[178] Id. at 10.
[179] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 6-8 (2007) (statement of Steven L. Austin, PhD).

inform petitioners of this diversion and have a basis for the selection of the alternative method.

The AS-IA has disagreed with the acknowledgment recommendations made by the OFA staff. The disagreements and the claims that the recommendations are based on past precedent are unclear to petitioners.[180] Further, review of the proposed findings and final determinations indicate that the standard of proof for issuing a decision shifts based on who is presiding as the AS-IA.[181]

In February 2000, the BIA published notice of internal changes of processing FAP petitions. In the 2000 internal changes, the AS-IA indicated that the OFA 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."[182] In July 2000, five months after the internal procedures were issued, this notion was rejected in the Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana when 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."[183] While the regulations provide for discretion, such conflicting statements as to how evidence will be interpreted can be confusing to petitioners.

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[180] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 11.
[181] Compare 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) and PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGEMENT OF THE STEILACOOM TRIBE OF INDIANS, 65 Fed. Reg. 5880 (Feb. 7, 2000).
[182] CHANGES IN THE INTERNAL PROCESSING OF FEDERAL ACKNOWLEDGMENT PETITIONS, 65 Fed. Reg. 7052, 7053 (Feb. 11, 2000).
[183] PROPOSED FINDING FOR FEDERAL ACKNOWLEDGMENT OF THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA, 65 Fed. Reg. 45394, 45395 (July 21, 2000).

In response the 2001 GAO Report, the BIA compiled a database of completed petitions. This database is now accessible and was last updated in August 2004. Indianz.com has posted a link to the database on its website.[184]

Although the database is accessible, some petitioners lack access to the documents being considered by the OFA in making its determinations. Any party can submit comments or documents for the OFA to review, and the OFA can conduct its own independent research. The petitioner, however, must submit a FOIA request to obtain copies of the documents submitted. In the event the OFA is considering "splinter" group petitions, those groups must also submit FOIA requests to obtain copies of the information that the OFA is evaluating.

The BIA has implemented the FAIR system, "a computer database system that provides on-screen access to all [of] the documents in the administrative record in a case."[185] While these databases may have been made available to some petitioners and third parties, not all petitioners or third parties have obtained access to these databases.[186] Even tribes with active petitions have been denied access to the FAIR database in their cases.[187] The current FAIR database does not allow for redaction of information protected under the FOIA and privacy acts, but the OFA plans to revise the database to

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[184] BIA Federal Acknowledgment Decision Compilation v 2.0 (2004), available at http://www.indianz.com/adc20/adc20.html.

[185] Hearing on H.R. 4213 Before the House Committee on Gov't Reform, 108th Cong. 3 (2004) (statement of Theresa Rosier, Counselor to AS-IA).

[186] Id.

[187] Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

allow for such redaction.[188] To create more transparency, the OFA should not require petitioners to submit FOIA requests for documents submitted by third parties, and the OFA should provide a copy of the FAIR database on cd-rom to petitioners.

Senator Campbell also sought to address issues related to the transparency of the FAP when he introduced S. 297. The Campbell Bill proposed to (1) provide a statutory basis for the acknowledgment criteria that have been used by the DOI since 1978; (2) provide additional and independent resources to the 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 parties.[189]

E. 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."[190] The FAP needs "greater transparency, consistency and integrity," in addition to "funding and technical expertise."[191]

Independent commissions have been proposed to potentially cure the ineffective agency process to recognize tribes. The creation of an independent commission may

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[188] Oversight Hearing on the Federal Acknowledgment Process Before the Senate Committee on Indian Affairs, 110th Cong. 4 (statement of R. Lee Fleming, Director of OFA).
[189] Id.
[190] S. REP. NO.108-403 (2004).
[191] Id.

relieve reliance upon the AS-IA, who is overburdened with many responsibilities.[192] Petitioners may experience shorter waiting periods throughout the several stages in a recognition process administered by a fully-funded commission.[193] Similar to the expertise currently found in the OFA, individuals on the independent commission could produce well-reasoned and carefully-decided decisions, especially if the individuals possess knowledge in the areas of history, federal Indian law and policy, anthropology, and genealogy.[194] Former AS-IA Kevin Gover believes that the current OFA process requires too much research prior to approving a petition that could be reduced under an independent commission.[195] Gover "believe[s 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."[196]

1. Bills Proposing Independent Bodies to Assist in the FAP

Two forms of independent bodies to assist in the FAP have been proposed: an independent commission and an advisory board. Under the Faleomavaega Bill, the FAP would be transferred from the BIA to an "Independent Commission on Indian Recognition."[197] The Faleomavaega Bill establishes an independent commission that would "review and act upon documented petitions submitted by Indian groups that apply for Federal recognition."[198] The commission would include three members appointed by

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[192] Id.
[193] Id.
[194] Id.
[195] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 64 (2004) (statement of Kevin Gover, former AS-IA).
[196] Id.
[197] H.R. 2837, 110th Cong. (2007).
[198] Id.

the President, with the "advice and consent of the Senate."[199] 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."[200] The Faleomavaega Bill outlines a process, including a timeline, for setting a preliminary and adjudicatory hearing after the submission of a petition to the commission.[201]

Senator Campbell proposed to create an "Independent Review and Advisory Board" to assist the AS-IA with decisions regarding evidentiary questions.[202] This board would serve in an advisory capacity to the AS-IA by conducting peer reviews of federal acknowledgment decisions.[203] The purpose of the board would be to "enhance the credibility of the acknowledgment process as perceived by Congress, petitioners, interested parties and the public."[204] The AS-IA would appoint the nine individuals to the board.[205] Three would have a doctoral degree in anthropology; three a doctoral degree in genealogy; two a juris doctorate degree; and one would qualify as an historian. Preference would be given to those individuals with a background in Native American policy or Native American history.[206]

In response to the idea of an advisory board, the BIA suggested that the roles and duties of an independent body should be clearly defined, which is fundamental to an

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[199] Id.
[200] Id.
[201] Id.
[202] S. 297, 108th Cong. § 6 (2003).
[203] Id.
[204] Id. § 6(a)(1)(C).
[205] Id. § 6(a)(2).
[206] Id.

effective recognition process. The BIA believed that the roles of an independent commission should be clearly defined.[207] This is essential so that the commission knows its duties, and it does not do duplicate research already involved in the process.[208] Timelines should also be outlined in order to have an effective independent body, and thus, a more effective process. Finally, the BIA suggested that a process should be established in the event there are disagreements between the OFA recommendations and the advisory board.[209]

In a hearing on the Campbell Bill in 2004, Former AS-IA Kevin Gover testified that he believed an independent commission is the best approach to resolving the federal recognition backlog if it is fully funded and able to begin work promptly.[210] Gover also suggested that individuals selected to serve on the commission should have backgrounds in different areas of expertise.[211]

2. Structuring a Successful Independent Commission

Congress should decide whether an independent commission separate from the BIA or an advisory commission within the BIA would be more efficient. A positive attribute of an independent commission would be the removal of any potential conflict of interest within the BIA in trying to balance its duties to already federally-recognized tribes and its duty to determine whether a tribal group's status should be affirmed. An independent commission would not compete with the BIA's other funding priorities. A

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[207] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 83 (2004) (BIA written responses to questions submitted by the Committee).
[208] Id.
[209] Id.
[210] Id. at 55 (statement of Kevin Gover, former AS-IA).
[211] Id. at 63.

potential risk of an independent commission is the possibility of reduced funding which can impact the efficiency of the commission, and the possibility that a commission may fail to review and act on all petitions within a specified time frame.

An advisory commission could also be helpful in ensuring that the OFA staff is not requiring petitioners to exceed the burden expressed in the FAP. If the advisory commission is under the BIA, this commission would also be subject to the budgetary priorities of the BIA, which means that it is likely that it would be underfunded and unable to provide the necessary review required to provide guidance to the AS-IA.

Congress should also decide whether an independent commission should be politically appointed as proposed in the Faleomavaega Bill.[212] If individuals are politically appointed, this may encourage "fresh eyes" to review claims. On the other hand, this may affect the use of precedent because new independent commissions may interpret the standards differently. Whether the positions are politically appointed or approved by the AS-IA, the qualifications of the individuals to fulfill their duties on the independent commission should be seriously considered in order to encourage the positive perception of the independent commission, the AS-IA, and the BIA.

Another consideration in creating an alternative body is to decide whether to include in-house counsel to work with the commission. The Campbell Bill required two of the nine individuals on the independent commission to possess a juris doctorate.[213] In-house counsel may work well in an advisory capacity to the independent commission because of a lawyer's ability to analyze and apply regulations and a lawyer's knowledge

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[212] Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 2837, 110th Cong. (2007).

[213] Federal Acknowledgment Process Reform Act of 2003, S. 297 § 6(a)(2), 108th Cong. (2003).

of legal standards. In-house counsel may also be an excellent resource for advising petitioners about the evidence needed when preparing a petition.

An advisory board could work with the OFA to create a more efficient process. Conceivably, the OFA could work on administrative requirements, such as FOIA requests, requests by petitioners for reconsideration of recognition, and lawsuits filed by discontented parties.[214] An independent body'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 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.

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. 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.[215] Establishing incentives for the AS-IA and the independent commission to produce results within a given time period may "create a sense of urgency" in determining the status of petitions.[216] Further, adopting sunset provisions for each stage in the process can guide the regulatory body and the petitioners.

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[214] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49, 16 (Nov. 2001).
[215] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 49 (2004) (statement of Aurene Martin, Deputy Assistant Secretary for Indian Affairs).
[216] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, 16.

An independent commission could also provide more transparency to the process. Currently, there is no process for petitioners and their experts to question the methods or analysis of OFA's researchers. A process that provides for an independent commission could include hearings on the record in the vicinity of the petitioner and the cross-examination of experts.

III. RECOMMENDATIONS

Despite the recommendations of a congressional commission, the AIPRC, in 1977, and the introduction of numerous bills addressing the process by which tribes should be recognized, no legislation has been enacted to address the problems with the FAP and the impacts the process has on petitioning tribes. It is clear from past hearing testimony and GAO reports that the current process for recognizing tribes needs reform. The disagreement is the extent and structure of the 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, funding allocations must be shared among more tribes. These funding decisions reveal an inherent conflict of interest in having the Department decide the fate of a petitioning tribe.

It is apparent from the existing budget and past funding allocations that the OFA is not a funding priority within the BIA. If the BIA, with the help of Congress, prioritized an adequate budget and resources necessary to address the backlog, perhaps an adequate solution could be developed to address the problems with the FAP. The

creation of a commission with independent judgment and decision making would be optimal; however, Congress would need to ensure funding for a commission and its activities. If funding for a commission is not guaranteed, the outcome may be worse than the existing process. Central to the success of eliminating the backlog is the administration prioritizing the federal acknowledgment process and Congress adequately funding the resources needed.

In addition to the procedural recommendations, one substantive recommendation should be considered—changing the starting point for considering social and political community under 25 C.F.R. Part 83 (b) and (c). The Clinic recommends changing the current starting point from historical times to 1850 or the date in which the state it historically occupied was admitted to the union.

Assuming adequate funding is allocated to any revised process, the revised process can provide numerous benefits to Congress, petitioning tribes, the DOI, and the regions in which tribes are located. First, the research used to prepare and analyze a federal acknowledgment petition can serve as an historical resource for that tribe's state and region of the country. Second, providing recognition in a timely manner can bring much needed federal dollars, specifically in the areas of health and education, to impoverished regions of the country. Third, timely review of petitions can help increase the self-sufficiency of tribal people who bear the effects of past discriminatory policies. Fourth, revised procedures can provide more guidance and resources to the OFA, a peer review committee or an independent commission, and the AS-IA. Finally, with a timely, transparent, and well-funded process, Congress may receive fewer requests for

congressional recognition from petitioners and potential petitioners who are essentially stuck in the current process.

A summary of the recommendations follow.

A. SUMMARY OF RECOMMENDATIONS

- Appropriate funding for additional staff to assist with administrative needs. As evidenced in the fiscal years 2003 and 2004, the appropriation for additional staff to help with administrative needs allows the OFA researchers to be more efficient, but it is not sufficient.

- 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.

- Appropriate funding for petitioning groups 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.

- Create an independent body to either take over the FAP functions or assist in the FAP analysis. If a 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 to determine an estimate of startup costs.

- Clarify the burden of proof required of petitioners and direct the body analyzing the petitions to apply the appropriate burden of proof.

- Provide hearings on the record, allowing cross-examination of witnesses and experts.

- Create realistic timeframes for processing petitions.

- Revise the social and political requirements 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 Union

- Automatically provide petitioners copies of documents submitted in their cases without requiring a FOIA request.

- Provide petitioners copies of the FAIR database without requiring a FOIA request.

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

Congress could decide to keep OFA while creating a commission, task force, or peer review committee to aid the 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 upside of creating a fully-funded independent commission, separate from the BIA, is that the commission will be ensured funding and not have to rely on the budget priorities of federally-recognized tribes.

- The creation of an independent commission/task force or peer review committee could provide a positive impact on the federal acknowledgement process; 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. Congress should determine where the commission, task force, or peer review committee should be located.

- 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 precedents should be taken into consideration.

- An internal deadline for each step in the 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.

- Commission members should receive financial support, either travel reimbursement or funding for a fully functional commission.

- 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.

- Identify a time frame by which Congress would like the recognition process would end, and then implement sunset provisions throughout the stages of the process.

The CHAIRMAN. Thank you very much for your testimony. I thank all three of you for testifying about what is a complicated, challenging, and interesting issue.

I will ask questions at the end. I am going to call on Vice Chairman Murkowski first, Senator Tester next, and then I will follow.

Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman, and thank you to the members of the panel for your willingness to provide us with some information here this morning.

Listening to the specific examples that you are living, if you will, Mr. Rivera, and then hearing some of the recommendations that the students have proposed and you have presented, and recognizing the situation that the Department is in as they process these, I think we recognize that there are issues of timeliness. There are certainly issues of funding, staffing, and so perhaps the solutions are not so far away from this. Of course, it always comes down to a question of the adequacy of the funding.

Assistant Secretary Artman, let me ask you first, in your testimony, you indicae that OFA currently employs about 20 staff, including those that are under contract with the Department. With the present number of employees that you have, how long do you figure that it would take to complete the remaining acknowledgment cases that are currently submitted to the Department?

Mr. ARTMAN. With the current staff, right now probably the most important are the teams that we have that are made up of the historians and the anthropologists and the genealogists who look into the reams of materials that we receive. And assuming everything is complete, the entire package is complete, which does take up a lot of our time as well, we are doing on average, between one and two, each team is doing between one and two packages per year, being able to complete those.

So at our current workload of approximately 260 applications, and by the way we are looking for a fourth team, with that fourth team in place we are still looking at somewhere between 50 to 60 years to do this. That is a big number.

But also it requires a little bit of explanation behind that. A lot of our time is also spent on fulfilling FOIA requests, preparing material for challenges in court. I think right now we have four ongoing court challenges for some of our most recent decisions. And almost every decision, it is almost a guaranteed court challenge by somebody, almost every one.

Senator MURKOWSKI. Let me ask you on that line, then, Ms. Ferguson-Bohnee has indicated that it seems that there is just additional evidence, additional standards for interpreting the criteria that have come about over the years. Is some of this due to the fact that you anticipate legal challenges, so you need to make sure that you have more documentation than less? Is this what we are seeing?

Mr. ARTMAN. I think if you look at our decisions, and being very familiar with the Juaneño decision, I think the Juaneño decision is a perfect example. We looked at, I think it was approximately 175 pages, 190 pages long, it was a long decision. And there were two Juaneño decisions that were put out at the same time. For me, that was a culmination of where we had come from. That was a result of the litigation that we have had, things we have learned. But I also think, when I say the culmination, we certainly realize that has to turn around. One of the things that we are proposing in guidelines and how you do your works management guidelines, is to create shorter decisions.

One of the big problems is, people who are receiving these, either the parties, the petitioners themselves, or the interested parties, have difficult times understanding where we are getting to. So we are trying to bring it down to the most core material and putting the additional substantiation elsewhere. I think that is going to be easier for the teams to develop those documents as well and create a reduction in time.

But that is a result of all those court cases. But yet at the same time, I think we are going to be able to create documents and we are already starting to reduce the size of our documents but maintain the standards that have been put in place by the courts previously.

Senator MURKOWSKI. You mentioned that to get through what you have current pending within the Department, it could be a long time, 50 to 60 years. But Mr. Rivera has indicated that the case with the Juaneño tribe has been under active consideration on that list for some years now. Is that correct, that there are only seven on the active consideration list?

Mr. ARTMAN. There are six right now on the active consideration list.

Senator MURKOWSKI. So once you get to the active consideration list, how long do you figure is a reasonable time to resolve a case that has made it that far in the process?

Mr. ARTMAN. Through regulation, it should take about 25 months.

Senator MURKOWSKI. From the time that it gets to active consideration?

Mr. ARTMAN. Yes. That includes the time for developing the determination, going through the technical assistance, putting out the proposed findings. Then there is a review period of 90 days and additional technical assistance time. And then there is the final determination. So it is a lengthy time, once you make it to that point.

Now, the ready list, that is where a team is assigned to you and all of your documents are reviewed. You have gone through your prior technical assistance, your documentation is considered complete and it is now, you now have the ability to have a team look at it. And that will vary, depending upon the size of the organization and also in certain situations, a tribe which may make it to the ready list or active list may split, may even split a few times. That can further delay the process, because then we have to look at where the membership is. And sometimes in those cases, those splits will create other entities which have parallel consideration, they are being considered at the same time out of necessity because of the way the membership has divided.

Senator MURKOWSKI. So even though the goal would be that it is no longer than 25 months on this active consideration list, you are saying that there are circumstances that occur, Mr. Rivera has mentioned that there have been seven extensions since they have been on active consideration, not extensions that the Tribe has requested, but extensions that have come from the Department. So are we able to realistically look at 25 months and say that from a Department perspective, that is an achievable goal?

Mr. ARTMAN. I think we are. But again, the 25 months is a perfect scenario. Everything is complete. And in addition, for example, in the Juaneño case, Juaneño is a good example of where there was a split. Part of those delays, part of those extensions that we were seeking was to consider the impact of the split in the membership or in the split of the entity.

So those externalities do impact that time line I have given you.

Senator MURKOWSKI. Then in your proposal that there be a sunset provision of 15 years for the Federal acknowledgement process, your comments here right now indicate to me that there are things that can happen that can delay a process. Is it fair to impose a 15 year deadline on the petitioner when they may require more assistance to meet the requirements that you are imposing on them?

Mr. ARTMAN. Along with that is the management guidance which we will be putting out shortly. In that, we are able to move up, we will be moving entities up the list if they meet certain requirements. We will be taking entities out of the list, and therefore they won't be due to have consideration based on other factors, for example, immediately failing one of the seven criteria would take them out.

One of the recommendations that Ms. Bohnee made about moving up the dates for historical consideration, we are looking at that as well. So we are already taking steps that don't require regulatory changes to pull out the individuals who can move up more quickly through the list.

Senator MURKOWSKI. Will these guidelines, one of the concerns that we have heard is that the rules seem to change on the peti-

tioners, and now all of a sudden this is required, or now we need to do this. By the revised guidelines that you are looking at, can you give me the assurance that they are not going to further complicate somebody that is in the process?

Mr. ARTMAN. Yes, we have looked at that specific issue to make sure that isn't the case. Usually when people say the rules are changed, when the petitioners claim the rules are changing, those changes are being caused by a recent court decision, most likely. We are making changes in our own system to adapt to that court ruling.

So we don't want to create additional work or create any changes that the petitioners may not have been aware about already that were in the rules. These really do clarify what the rules state, and provide management guidance.

Senator MURKOWSKI. Can the Department do more to provide the technical assistance? Both Ms. Ferguson-Bohnee and Mr. Rivera have indicated that a level of technical assistance could help the petitioners. And if we are going to impose these deadlines, it seems to me there has to be a little bit of just technical assistance that might be provided.

I am not suggesting that the answer has to be financial. But just in terms of working the process, is that something that could be made to happen?

Mr. ARTMAN. Yes, ma'am. And for making our information available to the petitioners to clarify for them exactly what is expected to actually sitting down in the room and going through the documents at the various stages of the acknowledgement process and providing the technical assistance, those are all things we do strive to do. As Chairman Rivera noted, you just had a very successful technical assistance session, I believe two formal technical assistance sessions where we sat down and we worked through all of the issues that came up in the proposed findings.

So we are taking strides to do just that.

Senator MURKOWSKI. Mr. Rivera, what do you think of this proposed 15-year sunset?

Mr. RIVERA. I think it is a very interesting and perhaps a thoughtful process to get through what needs to be done. Again, I would like to emphasize that nothing is going to happen in the ready list until the actives get decisions made. Assistant Secretary Artman is correct that the technical assistance has been very helpful for us, because that is a time that we can engage the Department to find out exactly what evidence is needed and required. We haven't had that opportunity to do that until we are able to sit down and find out how the Office sees the evidence and how that takes place.

So that part has been very helpful. It would be nice to have that part at the front end instead of at the back end.

As far as the extensions on our case are concerned, and we will provide the Committee with copies of those letters, never once was it communicated to us that the reasons for extensions were because of another petition. It was always because of, more time is needed and resources are needed to examine the evidence and to work on the petition. So the communication part, getting up to the release of a proposed finding, is many times not quite as open as it should

be, so that we can know exactly what needs to be done. There needs to be a lot more cooperation between the various different parties.

The way that we see it is the Committee oversees that the regulations are being followed properly. The Department enforces those regulations. And it is up to the Tribe to provide the evidence to comply with those regulations. But in order for us to do that, we have to have to have that kind of tripartite understanding and the communication with the Department. We realize that they are burdened because of resources. We realize that, but at the same time, with this 25 month period, according to the regulations, we feel that that is doable, when we comply with the regulations as far as providing our petition to be ready for active and inactive status.

So all we are asking for is that those regulations are abided by, the communication and technical assistance is provided, and that the movement proceeds without unnecessary delay.

Senator MURKOWSKI. Let me ask just one final question of you, Ms. Ferguson-Bohnee. You have indicated that in the recommendations from your students that a time frame is identified, and a sunset provision for each stage. Were the recommendations more specific than that in terms of suggested time frames? In other words, the Secretary has proposed 15 years for the entire process. But within the stages, did you identify what you felt to be sufficient time lines that could be shared with the Committee and with the Secretary?

Ms. FERGUSON-BOHNEE. Yes, ma'am. I think to answer your question, the students reviewed identifying the time frame, but the time frame has to be dependent on funding, so that the time frame can be realistic. And we can't assess what that realistic time frame will be, and we think that either Congress or the Department should identify what they think the time frame should be.

Senator MURKOWSKI. Do you think 15 years is reasonable for the entire process?

Ms. FERGUSON-BOHNEE. For each?

Senator MURKOWSKI. For the entire process.

Ms. FERGUSON-BOHNEE. For each petitioner?

Senator MURKOWSKI. Yes, for each petitioner.

Ms. FERGUSON-BOHNEE. I think that 15 years, if there are resources allocated, is a long time. But I think that 10 years or a shorter time period would probably be better, because a lot of these petitioners have been waiting on these lists and engaged in research for, some of them, 26 years, some of them longer. But the issue is, if the resources are allocated to them, and I think what the students identified is that perhaps Congress or the Office should look at how long should the process of Federal acknowledgement go on?

For example, should we identify when all of the petitions should be assessed, and in that way, appropriate sufficient funding for all of the petitioners and for the Office, so that in 60 years, there aren't still petitioners who are submitting letters of intent so that the sunset provisions relate to, by what deadline should a petitioner submit a letter of intent, and then start the time frame from there.

Senator MURKOWSKI. Thank you. Thank you, Mr. Chairman, I have gone over my time.

Mr. RIVERA. Mr. Chairman, may I say one more thing on the 15-year item?

The CHAIRMAN. Yes.

Mr. RIVERA. I do think that it is sufficient as far as I am concerned. If a tribe has not provided the ample evidence to be ready for active within the next 15 years, then that is another issue that falls the burden on the tribe. There are only six tribes that are ready for active right now. There are only six tribes that are inactive. That is 12. So 12 to be completed within the next 15 years I think is sufficient time.

The CHAIRMAN. Senator Tester?

Senator TESTER. Thank you, Mr. Chairman. A couple of things. First of all, I want to thank the panelists for their testimony. I also want to thank Assistant Secretary Artman for making changes in the regulations. I hope they are not just changes for the sake of changes. I am sure they are not. But they are to help move the process along and streamline it and make it work better for everybody.

Along those lines, as you were reviewing the regulations, is there anything we need to do at the Congressional level to make that streamlining better, or can you handle it within your regulations?

Mr. ARTMAN. I think right now, though there may be disagreement from our point of view, we think we can handle it within the current regulations and the APA process.

Senator TESTER. Okay. Thank you. And then there were, by your own answers to the questions here earlier, you said that it would take 50 to 60 years to take care of the current backlog. Is that correct?

Mr. ARTMAN. That is correct.

Senator TESTER. So how, let's say you put your regulations into effect, are those folks grandfathered in?

Mr. ARTMAN. A large part of that backlog, we have six on the active list, we have another ten on the ready list. Then there are 243 on the waiting list. Now, that 243 is a very important number, because we don't know how many of those could qualify in the acknowledgement process. Many of those 243 are made up solely of letters of intent and little documentation to support them otherwise. Many of those are made up of groups who are not tribes, and we know already that in a handful of cases, the FBI is looking into them because these are essentially confidence operations that are being set up for one purpose or another, either to get Federal funds or to help speed through the immigration process for people who go through them.

So that is a mixed bag in there. We still have to deal with that, because they have set the marker in our organization, they have sent in the letter of intent. So we are looking at all 259 over the next 15 years. What that will do, I think, if we put the regulations up there, if they are put in place, you will see the 243, members of the 243, who feel that they can make it into the ready list quickly begin to compile their documentation in the correct order, within our guidelines and our handbooks, and submit that for consideration to make it onto the ready list.

Senator TESTER. Do you have the staffing to be able to handle that?

Mr. ARTMAN. Not at the moment. But of course, if these regulations go in place, that is one of the things we will have to look at.

Senator TESTER. So you will be asking us for an additional appropriation.

Mr. ARTMAN. That may be the case.

Senator TESTER. Do you have any idea how much that might be?

Mr. ARTMAN. Not yet, Senator, and when I say these regulations are in the very beginning stages, we are still working with OMB on finalizing what these would say, for that reason. That is one of the many reasons.

Senator TESTER. That is fine. So the clock starts ticking on the 15-year sunset when you receive the letter of intent or when you receive the first documentation?

Mr. ARTMAN. Well, it is broken down into different stages. As they are written right now, and that is to say that they haven't gone through consultation yet, and they haven't gone through the comment period, and we are still going through OMB review. So right now, in our head, we have set out a time line that we think would work, but it will go through quite a bit.

There is a sunset of five years to get all the information in, and then there is an additional ten years for us to get, and the petitioners, to get through the next stages.

Senator TESTER. I honestly don't have any problem with putting out time lines. Self-imposed time lines work the best, because you guys should be able to determine how quickly you can run through it. But I didn't hear the answer. Does the clock start ticking when you get the letter of intent?

Mr. ARTMAN. Yes. That is when our tolling period starts.

Senator TESTER. That is fine.

Mr. ARTMAN. But we would essentially, the 15-year sunset is for OFA to sunset its process.

Senator TESTER. Okay. I don't know if you have any, but over the last, let's say ten years, how many tribes have been denied recognition, how many have been accepted? Do you have those figures? Even the last five, I don't care. I am just curious.

Mr. ARTMAN. From 1978, when the regulations first began to present, we have 16 petitioners that became federally-acknowledged tribes. Twenty-eight have been denied.

Senator TESTER. Of those 28, how many were challenged in court?

Mr. ARTMAN. I don't know. I would say probably a dozen of those.

Senator TESTER. I don't know if you can get that information, I would like to know that. I would also like to know how many were successful, what was done, were there damages awarded, what happened.

Mr. ARTMAN. We can compile that for you.

Senator TESTER. If you would. I am just really curious about that.

I guess the last thing I want to say is the transparency issue. I just want to concur with Ms. Bohnee. The issue about transparency and making sure we have all our agencies as transparent as possible for information I think is critical. If in fact you are re-

sponsible for getting the website up and going, you need to be applauded for that and anything else you can do in that vein I think is positive. Because transparency is critically important, and I think we need to work at it.

Thank you.

Mr. ARTMAN. Thank you, sir.

The CHAIRMAN. Mr. Artman, Mr. Assistant Secretary, review with me again some numbers here. How many petitions have been approved since 1978 in the recognition process?

Mr. ARTMAN. Since 1978, there have been 16 petitioners that have become acknowledged through our process, or there have been, and 3 others whose status has been clarified through other means.

The CHAIRMAN. How many of the 16 have been approved?

Mr. ARTMAN. Those were the ones that were acknowledged.

The CHAIRMAN. Those were approved. How many were denied?

Mr. ARTMAN. There were 28 since 1978 that have been denied.

The CHAIRMAN. Do you have material with you of how many tribal recognition actions have occurred as a result of legislative action?

Mr. ARTMAN. Yes, we do, nine.

The CHAIRMAN. Over what period of time?

Mr. ARTMAN. Since 1978, there have been two through legislative restoration and seven through legislative recognition.

The CHAIRMAN. Ms. Ferguson-Bohnee, you indicated that there are two approaches: one is to improve the current system, and the other is to create some sort of independent process outside of the system. Which do you prefer? What are the merits of each?

Ms. FERGUSON-BOHNEE. I think if the current system as it rests, is not funded, then we are going to be at the same standstill and have the same burdens of not being able to evaluate the petitioners. I think that there is nothing inherently within OFA that is a problem. I don't think the students identified anything with OFA as being a problem.

But the thought was that if Congress wanted to create a commission that would expire, such as the Indian Land Claims Commission or something of that nature, which would provide a sufficient number of researchers, genealogists, historians, anthropologists and lawyers to administer the process, and fund that process, then the Congress has dedicated funds and noted it as a priority that it would sufficiently allow time for that process to occur. But nothing within the process is inherently a problem.

The CHAIRMAN. I see.

Mr. Rivera, you said that you filed the letter of intent 26 years ago?

Mr. RIVERA. In 1982, August 13th. About August 13th.

The CHAIRMAN. You know exactly, don't you?

Mr. RIVERA. Oh, yes.

The CHAIRMAN. You indicated that there have been a number of delays as a result of the Interior Department, but you also excuse some of those delays, correct? But there was a 13-year period that you described, can you tell me again what the 13-year period was?

Mr. RIVERA. In the ready status, when a petition has all the evidence provided that qualifies for a tribe to be ready for active, it

is kind of the waiting room, you sit there and you wait. We sat there and waited for it for a while, and moved up in the process as tribes moved into active. It is like taking a number. We moved up in the process to the point where we were in the first place, the next tribe to move into ready.

We submitted our letter of intent in 1982. Another party, which was not affiliated as far as the membership of the Tribe, submitted a letter of intent approximately 14 years later under the same name as our Tribe. Because of that, and other issues surrounding that, and because the policy and procedures on how to deal with something like that were a little sketchy at the time, the Department decided under executive discretion to remove the Tribe from that first spot to sort things out, under our protest.

The CHAIRMAN. Is that where the 13 years came in?

Mr. RIVERA. A year later, when we were put back on the ready status, we were put back at the number six spot. And it took us ten years to get back.

The CHAIRMAN. That didn't happen under Mr. Artman's watch, obviously.

Mr. RIVERA. No.

The CHAIRMAN. But that seems to me like an unfairness in the system.

Let me ask Mr. Artman the other issue that has intervened since 1978 which is the Cabazon decision. I assume that there is at least, not for all, and I am not suggesting this is across the board, some tribal recognition activities which are a result of an interest in being able to conduct gaming. Would that be the case?

Mr. ARTMAN. I am sure there may be some motivation for that.

The CHAIRMAN. We are talking about especially some of the letters of intent that are filed. I am not talking so much about the cases that have been going on for a long while.

Mr. ARTMAN. And that may be some of the motivation for that. But when we looked at the numbers, since the Cabazon case, or since 1988 with the passage of IGRA, they stayed relatively consistent. We receive anywhere between 9 to 12 petitions a year. And that didn't change after 1988 or after the Cabazon decision.

The CHAIRMAN. That might answer my question. I am a little surprised by that, because I would have thought the opposite. That is good news, because that suggests those that are seeking recognition are doing it not with respect to gaming activities. The gaming activities can be very lucrative.

My understanding, you might correct this, is that there is in one part of this Country a tribe with a membership of one that owns a gaming facility. Is that correct?

Mr. ARTMAN. I don't recall a membership of one. There are tribes and bands out there that have small memberships that may partake in gaming. I know there are many that don't, small memberships that don't partake in gaming as well.

The CHAIRMAN. The process of seeking recognition is a very important process to the First Americans. Many of them were here, they had governments, they lived, they had territory. But we came along later and we even rewrote the history books. It is interesting, I grew up understanding the father of our Country was George Washington. I learned later, of course, there were some great In-

dian leaders out on the prairies in my part of the Country and throughout the rest of America who were providing leadership to their tribes long before George Washington was born. Yet we write the history books the way we want to write them.

This acknowledgement process is an interesting process, because in many ways it is trying to right some wrongs by allowing tribes to achieve the proper recognition that they are entitled to, if they can demonstrate to you through this process and through the seven criteria that they have a historical culture in existence.

I do think the frustration you are seeing from tribes and from the Congress is that the process takes a long, long time. I would not today suggest that somebody ought to be able to apply and in 24 months get an answer from you. I think that is not realistic. This is about genealogy and historians, and so much goes into making the right decision here. So I am not suggesting that there has to be drive-by recognition or should be. I would not support that.

But I think somewhere between 30 years and some more reasonable timeframe we should be able to achieve this. I assume there are people that have applied that are long since dead when the Department makes a decision, given the 20 and 30 year time frames. I note that the budget request that is submitted for this activity this year is identical to last year, I believe. It goes to Ms. Ferguson-Bohnee's point that this is a process that can work if it is properly funded. Why are we receiving a budget request that is flat if in fact we have these lengthy periods of delays?

Mr. ARTMAN. One of our responsibilities is the Office of Federal Acknowledgement and overseeing the acknowledgement process. But also, in developing our budgets, there are a lot of inputs into the process, one of which is the tribal budget advisory committee that we work with, which is made up of tribal leaders from all the 12 different regions of the Nation. As you can imagine, being made up of tribal leaders, their priorities are in other areas, oftentimes. And acknowledgement isn't something that is often spoken about.

So this is something that we have to work within to our other core responsibilities. This is part of our responsibility. But the majority of our budget we try to make sure is focused on, that we meet the trust responsibilities, be it enforcement, taking land into trust, education, law enforcement, what have you. It is difficult oftentimes to carve out anything more than that. Now, if we have something like regulations with a set time frame, where there is a cost benefit to that, perhaps that is a different formula then.

The CHAIRMAN. Let me ask about regulations just for a moment. First of all, I appreciate the fact that today you talked about consultation in the development of these regulations. Consultation with tribes is very important; I know you know that since you are a tribal member. Our Committee emphasizes consultation. So I appreciate what you said today about that.

Regulations sometimes have been pretty elusive in terms of getting them complete. We have hearings with this Committee on the subject of off-reservation gaming, the two-part determination, and other related issues. I think they have been writing regulations for 17 years now on those subjects. What is your estimate of when you might complete your regulatory process, or the process of developing these regulations on this issue?

Mr. ARTMAN. At the moment, we have a draft. We are working with OMB on that draft and through our own internal processes. Then there will be the comment and consultation.

I can say with some surety, it will be in the next Administration. We just don't have the time this year to finish them up.

The CHAIRMAN. I recognize it won't happen in the coming couple of months. But is it reasonable for us to be expecting that this is not going to take four years or three years to do regulations?

Mr. ARTMAN. I would hope not. Since at that time I won't be Lee Fleming's boss, I will say that he will get them done as quickly as possible.

The CHAIRMAN. As you saw by this morning's action with the Lumbee Tribe, this is a very important issue. This Committee is pressured, when I say pressured, that is the wrong word, this Committee is requested by a number of tribes to pass recognition bills for them, because they are frustrated that the acknowledgement process is too slow. It is my view that we not get involved, as a Committee, in addressing these individual pieces of legislation that require us to recognize tribes.

I would much prefer they go through the acknowledgement process. That was not possible for the Lumbees, but it is for other tribes. The Virginia tribes, for example, have requests in front of us, and they make a pretty powerful case, as do some other tribes. But our hope is to work with you in the process with these tribal governments and get them in the process and get these issues resolved.

I appreciate, Assistant Secretary Artman, your appearance today. Mr. Rivera, thank you for coming a good long distance. Ms. Bohnee, the same to you. Would you ask your students, who worked on these issues, to stand up, so that we can recognize them? And these are all Arizona State law students?

Ms. FERGUSON-BOHNEE. Yes, sir, they are third-year law students in the Indian Legal Program.

The CHAIRMAN. We thank you very much for your work and welcome your participation. Thank you very much for being here.

This hearing is adjourned.

[Whereupon, at 10:25 a.m., the Committee was adjourned.]

A P P E N D I X

JUANEÑO BAND OF MISSION INDIANS

Traditionally known as the Acjachemem Nation

Statement of the Honorable Sonia Johnston, Chairwoman
Juaneño Band of Mission Indians, Acjachemem Nation

Submitted to the
Senate Committee on Indian Affairs for the
April 24, 2008 Oversight Hearing on Recommendations for
Improving the Federal Acknowledgment Process

Chairman Dorgan, Vice-Chairman Murkowski, and Honorable Members of the Committee:

I submit this statement to clarify for the Committee the status of the Juaneño Band of Mission Indians, Acjajchem Nation of California, its decades-long quest for federal acknowledgment, and to explain why two Juaneño petitions are now pending before the Office of Federal Acknowledgment ("OFA"). You heard testimony today from one of those petitions, Chairman Anthony Rivera, representing Petition No. 84A. I am Chairwoman Sonia Johnston, and I represent Petition No. 84B, whom you did not hear from.

The Juaneño People sought recognition through a single petition for federal acknowledgment decades ago, a petition the Bureau of Acknowledgment and Research ("BAR") numbered Petition No. 84. Years later, in 1994, a dispute arose over tribal election results, which carried over to BAR's doorstep. Rightly refusing to intervene, BAR explained that in the context of a leadership dispute within a petitioning group, nothing in the regulations provides "for a change in the representatives of that petitioner against their wishes."[1] Consequently, due to the dispute, BAR requested an updated membership list from Petition No. 84. When it was not provided, BAR withdrew the Juaneño petition from the list of petitions "ready" to be considered by BAR staff in 1995.

BAR then indicated it would "provide each contending group with separate petition numbers, thus giving each the status of a petitioner."[2] As a candidate in the disputed 1994 election, BAR recommended that I file a new recognition petition on behalf of the Juaneño People, which I did.[3] This is how the original Juaneño petition became two: One, Petition No. 84A, was led by Chairman David Belardes, the other, Petition No. 84B, was led by me. A second election dispute later occurred in Mr. Belardes' group, which ended in Jean Frietze being the Chairwoman of Petition No. 84A.[4] However, Mr. Belardes contended a fraudulent election and refused to relinquish the petition. Here again, BAR informed one candidate, Jean Frietze, that she could either file separately and become Petition No. 84C, or consent to be treated as a faction within petitioner 84A.[5]

If Juaneño politics challenged BAR, BAR's shifting position on the Juaneño petitioners failed to resolve the turmoil. At the end of 1997 BAR informed me, as Chairwoman of Petitioner 84B, that due to "political disputes among the Juañeno Indians in the past two years" it would recognize three separate Juañeno petitioners.[6] By 1999, it took yet a

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[1] *Letter, Nov. 7, 1995, Joan Sebastian Morris to Sonia Johnston.*
[2] *Letter, Nov. 7, 1995, Joan Sebastian Morris to Sonia Johnston.*
[3] *Letter, April 16, 1996, BAR to S. Johnston.*
[4] *Letter, Dec. 23, 1997, Holly Reckord, BAR to David Belardes.*
[5] *Letter, Dec. 9, 1997, Holly Reckord, BAR to Jean Frietze.*
[6] *Letter, Dec. 15, 1997, Rita Santias [sp.?] to S. Johnston.*

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new position: as far as its petition was concerned, the Juaneño People had split into two groups, however, Petition No. 84A would have two petitioners.[7] Though BAR found "insufficient justification to create a third Juañeno group," it would nevertheless communicate separately with both of 84A's claimed leaders "until [they] resolve [their] leadership dispute."[8] By 2005, Anthony Rivera was the elected leader of one of 84A's factions; Mr. Belardes remained head of the other. In early 2006 OFA changed position once more, saying it would no longer treat Mr. Belardes as a petitioner, but as an "interested party" for both 84A and 84B.[9] I opposed this, and a month later OFA limited Mr. Belardes' interested party status to 84A alone.[10] Sadly, my own continuing leadership of Petition 84B has not gone without challenge; however, though I have been voted out of office once, I have been voted in twice and remain the Chairwoman of Petition No. 84B.

Last week OFA held formal technical assistance hearings on proposed findings issued for each petitioner. Representatives of Chairman Rivera and Mr. Belardes (as Interested Party) met with OFA staff on April 17th to discuss 84A's petition; my representatives met with OFA staff the following day to discuss ours. The proposed findings for each petitioner are virtually identical. No wonder: Despite more than a decade of internal dissension, which continues notwithstanding any claims to the contrary, the Juaneño tribal members of petitioners 84A and 84B remain united by ties of friendship, kinship, and, as OFA has acknowledged, by common descent from the same Historical Tribe.[11] We remain a single People in search of that which has been denied us historically: federal acknowledgment of our existence as a historical Tribe.

BAR/OFA's responses to the Juaneño Tribe's internal disputes were, I believe, misguided. They encouraged the proliferation of acknowledgment petitions, thereby fanning the flames of tribal dissension and straining OFA's already limited human resources. I respectfully submit that the better policy would have been for BAR/OFA to place a hold on our original petition the moment it saw a true internal dispute arise, at least until the Juaneño People could act as one again. Removing the petition from consideration would have provided incentive to bring the People's leaders together to work in the best interests of the entire Tribe. A divided Juaneño community, by contrast, makes the rejection of both petitions simpler.

Years after first submitting our petition for federal recognition, a tribal election divided the Juaneño People. BAR/OFA has effectively institutionalized that division and ensured that the Juaneño People's chances of successfully negotiating the federal acknowledgment process are thereby dramatically reduced.

In closing I wish to make clear that the purpose of my remarks has not been to air my Tribe's internal disputes, but to chronicle for the Committee the problems the Juaneño have faced in their quest for federal acknowledgment and the consequences thereof, and to offer my thoughts on how to avoid their recurrence in the future in hopes of improving the federal acknowledgment process and of securing the rights of unrecognized tribal communities.

Sonia Johnston
Chairwoman
Juaneño Band of Mission Indians, Acjachemen Nation

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[7] *Letter, June 18, 1999, V. Townsend to S. Johnston.*
[8] *Letter, Oct. 29, 1999, L. Tuell, Office of Tribal Services, to J. Frietze.*
[9] *Letter, Feb. 23, 2006, R. Lee Fleming, OFA to S. Johnston. See 25 C.F.R. § 83.1.*
[10] *Letter, March 15, 2006, R. Lee Fleming, OFA to S. Johnston.*
[11] *See Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (84A), Nov. 23, 2007; Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (84B), Nov. 23, 2007.*

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