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**Testimony before the Senate Committee on Indian Affairs
Oversight Hearing on Fixing the Federal Acknowledgment Process**

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November 4, 2009**

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 ("Clinic"). On behalf of the Clinic, we thank you for the opportunity to present testimony on the Federal Acknowledgment Process ("FAP").

In 2007, a staff member of the Senate Committee on Indian Affairs ("Committee") requested the Clinic to analyze the FAP and alternative models for federal acknowledgement. The student-attorneys in the Clinic analyzed the history of the process and legislation proposing alternative models for federal acknowledgement. The preliminary analysis was originally submitted to the Committee in April 2008 in conjunction with an Oversight Hearing on Recommendations for Improving the FAP. Student-attorneys assisting in the research and drafting of the 2008 preliminary analysis were Alejandro Acosta, Jerome Clarke, Tana Fitzpatrick, Chia Halpern, Mary Modrich-Alvarado, and M. Sebastian Zavala. The Clinic continued its research and analysis on the project and updated the preliminary analysis. The following student-attorneys assisted in preparing the attached updated analysis: Derrick Beetso, Daniel Lewis, Rebecca Ross, and Vanessa Verri.

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. The FAP anticipated, and the Bureau of Indian Affairs' most recent Guidelines suggest, that petitioners can complete petitions without assistance from experts.¹ However, due to the shifting standards and the increased burden, petitioners need experts to help them navigate the process and prepare their petitions. 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 ongoing problem 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 thirty-one years, only forty-five petitions have been resolved through the FAP. The Department fails to issue decisions within its scheduled framework, and it is 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 Office of Federal Acknowledgment ("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

¹ See OFA, Official Guidelines to the Federal Acknowledgment Regulations 17-24 (1997).

needed to review information that is not compiled, organized, and analyzed in a professional manner.

The current process is adjudication without the benefit of discovery or the questioning of experts relied on by the OFA to issue its decisions. Proposed Findings and Final Determinations issued by the OFA are legal decisions relying on legal standards, and the agency is given great deference in interpreting and applying the regulations to each petitioner. The reconsideration process does not provide for review based on the misapplication of the facts to the law/criteria or the misapplication of the standard of review. No tribe receiving a negative final determination has successfully reversed a decision through the reconsideration process.

A reasonable solution for the process must be undertaken to ensure that petitions are processed more timely. Congress has options— (1) encourage the Assistant Secretary to create additional guidance addressing certain key issues; (2) pass legislation directing OFA as to its responsibilities, including definitions of the petitioner's burden, the evaluative standards, and provide funding for petitioners; (3) create a commission to either replace or assist the OFA in the evaluation process; (4) allow Administrative Law Judges to review and render acknowledgment decisions; (5) implement sunset provisions at various stages of the process to ensure that timeframes are respected; or (6) take no action and allow OFA to continue administering the FAP according to its existing procedures. Numbers 3-5 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 public information should be separated, and copies of the CD-ROMs should be available 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 pursued 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 tribe should be extended federal recognition, 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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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").² Other avenues include federal court recognition and congressional legislation.³ 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-five tribes have completed the FAP.⁴

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

² The Federal Acknowledgment Process refers to the administrative process by which unrecognized tribes seek recognition from the Department of the Interior under 25 C.F.R. pt. 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)).

³ 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)).

⁴ As of September 2008, only forty-four petitions have been resolved through the process. The AS-IA signed one subsequent final determination. OFA, Status Summary of Acknowledgment Cases (Sept. 22, 2008), [available at](http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf) <http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf>; Final Determination Against Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, 74 Fed. Reg. 56,861 (Nov. 3, 2009).

A. THE AMERICAN INDIAN POLICY REVIEW COMMISSION

In 1975, Congress established the American Indian Policy Review Commission ("AIPRC") during the era of Indian Self-Determination, which followed the era of Termination.⁵ This was a time of Indian activism, with confrontations between American Indians and federal authorities at Wounded Knee, in Washington D.C. and in Washington State.⁶ 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.⁷ 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."⁸ He believed that past legislation was "piece-meal" and future legislation needed to be comprehensive.⁹ Congress agreed and found the need to conduct a comprehensive review of Indian affairs similar to the Meriam Report conducted in 1928.

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."¹⁰ Included in the AIPRC's charge was the duty to examine "the statutes and procedures for granting federal recognition and extending services to Indian communities and individuals."¹¹

The AIPRC was comprised of six members of Congress, three from the House of Representatives and three from the Senate, and five Native American leaders.¹² The House and Senate members of the AIPRC, through a majority vote, selected the Native American members of the AIPRC.¹³ The AIPRC congressional members identified over 200 individuals who could be effective in lobbying Congress and had experience in

⁵ 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).

⁶ UCLA AMERICAN INDIAN STUDIES CENTER, NEW DIRECTIONS IN FEDERAL INDIAN POLICY: A REVIEW OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION 115 (1979).

⁷ Id. at 10.

⁸ Id. at 8.

⁹ Id.

¹⁰ Pub. L. No. 93-580, Preamble, 88 Stat. 1910 (1975).

¹¹ Pub. L. No. 93-580, § 2(3), 88 Stat. 1910, 1911.

¹² 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.

¹³ Id. at 4-5; Pub. L. No. 93-580.

Washington D.C. politics.¹⁴ The AIPRC included one member from an urban area, one member from an unrecognized tribe, and three from federally recognized tribes.¹⁵ The congressional members selected Ada Deer, John Borbridge, Louis Bruce, Adolph Dial, and Jake White Crow as the Native American commissioners.¹⁶

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.¹⁷ Adolph Dial, a Lumbee, was considered, among the commission's members, the voice most representative of unrecognized tribes. He had a reputation for vigorously advocating in favor of federal recognition and federal support, both for his tribe and in general.¹⁸

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

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," rather than "tribes" to establish eligibility for federal services.²² These statutes were broad and did not place limits on which "Indians" were eligible for services.²³ In the 1970s, many statutes began requiring tribes to be recognized by the federal government before tribes and their members could receive services and participate in Indian programs.²⁴ During this time, the Department received an increased number of requests to recognize tribes.²⁵ Issues related to federal

¹⁴ UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 12-13; Pub. L. No. 93-580.

Tribes received a memorandum requesting their input on the nomination 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.

¹⁵ Pub. L. No. 93-580, 88 Stat. 1910-11.

¹⁶ UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 14. The authorizing legislation created nine of the eleven task forces. Pub. L. No. 93-580, § 4, 88 Stat. 1910, 1912.

²⁰ *Id.*

²¹ UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 21.

²² COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 153.

²³ *Id.*

²⁴ *Id.* at 154.

²⁵ Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978); *see also*, Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 492 (2003).

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.²⁶ 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.²⁷ 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 past mistakes endured by unrecognized and terminated Indians.²⁸ 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.²⁹ It obtained research information through questionnaires distributed to Indian groups and tribes, as well as through hearings, interviews, and site visits.³⁰

The task force stated that the concern over appropriations by both Congress and the Executive Branch had determined Indian affairs, and as a result, federal services, programs, and benefits were often denied to terminated and unrecognized Indians.³¹ It recommended that Congress direct all federal departments and agencies to serve all Indians, regardless of their status.³² 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.³³ 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.³⁴

2. Task Force Nine Report

Task Force Nine researched and made recommendations in the areas of revision, consolidation, and codification of laws.³⁵ It set out to provide recommendations for

²⁶ 2 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT APPENDIXES AND INDEX 8 (1977).

²⁷ Id. at 17.

²⁸ AIPRC, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 4 (1976).

²⁹ Id. at 17-209.

³⁰ Id. at 1716-1722.

³¹ Id. at 1696.

³² Id. at 1701.

³³ Id.

³⁴ Id. at 1702.

³⁵ 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).

Congress to establish a special body to codify its recommendations, which would be headed and staffed by Indian attorneys.³⁶

The Task Force Nine Report proposed that Congress devise statutory standards governing federal recognition.³⁷ The task force requested that Congress develop criteria for federal recognition of Indian groups that had been previously denied recognition.³⁸ The report suggested that Congress explain that there are a number of Indian groups who have been denied federal recognition because they lack treaties or other contact with federal authorities.³⁹ 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.⁴⁰

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 previously recognized, as well as a lack of clear legislative guidelines for federal recognition. It 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 previously recognized.⁴¹

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.⁴² It recommended that Congress restate its plenary power over tribes, including its authority to withdraw federal recognition of tribes.⁴³ 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."⁴⁴

3. AIPRC Final Report

The AIPRC issued its final report to Congress in 1977.⁴⁵ 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.⁴⁶

³⁶ Id. at pt. IV.

³⁷ Id. at 100.

³⁸ Id. at 46.

³⁹ Id. at 30.

⁴⁰ Id. at 44.

⁴¹ Id. at 30, 46.

⁴² Id. at 27.

⁴³ Id. at 28.

⁴⁴ Id. at 27, 29.

⁴⁵ 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.

The AIPRC Final Report included a chapter on unrecognized and terminated tribes.⁴⁷ The AIPRC found that many tribes were terminated or not recognized because of past federal policies.⁴⁸ At the time of the report, the AIPRC identified that 130 tribes had not been recognized because of bureaucratic oversight.⁴⁹ 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.⁵⁰

The AIPRC proposed recommendations to resolve the status of unrecognized tribes. First, it 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.⁵¹ 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.
- 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.

⁴⁶ 1 AIPRC, FINAL REPORT 567-612 (1977).

⁴⁷ Id., ch. 11.

⁴⁸ Id. at 8.

⁴⁹ Id. at 8.

⁵⁰ Id. at 8, 37, 480.

⁵¹ Id. at 37.

- 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.⁵²

Under the AIPRC's proposed process, the federal government had the burden of proving that the Indian group did not meet any one of the seven criteria.⁵³

To evaluate the petitions, the AIPRC recommended that Congress develop an office independent from the BIA to assess petitions.⁵⁴ The office would contact all known unrecognized tribes, provide technical and legal assistance and review the petitions.⁵⁵ The office would decide if the group was eligible as a tribe for federal services and programs.⁵⁶ The determination 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."⁵⁷ 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 any one of the seven factors.⁵⁸ This decision could be appealed to a three-judge federal district court. Under this process, if a tribe's status was positively determined, the government was required to immediately provide benefits and services to the tribe, and Congress was mandated to provide the relevant agencies additional appropriations.⁵⁹

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

⁵² Id. at 482.

⁵³ 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.

⁵⁴ 1 AIPRC, FINAL REPORT at 38, 481-482.

⁵⁵ Id. at 38.

⁵⁶ Id. at 38.

⁵⁷ Id. at 38.

⁵⁸ Id. at 38, 480-483.

⁵⁹ Id. at 40.

Tribes."⁶⁰ This pressure came in the form of federal circuit courts recognizing that descendants of tribes possessed inherent and delegated rights.⁶¹ 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.⁶² 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; the Department lacked an adequate system to evaluate petitions.⁶³ Consequently, the Department set out to promulgate rules with the essential requirement: "the group has existed continuously as a community with retained powers."⁶⁴

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:⁶⁵

- 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;"
- 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;

⁶⁰ 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. 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)).

⁶¹ Id.

⁶² Coen at 497.

⁶³ Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978).

⁶⁴ Coen at 496.

⁶⁵ Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978).

- 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; and
- g) The petitioner is not, nor is its members, the subject of congressional legislation which has expressly terminated or forbidden the federal relationship.

The regulatory framework's purpose was to provide an "equitable solution to a longstanding and very difficult problem."⁶⁶ 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."⁶⁷

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").⁶⁸ The 1994 Regulations sought to clarify the FAP requirements and define clearer standards of evidence.⁶⁹ One of the significant changes to the FAP made by the 1994 Regulations was a reduced burden of proof for petitioners demonstrating previous federal acknowledgment.⁷⁰

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.⁷¹ 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 objective was to provide a more efficient and effective process of evaluation.⁷²

3. 2008 Guidance on Internal Procedures

⁶⁶ Id.

⁶⁷ Coen at 492.

⁶⁸ Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994).

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

The AS-IA has the authority to issue guidance and direction to the Office of Federal Acknowledgment ("OFA") professional staff to improve internal procedures in a way that addresses the transparency, timeliness, lack of adequate funding, and burden on the petitioner problems that are systemic in the OFA process. Such guidance and direction allows the AS-IA to improve the process by utilizing the existing statutory and regulatory framework.

In May 2008, AS-IA Carl Artman published "Office of Federal Acknowledgment: Guidance and Direction Regarding Internal Procedures,"⁷³ ("Guidance") to "assist in making the Office of Federal Acknowledgment process more streamlined and efficient, and improve the timeliness and transparency of the process." The Guidance is limited in its function; it clarifies internal procedures and interprets existing regulations but does not (and cannot) create new regulations for the OFA to follow. Given its limited function, the Guidance aims to improve the OFA process by utilizing the existing framework.

The Guidance provides that reference to "first sustained contact" in the OFA regulations under 25 C.F.R. Part 83 ("Regulations") can be interpreted to mean contact on or after March 4, 1789, the date the United States Constitution was ratified.⁷⁴ The Guidance recognized that the purpose of a historical accounting of the tribe's self-governance is to demonstrate that such tribe is "entitled to a government-to-government relationship with the United States."⁷⁵ For this reason, the Guidance eases petitioners' burden of persuasion by providing that a reasonable interpretation of the regulations requires that petitioners demonstrate "continuous tribal existence only since the formation of the United States."⁷⁶ This is a positive change that reduces the burden on petitioners as to the amount of research that needs to be conducting to meet the criteria.

Acknowledging the backlog of pending petitions waiting OFA review, the Guidance attempts to clear the backlog in three ways. First, the OFA may suspend petitions of tribes if a political controversy arises between different factions of the same petitioning tribe. The petition will remain suspended until the controversy is resolved or one faction demonstrates actual political control.⁷⁷ Second, the Guidance expands the ability of the OFA to expedite denials, clarifying when this process is triggered before a petition is on the "Ready, Waiting for Active Consideration" list ("Ready List"),⁷⁸ and allowing an expedited denial after placement on the Ready List for failure to meet any of the evidentiary criteria outlined in 25 C.F.R. § 83.7.⁷⁹ Third, the OFA may move petitions to the top of the Ready List if, after a preliminary review, the petition meets the criteria set

⁷³ Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 (May 23, 2008).

⁷⁴ Id. at pt. V.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. at pts. I, II.

⁷⁸ Id. at pt. VI.

⁷⁹ Id. at pt. VII.

forth in 25 C.F.R. § 83.7(e)-(g),⁸⁰ and the petitioning group can demonstrate either residence on an "Indian reservation continuously for the past 100 years," or that its members "voted in a special election called by the Secretary of the Interior under section 18 of the Indian Reorganization Act between 1934 and 1936, provided that the voting Indian group did not organize under the IRA."⁸¹

It is unclear whether petitions qualifying for priority placement at the top of the Ready List would be evaluated before petitions already pending on that list. If that is the case, then these petitioners jump ahead of petitioners who have already completed their petition submission and are waiting for the OFA's review. As of September 22, 2008, there were nine petitioners on the Ready List, four of whom have been on the list for over ten years, and four others who have been on the list for over six years.⁸²

The Guidance takes some, but ultimately insufficient, steps toward transparency in the OFA process. The Guidance requires the OFA to set forth the "evidence, reasoning, and analyses that form the basis" for its expedited proposed finding against acknowledgment when a petition fails on at least one of the seven criteria.⁸³ This detail potentially assists a petitioner who seeks to reverse the finding after accumulating more persuasive evidence. The standards used by the OFA are not adequately identifiable or defined, leaving petitioners at a significant disadvantage in the acknowledgment process.

Despite the 2008 Guidance, the OFA must take additional steps to shed light on the acknowledgment process and the standards it uses to make acknowledgment determinations. Significant problems related to the burden on the petitioners, timeliness, funding, and transparency continue to undermine the acknowledgment process.

II. THE CURRENT ADMINISTRATIVE PROCESS

A. ISSUE ONE: INCREASED BURDEN ON PETITIONERS

Since their 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

⁸⁰ 25 C.F.R. § 83.7(e) requires that members of the petitioning group "descend from a historical Indian tribe." Section 83.7(f) requires that members be composed principally of persons who are not members of any acknowledged North American Indian tribe." Section 83.7(g) mandates that the petitioning group is not the subject of congressional legislation that has expressly terminated or forbidden the federal relationship."

⁸¹ Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 pt. IV (May 23, 2008).

⁸² See Status Summary of Acknowledgment Cases (Sept. 22, 2008), available at <http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf>.

⁸³ Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 pt. VII (May 23, 2008).

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 OFA seeks historical truths when evaluating petitions, a more intense standard than what is called for in the FAP.⁸⁴

The FAP provides that

A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.⁸⁵

"Reasonable likelihood" is the burden of proof used to evaluate a petition for federal acknowledgment. In general, several standards of proof exist for different types of legal issues. "Beyond a reasonable doubt" is probably the most familiar. This standard is commonly used in criminal trials. "Beyond a reasonable doubt" is the most difficult evidentiary standard to prove because criminal defendants require stronger protections due to the personal liberties at stake.⁸⁶ If we imagine no reasonable doubt exists that point X is true, we begin to understand the difficulty of proving "beyond a reasonable doubt." For instance, we might say you must be 90-95% convinced by the evidence. Compare that level to another commonly used standard, "clear and convincing evidence."

Clear and convincing evidence is "the degree of proof that produces . . . a firm belief or conviction as to the truth of the allegations."⁸⁷ So now, a person can firmly believe something, but yet there still may be some reasonable doubts floating around in their minds. Clear and convincing evidence is required to terminate parental rights.⁸⁸ This degree of proof is not quite as strong as "beyond a reasonable doubt" because in these instances, while both highly important, the child's well-being is more of a concern than the loss of parental rights by the parent.⁸⁹ Our society in general, seeks to protect

⁸⁴ 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).

⁸⁵ Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83.6 (d).

⁸⁶ Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2548 (2009).

⁸⁷ Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 515-16 (1990) (citing an identical standard from Cross v. Ledford, 161 Ohio 469, 477 (1954)); see also Smith v. Texas Dept. of Protective and Regulatory Services, 160 S.W.3d 673, 678 (Tex. App. 2005).

⁸⁸ Smith, 160 S.W.3d at 678.

⁸⁹ Id.

children through legislation from any potential harm. We might say, for comparison, that one must be 75% convinced by the evidence under this standard.

The next degree of proof commonly used is "a preponderance of the evidence." This standard, used in most civil cases, is a lower degree of proof than "clear and convincing."⁹⁰ This standard only requires the "greater weight of the evidence."⁹¹ In comparison to the other standards, we can say one must be 51% convinced that the point is true.⁹²

In order to develop a workable understanding of the standard used in the federal recognition process, we must establish what relationship "reasonable likelihood" has to "beyond a reasonable doubt," "clear and convincing evidence" and "preponderance of the evidence."

The "reasonable likelihood" standard was in common usage when the Supreme Court decided *Boyde v. California*.⁹³ The Supreme Court stated that "reasonable likelihood" does not rise to the level of "more likely than not."⁹⁴ "More likely than not" is nearly the same as the 51% degree of belief needed under the "preponderance of the evidence" standard.⁹⁵ Thus, "reasonable likelihood" must be something less than 51% in our comparison. As former Assistant Secretary of Indian Affairs Kevin Gover stated, this burden of proof is quite low.

A literal interpretation of 25 C.F.R. § 83.6(d) establishes, first, that the OFA, the decision makers, only look to the available evidence. Available evidence is the material provided by the petitioners to the OFA for review and any additional evidence obtained or submitted to the OFA. Next it establishes that this available evidence, when carefully examined, creates a *reasonable likelihood* that the facts, relating to the criterion, are valid. The Regulations add, "[c]onclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met."⁹⁶ In other words, the Regulations do not require conclusiveness, or certainty, of the facts relating to the criterion considered, only a reasonable likelihood as to their validity. So what then, is "reasonable likelihood?"

The term "reasonable likelihood" is sometimes used to describe the burden of proof for eventually succeeding on the merits of a claim before a preliminary injunction is granted. In *Mazurek v. Armstrong*, the Supreme Court said "[i]t is frequently observed that a

⁹⁰ Id.

⁹¹ BLACK'S LAW DICTIONARY (8th ed. 2004).

⁹² See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (explaining that the "preponderance of the evidence" standard divides the risk of litigation equally between two parties).

⁹³ *Boyde v. California*, 494 U.S. 370 (1990).

⁹⁴ Id. at 380; see also *Brecheen v. Oklahoma*, 485 U.S. 909, 911 (1988).

⁹⁵ *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

⁹⁶ Id.

preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."⁹⁷ Likewise, federal recognition of Indian tribes is an extraordinary and drastic alteration of the political status of tribal governments. The Regulations outline seven criteria which must be met. If all seven criteria are met, the tribe has proven, by a clear showing, they should be recognized; much like a clear showing must be proven before preliminary injunctions are granted. We must then turn to the "burden of persuasion" referred to in *Mazurek*.

In the preliminary injunction context, reasonably likelihood of success is a low threshold."⁹⁸ In *Ashcroft v. ACLU*, the Supreme Court said, "[i]n deciding whether to grant a preliminary injunction, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits."⁹⁹ Thus, if we examine how the Supreme Court determines likelihood to prevail on the merits, we might gain a better understanding of how to interpret the reasonable likelihood standard found in the Regulations.

Ashcroft considered whether a district court's grant of a preliminary injunction was correct. That case involved whether the Child Online Protection Act ("COPA") violated the First Amendment. The Supreme Court affirmed the district court's decision.

As the government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.¹⁰⁰

Essentially, the court gives a hypothetical predetermination of their outcome, and this is sufficient to meet the burden of persuasion.

Reviewing the roots of the "reasonable likelihood" standard in *Boyde v. California*, we see that the standard is akin to the reasonable person standard, yet cast with a broader net. For example, the Supreme Court in *Boyde* stated:

[t]his "reasonable likelihood" standard . . . better accommodates the concerns of finality and accuracy than does a standard which makes the

⁹⁷ *Mazurek v. Armstrong*, 520 U.S. 968, 72 (1997).; CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2948 (2d ed. 1995).

⁹⁸ *Goodman*, 430 F.3d at 437. (emphasis added).

⁹⁹ *Ashcroft v. ACLU*, 542 U.S. 656, 66 (2004).

¹⁰⁰ *Id.* at 701-2.

inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction.¹⁰¹

The issue in *Boyde* was "whether there [was] a *reasonable likelihood* that the jury . . . applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."¹⁰² The Supreme Court stated in earlier decisions, the inquiry focused on "what a reasonable juror could have understood the charge to be."¹⁰³ The court was unsatisfied with this earlier standard and developed a reasonableness standard that looked at the totality of the situation and not at a hypothetical reasonable juror's perspective.

If this macro interpretation of the reasonableness standard is what we are left with, it presents us with a broad understanding of the burden of persuasion. In tort law, the reasonableness standard asks what a similar person, in like circumstances, would have done. If we apply this wording to the Regulations' definition of the burden of proof, the Regulations essentially ask whether the available evidence could reasonably be interpreted to validate the necessary facts to meet the criterion.

For example, the first criterion which must be demonstrated is whether the "petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900."¹⁰⁴ There are two elements which must be met: 1) the petitioner must be identified as an American Indian entity; and 2) the petitioner must have been identified as such, continuously, since 1900. The Regulations provide examples of documents which may be used to assist in proving the two elements of this criterion. If the available evidence could reasonably be seen to support both elements of this criterion, the criterion should be considered met, according to the Regulations. While this might seem like a low burden, this is balanced with the overall requirement that all seven criteria must be met in a similar manner. Ultimately, this interpretation of the burden places a great deal of responsibility in the hands of the OFA. While the burden of "reasonable likelihood" seems low and relatively easy to maintain a consistent standard of review, the reality is that consistency in its interpretation by the OFA does not exist.

1. Inconsistent Application of the Standard

This inconsistency in the application of the standard is demonstrated by the increase in time and resources to document and review petitions. Even though the AIPRC proposed regulations, the initial regulations, and the current regulations anticipate that a Proposed Finding should be issued one year after a petition is placed on active status,¹⁰⁵ adherence

¹⁰¹ *Boyde v. California*, 494 U.S. at 380.

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* at 378.

¹⁰⁴ 25 C.F.R. § 83.7 (1994).

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

to this timeframe does not occur. DOI took less time to evaluate petitions earlier in the 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.¹⁰⁶

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 1826.¹⁰⁷ The tribe filed a petition for acknowledgment in 1978, and its petition was placed on active status in February 1979.¹⁰⁸ In 1980, the Department issued a positive proposed finding and a technical report totaling seventy-eight pages.¹⁰⁹ The technical reports included a history report, an anthropological report, a demographic report, and a genealogical report.¹¹⁰

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 1981.¹¹¹ 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.¹¹²

Although the Tunica-Biloxi provided the necessary information to become federally recognized, the burden has become far more onerous for tribes currently seeking federal recognition. While the Tunica-Biloxi petition was relatively small and the technical report spanned a mere seventy-eight pages,¹¹³ the United Houma Nation, Inc. submitted

¹⁰⁶ There is no explicit evidentiary burden of proof identified in the initial regulations. See Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978).

¹⁰⁷ 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>.

¹⁰⁸ Receipt of Petition for Federal Acknowledgment of Existence as Indian Tribes, 44 Fed. Reg. 116 (Jan. 2, 1979); BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 73 (1980), available at <http://www.indianz.com/adc20/Tbt/V001/D005.PDF>.

¹⁰⁹ 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, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 73 (1980).

¹¹⁰ Id. at 7, 8, 28, 65, 73.

¹¹¹ Final Determination for Federal Acknowledgment of the Tunica-Biloxi Tribe of Louisiana, 46 Fed. Reg. 38,411 (Jul. 27, 1981).

¹¹² Id.

¹¹³ BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 7-85 (1980).

approximately 19,100 pages in non-private information,¹¹⁴ and the technical report and proposed finding issued in 1994 totaled 448 pages.¹¹⁵ 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 Clallam Indians' proposed finding documents issued in 1980 totaled eighty-four pages.¹¹⁶ 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.¹¹⁷ The BIA reported in 2002 that administrative records, at that time, ranged in excess of 30,000 pages to over 100,000 pages.¹¹⁸

2. Proposed Bills to Reduce the Substantive Burden

In 2003, Senator Campbell introduced S. 297 ("Campbell Bill"), which proposed changes to several aspects of the substantive criteria.¹¹⁹ 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).¹²⁰ 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.¹²¹

Revising the date from which petitioners must prove the social and political requirements of 25 C.F.R. Sections 83.7(b) and 83.7(c) from historical times to the present to a later

¹¹⁴ Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney at Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

¹¹⁵ BIA, 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>.

¹¹⁶ 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>.

¹¹⁷ BIA, 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>.

¹¹⁸ Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgment, 37 NEW ENGLAND L. REV. 491, 492-493 (2003).

¹¹⁹ Federal Acknowledgment Process Reform Act of 2003, S. 297, 108th Cong. (2003).

¹²⁰ Id.

¹²¹ Id.

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, reduces the burden for both the DOI and the petitioner. Though the 2008 Guidance clarifies that historical times means 1789 or later, some tribes must still provide information under colonial periods requiring documents that petitioners may have little access and little control. Searching historical records of France, Spain, and England is extremely burdensome and in some cases unavailable. Such research may require the use of translators and uncertainty as to whether 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. Therefore, it is more reasonable to evaluate a tribe's social and political status from the date at which the United States would have begun to have relations with the tribe rather than the date of a foreign nation's relations with a tribe.

The Guidance issued by AS-IA Carl Artman in 2008, setting March 4, 1789 as the earliest date petitioners must show continued tribal existence, eases the burden on petitioners.¹²² However, many tribes in North America maintained a different relationship (or perhaps no relationship) with any other sovereign in 1789. For many tribal communities, especially those in the western United States, the beginning of a government-to-government relationship with the United States formed when the state in which they resided achieved statehood. Petitioners who are required to provide documentation prior to statehood may have problems accessing documents, those documents may be limited or may not exist, and documents they are able to access may be in a foreign language as they were prepared by a foreign sovereign. For these reasons, petitioners should be permitted to satisfy the evidentiary burden under 25 C.F.R. § 83.7(b)-(c) if they can demonstrate continued tribal existence from the date of statehood or 1789, whichever is later.

In 2007, Representative Faleomavaega introduced H.R. 2837 ("Faleomavaega Bill") to improve the recognition process.¹²³ 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 twenty years; (2) tribes must spend excessive sums of money to produce the documentation required by the process; (3) the criteria are too vague and overly subjective; (4) documentation accepted as proof

¹²² Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 (May 23, 2008).

¹²³ H.R. 2837, 110th Cong. (2007).

for one tribe is not accepted for another; and (5) the system is inherently biased, leaning heavily towards denying recognition.¹²⁴

The DOI voiced concerns about the 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.¹²⁵ However, he testified that the proposed bill would lower the standard for acknowledgment by requiring a showing of continued tribal existence from 1900 to present and therefore the legislation could result in more limited participation by parties such as states and localities.¹²⁶ He did not, however, provide an explanation in his written testimony as to why the proposed changes should not be 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. The process has been consistently criticized for the delay in reviewing a petition, evaluating a petition, and issuing a decision. Timeliness in processing petitions has been a long-standing problem for the OFA. The United States General Accountability Office ("GAO") evaluated OFA procedures, identifying the systemic timeliness problems plaguing the agency and acknowledging that a process designed to take two years is more likely to take four or more.¹²⁷ Some petitioners have been engaged in the OFA process for decades.¹²⁸ OFA publishes a document on its website offering a timeline for the acknowledgment process, indicating the optimistic scenario that the process could take as little as two years from filing a letter of intent for OFA to issue a final determination.¹²⁹

¹²⁴ Id.

¹²⁵ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 5 (2007) (statement of Carl J. Artman, AS-IA).

¹²⁶ Id.

¹²⁷ See, e.g., GAO, INDIAN ISSUES: TIMELINESS OF THE TRIBAL RECOGNITION PROCESS (2001) (identifying the extensive timeliness issues faced by OFA in processing acknowledgment petitions); GAO, INDIAN ISSUES: TIMELINESS OF THE TRIBAL RECOGNITION PROCESS HAS IMPROVED, BUT IT WILL TAKE YEARS TO CLEAR THE EXISTING BACKLOG OF PETITIONS (2005) (acknowledging that "[w]hile [OFA] has taken a number of important steps to improve the responsiveness of the tribal recognition process, it still could take 4 or more years, at current staff levels, to work through the existing backlog of petitions currently under review").

¹²⁸ See Status Summary of Acknowledgment Cases (Sept. 22, 2008), available at <http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf>.

¹²⁹ See General Timelines for 25 CFR 83 [sic] Acknowledgment Process (date of authorship unknown), available at: <http://www.bia.gov/WhoWeAre/AS-IA/OFA/SuppRegDocs/index.htm>.

The likelihood that any petitioner could file a letter of intent and receive a final determination within two years regarding their petition is so remote, absent an expedited denial, that the information is not helpful to petitioners. What would be more helpful and would shed more light on the internal procedures of the agency, would be a more realistic timeline that accounts for the backlog of pending petitions. Additionally, OFA should develop a clear plan with stated deadlines demonstrating how it will work through pending petitions to clear the backlog and publish this plan on its website, giving existing and future petitioners a more accurate estimate of the timing involved in getting a final determination.

In 2000, the AS-IA changed its internal procedures for processing petitions for federal acknowledgment as an Indian tribe, and clarified other procedures in order to reduce the delays in reviewing petitions.¹³⁰ The revised procedures did not change the acknowledgment regulations but provided a different means of implementing the existing regulations.¹³¹

The AS-IA found the demands on the OFA's time continued to reduce the proportion of available time to evaluate petitions.¹³² The OFA encountered numerous demands including (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) responding to litigation in at least five lawsuits concerning acknowledgment decisions; and (3) processing the growing number of Freedom of Information Act ("FOIA") requests requiring the OFA to copy the voluminous records of current and completed cases.¹³³

During a hearing on the Campbell Bill in 2004, the BIA supported a more timely decision-making process, but objected to reducing the factual basis required to render a favorable decision.¹³⁴ At the hearing, two former AS-IAs, Neal McCaleb and Kevin Gover, testified.¹³⁵ They identified three problems in the current process: (1) the length of time and duplicative research required of petitioners to participate in the process have slowed the process considerably; (2) the exclusive reliance of the AS-IA on the OFA staff, due to the complexity and volume of research required of petitioners, has resulted in unnecessary friction and perceived irrationality in recognition decisions; and (3) the extent, frequency, and duplicative nature of FOIA requests to the BIA for documents submitted to or accumulated by the BIA pursuant to petitions resulted in a "churning" of

¹³⁰ Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000).

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ 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).

¹³⁵ Id. at 52-56 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).

document submissions and redistributions by way of FOIA requests; this churning resulted in a diversion of key, technical staff from their intended roles as analysts.¹³⁶ Former AS-IAs McCaleb and Gover expressed frustration with the OFA's recommendations for acknowledgment decisions and, as a result, supported the creation of an independent body to offer a second opinion on controversial matters.¹³⁷

The Muwekma Ohlone ("Ohlone") case exemplifies the need for clarity in the timeframes. The Ohlone have occupied the San Francisco Bay Area since pre-Columbian times. Despite the fact that the DOI recognized the Ohlone in the early Twentieth Century, the tribe has been unable to achieve federal recognition. It took the DOI over a decade to conclude its review of the Ohlone petition.¹³⁸

The Ohlone filed a letter of intent to file a petition for federal acknowledgment in 1989.¹³⁹ In 1995, the Ohlone submitted a petition for acknowledgment as a federally recognized tribe.¹⁴⁰ The following year, the Bureau of Acknowledgment and Research ("BAR")¹⁴¹ notified the Ohlone that the DOI had previously recognized the tribe as the 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.¹⁴² In 1996, 1997 and 1998, the BAR continued to request additional information from the Ohlone, and the tribe complied with those requests. 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 was processed.¹⁴³ 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."¹⁴⁴ 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.¹⁴⁵

Frustrated with the timeliness of the FAP, the Ohlone filed suit against the Secretary of the Department of Interior and the AS-IA to compel the Department to set a date by which consideration of the Ohlone petition must be concluded.¹⁴⁶ The court granted summary judgment to the Ohlone and "directed the defendant to propose . . . a schedule for 'resolving' the plaintiff's petition."¹⁴⁷ On appeal, the Court of Appeals for the D.C.

¹³⁶ Id.

¹³⁷ Id. at 53, 55.

¹³⁸ Muwekma Tribe v. Babbitt, 133 F. Supp.2d 42 (D.D.C. 2001).

¹³⁹ Id.

¹⁴⁰ Id. at 44.

¹⁴¹ The Bureau of Acknowledgment and Research is the predecessor to the Office of Federal Acknowledgment.

¹⁴² Muwekma Tribe, 133 F. Supp.2d at 45.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id. at 43.

¹⁴⁷ Id. at 46.

Circuit found that the ruling did not, "intend to mandate that the agency act within a prescribed time frame at this point."¹⁴⁸

Following the court order, the BIA submitted a "fast-track" policy for tribes similar to the Ohlone.¹⁴⁹ Under the fast-track policy, tribes with prior federal recognition after 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.¹⁵⁰

The court directed the DOI to issue a final determination on the Ohlone petition by March 2002.¹⁵¹ In September 2002, the Department issued a determination denying federal acknowledgment of the Muwekma Ohlone.¹⁵² Because of the court order in the Ohlone case, the OFA was required to reprioritize its caseload to address the Ohlone petition. Other litigation also results in similar reprioritization, which affects petitioners awaiting acknowledgment decisions.

The Ohlone case exemplifies the need for timeliness in the recognition process. It is unclear when a tribe will be placed on the active consideration list. Furthermore, the actual time period that a tribe will spend on the active list is undetermined. Should the federal recognition process be modified with clear timelines, the threat of costly lawsuits would likely be eliminated.

In November 2001, the GAO prepared a report analyzing the FAP, including the inability of the BIA to provide timely evaluations of completed petitions.¹⁵³ The GAO found that "the process does not impose effective timelines that create a sense of urgency."¹⁵⁴ 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.¹⁵⁵ 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

¹⁴⁸ Id.; see also Muwekma Tribe v. Babbitt, 133 F.Supp.2d 30, 41 (D.C. Cir. 2000).

¹⁴⁹ Id. ("[T]he BIA would agree to place promptly on active consideration any petitioner on the Ready list which establishes . . . under 25 C.F.R. Part 83.8 that is had prior or Federal recognition after 1900 and that its current members are representative of and descend from that previously recognized tribal entity").

¹⁵⁰ Id. (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.)

¹⁵¹ Id. at 51.

¹⁵² Final Determination to Decline to Acknowledge the Muwekma Ohlone Tribe, 67 Fed. Reg. 58,631 (Sept. 17, 2002).

¹⁵³ GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, (2001).

¹⁵⁴ Id. at 3.

¹⁵⁵ Id. at 17.

determinations.¹⁵⁶ 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.¹⁵⁷ Ten additional petitions were completed and awaiting placement on the active consideration list.¹⁵⁸

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.¹⁵⁹ The GAO found that petitions under review are becoming more detailed and complex as petitioners and interested parties commit more resources to the process.¹⁶⁰

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.¹⁶¹ The bill proposed to reform the FAP by setting forth a process for eligible tribes to opt into expedited procedures so they could be considered for recognition sooner.¹⁶² To date, no progress has been made on identifying realistic timeframes 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 timeframes.

1. Funding for the OFA

For fiscal year 2008, the DOI operated on a \$15.8 billion annual budget.¹⁶³ For fiscal year 2009, the President requested \$2.3 billion for Indian Affairs, a net decrease of

¹⁵⁶ Id. at 15-16.

¹⁵⁷ Id. at 17.

¹⁵⁸ Id.

¹⁵⁹ Id. at 3, 16.

¹⁶⁰ Id. at 16.

¹⁶¹ H.R. 512, 109th Cong. (February 2, 2005).

¹⁶² Id.

¹⁶³ Department of the Interior Quick Facts, available at <http://mits.doi.gov/quickfacts/facts2.cfm>.

\$105.4 million from fiscal year 2008.¹⁶⁴ About ninety-five percent of the budget authority is provided through current appropriations for discretionary programs.¹⁶⁵ 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 the development of governing documents.¹⁶⁶

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."¹⁶⁷ In addition to the backlog of petitions, the technical staff had an increased burden of administrative responsibilities which reduced their availability to evaluate petitions.¹⁶⁸ The staff had an increased burden of responding to FOIA requests related to petitions.¹⁶⁹ In response to the GAO Report, the DOI adopted a strategic plan.¹⁷⁰ 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."¹⁷¹

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.¹⁷² The GAO found that the contractors freed the professional staff of administrative duties resulting in greater productivity.¹⁷³

As of April 18, 2008, the OFA staff consists of twenty-two individuals, but has the funding capacity to employ three additional researchers.¹⁷⁴ 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

¹⁶⁴ 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.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (2005) (statement of Robin M. Nazarro); GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS (2001).

¹⁶⁸ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (2005) (statement of Robin M. Nazarro).

¹⁶⁹ Id. at 6.

¹⁷⁰ See DEP'T OF INTERIOR, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GAO REPORT 2-3 (2002).

¹⁷¹ Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. 9 (2005) (statement of Robin M. Nazarro).

¹⁷² Id. at 8.

¹⁷³ Id.

¹⁷⁴ Telephone Interview with Linda Clifford, Secretary, Office of Federal Acknowledgement, in Washington, D.C. (Apr. 18, 2008).

team if hired.¹⁷⁵ 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.¹⁷⁶

Despite these changes, the process needs additional funding. The need for funding is acknowledged in GAO Reports, by former AS-IAs,¹⁷⁷ and by at least two former BAR researchers. Former BAR researchers testified that the lack of resources is a fundamental problem in the process.¹⁷⁸ 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. 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.¹⁷⁹

Former AS-IA Kevin Gover also acknowledged that the Department was advised not to disclose its funding needs with regards to the OFA.¹⁸⁰

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.¹⁸¹

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ 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).

¹⁷⁸ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. (2007) (statements of Steven L. Austin, Ph.D., and Michael L. Lawson, Ph.D.).

¹⁷⁹ Id. (statement of Steven L. Austin, Ph.D.).

¹⁸⁰ Interview with Kevin Gover, Professor of Law, Sandra Day O'Connor School of Law, in Tempe, Ariz. (Oct. 23, 2007).

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 does not want to sacrifice funding for programs operated by the BIA for federally-recognized tribes in exchange for additional funding for the OFA.¹⁸² Funding for the OFA is, therefore, a low priority for the BIA.¹⁸³

Hiring additional staff to analyze petitions could increase the overall efficiency of the process. Additional funding is needed to assemble 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 lack of available staff, the same research team was simultaneously assigned to petitioning tribes in Michigan, California, and Louisiana that 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.

The annual budget processes ultimately determine the amount of funding for all agencies including funding for the OFA. The current funding amounts are not acceptable given the backlog of petitions. There must be meaningful disclosure of the OFA's fiscal needs 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, not only for the OFA, but to support petitioners throughout the entire process. While several 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

¹⁸¹ 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).

¹⁸² Id. at 61-62.

¹⁸³ Id. at 64.

federal monies available for petitioning tribes. Non-competitive grant funding should be made available through the Administration for Native Americans.

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.¹⁸⁴ He noted that unrecognized tribes tend to be small with few resources.¹⁸⁵

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.¹⁸⁶

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 to fund the expert research necessary to assemble a comprehensive petition has not been adequately considered under the current FAP.

The current scheme places the burden of the entire research and preparatory process on tribal groups that lack access to financial and political resources. Prior to the issuance of the 2000 internal procedures guidance document, the BAR staff were allowed to conduct research on petitions and did, in fact, conduct substantial additional research on petitions.¹⁸⁷ In 2000, the AS-IA revised the internal procedures for processing petitions by advising the OFA that it is neither expected nor required to locate new data in any substantial way.¹⁸⁸ Further, the revised internal procedures prohibited the OFA from requesting additional information from the petitioner or third parties after a petitioner was placed on active consideration; moreover, the OFA was directed not to consider any material submitted by any party once the petitioner's case went on active status.¹⁸⁹ 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.¹⁹⁰ 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

¹⁸⁴ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 3 (2007) (statement of Michael Lawson, Ph.D.).

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000).

¹⁸⁸ Id.

¹⁸⁹ Id. at 7053.

¹⁹⁰ Id. at 7052.

petitioner and third party submissions during the comment period, not additional OFA research, addressed any deficiencies in the petition.¹⁹¹

In 2005, the BIA issued revised guidance on internal regulations superseding the 2000 internal procedures for processing petitions.¹⁹² Three revisions address potential funding burdens of the petitioner. First, the 2005 internal procedures removed the limitation on research by the OFA staff imposed by the 2000 internal procedures.¹⁹³ The 2005 notice allowed flexibility for the OFA staff to undertake additional research beyond the arguments and evidence presented by the petitioner or third parties at the discretion of the Department.¹⁹⁴ This change may have limited benefits to the process since additional research by the OFA is permitted "only when consistent with producing a decision within the regulatory time period."¹⁹⁵

Another key change found 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. This provision enables a petitioner whose comment period has been closed for several years to comply with the current criteria that mandates updated membership rolls and data from the time period in which the comment period was closed to when the petition was placed on active status. This process includes printing the necessary two copies for the 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 not be sufficient time to update and copy a decade of information.

Notwithstanding the changes made in the 2005 Guidance, funding is necessary for any efficient process, whether it is administered by the OFA, an administrative law judge, an independent commission, or an advisory board. There is currently no funding source for petitioners to prepare petitions for the FAP. Providing a funding source would not only improve the quality of the petitions, but it would improve the efficiency of the arbiter to review, analyze, and comment on the petition. Petitioners who lack resources may fail to satisfy the evidentiary burden even if they could meet the criteria.

Instead of providing direct funding to tribes for research assistance, Congress can create and fund regional offices for petitioner assistance. These regional staff and experts could assist petitioners in preparing their petitions. In this way, both the OFA would have professional staff and the petitioner would have access to professional staff. Currently, most petitioners are poor and cannot afford to pay experts to assist in preparing the petition. By providing either grant opportunities or regional contract researchers, the playing field would be more balanced and facilitate a more efficient and fair review.

¹⁹¹ Id.

¹⁹² Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, etc., 70 Fed. Reg. 16,513 (Mar. 31, 2005).

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id.

3. Addressing Resources through Legislation

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.¹⁹⁶ Some tribes must spend "huge sums of money – as much as \$8 million – to produce the mountains of documentation required by the process."¹⁹⁷ In response to this burden, the Faleomavaega Bill proposed monetary assistance to tribal petitioners through grants funded by the Department of Health and Human Services.¹⁹⁸ 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. This section did not include a specific amount of grant funding. The bill authorized 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 2017.¹⁹⁹

In 2001, Senator Dodd introduced two bills to address the funding concerns highlighted in the 2001 GAO Report, Senate Bill 1392²⁰⁰ and Senate Bill 1393.²⁰¹ 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.²⁰² Under Senate Bill 1393, grants of up to \$500,000 per fiscal year could be awarded to a tribe or local government.²⁰³

Similar efforts to include grant funding for petitioners were included in bills sponsored by Senators Campbell and McCain.²⁰⁴ In the "Tribal Acknowledgment and Indian Bureau Enhancement Act of 2005" sponsored by Senator McCain ("McCain Bill"), \$10 million was contemplated for fiscal year 2006 and each fiscal year thereafter.²⁰⁵ The Campbell Bill included a funding authorization to carry out the provisions of the bill for each of the fiscal years 2004 through 2013.²⁰⁶ The Congressional Budget Office ("CBO") estimated that implementing the Campbell Bill would cost \$44 million over the

¹⁹⁶ H.R. 2837, 110th Cong. (2007).

¹⁹⁷ 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).

¹⁹⁸ H.R. 2837, 110th Cong. § 17 (2007).

¹⁹⁹ Id. § 19.

²⁰⁰ Tribal Recognition and Indian Bureau Enhancement Act of 2001, S. 1392, 107th Cong. (2001).

²⁰¹ A bill to provide grants to ensure full and fair participation in certain decision-making processes at the Bureau of Indian Affairs, S. 1393, 107th Cong. (2001).

²⁰² S. 1393, 107th Cong. § 1 (2001).

²⁰³ Id.

²⁰⁴ S. 297, 108th Cong. § 6(b) (2003).

²⁰⁵ S. 630, 109th Cong. (2005)

²⁰⁶ S. 297, 108th Cong. § 6(b)(4).

2005 to 2009 budget periods, subject to the appropriation of the necessary amounts.²⁰⁷ 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.²⁰⁸

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.²⁰⁹ The project's intent was to make additional research resources available for researching, reviewing, and analyzing petitions for acknowledgment received by the AS-IA.²¹⁰ 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 the DOI review tribal recognition petitions.²¹¹ The CBO estimated that it would cost \$6 million between 2005 and 2006 to implement this provision.²¹²

D. ISSUE FOUR: LACK OF TRANSPARENCY

The FAP lacks transparency, leaving petitioners unaware as to the manner in which the criteria will be applied to their petitions. The 2001 GAO Report found that the "basis for BIA's recognition decisions is not always clear."²¹³ 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.²¹⁴

The GAO found that the guidelines provided petitioners a basic understanding of the FAP, not constructive notice of the manner in which evidence would be applied to the criteria.²¹⁵

²⁰⁷ S. REP. NO. 108-403 (2004).

²⁰⁸ Id.

²⁰⁹ S. 297, 108th § 6(c)(1) (2003).

²¹⁰ Id.

²¹¹ S. REP. NO. 108-403 (2004).

²¹² Id.

²¹³ GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 2 (2001).

²¹⁴ Id. at 2-3.

²¹⁵ Id. at 10.

Petitioners lack guidance regarding the manner in which the OFA interprets the regulations. Dr. Steven Austin explained that the OFA does not consistently 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 relied upon an entirely different method that was not supported by the profession.²¹⁶ If the OFA does not rely on standards in the profession, it should 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. These disagreements and the claims that the recommendations are based upon past precedent are not understandable to petitioners.²¹⁷ Further, review of the proposed findings and final determinations indicate that the standard of proof for issuing a decision is heavily dependent upon who is presiding as the AS-IA.²¹⁸ The Little Shell negative final determination by the AS-IA, despite its earlier positive proposed finding, illustrates this point.

In February 2000, the BIA published notice of internal changes of processing FAP petitions. In the 2000 guidance on 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."²¹⁹ 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."²²⁰ While the regulations provide for discretion, such conflicting statements as to how evidence will be interpreted confuse petitioners.

In response to the 2001 GAO Report, the BIA compiled a database of completed petitions. This database is now accessible and was last updated in August 2004.

²¹⁶ Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 6-8 (2007) (statement of Steven L. Austin, Ph.D.).

²¹⁷ GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 11 (2001).

²¹⁸ 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) with Proposed Finding Against Federal Acknowledgement of the Steilacoom Tribe of Indians, 65 Fed. Reg. 5880 (Feb. 7, 2000).

²¹⁹ Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052, 7053 (Feb. 11, 2000).

²²⁰ Proposed Finding For Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, 65 Fed. Reg. 45,394, (July 21, 2000).

Indianz.com has posted a link to the database on its website.²²¹ 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. This process of submitting FOIA requests is extremely time and resource consumptive.

Presently, a petitioner's access to the administrative record for their petition is difficult to obtain due to technology, bureaucracy, and expense. 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."²²² The OFA began using the FAIR electronic database to store and manage the administrative documents for petitions. FAIR is accessible to some petitioners, but not all, and no petitioner can access it without submitting a FOIA request to compel the OFA to make the database available. Therefore, not all petitioners or third parties have obtained access to these databases.²²³ Even tribes with active petitions have been denied access to the FAIR database in their cases.²²⁴ As of 2008, the FAIR database did not allow for redaction of information protected under the FOIA and privacy acts.²²⁵ As of 2009, the OFA has software to make redaction possible. It is unclear, however, whether individuals who had submitted FOIA requests must resubmit FOIA requests to obtain copies of redacted files from the FAIR database.

As stated above, the documents in the administrative record for a petitioner's case are not made available to that petitioner without a FOIA request.²²⁶ Following a FOIA request,

²²¹ BIA Federal Acknowledgment Decision Compilation v. 2.0 (2004), available at <http://www.indianz.com/adc20/adc20.html>.

²²² 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).

²²³ Id.

²²⁴ Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney at Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

²²⁵ Oversight Hearing on the Federal Acknowledgment Process Before the Senate Committee on Indian Affairs, 110th Cong. 4 (2007) (statement of R. Lee Fleming, Director of OFA).

²²⁶ Although OFA addresses sensitive issues requiring privacy for the parties involved, the difficulty and apparent unwillingness to offer more visibility into the administrative record sets OFA apart from other agencies that make an administrative record available to interested parties. See, e.g., Nuclear Regulatory Commission, Review of [the Department of Energy's] Environmental Impact Statement for Yucca Mountain, <http://www.nrc.gov/waste/hlw-disposal/reg-initiatives/review-envir-impact.html> (last visited Nov. 2, 2009) (offering details regarding the application to construct a nuclear waste storage facility, including draft environmental impact statements, public comments

the documents are made available and will be copied for the petitioner at a rate of \$0.10 per page. Given the volume of documentation compiled for each petition, the expense for copies of the record can quickly run a petitioner thousands of dollars. Further, petitioners and interested parties without access to the FAIR database must pay to travel to Washington, D.C. to review petition documents and to identify documents they may want to request copies of under FOIA.

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. Similarly, the FAIR database should be made available to petitioners for their case without having to submit a FOIA request. As an alternative to paper copies, a digital copy of the administrative record, published on a CD-ROM or provided through a secure website, should be available to petitioners at little to no cost. Lastly, the OFA website should provide an up-to-date compilation of prior precedents that guide new determinations, status summaries for all pending petitions published on an annual (if not more frequent) basis.

Senator Campbell also sought to address issues related to the transparency of the FAP when he introduced S. 297. The Campbell Bill provided (1) a statutory basis for the acknowledgment criteria that have been used by the DOI since 1978; (2) additional and independent resources to the AS-IA for research, analysis, and peer review of petitions; (3) additional resources to the process by inviting academic and research institutions to participate in reviewing petitions; and (4) much-needed reformation of the process by requiring more effective notice and information to interested parties.²²⁷

E. ALTERNATIVE STRUCTURES FOR THE ACKNOWLEDGEMENT PROCESS

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."²²⁸ The FAP needs "greater transparency, consistency and integrity," in addition to "funding and technical expertise."²²⁹ Three forms of independent bodies to assist in the FAP have been proposed: an administrative law judge ("ALJ") system, an independent commission and an advisory board.

1. Administrative Law Judge System

relating to the project, and status updates regarding the agency's timeline for a determination).

²²⁷ Oversight Hearing on the Federal Acknowledgment Process Before the Senate Committee on Indian Affairs, 110th Cong. 4 (2007) (statement of R. Lee Fleming, Director of OFA).

²²⁸ S. REP. NO.108-403 (2004).

²²⁹ Id.

Currently, OFA incorporates ALJs within its procedures for reconsideration of a final determination. The regulations provide that "the [Interior Board of Indian Appeals ('Board')] may require, at its discretion, a hearing conducted by an administrative law judge of the Office of Hearings and Appeals if the Board determines that further inquiry is necessary to resolve a genuine issue of material fact or to otherwise augment the record before it concerning the grounds for reconsideration."²³⁰ The utilization of an ALJ occurs only during the process of reconsideration and only at the discretion of the Board. Therefore, an ALJ review is not a guarantee.

OFA's website lists twenty-six IBIA decisions.²³¹ Of those twenty-six, the IBIA has vacated only two final determinations. Both requests resulted in reversals of positive final determinations to negative reconsidered final determinations.²³² Another tribe received a reversal of a positive finding after the IBIA affirmed the final determination but referred issues to the Department. The Chinook Indian Tribe received a negative proposed finding in 1997 and a positive final determination in 2001. The Quinalt Tribe filed a request for reconsideration to the IBIA.²³³ Through reconsideration by the Department, the Chinook Tribe was ultimately denied federal acknowledgment.²³⁴

No tribes have reversed a negative final determination to a positive reconsidered determination through the IBIA process. During the reconsideration process, the legal burden of proof is higher than during the initial acknowledgement process in two ways. The burden during the ALJ reconsideration process is "preponderance of the evidence," meaning when all facts of evidence are gathered and duly weighed, it is either more likely than not, or it is likely not, that X is true. The exact language from the Regulations provides:

(9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by

²³⁰ 25 C.F.R. § 83.11 (e)(4) (1994).

²³¹ U.S. Department of Interior, Indian Affairs, Documents Pertaining to the Interior Board of Indian Appeals, available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm>.

²³² Reconsidered Final Determination To Decline To Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. 60,101 (Oct. 14, 2005); In re Federal Acknowledgment of the Schaghticoke Tribal Nation, 41 IBIA 30 (May 12, 2005); Reconsidered Final Determination To Decline To Acknowledge the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, 70 Fed. Reg. 60,099 (Oct. 14, 2005); In re Federal Acknowledgment of the Historical Eastern Pequot Tribe, 41 IBIA 1 (May 12, 2005).

²³³ In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation, 36 IBIA 245, 250-252 (8/1/2001).

²³⁴ Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation, 67 Fed. Reg. 46,204 (July 12, 2002).

a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1)-(d)(4) of this section.

(10) The Board shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for further work and reconsideration if the Board finds that the petitioner or an interested party has established, by a preponderance of the evidence, one or more of the grounds under paragraphs (d)(1)-(d)(4) of this section.²³⁵

Also daunting, and adding to the difficulty of achieving reconsideration, a tribe must prove that new elements, or administrative shortcomings during the recognition process, change the fact pattern in such a way that, if taken as a whole, it is more likely than not that reconsideration is appropriate (paragraphs (d)(1)-(d)(4) from regulations cited above).²³⁶ If the ALJ determines this burden is met, reconsideration is granted and the final determination is vacated. So essentially, a tribe cannot appeal the OFA's final determination on the merits, but must create some new circumstance which the IBIA feels compelled to address. Paragraphs (d)(1)-(d)(2) read as follows:

(d) The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:

- (1) That there is new evidence that could affect the determination; or
- (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or
- (3) That the petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or
- (4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more [of the 7 criteria].²³⁷

The IBIA's review is limited to these four issues. The IBIA is not allowed to vacate a decision if OFA failed to properly apply the burden of proof to the facts in the petition. The IBIA has held that a tribe's claim that the Department required proof that exceeded what is required in the regulations is not a ground for reconsideration under the IBIA's jurisdiction.²³⁸

After submitting the initial petition for federal acknowledgement, most unrecognized tribes have scarce resources, and may have difficulty meeting all the requirements for

²³⁵ 25 C.F.R. § 83.11 (e)(9)-(10) (1994).

²³⁶ *Id.* at § 83.11(d)(1-4).

²³⁷ *Id.*

²³⁸ In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama, 34 IBIA 63, 70 (Aug. 4, 1999).

reconsideration. The ALJ process used to address reconsideration petitions is ideal, but unfortunately comes too late in the process. Asking a tribe petitioning for reconsideration to not only prepare a legal argument citing additional circumstances which substantially change the fact pattern, but also meet a higher burden of proof, seems to be an unfair, and, some might say, illusory remedy. Instead, the ALJ process should be implemented at an earlier stage of the process.

a. An Administrative Law Judge Addresses Concerns about Potential Conflicts of Interest under the Current Model

The current system of federal recognition creates an appearance that allowing the BIA to decide questions of federal recognition presents a conflict of interest. While it may not be true, it seems plausible that there may be an incentive to deny applications for recognition since the BIA is also responsible for carrying out trust obligations for all recognized tribes. Nevertheless, agencies routinely handle such petitions. The Department of Health and Human Services ("DHHS") processes applications for Social Security. But in comparison, while DHHS processes tens of thousands of applications per year, the OFA, admittedly, estimates that it should take twenty-five months for a petitioner to complete the process.²³⁹ In practice, however, this estimate is unrealistic and has not been achieved.

Because of the problems with the current process, unrecognized tribes need an alternative venue. Under an ALJ system, judges are intentionally separated from possible agency influence in order to ensure independent decisions. An ALJ system, governed by the Administrative Procedures Act ("APA"), seems more objective on its face. The Supreme Court has described the administrative adjudicative process as follows:

[T]he Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing . . . , a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. Their pay is also controlled by the Civil Service Commission.

²³⁹ Testimony Before the Senate Committee on Indian Affairs, Oversight Hearing on Fixing the Federal Acknowledgment Process, (Nov. 4, 2009) (statement of George Skibine, Acting AS-IA).

In light of these safeguards, the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.²⁴⁰

This political insulation is necessary to afford tribes applying for recognition a fair and impartial process. Furthermore, if tribes are afforded their initial review by an ALJ venue, petitioning tribes can spend a portion of their initial resources seeking a competent administrative lawyer to advocate on their behalf in an ALJ process. An ALJ process "permit[s] an oral hearing with direct and cross-examination, testimony under oath, the development of a complete and exclusive record on which the decision is based, and the presence of a neutral presiding officer."²⁴¹

The protection afforded ALJs in order for them to function independently is exactly what the federal government needs when making determinations about federal recognition of Indian tribes. An ALJ process, governed by the APA, significantly curtails any concerns over potential conflicts of interest. Overall, an ALJ process seems fairer on its face, and, being governed by the APA, should prove more efficient in practice than the current OFA process. Also, the ALJ process is already in place in the federal acknowledgement process, but just at a later stage in the process; the reconsideration phase.

Further, a judge may be better able to apply the appropriate legal standards when applying the facts to the criteria.

b. An Administrative Law Judge System Fails to Address the Need for Technical Analysis of Historical Documents

The current process requires that seven criteria be met before recognition. Under the FAP, the analysis is conducted by a "technical staff within the BIA, consisting of historians, anthropologists, and genealogists."²⁴² The technical staff is necessary because the findings often rely upon careful examination of historical documents. Currently, OFA reviews all of the documents submitted by petitioners. A standard ALJ system may not be able to conduct as careful an analysis as the current model for federal recognition.

While an ALJ system can incorporate a framework more cognizant of appropriate legal standards, insulated from potential outside influence, it lacks the technical expertise to

²⁴⁰ Butz v. Economou, 438 U.S. 478, 514 (1978).

²⁴¹ William F. Fox, Jr., UNDERSTANDING ADMINISTRATIVE LAW 11 (Matthew Bender & Co., Inc. 1982).

²⁴² GAO, INDIAN ISSUES: BASIS FOR BIA'S TRIBAL RECOGNITION DECISIONS IS NOT ALWAYS CLEAR 4-5 (2002).

appropriately analyze the historical documents many petitioners rely upon during the recognition process. Examples of such documents include historic marriage certificates, roll sheets, historic federal documents recognizing a petitioner's existence as a tribe, among others. If an ALJ system were to be used for determining federal recognition of petitioning Indian tribes, the current usage of historians, anthropologists, and genealogists should not be abandoned, but should be integrated within the ALJ proceedings.

While in a normal court setting, this would not be a problem because the parties can present experts and the Judge can weigh the evidence, petitioners who lack the resources to hire such experts may suffer a disadvantage under this process unless funding is appropriated to provide assistance to petitioners. Without this assistance, petitioners may fail to introduce and get the required evidence into the record so that the Judge can make a determination based on the available facts.

2. Independent Commission

Independent commissions have been proposed to potentially cure the ineffective agency process to recognize tribes. The creation of an independent commission may relieve reliance upon the AS-IA, who is overburdened with many responsibilities.²⁴³ Petitioners may experience shorter waiting periods throughout the several stages in a recognition process administered by a fully-funded commission.²⁴⁴ Similar to the expertise currently found within the OFA, individuals on an 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.²⁴⁵ Former AS-IA Kevin Gover believes that an independent commission could reduce the volume of research the current OFA process requires.²⁴⁶ AS-IA 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."²⁴⁷

An independent commission could be created to replace the OFA. In doing so, all the duties to review and recognize tribes seeking federal recognition would be transferred from the OFA and the BIA to the independent commission. An example of this alternative can be found in the recent legislation introduced by Representative Faleomavaega during the 111th Congress ("2009 Faleomavaega Bill"). The 2009 Faleomavaega Bill recommends the complete transfer of all federal acknowledgement capabilities from the OFA to a seven person, appointed independent commission.²⁴⁸

²⁴³ S. REP. NO. 108-403 (2004). .

²⁴⁴ Id.

²⁴⁵ Id.

²⁴⁶ 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).

²⁴⁷ Id.

²⁴⁸ Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 3690, 111th Cong. § 4(b) (2009).

According to the 2009 Faleomavaega Bill, 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."²⁴⁹

a. Advantages of an Independent Commission

An independent commission would improve the federal recognition process in various ways. First, it would decrease the length of time to make a determination concerning acknowledgment. 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.²⁵⁰ Furthermore, adopting sunset provisions for each stage in the process can guide the regulatory body and the petitioners. For instance, the 2009 Faleomavaega Bill categorizes petitions into several groups: expedited negatives, expedited positives, and non-expedited petitions.²⁵¹ The division of petitions would increase the speed with which the commission arrives at determinations. An independent commission could also establish time limits within which the commission must conduct preliminary hearings. In the case of the 2009 Faleomavaega Bill, a preliminary hearing must be held within six months of the submission of a complete petition.²⁵² If the commission cannot make a determination for acknowledgement at the preliminary hearing, it must set a date for an adjudicatory hearing.²⁵³ Within sixty days of the adjudicatory hearing, the commission must arrive at a determination for or against acknowledgement.²⁵⁴ Should the commission fail to comply with these requirements, legislation could permit petitioners to bring actions in federal court for enforcement.

Second, an independent commission would likely address ongoing problems with the transparency of the decision-making process. This is mainly due to the fact that an independent commission would remove all recognition capabilities from the BIA, an agency that currently funds programs for federally recognized tribes and from which the OFA's budget derives. An independent commission, with funding sources separate and apart from the BIA, would remedy the conflict of interests existing between funding for federally recognized tribes and tribes pursuing recognition. The independent commission could assure transparency in its decision-making process by making all records the commission relied upon in the preliminary hearing available to the petitioner. Petitioners could more readily request relevant documents since the independent commission would not be subject to the Freedom of Information Act.

²⁴⁹ Id.

²⁵⁰ GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 16 (2001).

²⁵¹ H.R. 3690, 111th at § 5(c).

²⁵² Id. at § 8(a)(1).

²⁵³ Id. at § 8(b).

²⁵⁴ Id. at § 9(d).

Currently, there is no process for petitioners and their experts to question the methods or analysis of the 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. Petitioners could have the opportunity to cross-examine acknowledgement and research staff during hearings about the commission's methodology and basis for decision.

Furthermore, the independent commission would have the power to create new regulations guiding the federal acknowledgement process should it so determine. Sunset provisions within legislation could set limits on the length of time for which the commission would operate. Establishing a finite time within which an independent commission could review petitions for acknowledgment could increase the efficiency of the process. In the case of the 2009 Faleomavaega Bill, the commission will terminate twelve years after the date of the commission's first meeting.²⁵⁵

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.²⁵⁶ AS-IA Gover also suggested that individuals selected to serve on the commission should have backgrounds in different areas of expertise.²⁵⁷

a. Disadvantages to an Independent Commission

Congress should also decide whether an independent commission should be politically appointed as proposed in both the 2007 and 2009 Faleomavaega Bills.²⁵⁸ 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.

The concept of an independent commission will not meaningfully address the problems with the current process unless the issue of funding is directly addressed. Under the 2009 Faleomavaega Bill, the only provisions that relate to providing financial assistance to petitioning tribes are competitive grants offered through the Secretary of Health and

²⁵⁵ *Id.* at § 4(g).

²⁵⁶ 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).

²⁵⁷ *Id.* at 63.

²⁵⁸ Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 2837, 110th Cong. (2007); Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 3690, 111th Cong. § 4(b) (2009).

Human Services.²⁵⁹ Moreover, it is also unclear the amount of funding the commission would receive to support a full staff of researchers. Without addressing the critical need for funding for petitioning tribes and for the operation of the independent commission itself, many of the major deficiencies within the current process will remain unresolved.

3. Advisory Board Model

Senator Campbell proposed to create an "Independent Review and Advisory Board" to assist the AS-IA with decisions regarding evidentiary questions.²⁶⁰ This board would serve in an advisory capacity to the AS-IA by conducting peer reviews of federal acknowledgment decisions.²⁶¹ The board would "enhance the credibility of the acknowledgment process as perceived by Congress, petitioners, interested parties and the public."²⁶² The AS-IA would appoint nine individuals to the board.²⁶³ Three members would have a doctoral degree in anthropology; three a doctoral degree in genealogy; two a juris doctorate degree; and one would qualify as a historian. Preference would be given to individuals with a background in Native American policy or Native American history.²⁶⁴

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 effective recognition process.²⁶⁵ Clearly defining the roles and duties of an independent commission or advisory board would prevent duplicative research already involved in the process.²⁶⁶ Formulating concrete timelines would also be critical to the efficiency of an independent body. Finally, the BIA suggested that a process should be established in the event there are disagreements between the OFA recommendations and the advisory board.²⁶⁷

An advisory commission could also ensure that the OFA staff has not required petitioners to exceed the burden of proof expressed in the FAP. However, if the advisory commission is placed within the existing BIA structure, this commission would also be subject to the budgetary priorities of the BIA, meaning that it is likely to be under funded and unable to provide the necessary guidance to the AS-IA.

²⁵⁹ H.R. 3690, 111th at § 20 (a)(b).

²⁶⁰ S. 297, 108th Cong. § 6 (2003).

²⁶¹ Id.

²⁶² Id. § 6(a)(1)(C).

²⁶³ Id. § 6(a)(2).

²⁶⁴ Id.

²⁶⁵ 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).

²⁶⁶ Id.

²⁶⁷ Id.

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.²⁶⁸ 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 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.²⁶⁹ 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, and (3) fulfilling all tasks in the regulatory process in a timely, efficient manner.

III. RECOMMENDATIONS

Despite the recommendations of the AIPRC, a congressional commission, and the introduction of numerous bills addressing the recognition process, no legislation has been enacted to address the problems with the recognition process 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, an adequate solution could be developed to address the problems with the FAP. The creation of a commission with independent judgment and decision-making authority 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

²⁶⁸ Federal Acknowledgment Process Reform Act of 2003, S. 297 § 6(a)(2), 108th Cong. (2003).

²⁶⁹ GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 16 (2001).

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 change in the Guidance from historical times to the present to 1789 or later was a great start. The Clinic recommends further clarification of this starting point by changing the current starting point from 1789 to 1850 or the date in which the state it historically occupied was admitted to the Union.

Furthermore, the Clinic recommends as an alternative to replacing the OFA, Congress should pass legislation outlining the OFA's duties, and the criteria, burdens, and definitions for the FAP. Through this legislation, Congress can provide direction to the OFA regarding the evidentiary burdens and the standards for reviewing the determinations. Agencies have discretion in decision-making, but perhaps Congress should outline the issues and factors that can be taken into consideration for acknowledgment decisions. A reformed process could highlight regional issues that could be considered in evaluating criteria.

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 serves as a historical resource for a tribe's state and region of the country. Second, providing recognition in a timely manner brings much needed federal dollars, specifically in the areas of health and education, to impoverished regions of the country. Third, timely review of petitions increases the self-sufficiency of tribal people who bear the effects of past discriminatory policies. Fourth, revised procedures provide more guidance and resources to the OFA, the AS-IA, a peer review committee, an independent commission, or an ALJ. Finally, with a timely, transparent, and well-funded process, Congress would 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 non-competitive funding for petitioning groups through the Department of Health and Human Services or some other forum. Providing funding to petitioners will ease the adjudicatory body'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 ALJ system or independent commission or advisory board 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. Allow appeals from decisions misapplying the standard or misapplying the facts to the criteria.
- 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 ALJ /INDEPENDENT COMMISSION/ADVISORY BOARD

Congress could decide to retain the OFA while creating an ALJ system, commission, or advisory board to aid the OFA in the current backlog. As an alternative, the 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 or ALJ process 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 ALJ system, independent commission 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 the OFA and increasing the efficiency of the acknowledgment process. Congress should determine where the commission or advisory board should be located.
- Whether an independent commission is a "peer review" committee to the AS-IA, or an entirely new entity replacing the Assistant Secretary's role in the FAP, the duties of an independent commission should be clearly defined within a bill.
- An independent commission consisting of individuals with 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.
- Sunset provisions for each step in the process should be established 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 AS-IA 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 the OFA. The detailed budget analysis should make a suggestion for the amount of additional staff needed within the OFA and justification for the positions.
- Identify a timeframe by which Congress would like the recognition process to end, and then implement sunset provisions throughout the stages of the process.

IV. CONCLUSIONS

Reform must address the four major issues impeding the current effectiveness of the OFA process by (1) decreasing the burden on petitioners; (2) improving the timeliness of the process; (3) increasing resources available to the adjudicative body and the petitioners; and (4) increasing the transparency of the process.

The current regulations do not anticipate an end date by when petitioners can declare their intent to petition, and there is no timeframe by which petitions must be completed by the petitioners or evaluated by the OFA. Reform must include realistic timeframes.

By adopting a regional approach to evaluating petitions, experts with familiarity in the region will enhance the ability to understand facts, work more expeditiously, and apply standards more even-handedly, thereby creating a more efficient process. This regional approach can be applied both to the adjudicative process and petitioner funding. Standards should take into consideration "available evidence" and how historical facts may impact the availability of this evidence.

At the bare minimum, standards must be clarified and the burden must be reduced. Under a "reasonable likelihood" standard, circumstantial evidence should be allowed to make assumptions if there are limitations to the record. Transparency of the decision-making process and the exchange of documents will increase fairness and provide a better opportunity for the petitioner to prepare its case.