S. HRG. 111–470

FIXING THE FEDERAL ACKNOWLEDGMENT PROCESS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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FIXING THE FEDERAL ACKNOWLEDGMENT PROCESS

WEDNESDAY, NOVEMBER 4, 2009

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

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

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

The CHAIRMAN. We are going to call the hearing to order. This is a hearing of the Indian Affairs Committee. It is an oversight hearing on the Fixing of the Federal Acknowledgement Process. The very title implies that the process is broken, so our title says this is about fixing it.

Today we are going to talk about the Federal acknowledgement process, which is a very important issue, and one I think that does need substantial oversight. Last month, this committee considered and approved two bills that will grant Federal recognition to the Lumbee Tribe in North Carolina and to six tribes in Virginia. I believe in both cases they represented unique circumstances. I stated last month, however, that I would not intend for this Committee to begin to become a committee in which we recognize Indian tribes. That is not what we would like to do. That is a process that has been established and funded at the Interior Department, and that is where the acknowledgement process should exist and be adjudicated.

Congress and this Committee do not have the resources nor the expertise to make informed decisions on recognizing Indian tribes. They are better left, in my judgment, for people with expertise in this matter.

But I believe that the administrative process at the Department of the Interior is broken. Both of our tribal witnesses today have been in this process for some 30 years, that is three decades. People will be born and people will die in the middle of that process without ever getting answers.

The Little Shell Band of Chippewa Indians in Montana first submitted their letter of intent in 1978. Their petition was deemed complete by the Federal acknowledgement in 1995. A final decision was issued last week, which I believe was denying that petition.

The Muscogee Nation of Florida submitted their letter of intent in 1978. The petition was submitted in 1995, deemed complete, 18 years later, in 2003. And the Office of Federal Acknowledgement, however, has not started a review of the petition, which means they too will have to wait perhaps another decade before receiving a final determination.

Regardless of the merits of these petitions, and that is not my point of raising them. The current process, in my judgment, is taking too long. I understand the frustration of petitioning groups. They spend decades gathering and documenting to complete their petitions, only to learn that it will take the Department decades more just to review the documentation.

In addition, concerns have been raised about the consistent application of the mandatory criteria for recognition. It is not clear what level of evidence is really sufficient to meet the "reasonable likelihood" standard required by the regulations. The Little Shell Tribe, as an example, was originally told in the year 2000 it did not need to provide evidence of being identified as an Indian entity on a "substantially continuous basis" in every decade in order to meet the criteria. However, the Department's final determination last week found that the group failed to meet the criteria because it failed to provide the evidence for every decade.

The Department's deliberations on the Little Shell petition reveal a significant disagreement between the Office of Federal Acknowledgement and the Assistant Secretary back when the Department's proposed positive finding was issued in 2000. It also shows the Department reversing its position on several factors midway through the process. That raises several concerns, not just exclusive to that petition. It brings into the question who is deciding the Federal recognition petitions at the Department of the Interior, the Office of Federal Acknowledgement or the Assistant Secretary? Ultimately, it is supposed to be the Secretary.

Second, it is unclear what the burden of proof is for a petitioner to meet each of the seven mandatory criteria. The burden of proof is supposed to be "reasonable likelihood," however, this standard has never been defined by the Department. Former assistant secretaries and the author of the recognition regulations have testified that the process should be taken out of the Department of the Interior. This would avoid inconsistent interpretation of data that seems to be occurring.

Congressman Faleomavaega recently introduced a bill to transfer the recognition process to an independent commission. Last year, the former assistant secretary testified about changes the Department was making internally to improve the process. So today, I am curious to hear about whether there has been an improvement in the process. I am interested in learning what additional steps the Department is taking to make more substantial changes. And I want to hear other ideas on how this process can be improved. My staff is analyzing whether the processed should use administrative law judges to provide more transparency and a clear legal standard for evidentiary review.

Let me just say finally that this process, I have this summary in front of me that says there are, in the current workload, 15 petitions, 7 I believe are active status. That perhaps is now six from

last week's decision. Nine are petitions in ready status. And I understand, although this is a hard number to get from the Interior, there are about 80 partially documented petitions.

In any event, as I have indicated, even petitions that have been ready and complete on nearly a decade ago are now just getting into the process of being part of the current workload. I just think this is not a system that works. I am not talking about the yeses or the noes that come from the Department. I am talking about the fact that when people get together and file a petition, they should not expect it will take three decades for their Government to respond to them. That is just not satisfactory to me, and I think it is not satisfactory to the Committee.

Let me call on the Vice Chairman, Senator Barrasso.

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman. I agree completely with you. It is not satisfactory to me as a member of the Committee. I want to thank you for holding this hearing, I want to thank the witnesses for traveling great distances to be with us today.

I want to be clear: I support an administrative process for recognizing Indian tribes as opposed to the legislative process. The administrative process emphasizes a thorough and uniform analysis of every Federal acknowledgement petition. The Office of Federal Acknowledgement includes professional historians, anthropologists, genealogists. And these are people who are trained to evaluate and compare each petition against the seven criteria found in the Federal acknowledgement regulations.

However, many tribal groups feel, appropriately, that the petition process is too costly and too protracted. Since 1978, only 47 petitions have been fully processed and resolved by the Department. Several tribal groups have been in the queue for over 30 years. The Department has told the Committee on the past that the delays are often the result of petitioners not adequately documenting their petitions. But we have heard petitioners say that the OFA keeps moving the goalpost back, requiring more and more documentation, Mr. Chairman.

The fact is, the current administrative petition process does not impose strict deadlines. It is, practically speaking, open-ended, and some would say, never-ending.

Mr. Chairman, I think this tells a story: Currently, nine group are on the OFA's ready and waiting list, that is, waiting to be considered by the OFA. One of these nine tribes has been in the ready and waiting status for almost 14 years. Three others have been there for 12 or 13 years. So I can see why group would conclude that it is better to avoid the process altogether and ask Congress to recognize them.

But frankly, Mr. Chairman, that doesn't mean that Congress is the right way to go. It may be an easier way to go, but not the right way. So I hope to hear suggestions today, Mr. Chairman, to show us how this process can be improved.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso, thank you very much.

I am going to recognize members for brief opening statements. Then what I will do is I will recognize our colleague, Senator Nelson from Florida, who I believe wishes to introduce the Honorable Ann Tucker. She will be on the second panel.

We are going to hear first from Interior, but I know that Senator Nelson will have other things. I would like to have him have the opportunity to introduce Ms. Tucker.

Senator Tester.

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

Senator TESTER. Thank you, Mr. Chairman. I want to thank you for this Committee meeting, and I mean that a lot.

Before I get into my statement, real quick, I want to thank John Sinclair from Montana Little Shell Tribe, for being here today. John is a third generation president of the Little Shell Tribe. I know how many trips you have made back to Washington, D.C., just in the short time I have been here. And I know that it comes at great financial sacrifice and sacrifice to your family. I want you to know that we appreciate it. And I want to thank you for your lifelong dedication to your people. It means a lot.

Mr. Chairman, I want to thank you for this hearing. I think that as you and the Ranking Member have said, the process is broken. I don't think there is any doubt about that. It is a good opportunity to have the folks from Interior here to discuss it to see if there are ways that we can make it better, because I think it needs to be better. We do need a balance on one hand, we don't want a rubber stamp on one hand. On the other hand, it shouldn't take 31 years to make a decision, $2 million in legal fees, which is what the Little Shell have had to pay, and over 70,000 pages of documents, which by the way, if stacked on top of one another would be 35 feet tall.

Mr. Chairman, I think you probably already know this, I think the decision that came out of Interior last week was wrong. But that is not why we are here. We are really here to fix a situation that needs to be fixed. You have said many times in this Committee that you don't think it is appropriate for the Committee to take up tribal recognition. I agree with that. I think it is a function of the Department of Interior.

But by the same token, if their ability to do this in a timely basis with solid reasoning behind it doesn't happen, that system is broken and needs to be fixed. It falls upon us as people in the legislative branch to make it work or potentially even recognize tribes that the Department of Interior has shown that they weren't going to recognize because their process is broken.

At any rate, I want to thank you for having the hearing, once again. I appreciate the opportunity to ask some questions once the witnesses get done.

The CHAIRMAN. Senator Tester, thank you.

Senator Udall.

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Mr. Chairman. I would also like to thank the Chairman for continuing his efforts to keep attention on the pitfalls and the long and complicated and even unclear process of Federal acknowledgement. It is my understanding that this Committee has held a hearing on this issue every Congress since 2002. I hope that this hearing will be productive for all of us, and I hope we will gain new determination and ideas on how we can improve this process.

Federal tribal recognition is a serious thing. It is of the utmost importance to communities and nations across the Country. The United States has a solemn trust responsibility to tribes that is based on a long and often tragic history of treaties and contracts. It is important that the Federal Government take these responsibilities seriously and conduct a fair and transparent process of Federal acknowledgement.

With that, thank you, Mr. Chairman.

The CHAIRMAN. Senator Udall, thank you very much.

Chairperson Tucker, you should know the Muscogee Nation has a very fierce advocate here in the form of Senator Nelson. I know he wishes to introduce you, even though you are going to be on the second panel.

Senator Nelson, if you would come up and introduce the Chairperson, we would appreciate that.

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

You don't normally associate tribes with Florida, all of you four esteemed Senators being from the western part of our Country. But as you know, we have two very prominent tribes, the Seminoles and the Miccosukee in Florida. And the Seminoles are quick to point out that they are the only unconquered tribe.

But we have many others that are represented. And I am here to mirror the frustration that you all have just expressed in your opening comments with a process that needs to be repaired and that needs to be improved. And it is tribes like the Muscogee Nation of Florida that have waited for decades and they still don't have a decision. As a matter of fact, they participated in the Federal acknowledgement process in 1978, that is 31 years ago, without a decision. Even the State of Florida legislature recognized them in 1986. But the recognition is still not there.

So what I wanted to do was to introduce Ann, the Chairwoman of the Muscogee Nation, Ann Tucker. She served as the tribal council Chairwoman since 2002. The Chairwoman has served the Muscogee Nation of Florida since 1979, when she first collected oral histories for the University of West Florida. It was a project funded by the Florida Endowment of the Humanities.

She was the youngest appointee to the Northwest Florida Creek Indian Council by then-Governor and our former colleague Senator Bob Graham, in 1981. She served 12 years as an elected representative to the tribal council, and the Chairwoman is also tasked by

the tribal council to complete the Federal recognition process for the tribe.

So I want to thank you for your willingness to hold this hearing and to keep after this. While the bill that I had filed had a hearing, it never made it to the Senate Floor. So Senator Martinez and I reintroduced it as the 111th Congress started. I am hoping that you will be able to address this, address the process, and move to a markup.

Thank you for the courtesies that you have extended to me, Mr. Chairman.

The CHAIRMAN. Senator Nelson, thank you very much. Thanks for your work, and the Committee looks forward to continuing to working with you.

Our first panel is going to be Mr. George Skibine, Acting Principal Deputy Assistant Secretary for Indian Affairs at the U.S. Department of the Interior. He is accompanied by Mr. R. Lee Fleming, the Director of the Office of Federal Acknowledgement at the U.S. Department of the Interior here in Washington, D.C.

Mr. Skibine, you may proceed. Thank you for being with us.

STATEMENT OF GEORGE T. SKIBINE, ACTING PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY R. LEE FLEMING, DIRECTOR, OFFICE OF FEDERAL ACKNOWLEDGEMENT

Mr. SKIBINE. Thank you, Mr. Chairman, Mr. Vice Chairman, Senator Tester, Senator Udall. I am pleased to be here today to present our views on fixing the Federal acknowledgement process.

I am appearing today as the Acting Principal Deputy Assistant Secretary of Indian Affairs. And it is in this capacity that I am appearing before you today.

I am also the Acting Chairman of the National Indian Gaming Commission. But that is not what I am here to talk about.

My statement is in the record, so I am not going to repeat it. I am just going to make a few comments and highlight what we said.

Essentially, when Larry EchoHawk became Assistant Secretary, at his confirmation hearing, I think he agreed with you, Mr. Chairman, and with Senator Tester, that the acknowledgment process needed to be improved, to say the least. So he has asked me to be the chief architect of trying to fix what is broken.

As a result, I have committed to him that this is going to be one of the priorities of his Administration, and that we are going to get that done before he leaves office, for sure. I became involved in the process in June of last year, when I became the Acting Assistant Secretary during the Kempthorne Administration. At that time, I really didn't know much about the acknowledgement process, so I am certainly no expert in this area. I have certainly learned a lot in the year and a half or so that I have been involved in it.

One of the first issues that I tackled was a request for an extension of time for a petitioner. I granted it, it was my first week in the job. Lo and behold, I thought it was going to be non-controversial. The following day, I got a call from an angry Congressman who was wondering what this was all about. I became quickly immersed in the controversies that surround this process.

And what I have come to conclude at this point is that, I know the title of the hearing is fixing something that is broken. I am not sure that the system is necessarily broken. Certainly, Mr. Lee Fleming will tell you, if he may, when I am done, why it is not broken. But we have looked at the x-rays, and there is certainly room for disagreement there.

But if it is not broken, I think the doctor would say, you had better fix this before things get worse. So that is what I am determined to do.

One of the things I think we need to do is, what we can do here, at Interior, is revise the process in 25 C.F.R. Part 83. The revision that I think needs to be done is the following. We need to establish time frames that are going to be easily ascertainable, that can be followed and where a petitioner can see where it began and date certain of when it ends. Right now, as you have said, there is no certainty in that process. That needs to happen.

There needs to be, besides a time line, there needs to be an end to what I think in reading the regulations are a series of discretionary extensions that can be granted. I think all of these extensions can combine to take years in the process. That, whether it is for the Government or the petitioner, that cannot continue if we want to have a process that is clear and within certain time frames.

We also need to take a look at perhaps the elimination of unneeded steps. I know that in the last regulation, 1994, we added a review by the Interior Board of Indian Appeals. There are reasons for that, but I think I want the staff to take a look at whether that is really needed. I will talk to the chief judge of the IBIA about that. Their process adds two years or more to the process. Then after that, the decision can be appealed to Federal district court.

So essentially, is this really a necessary administrative process that we add this many years, because of the backlog at IBIA.

In terms of the standards, I think we are probably going to take a hard look at the standards. The standards were established a long time ago. In fact, I was reading the excellent article by Patty Ferguson-Bohnee from Arizona State University. I think that even the American Indian Policy Review Commission started developing standards a long, long time ago.

So it may be something that we take a look at to see whether there is some redundancy or see whether this is all needed. Then I think I would like to take a look at clarification of some of the terms that are somewhat ambiguous, for instance, the words, "on a substantially continuous basis." Well, to me, there is some ambiguity there. That is why, for instance, I think in the Little Shell proposed finding, Kevin Gover, the Assistant Secretary, found that the petitioner met criterion A. When the final outcome was decided, the Office of Federal Acknowledgement found that it did not.

How can you have this kind of disagreement? I think that what is important is to have standards that are, where you can rearticulate, either they meet or they don't. I think we need to do that on a consistent basis.

For instance, I remember when a couple of years ago I was involved in the development of regulations to implement Section 20

of the Indian Gaming Regulatory Act. We needed to define what is a nearby tribe and what is the surrounding community. There were not a lot of agreements as to whether there should be a radius. I was a strong proponent for putting something in. Otherwise, it may be questionable, but at least the people who look at the regulation know exactly, are they a nearby tribe, are they within the surrounding community, instead of asking the question.

I think we need clear standards where, if you are going to be recognized on a substantially continuous basis, then what does it mean? Can there be a break of 5 years, 10 years, 20 years? I think that needs to be in there.

I also think we need to clarify what the term predominant portion in 83.7(b) means. To me, that is again not exactly clear. Do we mean 60 percent, 62 percent? That should be pinned down, so that everybody knows exactly what it means. That should be in regulation.

Finally on clarification, I think I agree that the burden of proof should be clarified in the regulation.

You asked in your question who makes the decision. I think under our system at Interior, the Assistant Secretary makes the decision. In the case of Little Shell, I made the decision because the Assistant Secretary is recused from this matter. Even though I make the decision, I rely extensively on the proposed findings of the Office of Federal Acknowledgement. The office is staffed by a number of professionals. They are all very extensively qualified. I am not sure that it is my duty to substitute my judgement for that of the professional staff. We have a budget of——

Mr. FLEMING. About $2.2 million.

Mr. SKIBINE. We pay these people $2 million a year to provide this advice. I think that, and I know that they are qualified. I am not going to essentially second guess their professional determinations.

But at the same time, if we have ambiguities in the way the regulations are implemented, then essentially you are going to have problems. In fact, with Little Shell, it was an excruciatingly difficult decision for me and really agonizing. Because Kevin Gover had made a positive determination, I have the utmost respect for him. So we asked for an extension. We looked at what we could do, should we do, you know, what are our options here, could we do a re-proposed determination.

Well, in the end, this is the way it came down. But it certainly was not easy. I think I have gone over my time at this point, so I am going to end and say that I am looking forward to working with the Committee as we proceed to develop regulations. We will, I think one of the things we decided that we will do consultation with the Indian tribes under the Executive Order and our consultation policy.

But I think that I have promised our Assistant Secretary that we are going to get this done. And by the time we are done, we should have a process that works a lot better than it does now.

Thank you very much.

[The prepared statement of Mr. Skibine follows:]

PREPARED STATEMENT OF GEORGE T. SKIBINE, ACTING PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY R. LEE FLEMING, DIRECTOR, OFFICE OF FEDERAL ACKNOWLEDGEMENT

Mr. Chairman and members of the Committee, my name is George T. Skibine and I am the Acting Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior. I am pleased to be here today to present the views of the Department of the Interior on Fixing the Federal Acknowledgment Process. We recognize Congress has plenary authority over this issue and look forward to working with this Committee to devise solutions on how to improve and streamline the Department's Federal acknowledgment process. Appearing with me before you today is Mr. Lee Fleming, the Director of the Office of Federal Acknowledgment.

Assistant Secretary Larry Echo Hawk is committed to reforming the acknowledgment process, and we are currently exploring ways to improve the process. One of the problems that we are aware of is the significant amount of time it takes for some, if not all, petitions, to be processed from beginning to end. We have undertaken a process to revise the current regulations in 25 CFR Part 83 to eliminate any steps in the process that we find to be unnecessary as well as to implement deadlines so that a timeframe for considering petitions can be determined with certainty.

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

These decisions have significant impacts on the petitioning groups, the surrounding communities, and federal, state, and local governments. Acknowledgment carries with it certain immunities and privileges, including partial exemptions from state and local criminal and civil jurisdictions, and the ability of newly acknowledged Indian tribes to undertake certain economic opportunities.

The federal acknowledgment process set forth in 25 CFR Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," allows for the uniform and rigorous review necessary to make an informed decision on whether to acknowledge a group. When the Department acknowledges an Indian tribe, it is acknowledging that an inherently sovereign Indian tribe has continued to exist socially and politically since the beginning of European settlement. The Department is not "granting" sovereign status or powers to the group, nor creating a tribe made up only of Indian descendants.

Under the Department's regulations, in order to meet this standard, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

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

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

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

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

(5) demonstrate that its membership consists of individuals who descend from the historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;

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

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

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

OFA consists of anthropologists, genealogists, and historians who review, verify, and evaluate petitions from groups seeking federal acknowledgment. Since the process began in 1978, 67 petitions have been resolved, 45 through the Department's acknowledgment process (16 acknowledged, 29 denied acknowledgment—representing 105 decisions composed of 51 proposed findings, 47 final determinations, and 7 reconsidered final determinations) and 22 by Congress or other means.

The last hearing on this topic was on April 4, 2008 and in that testimony the Department's witness testified the Department would consider various ideas for improving the OFA process. In the *Federal Register* on May 23, 2008, the Department published guidance and direction to the Office of Federal Acknowledgment for managing recurring administrative and technical problems in processing petitions for federal acknowledgment. This guidance and direction has or will produce results in dealing with the following problems:

- splintering petitioning groups,
- handling petition documentation when disputes between factions of a petitioner arise,
- providing technical assistance,
- processing expedited decisions,
- reducing the time period for which petitioners must submit evidence,
- processing expedited findings against acknowledgment,
- processing decisions against acknowledgment based on failure to meet fewer than seven criteria,
- maintaining integrity of the process, and
- establishing inactive status for petitioners that are no longer in contact with the Department or who have not provided adequate documentation.

Our goal is to continue to improve the process so that all groups seeking acknowledgment can be processed fairly, systematically and completed within a set time frame. This goal is in line with other goals:

- to ensure that when the United States acknowledges a group as an Indian tribe, it does so with a consistent legal, factual, and historical basis, with uniform evidentiary standards;
- to provide clear and consistent standards for the review of documented petitions for acknowledgment; to expedite an administrative review process for petitions through establishing "sunset" deadlines for decisions; and
- most importantly, to provide adequate resources to process petitions meeting the expectations of Congress and the people affected by federal acknowledgment decisions.

We welcome the interest of Congress in the acknowledgment process, and are willing to work with the Congress on legislative approaches to the Federal acknowledgment process. Thank you for the opportunity to testify. I will be happy to answer any questions you may have.

The CHAIRMAN. All right, Mr. Skibine, thank you very much. We appreciate your testimony.

I am going to question last, so I will call on my colleagues to ask questions first. I will start with Senator Tester. I will just use the early bird rule, if that is all right.

Senator TESTER. Thank you, Mr. Chairman.

I want to thank you for your testimony, Mr. Skibine. We will stick with the Little Shell here for a bit. What options does Little Shell have now?

Mr. SKIBINE. I think at this point, Little Shell certainly has the option of having Congress look at legislative recognition. There may be very good reasons why in this particular case, Little Shell should be recognized legislatively.

In terms of our process, I think Little Shell can ask for a reconsideration, correct?

Mr. FLEMING. Correct.

Mr. SKIBINE. Before Interior, or they can go and appeal to the Interior Board of Indian Appeals, that I discussed before. Those are the administrative options at this point.

I think they can also go directly to Federal District Court, correct?

Mr. FLEMING. Correct.

Mr. SKIBINE. Yes.

Senator TESTER. The reconsideration process goes through your office?

Mr. SKIBINE. Yes, it does.

Senator TESTER. And you would just go review the material again, is that what you would do, basically?

Mr. SKIBINE. Let me ask, since I have never done one, let me ask Mr. Fleming to elaborate on this.

Mr. FLEMING. The request for reconsideration is before the Interior Board of Indian Appeals, which is an independent review board within the Department of Interior. It is not within the Office of the Assistant Secretary of Indian Affairs.

Senator TESTER. Okay, so how is that different from an appeal?

Mr. FLEMING. It goes from the Office of the Assistant Secretary, Indian Affairs, that a decision was made, and it is reviewed by the Office of Hearings and Appeal. It is separate from the structure of the Bureau of Indian Affairs, or Office of the Assistant Secretary, Indian Affairs.

Senator TESTER. Okay, so if they appeal it, where does it go?

Mr. FLEMING. To the Office of Hearings and Appeals, and within that office is the IBIA.

Mr. SKIBINE. I think that what you are saying is that the request for reconsideration is a request to the IBIA. So it is an appeal to the IBIA.

Senator TESTER. It is the same thing?

Mr. SKIBINE. Right, it is the same thing.

Senator TESTER. Has there been any appeals done before?

Mr. SKIBINE. Yes, there have been.

Senator TESTER. And what have the results been?

Mr. SKIBINE. I am going to have to ask Mr. Fleming about that.

Mr. FLEMING. Results have been that some of the decisions were sustained. Some of the decisions were remanded back to the agency.

Senator TESTER. Can you give me, has it been half and half, 30–70, 20–80?

Mr. FLEMING. There have been seven reconsidered final determinations. Out of the seven reconsidered final determinations, one, Cowlitz, was positive. The other five were not.

Senator TESTER. They were upheld by the decision that was made by the Department.

Can I ask you this? I am going to jump back to this in a minute, but you said you were going to work on a certain time frame when you are fixing the appeals process. Can you tell me what that time frame would be?

Mr. SKIBINE. I am hoping to have proposed rules within the year, within a year.

Senator TESTER. Yes.

Mr. SKIBINE. I know that when I appeared before this Committee on the Section 20 IGRA regs, I made some commitments that beyond my control were not——

Senator TESTER. This is a different time frame than getting the rules. I want to know, do you have a time frame in mind to make the decision-making process? In other words, if Little Shell were going to apply for the first time tomorrow and your rules were in effect, would you expect the Department to make a decision within six months, one year, five years? What would it be? Will that be defined?

Mr. SKIBINE. Yes, that will be defined. I cannot tell you what it is right now.

Senator TESTER. Do you have any figure in mind? No?

Mr. SKIBINE. Not really.

Senator TESTER. Okay. The release that you sent out on Little Shell, the reason that the acknowledgement was not given, and correct me if I am wrong, but it said it has been identified as an Indian entity on a substantially continuous basis since 1900. What you are saying is they did not have that entity since 1900. Can you tell me who is responsible for making sure that that entity exist? Does that come from an outside source or does it come from outside the tribe?

Mr. SKIBINE. I think on criterion A, it has to be identified by outside sources.

Senator TESTER. Outside the Department of Interior?

Mr. SKIBINE. Yes.

Senator TESTER. Okay, so what kind of sources are you looking at? Because the truth is, I know for a fact Mr. Sinclair, this has been three generations, 1900 is a little longer than three generations, but my guess is that they could probably track that back. But what kind of paperwork are you looking for?

Mr. FLEMING. If I may answer, the identifications are made by individuals outside of the group itself.

Senator TESTER. Okay, let me get this right, then. You are not asking the Little Shell to determine that they have been around since 1900?

Mr. FLEMING. Right,

Senator TESTER. You are not asking the Bureau of Indian Affairs or the Department of Interior to determine if they have been around since 1900. So who did you ask to find out if Little Shell has been around since 1900?

Mr. FLEMING. We rely on documentation such as newspapers, articles by other professionals, such as anthropologists who may have studied the region, correspondence that may be to and from Congress.

Senator TESTER. Is it public information who you reached out to for that information?

Mr. FLEMING. Yes, it is public information.

Senator TESTER. Could I get a list of the folks you reached out to for that information? The reason is because I want to make sure they are Montanans and have Montana connections. It would be very difficult for a Seminole to determine whether the Little Shell existed since 1900.

Mr. FLEMING. What would be helpful to you would be the actual decision-making document. Because it goes through the various identifications that were used.

Senator TESTER. Actually, I think I have that. But it doesn't list who was used. I think that is as important as the criteria.

Mr. FLEMING. Okay.

Senator TESTER. You can do that for me?

Mr. FLEMING. Sure.

Senator TESTER. Okay. The second point that you said was that they comprised a distinct community since historical times and maintained significant social relationships and interaction as a part of a distinct community. Can you tell me what is the difference between that one and the first one?

Mr. SKIBINE. Yes. I can tell you that between A and B, in A it has to be identification by outside sources that the tribe existed. In B, I think it is essentially evidence that there has been a community.

Senator TESTER. So who do you turn to for that information? Do you turn to the tribe?

Mr. SKIBINE. I think we turn to the tribe for that.

Senator TESTER. So the tribe didn't indicate, and this goes back to 1900 too, then?

Mr. SKIBINE. No.

Mr. FLEMING. Criteria B and C require documentation from first sustained contact. And this would be, in various forms of evidence, evidence that is found on the national level, the State level, the local level, the various levels where documentation is found.

What is needing to be demonstrated by a group is that they have held events that took place where you have interactions between its members, which is demonstrating the community. Then you would have to have evidence to demonstrate the political authority and leadership from historical times.

Senator TESTER. Are you talking about like pow-wows? Is that what you are talking about?

Mr. FLEMING. Pow-wows is a good demonstration for a community, funerals is another example.

Senator TESTER. Then the last question on this is, you maintain political influence, this is one of the reasons you denied them, maintain political influence over a community of its members, or over communities that combined into the petitioner. I don't track the last one, but that is okay. Are you talking about elections?

Mr. FLEMING. Talking about leadership where there may be situations that arise where the leaders take action and that the members of the group follow the action or they don't follow the action.

Senator TESTER. So it is more than just an election of leaders?

Mr. FLEMING. Election is factored in, but it is more than just elections.

Senator TESTER. Okay, so where do you go to get that information? Does that come from the tribe?

Mr. FLEMING. Again, the tribe, local records, repositories, newspapers, those kinds of records.

Senator TESTER. And you can give me information on where you got that, either the lack of information or the criteria to substantiate the fact that these were valid reasons to deny? Okay, good.

And if I might, last question, then we will move on. Thank you, Mr. Chairman, for your indulgence. Who set up the seven criteria and how long have they been around?

Mr. FLEMING. The regulations were created in 1978. And it went through the Department's regulatory process, a rule was promulgated. Hearings were held and such.

Senator TESTER. Super. Mr. Skibine, do you anticipate these seven criteria being still in effect when you get done revamping this system?

Mr. SKIBINE. Perhaps. I think we are going to take a look at it. I am not sure that the criteria in themselves are necessarily the problem. The problems fundamentally are the time line and how you weight the evidence. I think this is what we are going to have to focus on.

But frankly, I agree that some of these criteria, we will take a hard look at that. That is the only thing I can say.

Senator TESTER. Thank you, Mr. Chairman. If we get a second round, I have some more questions.

The CHAIRMAN. Senator Tester, if you need a second round, we will do that.

By consent, let me call on the former Vice Chair. She has some questions to submit and a comment and then has to leave.

So if it is okay with the Committee members, I will call on Senator Murkowski.

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

Senator MURKOWSKI. I appreciate that, Mr. Chairman, and appreciate the indulgence of the other Committee members.

Mr. Skibine, welcome back before the Committee. In the last Congress, when I was sitting as the Ranking Member and had an opportunity to discuss these issues that we appreciate are very difficult. We have seen the impact in terms of the cost, the time lines. Resolution is multi-generational. I think we recognize that the process is one that just does not work.

I don't want to speak to that today, and I am going to submit to you a couple of very specific questions that I would like you to address in some detail. And it relates to my State. As you know, in the State of Alaska, we have some 225 federally-recognized tribes on the list. But there remain several tribes that believe that they should be on the list of federally-recognized tribes, and they are not. The Bureau of Indian Affairs has told these groups that they have to seek acknowledgment under the Part 83 process. The tribes' attorneys submit, however, that they should be using the streamlined process that is provided by the 1936 Alaska amendments to the Indian Reorganization Act. So the questions that I will submit to you are two very specific ones. Given that I would like some detail, I will just ask that you spend some time on that. But I would appreciate your response to that so that I can be responsive to my constituents.

Senator MURKOWSKI. And with that, Mr. Chairman, I conclude, and I appreciate your letting me leapfrog over the other more timely members of the Committee.

The CHAIRMAN. Senator Murkowski, thank you very much.

Senator UDALL.

Senator UDALL. Thank you, Chairman Dorgan.

Mr. Skibine, it is my understanding that 150 petitioners have submitted letters of intent, stating they intend to enter the recognition process, but have not acted to submit the documentation necessary for consideration, while only about 48 groups have completed the full process since 1978. What are your opinions on why so many groups have noticed their intent but have not entered the process? Is it an issue of resources? I have heard the same thing that Senator Tester has, and that he talked about in his testimony, that this is very, very expensive. So is that what is going on here?

Mr. SKIBINE. I think, to a large degree, that is very possible. Let me just say that you are right, I think that is probably one of the issues, and I think that is one of the concerns I have. I am involved also to a large degree in handling gaming issues for the Department. And because of the cost of these petitions, the tribes, or the group who are essentially money-less, have in some cases involved developers to help them to fund those petitions, which has led some to essentially associate the petitioning process with gaming, especially off-reservation gaming.

There are no ties between the two, but because, I think, of the cost of these petitions, I think some of these petitioners really do not have a choice but to turn to outside sources, who essentially are not going to do this out of the goodness of their heart, unless they get something in return.

So that is an issue. But I think that the cost is definitely one of the problems that we have had.

Senator UDALL. One of the bills that has recently addressed this issue is Representative Faleomavaega's bill, H.R. 3690. This is a proposal that tries to deal with the acknowledgement process. The bill would move the petition review process from the BIA to an independent commission of recognition of Indian tribes. The commission would consist of seven members appointed by the President with the consent of the Senate.

My question to you is, are there any benefits in keeping the Federal acknowledgement process within the Department of Interior rather than an independent commission? What are your thoughts on that?

Mr. SKIBINE. Without commenting on Mr. Faleomavaega's bill, because we haven't, we are not authorized to do that——

Senator UDALL. Well, just the concept.

Mr. SKIBINE. Yes, the concept, I think the concept, personally I think the concept of a commission is not something that we can implement in Interior. But it is something that Congress would have to do. I think that is something we should explore. It is not necessarily a bad thing. I think we have to look at it. But I think that it is, in terms of wanting to work with Congress to try to improve the process, that is certainly one of the issues that I think the agency or the Department should consider.

Senator UDALL. And one of the things that he simplifies in his bill would be the idea of taking these seven mandatory criteria, and sort them down to two. And those would be proof that members of the petitioning group descended from a historic Indian tribe or historical Indian groups that combined and functioned as a single, au-

tonomous entity; and two, proof that the petition group comprises a community, related members distinct from surrounding communities, continuously since 1900. Does that make sense to simplify these seven criteria?

Mr. SKIBINE. I am not sure. I think simplification is good. But I am not sure that we want to simplify it that much. Because we have to, there is reasons we have those seven criteria. And I think that we want to make sure that we have the real thing. If you simplify too much, then essentially, you don't get the same level of evidence that we have with the seven criteria. So that is something we would have to be careful to look at.

Senator UDALL. Thank you very much, Mr. Chairman. I appreciate your doing this hearing.

The CHAIRMAN. Senator Udall, thank you.

Senator Franken.

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Thank you, Mr. Chairman. I apologize for being late today. I was at a Judiciary hearing. So I apologize if any of these questions were kind of covered in your testimony. I want to thank you for being here today.

As the newest member of the Committee, this testimony is very valuable to me. I would like to recognize some folks from Leech Lake Reservation here today from Minnesota. This is off topic, but I just want you to bring this back to the BIA. At Leech Lake and other reservations in Minnesota, there has been an issue with the new school construction fund, where tribes have put in requests that are 15 years old and can't find out where they are on the list of projects. There is kind of no existing list.

So please, if you could take that back and maybe I could find out something about that.

I read through the GAO report from 2005. When they, that is the Government Accountability Office, and when they testified before the House Committee on Resources, the testimony says, "While the BIA could extend the time lines, it has no mechanism to balance the need for a thorough review of a petition with the need to complete the decision process." Excuse me again if you covered this in your testimony before I got here. Is this still the case? And what mechanisms are in place to ensure a complete review in a timely manner?

Mr. SKIBINE. Let me ask Lee Fleming to address this issue, since he was around for all this time.

Mr. FLEMING. Good afternoon. The GAO actually began their review of the acknowledgement process in 2001, November. Their report was quite extensive in our process. Their ultimate recommendation was to improve the timeliness and the transparency. We provided the GAO with a plan of action on correction.

Within the past ten years, we have had quite a bit of growth in our decisions. In the past ten years, we have had approximately 38 decisions that came forward. These would be proposed findings, final determinations and reconsidered final determinations.

The GAO also asked the Department to develop a needs assessment to see what could be applied to make the process more effi-

cient and transparent. We provided that. I believe that as time has passed, we have indeed increased our production. Clearly not as fast as what the expectations are, but that is what we also put into the report, that if the expectations are such that this process be completed in three years, five years, ten years, then these are the resources that need to be applied.

The outcome of that was we got one additional team.

Senator FRANKEN. So what you got is insufficient. So you can't do it in three or five or ten. We can't expect that. What is the time line? What can you expect? From soup to nuts, to the beginning to the end of the process, what kind of time?

Mr. FLEMING. Currently, the regulations define a 25 month process. That entails a 12 month review of all the evidence that is presented. There is a due process phase called the public comment period, so that when, after the first year, we issue a proposed finding and then it is introduced to the public; the petitioner, interested parties, and the public then have an opportunity to comment on our proposed finding, either to acknowledge or not to acknowledge.

After the six month comment period, then there is a 60-day or two-month period for the petitioner to respond to any comments that came from any third parties. Again, all a part of due process. At the end of that two month period, then the Department has a minimum of 60 days to issue a final determination. When that is issued, then there is this 90 day period to request reconsideration before the Interior Board of Indian Appeals.

So you add all of those together, it comes up to 25 months.

Senator FRANKEN. But that is a much shorter period than the reality, right?

Mr. FLEMING. That is ideal. That is if there are no backlogs, if there are no administrative tasks that are preventing direct attention. We have litigation that we have to juggle in.

The CHAIRMAN. Mr. Fleming, let me ask if Senator Franken would yield.

Senator FRANKEN. Please.

The CHAIRMAN. My understanding is, you have six petitions that are active in the current workload, is that correct? You had seven?

Mr. FLEMING. I have eight that are currently on active consideration.

The CHAIRMAN. Then nine petitions that are on ready status?

Mr. FLEMING. Seven that are on the ready status.

The CHAIRMAN. So I will correct that, seven that are on the ready status. But when you talk about 25 months, the seven that are on the ready status, presumably these are petitions that are ready. I assume you are not going to get to some of those for five, ten years, are you? I mean, you are doing two a year.

Mr. FLEMING. We are doing——

The CHAIRMAN. Because the 25 months seems just way outside the real issue, and that is you have seven petitions on ready status that you are not even going to be looking at for some years, are you?

Mr. FLEMING. No, the seven that are active are currently being acted upon.

The CHAIRMAN. I am talking about ready status.

Mr. FLEMING. The ready status. Those can't go into active until we have the resources open and available to address them.

The CHAIRMAN. The only reason I interrupted Senator Franken here is to say that the 25 months doesn't mean anything. All that mean is that at some point, once you get from ready to active and then moving on active up to the first one or two, then you have 25. But that might be four years from now.

So I thank you for yielding. Go ahead.

Senator FRANKEN. Well, that was sort of my question. I understand you delineated all the different periods that lead up to the 25 months. But you also said you can't do it in three, five or ten years without the level resources that you don't have.

Mr. FLEMING. Right.

Senator FRANKEN. So, soup to nuts, from the beginning to the end, what would the expectation be of someone starting today of, of someone seeking recognition if they started today?

Mr. FLEMING. I don't think I could give you an estimation, because we have a work flow that is like getting into a grocery line. The first one in is the first one out, which is a fair way of working with the groups. We only have so many resources or teams to work each case. So we have four teams. You can expect that the four teams are able to work on proposed findings or the final determinations or the reconsidered final determinations. There are various different phases of this process and it all is complex in the processing of these decisions.

Mr. SKIBINE. Can I interrupt you? Senator Franken, what I said at the beginning is that when we revise the regulations, we are going to try to address this issue, so that there is a, essentially a time frame with a beginning and an end, so when you ask that question, there can be an answer.

Senator FRANKEN. Okay, thank you.

The CHAIRMAN. Mr. Skibine, we have had these discussions before on other issues with respect to regulations. This set of laws has been in position for 31 years, 1978 the accountability process was established. And you are saying we don't have regulations with which to make judgments about some of the sensitive areas. I just don't understand that. But assuming you do regulations, now, from 2002 to 2010, the Department has never asked for more money. And we all know, the problem is, this is no more fun for you than it is for us, to have a hearing every two years and complain about a process that doesn't work. It doesn't make any sense to do this every second year.

So the question I would ask Mr. Fleming is this. Can you provide to this Committee what would be necessary to have some reasonable prospect of processing applications between a five and ten year interval as an end process? How much would that cost? If we have a tribal recognition process that by and large gives answers after a lot of people are dead, it is not a process that works very well.

Are you asking for more money each year so that you—I am not a big advocate of spending here, but I am just saying, if you represent being able to do a job, then how much money do you need to do the job effectively? Are you requesting the funds? And if so, could you give a report to this Committee on what it would cost, so that we would have at least some measurable time frame and

be able to meet some measurable objective on this acknowledgement process? Otherwise, maybe we should all just give up and say, you know what, this process doesn't work. The Little Shell Band, I don't know the merits of that. Frankly, I have not studied it. But they wait 30 years? And a decade ago get told that things look fine, and then a decade later, they are told no, you are turned down? Somehow, that doesn't meet any test of reasonableness.

So Mr. Skibine, you have kind of disagreed that it needs fixing. You have heard my description of it. Disabuse me of the fact that my contention is it needs fixing.

Mr. SKIBINE. Oh, I didn't say that I didn't believe it needed fixing. I agree, and we are going to try to do the best through our regulatory process to fix the problem that we have with the process.

The CHAIRMAN. How long will it take you to develop regulations that are in force?

Mr. SKIBINE. Well, it will take me, I think it will take about a year to develop proposed regulations. And then they will have to be finalized, we will have to do consultation with Indian tribes. So another year probably, at this point.

The CHAIRMAN. Do you think you will still be working for the Federal Government when regulations are in force?

Mr. SKIBINE. I am eligible to retire right now.

[Laughter.]

Mr. SKIBINE. But I have committed——

The CHAIRMAN. It is about regulations. We are not trying to hurry you out the door. We would like to get some regulations in place.

Mr. SKIBINE. I have committed to Assistant Secretary EchoHawk that I would work on this issue until we address it.

The CHAIRMAN. Let me say that it is not sport for us on the Committee to have you up here and to say, what is wrong with you all? That is not the issue. But the issue is this. In the Federal acknowledgement process, we have tribes beating on this door saying, we want hearings on recognition for us and we want the Congress to do it. And I keep saying, that is not the job of Congress. We can't do that. We don't have all of the folks that you have on your team. So I am very uncomfortable doing that.

On the other hand, those knocks are going to get louder on that door unless this acknowledgement process starts to work a bit better. We have 80 partially document petitions in front of you, my understanding is about 80. We have seven that are ready, in ready status, and I think you said eight that are active petitions. You have done two in this calendar year. So that looks to be like, if you are in a ready status, you might be, even if you are just completely ready status at this point you are not one of the 80 that is partially, you are ready, it might be eight or nine years if you happen to fall at the end of the seven on the ready status.

I am just saying that I understand why tribes are saying, we want something else, something that works. So to me, I don't want this Committee to be the recognition committee. I want to fix this, so that they can have some reasonable expectation of a time line that is fair and that they all kind of understand when they file a petition. That is all.

Senator Tester, you wanted some additional comments.

Senator TESTER. Just real quick. I want to echo your statements right now, Mr. Chairman, that is, you are right, the banging on that door is going to get louder until we get this process fixed. Why I bring up Little Shell is because you have regulations. It is much easier to look and see how those regulations are applied than just read the regulations for what they are.

I guess that the Department has determined that the Little Shell are not a part of any other tribe, so they are not eligible for a lot of the benefits that a recognized tribe does. But yet they don't meet each one of these seven criteria, which puts them out in limbo, unless we don't think they are Native Americans at all.

So how do you propose to fix that through regulations? Does that make any sense to you? It was a little bit convoluted, so you can say no, and I will say it again. But if we actually believe that the Little Shell, 89 percent of their members, were descendants from the Pembina Band of Chippewa Indians, but yet they are not, they are a separate band, so they are not part of the Chippewa, they are separate from that. How do they get to this kind of status? The Department makes one finding on one level, but yet doesn't make a finding on another level. They say they are Native Americans, but they are not part of the Chippewa, but yet they are not Native Americans to be recognized as a tribe?

Mr. SKIBINE. I think in the Little Shell case at this point, of course they could, if they appealed, there could be a reversal of the Department's decision. So they could be recognized. But potentially, if they do not meet this regulation, it does not mean they are not a tribe. But then it will mean that they need legislative solution.

Senator TESTER. Okay, so does that mean you are going to support my bill?

Mr. SKIBINE. I cannot commit to that right now. But I think that we will definitely take a very close look at that.

Senator TESTER. All right. Will you commit to support it after you take a look at it?

[Laughter.]

Mr. SKIBINE. Not if I want to be working for the Government tomorrow.

Senator TESTER. We will probably ask your boss that question, too.

Thank you, Mr. Chairman. I appreciate your indulgence.

The CHAIRMAN. Senator Tester, thank you very much. You came close to getting a commitment, it appeared to me.

[Laughter.]

The CHAIRMAN. Let me say, Mr. Skibine and Mr. Fleming, you both are Federal employees, you have long careers, it is not our intention to suggest that your work is without merit. That is not my intention at all. You no doubt work hard. Mr. Skibine, we have had, you have, in fact, filled many roles in the Department recently because of vacancies. You have had a lot to do on a lot of issues over many years here with this Committee, dealing with regulations and so on.

I do say, however, that it is frustrating, every couple of years, to have another hearing. So somehow, this Committee needs your assistance to try to evaluate what kind of process could exist with respect to Federal recognition so that if a tribe does the work that

it needs to do, really develops the historical record in a very strong and positive way, that they could expect long before most of their residents have died to have some answer from the Federal Government. And 25 or 30 or 35 years is too long.

So Mr. Fleming, can I ask you, would you submit a report to this Committee, if the head of the Interior Department will allow you to do that, I expect the Interior Secretary would, submit to us a report, what would be necessary, in your work, to give you the opportunity to put some time lines and some reasonable time frames on the acknowledgement process, so that we could find a way to address this, even as Mr. Skibine and others begin to do the regulations that will address the things that Senator Tester was asking us about?

I did not ask about the issues Senator Tester asked about because I don't want to duplicate it, but I have the same questions about criteria and what some of the provisions mean, how they are interpreted, why they might be interpreted 10 years ago one way and now quite another way, in the middle of the process of an application. Mr. Fleming, are you able to provide a report to me that would give me that sense?

Mr. FLEMING. I should be able to.

The CHAIRMAN. All right. I thank you both for being here. And thank you for your work and your service. I hope perhaps the next time we have you here, which I expect would be in the next Congress, that we would have some good news to report, finally. Thank you very much.

Mr. SKIBINE. Thank you very much.

The CHAIRMAN. Next I am going to ask to come to the witness table four additional witnesses on a second panel. Mr. Frank Ettawageshik, the Honorable John Sinclair. Frank Ettawageshik is the Chair of the Federal Acknowledgement Task Force, National Congress of American Indians. The Honorable John Sinclair is President of the Little Shell Tribe of Chippewa Indians in Havre, Montana. The Honorable Ann Tucker, Tribal Chairperson of Muscogee Nation of Florida, in Bruce, Florida. And Ms. Patty Ferguson-Bohnee, the director of the Indian legal clinic at Tempe, Arizona.

If the four of you would come forward and take your seats, I would appreciate it. I want to tell all of you that your full statements will be made a part of the permanent record, so you don't have to read your full statement. You may appropriately summarize the statement if you would.

Mr. Ettawageshik, we appreciate your being here, and we will ask you to speak first. You are the Chairman of the Federal Acknowledgement Task Force at the National Congress of American Indians. Welcome.

STATEMENT OF FRANK ETTAWAGESHIK, CHAIRMAN, FEDERAL ACKNOWLEDGEMENT TASK FORCE, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. ETTAWAGESHIK. Thank you, Mr. Chairman and members of the Committee.

I have a prepared statement, as you said, and we of course stand by that statement. It is interesting that pretty much everybody

here, even the Department, although not directly, has agreed that the process is broken. Clearly, if you are going to attempt to fix something, then you must think that there are things that aren't right within that process.

So we all agree that this isn't working. In my case, I am the former chairman of my tribe, I was the chairman of a non-federally recognized tribe when I first was elected and first went to work many years ago. Our tribe was not on that list of federally-recognized tribes. We went through the process. We eventually had legislation passed, because in our case, as you have pointed out, Mr. Chairman, at the rate that they were considering petitions, in our case, it would have been between 50 and 100 years before they got to our petition. We felt that that was too long. Justice that is delayed is justice denied.

And as tribes, we are very much aware, through the National Congress and as individual tribes, that Congress isn't creating a tribe through recognition. I think that is really important, because there are people who sort of feel that there is this weight of responsibility that somehow a tribe is being created through this. But it is not. Congress is acknowledging tribes exist.

In the U.S. Constitution, we have the acknowledgment of the pre-existent sovereignty of tribes in the commerce clause. We go on, we look through, those of us who have signed treaties, we look to the section of the Constitution that talks about the signing of treaties, and that treaties are the supreme law of the land and that they don't go away just because they are old.

We are very concerned that, as a tribal chairman, one of the things that I used to do was to ask our legal interns when they were coming in that, if the Supreme Court made a ruling that limited tribal sovereignty, how did that limit our sovereignty. And the answer to that question was that it doesn't limit our sovereignty at all. Tribes are either sovereign or they are not. And when they are sovereign, that is what the tribes are.

But what that Supreme Court decision did would be limiting the ability of the Federal Government and its agencies in how they could acknowledge the sovereignty of the tribes. So it very much limits the ability of the tribes to be able to exercise that sovereignty.

Well, what we have here in the case of the Federal acknowledgment process is we have tribes that are sovereign that are trying to figure out how to get the Government to agree that they are, and what kind of criteria do we have. I have heard people talk about shifting goalposts. I remember, the way I describe it is that we had a picture once in the process that we showed, we wanted to see what was going on in terms of voting.

Well, we had a picture here of people voting, we had minutes of that meeting. So we provided that. Then they said, all right, well, that is fine, we really like the fact that you have provided this picture. But now, what are those women in the back of the picture talking about? In other words, we crossed one line, now here is another line in the sand, now cross that line.

So what happened was, as tribes, what we felt was that this process was started originally to sort through those groups that clearly were not tribes. We have all read the reports, there were

groups that clearly weren't tribes that were in the process or trying to be recognized as tribes. And all of us, tribes, everyone agrees that those folks should not be there, and that this process was designed to sort through that.

What has happened is this process has deteriorated to the point that it today appears to those of us who are looking at it, either looking at the process from within it or looking at it from the side of trying to petition, that this process appears to be more one that is designed, through its application, to deny tribes, rather than one to actually provide justice for those tribes that are trying to seek that recognition, that status, where their governments are recognized by the United States.

We realize that there are a lot of things that are involved in this. Mr. Chairman, the National Congress of American Indians and the Task Force that I chair are committed to working to find ways to make this process work in a better manner. We have looked at the new legislation and think that that legislation should be studied. There maybe some things in there that Mr. Faleomavaega's bill and that concept of having an outside commission look at this, that is one thing that people have looked at.

We also are, however, very much aware that if the criteria were to be looked at and analyzed and used in a manner as they were originally intended, we believe that they would work. But the problem is that in the application of those criteria, it has gotten progressively more and more difficult and we believe inconsistent in the way those have been applied. And as have some of the people who will be following me here will be getting into the very specifics, and particularly in the most recent case, I think there are some very flagrant examples of that inconsistent application of the criteria.

So we are very much, very much supportive of change. We share with you the process, we are not trying to demean people for good intentioned efforts and everything that they are working on. We really appreciate having this hearing and bringing this focus on it. But like you, we also are frustrated by the fact that about every two years or so, we seem to have to do this again. It seems like we are saying the same thing over and over again.

But we really need to have a timely process, and one that removes political considerations from it. With that, Mr. Chairman, I will close my oral comments.

[The prepared statement of Mr. Ettawageshik follows:]

PREPARED STATEMENT OF FRANK ETTAWAGESHIK, CHAIRMAN, FEDERAL ACKNOWLEDGEMENT TASK FORCE, NATIONAL CONGRESS OF AMERICAN INDIANS

On behalf of the National Congress of American Indians, thank you for the opportunity to discuss this central issue in the relationship between tribes and the federal government.

My name is Frank Ettawageshik and I am a member of the Little Traverse Bay Bands of Odawa Indians. I have served as a leader in Indian Country for twenty years, including fourteen years as Chairman of my tribe. I am also the Co-Chairman of the NCAI Federal Acknowledgement Task Force.

It is widely known that the federal acknowledgement process is badly broken and needs reform. But to understand how the flaws in the acknowledgement process cause so much harm, we must be clear about why the federal acknowledgement is critically important. Put simply, federal acknowledgement empowers tribal governments to provide the services and stability that their people need in order to maintain tribal culture and identity. The federal acknowledgement process is about nothing less than the cultural survival of the indigenous Nations to whom the United States owes a trust responsibility. The federal government does not create the existence of an Indian tribe. Tribes exist and have existed since time immemorial. The federal acknowledgement process is intended to recognize those tribes that have existed since historic times as living political and cultural groups, and to deny recognition to groups that have not. When this process fails, the denial bars tribes from accessing resources necessary for their continued survival. Thus, the failures of the federal acknowledgement process must be called what they are – if the federal government fails to acknowledge a historic tribe it is a failure of the federal trust responsibility and contributes to the destruction of a tribal culture.

Experiences with the Acknowledgment Process

When I began serving in my tribal government, we were not a federally recognized tribe. We began the acknowledgment process while I was in office. We collected thousands of pages of documentary evidence that my tribe had existed historically and had continued to function, culturally and politically, as an Indian tribe. By the time we finished providing documentation, we had provided more than thirty boxes of evidence from every era since European contact. Despite this mountain of evidence, there was still no guarantee that we had satisfied the requirements. Every time we believed we had satisfied the requests for evidence, a different request for new evidence would arrive.

We continued our efforts to move forward in the acknowledgement process, but it soon became clear that there was little hope that the process would conclude at any foreseeable point in the future. We then channeled our efforts into the legislative arena. After House

and Senate review, Congress passed and the President signed Public Law 103-324 reaffirming our status as a recognized tribe.

As a chairman of the NCAI Federal Acknowledgement Task Force, I have worked with recognized and unrecognized tribes on navigating the acknowledgment process. They have told me about the burdens the process places on their tribes and the constant uncertainty that they face throughout the process as the requirements for acknowledgement shift from year to year and from tribe to tribe. They have told me about how the goal posts keep moving; leaving them just short of proving to the federal government that the tribe does, in fact, exist. In short, a process that was intended to provide a path to federal recognition has instead been corrupted into a process that seems to be focused on denying the existence of tribes.

My experiences as a leader of my tribe and as a leader of the Task Force have shown me the great harms caused by the acknowledgment process. The process is broken, and it is an active cause of injustice in the relationship between the federal government and the sovereign tribes throughout the country.

History of the Acknowledgement Process

The first federal-tribal relations were created through treaties under the U.S. Constitution. Many tribes, however, never entered a treaty with the United States. These tribes were either too peaceful to be considered a military threat, too small or isolated to be noticed, or possessed nothing that the United States desired. Other tribes simply refused to enter into a treaty with the United States. By 1871 treaty-making was replaced by the making of agreements, and the making of agreements ceased in practice by 1913. These methods of establishing recognition were thus closed to many tribes. The Commissioner of Indian Affairs foresaw trouble when he wrote in 1872:

> This action of Congress...presents questions of considerable interest and much difficulty, viz: What is to become of the rights of the Indians to the soil over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses: How are Indians, never yet treated with, but having in every way as good and complete rights to portions of our territory as had the Cherokees, Creek, Choctaw and Chickasaws, for instance, to the soil of Georgia, Alabama and Mississippi, to establish their rights?[1]

The process of federal recognition was altered by the passage of the Indian Reorganization Act in 1934. For almost fifty years after the Indian Reorganization Act (IRA), the Bureau of Indian Affairs (BIA) employed an informal acknowledgement process based on the ratification of tribal constitutions. A tribe would submit an IRA

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[1] Annual Report of the Commissioner of Indian Affairs, 1872, quoted in the Final Report of the American Indian Policy Review Commission, p. 466.

constitution to the Secretary of the Interior. If the Secretary approved the constitution, that approval constituted federal acknowledgement of the tribe. For years, the Secretary based the decision on criteria listed in Felix S. Cohen's *Handbook of Federal Indian Law*. However, the factors listed in the Handbook were not considered exhaustive. By the 1970s, the Interior Solicitor indicated he did not think the Handbook factors were adequate, and he was concerned that the "Department ha[d] no established procedures for making the recognition determination."[2]

As tribal applications increased during the 1970s, NCAI called a special convention of its members to discuss federal acknowledgement. Our members expressed their support for the establishment of federal standards and an accountable decision making process. They believed that a tribe should demonstrate a continuous history of tribal relations in order to receive federal acknowledgement. The principles articulated at that convention developed into the current federal acknowledgement process that is codified at 25 C.F.R. Part 83.[3]

While the acknowledgement process began with a firm commitment to fairness and impartiality, the process has deteriorated over the decades since the regulations were adopted. The process now fails even the simplest metric: time. The process can take decades. As the Committee is aware, the Little Shell Tribe of Chippewa was recently denied acknowledgement based on a petition they submitted in 1978. Such delays are not uncommon, and they seriously undermine the legitimacy of the acknowledgement process.

The documentation required also adds to the delay and raises questions about the acknowledgement process. The number and scope of the documentation requirements place an untenable burden on tribes attempting to engage in good faith with the Secretary. These requests defy the historical and cultural realities of tribal existence over the last centuries. They appear to change with each passing year. And, rather than address meaningful questions of tribal history, they often focus on questions of tribal leadership that do little more than feed intra-tribal conflicts.

Most troublingly, there are significant questions about the fairness and integrity of the process. In recent years, significant concerns have been raised among our members and the public at large when actions during the acknowledgment process created the appearance that political forces shaped the nature of the process and influenced the outcome of acknowledgement decisions.

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[2] Letter from Interior Solicitor Kent Frizell (Feb. 26, 1975).

[3] For an in depth discussion, see "An Historical Perspective on the Issue of Federal Recognition and Non-Recognition," Institute for the Development of Indian Law, Prepared for the National Congress of American Indians in conjunction with the NCAI Conference on Federal Recognition, March 28-30, 1978.

The profound importance of federal acknowledgement makes the problems throughout the acknowledgment process all the more pressing. We urge you to develop a fair and equitable acknowledgment process that ensures prompt action based on impartial criteria. NCAI has made its commitment to an impartial acknowledgment process clear for over thirty years, and my testimony will highlight the foundational principles that we believe should shape the legislation considered by the Committee.

NCAI and Federal Acknowledgement

NCAI's position on federal acknowledgement remains virtually unchanged since its formative convention on the issue over thirty years ago. NCAI and its members are committed to a fair and equitable process free of political considerations that results in a timely determination on each application for federal acknowledgement. As a chairman of the NCAI Federal Acknowledgment Task Force, I can say that there are several core themes that have grown out of our work.

We continue to believe the central question in federal acknowledgement is whether the tribe has maintained tribal relations from historic times. All inquiries in the process should be targeted to answering this narrow question. The inquiry should not be so broad that the acknowledgement process functionally closes the door on deserving tribes by requiring an impossibly large amount of evidence of disparate activities over vast stretches of time.

NCAI and its members suggest that the Committee focus its oversight efforts on tailoring the decision making process around this inquiry. In doing so, the Committee should consider reforming the process to ensure timely, transparent, and fair consideration of each application. It should identify reasonable documentation requirements and allow tribes to address any gaps in the historical record. The process should include consideration of the historical and cultural realities informing each tribe's relationship with the federal government. Most importantly, NCAI encourages the Committee to take steps to ensure that the integrity of the process is restored.

We understand that the Committee is considering several different mechanisms for reforming the federal acknowledgement process. As a membership organization, we cannot take a position on any specific proposal without the formal approval of our members. We know that our members will want to examine any proposed standards for reforming the acknowledgement process to ensure that the content of the standards matches the core principles NCAI has articulated. While we believe any step towards these goals is laudable, the history of federal acknowledgment has taught our members that the content of even the most noble standards can have unanticipated and unwanted effects on the acknowledgement process.

Conclusion

The current federal acknowledgement process is broken. Despite the best intentions of those that created the process and those that currently administer it, the process simply does not work. It subjects tribes to unconscionably long delays and unreasonable documentary requests. It establishes a seemingly objective list of criteria but provides no guarantees of objectivity or fairness in their application. These problems cause incalculable harm. The length of the process leaves tribes suspended in limbo, unable to guarantee services to their members or to prove to state and local governments that the federal government recognizes the tribe's sovereignty. The lack of transparency casts doubt on the federal government's willingness to faithfully perform its trust responsibilities. And the increasing demands on tribes in the process inflict hundreds of hundreds of thousands of dollars of unnecessary costs every year.

Legislation addressing these concerns is both timely and appropriate. Given the unquestioned importance of federal acknowledgement, we emphasize that the legislation must be tailored to fix the problems in the process without imposing unnecessary hurdles to federal acknowledgement. It should focus on providing a fair, equitable and timely process that removes political considerations from the decision.

We are grateful that you have devoted the time to consider this pressing issue, and we thank you for your diligent efforts on behalf of Indian country on these and many other issues.

An Historical Perspective on the Issue of Federal Recognition and Non-Recognition by Terry Anderson and Kirke Kickingbird has been retained in Committee files.

The CHAIRMAN. Mr. Chairman, thank you very much. We appreciate your being here.

Next, we will hear from the Honorable John Sinclair, President of the Little Shell Tribe of Chippewa Indians in Havre, Montana. Mr. Sinclair, welcome.

STATEMENT OF HON. JOHN SINCLAIR, PRESIDENT, LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA

Mr. SINCLAIR. Thank you, Chairman Dorgan.

I appreciate the opportunity to testify today on the Federal acknowledgment process. I would also like to extend to Senator Tester our heart-felt thanks for his unwavering support of Little Shell recognition on behalf of myself and the Little Shell people.

This is a frustrating time for the Little Shell people. After more than 30 years of being processed, examined, poked and prodded by the Bureau of Indian Affairs, we were told last week that we failed to satisfy three of the BIA's mandatory criteria and cannot be recognized. I am here to share our experience with the administrative recognition process with you, to urge the Congress to establish a new and more realistic recognition process, and also to press Congress to recognize the Little Shell Tribe.

Let me assure you that the Little Shell people are Indian. The BIA found that roughly 90 percent of our 4,000 plus members descend from the Pembina Chippewa, the same Pembina Chippewa who historically had treaty relations with the United States. Our people kept to the old ways and followed the buffalo. Instead of sitting on a reservation, we migrated from place to place. As a result, we didn't generate enough records as far as the BIA is concerned.

So the BIA concluded that we lacked enough evidence on three of their criteria. These criteria are all mandatory, so if you fail on one you cannot be recognized. The first one of these three, identification by outsiders as an Indian tribe, means nothing. No one can seriously argue that a tribe should not be recognized just because outsiders didn't put it in writing every 10 years.

But the other two, community and political authority, are meaningful. They overlap and probably shouldn't be a separate criteria, but they are meaningful. In the BIA's jargon, this means that you must prove there are social and political boundaries between your community and outsiders. But the BIA looks for these boundaries in the detail, and I do mean detail, not in the tribe's overall history.

It is like the BIA is looking at a chain link fence with their faces pressed to the fence. If you do that, you see the gaps between the chain links, but you don't see the links. If you take a few steps back, you see the links and realize the fence separates those on one side from those on the others.

In the proposed finding on the Little Shell petition, former Assistant Secretary Kevin Gover did take a step back, and he saw the links that bind Little Shell, not the gaps. So the proposed finding on Little Shell was positive. Flexibility in the regulatory requirements was possible, Mr. Gover said, and justified the case of Little Shell because of our migratory history.

But this Administration said no, flexibility is not allowed, Little Shell must look like every other tribe or we can't be recognized. Other governments, with their experience with the Little Shell Tribe, though, acknowledge that we are an Indian tribe. Tribes in Montana, the Montana-Wyoming Tribal Leaders Council, the State of Montana and all local governments. And in the comments on the favorable proposed finding on Little Shell, not a single party submitted any negative data against the finding.

If the BIA regulations cannot be interpreted to allow for Federal recognition of the Little Shell Tribe under such circumstances, then the fault is in the regulatory process, not with the Little Shell Tribe. Our experience proves that the administrative recognition process doesn't work.

In my written statement, I make a number of suggestions on how Congress might create a new and equitable process. All of those ideas are contained in H.R. 3690, which is pending before the Natural Resources Committee. I urge this Committee to seriously consider the reform proposed there.

It is time that the Congress stop the abuse of non-federally-recognized tribes that takes place in the BIA recognition process. All Indian tribes, whether or not formally recognized by the BIA, are sovereign. And the BIA's offensive treatment of sovereign tribe like the Little Shell undermine sovereignty for all tribes.

Finally, I am duty bound by my people to remind the Committee that we are the most recent tribe for which the BIA process failed. Justice was not done for Indian Country by creating a new process. But justice must also be done for the Little Shell people. And at this point, only Congress can provide this justice for the Little Shell people. We ask that Congress do what the BIA should have done and recognize the Little Shell Tribe.

Senator Tester has introduced S. 1936 that would extend Federal recognition to the Little Shell Tribe. On behalf of the Little Shell Tribe, I urge the Committee to report out Senator Tester's bill while it deliberates on what it might do to establish a new recognition process.

Thank you.

[The prepared statement of Mr. Sinclair follows:]

PREPARED STATEMENT OF HON. JOHN SINCLAIR, PRESIDENT, LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA

Chairman Dorgan, Vice Chairman Barrasso, and honorable members of the Senate Committee on Indian Affairs, I want to thank you for holding this extremely important hearing. Most particularly, I want to thank, Senator Jon Tester, who has always been the Little Shell Tribe's dear friend and tireless champion.

You may remember me. During my six years as President of my tribe, I have testified before Congress on Federal Recognition issues on three separate occasions to provide evidence of the ways in which the Department of the Interior's Federal Acknowledgement Process is hopelessly broken. My name is John Sinclair, and like my grandfather and my father before me, I have been honored to serve my tribe during my Tribe's decades-long, painful history of petitioning the Federal Government for recognition and a reservation so that, finally, justice will be done for the Little Shell people.

Our experience with this process proves two things: first, that the process is deeply flawed; second and even worse, the process cannot be counted on to result in the recognition of legitimate Indian tribes—the stated goal of the process. As every government in Montana acknowledges, the Little Shell Band of Chippewa Indians is an Indian tribe. And yet, the Bureau of Indian Affairs (BIA) very recently refused to recognize the Tribe. Mr. Chairman, simply put, the administrative recognition process is a mess and, in all fairness and justice to Indian people, the Congress must step in and fix it. Every time a legitimate tribe fails, it undermines the sovereignty of all tribes.

The history of our Tribe is the first part of this story. Our history shows what every government of Montana knows—that the Little Shell people constitute an Indian tribe. The BIA's long and tortuous administrative deliberations on the Little Shell's petition for federal recognition is the second part of the story—that the Tribe has been subjected to an interminable and intrusive process that failed to see the reality of Little Shell tribal existence. In its insatiable desire for more and more paper, the BIA process missed the forest for the trees. Based on our painful experience with this failed process, the Little Shell people have serious recommendations to make to Congress to fix this mess.

The History of the Little Shell Tribe

The Little Shell Tribe of Chippewa Indians is a successor in interest to the Pembina Band of Chippewa Indians in North Dakota. We were buffalo hunters who lived and hunted around the Red River and the Turtle Mountains in North Dakota in the early 1800s. The Pembina Band was recognized by the United States in an 1863 treaty that was ratified by the Senate. *See* Treaty of October 2, 1863, 13 Stat. 667. After the treaty, some members of the Pembina Band settled on reservations in Minnesota but our ancestors followed the buffalo herds into western North Dakota and Montana, eventually settling in Montana and in the Turtle Mountains of North Dakota.

In 1892, the United States authorized the creation of a commission to negotiate for a cession of land from the Turtle Mountain Chippewa and provide for their removal. Chief Little Shell and his followers walked out of the negotiations and refused to accept the terms of the eventual agreement. Some of Little Shell's followers moved to Montana and joined with other members of the Pembina Band who had settled in Montana; accordingly, our collective Pembina ancestors came to be known as the "Little Shell Band." When our traditional means of livelihood died with the buffalo herds, our ancestors were left to eke out an existence in a number of shantytowns across Montana. We became known as "the trash-can Indians," or "the landless Indians." Forced to live in communities which did not welcome us, our people faced severe racism and discrimination throughout Montana, some of which continues today.

For one hundred years now, Congress has been aware of, and has attempted to address, the plight of the Little Shell people. In 1908, Congress first appropriated

funds to settle our people on a land base. *See* 35 Stat. 84. In 1914 Congress again appropriated funds for this purpose, and continued to do so every year thereafter until 1925—always to provide a reservation land base on which to settle the "homeless Indians in the State of Montana." Unfortunately, no land was ever acquired with these appropriated funds and accordingly, because we had no land base, the Department of the Interior did not recognize us as a result of these appropriation acts.

In the 1920s, newspaper articles chronicled our plight, and our leaders pleaded for help for the destitute Little Shell people. Tribal leader Joseph Dussome asked Congress, "Are we not entitled to a Reservation and allotments of land in our own County, just the same as other Indians are?" Two weeks later, the Department of the Interior rejected our leader's plea:

> The Indians referred to are Chippewas of the Turtle Mountain Band. They were under the leadership of Little Shell who became dissatisfied with the treaties of the United States and the Turtle Mountain Band of Chippewas. He accordingly refused to accede thereto . . . The disaffected band, by its failure to accede to the terms of the treaty and remove to the reservation is now unable to obtain any rights thereon for the reason that the lands of this band are all disposed of, and the rolls became final[.] . . . There is now no law which will authorize the enrollment of any of those people with the Turtle Mount band for the purposes of permitting them to obtain either land or money.

Letter of Asst. Secretary Scattergood, dated December 14, 1931. Three years later, however, Congress enacted the Indian Reorganization Act (IRA), which provided a mechanism for groups of Indians like ours to organize and apply for land. In December 1935, the Commissioner of Indian Affairs took steps to organize our people under the IRA. The Commissioner proposed a form to enroll our people, stating:

> It is very important that the enrollment of homeless Indians in the State of Montana be instituted immediately, and it is proposed to use this form in the determination of Indians who are entitled to the benefits of the Indian Reorganization Act.

BIA Letter, December 23, 1935. This effort resulted in the Roe Cloud Roll, named after Dr. Henry Roe Cloud, an Interior official who played a large part in the project. Once the roll was complete, the Field Administrator clearly stated that the purpose of the roll was to settle our people and bring them under active federal supervision:

> The landless Indians whom we are proposing to enroll and settle on newly purchased land belong to this same stock, and their history in recent years is but a continuation of the history of wandering and starvation which formerly the Rocky Boy's band had endured.
>
> Out of the land purchase funds authorized by the Indian Reorganization Act, we are now purchasing about 34,000 acres for the settlement of these Indians and also to provide irrigated hay land for the Indians now enrolled on Rocky Boy's Reservation. The new land, if devoted wholly to that purpose, would take care of only a fraction of the homeless Indians, but it is our intention to continue this program through the years until something like adequate subsistence is provided for those who cannot provide for themselves. The first step in the program is to recognize those Indians of the group who may rightfully make claim of being one-half degree, which is the occasion for presenting the attached applications. The fact of these people being Indian and being entitled to the benefits intended by Congress has not been questioned.

Roe Cloud Roll applications, 1937. The Department of the Interior was never able to fulfill this promise. The limited resources available to acquire land were expended for tribes already recognized. In 1940, Senator James Murray formally requested that the Department fulfill the Federal Government's promise to acquire land for the Little Shell Band. Assistant Commissioner Zimmerman responded that his office was "keenly aware of the pressing need of the landless Chippewa Cree Indians of Montana. The problem thus far has been dealt with only in a very small way. I sincerely hope that additional funds will be provided for future purchases in order that the larger problem remaining can be dealt with in a more adequate manner." Unfortunately, the Federal Government's efforts to assist the Little Shell Tribe gave way during the termination era of the 1950s, and, as a result, the land promised for our people was never forthcoming.

The Tribe's Experience with the Administrative Process

When the acknowledgment regulations were first adopted in 1978, the Little Shell Tribe was hopeful that this process finally provided the means by which the Tribe would become federally recognized and eligible for the federal Indian services that all other tribes in Montana enjoy. As the years passed, though, this hope became fear, resulting in a federal pronouncement that the Little Shell Tribe does not constitute an Indian tribe. This pronouncement is wrong, as every government in Montana knows. And this pronouncement has caused intense pain and sadness to the Little Shell people. Now, the Tribe's only real hope is the passage of S. 1936, and the Tribe is deeply appreciative to Senator Tester and Senator Baucus for giving us this hope. Without it, our people would truly be despairing now.

The administrative process is so long and so intrusive that words can hardly describe it. A few basic numbers, though, will give the committee a sense of what the Little Shell people have endured in this process. The Little Shell Tribe first petitioned for recognition in the administrative process in 1978. On October 27, 2009—31 years after the Tribe initiated the administrative process—the BIA issued its Final Determination on the Tribe's petition. During these long years that the BIA deliberated on the Tribe's petition, the Tribe lost a whole generation of tribal elders and a whole generation of Little Shell children was born and grew to adulthood. These 31 years of deliberation on the Tribe's petition produced more than 70,000 pages of material that constitute the administrative record in the case. Placed one on top of the other, these 70,000 pages would be 35 linear feet in height. Put another way, the BIA record includes nearly 20 pages of documentation and analysis for each member of the Little Shell Tribe. The Tribe was represented through this process by the Native American Rights Fund (NARF), which hired the multiple experts needed to navigate the process and devoted hundreds of hours of attorney time. NARF estimates that it has expended more than $1 million in hard costs on the Tribe's petition and an additional $1 million in attorney time. Even if the process were otherwise perfect and resulted in the recognition of every legitimate tribe that went through it, these numbers alone show that the process is completely run amok, requiring detailed analyses and documentation beyond anything approaching reason.

Unfortunately, though, even if a legitimate tribe has the stamina, patience, and resources to make its way through this process, it cannot be certain that it will be rewarded with federal recognition at its end. There are 7 mandatory criteria used by the BIA to determine whether a tribe exists as such, 4 of which are substantive and 3 of which are mechanical (e.g., whether the tribe has been terminated.) *See* 25 CFR § 83.7 Some of the substantive criteria are really irrelevant to whether a tribe exists, others are duplicative, and the key criteria are so subjective as to defy even handed and fair application. The Little Shell Final Determination reflects all these flaws.

First, it is important to point out that there is no question that the Little Shell people are descendants of the Pembina Chippewa. The BIA itself found in the Final Determination that nearly 90 percent of the Little Shell membership has proven their descent from the Pembina Chippewa. And remember, these same Pembina Chippewa negotiated treaties with the United States. It would seem reasonable that where, as in the case of Little Shell, the Tribe has proven its descent from a treaty recognized entity, there should be some flexibility in the application of the other criteria. Sadly, this is not the case. The BIA found that the Little Shell Tribe had failed to prove 3 other criteria.

On criterion a, or identification of an Indian entity, the BIA found that the Little Shell had failed to give evidence of such between 1900 and 1935. In the Tribe's view, this criterion is irrelevant to whether the Tribe exists as such. It basically says that, even if you are a tribe and can meet all the other criteria, *you will not be recognized unless outsiders have written down someplace that you are an Indian tribe.* What sense does this make? If a tribe is a tribe, it shouldn't matter whether outsiders have recorded it as such. So failure on this criterion is meaningless on the basic question of whether the Little Shell constitutes an Indian tribe.

On criterion b, or proof of community over time, the BIA found insufficient evidence for Little Shell. The BIA also found insufficient proof on criterion c, political authority, for the same period of time. These 2 criteria overlap significantly, as the regulations themselves indicate. *See* 25 CFR §§ 83.7(b) (v), 83.7(c) (3). The overlap is also evident from the fact that every single petitioner which has failed on one has also failed on the other.

These 2 criteria, b (community) and c (political authority), are so subjective that any tribe's evidence on them can be viewed as sufficient by one researcher and as insufficient by another. The criteria require proof of relationships—interaction among significant numbers of the members, bilateral political relations, etc. Basi-

cally, according to the BIA, the question is one of whether there are social and political boundaries that separate the tribal group from others.

As applied by the BIA, these criteria cannot be quantified. They require that a judgment call be made in each case. And because the data compiled in each case is so massive, every researcher's overall assessment of the data is different. The Little Shell petition suffered from this flaw. For example, the Final Determination essentially concludes that there was no historic community of Little Shell, that the Tribe consists of individual Indians who sort of came together over time. But the researcher's assessment of the data in the Proposed Finding on the Little Shell petition was different. The Technical Report in support of the Proposed Finding documents that the Little Shell people responded to the disappearance of the buffalo by coming together consciously, sometimes by decision formally made by the group. Technical Report, Proposed Finding, p. 45.

This highly subjective analysis of massive amounts of data explains how the Proposed Finding on the Little Shell could be positive while the Final Determination was negative. It all depends on a personal judgment regarding an overwhelming amount of data. Basically, the BIA is looking for tribal boundaries, a tribal community that is separate from others. But if you look at a chain link fence with your face right against it, you see the holes, not the links, and you fail to see the boundary. If you take just a few steps back, you can see the fence and the links that the separate those inside the fence from those outside the fence.

Former Assistant Secretary Kevin Gover understood this. He took a step back from the thousands of pages of data compiled on the Little Shell Proposed Finding to look at the Tribe as a whole in the context of its history. He understood that traditional, migrating tribes like Little Shell just do not generate the paper record that the BIA interprets the regulations to require. And he understood that the real question is does the group constitute an Indian tribe, not whether the group has a piece of paper on each of the mandatory criteria for every ten year period. The regulations themselves purport to require that each tribe's petition be evaluated in the light of its own historical circumstances, but the BIA gave no weight on the Little Shell petition to the federal policies that wreaked havoc on the Tribe. Rather, solely for the sake of administrative uniformity, the BIA takes the position that no departure from its analysis in every other petition is permissible. Every tribe must fit the BIA's mold or recognition is denied.

At the end of the day, this is the most fundamental flaw in the administrative process. It examines every tribe not just microscopically, but down to the subatomic level! And unless the features of that tribe are just like every other tribe that has been recognized, recognition must be denied. The Little Shell is penalized because it maintained its traditional life following the buffalo as long as possible instead of settling down into one place. Unless the regulations are applied in a flexible manner as Assistant Secretary Gover did, the regulations simply do not work for a migratory tribe like Little Shell.

Those who know the Little Shell Tribe the best all know that we are an Indian tribe. The State of Montana recognizes Little Shell as an Indian tribe. Every tribe in the State of Montana supports recognition of the Little Shell, including our close relatives at Turtle Mountain in North Dakota and at Rocky Boy's. Because of the strong support for Little Shell recognition, there was not a single, substantive comment made in opposition to the BIA's favorable Proposed Finding on the Little Shell petition. Nonetheless, the BIA could not see the Little Shell community and refused to recognize the Tribe. This is morally indefensible.

The Tribe's Recommendations on Recognition Reform

It is essential that the Congress step in to stop this miscarriage of justice. Congress did not create the BIA's process and has never blessed the mandatory criteria applied in that process. Both must be examined and changed in a comprehensive way in reform legislation. And Congress must do so now to make sure that no other Indian tribes are forced to endure what the Little Shell Tribe has endured.

Based on our nightmarish experience, the Little Shell Tribe makes the following recommendations to Congress regarding reform of the process:

1. The recognition process should be taken out of the hands of the BIA. Of course, the BIA has great experience with federally recognized tribes. But it does not have great experience with non-federally recognized tribes and has proved that it is not capable of identifying all legitimate Indian tribes.
2. The recognition criteria must be changed. The a criterion, identification as an Indian entity, should be eliminated because its absence does not disprove tribal existence. And the overlapping and highly subjective b (community) and

c (political authority) criteria should be combined and redefined to eliminate the subjective and highly detailed examination.

3. The documentary burden must be reduced. It just makes no sense to compile records consisting of tens of thousands of pages in each case. Obviously, Indian ancestry is necessary. But it really is not necessary to present a complete profile of the community, literally showing the interaction of all tribal members, every ten years.

4. There must be meaningful deadlines in the process. It is just not acceptable that tribes spend 30 years in a recognition process.

There is a recognition reform bill that is now pending in the House of Representatives. It was introduced by Mr. Faleomavaega and is H.R. 3690. This bill would abolish the BIA process in favor of an independent commission to process petitions for recognition. The Little Shell Tribe supports this idea and many of the other reforms contained in H.R. 3690.

In the administration of Indian affairs, the Congress has no more fundamental responsibility than determining which Indian people are subject to federal Indian statutes and policy. Congress can no longer leave this fundamental responsibility to the administration of inflexible bureaucrats at the Bureau of Indian Affairs. In the name of the Little Shell people, I urge the committee to move forward immediately on this important issue. Justice must also be done for the Little Shell Tribe, the most recent victim of this flawed administrative process, by the swift enact of S. 1936, to extend the federal recognition that Little Shell deserves.

The CHAIRMAN. Chairman Sinclair, thank you very much.

Next we will hear the Chairwoman of the Muscogee Tribe in Florida, the Honorable Ann Tucker. Ms. Tucker, you may proceed.

STATEMENT OF HON. ANN D. TUCKER, CHAIRWOMEN, MUSCOGEE NATION OF FLORIDA

Ms. TUCKER. Thank you. First, I want to thank Senator Nelson and his staff for their continued support of our tribe in this process.

Chairman Dorgan and honorable members of this Committee, I am Chairwoman Ann Denson Tucker of the Muscogee Nation of Florida, a Florida tribe of Eastern Creek Indians. I am again honored to represent my tribe's people on the issue of Federal recognition.

As petitioner number 32 in the Office of Federal Acknowledgement, we are one of the last of the old tribes who filed a petition before the 1978 regulatory changes. We are shackled to a process describe by an in-depth report of the United States GAO as irrevocably broken.

When we read the report, our tribal government had to face the fact that our evidence, which now fills 144 banker boxes, was not going to cut it in the OFA. Jim Crow laws in North Florida did not allow for Indians to live openly. Therefore, external identification is not possible for us for the first part of the 20th century. We have no more resources to fight in-house changes, or worse, legal precedents from Federal courts that have become a mainstay in the recognition process.

The burden of proof is on the Indian tribe. But today there are no grants to help petitioners respond to the new precedents. There is no grandfathering in. There is little to no written communication on proposed agency changes, no input on Federal court cases involving one petitioner whose findings can and will impact every other petitioner left in the OFA process.

Our universe becomes nothing more than 100 years of 10-year increments, scanned and digitized, sorted four ways and subject to bureaucratic interpretation. For them, our world is a paper trail.

We will never have enough paper for the current process, and we will never have the right paper. We have buried two generations of people waiting for self-determination. The elders of the third generation are now in their 80s. We did not come to Congress on a whim.

It is a frightening reality that when a process is broken, Congress is where an Indian tribe from Bruce, Florida, has to come to. We have spent the last 10 years watching this same broken process eliminate petitioners, and now this includes the Little Shell, who wait in a 90 day window to receive a final determination that will demoralize their people and the leaders who have struggled to protect their rights for these past 30 years. So it will be with us. Muscogee Nation of Florida has no confidence that a positive determination will be issued for our tribe. How can it be when we share similar experiences in a broken process?

We are among the oldest petitioners left, and are destined to fail because we are exactly what we claim to be: an Indian community and government who lived separate and distinct in a world of Jim Crow law. We did not come to Congress to circumvent the administrative process. We worked for 20 years to try to answer every OFA criteria and filed our paperwork to move to "Ready, Waiting for Active Consideration." We came to Congress because we believe we have no option. We can sit in the OFA and be turned down because of historical gaps directly caused by Jim Crow laws, or we can come here. We can sit in the OFA while a new process is created that we do not have the fiscal ability to respond to or we can come here. We can be a tribal government whose hands are tied while our impoverished people live in substandard conditions, or we can come here to fight for the immediate relief and honor of self-determination from a government-to-government relationship.

Our tribe will never fit into pre-established criteria that do not allow for the devastating historical impact of State and local policy. We are not the exception as a tribe in this current process. We are the norm. And that is an unfortunate truth.

One process cannot fit all, not when it comes to the histories of indigenous people. We are not all alike. And the process has to have enough flexibility that it allows for and accepts this fact. Once again, I have come from Bruce, Florida, to tell you that we are a 150 year old community of Creek Indians waiting for justice. Our quality of life matters. The preservation of our culture and our tradition matters. The repatriation of our dead matters. And it matters now, not five years from now when the OFA makes a determination on Muscogee Nation of Florida that may or may not be just, and may or may not be reversed.

I came here because I am the head of a tribal government for a people who managed to survive Governor Andrew Jackson. We have survived Indian removal and genocide, the Civil War, the burning of our courthouses, the Jim Crow laws and their KKK enforcers. Today we find our existence threatened by a broken process, so we have had to place our faith in you. We still exist, just like we always did, and we deserve recognition. We have waited long enough for a broken process to determine our fate. I ask you today to stand for our people.

Thank you.

[The prepared statement of Ms. Tucker follows:]

PREPARED STATEMENT OF HON. ANN D. TUCKER, CHAIRWOMEN, MUSCOGEE NATION OF FLORIDA

Chairman Dorgan, honorable members of this Committee, I am Chairwoman Ann Denson Tucker of the Muscogee Nation of Florida, Florida Tribe of Eastern Creek Indians. I am again honored to represent my Tribe's people on the issue of federal recognition. As Petitioner Number 32 in the Office of Federal Acknowledgement, we are the last of the old Tribes who filed a petition before the 1978 regulatory changes. We have seen many things.

We are shackled to a process described by an in-depth report of the U.S. General Accounting Office as irrevocably broken. When we read the report, our Tribal Government had to face the fact that our evidence which fills 144 banker boxes was not going to cut it in the OFA. Jim Crow Laws in North Florida did not allow for Indians to live openly. Therefore, external identification was not possible for us in the first part of the 20th century.

We have no more resources to fight in-house changes or worse, the legal precedents from federal courts that have become a mainstay in the recognition process. The burden of proof is always on the Indian Tribe, but today, there are no grants to help petitioners respond to the next new precedent. There is no Grandfathering in. There is little to no written communications on proposed agency changes, no input on federal court cases involving one Tribe whose findings can and will impact every other petitioner left in the OFA process. Our universe becomes nothing more than 100 years of 10-year increments, scanned and digitized, sorted 4 ways, and subject to bureaucratic interpretation. For them, our world is a paper trail. We will never have enough paper for the current process. We will never have the right paper.

We have buried 2 generations of people waiting for self-determination. The elders of the 3rd generation are now in their 80s. We did not come to Congress on a whim. It was a frightening reality that when a process is broken, Congress is where an Indian Tribe has to come. We have spent the last 10 years watching this same broken process eliminate petitioners, and now this includes the Little Shell, who wait in a 90 day window to receive a final determination that will demoralize their people and the leaders who have struggled to protect their rights these past 30 years. So it will be with us. Muscogee Nation of Florida has no confidence that a positive determination will ever be issued for our Tribe. How can it be when we share similar experiences in the OFA's broken process? We are the oldest petitioners left and we are destined to fail because we are exactly what we claim to be: an Indian community and government who lived separate and distinct in a world of Jim Crow Laws.

We did not come to Congress to circumvent the Administrative Process. We worked for 20 years to try to answer every OFA criteria and we filed our paperwork to move to Ready, Waiting for Active Consideration. We came to Congress because we have no other option. We can sit in the OFA and be turned down because of historical gaps directly caused by Jim Crow laws or we can come here. We can sit in the OFA while a new process is created that we do not have the fiscal ability to respond to, or we can come here. We can be a Tribal Government whose hands are tied while our impoverished people live in substandard conditions, or we can come here to fight for the immediate relief and honor of self-determination and a government-to-government relationship with the United States. Our Tribe will never fit into pre-established criteria that do not allow for the devastating historical effects of state and local policies. We are not the exception as a Tribe in the current acknowledgement process. We are the norm. And that is an unfortunate truth. One process cannot fit all—not when it comes to the histories of indigenous people. We are not all alike and the process has to have enough flexibility that it allows for and accepts this fact.

Once again I have come from Bruce Florida to tell you that we are a 150-year-old community of indigenous people who are waiting for justice. Our quality of life matters. The preservation of our culture and our traditions matters, the repatriation of our dead matters—and it matters now—not 5 years from now when the OFA makes a determination on Muscogee Nation of Florida that may or may not be just, and may or may not be reversed within the Department of Interior or by Congress. I came here because I am the head of a Tribal government for a people who have managed to survive Governor Andrew Jackson. We have survived Indian removal and genocide, the Civil War, the burning of our courthouses, the Jim Crow Laws

and their KKK enforcers. Today we find our existence threatened by a broken process so we have placed our faith in you.

We still exist just like we always did and we deserve recognition. We have waited long enough for a broken process to determine our fate. I ask you today to stand for our people.

On behalf of the tribal government and people of Muscogee Nation of Florida, thank you for allowing our voice to be heard.

The CHAIRMAN. Chairperson Tucker, thank you very much for your testimony. We appreciate your coming to Washington, D.C.

Finally, we will hear from Patty Ferguson-Bohnee, the Director of the Indian Legal Clinic in Tempe, Arizona. Welcome.

STATEMENT OF PATTY FERGUSON–BOHNEE, DIRECTOR, INDIAN LEGAL CLINIC; CLINICAL PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY

Ms. FERGUSON-BOHNEE. Thank you, Mr. Chairman and Senator Tester. Thank you for inviting us here today.

I am the Director of the Indian Legal Clinic, and the students in the clinic have helped to prepare the testimony, and they are here and present today. They are Rebecca Ross, Vanessa Verri, Derrick Beetso and Dan Lewis.

The CHAIRMAN. Can we have the students stand up so we can identify them? Thank you. Thank you for being here.

Ms. FERGUSON-BOHNEE. As it has already been stated, the Federal acknowledgement process has been the focus of legislation introduced in both the House and the Senate and of the Committee hearings in this chamber over the past many years. As I think it is fair to say, that progress has been slow in developing a comprehensive solution to the issues at hand. Indeed, since the Committee's last hearing in April, 2008, there was some movement by the Bureau of Indian Affairs to address a few issues through the guidance published in May, 2008. Notably, clarification of when from historic times to the present begins.

However, in an effort to promote further progress, we are pleased to provide the Committee with additional views that may improve the process. And the issue before you is to decide whether the OFA process can be fixed. If so, how, and if not, what alternatives should Congress consider to replace or reform the system?

The Federal acknowledgement process sought to redress the inconsistent standards applied by the Administration in recognizing tribes and to provide an opportunity for those tribes who lacked formal acknowledgement to obtain it in a timely and a fair manner. Neither the 1978 nor the 1994 regulations anticipated that tribes needed experts to produce or to complete a petition.

The implementation and reality, however, have been quite different. As you have heard the testimony, petitioners have spent in some cases millions of dollars preparing petitions that don't meet the standards of the Bureau of Indian Affairs. After three decades, only 45 to 48 petitions have been determined through the process, and the process is plagued with the exact problems that the regulations sought to address.

We are left with a process that is not transparent, that applies an increased burden of proof on the petitioner, that is untimely, and that lacks resources for both the petitioner and the Office of Federal Acknowledgement. The current standards have steered so

far from the intent of the regulations that the OFA process must be overhauled in a meaningful way to address these problems.

Due to the increased burden and shifting standards, the rules for evaluating petitions have changed without rulemaking. The main reason for this is because the interpretations left to agency discretion have changed while the criteria have remained the same. Some petitioners would argue that the current process is adversarial, and is definitely adjudicative, without the benefit of meaningful discovery. The process lacks transparency, leaving petitioners without clear direction of how criteria are applied and how the regulations are interpreted.

A major problem in the current process is the application of the reasonable likelihood standard. Reasonable likelihood is a standard identified in the regulations to evaluate the sufficiency of evidence supplied by the petitioners. The plain language of the regulations provides that in evaluating the seven criteria, 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.

Reasonable likelihood is the lowest evidentiary burden. This standard means that when reviewing the available evidence, is it more likely than not that the petitioner met the criterion. While the petitioner's burden of proof, reasonable likelihood, is the lowest evidentiary burden, the evidence necessary to meet the criteria has increased, requiring petitioners to exceed the standard by providing more documentation and analysis than required in the regulations. Earlier petitions, for example, were not required to satisfy the evidentiary burdens that current petitioners must satisfy.

From reviewing proposed findings and final determinations, it seems that the standard of proof for issuing decisions shifts based on who is making the decision. The benchmarks, therefore, are not clearly defined. Conflicting statements and decisions as to how evidence will be applied is not helpful. For any positive and fair reform, there must be, one, commitment to funding the petitioner and the adjudicative body, whether it is OFA or some other process; two, clarification of the standards; three, clarification of the burden of proof; and four, provide for the exchange of discovery so that the petitioner knows what evidence is being presented in its case.

There are several options. The first is to do nothing and to allow OFA to revise the guidelines or allow Interior to develop revised regulations. If the OFA only revised its guidelines, these will not address the serious issues that have been identified by the GAO and others as to flaws in fairness and funding. Further, the agency has been given numerous opportunities to work within its framework to provide meaningful reform, and it has failed to do so.

Another option is to pass legislation defining the criteria, the burden of proof, and direct the OFA to follow the criteria and standards set forth by Congress, and to appropriate funding with sufficient staff and resources for this purpose. A third option is to create a commission or an administrative law judge process that replaces OFA, allowing for increased transparency, funding for petition development and application of the appropriate burden of

proof to the criteria. It should also include an implementation of a sunset provision, setting deadlines for bringing the recognition process to an end, and implement time frames for processing petition applications.

I would like to thank you for your time and I would be happy to address any questions you may have.

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

PREPARED STATEMENT OF PATTY FERGUSON-BOHNEE, DIRECTOR, INDIAN LEGAL CLINIC; CLINICAL PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY

Good morning Mr. Chairman and members of the Committee. My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University ("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.

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.

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[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; 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

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[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

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[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

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[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]

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[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.

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[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

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[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;

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[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

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[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

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[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

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[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
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> > 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

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[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

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[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

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[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

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[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

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[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

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[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

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[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 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]

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[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

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[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.

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[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

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[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

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[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

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[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]

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[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

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[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

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[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.

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[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 1392[200] 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

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[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]

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[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.

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[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,

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[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

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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

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[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(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

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[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, illusionary 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.

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[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

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[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]

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[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.

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[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

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[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.

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[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

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[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.

The CHAIRMAN. Ms. Ferguson-Bohnee, thank you very much for your testimony. We appreciate the testimony of all four of you.

A couple of questions, if I might. Ms. Tucker, my understanding is that you filed a letter of intent in 1978.

Ms. TUCKER. Yes, sir.

The CHAIRMAN. So that is 31 years ago. You filed all of your documents in 1995?

Ms. TUCKER. We had filed them before that also. They were returned when the regulatory change took place.

The CHAIRMAN. This says that all documents received 9/28 in 1995?

Ms. TUCKER. Yes, for the second regulatory process, yes, sir.

The CHAIRMAN. And then nothing happened to them for eight years. And then in 2003, they were given ready status, is that your understanding of the process?

Ms. TUCKER. Yes, sir.

The CHAIRMAN. Despite the fact that you are in ready status, there are, you are not in the top tier at this point, in active status?

Ms. TUCKER. No, sir.

The CHAIRMAN. The reason I ask that question is that describes to me the difficulty here. If you filed the documents before and then leading up to 1995 and 2003, eight years later, you are put in ready status, but you are not now, six years even after that, in a situation where you are on the active list.

Ms. TUCKER. No, sir.

The CHAIRMAN. So it is just a system that is not working very well. And I assume that were I or Senator Tester a petitioner, we would be frustrated as well and trying to find a table to express that frustration.

Mr. Ettawageshik, can I call you Frank?

[Laughter.]

Mr. ETTAWAGESHIK. Sure. I have been on a first name basis with people all my life.

The CHAIRMAN. Thank you. How long had you been in the process before deciding to go to the Congress for recognition?

Mr. ETTAWAGESHIK. We had been in the process only a short while. We had not been in the process for a decade or more. But we realized, because of the number that we were at that it would take us, at the rate they were going, even with the completed petition, it would take us years before we would be considered.

The CHAIRMAN. I see. I will call you Frank, you call me Byron. [Laughter.]

Mr. ETTAWAGESHIK. I will call you Mr. Chairman, I think.

The CHAIRMAN. Chairman Sinclair, what is your tribe planning to do next at this point? Will it appeal the decision to the Board of Appeals?

Mr. SINCLAIR. We are considering that option. I don't know if I have a lot of faith in that process, so we have to consider that, and what does that do to this legislative process that we are requesting. So that is kind of where we are there. We are not dismissing it out of hand, but we have to look at it hard.

The CHAIRMAN. Tell me about the process that it took you, you submitted 60,000 pages of documents, I understand.

Mr. SINCLAIR. Seventy, I have heard.

The CHAIRMAN. Seventy thousand pages that are now in the possession of the agency. Over what period of time? I know that your petition spans, or at least the notice of intent, spans back 31 years as well.

Mr. SINCLAIR. Right.

The CHAIRMAN. So over that lengthy period of time, some 70,000 pages were developed. I think Senator Tester's question is germane. Leading up until the decision you had expected, because of other decisions that had been affirmative in that application process that there was not a problem in some of those areas. For example, the issue of having to demonstrate every 10 years. If you are a couple hundred years old, the fact that you can't find a 10 year period some place in the middle of those 20 different decades, I think it had been indicated to you that that is not going to be a problem, providing you can demonstrate the continuum.

Mr. SINCLAIR. Right. I really don't know, as far as in detail, where the gaps were that they are saying we had, or what spans and why the evidence that we buried them in for years wasn't adequate. That is the biggest problem. They came back, in 2000, when they came out with the proposed positive finding, and they say, strengthen your petition. But they don't say in detail where are we lacking and how much do they need. So we end up just burying them in paper.

The CHAIRMAN. Ms. Tucker, in dealing with the Office of Federal Acknowledgement, have they provided you with any guidance on how you might deal with the specific time frames where historical information may not be available?

Ms. TUCKER. No, sir.

The CHAIRMAN. Ms. Ferguson-Bohnee, my understanding is that the petitioners are not allowed access to all the information that the Department is considering in the process. Is that correct?

Ms. FERGUSON-BOHNEE. The petitioners must submit a FOIA request to obtain all of the documents that are being considered in their petition.

The CHAIRMAN. And so, that further adds to the burden and expense, correct?

Ms. FERGUSON-BOHNEE. That is correct. They do have a new process which offers some of the documents in a digital data base. If you have submitted information about your petition and it includes private information, if they then mark on that information then they will redact that personal information about a petitioner because of the Privacy Act.

The CHAIRMAN. You mentioned, when you talked about alternatives, you talked about an administrative law judge, an ALJ process. Can you describe more fully to us what that process would look like, in your judgment?

Ms. FERGUSON-BOHNEE. Yes, sir, and I would also like the opportunity to follow up on that question. Our students have been looking at the administrative law judge process. There would be, as they have in certain agencies now, administrative law judges who the petitioners could go to and present their evidence. Then they would be able to cross examine witnesses. I would assume that the Federal Government would have an interest in those petitioners, so that there would still be an office with experts, because they would want to know who was petitioning through the process. Since it recognizes a political relationship with the United States.

I think one of the issues that Mr. Sinclair and Ms. Tucker mentioned is that there isn't funding for tribes to go through the process. So that would be something that would have to be considered, because many tribes are poor and unfunded, to have to go through the process. So we would recommend some sort of regional petitioner assistance to help tribes navigate that process, so that they wouldn't all be coming to D.C. for a week to two weeks to try to put on a trial, and to take into account that many people who have prepared evidence in these petitioner cases could actually no longer be living, are dead. So then to take into account certain hearsay evidence.

But I think that the primary point that would be positive would be the burden of proof in the standard that an administrative law judge could apply, and apply in an even-handed manner.

The CHAIRMAN. But it wouldn't be unusual that it would cost money in an ALJ process. The fact is, I don't know of a tribe that has not had to bear substantial monetary burden to go through the acknowledgement process at Interior. Isn't that correct?

Ms. FERGUSON-BOHNEE. That is correct. I think for any process, there needs to be some sort of funding. Because there is not a level playing field. And the guidance has changed. I don't remember which year, 2000 or 2005, where the Bureau doesn't do additional research on a petition. So whatever the Bureau is reviewing is whatever the petitioner submitted.

The CHAIRMAN. I think it would be helpful for our Committee if you would wish to submit additional information about those alternatives.

Ms. FERGUSON-BOHNEE. Okay, we will do that.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman. I am going to stay with you, Ms. Ferguson-Bohnee. The previous two gentlemen, Mr. Skibine and Mr. Fleming, had said that the reconsideration appeal

process, the reconsideration and appeal process were the same. Do you have enough knowledge about the recognition process that currently exists to comment on that?

Ms. FERGUSON-BOHNEE. Yes, sir. The reconsideration process is discretionary. You can ask for reconsideration and it can be denied. Then if, obviously because the OHA can deny reconsideration because it goes back to the OFA to reconsider. And I don't think that very many people have been successful through that process. It is a higher burden also in that process than reasonable likelihood.

So I think that Mr. Skibine mentioned that that may be something they are considering changing. If it serves really no function to actually process these petitioners, then I think it probably should be changed.

Senator TESTER. Yes, so the reconsideration process, you said, is a much higher standard than the appeal process?

Ms. FERGUSON-BOHNEE. You would need some new evidence. And it is also a preponderance of the evidence. It is not reasonable likelihood, which is a somewhat higher standard.

Senator TESTER. Thank you. And thanks for your testimony.

Chairman Sinclair, could you give me an indication of what the Government structure is for the Little Shell at this time?

Mr. SINCLAIR. At this time, we have a seven-man council made up of an executive committee with a president, first vice president, second vice president, secretary-treasurer and then three councilmen at large.

Senator TESTER. Okay. Do you ever make decisions that would demonstrate influence over your community from a political standpoint?

Mr. SINCLAIR. Oh, absolutely.

Senator TESTER. Give me an example of one.

Mr. SINCLAIR. Well, you can take the new stimulus money that came out. We made the decision how to spend that money. That would be the latest one.

Senator TESTER. That is good. Can you give me the insight into why there is no available evidence between 1935 and 1900? The definition from the Department said, I don't know if you have seen this or not, Mr. Chairman, I assume you have, but it said that there was no external, there was no evidence that showed external observers that have identified the petitioner as an entity only since 1935, and not since 1900. Do you have any insight as to why that has occurred?

Mr. SINCLAIR. I go back to Ms. Tucker's comments about the time period we are talking about. During that time, there were three factors I think that were involved: Federal action, which made us sell our lands; racism and extreme poverty. I go back to the old bar sign, no dogs and Indians allowed. We were really non-people. Unless we attacked somebody, I don't think they really mentioned us much, and we were not in any position to attack somebody.

Senator TESTER. The last thing that was a determination against you was you didn't comprise a distinct community since historical times, which sounds to me to be, distinct community and Indian entity seem to be very similar to me in impact. And then it went on to say, nor did the petitioner maintain significant social rela-

tionships and interaction as a part of a distinct community since their migration to Montana.

When did you migrate to Montana?

Mr. SINCLAIR. Well, we have always been traveling in that area. We have traveled into Canada. I am not supposed to mention Canada, but that was, the Cypress Hills which extend from Turtle Mountain, up into Canada about 100 miles north of Havre and back down and along the Milk River Valley. That was where we hunted.

Senator TESTER. So there really wasn't a migration to Montana? You have been here forever.

Mr. SINCLAIR. Yes, we were back and forth with the buffalo hunts. That is what we did.

Senator TESTER. I want to thank you, thank you for your patience. I think that you do have some recourse in this, and I will certainly give you my opinion, but that is all it is worth, is an opinion. So we will go from there.

I did have one other question, let me find it here. It was for Frank.

[Laughter.]

Senator TESTER. Frank, if I heard your testimony right, you had talked about agency conflict with the BIA. And I was wondering, if we take this decision away from the BIA, number one, where would you put it?

Mr. ETTAWAGESHIK. Well, the proposals that have been there are to create this separate commission and put it there. Frankly, those of us who have thought about this and looked at it wonder if that will just be putting it in another place where we are still going to have some of the same kind of problems. But of course if you do that, you create a separate commission, you then have, it will take, after it is created it will take a year to get it peopled. Then it will take a while to get rules, and it will take a while more longer to figure out how they are going to work. So you have two or three years before it is really functioning. And then you don't know if it is going to function all that much better than the current system.

So those are some of the problems that we see. It has to be looked at really carefully in any ways that we do this.

Senator TESTER. Once again, I want to thank you all for being here. I didn't ask you any questions, Ms. Tucker, that is because you did such a great job on the Chairman's questions. But I want to thank all four of you for being on the Committee today and the two in the previous panel, too. Thank you all for being here.

The CHAIRMAN. Let me add my thanks to all of you, and say that the hearing record will be held open for two weeks. If there are others who wish to submit formal testimony, we will include it in the hearing record.

I am going to ask my colleagues on the Committee to sign a letter with me to the Secretary of the Interior. I am going to ask the Secretary of the Interior to provide formally for the Committee his views on how to fix this issue. Clearly, this needs fixing. And I don't want to the Interior Department to be a bystander here. I want to hear the views of the Interior specifically on what kinds of approaches does he believe would be necessary for us to be able to have an acknowledgement system that would set targets and

time tables and have a reasonable expectation of completing these things before two or three decades.

So we will submit that later this week to the Secretary and ask within 60 or 90 days if he can provide the Committee formally with his views on those issues.

Ms. Ferguson-Bohnee, you and your assistants will provide some additional information on alternatives that you discussed in your testimony as well.

So again, we thank you for traveling to Washington, D.C. to testify today. This hearing is adjourned.

[Whereupon, at 4:00 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF JOHN NORWOOD, PASTOR, NANTICOKE LENNI-LENAPE TRIBAL NATION OF NEW JERSEY

My name is Pastor John Norwood and I am from the Nanticoke Lenni-Lenape Tribal Nation of New Jersey, which is united with the historically related Lenape Indian Tribe of Delaware in an intertribal alliance known as the "Confederation of Sovereign Nentego-Lenape Tribes." I am writing as a Nanticoke Lenni-Lenape tribal councilman, delegate to the National Congress of American Indians, and the government agent for the confederation. I am humbly requesting that my statement be added to those included in the November 4, 2009 Senate Indian Affairs Oversight Hearing on "Fixing the Federal Acknowledgement Process."

In 1982, the legislature of New Jersey called on the United State Congress to recognize our tribal nation. Having no action taken by congress on the request, an honored tribal elder attended a briefing provided to tribes involved in the federal recognition process. She returned to our people and indicated that the millions of dollars needed to go through the federal acknowledgement process made it insurmountable for poor tribes. Since that time, tribal volunteers have painstakingly gathered the information required for an application, while watching worthy tribal applicants wait for decades only to be denied recognition over minutia. The impact of such a denial is immeasurably and intergenerationally devastating to the psychological, social, and political wellbeing of tribal communities.

The administrative process was meant to be an objective method to correct the relationship between the United States and historically verifiable American Indian Nations without federal recognition. However, the GAO has reported, along with other independent studies and congressional hearings, that the current methodology of the administrative process has become a cumbersome, expensive, and time consuming barrier to the recognition of deserving tribes. The process meant to aid legitimate tribes has become a burdensome obstacle to their recognition.

The particular challenge for many "eastern tribes of first contact" is that legitimate tribal communities of the colonial period that remained in the east often had no contact with the military or federal authorities and were not enumerated in the manner their migrating sister tribal bands and the western tribal nations were. Treaties, which were typically the result of hostile engagements, were not established with tribal communities that peacefully remained in the east and partially assimilated into the dominant society. Some eastern states, eager to be rid of any land claim or treaty entanglements, asserted that there were no more Indians within their borders, as they reclassified or overlooked remaining tribal communities as they saw fit. Some legitimate tribes suffer from this turn of history, which for them, makes the current federal recognition process even more difficult. This reality leaves deserving tribes, which can reasonably document their history, still unable to meet the overwhelming burden of proof now required by the current administrative process.

During the November 4, 2009 Senate Committee on Indian Affairs oversight hearing on fixing the federal recognition process, Senator Byron L. Dorgan indicated his frustration that after many years of review and unanimous agreement on the need for change, little has actually been done. Representative Nick Rahall II, in his opening statements during a House of Representatives Committee on Natural Resources hearing said on November 4, 2009, "Whether or not the Congress decides to exercise our jurisdiction over an Indian tribe does not mean that we do not have the power to do so. If the group is an Indian tribe, it is under our authority as vested by the Constitution. As such, Congress possesses jurisdiction over any tribe that exists, whether formally recognized or not by the Federal Government." Non-federally recognized tribes, which can document their histories, have still been left in limbo and need congress to exercise its authority in changing the federal recognition process in the following ways:

1. Recent federal recognition decisions appear to be focused on what may lacking in an application instead of giving weight to the strengths of an application. Overwhelming evidence in response to one criterion can be overshadowed by missing evidence in another related criterion. During much of the time for which evidence is required, many tribes were more concerned with survival in a socio-political environment that was hostile to their existence; documenting activities was not a high priority, and in some cases could have been dangerous. Therefore, evidence provided for criteria (a) "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900," (b) "A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present," and (c) "The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present," should be viewed in a more unified fashion and not weighed separately. The process should allow for any historical documentation that provides evidence for a tribe's continued communal existence as being sufficient proof to meet requirements (a), (b), and (c) as a whole.
2. The process should give weight to the unique historical situation of each applicant. One challenge for some tribes of first contact is in meeting criterion (e) "The petitioner's membership consists of individuals who descend from a historian Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." Administrative genocide was prevalent in eastern states in regard to dealing with tribes of first contact. The first tribal termination began in 1813 against the Gingaskin, after local officials pushed to racially reclassify tribal families. Similar situations of racial reclassification imposed by the dominant group upon remaining tribal communities are evident in, but not limited to, Virginia, Delaware, and New Jersey. Evidence provided by an applicant that meets criteria (a), (b), and (c) should be viewed to have a positive impact on that applicant's ability to meet criterion (e), especially in geographic areas in which the dominant society's racial reclassification can be demonstrated.
3. The expense and time involved in the current administrative process is unreasonable. Some of the suggested changes indicated above would address this. The process should be one in which the poorest tribe can navigate its way to federal recognition in a matter of no more than two or three years with its volunteers completing the application. Federal assistance for this could come in the form of grants for tribal research and/or funded technical assistance consultants that would evaluate tribal prospects for federal recognition and then provide professional help to a tribe in order to assemble a complete application.
4. There should be some logical connection between an preliminary finding and a final decision. A positive preliminary finding should be relative assurance that the final decision will also be positive. A negative preliminary finding should be a tool that the tribe can use to better focus its research. The preliminary finding, which should be aimed at assisting a tribe in identifying areas of historic evidence it may need to reinforce or in determining its own eligibility for meeting the criteria, should not be completely disconnected from the final decision.
5. Congress should not shy away from legislative recognition. The use of consultants or administrative judges who, being familiar with the unique histories of their respective geographic regions, could provide objective review of the petitioner's evidence and provide a finding for congressional action. This method could greatly reduce the backlog of applicants along with the time and expense involved in the process.
6. Tribes that can demonstrate that they meet the "Montoya" standard used by the federal courts to determine tribal federal common law recognition, should have access to that process without the expense of attorneys and lengthy court cases. In *Montoya v. United States* (1901) the court ruled that a tribe was, "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Tribes should be able to file their evidence with the courts and have a hearing on the matter. Positive decisions through such a process should suffice for federal recognition. This would reduce the backlog of applicants along with the time and expense involved in the process.
7. "Interested parties" should not be able to derail the recognition of a deserving tribe.

Each of these suggestions could be implemented in complimentary fashion to provide objective measures to address the crisis that deserving non-federally recognized tribes have been in for generations. None of the suggestions should be exclusionary toward the others; tribes should be able to apply to each, thereby reducing the likelihood of deserving tribes being rejected.

I appreciate the opportunity to submit this statement on behalf of my people and other deserving non-federally recognized tribes.

PREPARED STATEMENT OF JACK F. TROPE, EXECUTIVE DIRECTOR, ASSOCIATION ON AMERICAN INDIAN AFFAIRS

The Association on American Indian Affairs is an 87 year old Indian advocacy organization located in South Dakota and Maryland and governed by an all-Native American Board of Directors. Our current projects focus to a considerable extent in the areas of cultural preservation, youth/education, health and federal recognition of unrecognized Indian tribes. In regard to the latter, we have been working to support tribes seeking federal acknowledgment for more than 20 years, most recently working with the Pueblo of San Juan de Guadelupe.

The testimony before the Committee amply documented the profound problems with the acknowledgment process. In view of the lengthy delays in considering petitions and the ever-changing and increasing burden of proof upon petitioners, the system clearly is broken. Federally unrecognized tribes that have survived in spite the array of forces pushing them to extinction are now being in effect terminated by a process that is out of control.

The witnesses laid out a number of proposals for the Committee to consider and we are not going to reiterate those ideas. We would like to propose one additional action for your consideration, however. We would recommend that the Congressional Research Service be asked to do an analysis of the decisions by the BlA and document the application (and evolution) of the standards over the 30 years since the recognition process became codified.

Thank you for considering this testimony.

PREPARED STATEMENT OF LISA WYZLIC, CITIZEN, GRAND RIVER BANDS OF OTTAWA INDIANS

My name is Lisa Wyzlic and I am a citizen of the Grand River Bands of Ottawa Indians (GRBOI). I would like to thank you and the Committee for the attention afforded to the inefficiency and inconsistencies of application of standards noted in the federal acknowledgement process during the recent hearing and your commitment to correcting these deficiencies.

As you are aware, as of September of 2008, GRBOI was listed as number lO on the Ready list. The merits on which the Tribe's recognition will be based are summarized in Chairman Ronald Yob's testimony to the Committee in both September of 2007 and September of 2008 and the materials included in our petition, which we were required to submit in 2000 as a condition of the 1997 Michigan Indian Land Claims Settlement.

GRBOI is recognized as a State Historical Tribe by the State of Michigan and has the support of our Senators and Governor as well as other tribes. As noted by BIA Commissioner Collier in 1935, GRBOI was found eligible to reorganize under the Reorganization Act of 1934, but did not have a land base at the time, which was a requirement for reorganization, and there were no federal funds available to assist in acquiring said land. Additionally, BIA Commissioner Thompson in 1976 indicated that GRBOI was functioning as and was accepted as a tribal political entity by the Minneapolis Area and Great Lakes Agency. GRBOI has been found not to have been terminated by Congress, but terminated *as a result of faulty and inconsistent administrative decisions.*

By the inaction of the OFA to act upon our submission we have lost significant funds never to be received. While some of our members have left the tribe and joined our recognized sister tribes for which they are eligible to gain access to services, most remain proud citizens of the Grand River Bands of Ottawa Indians and hope for the day that we are fully recognized by the Federal Government. Although we may not have been waiting as long as some other tribes, we have now been in the process for 15 years (1994 Letter of Intent) with the expectation of our petition being reviewed in 15–20 years. As the Committee so noted, this is not acceptable.

The ancestors of Grand River members were signatories to five treaties dating from 1795–1955. My great-great-great-great grandfather was signatory to at least two said treaties, yet currently our treaty rights are being negotiated by other

Michigan tribes. This should not be the case. As the witnesses testified at the hearing and the Committee agreed, there are significant problems within the acknowledgement process, most notably, the lengthy delays, inconsistent application of standards, and ever increasing burden of proof on top of the financial burden.

Tribes are being terminated or worse, becoming extinct, by virtue of a broken process which has become a denial process rather than an acknowledgement process. Non-recognized tribes are desperately trying to hang on to our cultures, our languages and our sense of identity and provide for our communities and our future generations without the benefit of the financial support and eligibility for programs that comes with recognition. In Michigan it is getting harder and harder to stay connected with our tribe due to economic difficulties which would be relieved if recognition were granted. People would not have to relocate for jobs if they felt they had access to health care and other services, and cultural traditions would be easier to continue if people felt they could travel to gatherings across two counties on an already depleted budget without incurring sometimes devastating expenses.

Several proposals for fixing this broken process were laid out during the hearing and you requested additional materials for consideration from Mr. Skibine and Mr. Flemming as well as from Ms. Ferguson-Bohnee. I ask you to please carefully consider any proposals and move to expedite the implementation of any solutions deemed appropriate. In the interim, I urge you to reconsider your stance on the legislative acknowledgement process.

Thank you for considering my comments.

PREPARED STATEMENT OF PEDRO ACEITUNO, CHAIRMAN, CALIFORNIA CITIES FOR SELF-RELIANCE JOINT POWERS AUTHORITY

Good afternoon Chairman Dorgan, Ranking Member Barrasso, and Members of the Committee. My name is Pedro Aceituno, and as Chairman of the California Cities for Self-Reliance Joint Powers Authority (JPA), I am pleased to submit the following testimony on "Fixing the Federal Acknowledgment Process" to the Committee on behalf of the JPA.

The JPA is a coalition of local communities, chartered under California law, representing several hundred thousand citizens and thousands of local businesses and their employees in Los Angeles and Orange Counties. The process of federal recognition and acknowledgement of Indian tribes is of great interest to the members of the JPA, and we commend the Committee for holding this much-needed hearing on the topic of recognition reform. On behalf of our organization, I would respectfully submit the views of the JPA for the hearing record for consideration as the Chairman, Ranking Member, and Senators on the Committee work together to tackle the current problems with the recognition process and potentially craft recognition reform legislation.

Currently, the JPA is an interested party in the petitions for federal acknowledgement of the Juaneno Band of Mission Indians (designated petitioners 84A and 84B). Through our participation as interested parties in the Juaneno petition, as well as discussions with others intimately familiar with federal acknowledgment, we have noted many areas of serious problems where the recognition process is in dire need of significant reform.

Our observations of faults that need correcting with the current system include:

- The recognition process as currently constituted takes far too long for completion. In the case of the Juaneno petitioners, they first gave notice to the Federal Government in 1982 of their intention to seek federal recognition. 27 years later, the BIA has yet to give a final decision in this matter.
- Overall, there are over 250 potential petitioners who are not even yet on the ready for active consideration list, many of whom have last contacted the BIA decades ago with an intent to pursue recognition, but who have not followed up with any materials or further action. Despite their inactivity, these petitioners still consume time and resources and impact decision making in processing other petitioners.
- Current deadlines under BIA regulations mean little or nothing to the petitioners. Over the past several years, the Juaneno have continually been granted time extensions to complete required work by the BIA, often based on factually-unsubstantiated claims by the petitioners. The routine granting of extensions creates an environment where the petitioners do not take deadlines seriously, do not make sufficient efforts to complete work on time, and take it for granted that there will always be more time available to delay their final determination, even though their historical record or lack thereof remains the same.

- These continual extensions of deadlines are costly to the BIA, other petitioners, and the American taxpayer. The Office of Federal Acknowledgement (OFA) within BIA is small, and has limited resources which are wasted by petitioners who fail to make deadlines. These failed deadlines in turn force other petitioners, who often have their materials ready, to wait longer for active consideration. In some cases, this has prompted costly litigation by these petitioners against the BIA to force active consideration of their petitioners sooner. Taken together, all of these delays and litigation ultimately waste millions of American taxpayer dollars each year.
- Splinter groups of petitioners further complicate and delay the process. In the case of the Juaneno petitioners, there are two official petitioners, as well as at least three splinter groups, meaning that no less that five different factions are claiming to be a Juaneno Indian tribe. The issues of Juaneno petitioner leadership should have been sorted out years ago, by the petitioners themselves. Instead, because of their failure to do so, the BIA must expend additional time and funds attempting to communicate with and sort out the materials received from these quarreling, conflicted factions.
- Another waste of OFA time and resources is the need to fully evaluate all aspects of a petition when it has been clearly established that the petitioner cannot meet all 7 requirements for federal recognition. In such cases, the petitioner should be given an expedited denial of their petition so OFA resources can be redeployed to work on other petitioners that may qualify for recognition.
- The current system of communicating between the BIA and interested parties needs serious improvement. While the BIA does send copies of official correspondence sent to petitioners to interested parties, it does not provide copies of official correspondence from petitioners to the BIA to interested parties. This causes petitioners to be unaware of key or critical requests made by petitioners, such as requests for extensions of deadlines, until after the BIA has considered the petitioner's request and issued a decision. At that point, the interested party receives a copy of a request decision that it had no idea existed, and had no opportunity to comment upon. The only present alternative to help keep interested parties informed of petitioner requests is to constantly bombard BIA and OFA with regular FOIA requests. These FOIA requests are costly and time consuming for all involved, and lead to further delays in the processing of petitions. Lee Fleming, Director of OFA, testified to Congress a few years ago that one of the biggest burdens for personnel in his office is the constant need to comply with FOIA requests, which he cited as a major reason that OFA takes so long to process and come to a decision on petitions.

The good news is that despite these numerous problems, there are numerous actions the Bureau could take which would improve the recognition process for petitioners, interested parties, and the American taxpayer. Based on our experiences, **we would like to submit the following ideas for recognition reform for your consideration:**

- **First, and most importantly, the seven criteria for determining if a petitioner qualifies for federal recognition should not be weakened or loosened in any way.** Weakening these requirements would be unfair to currently recognized tribes who have had to meet these criteria, as well as open an unnecessary controversy over whether petitioners turned down under the old criteria should be allowed to re-apply for recognition under new, weaker criteria.
- To clear the backlog of old, inactive, or non-responding petitioners who have not followed up their letter of intent to seek recognition with any further actions, the Secretary should initiate a program to determine whether these petitioners still are seriously intent on seeking federal recognition. We would suggest that each potential petitioner currently not on the "active consideration" or "ready for active consideration" list be sent official correspondence from the BIA requiring that they re-affirm their interest in pursuing federal recognition in writing within six months, and supply materials necessary to satisfy documentation requirements to be ready for active consideration within twelve months. If a petitioner should fail to reaffirm their interest in recognition, or fail to present initially required documents within the time designated, they should be permanently stricken from the BIA's list of petitioning tribes.
- There should be a cut-off deadline for all potential petitioners to seek federal recognition, after which the program should be closed to future applicants. Once all pending petitioners have either reaffirmed their interest in recognition and supplied all required materials to BIA, or have failed to do so, the list of petitioners eligible to seek recognition should be finalized and closed. In this era

of modern technology and communications, there is no reason that if a group exists that could conceivably satisfy the seven criteria for recognition it cannot at least submit its interest and petition for doing so now. As each year passes, the idea that a real, but currently unrecognized, Indian tribe would exist but fail to even petition for recognition becomes more absurd. At some point soon the process needs to be brought to a close, pending petitions analyzed, and after that ends, the OFA will have fulfilled its mission of identifying all legitimate sovereign Indian tribes in America, and no more remain to be discovered.

- As mentioned above, the BIA should have an expedited denial process for petitioners who obviously do not meet one or more of criteria for federal recognition. This would save the OFA and American taxpayer significant time and resources better spent elsewhere.
- Deadlines in the recognition process should be firm and upheld strictly. Lax deadlines and easy extensions have helped turn a recognition process designed to last months from start to finish for a petitioner into one which lasts decades. If a petitioner fails to do the work necessary to meet a deadline, they should not be rewarded with more time, but rather be forced to go forward with what materials they have at the time. Once again, our supposition here is that a tribe that can legitimately meet the 7 recognition criteria will have the information they need to meet deadlines readily at hand, and its government will be sufficiently well-organized to ensure that it meets deadline requirements.
- Petitioners with multiple splinter groups, such as the Juaneno, should be temporarily excluded from active consideration and given a deadline to present a united petition for a single tribal government entity to the OFA. If they fail to meet this deadline, they should be removed from the recognition process and all related petitions rejected.
- Communications with interested parties should be improved by requiring the petitioners and interested parties to provide copies of all written communications they make to the BIA and OFA, along with proof of service, regarding deadline extensions or other requests to all other interested parties and petitioners. This would relieve interested parties and the BIA/OFA from the time-consuming and expensive FOIA process, and improve the amount of information available to all petitioners and interested parties.

The members of the JPA, as well as the citizens we represent, greatly appreciate your time and consideration of our views on recognition reform. It is our hope that our experiences and insights bill be of value to you in the process of reviewing your policy options. We look forward to working with the Committee as you evaluate options for making legislative changes to the system. We would welcome the opportunity to participate further in any way possible, and of course, are available to answer any questions you may have or provide any further assistance that would be appropriate.

Once again, on behalf of the JPA, its member communities, and their businesses and citizens, we thank you for this opportunity to present our views for the hearing record.

PREPARED STATEMENT OF THE TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT

Mr. Chairman and Members of the Committee, thank you for the opportunity to comment on the Bureau of Indian Affairs (BIA) tribal acknowledgment process. This testimony is submitted on behalf of the Towns of Ledyard, North Stonington, and Preston, Connecticut (the Towns). The Towns have extensive first-hand experience with the federal tribal acknowledgment process, having participated for many years as an interested party in the review of acknowledgment petitions for the two Pequot petitioner groups. Any changes to this process would affect not only our Towns, but the entire State of Connecticut, whose petitioner groups have included the Schaghticoke Tribal Nation (STN), the Schaghticoke Indian Tribe, the Golden Hill Paugussett, and two Nipmuck groups, as well as the two Pequot groups. We address this Committee to express our strong and common concerns with respect to the potential for Congress to intervene in the tribal acknowledgment process and, in doing so, interfere with an administrative process that does not need to be reformed. Simply put, if the goal is to ensure fair, objective, and reasoned decisions on tribal acknowledgment petitions, there is no need for Congressional action.

As a general matter, the primary drawbacks of the current process are its cost to participating parties and the length of time required to undertake a review. The cost problem is difficult to avoid given the detailed nature of the required analysis

and the great importance associated with BIA's decision. This problem can be addressed by offering more technical assistance and ensuring that casino resort financial backers are not allowed to bankroll acknowledgment petitions. The time factor can be addressed through the simple solution of providing more funds to BIA to hire more staff. When left alone from political interference and adequately funded and staffed, the BIA-administered process applying the existing regulatory standards in 25 C.F.R. Part 83 should result in appropriate decisions. The solution to the problems of cost and delay is not to follow the approach outlined in the recently introduced House bill, H.R. 3690, which is to create a new bureaucracy that will give rise to entirely new coordination problems, demand new staff and administrative structure that lack the necessary expertise, operate under a procedure that is biased in favor of petitioner groups, not allow for full participation of interested parties, apply more permissive substantive standards that will favor petitioner groups, and allow the reopening of already decided and even litigated decisions. There is no basis whatsoever for taking any of these actions. As the Committee considers the BIA acknowledgment process, we respectfully request that deference be accorded to the decades of experience that exist under the BIA regulations in 25 C.F.R. Part 83 and that no action be taken to disrupt the status quo procedures and decisions.

Background on Connecticut Local Involvement in Tribal Acknowledgment

The Towns have extensive experience with the tribal acknowledgment process, having participated for close to a decade in the review of the Eastern Pequot and Paucatuck Eastern Pequot petitions. The Towns submitted detailed technical evidence which demonstrated, as ultimately determined by BIA, that neither of these petitioners qualified for federal acknowledgment. Elsewhere in the State, a final determination against acknowledgment of the STN was recently upheld by the Second Circuit Court of Appeals. Through these experiences, we are familiar with all aspects of the acknowledgment process and can address the issues raised in the testimony of the witnesses and in the questions of the Committee members during the November 4 oversight hearing. We offer this testimony with our preliminary views and would be pleased to participate directly in future Committee deliberations.

Impacts on Local Governments

Local governments such as ours are impacted by tribal acknowledgment reviews and decisions in a number of very important ways. In some cases, even before a tribe is acknowledged, the petitioning group files a land claim lawsuit. This was true of the STN group. If challenges to the title of land ownership of residents in an affected community are not filed prior to recognition, they very often either follow, or are threatened to follow, acknowledgment, as was threatened by the Pequot groups. Needless to say, land claim litigation causes serious disruption to the lives of the affected landowners and the economy of the local community. The inevitable connection between land claim litigation and tribal acknowledgment is one reason why rigorous standards must be applied and a timely and efficient procedure used.

In addition to disputes over land title, the acknowledgment of Indian tribes often gives rise to the effort to establish gaming facilities. The Indian Gaming Regulatory Act (IGRA) has created considerable incentive for financial backers to support petitioners seeking recognition. If successful, newly recognized tribes are in a position to reap the significant benefits that flow from gaming on tribal lands. Financial backers cash in through management contracts with the tribes. This is true of the Pequot and other Connecticut tribal petitions, which were bankrolled by wealthy casino backers who spent tens of millions of dollars in the effort to gain recognition for these groups so that massive casino resorts could be developed.

We are well aware that gaming has become a fact of life in the funding of acknowledgment petitions. As we can attest, the acknowledgment process is expensive to participate in, and petitioning groups often have limited means to pursue tribal status and look to financial supporters for the resources to pursue their claims. The solution to that problem is not unfettered, unreported, and uncontrolled financial support from gaming interests, however. The involvement of these funding sources inevitably creates political pressures on the BIA review and adds to the expense and delay in the process due to the volume of evidence submitted, and the delay associated with the small BIA Office of Federal Acknowledgment (OFA) staff responding to massive records and contested proceedings.

Yet another problem for local governments is the establishment of reservations and trust lands, often without regard to existing community land use patterns and economic needs. Trust land and reservation status removes land from state and local jurisdiction. BIA does very little to ensure that establishing such lands for a newly acknowledged tribe is undertaken on a negotiated basis that does not result

in undue adverse impacts on local communities. As a result, local governments such as ours have no choice but to participate in the process.

Newly acknowledged tribes are, of course, entitled to certain benefits. The end result, however, can be a strained and contentious relationship between the tribe and the local governments and residents of surrounding non-Indian communities. As the Department of the Interior itself has stated, recognition has "serious significance" and "considerable social, political, and economic implications for the petitioning group, its neighbors, and federal, state and local governments." Letter from William B. Bettenberg, Acting Assistant Secretary of the Interior, to the President of the United States Senate (Jan 17, 1992). Consequently, any meaningful and fair review of the acknowledgment process must be premised on the understanding of the great importance of these determinations to local governments, as well as the petitioner groups. Federal tribal status should be awarded to petitioning groups only under the most rigorous, searching, objective, professional, and equitable standards, and after all affected parties have the opportunity to participate. We are disappointed that only BIA and tribal groups participated in the November 4 hearing, and we request that any future Committee review include a balanced witness list.

Weakened Criteria

One of the themes of the November 4 hearing was the need for more permissive criteria than the current standards. There is no reason to make any changes to the current standards. They have been in effect in essentially the current form for nearly 30 years, and they have worked well. The standards and the precedents that have evolved under the criteria have served as the basis for dozens of decisions, both positive and negative. Congress should not seek to substitute its judgment for that of the government experts and the multiple layers of public review that have defined these criteria over many, many years.

The 25 C.F.R. Part 83 acknowledgment criteria are detailed and complex. Even small changes in these standards can open the floodgates to new applicant tribes who should not be awarded federal status, but may qualify under the substantially weakened standards. In this regard, we note that the House bill would dramatically change the criteria in totally unjustified ways. As applied to Connecticut alone, those criteria would turn the several negative determinations into positive findings, despite decades of review and tens of thousands of pages of evidence from all parties. There is absolutely no reason to touch the 25 C.F.R. Part 83 criteria other than to favor petitioner groups, including those previously denied.

For these reasons we object to any change to the existing criteria. If Congress is to act on the acknowledgment process, it should not legislate standards. Those criteria should be left to BIA to establish, to be revised through the rulemaking process and public comment, as appropriate.

Lack of Objectivity of Commission

Our second concern relates to the structure and composition of a possible commission on tribal recognition. As proposed in the House bill and urged by some parties, the Commission would not improve the administration of the tribal acknowledgment process. The current BIA system is not perfect, but it at least has sufficient built-in checks and balances to make possible fair and objective decisions. Essential elements of the current process that must be retained include: full participation of interested parties; independent review of an administrative law judge entity; reasonable deadlines; and decision-making based on review by a staff of qualified experts, not political appointees. The proposed Commission fails on all of these fronts. The existing BIA process is not broken; it is simply underfunded. Creating a new bureaucracy is not the answer; more Congressional appropriation and financial assistance to parties participating in the review (on all sides) is.

Involvement of Interested Parties

Numerous examples illustrate how critical the evidence and analysis submitted by interested parties can be to the development of a complete and well-balanced record upon which BIA can make a final decision. Without this participation in the Connecticut petitions, the record would have been one-sided and dominated by the pro-acknowledgment evidence from the petitioners, funded by wealthy gaming interests. The current BIA process allows for such a role for interested parties. The current House bill does not, and the November 4 hearing before this Committee gave no consideration to the important role of third party participation.

We strongly encourage the Committee to make interested parties equal players in any revised acknowledgment process.

Reopening Past Decisions

It must be an accepted premise of any Congressional review of the acknowledgment process that already completed reviews will not be reopened. It can be expected that most, if not all, denied petitioners will seek to take advantage of any such opportunity. In the case of groups funded by gaming financial backers, the reviewing agency will be overwhelmed by documentation and argument. The result will be utter chaos, as the ability to consider yet-undecided petitions is impeded by petitioner groups and their casino backers seeking a second chance. BIA's past decisions are well-considered and based on decades of process. They should be left as they stand, positive or negative.

Conclusion

While certain aspects of the tribal acknowledgment process could be improved, the major problems, such as the lack of adequate funding, staff, and time to conduct appropriate reviews and avoid the pitfall of casino financial backers bankrolling the process, can be addressed without enacting legislation or trying to fix a procedural framework and substantive criteria that are not broken. We would support an effort by this Committee to improve the acknowledgment process by providing adequate funding to BIA and participating parties. Any changes to the current BIA rules cannot be justified.

Thank you for considering this testimony. We would be pleased to provide additional information to the Committee.

ENI F.H. FALEOMAVAEGA
AMERICAN SAMOA

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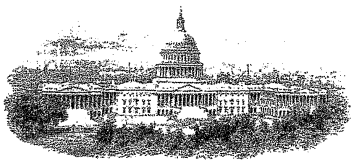

Congress of the United States
House of Representatives
Washington, DC 20515–5201

November 2, 2009

The Honorable Senator Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Dear Chairman Dorgan.

In light of your upcoming oversight hearing to improve the Federal Acknowledgment Process for Indian Tribes, scheduled for November 4, 2009, I write to bring to your attention legislation that I recently introduced. Under H.R. 3690, I propose a new framework to lessen the adverse impact and the unfortunate burden on Indian Tribes seeking federal recognition. This legislation follows suggestions and discussions over the years for legislative remedies to fix the broken process for federal acknowledgement of Indian Tribes.

Most notably, in a testimony before the House Subcommittee on Indian Affairs in 1994, Bud Shapard, the primary author of the original acknowledgment regulations, admitted that "these regulations do not work." Particularly, the "subjective and complicated nature of the criteria (which serve as primary tool for determining Indian Tribes) has resulted in what appears to be inconsistent interpretation of data." In an even more recent statement, Mr. Shapard's agrees that "placing the program with another entity outside the purview of the Department of the Interior with different personnel using different guidelines will probably best serve both the petitioners and the government."

Over the years, addressing concerns with the acknowledgement process has been the subject of numerous hearings in Congress but without further progress. While the cost and length of time are major concerns, the real injustice in this process is the fact that genuine Indian Tribes are denied federal recognition, not because they do not exist, but for lack of certain documents required to prove a particular fact in a particular year.

For this reason, I introduced H.R. 3690 to provide much needed relief to Indian Tribes seeking federal recognition. This legislation abolishes the broken administrative process and replaces it with an independent commission consisting of seven commissioners to be appointed by the President, with the advice and consent of the Senate. These commissioners are authorized to promulgate regulations governing their operations, hire staff, and conduct proceedings as required by the bill to process petitions for federal recognition.

Moreover H.R. 3690 consolidates the seven mandatory criteria currently in the regulations into two criteria. These two criteria contain all the substantive criteria of the existing regulations: 1) proof of descent from an historic tribe; and 2) proof of a community (including proof of political authority.) These criteria are consistent with the regulations and consistent with Supreme Court case law that defines an Indian tribe. For proof of the two criteria, H.R. 3690 adds methods that are objective and can be measured to minimize the subjective evaluation of tribes currently required in the regulations.

ENI F.H. FALEOMAVAEGA
Member of Congress

*H.R. 3690 has been retained in Committee files and can be found at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3690ih.pdf*

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