

PRIMER ON FEDERAL RECOGNITION AND CURRENT ISSUES AFFECTING THE PROCESS

Prepared For NCAI Winter Session
February 2001

Updated November 21, 2001

Jennifer P. Hughes, Esq.

I. The Branch of Acknowledgment and Research

A. The Office

The Branch of the Acknowledgment and Research (BAR) is a division of the Bureau of Indian Affairs (BIA) which implements 25 C.F.R. Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*. These regulations, known as the Federal Acknowledgment Process (FAP), set forth the administrative process by which tribal groups are given federal recognition as an Indian tribe. Federal recognition acknowledges the tribe's eligibility to receive federal services provided to tribes and to enjoy other privileges of federally recognized tribes.

The BAR consists of approximately eleven (11) staff persons-professional anthropologists, genealogists and historians-who evaluate petitions for federal recognition and make recommendations to the Assistant Secretary for Indian Affairs on whether to approve or deny each petition. If the Assistant Secretary approves the petition, he acknowledges tribal existence and establishes a government-to-government relationship between the tribe and the United States.

1. The Volume of Petitions and Letters of Intent

As of February 6, 2001, when the list was last officially updated, the BAR has received 250 letters of intent and petitions from tribal groups seeking federal recognition. Of these, 51 have been resolved: 34 by the Department of the Interior (15 acknowledged, 15 denied, one whose status was clarified by legislation, two whose statuses were clarified by other means and one whose status is pending).

There are currently 12 petitioners on active status and 11 ready, waiting for active status. There are 175 not yet ready for evaluation: 55 of which have submitted partial documentation for their petitions; 105 of which have submitted only a letter of intent

to petition without any other documentation; and nine that are no longer in touch with the Department of the Interior.

The FAP process is rigorous, demanding and time-consuming. Exceptional anthropological, genealogical and historical research is required. The cases on active consideration, including those with proposed findings, have been in the process for anywhere from 2 to 9 years.(1) Many petitions have been in the process much longer. The BAR processes, on average, two petitions each year.(2) The cry for more resources for the BAR, however, has always been overshadowed by other priority needs in Indian Country.(3)

II. The Regulations: 25 C.F.R. Part 83

A. Development of the Regulations

Prior to 1978, federal acknowledgment of Indian tribes was accomplished by Congressional action, various forms of administrative decisions and the courts. It became clear, however, that a uniform process was necessary to address the several acknowledgment claimants whose characters and histories varied widely. The regulations were developed in response to the ad hoc, inconsistent and sometimes arbitrary determinations of tribal status.

Proposed recognition regulations were released on June 16, 1977. The BIA had "approximately 400 meetings, discussions and conversations about federal recognition with other federal agencies, state government officials, tribal groups, petitioners, congressional staff members, and legal representatives of petitioning groups."(4) The BIA also received over 60 comments on the proposed regulations, and 32 comments on the revised regulations which were issued a year later.(5) The final acknowledgment regulations, which were published in September 1978, represented a compromise of diverse interests committed to establishing an equitable process for determining whether a group warranted federal recognition as an Indian tribe.

The regulations established the first detailed, systematic process for reviewing petitions from groups seeking federal recognition. While some tribes still receive federal recognition or restoration of previous federal recognition from Congress, the courts have generally deferred to the Department of Interior for questions of tribal status.(6)

The regulations were revised in 1994 to clarify the criteria for acknowledgment and make more explicit the kinds of evidence which could be used to meet the criteria. Other changes were made to increase the speed at which petitions were

processed. The 1994 regulations also gave a lesser burden to previously acknowledged tribes. The general standards for interpreting the evidence and the standard of continuity of tribal existence, however, remained unchanged.(7)

B. The Petition Process

1. Who can Petition and How Does the Process Start?

Under 25 C.F.R. Part 83, an Indian group that believes it should be acknowledged by the federal government as an Indian tribe and can satisfy the mandatory criteria for acknowledgment can submit a letter of intent to the Assistant Secretary for Indian Affairs requesting such acknowledgment.(8) The group must also submit a documented petition containing detailed evidence in support of its request for acknowledgment and thorough explanations of how it meets all of the criteria for tribal existence.(9) The letter and the petition must be signed by the group's governing body.(10)

2. Who Cannot Petition?

Tribes, organized bands, pueblos, Alaska native villages, and communities which are already recognized as such and receive services from the BIA cannot be reviewed under the FAP process.(11) Neither can associations, organizations, corporations or groups of any character that have been formed in recent times (the fact that a group that meets the mandatory criteria under the regulations has recently incorporated or formalized its existing autonomous political process does not affect the Assistant Secretary's final decision on its petition).(12) Splinter groups, political factions or groups of any nature that separate from the main body of a currently recognized tribe cannot be acknowledged under the FAP process unless the group can establish that it has functioned throughout history until the present as an autonomous tribal entity.(13) Groups that are subject to federal legislation terminating or forbidding federal recognition as a tribe cannot be acknowledged under the FAP process.(14) Lastly, groups that have previously petitioned and were denied cannot petition.(15)

3. How Does the Assistant Secretary Process the Petition?

a. Notice and Interested/Informed Parties

The Assistant Secretary will acknowledge the receipt of the letter of intent of the documented petition (if a letter has not previously been received and noticed) and publish notice of such receipt in the Federal Register.(16) This notice serves to

announce the opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment and/or to request to be kept informed of general actions affecting the petition.(17) The Assistant Secretary will also notify the governor and the attorney general of the state in which a petitioner is located, and any recognized tribe and other petitioner which appears to have a historical or present relationship with the petitioner or may otherwise have a potential interest in the acknowledgment determination.(18)

Under the regulations, an "interested party" is any party that has a legal or property interest in the outcome of the acknowledgment determination. The governor and attorney general of the state in which a petitioner is located are automatically included in this category. It may also include, but is not limited to, local governmental units and any recognized Indian tribes and unrecognized groups that might be affected by an acknowledgment determination.(19)

An informed party is any person or organization, other than an interested party who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.(20)

b. Review of the Petition and Technical Assistance

The Assistant Secretary, through the BAR, then begins the review of the documented petition. He may consider any evidence submitted by interested parties and informed parties.(21) Prior to placing the petition on active consideration, however, the BAR conducts a technical assistance review of the petition to provide the petitioner with an opportunity to supplement or revise the petition.(22) The Assistant Secretary will notify the petitioner of any obvious deficiencies or significant omissions in the petition and will allow the petitioner to supply additional information or clarification on the petition.(23) Once the deficiencies have been addressed, the petition is then placed on active consideration.

c. Proposed Finding

After reviewing the materials submitted, the Assistant Secretary will publish a proposed finding on the petition in the Federal Register.(24) The petitioner or any individual or organization wishing to challenge or support the proposed finding has 180 days from this publication to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding.(25) During this comment period, the petitioner or any interested party can request a formal technical assistance meeting to discuss the reasoning, analysis and factual bases for the proposed finding on the record. This is an opportunity primarily for third parties to have their questions and

concerns be addressed by the BAR staff on the record.(26) The petitioner has sixty (60) days after the comment period ends to respond to the arguments and evidence that were submitted.(27) The Assistant Secretary will then consult with the petitioner and the interested parties to determine a schedule for consideration of the comments and responses.(28)

Sixty (60) days after the Assistant Secretary begins the review of these materials, he shall publish a final determination of the petitioner's status.(29) If the petitioner meets all of the criteria under 25 C.F.R. § 83.7, the Assistant Secretary must acknowledge it as an Indian tribe.(30) Upon publication of the Assistant Secretary's determination in the Federal Register, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals.(31)

C. The Criteria for Federal Acknowledgment (25 C.F.R. Part 83.7)

1. What the Petitioner Must Show

The Assistant Secretary must acknowledge the existence of the petitioner as an Indian tribe if it satisfies all of the following criteria:

- a. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. § 83.7(a).
- b. A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. § 83.7(b).
- c. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. § 83.7(c).
- d. It submits to the BAR a copy of the group's present governing document including its membership criteria. § 83.7(d).
- e. The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. § 83.7(e).

(The petitioner must provide an official membership list certified by the group's governing body. It must also submit a copy of each available former list of members based on the group's own criterion).

- f. The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. § 83.7(f).

(It can meet the criteria if: (1) the petitioner can establish that it has functioned throughout history until the present as a separately autonomous tribal entity; (2) that its members do not maintain a bilateral political relationship with the acknowledged tribe; and (3) that its members have provided written confirmation of their membership in the petitioning group).

- g. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship. § 83.7(g).

A criterion is met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.(32) Conclusive proof of the facts is not required. While the regulations list specific types of evidence that can be used to show that the petitioner has met the criterion, the specific forms of evidence are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criteria.(33)

2. Lesser Burden For Those Previously Acknowledged (Part 83.8)

If a petitioner can provide substantial evidence of unambiguous previous federal acknowledgment, its evidentiary burden of meeting the mandatory criteria is lessened.(34) Evidence to demonstrate a previously acknowledged group must show that it meets criterion 83.7(a) only since the point of last federal acknowledgment. It must show that it meets the requirements of criterion 83.7(b) to demonstrate that it comprises a distinct community at present and that it meets the requirements of §83.7(c) to demonstrate that political influence is exercised within the group at present. The petitioner must meet the rest of the criteria as set forth in part 83.7.(35)

III. Legislation in the 107th Congress to Amend the Process for Acknowledging Tribes

A. S. 504/H.R. 1175

1. Background

Senator Campbell (R-CO), Chairman of the Senate Committee on Indian Affairs, introduced S. 611 on March 15, 1999, to amend the process by which the federal government recognizes Indian tribes. A similar but not identical bill, H.R. 361, was introduced by Delegate Eni Faleomavaega (D-AS) in the House. The Senate Committee held a hearing on S. 611 on May 24, 2000, and the Committee reported the bill out favorably on September 6, 2000, with an amendment in the nature of a substitute.

In the 107th Congress, Senator Campbell and Delegate Faleomavaega introduced essentially identical bills in the Senate and House, S. 504 and H.R. 1175. S. 504 has been referred to the Senate Committee on Indian Affairs, of which Senator Campbell is Vice-Chairman. H.R. 1175 has been referred to the House Committee on Resources, which in turn has asked for executive comment from the Department of Interior. There are three major differences between the 107th Congress versions and those of the 106th Congress. Under the new version:

- The earliest date from which a tribe must prove existence is now agreed upon to be 1900. In the last Congress, S. 611 originally called for existence to be proven from 1871 while H.R. 391 set the date at 1934.
- Petitioners denied recognition through the Federal Acknowledgment Process now codified in 25 C.F.R. Part 83 would have the opportunity for an adjudicatory hearing before the Commission to determine if the changes in the criteria merit a reexamination of the petitioner.
- Former employees of the Branch of Acknowledgment and Recognition are not specifically excluded from becoming members of the Commission.

2. What the Bills Would Do

a. Transfer of Duties to Commission

S. 504/H.R. 1175 would transfer the federal acknowledgment process from the BIA to an independent Commission on Indian Recognition (the "Commission"). The Commission would consist of three members each appointed by the President.

Under S. 504/H.R. 1175, an Indian group seeking federal recognition would submit a documented petition to the Commission. Similar to the existing regulations, tribes that were already receiving services from the BIA, splinter groups and political factions of recognized tribes, groups who had previously petitioned and were denied, and groups whose relationships with the federal government were expressly terminated would not be allowed to petition. However, any petitioner that was denied recognition under the regulations prior to the passage of these bills would be entitled to a hearing to determine if the changes in the criteria merit a reexamination of the petitioner.

S. 504/H.R. 1175 would require the Secretary of the Interior to transfer all petitions and letters of intent pending before the Department of the Interior to the Commission. They would be deemed submitted to the Commission in the same order they were submitted to Interior. The Secretary would continue to have the authority to recognize tribes under 25 C.F.R. Part 83 until the Commission is established.

The Commission would have a sunset date twelve (12) years after its establishment. Groups seeking recognition would be required to submit their documented petitions to the Commission no later than eight years after the date of the first meeting of the Commission. Letters of intent would only be received for one year after the date of the first meeting of the Commission, and petitioners whose letters were transferred from Interior would have only three years after the date of the first meeting of the Commission to submit their documented petitions.

b. Criteria for Recognition under S. 504/H.R. 1175

The mandatory criteria to receive federal recognition under S. 504/H.R. 1175 are:

- (1) a statement of facts establishing that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
- (2) a statement of facts and an analysis of such facts establishing that a predominant portion of the membership of the petitioner (a) comprises a community distinct from those communities

surrounding that community and (b) has existed as a community from historical times to the present;

- (3) a statement of facts and analysis of such facts establishing that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the time of the documented petition;
- (4) a copy of the then present governing document of the petitioner that includes the membership criteria; and
- (5) a list of all then current members of the petitioner, a copy of each available former membership list and a statement of the methods used in preparing the lists. Membership would have to consist of established descendance from an Indian group that existed historically, or from historical Indian groups that combined and functioned as a single autonomous entity.

S. 504/H.R. 1175 would provide a lesser burden for petitioners who could demonstrate previous federal acknowledgment. Further, similar to the existing regulations, S. 504/H.R. 1175 set forth forms of evidence acceptable for proving that a criterion had been met.

3. Process under S. 504/H.R. 1175

a. Comments

S. 504/H.R. 1175 would allow other parties to submit factual or legal arguments in support of or in opposition to the documented petition. The petitioner would receive copies of all such submissions and have 90 days to respond to them. The Commission would conduct a review of the petition, and, in so doing, could initiate other research relative to analyzing the petition and consider evidence submitted by other parties.

b. Preliminary Hearing/Adjudicatory Hearing/Determination

The Commission would be required to hold a preliminary hearing at which the petitioner and any other interested party could provide evidence concerning the status

of the petitioner. After this preliminary hearing, the Commission would decide whether the petitioner warranted federal acknowledgment or whether it should proceed to an adjudicatory hearing to address the obvious deficiencies and omissions in the petitioner's materials. During the adjudicatory hearing, testimony from the Commission's research staff and others involved in the preliminary determination could be taken. This testimony would be subject to cross-examination by the petitioner. The petitioner could also provide additional evidence to the Commission.

The Commission would then make a determination concerning the extension or denial of federal recognition and publish its decision in the Federal Register. The petitioner could appeal the decision in the United States District Court for the District of Columbia.

4. Other Duties and Authorizations in S. 504/H.R. 1175

S. 504/H.R. 1175 would also require the Commission to publish, on an annual basis, a list of recognized Indian tribes. It would also have to prepare and submit an annual report describing its activities to the Senate Committee on Indian Affairs and the House Resources Committee.

Finally, S. 504/H.R. 1175 would authorize the Secretary of Health and Human Services to award grants to groups seeking federal recognition to help them with the costs of research and preparation of a documented petition. The bill would also authorize appropriations for this purpose.

B. S. 1392

1. Background

On August 3, 2001, Senators Dodd (D-CT) and Lieberman (D-CT) introduced S. 1392, the Tribal Recognition and Indian Bureau Enhancement Act of 2001. This bill is the result of the "Dodd Initiative." Senator Dodd called for moratorium on federal recognition until the BAR process can be fixed. He also asked Secretary Norton to re-examine the proposed findings on two petitioners from Connecticut. Senator Dodd and Representative Simmons co-chaired the February 9, 2001, hearing to discuss land-into-trust issues of the Mashantucket Pequot Tribe and federal recognition. During this discussion, Senator Dodd promised to introduce legislation to reform the tribal recognition process; the result was S. 1392.

While the bill claims to "reform" the recognition process, its most important changes are very subtle. It appears to have been created in response to an argument set forth

by Connecticut Attorney General Blumenthal, who argues that federal recognition of Indian tribes was never delegated by Congress to the Department of Interior. As a result, the language is taken almost verbatim from 25 C.F.R. § 83 except for two very important "clarifications."

First, the bill would exclude "[a]n association, organization, corporation, or group of any character that has been formed after December 31, 2002." This may be in response to some of the petitioners from Connecticut, Massachusetts and Rhode Island which have recently organized and petitioned for federal recognition.

Second, the bill defines the evidentiary standard of "reasonable likelihood" which is required for petitioners to meet the mandatory criteria for recognition under 25 C.F.R. Part 83 as "more likely than not." This essentially equates "reasonable likelihood" with the "preponderance of evidence" standard used in the courts. This arguably raises the bar with regard to evidence required under the regulations and may pose a serious concern for petitioners. The recognition regulations have always used a more scholarly approach, taking into consideration the totality of the evidence submitted in light of historical context rather than a strictly legal approach.

C. H.R. 992/S. 1393

It is no coincidence that at the same time that S. 1392 (described above) was introduced, S. 1393, a bill "to provide grants to ensure full and fair participation in certain decision-making processes at the Bureau of Indian Affairs" was also introduced by Senators Dodd and Lieberman. A similar, earlier bill, H.R. 992, was introduced by Representatives Johnson (R-CT) and Simmons (R-CT) in the House. The bills would require the Secretary of the Interior to provide up to \$8 million per year to local governments which wish to participate in the decision-making process related to:

1. Federal acknowledgment of Indian tribes;
2. The taking of land into trust;
3. Land claims, including land claims based on the 1790 Non-intercourse Act;
4. "Any other action relating to an Indian group or acknowledged Indian tribe if the Secretary determines that the action or proposed action is likely to significantly affect the people represented by that local government."

These bills are specifically designed to compensate Connecticut towns for opposing tribes' efforts for federal acknowledgment and taking land into trust.

S. 1393 has been referred to the Senate Committee on Indian Affairs. H.R. 992 has been referred to the House Committee on Resources, which has asked for executive comment from the Department of Interior.

IV. Litigation Attacking the Process for Acknowledging Tribes

On January 18, 2001, the State of Connecticut and three Connecticut towns (Ledyard, North Stonington, and Preston) filed a Complaint against the Department of the Interior, the Bureau of Indian Affairs, Bruce Babbitt, the Secretary of Interior (in his official capacity), Kevin Gover, Assistant Secretary for Indian Affairs (in his official capacity), and Sharon Blackwell, Deputy Commissioner for Indian Affairs (in her official capacity). The Complaint claims that the defendants behaved in an arbitrary and capricious manner that has unfairly prevented the state and the towns from participating in the BAR process with respect to specific petitions.

The lawsuit is an open attack on the BAR process and an effort to gain more state and local government influence over a significant issue in Indian affairs. They allege that the BAR process deprived the state and towns of their right to be heard. For their relief they are requesting, among other things, that the proposed findings of two petitioners that were recently released be withdrawn. They are also calling for a moratorium on recognitions until the BAR process is fixed, claiming that it is currently biased in favor of recognizing tribes.

The relief called for would punish petitioners who have spent enormous time and effort following the letter of the law and meeting the rigorous requirements of the recognition regulations. The lawsuit is simply a way to delay the process, to derail the petitions, and to win support for a moratorium.

The lawsuit has other implications too. If the state and local governments are allowed to derail this federal regulatory process because they fear sovereign powers of tribes, we fear their sentiments and threats to tribal sovereignty will spill over into other areas, such as land-into-trust and land claim issues. In fact, there is some evidence to suggest that exactly such a thing is happening now.

V. Current Political Activity on Federal Recognition and Related Issues

A. GAO Report

In response to six Republican Members of the United States House of Representatives, the General Accounting Office (GAO) released a report on November 2, 2001, entitled, "Improvements Needed in Tribal Recognition Process." At the request of the Congressmen, the GAO reported on the significance of tribal recognition, evaluated the BIA regulatory recognition process and made recommendations for improving the process. The report also includes a historical overview of how tribes have been recognized, provides an explanation of BIA's recognition process, discusses the status of petitions for recognition, and provides information on Indian gambling operations. While the GAO report does not support claims that the process is tainted by gambling interests, it does state that the potential benefits of becoming a federally recognized tribe have increased since the enactment of the Indian Gaming Regulatory Act.

The GAO report emphasized two weaknesses in the BIA's recognition process: (1) the need for clearer guidance on criteria and evidence used in recognition decisions and (2) the lack of the agency capability to provide timely responses to recognition petitioners. The report explains that while there are set criteria under the regulations that petitioners must meet to be granted recognition, there is no clear guidance that explains how to interpret key aspects of the criteria. In particular, the report states, it is unclear what is required to support two key aspects of the criteria: (a) demonstration of continuous existence and (b) the proportion of members of the petitioning group that must demonstrate descent from a historic tribe. Further, the report explains, while BAR staff states that it makes its recommendations based on precedent of past recognition petitions, transparent guidance on past precedents is not readily available to affected parties or the decisionmaker.

On the issue of timeliness, the GAO report explains that workload of BAR has increased with more detailed petitions ready for evaluation and increased interest from third parties but that the BAR staff has decreased by approximately thirty-five percent (35%) since 1993. Also, the report notes that there are no effective procedures for promptly addressing the increased workload and no timelines in the regulations to give the process a sense of urgency.

Ultimately, the GAO report, in an effort to ensure more predictable and timely tribal recognition decisions, recommends that the Secretary of the Interior direct the BIA to: (1) provide a clearer understanding of the basis used in recognition decisions by developing and using transparent guidelines that help interpret key aspects of the criteria and supporting evidence used in federal recognition decisions; and (2) develop a strategy that identifies how to improve the responsiveness of the process for federal recognition.

The Department of the Interior responded to the GAO by agreeing that precedents from recognition decisions, as well as the related court findings, statutes and administrative actions which served as a basis for the recognition regulations, provide useful guidance to petitioners, interested parties and the BIA staff and decisionmakers. It agreed to develop a plan to make these precedents more readily accessible and to provide clearer guidelines on what evidence is necessary to meet the seven mandatory criteria of the recognition regulations. The Department also acknowledged that timeliness is an issue and stated that it would identify potential changes to improve response time on the petitions and develop a plan for effective reform.

The Department has already set forth a detailed action plan under which it will finalize strategic plans to instill dramatic policy changes on how it processes recognition petitions. These changes include updating the official guidelines to the recognition regulations, updating the Acknowledgment Precedent Manual and making it available on the BIA website, providing all acknowledgment decisions, related unpublished court decisions, IBIA acknowledgment decisions and pertinent technical assistance letters on the BIA website, performing a needs assessment of current workload of the BAR and reviewing the recognition regulations to determine whether more specific and predictable timelines can be included. The Department has set a six-month deadline for its strategic plan for developing and implementing these changes in the recognition process.

B. Decision Reversals and Negative Findings on the Part of the Department of Interior

Since the change in Administrations, the Department of Interior has delayed and/or reversed several recognition decisions made in the twilight of the Clinton Administration. Rather than follow Senator Dodd's Initiative to place a moratorium on the recognition of Indian tribes, the Department of Interior appears to have simply decided to issue negative decisions.

On July 30, 2001, the Department of Interior issued a proposed finding to decline to acknowledge the Ohlone/Costanoan Muwekma Tribe of California. The proposed finding was made following a January 16, 2001, U.S. District Court decision ordering the Bureau to issue a proposed finding in the case by July 30, 2001. Furthermore, proposed positive findings in the case of the Duwamish Tribe and the Nipmuc Nation of Massachusetts were withdrawn, then reversed and re-published in the Federal Register as proposed negative findings on September 27, 2001. The Webster/Dudley

Band of Chaubunagungamaug Nipmuck Indians was also issued a proposed negative finding, as they had been under the Clinton Administration.

The sole exception to the negative findings is the after-the-fact approval of a positive final determination for the Chinook Nation, which was actually approved by AS-IA Kevin Gover in early January 2001, before the Bush Administration took office, but which was held up by the Bush Administration pending further review. To date, no tribe has been federally recognized exclusively under the current Administration.

C. February 9, 2001, Hearing on Federal Recognition/Senator Dodd's and Representative Simmons' Initiatives

To fulfill a campaign promise to address Indian issues in Connecticut, newly elected Representative Simmons held a hearing on February 9, 2001, in Hartford, Connecticut, to discuss land-into-trust issues of the Mashantucket Pequot Tribe and federal recognition. The hearing lasted seven (7) hours. Over 200 people attended and approximately 70 people testified. Those who testified included the State Attorney General, the Secretary of State, Tribal Leaders of recognized tribes and of those pursuing federal recognition, and the general public.

The hearing encouraged dialogue among the parties about the land-into-trust and federal recognition processes. Such efforts, however, were overshadowed by the State's lawsuits against the BAR process and its opposition to the Mashantucket Pequot's efforts to put land into trust.

After the hearing, Representative Simmons promised to introduce legislation to reform the BIA. One provision would be to push for a revolving door law that would prevent any BIA official from subsequently being employed by a tribe. Senator Dodd also promised to introduce similar legislation. The result is the introduction of S. 1392 and S. 1393/H.R. 992 described above.

D. Implications for Other Issues

The activity in Connecticut on federal recognition has spilled over into other areas important to all tribes-specifically, land-into-trust issues and land claims. The new land-into-trust regulations were delayed by the new Administration pursuant to the President's order to delay the effective date of regulations published in the final days of President Clinton's Administration, and were eventually withdrawn on November 9, 2001.

Representative Johnson (R-IL) and Senators Durbin (D-IL) and Fitzgerald (R-IL) have introduced legislation (S. 533/H.R. 791) that will require any land claim for Illinois land to be brought in the United States Court of Claims where the only relief allowed would be money damages, not the return of land to the tribe. It also seeks to extinguish treaty rights and aboriginal title to land in Illinois.

Senator Fitzgerald introduced S. 2909 last year that would have allowed defendant landowners in a land claim by an Indian tribe to assert any affirmative defense under state law, regardless if Federal Indian law and policy have always held otherwise.

Representative Tom Reynolds (R-NY) asked Attorney General Ashcroft to adopt a new policy to withdraw the federal government from land claim lawsuits involving American Indians.

V. Conclusion

There will be plenty of activity on the recognition issue within the next six months especially in light of the BIA's strategic plans for change outlined in its response to the GAO report and the potential for Congressional activity in the second session of the 107th Congress on the recognition process reform legislation. Further, BIA is scheduled to deliver two final determinations in June 2002, on the subject recognition petitioners in the lawsuit filed by the State of Connecticut.

We urge you to monitor the aftermath of the GAO report, the legislation to reform the recognition process and Congressional and Administrative activity related to the recognition of tribes. Any changes to the recognition process must be fair, efficient and ensure the integrity of the manner in which the federal government recognizes tribes.

We believe that as the 107th Congress unfolds we will see other issues affected by the current debate over the federal recognition process. We ask you to continue to monitor this issue and support the BAR process in the face of the litigation.

NOTES

1. S. Hrg. 106-569, p. 77, July 11, 2000, Letter from Assistant Secretary Gover to Senator Campbell, Chairman of the Senate Committee on Indian Affairs in response to written questions following the May 24, 2000, on S. 611, a bill to provide for the administrative procedures to extend federal recognition to certain Indian groups.

2. Id. at 76.

3. S. Hrg. 106-569, p. 54, Statement of Honorable Kevin Gover, Assistant Secretary, Indian Affairs.

-

4. 43 Fed. Reg. 39361 (1978).

-

5. Id.

-

6. See e.g. , *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993) ("we conclude that the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation."); *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2nd Cir. 1994) ("The Department of the Interior's creation of a structured administrative process to acknowledge non-recognized Indian tribes using uniform criteria, and its experience and expertise in applying these standards, has now made deference to the primary jurisdiction of the agency appropriate."); *United States v. 43.47 Acres of Land*, 855 F. Supp. 549 (D. Conn. 1994) (noting that after *Mashpee*, where a "jury decided the issue of tribal status somewhat confusedly," the "BIA, as authorized and directed by Congress, has established criteria and a procedure for determining [tribal status]").

-

7. 59 Fed. Reg. 9293 (February 25, 1994).

-

8. 25 C.F.R. § 83.4(a)-(b).

-

9. 25 C.F.R. § 83.6(a); § 83.6(c).

-

10. 25 C.F.R. § 83.4(c); § 83.6(b).

-
11. 25 C.F.R. § 83.3(b).

-
12. 25 C.F.R. § 83.3(c).

-
13. 25 C.F.R. § 83.3(d).

-
14. 25 C.F.R. § 83.3(e).

-
15. 25 C.F.R. § 83.3(f).

-
16. 25 C.F.R. § 83.9(a).

-
17. 25 C.F.R. § 83.9(a).

-
18. 25 C.F.R. § 83.9(b).

-
19. 25 C.F.R. § 83.1.

-
20. Id.

-
21. 25 C.F.R. § 83.10(a).

-
22. 25 C.F.R. § 83.10(b)(1).

-
23. 25 C.F.R. § 83.10(b)(2).

-
24. 25 C.F.R. § 83.10(h) (the regulation states that a proposed finding will be published within a year of the petition being placed on active consideration. It notes, however, that the Assistant Secretary may extend this period up to an additional 180 days. The extension is usually invoked, and, in most instances, it takes even longer for a proposed finding to be published.).

-
25. 25 C.F.R. § 83.10(I) (the period for comments may be extended by the Assistant Secretary for an additional 180 days upon a finding of good cause).

-
26. 25 C.F.R. § 83.10(j)(2).

-
27. 25 C.F.R. § 83.10(k).

-
28. 25 C.F.R. § 83.10(I).

-
29. 25 C.F.R. § 83.10(l)(1)-(3) (this period may be extended if warranted by the extent and nature of the evidence and arguments received).

-
30. 25 C.F.R. § 83.10(m).

-
31. 25 C.F.R. § 83.11.

-
32. 25 C.F.R. § 83.6(d).

-
33. 25 C.F.R. § 83.6(g).

-
34. 25 C.F.R. § 83.8(a) (Previous federal acknowledgment includes: (1) that the group had treaty relations with the United States; (2) that the group has been denominated a tribe by act of Congress or Executive Order; and (3) that the group has been treated by the federal government as having collective rights in tribal lands or funds.)

-
35. 25C.F.R. § 83.7 (d).