

What Criteria Must Be Met for Federal Recognition of Tribal Status?

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U.S. Department of the Interior at the Hearing
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Good morning, Mr. Chairman and Members of the Committee. My name is Theresa Rosier and I am the Counselor to the Assistant Secretary - Indian Affairs. I am pleased to be here today to speak on behalf of the Department of the Interior about the Federal acknowledgment process, recent improvements to this process, and other potential improvements that can be made to promote clarity, transparency and efficiency in acknowledgment decisions. I understand this issue is of importance to this Committee. On April 22, 2004, H.R. 4213 was introduced and cosponsored by Mr. Shays. That bill would codify the criteria established at 25 C.F.R. Part 83, and repeal certain exemptions for former federal officers and employees representing Indian tribes.

The Federal acknowledgment regulations, known as Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, [25 C.F.R. Part 83], govern the Department's administrative process for determining which groups are Indian tribes within the meaning of Federal law. The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and, which have functioned as autonomous entities throughout history until the present. See 25 C.F.R. Sections 83.3(a) and 83.7. When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist. The Department is not granting sovereign status or powers to the group, nor creating a tribe made up 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.

For the past few years, Congress has considered legislation almost annually to modify the criteria for groups seeking acknowledgment as Indian tribes or to remove the process altogether from the Department. Although the Department supports the current Federal acknowledgement criteria, we do recognize that improvements could be made to encourage more timely decisions and increased transparency. Generally, the Department is supportive of legislation that maintains the criteria established by 25 C.F.R. Part 83 and that promotes increased integrity, transparency and time sensitivity to the federal recognition process.

The Federal acknowledgement process is implemented by the Office of Federal Acknowledgment (OFA), formerly the Branch of Acknowledgment and Research. OFA is staffed with a director, a secretary, three anthropologists, three genealogists, and three historians. There is a high volume of work within this office. The current workload consists of nine petitions on active consideration and 13 fully documented petitions that are ready, waiting for active consideration. The administrative records for some completed petitions have been in excess of 30,000 pages. There are 213 groups that have submitted only letters of intent or partial documentation. These groups are not ready for evaluation and require technical assistance. Two final determinations representing three petitioners are under review at the Interior Board of Indian Appeals in response to requests for reconsideration. In addition, there are currently four lawsuits directly involving Federal acknowledgment or the Freedom of Information Act (FOIA) related to Federal acknowledgment.

Recent Improvements in the Federal Recognition Process

In November of 2001, the General Accounting Office (GAO) issued a report entitled Indian Issues: Improvements Needed in the Federal Recognition Process. The two primary findings made by the GAO in this report are that the Federal acknowledgement decision making process is not transparent nor is it equipped to respond in a timely manner.

In response to the GAO report, the Assistant Secretary Indian Affairs implemented a Strategic Plan to provide strategies to communicate a clearer understanding of the basis used in making federal recognition decisions, and to improve the responsiveness of this process. As illustrated below, many of the strategies developed in the Strategic Plan have been implemented and completed.

1. In response to the GAO report, all technical assistance review letters, proposed findings, final determinations, and reconsidered petitions have been electronically scanned and indexed and are now available on CD-ROM. This CD-ROM has been made available to the general public. Immediate and user-friendly access to all prior decisions enhances both transparency and consistency in the decision making process. We are hopeful that interested parties will have access to this information via Internet once the BIA is able to access it.

2. Additional resources have enabled the OFA to fill two professional staff vacancies. The addition of these new staff members resulted in the formation of three functioning teams composed of one professional from each of the three disciplines. With three teams, the OFA has increased its ability to review petitions and their accompanying documentation in a more time sensitive manner.

3. OFA has also hired two sets of independent contractors to assist in administrative functions. The first set of contractors includes two FOIA specialists/records managers. The second set of contractors includes three research assistants who work with a computer database system, scanning and indexing the documents to help expedite the professional research staff's evaluation of a case. Both sets of contractors assist in making the process more accessible to petitioners and interested parties, while increasing the productivity of the OFA researchers by freeing them from many administrative duties.

4. Implementation of the Federal Acknowledgment Information Resource (FAIR) system, a computer database system that provides on-screen access to all the documents in the administrative record of a case has made a significant positive impact in the efficiency of the OFA. The FAIR system scans all submitted documentation and then the data is extracted, linked, and indexed to create a searchable administrative record. This system allows the OFA researchers to have immediate access to the records and allows them to make more efficient use of their time. This system also allows petitioning groups and interested parties, such as States and local governments, to have the record on CD-ROM and thus have on screen access to the administrative record and to any data entries made by the OFA researchers. We anticipate that the next generation of scanning for FAIR will allow electronic redaction of privacy information from the documents, which will save the Department a tremendous amount of time otherwise spent photocopying cases for interested parties or FOIA requests.

Another significant improvement made to the Federal acknowledgement process as the realignment of the OFA. Effective July 27, 2003, the staff of the Branch of Acknowledgement of Research were realigned and renamed. OFA now reports directly to the Principal Deputy Assistant Secretary Indian Affairs. Previously, the Branch of Acknowledgement and

Research reported through the Office of Tribal Services and the Bureau of Indian Affairs to the Assistant Secretary Indian Affairs. This realignment eliminated two layers of review and now provides more direct and efficient policy guidance.

Due to these above mentioned improvements made to the federal recognition process, OFA was able to assist the Department in completing 14 major decisions regarding Federal acknowledgment since January 2001. During this time, OFA completed six proposed findings, six final determinations, and two reconsidered final determinations.

Other Improvements to the Federal Acknowledgement Process

On April 1, 2004, Secretary Norton requested that Indian Affairs review the Strategic Plan and ensure that all the appropriate steps were being taken to implement the strategies developed in the plan. As discussed above, the Department has completed many of the action items identified in the strategic plan. We plan to have all the remaining tasks (that are within the control of the Department) completed by this fall. We do recognize however, that some tasks will take longer to implement because they may require congressional action, regulatory amendments, or access to the Internet.

In addition, we are planning to formalize an already internal policy of the Assistant Secretary's office that prohibits federal acknowledgement decision-makers from having contact and communications with a petitioner or interested party within 60 days of an acknowledgment decision. Formalization of this policy will ensure that all parties are made aware of this 60 day period and that the integrity of the process is protected.

Conclusion

The Department believes that the acknowledgment of the existence of an Indian tribe is a serious decision for the Federal Government. It is of the utmost importance that thorough and deliberate evaluations occur before the Department acknowledges a group's tribal status, which carries significant immunities and privileges, or denies a group Federal acknowledgment as an Indian tribe.

When the Department acknowledges an Indian tribe, it recognizes an inherent sovereign that has existed continuously from historic times to the present. These decisions have significant impacts on the petitioning group as well as on the surrounding community. Therefore, these decisions must be based on a thorough evaluation of the evidence using standards generally accepted by the professional disciplines involved with the process. The process must be open, transparent, and timely.

Thank you for the opportunity to testify about the Federal acknowledgment process. I will be happy to answer any questions you may have.