INDIAN TRIBAL RECOGNITION: THE HISTORICAL EVIDENCE QUAGMIRE TO PROVE TRIBAL STATUS

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ABSTRACT:

The federal government has an elaborate and comprehensive set of regulations to recognize Indian groups as tribes. This administrative process requires exhaustive documentation and considerable scientific analysis to prove that the group can meet seven mandatory criteria. In addition to the administrative process, Congress continues to exercise its authority to legislatively recognize tribes. The author reviews four recognition cases – two legislative and two administrative – to understand the use of historical information and to evaluate differences in results between these two processes. Based on this review, recommendations for changes include incorporation of international law concepts, previously suggested policies, and traditional tribal knowledge and practices.
Indian Tribal Recognition: The Historical Evidence Quagmire to Prove Tribal Existence

I. Introduction

The United States federal government has a complex and detailed set of regulations to determine whether it should recognize an Indian tribe\(^1\) for a government-to-government relationship.\(^2\) These regulations allow a tribe to petition the federal government for federal recognition (sometimes referred to as acknowledgement). In addition to the administrative process, Congress continues to exercise its legislative prerogative to recognize Indian tribes.\(^3\)

The recognition of a tribe is a prerequisite for tribes and individual tribal members to receive federal benefits, services and protection. Individual tribal members benefit from federal assistance for education and health benefits. Tribal benefits range from grants and loans to direct government, education, and health assistance. Most importantly, though, recognition is the legal confirmation, acknowledged by federal and state governments, that the tribe is a sovereign entity, entitled to the right of self-government and the unique status reserved for Indian tribes within the United States' system of government.

The purpose of this paper is twofold: to compare the use of historical information between legislative and administrative recognition of Indian tribes, and to provide recommendations for minimizing the onerous burden placed on Indian groups to prove tribal existence. A review of four cases—two administrative and two legislative—allows for the

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\(^1\) One anthropologist describes tribes as a "secondary phenomena" and a product of the "White Man's construct" because they are created as a result of the influence and impact of a more complex, dominant society. MORTON FRIED, THE NOTION OF TRIBE, (1975). Fried also challenges the notion that the label of "tribe" is appropriate to describe indigenous societies from either a social or political perspective, since there is no real tribal level of polity, and social communities are usually defined at the kinship or village level. Fried is not alone in this skepticism. Several noted anthropologists have testified before Congress about this anthropological label as well. See Rachel Paschal, The Imprimatur of Federal Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 WASH. L. REV. 209, n. 128 (1991)


\(^3\) See, e.g. 25 U.S.C. §§ 566, 711, 712a, 713b, 714a, 715a, 733, 762, 861, 903a, 941b, 983a, 1300f, 1300g-2, 1300h-2, 1300j-1, 1300k-2, 1300l, 1300m-1 (1994)
evaluation of the type of evidence, data, and information used by the two branches of
government to render its decision on whether or not to recognize a tribe.

The results of the both administrative and legislative recognition are evaluated to provide
a basis for a set of recommendations to change the current evidentiary requirements and
standards. Acknowledgment decisions should be done within a uniform and consistent process
but with an outcome that accurately accounts for the uniqueness of each petitioner's
circumstances and historical and traditional background. The insurmountable burden created by
the BIA is inconsistent with the recommendations of the American Indian Policy Review
Commission, and these recommendations should be revisited.4

Since tribes are “quasi-sovereign” entities,5 the two federal processes will also be
compared to the federal government’s recognition of foreign sovereigns. Key elements of
international law, such as the definition of statehood, recognition of states and governments, and
United States foreign relations law, such as the reasons for recognition, are compared to the
recognition requirements for tribes. A comparison with foreign country recognition indicates
that the United States has a higher standard for Indian tribes, and a double standard as well. For
example, no foreign state is required to prove its continuous existence from some arbitrary point
in time in order to be recognized. In addition, foreign states can reconstitute themselves – either
as new independent states or as re-formed states - as long as they meet the international law
criteria for statehood. International law principles provide a reasonable basis for lowering the
evidentiary hurdle and allowing reconstituted tribes to petition for acknowledgment.

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4 See discussion infra Part VI-B
Finally, consideration for traditional Indian methods of recognition – tribes’ recognition of each other – should also be incorporated. An Indian viewpoint, from a traditional affiliation perspective, should be part of the petition review process. The Western bias, both in the analysis of evidence and in the framing of the criteria, ensures that Indian groups are still at the sufferance of a non-Indian worldview. The BIA intended recognition to be difficult. Yet, it should not be virtually impossible.

II. History of Federal Recognition

The reason for federal recognition of Indian tribes parallels – in theme and effect – the history of federal Indian policy. From the first European contact until the mid-1800’s, treaty making truly acknowledged a sovereign-to-sovereign relationship. However, as the United States grew bigger, more politically stable, and militarily stronger, both the recognition of tribes and the policy towards Indians was one of assimilation and annihilation, oversight and plenary power. With the reversal of this policy in 1934, the Indian Reorganization Act promoted tribal recognition, but limited such to specific criteria. This era also ushered in federal benefits and services for Indians and tribes because of their status as Indians. Legislative termination of tribes in the 1950’s resulted in executive termination policies, especially for landless tribes. Finally, with the advent of self-determination in the 1970’s, but fully ensconced in the federal trustee relationship (read “guardian-ward”), the federal government established new regulations that challenged and rewarded tribes to overcome these historical Indian policies.

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6 43 Fed. Reg. 23743, 23744 (June 1, 1978). The BIA acknowledged in the original regulations that “the criteria . . . is difficult to meet. They can, however, be met with relative ease and at minor expense by tribes which have remained intact throughout history.”
7 See discussion infra Part II-A
9 See infra, Part II.C
10 Id. See also, 25 U.S.C. § 479 (1994)
11 Id. See also, STO Summary of Findings, infra note 103
A. Pre-European Contact

Before the Europeans arrived, Indian tribes dealt with each other as neighbors, friends, and enemies. In some cases, confederacies were in place to promote regional harmony and protection. In others, tribes simply acknowledged that neighboring tribes were different. Acknowledgement was both formal and informal, with elaborate ceremonies or simple oral agreements, and other practices and behavioral patterns. For example, the Great Lakes and Northeastern tribes gave wampum belts to “create a chain to bind Indian nations together.” The Sioux nation conducted a Hunkapi ceremony to acknowledge and accept different people of different nations, and the Apaches engaged in a peace pipe ceremony.

B. Treaty-Making Period

Once the Europeans established themselves on this continent, more formal interaction took place between the Europeans and the Indians. These interactions were pursued by the European nations themselves to ensure an exclusive relationship with the Indian Nations, an accepted practice in international law at the time that allowed the “discoverer” to stake first claim. Prior to the revolution, for example, the British government or the colonies negotiated at least twelve treaties with the Indian nations, and Spain negotiated at least sixteen treaties. These treaties were generally negotiated to promote trade and protect the peace, acquire land, or forge

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12 See generally, ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES, 3-18 (1970). Ms. Debo has described several “foreign relations” practices by Indian tribes before European contact. The Iroquois Confederacy was an alliance between six Indian Nations to promote peace and harmony in the northeast region. The great Creek Confederacy in the Southeast was a conglomeration of towns. See also, ANGIE DEBO, THE ROAD TO DISAPPEARANCE, 3-36 (1934)


14 Id. at 6 - 7

15 Id. at 103-108, 202, citing five treaties, negotiated between 1777 and 1781, with Great Britain; seven treaties, from 1722 to 1768, with the colonies; and sixteen treaties, from 1784 to 1819, with Spain.

16 Id. at 124-25, Treaty with the Alabama, June 22-23, 1784

17 Id. at 118-21, Treaty with the Chippewa, May 12, 1781; Land Grant from the Ottawa and Chippewa, May 15, 1786
military alliances. Treaty negotiation documents and the treaty language itself show how the Europeans adopted and extensively used Indian customs to negotiate treaties. The treaty-making process effectively acknowledged the sovereign-to-sovereign relationship between Indian nations and European nations.

European and the United States governments recognized that the treaties were negotiated between sovereign nations, and most of the early treaties contain language that acknowledges the tribes as "nations." None of these governments required the Indian nation signatories to prove their sovereign status—it was a given.

C. Post-Treaty Making Period

Congress ended treaty making with Indian tribes in 1871. However, relationships with tribes continued to be authorized through statutory enactments and executive orders. These agreements also signified the recognition of tribes. By this time in American Indian policy, though, the federal government was exercising considerable control over tribes. Many of these statutes, such as the Major Crimes Act and the General Allotment Act, were designed to regulate Indian life and Indian affairs rather than acknowledge the independent sovereignty of Indian tribes. This period reflected the imposition of the guardian-ward relationship rather than the arms-length transactions that previous treaties represented.

With increased legislation, the court system soon became the forum for adjudicating Indian treaties and statutes. A judicial definition of tribe was therefore necessary to interpret and

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18 Id. p. 115-16, Treaty with the Ottawa, Huron, Chippewa, Potawatomi, Miami, Shawnee, and Delaware, June 17-24, 1777
19 Id.
20 Id.
22 FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 127 (1982 Ed.) (hereinafter Cohen Handbook) cites several statutes that "reveals Congress considered agreements and treaties to be similar"
23 25 U.S.C. § 331 (General Allotment Act)
18 U.S.C. § 1153 (Major Crimes Act)
apply these treaties and statutes. This common law definition of tribe reflected the notion that a tribe was a distinct group of people, generally of the same race, with a government that made it a political entity. In addition, while Congress has plenary power over tribes, the Supreme Court has held that Congress cannot arbitrarily create a tribe from a group of Indians. In effect, these judicial decisions are the basis for the Department of Interior’s approach to recognizing Indian tribes.

D. IRA and Federal Recognition

With the passage of the Indian Reorganization Act (IRA) in 1934, the federal government implemented a new Indian policy promoting tribal self-government and generally acknowledging the quasi-sovereign status of tribes. The IRA also included language that created the lexicon of “federally recognized” tribes and established a statutory definition of tribe. Section 19 of the Act defines tribes as “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” The Department became responsible for determining whether a tribe was subject to the IRA or should receive other federal benefits or services under various legislative acts. Recognition of Indian tribes became a prerequisite for individual Indians and tribes to obtain government benefits and services. Unlike treaties, which were in essence an acknowledgement of two (or more) sovereigns entering into an agreement, recognition was now a determination of

25 Montoya was the first case to set out a judicial definition that reflected the Court’s view on both the internal and external attributes of a “tribe”. "By a tribe we understand 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 . . ." This definition has been used over and over again for various Indian legal claims, mostly related to land claims under treaty rights or the Non-Intercourse Act, or hunting and fishing rights under specific treaties. See Mashpee Tribe v. New Seabury Corp, 592 F.2d 575 (1st Cir. 1979), cert. denied 444 U.S. 866 (1979); Joint Tribal Council of Passamaquody v. Morton, 528 F. 2d 370 (1st Cir. 1975); U.S. v. Washington, 641 F.2d 1368 (9th Cir. 1981), cert. denied sub nom. Duwamish, Samish, Snohomish, Snoqualmie and Steilacom Indian Tribes v. Washington, 454 U.S. 1143 (1982)
26 Sandoval, 231 U.S. at 46
a beneficiary status (in the federal trust relationship) in addition to an acknowledgement of the tribe's right to self-government.

To make a recognition determination under the Act, the Department looked to several sources—treaties, statutes, consistent dealings with the tribe, and case law. Between 1934 and 1978, this determination was conducted on an ad hoc basis, based on the "Cohen criteria," and the Solicitor was responsible for making the determination. It was within this new process that the Department first used historical information to recognize tribal existence.

Several aspects of the criteria and ad hoc approach used to recognize a tribe should be noted. First, the criteria are derived almost exclusively from case law for the definition of "tribe". Therefore, the judicial definition of tribe and its view of tribes as political entities, rather than an anthropological or ethnological definition, is an integral component in the recognition requirements. Secondly, the Solicitor established the precedent—later incorporated into the formal regulations—that a tribe must currently exist and have existed on a continuous basis. Once there was no formal government (i.e., no political entity), a tribe no longer existed. One consequence of this factor is that if a tribe has ceased to exist—either of its own accord or because of government indifference, assimilationist, or termination policies—then the tribe cannot reconstitute itself. Third, because of the length of time between the last of the treaties and

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29 Id.
30 Cohen Handbook, at 13
31 Id. The "Cohen criteria," which serve as the basis for federal recognition today, are: 1) treaty relations with the United States, 2) denominated a tribe by Act of Congress or executive order, 3) treated as having collective rights in tribal lands or funds, 4) treated as a tribe or band by other Indian tribes, 5) exercised political authority over its members through a tribal council or other governmental forms.
32 MEMO. SOL. INT., July 15, 1937 (cited in Cohen Handbook at 13) (recognizing two tribal towns of the Creek Nation, the Solicitor relied heavily on the anthropological report of Mr. Morris Opier). See also MEMO. SOL. INT. Feb. 8, 1937 regarding the Mole Lake Chippewa, and Memorandum from Acting Associate Solicitor for Indian Affairs, Nov. 16, 1967 (M 36759) recognizing the Burns Paiutes (both cited in Cohen's Handbook at 14)
33 See infra note 47
34 Cohen Handbook, at 14 "It is not enough, however, to show that any of the foregoing elements [Cohen criteria] existed at some time in remote past . . . There must be a currently existing group distinct and functioning as a group
the IRA (60 years) the Solicitor had to rely on historical information and evidence to determine whether a tribe existed.\textsuperscript{35} This evidence was especially critical for tribes to meet the "Cohen criteria." On several occasions, for example, the Solicitor accepted anthropological evidence in making his decision.\textsuperscript{36} Overall, these Solicitor opinions cemented the basic foundation for federal government recognition of tribes – that a tribe must be a political entity to exist, that only the federal government could say whether a tribe existed or not, and the purpose of tribal recognition was federal benefits, services, and protection.

E. Formal Recognition Regulations

With the flurry of Indian benefits and self-determination legislation in the 1960's and 1970's,\textsuperscript{37} the Department had to develop a more uniform approach for recognition determinations. This legislation in many cases specifically limited federal benefits and services to federally recognized tribes or members of federally recognized tribes.\textsuperscript{38} The Department was responsible for administering most of these programs, and therefore, had to determine which tribes and individuals were eligible.\textsuperscript{39}

In addition, several court cases in the 1970's highlighted the need for a uniform approach to tribal recognition and definition.\textsuperscript{40} The First and Ninth Circuit Courts of Appeal had

\begin{footnotesize}
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 188-206.
\textsuperscript{39} 25 U.S.C. § 1a (1994) "For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is authorized to delegate...his powers and duties under said laws to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law."
\textsuperscript{40} Paschal, at 211-12. Paschal provides a good summary of the three external forces operating on the BIA to promulgate regulations. For a slightly different perspective on how these forces operated, see William W. Quinn,
\end{footnotesize}
conflicting rulings on how to define tribal existence for purposes of land claims and treaty rights. As a result of the Ninth Circuit decision, some tribes lost BIA services because the Court held that they did not constitute a tribe for treaty rights purposes. Because of this ruling, dozens of tribes immediately petitioned the government for recognition, in fear that they too would lose federal benefits. During this time, Congress had commissioned a study on the current status of American Indian tribes. The American Indian Policy Review Commission also entered the fray with a comprehensive recommendation for recognizing currently unrecognized tribes. The key recommendation from the AIPRC was that Indian tribes should be recognized unless the Federal Government could prove that the tribe should not be recognized. In other words, the burden should be on the Federal Government to prove an Indian group is not a tribe. Congress itself contemplated bills to formalize the recognition process and standards.

Reacting to these external pressures to implement a more systematic approach for recognition, the Department of Interior issued regulations in 1978 for "Procedures for Establishing that an American Indian Group Exists as a Tribe." Acting under a general grant of authority from Congress, the Secretary of Interior codified seven mandatory criteria for federal recognition, which rest upon the essential requirement that the group have maintained tribal

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41 The 1st Circuit upheld the lower court decision in Mashpee Tribe that the Tribe had not proven tribal existence for purposes of the Non-Intercourse Act. Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir.) cert. denied 444 U.S. 866 91979). The 9th Circuit upheld a lower court decision that entitled treaty tribes to one-half of harvestable fish, even though the tribes may not be recognized by the Federal Government. U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt I), aff'd 520 F. 2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)
42 Paschal, at 211-212
43 Paschal, at 212
44 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, VOL. 1, 457-484 (1977).
45 Paschal, at 212
relations - “a political relationship is indispensable”. The criteria were expected to produce a more uniform and fair way to establish that a tribal group deserve the special legal status of recognition. They generally reflect the recommended criteria of the AIPRC, however, the Department reversed the burden of proof, and placed it on the petitioners to prove they exist as a tribe.

Under the 1978 regulations the petitioner must establish that: a) since historical times and on a continuous basis to the present time, the group has been identified as American Indian; b) a substantial portion of the group has continuously inhabited or lived in a specific area in a distinct social community which is viewed as American Indian, and the group members are descendents of an Indian tribe which historically inhabited the area; c) the petitioner has maintained autonomous political influence over its members continuously since historical times; d) the petitioner has a governing document; e) evidence that each member of the petitioning group descends from a historical tribe; f) membership is comprised of current members of a federally recognized tribe; and g) petitioner is not the subject of legislation prohibiting or terminating a relationship with federal government.

With the implementation of these formal regulations, the Bureau of Indian Affairs (BIA) established a separate group to process and evaluate the incoming petitions. This group, now known as the Branch of Acknowledgement and Research (BAR), is staffed with historians, anthropologists, and genealogists.

43 Fed. Reg. at 39363. According to the preamble for the final rule, the seven criteria incorporate the “Cohen criteria” and were intended to insure that petitioning tribes met stringent, but supposedly fair and uniform, standards in order to gain recognition.
48 AIPRC Final Report, at 483
49 43 Fed. Reg. at 39363
50 For an insider’s view of this department, see William Quinn, Jr., Public Ethnohistory? Or, Writing Tribal Histories at the Bureau of Indian Affairs, 10 PUBLIC HISTORIAN 71 (Spring 1988). Quinn was hired at BAR after the 1978 regulations were promulgated and the government advertised for Indian-specialist genealogists, cultural anthropologists, and historians.
Because of considerable concerns about the implementation of these regulations, the apparent inconsistencies in both the type of evidence required and the application of that evidence, and the considerable delays in processing new petitions, the federal acknowledgment regulations were revised in 1994. The seven mandatory criteria were unchanged. Evidentiary requirements and petitioner's burden of proof remain unchanged. However, the revised regulations did make four substantial changes to the old regulations: 1) the evidentiary hurdles are lowered if a petitioner can prove that they were previously recognized by the federal government; 2) acceptable evidence for criteria (b) – distinct social community and (c) – political entity has been specifically identified; 3) petitioner can meet the social community criteria (b) if it meets the political entity criteria (c), and vice versa; and 4) the burden of proof standard is clarified – the burden is not a legal one, but one that expresses a "reasonable likelihood" that the evidence provided satisfies the criteria.

F. Congressional Recognition

Even though the Secretary has promulgated regulations for acknowledging Indian tribes, Congress has continued to exercise its power to legislatively recognize tribes. Several tribes that were terminated in the 1950's have been legislatively restored. Other tribes have been recognized as part of legislation to settle land claims. Some tribes were recognized as part of

51 59 Fed. Reg. 9280 (Feb. 25, 1994). Paschal's article, supra, evaluates the problems with the process under the 1978 regulations. Paschal addresses both the inequitable application of the regulations and the inequitable evidentiary requirements, comparing the approval and denials for six petitioners. To a lesser degree, Paschal challenges the use of historical and ethnological information. The new regulations are supposed to correct and clarify many of these issues. Unfortunately, petitioners that have already been denied cannot reapply for recognition so any improvements in the process are denied to them. 25 C.F.R. §83.3(f)

52 25 C.F.R. § 83.8

53 25 C.F.R. § 83.7(b)(1-2), (v), (c)(1-2)

54 25 C.F.R. § 83.7(b)(v), (c)(1)(iv)

55 25 C.F.R. § 83.6(d) (1994)

56 Supra, note 3


legislation to make them eligible for federal benefits and services. Although the Supreme Court has claimed that Congress has no power to recognize a community of Indians as a tribe without the existence of some political attributes, federal courts have never overturned these legislative acts. In fact, the courts have generally deferred to Congress, as it is considered a political question. After the 1978 rules were promulgated, and even shortly before they were finalized, the Secretary has consistently opposed Congressional recognition of Indian tribes.

G. Current Status of Petitions

Since 1978, and as of February 6, 2001, the Department has received 136 petitions for federal acknowledgement. Another 105 tribes have filed letters of intent, but have not filed petitions. Of the 136 petitions filed, 51 have been resolved. Of the 51 resolved, 24 groups have been acknowledged - 15 by the Department and 9 by Congress. There are currently 10 bills pending in Congress to recognize various Indian tribes – including 2 tribes that were denied acknowledgement through the administrative process. In 1977, the American Indian Policy Review Commission estimated that there were 133 non-recognized tribal groups in the country. Some commentators estimate that number to be over 200 groups today, including 70 tribes that were terminated in the 1950’s. In spite of a more uniform process to evaluate petitions, the BIA is no closer to resolving the issue of non-recognized tribes than they were twenty-nine years ago, when they implemented the regulations.

25 U.S.C. §§ 1300f - f2 (extending recognition and federal benefits to the Pascua Yaqui Tribe)
25 U.S.C. §§ 761- 768 (Southern Paiutes of Utah)
U.S. v. Sandoval, 231 U.S. at 46 (1913)
AIPRC, Final Report, at 474
III. Legislative Recognition

Legislative recognition is dependent as much on persuasive political efforts as it is on having historical information to support your position. The two cases discussed below, and the different results, illustrate the benefits of timing, political support, and a sympathetic story. Several tribes have been successful in gaining recognition through the legislative process. However, since the creation of the administrative acknowledgement process, Congress has rarely used its power to recognize tribes, instead deferring to the BIA.\textsuperscript{65}

A. Pascua Yaqui Tribe of Arizona

Congress recognized the Pascua Yaqui Tribe in 1978.\textsuperscript{66} Yaqui Indians migrated to the United States from Mexico in the 1920's to escape severe persecution and threatened forced labor at the hands of the Mexican government. The area they settled in - Phoenix and Tucson, Arizona - was within their traditional territory, though the heart of the Yaqui territory was the Rio Yaqui region in Mexico. Old Pascua village, near Tucson, became the new settlement for the Yaqui Indians.

In 1964, the Yaquis requested help from Congress to turn around a dire poverty situation in the village. Congress responded by giving the Yaqui village 202 acres of land on which to build new homes and run businesses.\textsuperscript{67} As part of the legislation, Congress created an association to manage the land and develop the housing. This association also provided the Yaquis with a rudimentary form of government that determined membership in the association. Even though the legislation recognized the Yaqui for one specific purpose - the land grant - the legislation excluded the Yaquis from federal benefits and services.

\textsuperscript{65} Since 1978, Congress has recognized or restored recognition for seven tribes. See 25 U.S.C. §§ 1300g - 1300m (1994, 1999 Supp.)


\textsuperscript{67} Pascua Yaqui Land Grant, Act of October 8, 1964, 78 Stat. 1196
In 1978, the Yaquis again petitioned Congress to help solve the tribe’s plight and dire economic conditions. Two bills were introduced, H.R. 6612 and S. 1633, to extend congressional recognition to the Pascua Yaqui tribe. Both bills also established the federal trust relationship with the tribe, placed the 202 acres of land in trust, and extended federal benefits and services to the tribe and its members. The Senate bill differed from the House bill in one critical way - the Senate bill contained language about the tribe’s right to self-government. The final bill included the self-government language, and granted federal recognition to the Pascua Yaqui Indians.

The committee reports for both the House and Senate bills include a brief recital of the historical information relied upon by the committees to recommend the bills’ passage. This information was obtained through documentation and hearings. The reports indicate the wealth of information available on the Yaqui tribe, both in Mexico and the United States. Both reports also acknowledge that the Yaquis traditional territory was divided by the “[U.JS. boundary line, determined by agreement with Mexico . . .“ and that Yaqui Indians fled to Arizona and were given asylum to escape persecution. The House Committee Report also indicates that the tribe, when it moved to Arizona, retained its tribal identity, language, customs and culture.

During the Senate committee hearings, Senator DeConcini, the sponsor of the bill, testified of his own awareness and familiarity with the Yaqui Indians, their culture and heritage. In addition, the Chairman of the Pascua Yaqui Association testified about the Yaqui culture, ceremonies, language and traditional migration patterns across the southwest. He also provided information on how the association operated, and its quasi-governmental status within

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68 95th Cong. (1978)
69 PL 95-375, 92 Stat. 712 (1978)
71 Hearing on S. 1633 before the Senate Select Committee on Indian Affairs, 95th Cong. (1977)
the village\textsuperscript{73}. Dr. Edward Spicer, from the University of Arizona and a renowned expert on the Yaqui,\textsuperscript{74} submitted a letter of support for the bill, and included additional information on Yaqui migrations into Arizona. He was in all likelihood the primary source of the historical information on the Yaqui Indians in Arizona and Mexico.

The Yaquis had to appeal to Congress for recognition because the pending administrative rules precluded them from petitioning for recognition through the administrative process.\textsuperscript{75} Only tribes that existed within the continental United States borders can petition for administrative recognition. Since the Yaquis are a tribe originally from the Mexico side of the international boundary line, they were not within the scope of the new process. In spite of this exclusion, the Assistant Secretary of Indian Affairs opposed the legislation and indicated that the Yaquis should petition for recognition like all other tribes. Despite BIA resistance, today the Pascua Yaquis are a federally recognized tribe with a reservation south of Tucson Arizona and 10,000 members.

B. Lumbee Tribe of North Carolina

Unlike the Pascua Yaquis, the Lumbees have not been successful in gaining federal recognition through congressional legislation. North Carolina recognized the Lumbees in 1885, and the Lumbees have been trying to gain federal recognition since 1888.\textsuperscript{76} However, both Congress and the Department of Interior have refused to recognize the tribe. The most recent effort to gain recognition was in 1996.\textsuperscript{77}

\textsuperscript{73} Hearing, p. 2
\textsuperscript{74} Id. at 5-8
\textsuperscript{75} Dr. Spicer has written several books on the Yaqui Tribe: PASCUA, A YAQUI VILLAGE IN ARIZONA (1940); POTAM, A YAQUI VILLAGE IN SONORA (1954); THE YAQUIS, A CULTURAL HISTORY (1980).
\textsuperscript{76} 43 Fed. Reg. 23743, 23744 (June 1, 1978) The proposed rules (and ultimately the final rule) excluded tribes that were not indigenous to the United States.
\textsuperscript{76} S. REP. NO. 102-251
\textsuperscript{77} H.R. 3810, 104\textsuperscript{th} Cong. (1996)
In 1991, an extensive Senate committee report was produced for consideration of H.R. 1426, which passed the House of Representatives. This report outlined both the historical and ethnological evidence submitted in support of the tribe's recognition. In hearings on the bill, the committee gathered information from anthropologists (including one that worked with the tribe and one from the Smithsonian Institute), internal BIA documentation, and previous hearings to support its findings and recommendation to pass the bill.

The Lumbees petitioned for administrative acknowledgement in 1987. The tribe's anthropologist, Dr. Jack Campisi, testified before Congress in 1988, expressing his belief that the tribe met six of the seven mandatory criteria. Dr. William Sturtevant, an acknowledged leading anthropologist with the Smithsonian Institute, also testified that the Lumbee's were descended from an historic tribe. This testimony bolstered internal BIA studies, conducted in 1934, that the Lumbee's were descended from the Cheraw tribe—a North Carolina coastal tribe. Based on other BIA documents, the committee determined that the Lumbee's had been consistently denied recognition, not because they weren't a tribe, but because the cost for benefits and services was too great. The cost issue appears to play a continued role in the Lumbee quest for recognition.

The state of North Carolina was also aware of the Lumbee tribe since the early 1700's. Various state laws entitle the Lumbees to state services and recognition. The committee report

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76 S. REP.NO. 102-251
79 Id.
80 Id. The only criterion the tribe claimed it could not meet was the last criterion, (g), which excludes groups from administrative acknowledgment if they are the subject of prohibition or termination legislation.
81 Id.
82 Id.
83 Id. The Committee report quotes a letter from the BIA Commissioner, responding to a request for recognition: "[s]o long as the immediate wards of the government are so insufficiently provided for, I do not see how I can consistently render any assistance to the Croatans (Lumbees) or any other civilized tribe."
also references considerable evidence in newspapers and local government records, as well as state records, of the existence of the Lumbees as an "Indian community." In 1956, the state re-acknowledged the Lumbees as a tribe, and Congress seemed to follow suit with legislation. However, while the federal legislation purportedly recognized the group as a tribe, it specifically prohibited the tribe from receiving federal benefits and services.85

The BIA submitted opposing testimony regarding the Lumbee’s pending petition for administrative acknowledgement and efforts to gain legislative recognition.86 The BIA first opposed the legislation on the basis of the existing administrative process, and claimed the Lumbee should go through the administrative process.87 However, a Solicitor opinion indicated that the Lumbees are not eligible to petition because of existing legislation that precludes them from receiving federal benefits and services.88

Based on an initial review of the petition, the BIA also indicated that the Lumbees had not produced sufficient evidence to prove that current members descended from a historical tribe.89 The BIA claimed the evidence proving the Lumbee link to the Cheraw tribe was weak. While the BIA did not claim this necessarily meant the Lumbees were not Indians, the BIA used this evidentiary hurdle to express its disagreement with legislative recognition.90

84 137 Cong. Rec. H6888-07, H6893, Statement of Mr. Faleomavaega (D-American Samoa). During debate of the bill on the floor of the House of Representatives, Rep. Faleomavaega expressed off the record remarks from the BIA that the size of the Lumbee membership, 40,000, would strain Bureau budgets and administration.
85 PL 84-570, 70 Stat. 254 (1956) reprinted in 1956 U.S.C.A.A.N. 307. The bill simply states that the Lumbees are Indians, and therefore, should be called the Lumbee Indians. The purpose was to distinguish them from the Eastern Cherokees. As usual, the BIA opposed the bill, and insisted on the exclusionary language to prevent the Lumbees from receiving federal benefits and services.
86 S. REP. NO. 102-251. Statement of Ronal Eden, Director, Office of Tribal Services, Bureau of Indian Affairs
87 Id.
88 Supra, note 85
89 Id, Statement of R. Eden
90 Id.
Not only did the BIA oppose legislative recognition, but tribes and tribal organizations also opposed the Lumbee recognition legislation. These tribes expressed support of the administrative process, and claimed concern that the legislative process was too political—something the administrative process is supposed to avoid. Individual representative support was mixed, though. Two key members of the House Committee disagreed with each other. Mr. Rhodes from Arizona, did not support the bill, while Mr. Miller from California did.

Because the Lumbees are precluded from the administrative petition process, the only way for the Lumbees to gain recognition is through congressional action. Congress has to either repeal the benefits and service prohibitions in the 1956 Act or directly recognize the tribe. To date, neither has happened.

IV. Administrative Recognition

The formal administrative recognition process requires extensive evidence and proof to meet the seven mandatory criteria for acknowledgment. Four of these criteria require extensive historical evidence—criteria (a): establish group as Indians, (b): continuous distinct social community, (c): continuous and autonomous political entity, and (e): proof of descendancy from a historic tribe. The regulations specifically list the type of evidence acceptable to the Secretary, and the weight to be given to different types of evidence.

For criteria (a), evidence to be relied on includes: repeated identification by Federal authorities; longstanding relationship with state governments; repeated dealings with county, parish, or other local governments based on the group’s identity; identification as an Indian entity in courthouse, church or school records; identification as an Indian entity by

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91 137 Cong. Rec. H6888-07, H6888-90, statements of Mr. Rhodes and Mr. Miller.
92 Id.
93 25 C.F.R. § 83.7 (1999)
94 Id.
anthropologists, historians or other scholars; repeated identifications in newspapers and books; or repeated identification with recognized Indian tribes or national Indian organizations.95

To prove a continuous distinct social community, the regulations specify evidence related to inter-marriage (endogamy) or outer-marriage (exogamy) rates, social relationships, broad informal interaction, shared or cooperative labor, discrimination or distinction of non-members, or shared sacred or ritual activity encompassing most of the group.96 Alternatively, the group can meet the criteria if it can show that more than fifty percent of the group resides in the same geographic area, inter-maries, or maintains distinct cultural patterns, or if there are distinct social institutions.97

There is no specific evidence listed to prove an autonomous political entity that has political influence and authority over the group. Instead, the regulations identify certain situations that indicate such influence and authority.98 Internal documentation and oral history becomes critical in proving this criterion, but BAR will validate this information with external, knowledgeable and reliable information.99

Criteria (e) evidence can include: descendancy rolls prepared by the Secretary for purposes of distributing claims money or allotments; federal, state, or other official records (i.e., census) identifying ancestry of current members; church, school, similar enrollment records indicating membership in petitioning group; and affidavits by tribal elders, leaders, governing body of descendancy and membership.100

95 See id. § 83.7(a)
96 See id. § 83.7 (b)(1)
97 See id. § 83.7(b)(2)
98 See id. § 83.7(c)
99 Id.
100 See id. § 83.7(e)
Because the criteria related to identification as an Indian group (a), social community (b), and autonomous political entity (c) must be met on a continuous basis, the evidentiary hurdle must be met for generational time periods. In other words, a petitioner must provide evidence for twenty-year periods, since historical times, to prove continuity. If any time period cannot be satisfactorily proven, the petitioner will fail the criteria, and be denied acknowledgement.\(^{101}\)

The petition process seems relatively simple,\(^ {102}\) but it is considerably lengthy, expensive and time-consuming.\(^ {103}\) The petitioning group must submit a letter of intent to petition. Then the group must compile enough evidence and research to satisfy (or so it believes) the seven criteria. Generally, the tribe has to hire a historian, anthropologist and genealogist.\(^ {104}\) While this is not required, the amount and type of evidence needed makes this involvement critical. The group must advise BAR that the petition is ready for consideration. BAR will do an initial review to look for obvious deficiencies.\(^ {105}\) The group will then have an opportunity to correct these deficiencies. Once there are no obvious deficiencies, BAR will proceed to evaluate the petition.\(^ {106}\) BAR usually relies on the information provided by the petitioner, but it may supplement the petitioner’s research with independent research. Upon completion of any additional research and analysis, BAR will recommend a decision to the Assistant Secretary – Indian Affairs. A proposed finding is then published, with a 120-day comment period. Additional information may be presented during this time, including comments and information.

\(^{101}\) See id. § 83.10

\(^{102}\) Id.

\(^{103}\) Paschal, at 219, estimated the costs to petitioners at $50,000 to $150,000 and an average decision time of four and one-half years. See also Jackie J. Kim, The Indian Federal Recognition Administrative Procedures Act of 1995: A congressional Solution to an Administrative Morass, 9 ADMIN. L. J. AM. U. 899, 912-914 (1995). Kim cites committee hearings conducted in 1994 on problems with the federal acknowledgment process. Expenses have increased to the $500,000 range, and the BAR now processes a petition every two years (up from 1.5 petitions per year).

\(^{104}\) Contrary to BAR assertions (see BAR, Acknowledgment Guidelines, Frequently Asked Questions,<http://www.doi.gov/bia/bar/arguide.html>) professional consultants are the linchpin in the petition documentation. See also Paschal, at 219
from interested third parties. Depending on the type of comments or information received, the Assistant Secretary may reaffirm the initial decision, or change the decision. A final determination is then published in the Federal Register.

The two groups discussed below both spent more than five years going through this process. While each group was theoretically held to the same proof and evidentiary standards, the disparate historical backgrounds and time frames were probably the most dispositive reasons for the difference in results.

A. Snoqualmie Acknowledgement

The Snoqualmie Tribal Organization (STO) was federally acknowledged on October 6, 1999. The STO petitioned for acknowledgement in 1991, and were tentatively approved for acknowledgement in 1993. When the regulations were changed in 1994, the STO was given the choice, and they accepted, of being reevaluated under the new regulations. Under the 1994 regulations, the STO had reduced evidentiary burdens for several of the mandatory criteria - if they could prove the Federal government had previously acknowledged them. The STO did prove previous acknowledgment, and they were given recognition. It is important to note that the BIA had found, under its proposed finding, that the STO met the mandatory criteria under the 1978 regulations - and therefore were likely to meet them under the 1994 standard criteria, without the benefit of the reduced criteria.

The STO are a survivor band of the Snoqualmie Tribe that signed the Treaty at Point Elliott in 1855. After the treaty was signed, several members of the tribe did not remove to the

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105 25 C.F.R. § 83.10(e)(1) (1999)
106 See id. § 83.10(e)(2) (1999)
109 62 Fed. Reg. at 45864
110 25 C.F.R. § 83.8 (1994)
reservation designated in the treaty, but they received allotments of land in the “public domain.”

The members were part of the Jerry Kamin Band (Band) – the accepted leader of the Band in the early 1900’s. The BIA had continually recognized this Band as an official tribe from 1934 to the mid-1950’s. Internal Indian Agency documentation and lists proved the Band continually and consistently dealt with the Indian agencies in the area. In addition, Congressional reports and BIA reports to Congress included the Band as one subject to the Indian Agency’s jurisdiction and identified the Band as an official tribe. These dealings continued until the mid-1950’s, when the Commissioner of Indian Affairs, taking his cue from Congress, unacknowledged the tribe and denied future benefits and services. The Band, which was off-reservation, became a non-tribe for this reason alone. The STO successfully proved, with these extensive federal government records, that the federal government previously acknowledged the Band and the STO is descended from the Band.111

Once the STO established previous government acknowledgement, there was a reduced evidence burden for the seven mandatory criteria. However, the reduced burden did not apply to the type and validity of the evidence, but to the time frames that had to be satisfied. In other words, the evidence still had to be acceptable to the BIA, but the STO did not have to prove the criteria for longer periods of time.

The STO petition included reports from a historian, anthropologist, and genealogist. Primary documentation also included the treaty, federal government documentation, interviews, affidavits, meeting minutes, and BAR independent research.112

The Summary Findings and the Technical Report illustrate the analysis process BAR goes through to make its determination.113 In sum, BAR followed specific scientific

methodologies – historical, anthropological, and genealogical. For example, in determining whether the STO have a distinct social community (criteria b), and exercise political authority (criteria c) the BAR evaluated a network analysis (who knows who and to what degree), anthropological research techniques, and intermarriage documentation of the STO petition. This information, which is indicated in the regulations as acceptable evidence, is evaluated for validity and accuracy. Interview and affidavit documentation was “given a careful reading and evaluation” and conclusions about the validity drawn based on “professional standards.”

Tribal members must descend from a historical tribe, so the STO had to provide ancestry documentation. 96 percent of the members could conclusively prove ancestors identified as Snoqualmie or listed on the “Unenrolled Indians of Western Washington,” a schedule prepared by the Office of Indian Affairs in 1919, or identified as Snoqualmie in allotment lists or other BIA records. Federal government documentation that specifies Indian tribal membership is considered the most acceptable in the petition process. In addition, 85 percent of the members received a judgment award in 1978 for an Indian Claims Commission case, which required proof of descent from the historic Snoqualmie tribe. Therefore, the STO easily met criteria (c).

The proposed findings, when issued in 1993, were severely criticized by the Tulalip Tribe – a federal government creation and amalgamation of various treaty tribes, including the

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114 Id.
116 STO Technical, at 7.
117 STO Summary, at 7.
118 Id. at 12. The professional standards employed are accepted Western science standards for historical, ethnological, and genealogical disciplines. See also Quinn, Jr., supra, note 50
119 25 C.F.R. § 83.7(e)
120 STO Technical, at 74-77.
121 25 C.F.R. § 83.7(e)(1)(ii)
Snoqualmie, that located on the Tulalip reservation. The Tulalip Tribe also provided anthropological and genealogical reports to disprove the ST0 existed as a tribe. BAR’s Technical Report effectively addressed each of the Tulalip Tribe’s major issues and conclusions. In this case, the result was a battle of the experts. BAR defended its use of certain methodologies, citing standard academic sources for their use, and acceptance of affidavits and oral testimony that could not be corroborated by other written documentation.

In the end, BAR applied both the law and the evidence to determine that the Snoqualmie met the acknowledgement criteria. The ST0 received the benefit of a reduced burden of proof, but they also had shorter time frames to account for and more documentation on their side.

B. Ramapough Mountain Indians

Unlike the ST0, the Ramapough Mountain Indians (RMI) have never been acknowledged. The RMI are located in New Jersey, and claim descendency from several New Jersey and New York tribes, including the Tuscarora and Cherokee. The RMI originally petitioned for acknowledgement in 1990. The petition was reviewed in 1992 and 1993, and a proposed finding against acknowledgement was published in December 1993. The RMI had failed to meet four of the seven mandatory criteria – (a) continual existence as an Indian group, (b) distinct social community, (c) political authority and organization, and (e) descent from a historic tribe. The final determination was analyzed under the new 1994 regulations. After this new reevaluation and analysis, the RMI still failed to meet three criteria – (b), (c), and (e).

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120 STO Summary, at 2
121 Id.
122 STO Technical, at 68-71, n. 263.
124 58 Fed. Reg. 64662 (December 8, 1993)
125 61 Fed. Reg. 4476 (February 6, 1996)
Criteria (b) and (c) rely heavily on an anthropological evaluation and the petitioner must meet these criteria on a continual basis since first contact. For the RMI, first contact was the late 1600’s – when non-Indians effectively established themselves in the New Jersey area. Unfortunately, for the RMI they could only meet the criteria for a short time period – 1870 to 1950.\textsuperscript{126} The RMI could not provide any acceptable evidence of a distinct Indian community or political organization before 1870 or after 1950.\textsuperscript{127} The RMI provided what BAR considered anecdotal information – various books and newspaper articles that mention an Indian community in the area. BAR identified, though, the type of acceptable evidence for this criterion that has been valid in the past. This evidence includes proof of geographic cohesiveness, cultural cohesiveness, religious cohesiveness (such as proof of an “Indian” church), or other significant social interaction.\textsuperscript{128} For example, the BAR found in the local church registry proof of group endogamy\textsuperscript{129} during 1870 to 1950 time period. When this type of evidence isn’t available, BAR will accept extensive newspaper articles, church records, local histories, diaries, personal correspondence, oral histories, or other sources that produce evidence of social interaction.\textsuperscript{130} The RMI was not able to produce any of this type of information to prove social community.

RMI was also not able to prove descent from a historical tribe.\textsuperscript{131} Anecdotal information indicated there were several tribes that could be precursors to the RMI – including the Tuscarora, Creek, and Delaware.\textsuperscript{132} Even though this same information recognized that the RMI have Indian blood, the RMI also have white and black ancestry. The RMI have been generally

\textsuperscript{126} RMI Summary, at 15-17
\textsuperscript{127} Id. at 17
\textsuperscript{128} Id.
\textsuperscript{129} Endogamy is defined as marriage within the tribal or social community.
\textsuperscript{130} RMI Summary, at 16
\textsuperscript{131} Id. at 22
\textsuperscript{132} Id. at 20
considered to be a tri-racial group of people. While BAR did not use this information to
disprove the RMI was an Indian group, it did not rely on this information to prove ancestry.\textsuperscript{133}

Specific lineage from a historical tribe must be proven. RMI was able to prove descent
from four progenitors in the 19\textsuperscript{th} Century. But, they were not able to prove that these four
progenitors descended from a historic Indian tribe.\textsuperscript{134} Acceptable evidence of proof of Indian
blood for these progenitors include descendancy rolls prepared by the BIA for claim distribution,
state or federal records (such as census records) identifying the progenitors as Indian, church or
school enrollment records, or other valid evidence.\textsuperscript{135} RMI could not provide any evidence the
progenitors were Indian, let alone descended from a specific historic tribe. BAR determined that
statements of "Indian characteristics" are not sufficient to prove ancestry.\textsuperscript{136}

RMI proof of tribal status suffered at the hands of time and documentation. The group's
location on the east coast has resulted in its assimilation and miscegenation. The exacting
evidentiary standards required by the regulations does not allow for any gaps in the historical and
evidentiary record. Unfortunately, for the RMI the past has not been well recorded.

V. Analysis of Results

A. Legislative Results

The Pascua Yaqui tribe had been the subject of federal legislation since 1964, and the
Lumbees since 1956.\textsuperscript{137} In both cases, it is apparent that Congress was aware of the tribes’
existence. However, due to the limited purposes of the initial legislation – for the Lumbee it was
to clarify that they were Indians and for the Pascua Yaqui it was a land grant – the BIA was

\textsuperscript{132} Id. at 22
\textsuperscript{133} Id. at 21. See also, 25 C.F.R. § 83.7(e)(1)
\textsuperscript{134} Id. at 21
\textsuperscript{135} See supra, notes 66 and 85
expressly prohibited from providing benefits and services to the tribes. Both tribes sought to correct this situation by appealing again to Congress to clarify their status, and to gain formal recognition. The Pascua Yaqui succeeded, while the Lumbees did not.

In reviewing the bills that were introduced, the timing of those introductions may shed some light on why one succeeded and the other did not. First, the Yaquis had powerful allies sponsoring their legislation — Morris Udall and Dennis DeConcini, both from Arizona. Secondly, the Yaquis requested legislation in the early 1970’s. At the same time, Congress was also passing legislation to restore several terminated tribes. In addition, Congress was passing several critical bills related to Indian self-determination and educational assistance. Congress clearly had Indians on the brain. While the BIA opposed Yaqui recognition, they had not yet implemented the federal acknowledgement regulations. Therefore, they could only oppose the bill on the basis that the Yaqui should wait for the regulations and then petition like all other unrecognized tribes. In the case of the Yaquis, timing could have been everything.

Lastly, the Yaquis had a well-documented history on their side. The Yaquis were a well-known tribe in Arizona, with considerable research about the tribe disseminated from the University of Arizona and local knowledge of the tribe’s Easter ceremony. Dr. Edward Spicer, an anthropologist and witness for the tribe, was a renowned expert in Yaqui culture and history. During the hearings on the bill, there seemed to be no doubt as to the continuing existence of the tribe. There was no opposition testimony that contradicted the existence of the tribe. Again, only the BIA opposed the bill, and for purely procedural reasons.

The Lumbees, on the other hand, have been seeking federal recognition since 1888. The BIA (previously the Office of Indian Affairs) refused to recognize them on several occasions.

138 Id.
139 Supra, note 57
The Lumbees have petitioned Congress since 1934—most recently in 1988, 1989, 1991, 1993, and 1996. Unlike the Yaqui legislation, the Lumbees most recent legislation was introduced well after the federal acknowledgement regulations were in place. Because of this timing, the federal acknowledgement criteria played a more critical role in Congress' consideration of this legislation.

The BIA has consistently opposed the recent Lumbee legislation, in spite of the fact that the Lumbee are ineligible for administrative acknowledgement. In the Senate Report for the 1991 legislation, the BIA testified that it had serious concerns about whether the Lumbee would qualify for administrative acknowledgement because there were questions about the Lumbee's ability to prove descent from a historic tribe. The BIA's purpose in disclosing this information is unclear, since the BIA knew it could not continue to process the Lumbee petition without legislation repealing the benefits and services prohibition in the 1956 Act. However, its opposition to recognition through legislative means has been consistent, and therefore, the BIA testimony furthered this opposition.

Lastly, there was sufficient opposition in Congress. While the 1991 bill passed the House of Representatives, with considerable floor debate, the bill died in the Senate. Mr. Rhodes, a congressman from Arizona, opposed Lumbee recognition. He stated that his primary opposition was twofold: that Congress did not have the expertise to determine whether the Lumbee were an Indian tribe deserving of federal recognition, and that the BIA acknowledgment process was the appropriate (and thus, only) avenue for tribal recognition. In the Senate, their own senator

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140 See discussion supra Part II-E and note 37
142 See supra, text accompanying note 85
143 Id.
144 137 Cong. Rec. H6888-07, H6907-08 (September 30, 1991) by a vote of 262 - 155
145 137 Cong. Rec. H6888-07, H6890-91 (September 26, 1991) statement of Mr. Rhodes
from North Carolina, Senator Jesse Helms, also opposed the legislation. Several tribes and tribal organizations also opposed legislative recognition. Interestingly, they have all been federally recognized – some of them legislatively.

In spite of over 100 years of continued attempts, the Lumbees have not been successful in gaining recognition. The strong BIA opposition and suggestion that the Lumbees may not meet the acknowledgement criteria may make it incredibly difficult to gain legislative recognition. While the Senate Committee report on the 1991 bill clearly asserts that Congress is not bound by the administrative process and criteria, it appears that members of Congress effectively defer to the Bureau’s process and criteria.

B. Administrative Results

The Ramapough Mountain Indians have failed to qualify for acknowledgement for what are apparently typical reasons – lack of continuous social community, political authority, and proof of descendancy. RMI is one of the three most recent final determinations that were not approved for acknowledgement because of an inability to prove descent from a historic tribe. In addition, two of the most recent final determinations against acknowledgement are for an inability to prove distinct social community and political authority. BAR has stated that most of the petitioners fail the social community criteria.

It is not surprising that RMI failed these criteria – the BIA expected that most petitioners would not be able to meet the social community and political authority criteria. The criteria are especially difficult to prove for tribes that have been most severely impacted by European...
contact, given the extraordinarily long periods of time since first contact and lack of land. The RMI, because of their location, had to prove continuous community since the 1600’s – almost four hundred years. The RMI experience is not unusual for an eastern tribe. A review of the BAR Summary Status of Acknowledgment Cases indicates that nine of the fifteen denied petitioners are located east of the Mississippi. Another commentator also reviewed denied petitions and found that one major difference between denied and accepted petitions was whether or not the tribe was landless. Since political and social distinction and cohesion are critical to prove criteria (b) and (c), tribal land bases are almost necessary to create the distinction and cohesion.

For the RMI to prove their continued existence and descent, even assuming it was true, would require documentation that, quite honestly, did not exist. The regulations list as acceptable pieces of evidence: federal and state records, census records, church or school enrollment, newspaper articles. This information requires an awareness and documentation by the mainstream society. Even though the RMI submitted both newspaper articles and historical books, BAR did not give this evidence sufficient weight. BAR clearly prefers primary to secondary sources. The tribes from which the RMI descended would have most likely migrated out of the area, so neither the state nor the federal governments would have reasons to deal with those tribes in that particular area. In the end, there were not enough primary sources to support the secondary source evidence.

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151 Summary Status of Acknowledgment Cases
152 Id.
153 Paschal, at 224
154 FRANCIS PRUCHA, AMERICAN INDIAN POLICY IN COLONIAL TIMES, 1770 - 1834 (1962) The RMI claims descent from the Cherokee, Tuscarora, and Cheraw Indians. All three of these tribes migrated to different areas (the Cherokee consolidated into Georgia, the Tuscarora into New York).
Enrollment and other identification documentation also require a certain amount of
Indian pride. Many eastern tribes had been assimilated or isolated since the colonial period, and
did not want to be known as Indian.\footnote{AIPRC, Final Report at 465} Tribes that assimilated became known as the “Christian Indians” or “Praying Indians.”\footnote{Id.} Other tribes remained isolated, and although the general community knew they existed, the BIA ignored them.\footnote{Id.} BAR, in its findings, even compared the lack of church information for the RMI with other successful petitioners who were able to provide church records or proof of the existence of an “Indian church.”\footnote{RMI Summary Report, at 15-17.} It is ironic that those Indian groups who adopted Christianity, and are thus more assimilated, have an evidentiary advantage for recognition than those who did not.

While the BIA, in its findings on the RMI, indicated that several eastern tribes were able to meet the criteria (and therefore overcame the strenuous continuity requirements), there is really very little room in the requirements for gray areas. Those tribes clearly met the requirements. But, tribes that barely miss the requirements -- they cannot prove certain time periods, but can prove most time periods -- will be denied acknowledgement.\footnote{Id.} Length of time since first contact was an insurmountable hurdle for the RMI given the type of documentation required and its lack of existence.

Even though the regulations state that documentation and evidence will be considered in historical and cultural context, a review of the RMI findings really shows a mechanical approach to applying the criteria to the petitioning group. Little weight seems to be given to the particular and unique circumstances each petitioner faces. Instead, BAR relies on Indian law precedent, established over 100 years ago, to support its over-reliance on continuous political entity
BAR experts applied western scholarly professional methods to written and well-established documentation. Granted, the purpose of the review is to apply a consistent and uniform set of standards. But, tribal existence and histories are neither consistent nor uniform. The end result is a Western academic view of proof, evidence, and analysis to effectively prevent recognition.

The Snoqualmie Tribal Organization (STO) was able to avoid many of the pitfalls that the RMI fell into for several reasons: the STO predecessors signed a treaty in 1855 – almost 200 years after RMI predecessor contact; a complex federal agency was in place to implement the treaty so federal documentation existed; treaty provisions created certain rights – such as allotment and fishing rights - that were fulfilled by the federal government; and the federal government kept track of Indian tribe membership to provide benefits under the treaty. All of these reasons not only resulted in considerable documentation and evidence of the existence of the tribe, but the relatively short and recent time periods also worked in the STO’s favor. The recency helped because more written documentation is likely in more modern times – ancestry information, enrollment information, political process documentation. In the end, the STO was also considerably helped by the previous federal acknowledgement (treaty tribe) because it reduced the burdens of proof for all the standard criteria.

\footnote{25 C.F.R. § 83.1 (1999)}

\footnote{RMI Summary, at 7}

\footnote{Paschal, at 226, also addresses the narrow interpretation of the existing criteria as one of the fatal flaws in the process.
VI. Recommendations

Considering the inherent flaws in the historical evidence requirements for proving tribal existence, the BIA should once again review the criteria, standards, and evidentiary requirements for federal recognition. The current standards are based on case law and solicitor opinions from over 100 years ago. As the American Indian Policy Review Commission found in 1977, the federal government has an obligation to all Indians and tribes who fall within the intended definitions of various statutes. Therefore, the recognition requirements should incorporate the policy of this obligation.

I propose three recommendations for how the evidentiary requirements should be either relaxed or altered. The first recommendation is to look to international law principles for the presumption of tribal recognition. The second recommendation is to revisit the original AIPRC recommendations and place the burden of proof on the government. The last recommendation is to incorporate traditional notions of recognition and to involve affiliated tribal entities in the process.

A. Foreign State Recognition

According to the Restatements (Third) of Foreign Relations Law, under international law a state is defined as “an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.” A state does not cease to exist even if “all of its territory has been occupied by a foreign power . . . “ A state is not required to accord formal recognition

162 AIPRC, Final Report, at 477.
163 Restatements (Third) of Foreign Relations Law, § 201
to any other state or government, but if an entity meets the definitional requirements, a state is
required to treat the entity as a state. 164

Under international law, recognition extends certain rights and duties between states. 165
While recognition is a unilateral sovereign decision, many new states are recognized because of
world community recognition. 166 Under United States law, in the absence of formal recognition,
a foreign state will not be afforded certain benefits – such as access to US courts, acceptance of
the foreign states judicial decisions, certain property entitlements. Recognition of Indian tribes
serves the same purpose as recognition of foreign states. To receive some benefits from the
United States government, a tribe or state must be formally recognized.

Lack of United States recognition does not mean that a state does not exist. 167 Several
examples include North Korea, People's Republic of China, and the U.S.S.R. (in their initial
stages). 168 In other instances the United States has recognized states that have become part of a
larger state – Lithuania, Latvia, and Estonia when incorporated into the U.S.S.R. 169 When new
states are created, such as those in Africa and the Balkans, they are recognized under
international and United States law without proof, either anthropological or ethnological or
genealogical, of continuous existence since an arbitrary point in time. In fact, new and
reconstituted states are recognized in spite of a lack of historical continuity. 170

The federal acknowledgement standards reflect elements of international law for
statehood and recognizing tribes. Criteria (a), which requires proof that the petitioner is an
Indian group, allows evidence of dealings with federal, state, and local governments, or

164 Restatements (Third), § 202(1)
165 See id. § 202, com. c
166 See Sir. Hersch Lauterpacht, Recognition in International Law (1948)
167 Restatements (Third) § 202, com. b
168 See id. Reporter's Note 6
169 Id.
170 Id.
identification by other Indian groups or organizations.\textsuperscript{171} Criterion (b), autonomous political entity, is the mirror requirement for "own government." Criterion (c), distinct social community, is the equivalent of "permanent population." There is no equivalent for "defined territory" or for "capacity to engage in formal relations" except to the extent that tribes do have the capacity to engage in relations with other tribes, federal and state governments. There is no historical requirement under international law for proof of statehood or recognition. Therefore, under international law principles, if a tribe can meet the definition of state, at the current point in time, then the tribe exists as a state.\textsuperscript{172}

Formal recognition should not be dependent on a process that creates a higher standard for tribes than for foreign state recognition. Unlike the recognition process for tribes, the United States does not apply an anthropological or ethnological set of standards to determine if an existing country is a state, or should be recognized. Instead, the US generally decides which states to recognize based either on international organization declarations or foreign policy reasons.\textsuperscript{173}

Arguably more emphasis should be placed on international law concepts of recognition than archaic, out of date federal Indian law concepts. Tribes are inherently sovereign nations. Just like the former U.S.S.R., the United States has jurisdictionally absorbed tribes. However, unlike the states in the former U.S.S.R, which are reconstituted countries, tribes are not afforded the same benefit of recognition when they reconstitute. Under BIA regulations, based on a 1934 Solicitor Opinion,\textsuperscript{174} once a tribe ceases to exist,\textsuperscript{175} it cannot petition for recognition. The standards themselves disallow reconstituted tribes, since the petitioner must show continuous

\textsuperscript{171} 25 C.F.R. § 83.7(a)
\textsuperscript{172} Restatements, § 201. According to Paschal, almost all the tribes that have been recognized are land-based. Since territory is a critical element of the definition of "state" this result is not surprising.
\textsuperscript{173} Restatements, § 202, Rep. Note 6
\textsuperscript{174} 55 I.D. 14 (1934)
\textsuperscript{175} Supra, Part II-D. Tribes can cease to exist for a variety of reasons. They voluntarily disband, the government ignores them and never initially recognizes them, or the government terminates them.
existence. At a minimum, the standards should include an ability to reconstitute, especially in light of the past American Indian policies of assimilation and termination.

B. American Indian Policy Review Commission

In 1977, the American Indian Policy Review Commission (AIPRC) issued several recommendations for recognizing tribes. The AIPRC reviewed the ad hoc and arbitrary process of recognition, and found two key issues with the process. First, there appeared to be no legal basis for the BIA to deny recognition to Indian groups. Language in existing statutes, especially the IRA, requires a tribe to be “recognized,” but the statutes do not give the BIA authority to exclude recognition. Second, the AIPRC was especially critical of non-recognition of known Indian groups—especially those groups that were either legislatively terminated by Congress or silently terminated by the BIA. The AIPRC found that non-recognition had more to do with political and budgetary issues than anything else.

To address these two criticisms, the AIPRC recommended that Congress establish a separate group, not within the BIA, to recognize tribes. A second, and more liberal, recommendation was that the Department of Interior should recognize any Indian group that petitioned, unless the Department could prove that the group did not meet any of the Cohen criteria. In effect, the AIPRC recommended that the burden of proof be on the federal government to prove a petitioning Indian group was not a tribe. As long as a group met any of the Cohen criteria, they should be recognized; a group should only be denied recognition if it did not meet any of the criteria.

176 25 C.F.R. § 83(c) states “[g]roup(s) that have been formed in recent times may not be acknowledged under these regulations.”
177 AIPRC, Final Report, at 457 -84
178 Id. at 461.
179 Id. at 462
180 Id. at 476
181 Id. at 481
Needless to say, the BIA implemented the exact opposite approach to acknowledgment. Instead of a presumption for recognition, the presumption is against recognition. The petitioning group has the burden of proof, and must meet all of the criteria. This burden requires an incredible amount of research, money, and time. The AIPRC determined this was a problem in 1977, and it is still a problem today. The regulations should be revised to incorporate the original AIPRC recommendations: the burden should be on the government to prove the group is not a tribe, and the standards should be relaxed (or at a minimum, broadly interpreted) to accommodate the wide range of tribal historical and traditional experiences.

C. Use of More Traditional Knowledge

Lastly, BAR takes a typical western approach to analyzing evidence. The approach is mechanical and cookie-cutter, almost as if a checklist is used. BAR, as an administrative agency, has developed its own precedent for evaluating petitions. The precedent is not based on application of legal concepts, but is based on acceptable evidence. The result is that the successful groups precedent effectively binds all petitioning groups, and there is little room for deviation. While BAR must adhere to the regulatory process to ensure fairness in the process, this uniform process should be considerate of unique circumstances.

Tribal traditions, histories, and practices are severely discounted by the Western bias for written, external, verifiable documentation. BAR accepts only certain types of evidence, determines if it is valid and sufficient, and compares it to other successful petitioning groups. The criteria standards are narrowly interpreted and applied. Acceptable professional scholarly standards – read “Western science” standards – are followed when reviewing and validating evidence. The high evidence requirements are consistently invoked across the “continuous”

\textsuperscript{182} Id. at 482 (emphasis added)
\textsuperscript{183} See discussion supra Part II-G
standard – the same evidence is required, generation by generation, despite the obvious: certain
tickets and documents did not exist in 1700 or 1800 or 1900. Just as ludicrous is that the same
evidence is required of every petitioner, regardless of the group’s history.

Consistent consideration must be given to the unique circumstances each petitioner faces in obtaining and providing evidence, and to the petitioner’s unique tribal background and history. BAR claims that each group is evaluated in its historical context, however the RMI’s summary findings do not even mention the tribe’s traditional customs, habits, form or historical experience. For example, the RMI social community criterion was based on intermarriage (endogamy) rates. Yet, there was no indication of the tribe’s traditional practice. Instead, BAR’s analysis results in the position that all groups must fit within a “tribal model.” The social and political criteria should be consistently evaluated against tribal traditions, not western perceptions of how a group of people should behave.

The regulatory requirement for hard evidence may be one of the reasons that tribal traditions are not more heavily relied upon. Evidence of a tribal tradition must be considered valid. The typical western (and legal) view is that it must be documented. However, since very many Indian tribes did not (and in many instances still do not) record their practices, confirmation of the practice will be difficult at best. Isolated tribes won’t have outside observers

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184 25 C.F.R. § 83.6(c)
185 RMI Summary, at 16
186 Id. See also, Paschal, at 224, describes a similar issue with the Snohomish and Samish petitions. Both of these northwest tribes traditionally practice exogamy (out-marriage), but this was cited by BAR as evidence of lack of social cohesion. Paschal’s analysis also reveals the inconsistency of BAR’s analysis. Sometimes BAR considers tribal custom, sometimes it does not.
187 Paschal refers to this as the “ideal tribe”
188 See Debo, A History of the Indians of the United States
recording external events. Or, if the events are recorded, they may be misinterpreted.\textsuperscript{189} Most tribes won’t have outside observers recording internal events.\textsuperscript{190}

One possible solution is to involve affiliated Indians and traditional tribal experts in reviewing petitions. Since many of the petitioning groups are subgroups or bands of larger tribes, affiliated experts might be able to provide an insider’s view to corroborate the petitioner’s statements and evidence. Instead of relying on documented outside information, which may not exist, BAR can substantiate the petition with third-party traditional information. Reliance should be placed more on third party traditional knowledge rather than third party western knowledge. This approach would counteract the western view brought to the process by the regulations and BAR staff analysis.

VII. Conclusion

The federal acknowledgment process is complex, lengthy, time consuming and requires an inordinate amount of evidence and research. The purpose of the process is to have a uniform approach to recognize Indian groups as tribes, but the result is that it creates a uniform analysis of Indian groups. The standard criteria are rooted in archaic and outmoded Indian law concepts, derived from judicial decisions in the 19\textsuperscript{th} Century, and western ethnological and anthropological definitions. The uniform analysis is fraught with a Western bias that does not accommodate uniqueness in tribal history, experience, custom, and society.

Specific changes should be made to both the standards and the analysis to create a presumption of tribal recognition, and to mitigate the Western bias. Affiliated tribes and other tribal experts should be included in the petition review process to bring an Indian perspective to

\textsuperscript{189} See, \textit{e.g.}, JAMES P. RHONDA, LEWIS AND CLARK AMONG THE INDIANS, 129-32 (1984) (illustrating how westerners can misinterpret the ceremonies they witness)
the analysis. International law concepts of recognition for presumptive states – including new and reconstituted states should also be included. Recognition decisions should be based on the presumption of statehood and stated Indian policy goals of self-determination and fulfilling the trust obligation, just as foreign state recognition is based on foreign policy goals. These changes are critical since the other avenue for recognition, Congress, requires too much political clout more than a valid claim to recognition.

190 See Mashpee Tribe, 592 F.2d 575. One anthropologist cynically commented that the tribe should have provided copies of meeting minutes to prove there was a governmental aspect to the group’s behavior. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE, TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE AND ART, 277 – 372 (1988)