OLR RESEARCH REPORT

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FEDERAL REGULATORY ACKNOWLEDGEMENT OF INDIAN TRIBES

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You asked for a summary of the (1) federal administrative process for acknowledging Indian tribes, (2) draft amendments to the regulations governing the process, and (3) Connecticut attorney general's comments on the draft.

SUMMARY

Federally acknowledged Indian tribes have a government-to-government relationship with the United States and are eligible for certain federal benefits and protections.

There are three ways in which a Indian tribe can become federally recognized: through federal legislation, the Bureau of Indian Affairs (BIA) administrative process, or federal court action. Since 1978, the primary method has been the administrative process. This involves a tribe petitioning the BIA for acknowledgement and meeting seven criteria. The tribe must prove, among other things, that it has (1) been identified as an Indian entity on a continuous basis from 1900 to the present, (2) existed as a community from historical times to the present, and (3) maintained political authority or influence over its members as an autonomous entity from historical times to the present.

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A tribe initiates the acknowledgement process by submitting a letter to the BIA expressing its intent to submit a documented petition seeking acknowledgment. The BIA's Office of Federal Acknowledgement (OFA) is responsible for reviewing petitions and making recommendations to the BIA assistant secretary, who has the authority to decide whether the tribe should be federally recognized. The process includes (1) a preliminary review to give the tribe an opportunity to supplement or revise its petition, (2) comment and response periods, (3) issuance of proposed findings, (3) active consideration of the petition, and (4) issuance of a final determination, The tribe or a third party may ask the BIA to reconsider a final determination and may also appeal the acknowledgment.

In June 2013, the BIA assistant secretary proposed amending the acknowledgement process to streamline and make it more efficient, transparent, and fair. Among other things, the draft (1) includes a new "expedited favorable finding" based on state recognition; (2) allows tribes denied recognition to reapply under certain criteria; (3) eliminates the requirement that an external entity identify the petitioner as an Indian tribe since 1900 and sets a 1934 date for tracing tribal existence; and (4) eliminates the Interior Board of Indian Appeals (IBIA), which hears appeals of acknowledgement decisions.

On September 24, 2013, Connecticut's attorney general submitted a letter to the BIA assistant secretary in which he expressed several concerns about the proposals, especially how they would affect the Connecticut tribes denied recognition. According to the attorney general, (1) allowing a tribe denied recognition to reapply and (2) granting an expedited favorable finding based on a state reservation would reverse "the BIA's determination that state reservations in Connecticut provide no basis for inferring the existence of a community of political authority." According to the attorney general, the proposed changes would virtually guarantee that the Eastern Pequot and Schaghticoke Nation (STN), whose bid for federal recognition was denied by the BIA and upheld by the courts, would be federally recognized.

FEDERAL ACKNOWLEDGEMENT OF INDIAN TRIBES

Federal acknowledgment (also called recognition) is the formal process by which Indian tribes gain sovereign status and enter into a government-to-government relationship with the United States. This means they have the right to, among other things, establish their own government, enact laws, and establish courts, and they are exempt from most state laws. Federally recognized tribes receive special rights,

services, and benefits from the federal government designed to fulfill the government's trust responsibility to tribes.

ADMINISTRATIVE ACKNOWLEDGEMENT PROCESS

Letter of Intent to Petition for Federal Recognition

A tribe or group of Native American descendants (tribe) seeking federal recognition initiates the process by submitting a "letter of intent" to the BIA asking to be recognized. The tribe must submit, then or later, a formal, documented petition, which must meet seven criteria. The documented petition must contain:

1. a statement of facts identifying the tribe as an American Indian entity on a substantially continuous basis since 1900;

2. evidence that a predominant portion of the petitioning group has existed as a distinct community from historical times to the present;

3. evidence that the tribe has maintained political authority or influence over its members as an autonomous entity from historical times to the present;

4. a copy of the tribe's governing document, including membership criteria, or, if it does not have a formal governing document, a description of its membership criteria and governing procedures;

5. an official membership list, any available former lists, and evidence that current members descend from a historic tribe or tribes that combined into a single autonomous political entity;

6. evidence that the tribe consists mainly of people who are not members of an acknowledged North American Indian tribe; and

7. a statement that the tribe is not the subject of congressional legislation that has terminated or forbidden the federal trust relationship (25 CFR § 83.7).

The documented petition must also contain "thorough explanations and supporting documentation in response to all of the criteria" (25 CFR § 83.6).

The BIA has 30 days to acknowledge receipt of the letter of intent (or documented petition, if receipt of the letter of intent was not previously

acknowledged) and 60 days to publish notice of it in the *Federal Register*. It must also notify, in writing, the governor and attorney general of the state where the tribe is located and any recognized or petitioning tribes that appear to have a historical or current relationship with the tribe or an interest in the petition. The notices give them and other interested parties an opportunity to comment on the petition (25 CFR § 83.9). An "interested party" is any party that has a legal, factual, or property interest in the outcome of the acknowledgment decision (25 CFR 83.1). BIA must also publish the notice in a major newspaper of general circulation in the town or city nearest to the tribe (25 CFR 83.9).

Preliminary Review of Petition for Federal Recognition

The BIA's Office of Federal Acknowledgement (OFA) is responsible for reviewing, verifying, and evaluating documented petitions and making recommendations to the BIA assistant secretary. Before actively considering a petition, OFA must conduct a preliminary review (also referred to as technical assistance review) to give the tribe an opportunity to supplement or revise it. After this review, OFA must notify the tribe of any obvious deficiencies or significant omissions apparent in the petition and give the tribe an opportunity to withdraw it for further work or submit additional information or clarification. The tribe may choose to revise or supplement the petition or ask OFA to proceed with actively considering it using the material already submitted (25 CFR § 83.10).

OFA must investigate any tribe whose documented petition and response to the technical assistance review show little or no evidence that it will meet criteria 5 through 7 above. If the review cannot clearly show that the tribe does not meet the three criteria, OFA must list the petition for active consideration of all seven criteria. If the review clearly shows that the group does not meet these criteria, OFA must issue a proposed finding (preliminary determination) declining to recognize the tribe or group and publish the finding in the Federal Register (25 CFR § 83.10(e)).

Active Consideration of Federal Recognition Petition

When OFA is ready to actively consider a documented petition, it must notify the tribe and interested parties (25 CFR 83.10(f)). Within one year (with a possible 180-day extension) after notifying the tribe, it must publish its proposed findings in the *Federal Register*. OFA must summarize the evidence, reasoning, and analysis on which the decision is based and provide copies to the tribe and third parties (25 CFR 83.10(h)).

Public Comment, Response, and Consultation Period

Once the proposed findings are published, the tribe and any interested party have 180 days to submit comments and evidence. The comment period may be extended for up to 180 days for cause (25 CFR § 83.10(i)).

The tribe has at least 60 days from the close of the comment period to respond to any comments received. At the end of the response period, OFA consults with the tribe and interested parties to determine an equitable time for considering arguments and evidence submitted during the response period (25 CFR § 83.10(k), (l)).

Final Determination and Reconsideration

After considering the comments and tribe's response, OFA makes a final determination on the tribe's status. It must publish a summary of the final determination in the *Federal Register* within 60 days of the date when it began considering written arguments and evidence rebutting or supporting the proposed finding (unless it extends the date because of the extent and nature of the arguments and evidence).

The determination takes effect 90 days after publication, unless the tribe or a third party asks the IBIA to reconsider it (25 CFR § 83.10(l)).

Requests for reconsideration must include a detailed statement of the grounds for reconsideration. The IBIA will consider requests alleging that:

1. new evidence could affect the determination,

2. much of the evidence relied on in making the determination was unreliable or of little probative value,

3. the research forming the basis of the determination appears inadequate or incomplete in a material respect, or

4. there are reasonable alternative interpretations of the evidence not previously considered that would substantially affect the determination (25 CFR § 83.11(d)).

The IBIA may affirm the decision or remand it to the BIA assistant secretary for reconsideration (25 CFR § 83.11(e)). If it affirms the decision but finds grounds for reconsideration other than the four listed above, it must send the decision to the interior secretary, who may ask the BIA assistant secretary to reconsider the petition after receiving additional comments from the tribe and interested parties (25 CFR 83.11(f)).

The assistant secretary must issue a reconsidered determination within 120 days of IBIA's remand or the secretary's request for reconsideration (25 CFR § 83.11(g)). A reconsidered final determination becomes final and effective upon publication of the notice in the *Federal Register* (25 CFR § 83.11(h)).

Appeal to Federal Court

Under the federal Administrative Procedures Act (UAPA) tribes may appeal administrative decisions to federal court (5 USC § 500 et seq.). Generally, the courts look only to see if the decision was arbitrary and capricious or if the agency abused its discretion, or the decision was not made in accordance with the law (5 USC § 706).

DRAFT PROPOSAL

In June 2013, the BIA assistant secretary proposed several changes to the federal tribal recognition process. He characterized the changes as an attempt to streamline the process and make it more efficient, transparent, and fair. This report highlights the major changes, particularly those that may affect Connecticut's state-recognized tribes. (A copy of the draft is available at: http://www.bia.gov/cs/groups/xraca/documents/text/idc1-022706.pdf.)

Determining Tribal Existence

The most significant proposed changes affect two of the seven criteria a tribe must meet to be acknowledged. Under current regulations, a tribe must prove that it has been continuously identified as a tribe since 1900, has comprised a distinct community since historic times, and maintained political influence or authority over its members as an autonomous group since historic times.

The draft proposal would require tribes only to prove continuous political authority and community since 1934, the year the Indian Reorganization Act was passed and many tribes were federally recognized and eliminate the requirement that an external entity identify the group as an Indian tribe since 1900. According to the Interior Department, this aligns the review with the federal government's repudiation of the allotment and assimilation policies of the late 1800's and early 1900's.

Expedited Favorable Finding. The draft proposes a new process and criteria for an expedited favorable finding. The two new criteria are: (1) the tribe has maintained and continues to hold a state-recognized reservation since 1934 or (2) the United States has held land in trust for the tribe at any point since 1934 (proposed 25 CFR § 83.10(g)). Under this scenario, a tribe with a state reservation since 1934 is deemed to have satisfied the recognition criteria for community and political authority.

Re-petitioning for Federal Recognition

Under current regulations, a tribe denied federal recognition may not reapply (25 CFR § 83.3(f)). Under the draft revisions, a tribe may re-petition if it proves by a preponderance of the evidence that a change from the previous version of the regulations to the current version warrants reversal of the final determination (proposed 25 CFR § 83.10(r)).

Elimination of the IBIA

Under current regulations, the assistant secretary's approval or denial of federal recognition is appealable to the IBIA. The draft proposal eliminates the IBIA, thereby requiring appeals to be filed in federal district court.

Miscellaneous Changes

Among other changes, the draft proposes (1) eliminating the requirement for a tribe to file a letter of intent to petition for recognition, (2) limiting the number of pages in a petition and submissions by interested parties, and (3) limiting the third parties that can respond to proposed findings.

ATTORNEY GENERAL'S COMMENTS ON THE BIA DRAFT PROPOSAL

On September 24, 2013, Connecticut's attorney general, on behalf of the state, submitted comments on the draft (http://www.ct.gov/ag/lib/ag/press_releases/2013/20130924_biacomments_discussiondraft.pdf).

According to the attorney general:

> The proposed revisions are not just an easing of needless administrative burdens or a trimming of duplicative bureaucratic reviews and procedures. Instead, the Draft proposes to seriously weaken and undermine the core substantive criteria for acknowledgement. In particular, at least as it appears they would be applied to previously denied Connecticut petitioning groups, the proposed changes would have the effect of reversing prior acknowledgment decisions for reasons that were expressly rejected in those decisions. To effect such a dramatic result, under the guise of improving administrative efficiency, cannot be justified by the evidentiary record developed in the proceedings of the Connecticut petitioners and would be contrary to the principles that have long governed federal tribal acknowledgment.

Re-petitioners and Expedited Favorable Findings

The attorney general says "two proposed changes, working in conjunction, pose serious concerns": (1) the proposal allowing tribes previously denied acknowledgement to re-petition and (2) the establishment of "an expedited favorable finding" mechanism that "would allow a petitioner to avoid having to satisfy the community and political authority criteria with actual evidence probative of community or political authority." Under the proposals, a petitioner with a state reservation since 1934 is deemed to satisfy the key criteria of community and political authority. According to the attorney general:

> [T]he Draft's truncation of the time period for which community and political authority must be demonstrated is seriously at odds with the fundamental principle that tribal existence must be historically continuous. . . .Continuity is a basic concept in acknowledgment, and continuous existence as a community and continuous exercise of political influence and authority within the community cannot simply be presumed because such a community presently exists or existed for some other period. . .[t]he 1934 limitation is based on just such a presumption.

The attorney general contends that the principle of continuity since historical times should not be abandoned or weakened because it is central to recognizing a tribal sovereign entity. But if the BIA intends to "go forward with the time period limitation, at a minimum, the presumption of continual existence as a community and continual exercise of political authority ought to be a rebuttable one. Interested parties should have a fair opportunity to present evidence and argument that, as to a particular petitioner, continuous existence cannot be presumed and in fact cannot be demonstrated."

According to the attorney general, the original final determination for the Eastern Pequot and STN "had relied heavily on the existence of a state reservation since the colonial period to give more weight to the otherwise insufficient evidence of community and political authority." But," on reconsideration, the BIA determined that maintenance of a state reservation is not evidence of community or political authority." The attorney general contends that the two draft provisions "appear to have the virtually guaranteed result of overturning the reconsidered final determinations," which the courts have upheld.

The attorney general asserts that the new expedited favorable finding allows a tribe to satisfy the community and political authority criteria without actual evidence. He argues that using a state reservation as a proxy for community and political authority is unwarranted and should not be used as a substitution. He contends that the state's maintenance does not prove the tribes had a distinct community or political authority, but only proves the continued existence of the tribes' descendants. The attorney general finally reasons that if the state-reservation proxy rule is to be adopted, it should not be available to previously denied tribes.

Procedural Protections

While acknowledging that the draft "contemplates an even greater role in the process for state and local governments," the attorney general offers examples of procedural protections that should be part of any changes. He said interested parties should be (1) placed on equal footing as tribes in regard to submitting evidence, comments, or arguments and (2) served with and receive any filings and submissions made by the tribe or other party without relying on Freedom of Information Act (FOIA) requests.

IBIA Elimination

The attorney general argues that eliminating the IBIA will not make the acknowledgment process more efficient, but will deprive both the tribes and interested parties of an important procedural protection. He contends that the IBIA's standards of review (1) are distinctly different from those that a court would apply under UAPA and (2) provide for review of issues that would not ordinarily be available before a court.

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