

THOUGHTS ON REFORM OF THE FEDERAL ACKNOWLEDGMENT PROCESS

submitted by

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Background

In the course of 25 years of service on the U.S. Senate Committee on Indian Affairs, I served as the General Counsel and later as Chief Counsel/Staff Director to the U.S. Senate Committee on Indian Affairs from 1987 to 2005. During that time, a number of bills were introduced in the U.S. House of Representatives and the U.S. Senate – all of which proposed reform to the Federal Acknowledgment Process (FAP) administered by the U.S. Department of the Interior. Those bills reflected differing approaches to FAP reform, but ultimately House and Senate consensus on one approach was never achieved, and thus none of the bills ever reached the White House for the President’s approval.

Also adding to considerations of the need to reform the Federal Acknowledgment process during that time frame were reports by the General Accounting Office (now the Government Accountability Office - GAO), and investigations conducted by the Inspector General of the U.S. Department of the Interior and the GAO, both on specific circumstances and on the general need for reform.

Having been fully briefed by the Interior Department Inspector General’s investigators and the GAO personnel who undertook the investigations and reports, and having been engaged in the legislative deliberations on the reform bills referenced above, I subsequently engaged in a series of in-depth interviews with not only representatives of the Inspector General and GAO, but also with the chief and the staff of the Office of Federal Acknowledgment within the U.S. Department of the Interior, and one former Assistant Secretary for Indian Affairs. Set forth below are some thoughts and/or proposals that emerged from that effort.

The Challenges

At the time I engaged in the effort to develop a better understanding of the challenges confronting those working in the Office of Federal Acknowledgment (OFA), the OFA staff was under considerable pressure. They described how much of their time was taken up in responding to Freedom of Information Act requests for documents (anywhere from 20% to 50% of their time in any given period). They were in the process of developing a data base to provide greater access to documents and transparency to the acknowledgment process. They were under court-order to meet certain court-established deadlines for the processing of specific acknowledgment petitions. And we now know that they were also in the process of developing a rationale for the unprecedented “reconsideration” and reversal of the Federal recognition of two tribal groups.

Prior to preparing recommendations for the Assistant Secretary for Indian Affairs’ review of Federal acknowledgment petitions, the OFA staff had to engage in extensive reviews of historical, genealogical and anthropological data associated with each petition. In addition, the OFA staff were repeatedly called upon to provide technical assistance to petitioning groups – which presented yet another significant demand on their time.

And then there were the investigations conducted by the Office of the Inspector General of the Department of the Interior and the General Accounting Office, and mandatory appearances before the oversight committees of jurisdiction in the U.S. House of Representatives and the U.S. Senate. There was considerable political pressure brought to bear on the OFA staff in those forums - whether it was to call into question the criteria being applied to Federal acknowledgment petitions, the length of time involved in processing each acknowledgment petition, or to raise the specter of gaming as the real incentive motivating tribal groups to seek Federal recognition – notwithstanding the fact that most tribal groups had filed their petitions long before, often decades before, the enactment of the Indian Gaming Regulatory Act.

In interviews, the OFA staff readily acknowledged that they were over-burdened and understaffed to respond to all of the demands made on their time, often uncertain as to how to handle attempts to bring public pressure to bear on the outcome of their deliberations, and frustrated that their various responsibilities often made them vulnerable to charges of a conflict of interest. They made it clear that their primary objective was to preserve the integrity of the Federal acknowledgment process, and they made this objective well-known to those charged with evaluating or investigating the process.

Suggestions

Following months of in-person interviews with OFA staff, representatives of the Interior Inspector General's Office and the General Accounting Office, and one former Assistant Secretary for Indian Affairs, as well as those outside observers of the Federal acknowledgment process, I assembled an informal set of ideas for addressing some of the challenges identified above. I took these ideas back to each of those who represented the entities that were or had been engaged in a review of the Federal acknowledgment process – and received what turned out to be their favorable review. The ideas/suggestions are set forth below:

- Separate the Technical Assistance Function from the Acknowledgment Petition Review Function

Critics of the OFA process have asserted that there is an inherent conflict of interest when OFA staff is charged with both providing technical assistance to petitioning groups and also charged with later reviewing the merits of each petition of those groups. The removal of this alleged conflict of interest could and likely should be considered. This could be accomplished by separating the technical assistance function from the responsibilities with which the OFA is otherwise charged, and placing the technical assistance function in a location and under the aegis of another Federal entity. One possibility that I explored in interviews was the placement of the technical assistance function in the National Museum of the American Indian's Cultural Resources Center.

- Separate the Responsibility to Maintain the FAIR data base from the Acknowledgment Petition Review Function

This function – of entering information into the FAIR data base, as well as updating and maintaining the FAIR data base – could also be moved to the Cultural Resources Center of the National Museum of the American Indian (NMAI). Many tribes have used the Cultural Resources Center (CRC) to gather information on their tribal histories and cultures, including cultural resources, and cultural objects and artifacts maintained by NMAI. Tribal researchers spend considerable time at the CRC, and it thus seems a logical place to posit other tribal research data bases. The goal that many would like to see realized is a data base that contains the history of Federal and State policies and actions over time in each state, so that at some point, not every petitioning tribe has to spend millions of dollars re-creating the generic historical documentation that affected all tribal groups in the same way in a particular state.

- Separate the Responsibility of Responding to Freedom of Information Act Requests from the Acknowledgment Petition Review Function

As evidenced in interviews with the OFA staff, the time entailed in responding to Freedom of Information Act requests can amount to as much as 50% of the OFA staff's time. Most tribal groups would prefer that the OFA staff be relieved of other time-consuming responsibilities so that the sole function of OFA would be to review petitions and to make recommendations to the Assistant Secretary, and to refer to the technical assistance providers based at another venue, possibly the CRC, the information that the OFA staff sends to petitioning tribal groups identifying where additional documentation is needed, before a full review of a petition can be completed.

One of the former Assistant Secretary for Indian Affairs who had reason to carefully evaluate the functions of the Office of Federal Acknowledgment and how the Federal acknowledgment process could be improved now serves as the Director of the National Museum of the American Indian. I have discussed these suggestions with him and believe that there is conceptual agreement that the separation of the functions addressed above by placing these functions in the Cultural Resources Center of the NMAI might well serve the goal of streamlining the Federal acknowledgment process by addressing some of the inherent challenges identified by those who have studied the process.

Discussion Draft

As a long-time observer of the Federal Acknowledgment process, and having participated in numerous hearings on the subject, I commend those who have clearly invested considerable time and effort in developing a discussion draft that proposes to address many of the aspects of the Federal acknowledgment process that are known to warrant improvement.

Over the course of many years, the frustration that petitioning tribal groups have continually expressed with regard to the length and expense of the process is a constant. The discussion draft proposals hold the potential of streamlining the process, making the process more transparent, and assuring that all sources of information that should be brought to bear in understanding and documenting the history of a tribal group's existence are considered.

For instance, most observers of the Federal Acknowledgment process agree that the fact that a State has historically recognized a tribal group, has established a reservation for that tribal group, and that the State is engaged in ongoing relationships with a tribal group and its members is clearly both relevant and germane. For purposes of the Federal Acknowledgment process, this important aspect of documenting the continual existence of a tribal group for long periods of time – sometimes over a period of hundreds of years – cannot and should not be ignored.

Creating a path for the expedited review of a Federal acknowledgment petition if the petitioning group meets certain specified criteria is another commendable feature of the Discussion Draft's proposals. And consistent with the Federal law and procedure that is applied by the Federal courts in other areas, the Discussion Draft's conceptual approach to assuring that once a petition for Federal acknowledgment has been approved, the burden should rest with those who seek to challenge the Federal action - not with the petitioning group to whom Federal recognition has been extended - is clearly warranted.

Years and years of testimony before the committees of Congress, as well as studies and investigations and reports, make it abundantly clear that reform of the Federal Acknowledgment process must be undertaken.

The Assistant Secretary for Indian Affairs and the Deputy Assistant Secretary for Indian Affairs are to be commended for their initiative and thoughtful approaches to the matter of this long-overdue reform.