

SHIFTING FOUNDATION: THE PROBLEM WITH INCONSISTENT IMPLEMENTATION OF FEDERAL RECOGNITION REGULATIONS

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ABSTRACT

The establishment of federal recognition is the cornerstone of federal Indian law. All rights, including criminal jurisdiction, tax status, gaming rights, and hunting and fishing rights, stem from this initial acknowledgment. Yet prior law review articles have focused only on the overarching process of federal recognition without closely examining the actual administrative findings of the Department of the Interior.

This article will provide an in-depth examination of the regulations governing whether an Indian entity is entitled to the benefits of a government-to-government relationship with the United States. Specifically, this article examines the regulatory process for filing a federal recognition petition and critiques four of the criteria that petitioning Indian entities consistently fail to meet. By reviewing Department of the Interior decisions, this article demonstrates the inconsistencies in regulatory interpretations and guidance documents as well as the inherent biases in the current regulatory framework. Finally, the article discusses potential solutions to these problems and identifies the first step necessary in order to fully understand the depth of this regulatory issue.

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I.

INTRODUCTION

Understanding federal recognition is the cornerstone of a thorough understanding of Indian law. The logical starting point in understanding federal Indian law begins with exploring why certain entities qualify as Indian tribes. Since its formation, the United States government has “recognized” Indian tribes. Recognition by the federal government is a necessary precursor for a tribe to enter into a government-to-government relationship with the U.S. government, and it ensures that the tribe obtains all of the rights and benefits that accompany federal recognition.¹

While each branch of the U.S. government has the power to act within the scope of its authority to recognize a tribe,² the executive branch predominates as the primary federal entity involved in the recognition process.³ Despite the importance of recognition, the federal government did not implement standardized criteria for recognition until 1978. Today, the administrative process codified at 25 C.F.R. § 83 (“Part 83”) is the dominant approach to

1. Mark Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271, 276-78 (2001) (noting the various benefits that federally recognized tribes have compared to unrecognized tribes).

2. Congress can use its plenary power to recognize tribes and enter into a government-to-government relationship with them by passing legislation. The judiciary’s power is somewhat limited. It is clear that the judiciary can, and frequently does, recognize tribes for the limited purpose of issuing a decision on a case before the court. However, because a court must rule on a specific cause of action, cannot exceed its jurisdiction, and is bound by the political question doctrine, courts have not made rulings that provide overarching federal recognition to a tribe.

3. Currently, the executive branch exclusively recognizes tribes through agency action. However, prior to 1871, the Executive could engage in treaty-making with tribes, which is in itself federal recognition. The Department of the Interior (“DOI”) also engages in reaffirmation decisions, which differ from federal recognition because the DOI argues that the tribes were always recognized but, due to administrative errors, were not provided the benefits of recognition.

determining whether an entity is a federally recognized Indian tribe.

This article explores the Part 83 federal recognition regulation by critically examining how it is interpreted and implemented by the Department of the Interior's Office of Federal Acknowledgement ("OFA"). This article argues that the Part 83 regulatory text has been inappropriately superseded by agency guidance documents and that the OFA applies the regulation inconsistently, undermining the legitimacy of the process. Part I provides a general overview of the federal recognition process and a discussion of the benefits of federal recognition. Through a review of published findings, Part II examines how the OFA has interpreted the regulation. Finally, Part III considers potential actions that the federal government can take to reform the federal recognition system.

II.

THE PROCESS OF FEDERAL RECOGNITION

In its most fundamental form, federal recognition is the official recognition by the federal government of the political status of an Indian tribe. Federal recognition is an acknowledgement that a relationship exists between two nations on a political basis, rather than merely on a social or racial basis.⁴ A federally recognized tribe and its members are eligible for a variety of federal programs designed to further the trust relationship between the U.S. government and Indian nations. Once the political status of an Indian tribe is recognized, the federal government has a responsibility, similar to that of a trustee to its beneficiary, to act for the benefit of that tribe, in a trust relationship.⁵ For example, the federal government holds most tribal assets, including Indian land and natural resources, in trust and is required to manage these assets for the benefit of the Indian tribe.⁶ This fiduciary relationship derives from a line of case law called the Marshall Trilogy, and is reinforced by centuries of statutory, judicial, and administrative precedent.⁷ Thus, tribes must obtain federal recognition in order to fall under the federal government's trust umbrella and access the many benefits afforded to federally recognized Indian tribes. For example, the Indian Health Service provides direct healthcare to individuals who

4. *Morton v. Mancari*, 417 U.S. 535, 551 n. 24 (1974).

5. DAVID WILKINS & TSANINA LOMAWAIMA, *With the Greatest Respect and Fidelity: The Trust Doctrine*, in *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW*, 64–97 (2001).

6. *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (holding that federal timber leasing on behalf of tribes must be based on "the needs and best interests of the Indian owner and his heirs").

7. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (creating the foundation of federal Indian law and bedrock principles such as the Indian right of occupancy on U.S. lands, the separate sovereign classification of tribal nations, and tribal control over internal affairs). See generally Richard Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 57 *LOY. L. REV.* 435 (2011).

are members of federally recognized Indian tribes and provides funding to other federally recognized tribes to provide health services to their members.⁸

The administrative federal recognition process provides a comprehensive path for an Indian entity to petition for, respond to, and possibly appeal from a federal recognition determination by the Department of the Interior ("DOI"). Although most comprehensive regulations are developed when an agency receives a mandate from Congress to implement or reform a program,⁹ Part 83 regulations received no such mandate. Typically, congressional authorizing statutes are general in nature and delegate significant authority to a department or agency to issue regulations that implement the provisions of the statute.¹⁰ Authorizing legislation, which directs an agency to implement a specific program, generally provides a broad umbrella for enabling legislation,¹¹ which provides authority for all actions undertaken by the agency.¹² Agency action is invalid if it exceeds the boundaries of enabling legislation.¹³

However, the Part 83 regulation differs from most typical regulations in that Congress never passed an authorizing statute or officially weighed in by providing federal recognition standards. Instead, the DOI cites a general administrative law delegation statute as its authority to issue federal recognition criteria.¹⁴ Administrative law delegation statutes provide the DOI with the authority to prescribe regulations as necessary in the "performance of its business."¹⁵ The DOI does not say why development of the Part 83 regulation is necessary to administer agency business, however, it is clear that the DOI must analyze whether a tribe is federally recognized in order to determine whether it qualifies to receive benefits from the DOI.¹⁶ For example, the Division of Economic Development assists only federally recognized tribes through the

8. Synder Act of 1921, 25 U.S.C. § 13 (2006) (establishing the Indian Health Service); Reauthorization of the Indian Health Care Improvement Act of 2010, 25 U.S.C. §§ 1621, 1637–38 (2006) (clarifying compacting and contracting provisions under the Indian Self Determination and Education Assistance Act, which allows federally recognized tribes to operate their own health care facilities).

9. WILLIAM FUNK, SIDNEY SHAPIRO & RUSSELL WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 49 (4th ed. 2010) (noting that rulemakings are often undertaken upon congressional direction).

10. *Id.*

11. FED. LAW ENFORCEMENT TRAINING CTR, LEGAL DIVISION HANDBOOK 3, 14 (2010). See generally ROGER DAVIDSON, WALTER J. OLESZEK, & FRANCES E. LEE, CONGRESS AND ITS MEMBERS (CQ Press, 11th ed. 2008).

12. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 49 (5th ed. 2012) (providing framework for how and why federal agencies engage in rulemaking).

13. *Id.*

14. 73 Fed Reg. 30,146 (May 23, 2008) (citing 5 U.S.C. § 301 (2006); 25 U.S.C. § 2 (2006); 25 U.S.C. § 9 (2006); 43 U.S.C. § 1457 (2006)).

15. 5 U.S.C. § 301 (1994) (cited as authority in "Procedures for Establishing That an American Indian Group Exists as an Indian Tribe," 25 C.F.R. § 83).

16. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 77 Fed Reg. 47873 (2012).

provision of training, business planning, and consultation.¹⁷ Similarly, the Office of Justice Services operates the Indian Police Academy, which only trains tribal police officers from federally recognized tribes.¹⁸

Federal agencies that provide services to federally recognized tribes benefit from a clear mechanism for determining whether a specific tribe meets these standards. The DOI is required to periodically publish a list of federally recognized tribes.¹⁹ In the past, this list was published inconsistently; currently, it is published on an annual basis. The most recent list notes the addition of one federally recognized tribe, the Shinnecock Indian Nation.²⁰ Thus, a standardized method of adding entities to this list is beneficial for the DOI because it assists in administering agency “business.”

The intent of Part 83 is to “establish a department procedure and policy for acknowledging that certain American Indian groups exist as tribes.”²¹ The regulation applies only to those Indian entities that are currently not acknowledged, and is intended for “groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.”²² While the regulation does not purport to be the final determiner of whether a petitioner is a legitimate tribe, the regulation’s title has been criticized as providing the mistaken impression that an unsuccessful entity is not a tribe.²³

The process of petitioning for federal acknowledgement is fairly straightforward. First, an Indian group must file a letter of intent stating that it can satisfy the criteria laid out by the Part 83 regulation, and the group must formally request acknowledgement that it exists as an Indian tribe.²⁴ The letter should be addressed to the Assistant Secretary—Indian Affairs (“AS-IA”) and must be signed by the governing body of that Indian group.²⁵

The DOI must then provide a written notice of receipt within thirty days of

17. U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Division of Economic Development*, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DED/index.htm> (last visited Jan. 23, 2013).

18. OFFICE OF JUSTICE SERVICES, *Indian Police Academy*, <http://www.bia.gov/WhoWeAre/BIA/OJS/IPA/index.htm> (last visited Jan. 23, 2013).

19. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792 (1994).

20. 77 Fed Reg. 47,871 (2012).

21. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe Rule, 25 C.F.R. § 83.2 (2009).

22. *Id.* § 83.3(a).

23. Myers, *supra* note 1, at 279 (“This designation, however, is something of a misnomer. A group’s failure to meet the acknowledgement criteria of § 83.7 does not necessarily indicate an official finding that the group does not exist as a tribe, although others may draw this inference.”).

24. 25 C.F.R. § 83.4(a)–(b) (2009). Note that the letter must actually include a sentence that requests acknowledgment or else it may not be deemed sufficient to start the process.

25. *Id.* § 83.4(c).

receiving a letter of intent.²⁶ Within sixty days, the Secretary of the Interior must publish acknowledgment of receipt in the Federal Register to notify the public and any potentially interested parties.²⁷ Furthermore, the AS-IA must notify, in writing, both the governor and the attorney general of the state in which the petitioner is located, as well as any other petitioner that appears to have a historical or present relationship with the petitioner.²⁸

The onus then falls on the petitioner to draft a petition providing specific evidence in support of its request for acknowledgment.²⁹ Under Part 83, the petition may be in any readable form but must be certified by the group's governing body.³⁰ A petition is comprised of a narrative supported by appropriate contemporaneous documentation, such as newspaper clippings, official meeting minutes, or letters from the federal government, which prove that the Indian entity meets each of seven mandatory criteria.³¹ The quality and amount of supporting documentation submitted for the petition are not dictated by the regulations, and they tend to correlate to the tribe's financial means.³²

Once the OFA receives the petition, it conducts a preliminary review to provide the petitioner with technical assistance.³³ The technical assistance review advises the petitioner on how to improve the petition prior to active consideration.³⁴ Then, the AS-IA notifies the petitioner in writing of any obvious deficiencies or significant omissions and gives the petitioner the opportunity to withdraw the petition for further work or submit a supplement to the petition.³⁵ During this stage, the petitioner may request teleconferences or in-person meetings to query the OFA staff on how to draft a petition that will meet the requirements of the regulations.³⁶ Regardless of the quantity or seriousness of the stated deficiencies, the petitioner has the option to proceed with active consideration by being placed on the "ready and waiting list."³⁷ Review is conducted by the date stated in the OFA's notification letter to the petitioner

26. *Id.* § 83.9(a). The petitioner may also opt to file a petition without filing a letter of intent.

27. *Id.*

28. *Id.* § 83.9(b).

29. *Id.* § 83.6(a).

30. *Id.* § 83.6(a)-(b).

31. *Id.* § 83.6. *Accord* OFFICE OF FED. ACKNOWLEDGEMENT, OFFICIAL GUIDELINES TO THE FED. ACKNOWLEDGMENT REGULATIONS (1997), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001214.pdf>.

32. RENEE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 53-55 (2005).

33. 25 C.F.R. § 83.10(b).

34. *Id.* § 83.10(b)(1).

35. *Id.* § 83.10(b)(2).

36. OFFICE OF FED. ACKNOWLEDGMENT, OFFICIAL GUIDELINES TO THE FEDERAL ACKNOWLEDGMENT REGULATIONS 25 C.F.R. § 83, 12 (1997), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001214.pdf>.

37. 25 C.F.R. § 83.10(c) (2009).

indicating that its petition is in “active consideration.”³⁸

Petitioners most frequently cite the regulatory timelines as a significant source of frustration.³⁹ Although the regulations unambiguously state that, “within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register,” a petitioner generally waits decades before their petition is actually considered.⁴⁰ Under the current regulations it should take twenty-five months to review a petition with the possibility of two 180-day extensions.⁴¹ The regulations go on to state that the Secretary has the discretion “to extend that period up to an additional 180 days.”⁴² Under a plain reading, it would appear that the Secretary could provide one extension of 180 days, yet the OFA has interpreted this to mean that the Secretary can provide unlimited extensions of up to 180 days each.⁴³

To counteract the lengthy review process in part, the regulations allow for

38. *Id.* at 83.10(d).

39. *See, e.g.,* Jack Campisi & William A. Starna, *Why Does it Take So Long?: Fed. Recognition and the American Indian Tribes of New England* 1–17, 57 (unpublished manuscript) (copy on file with author). *See also* OFFICE OF FED. ACKNOWLEDGEMENT, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (July 31, 2012), *available at* <http://www.bia.gov/cs/groups/xofa/documents/text/idc-020611.pdf> (noting receipt dates of letters of intent and current statuses of petitions); OFFICE OF FED. ACKNOWLEDGEMENT, LETTERS OF INTENT RECEIVED, *available at* <http://www.bia.gov/idc/groups/xofa/documents/text/idc013622.pdf> (last visited March 20, 2012) (providing the date that all Indian entities seeking federal recognition through the Part 83 process originally filed their letters of intent).

40. 25 C.F.R. § 83.10(h) (2009).

41. *Id.* § 83.9–83.10 (providing thirty days to send notice of receipt of letter of intent, sixty days to publish acknowledgement of receipt of letter of intent, one year to review petition once on active consideration, 180 days for comments on proposed findings, sixty days for petitioner to respond to comments, sixty days to publish a final determination, with a potential 180-day extension for reviewing proposed findings, and 180-day extension to comment). *See also Process of Fed. Recognition of Indian Tribes: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 48–50 (2007) (tribe chairperson addressing timeline of federal recognition process).

42. 25 C.F.R. § 83.10(h) (2009).

43. *Process of Fed. Recognition of Indian Tribes: Hearing Before the Comm. on Indian Affairs*, *supra* note 41, at 33 (statement of Hon. Ron Yob, Grand River Band of Ottawa Indians of Michigan). *See, e.g., Sen. Jon Tester: “Not Another Delay” for Little Shell*, BUFFALO POST (July 29, 2009), *available at* <http://www.buffalopost.net/?p=2137> (noting that the OFA requested and granted itself an extension on July 24, 2008; January 15, 2009; and July 27, 2009); Aurene M. Martin, U.S. DEP’T OF THE INTERIOR, OFFICE OF FED. ACKNOWLEDGMENT, *Summary under the Criteria and Evidence for Final Determination Against Fed. Acknowledgment of the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians*, INDIAN AFFAIRS 5 (June 18, 2004), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001550.pdf> (noting that OFA requested and was granted extensions on May 30, 2003 and May 1, 2004). Proposed Findings and Final Determinations are agency decisions that arise outside of an administrative judicial process. Although they are not required to be published, the Assistant Secretary—Indian Affairs has published summaries of both the Proposed Finding and Final Determination in the Federal Register and the Obama Administration provides links via the Acknowledgement Decision Compilation online at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/index.htm>.

an expedited negative finding.⁴⁴ However, if the OFA's "[initial] review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria," a full review must be undertaken.⁴⁵ The OFA has never invoked this portion of the regulation.⁴⁶ Once a petition is actively reviewed and taken off of the waiting list, the OFA will notify the petitioner and interested parties and provide any substantive comments received prior to publishing its Proposed Finding.⁴⁷

Furthermore, in practice, the OFA frequently does not abide by the stated regulatory standard for evaluating evidence. The regulation requires that the OFA evaluate petitioners' evidence under the standard of "reasonable likelihood of the validity of the facts."⁴⁸ However, a guidance document issued in 2000 required that the OFA employ professional standards to evaluate whether there is sufficient evidence before applying the standard of review published in the regulation.⁴⁹ Thus, while Part 83 clearly states that the evidentiary standard is "reasonable likelihood of the validity of the facts," instead, the OFA first reviews the evidence according to the professional standards of historians, anthropologists, and genealogists.⁵⁰ Only after the evidence satisfies this professional standard does OFA review the evidence as a whole under the "reasonable likelihood of the validity of the facts" standard. This means that a petitioner's evidence is reviewed according to a higher standard because the above-mentioned professional standards are stricter than the regulatory standards. For example, a genealogist requires two sources in order to accept a piece of evidence, which is undoubtedly a higher standard than "reasonable likelihood of the validity of the facts."⁵¹

Publication of the Proposed Finding in the Federal Register starts a 180-day public comment period.⁵² At that point, again, the AS-IA has discretion to extend the comment period for good cause,⁵³ which is not unprecedented.⁵⁴

44. 25 C.F.R. §§ 83.6(d), 83.10(e) (2009).

45. *Id.* at § 83.10(e)(2) (emphasis added).

46. See OFFICE OF FED. ACKNOWLEDGMENT, ACKNOWLEDGMENT DECISION COMPILATION (ACD) LIST: PETITIONS RESOLVED BY DOI, available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/index.htm> (providing a database that lists all of the outcomes of Part 83 petitions).

47. 25 C.F.R. § 83.10(f)(2) (2009).

48. *Id.* § 83.6(d).

49. *Id.* §§ 83.6(d)–(e). 65 Fed. Reg. 7052, 7053 (Feb. 11, 2000).

50. See, e.g., Elizabeth Shown Mills, *Working with Historical Evidence: Genealogical Principles and Standards*, 87 NAT'L GENEALOGICAL SOC'Y Q. 165 (1999) (providing a description of the professional standards of genealogists).

51. *Id.* See also Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, Juaneño Formal Technical Assistance on the Record, 181–186 (Apr. 22, 2008) (on file with author).

52. 25 C.F.R. § 83.10(i) (2009).

53. *Id.*

54. See, e.g., Notice of Extension of Comment Period on Proposed Finding Against Fed.

After publication of the Proposed Findings and upon request of the petitioner, the OFA may provide informal technical advice or hold a formal technical assistance meeting on the record.⁵⁵ Historically, only a handful of these meetings have been held.⁵⁶ Because the actual team that reviewed and drafted the petitioner's Proposed Finding is present to answer questions, these meetings can be very helpful in understanding the methodology that each reviewer utilized, thereby assisting the petitioner in crafting an effective response. Although the regulation is silent as to the qualifications of the reviewers, the OFA traditionally has assigned a team consisting of a historian, an anthropologist, and a genealogist to review each petition.⁵⁷

The petitioner has at least sixty days to respond to any comments received, but the AS-IA may extend this time period.⁵⁸ At the end of the comment period, the OFA drafts a recommendation in the form of a Final Determination, based on all of the evidence submitted to the AS-IA regarding the petitioner's status.⁵⁹ A summary of the Final Determination must be published in the Federal Register within sixty days of the close of the comment period for the Proposed Finding.⁶⁰

Acknowledgement of the Principal Creek Indian Nation East of the Mississippi, 49 Fed. Reg. 44024 (Oct. 25, 1984). Because extensions need not be published in the Federal Register, it is common for the extensions to be granted through correspondence with the petitioners. However, if one compares the timeline for the length of time between the publication of the Proposed Finding and the publication of the Final Determination, it is clear that extensions to comment periods and extensions for the OFA's analysis of comments are routinely granted.

55. 25 C.F.R. § 83.10(j) (2009).

56. Interview with L. Tuell, former principal partner, Anderson Indian Law (formerly Anderson Tuell, LLP) and former Counsel at Bureau of Indian Affairs, in Washington, D.C. (Feb. 2008) (noting that the Muwekma Ohlone is the only other petitioner that requested a formal technical assistance meeting on the record).

57. BIA, OFFICIAL GUIDELINES TO THE FEDERAL ACKNOWLEDGMENT REGULATIONS 14 (1997), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001214.pdf> (last visited May 23, 2013) (noting that the OFA (formerly BAR) uses anthropologists, genealogists and historians to review petitions). See, e.g., BIA, Ramapough Proposed Finding 2-4 (showing the organizational structure of the petition broken down into three separate reports – historical, anthropological, and genealogical); Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, *supra* note 51, at 5–6 (noting that the team that reviewed the petition consisted of a historian, anthropologist, and genealogist). See also List of OFA Staff and their Credentials, INDIAN AFFAIRS, <http://www.bia.gov/idc/groups/public/documents/text/idc009020.pdf> (last visited Feb. 10, 2013).

The trend of having one historian, one anthropologist, and one genealogist review a petition should also be reconsidered. In order to adequately review a petition under the regulations, a regulatory or legal background is all that is required. Furthermore, contrary to Cramer's argument that the problem with the federal recognition process is that OFA staffers are too legalistic, the actual problem is that specific knowledge in an academic discipline such as history may detract from a strict reading of the regulations. For example, a historian will likely produce an analysis that incorporates historical standards, assumptions, and methods that go above what is enunciated in the regulation. By comparison, an attorney would more likely produce a review that strictly adhered to regulations and the standard within the regulations ensuring that the petitioner provided adequate proof of each criterion.

58. 25 C.F.R. § 83.10(k) (2009).

59. *Id.* § 83.10(l)(2).

60. *Id.*

However, the AS-IA has discretion to extend the preparation period.⁶¹ In practice, the AS-IA frequently grants itself extensions.⁶² Once the Final Determination is published, it becomes effective in ninety days unless a request for reconsideration is filed with the Interior Board of Indian Appeals ("IBIA").⁶³ A request for reconsideration consists of a "detailed statement of the grounds for reconsideration" and "any relevant new evidence."⁶⁴ If reconsideration is not requested, the publication of the Final Determination becomes the final agency action for the DOI.⁶⁵

Although the IBIA has limited appellate authority, it may review all timely requests for reconsideration on federal recognition petitions that allege any of the following: (1) there is new evidence that could affect the determination; (2) a substantial portion of the evidence relied upon was unreliable or of little probative value; (3) the petitioner's or Bureau of Indian Affairs' ("BIA") research was inadequate or incomplete; or (4) there are reasonable alternative interpretations, not previously considered, that would substantially affect the determination.⁶⁶ In order for the IBIA to vacate the Final Determination, the appellant must show by a preponderance of the evidence that it has met one of these four grounds for reconsideration.⁶⁷ If vacated, the case is remanded to the Secretary for reconsideration.⁶⁸

The IBIA may also find that the petitioner's or interested party's reconsideration should be granted on other grounds.⁶⁹ In this situation, the Board sends a request for reconsideration to the Secretary, who has discretion to reconsider the Final Determination or let it stand.⁷⁰ In either case, the Secretary must either issue a Reconsidered Determination within 120 days or let the decision stand.⁷¹ A federal appellate court must take up any additional appeals because a Reconsidered Determination is final upon publication.⁷² Furthermore, an unsuccessful petitioner may have success lobbying Congress for

61. *Id.* § 83.10(l)(3).

62. See OFFICIAL GUIDELINES TO THE FED. ACKNOWLEDGMENT REGULATIONS, 25 C.F.R. 83, 70 (1997) (noting that "in some complex cases," OFA has requested additional time beyond what is delineated in Part 83); BUFFALO POST, *supra* note 43; Martin, *supra* note 43.

63. 25 C.F.R. § 83.10(l)(4) (2009).

64. *Id.* § 83.11(b).

65. *Id.* § 83.10(o).

66. *Id.* § 83.11(d).

67. *Id.* § 83.11(e)(9).

68. *Id.* § 83.11(e)(10).

69. *Id.* § 83.11(f)(2).

70. *Id.*

71. *Id.* §§ 83.11(g)(1), (h)(2).

72. *Id.* § 83.11(h)(2)-(3). See also *The Appeals Process*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UndersgatingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx> (last visited Jan. 30, 2013).

recognition.⁷³

III.

A CLOSER LOOK AT THE CRITERIA FOR RECOGNITION

In order for a petitioner to successfully achieve federal recognition under the Part 83 regulation, it must be able to meet the seven mandatory criteria outlined in the regulation.⁷⁴ These criteria are:

- (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;⁷⁵
- (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;⁷⁶
- (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;⁷⁷
- (d) The petitioner has provided a copy of the group's present governing documents;⁷⁸
- (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity;⁷⁹
- (f) The membership of the petitioning group is composed principally of persons who are not members of any other previously acknowledged Indian Tribe;⁸⁰ and
- (e) Neither the petitioner nor its members are the subjects of congressional legislation that has expressly terminated or forbidden the Federal relationship.⁸¹

73. *Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that Congress has plenary power over Indian affairs). As part of Congress' plenary power over Indian issues, it may choose to limit tribal sovereignty while recognizing the Indian entity. For example, Congress may recognize an Indian entity, but prohibit the tribe from engaging in gaming. *See, e.g.*, Native Hawaiian Reorganization Act of 2009, S. 1011, 111th Cong. § 9 (2009) (limiting Native Hawaiians' ability to conduct gaming activities).

74. 25 C.F.R. §§ 83.6(d), 83.7 (2009). Each of the seven mandatory criteria provides examples of some of the evidence that the OFA will accept. However, these examples are not exhaustive.

75. *Id.* § 83.7(a).

76. *Id.* § 83.7(b).

77. *Id.* § 83.7(c).

78. *Id.* § 83.7(d).

79. *Id.* § 83.7(e).

80. *Id.* § 83.7(f).

81. *Id.* § 83.7(g).

In practice, four of these seven mandatory criteria have proven difficult for petitioning groups to meet under the OFA's interpretations and are worthy of further analysis.

A. Criterion (a)—Outside Identification

The first criterion, which requires identification as an American Indian entity on a substantially continuous basis since 1900, has stymied numerous petitioners due to the difficulty of gathering proof of continuous existence since early historical times in a form that the OFA will accept. The OFA requires a petitioner to provide evidence of outside identification of the entire Indian entity as a whole.⁸² This section analyzes the evidence that the OFA accepts in light of OFA interpretations of this regulatory criterion.

The regulation provides several examples of acceptable evidence. One such example is "[i]dentification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations."⁸³ Participation in a pan-Indian organization would seem to fit this criterion. However, when Clarence Lobo, a Juaneño leader, participated in the Mission Indian Federation (a California-based pan-Indian group consisting of the leaders from most California Mission Indians), the OFA argued that Lobo's participation was merely on his own behalf and not as a representative of the Juaneño.⁸⁴ The OFA argued this even though it accepted Lobo's actions as those of a leader and not an individual during the 1950s, 1960s, and 1970s when he made at least two trips to Washington, D.C. to lobby on behalf of the Juaneño and other Mission Indians and conducted extensive letter writing campaigns.⁸⁵ OFA's analysis of Lobo's leadership likely leaves future petitioners uncertain of what type of evidence will be accepted and what will be rejected.

Other types of evidence that a petitioning group may use to show that it satisfies criterion (a) include: documentation from bringing a claim before the Indian Claims Commission, providing agency reports from Indian agents and

82. See, e.g., Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A) 44 (BIA, 2007), www.bia.gov/cs/groups/xofa/documents/text/idc-001619.pdf (noting that the 1953 Report to the House of Representatives identified a tribal "subdivision," not an Indian entity, at San Juan Capistrano). See also UNITED STATES DEP'T. OF INTERIOR, OFFICE OF FEDERAL ACKNOWLEDGMENT, ACKNOWLEDGMENT PRECEDENT MANUAL 2 (2005) available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-021583.pdf> [hereinafter ACKNOWLEDGMENT PRECEDENT MANUAL] (noting that in order to meet criterion (a) an outsider who had contact with the Indian entity had to describe it as an entity rather than individual Indians).

83. 25 C.F.R. § 83.7(a)(6) (2009).

84. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B) 52 (BIA, 2007), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001626.pdf>. See *Id.* at 148 (questioning whether Marcos Forester was acting on his own behalf or on behalf of the San Juan Capistrano Mission Indian Federation chapter).

85. *Id.* at 43–48.

Superintendents, utilizing BIA censuses, being the subject of Congressional legislation, and nontaxation by states.⁸⁶ The underlying constant in these forms of evidence is that they show that the federal government, a state government, or the judicial branch of the United States acknowledges the group's coherence.⁸⁷ However, California, among other states, was not granted statehood until after 1850 and did not become a U.S. territory until 1848.⁸⁸ Indian groups from states like California that obtained statehood later in the nation's history, thus, are limited in their ability to find and utilize the suggested documents because such government records did not exist before statehood.⁸⁹

A separate issue is that the OFA interprets criterion (a) to mean that identifications of an Indian family or individual will not by themselves satisfy the criterion.⁹⁰ For example, in the recent decision concerning the Sokoki Abenaki, the OFA determined that photographs of an Indian family alleged to be Abenaki Indians in Vermont could not be considered evidence of criterion (a).⁹¹ Similarly, contemporaneous newspaper articles stating that Abenaki Indians lived in a certain part of town or that Juaneño Indians traveled to a pan-Indian meeting were insufficient evidence of the existence of an outwardly identifiable Indian group because they only showed the existence of Indian individuals.⁹² At a minimum, the existence of Indian individuals claiming an affiliation with an Indian group should provide *some evidence* of the existence of that Indian group, however, the OFA's current interpretations do not follow this logic and refuse to

86. See generally ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 18-55.

87. See *id.*

88. Treaty of Guadalupe Hidalgo, U.S.-Mex. Feb. 2, 1848, 9 Stat. 922.

89. See U.S. Census Bureau, *Mission Statement*, <http://www.census.gov/aboutus/mission.html> (last visited May 23 2013) (noting that their mission is limited to collecting data on the nation's people). The Proposed Finding Against Acknowledgment of Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 255-57, highlights this dilemma. Census data (OFA's preferred documentation) does not become available until California Statehood in 1850, but the petitioner must provide social and political evidence from first sustained contact in 1776 and genealogical evidence from 1834.

90. See, e.g., Proposed Finding for the Duwamish Tribe 4 (BIA, 1996), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001381.pdf> (providing an example of a determination that a given group consisted of individual Duwamish that were not part of the Indian entity).

91. Final Determination Against Federal Acknowledgment of the St. Francis/Sokoki Band of Abenakis of Vermont 9-10, n. 7 (BIA, 2007) (interpreting a photograph of Indians living in the appropriate land base as "of uncertain origin and providing no evidence of the existence of a group"), <http://www.bia.gov/idc/groups/xofa/documents/text/idc-001527.pdf>. See also Proposed Finding for the Burt Lake Band of Ottawa and Chippewa Indians 34 (BIA, 2004), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001651.pdf> (observing that references to individual Indians descendants or families are not adequate evidence of outside identification of an Indian entity).

92. Proposed Finding for the St. Francis/Sokoki Band of Abenakis of Vermont 36 (BIA, 2007), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001532.pdf>; Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 37-44.

consider such evidence.⁹³

Furthermore, an inherent problem with requiring an outsider's identification of an Indian entity is that outsiders are often not the best determiners of whether a group is Indian or what tribe they represent. This is especially true in the early part of the twentieth century, when distinctions between tribes were not considered important enough to distinguish.⁹⁴ Worse yet, the OFA's analysis of criterion (a) frequently suffers from the application of contemporary standards to the past. For example, given historical context, it is doubtful that a journalist or other outside observers from the 1930s would view a group of Indians as a political entity, and therefore it is unsurprising that an article from that era would contain little or no information about a larger Indian entity. Unfortunately, the OFA sees the lack of such modern descriptors in contemporaneous articles as evidence that a petitioner is not an "entity," but an individual Indian.⁹⁵

Not only must outside identification be of a coherent Indian group, the identification must encompass the entire group.⁹⁶ The Duwamish, a Washington-based tribe, submitted their petition on June 7, 1977.⁹⁷ Historically, the Duwamish encompassed two geographic localities—one based on the reservation and the other based off the reservation.⁹⁸ The reservation-based Indians were those that descended from the Duwamish Indians who signed an 1855 treaty with the United States.⁹⁹ The OFA argued that the identifications of the "Duwamish" or "Duwamish and allied tribes" referred to the treaty-reservation Indians and did not include those Duwamish that lived off-

93. *Id.*

94. See, e.g., MONTANA OFFICE OF PUBLIC INSTRUCTION, TEACHER GUIDE FOR TRIBES OF MONTANA AND HOW THEY GOT THEIR NAMES (2009) (noting that the name Nez Perce may have been a mistaken identification of their tribe with another tribe further south that practiced nose piercing). In addition, Meriwether Lewis and W.P. Clark misconstrued the Indian sign language for the Nez Perce tribe to mean that they pierced their noses. *Id.* This is merely one example of how outside entities often lack sufficient knowledge of Indian cultures to recognize subtle differences between tribes.

95. See Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 41–42. See also Final Determination for the Francis/Sokoki Abenaki 9–11 (BIA, 2007), <http://www.bia.gov/idc/groups/xofa/documents/text/idc-001527.pdf> (providing an example of an outside observer using language that was common at the time to identify Indians ("savages"), but not using language that the OFA would accept as evidence of outside identification of an Indian entity, such as calling the Indians "tribal members").

96. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 3 (noting that the Duwamish were not identified as one distinct entity, but as living separate from each other).

97. Receipt of Petition for Fed. Acknowledgment of Existence as Indian Tribes, 44 Fed. Reg. 116, 116 (Jan. 2, 1979) (providing a list of Indian entities that have submitted letters of intent and dates of submission).

98. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 2–5.

99. Final Determination Against Fed. Acknowledgment of the Duwamish Tribal Organization, 66 Fed. Reg. 49,966, 49,967 (Sept. 25, 2001).

reservation in villages.¹⁰⁰ The OFA, therefore, determined that these identifications were limited to on-reservation Duwamish even though in another section of the Proposed Finding the OFA acknowledged that the off-reservation Duwamish appeared on lists of the 1915 Roll of Duwamish Indians.¹⁰¹ Thus, despite outside identifications of the “Duwamish” both on and off the reservation territory, the OFA’s interpretation dismissed the weight of those identifications.

It appears that another unstated OFA presumption is that identification as an Indian entity cannot be confirmed by a tribal title or an acknowledgement of leadership.¹⁰² For example, letters written by Chief Lobo on behalf of the Juaneño are not evidence of the existence of an Indian group nor are they evidence of political authority.¹⁰³ Even return letters acknowledging Chief Lobo by his leadership title were presumed to be merely copying the signature line.¹⁰⁴ Instead, the OFA found that Chief Lobo might have been claiming the title of Chief without actually having the support of the tribe, even though no evidence of this was presented.¹⁰⁵ Thus, in order to be identified as an Indian entity the identifications must be made contemporaneously, include the entire entity rather than part of the Indian entity, and often must be contained within a transaction with the federal, state, or judicial branch. Due to the strict interpretation of criterion (a) many tribes fail to meet this requirement.

B. Criterion (b)—Distinct Community

The second controversial criterion mandates that “a predominant portion of the petitioning group comprise a distinct community . . . from historical times until the present.”¹⁰⁶ Although “distinct community” is a key element in the criterion, the regulation does not define this element. I critique this criterion in three ways. First, the OFA inappropriately uses Western ideology when interpreting the regulation. Second, OFA policy means that oral evidence uncorroborated by tangible proof is insufficient to meet the burden of proof,¹⁰⁷ which is problematic because Indian tribes often rely on oral methods of passing along information. Third, large land-based petitioners who are able to use their land to define the scope of their community are favored. This section will

100. *Id.*

101. Proposed Finding for the Duwamish Tribe, *supra* note 90, at Genealogy Report 8.

102. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84A), *supra* note 82, at 44–45.

103. *Id.*

104. *Id.* at 44.

105. *Id.* at 44–45.

106. 25 C.F.R. § 83.7(b) (2009).

107. OFFICE OF FED. ACKNOWLEDGMENT, OFFICIAL GUIDELINES TO THE FED. ACKNOWLEDGMENT REGULATIONS 25–26 (1997), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001214.pdf> (noting that oral evidence can be used as “direct evidence,” but that hearsay oral tradition should be used merely as a “guidepost” to finding written documentation).

discuss these critiques of the OFA's interpretation of criterion (b) in more detail.

1. Inappropriate Use of Western Ideology

Although the Part 83 regulation does not define the term "distinct community," the regulation does define "community" as "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers."¹⁰⁸ The lack of definitions of key terminology suggests that all parties involved have the same understanding of the terms. However, a careful analysis will show that this is not always the case. As such, the OFA tends to focus on geography, cultural differences, and tensions with the larger community to determine whether a petitioner meets criterion (b).¹⁰⁹ The OFA specifically considers racial tensions to be useful when analyzing whether a petitioner existed as a distinct community.¹¹⁰ These markers represent what the OFA believes show the distinctiveness of a community, and not necessarily what these tribal entities view as evidence of a distinct community.

a. Required Resistance to Acculturation and Assimilation Programs

To be successful under the Part 83 regulation, the petitioner cannot have acculturated or adapted to non-Indian society.¹¹¹ However, U.S. policy with respect to Indians attempted to assimilate Indians from the late nineteenth century to the mid-twentieth century.¹¹² For example, in the 1950s the U.S. government instituted a program called Relocation, which sought to move Indian individuals from their traditional homelands to live in urban environments.¹¹³ Assimilation programs and policies made it difficult for tribes to maintain a "distinct community" and are partly responsible for nearly eighty percent of all Indians currently residing off-reservation.¹¹⁴

108. 25 C.F.R. § 83.7(b)(1)–(2) (2009).

109. *See id.*

110. *See, e.g.,* Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 99.

111. *See* Proposed Finding for the Snoqualmie Tribe 20 (BIA, 1993), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001373.pdf>.

112. *See generally* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880–1920 (1984) (providing a detailed description of the federal government's attempt at assimilating Indians).

113. Indian Adult Vocational Training Act of 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956) (colloquially known as the Relocation Act).

114. DEP'T. OF COMMERCE, U.S. CENSUS BUREAU, FACTS FOR FEATURES, AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH, 2012, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html (last visited July 17, 2013) (providing that the latest figures on the number of Indians living off-reservation was nearly 80% of the total Indian population). *See generally* Larry W. Burt, *Roots of the Native American Urban Experience:*

While Relocation and other assimilationist policies have made it difficult for tribes to maintain a “distinct community” many tribal people nonetheless were, under the circumstances, quite successful. For example, although many Juaneño left the San Juan Capistrano area, they did maintain contact with other Juaneño who remained.¹¹⁵ They also returned to attend the San Juan Capistrano mission church for Swallows Day.¹¹⁶ However, the OFA failed to view this as the maintenance of a distinct community because the church has since become integrated with non-Juaneño and the petitioner was unable to show enough maintained communication between Juaneño within and outside of the San Juan Capistrano area.¹¹⁷ Despite the fact that the OFA found the evidence insufficient, it is difficult to argue that a community of Juaneño Indians did not remain.

Providing evidence of a distinct social unit can be problematic for other petitioners due to a group’s ancestors’ decision to “live underground,” by acculturating on the surface, but maintaining their Indian community and identity in secrecy.¹¹⁸ If petitioners’ Indian ancestors were successful in living underground, then two things may be true: (1) there would be little qualifying evidence of this secret society since most of the evidence would be oral; and (2) the Indian entity would still exist today since the ancestors passed the culture down. Since the OFA disfavors oral evidence without corroboration, providing sufficient proof of the maintenance of a distinct community that survived underground would be difficult.

On the other hand, those petitioners that manage to maintain an observable Indian identity and remain separated from non-Indian society tend to perform better under the regulation. For example, in responding to the Snoqualmie Tribe’s petition, the OFA found that the “maint[enance] of distinct cultural elements within the community against pressures from non-Indian society to acculturate to non-Indian society” to be sufficient to meet the criterion.¹¹⁹ The Snoqualmie were considered a single social unit consisting of the descendants of eighteen villages in the Puget Sound region of Washington.¹²⁰ The OFA considered the Snoqualmie’s high blood quantum, over fifty-year unity under

Relocation Policy in the 1950s, 10 AM. INDIAN Q. 85, No. 2. (1986).

115. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 100.

116. *Id.*

117. *Id.* at 89.

118. Jack Campisi, *Reflections on the Last Quarter Century of Tribal Recognition*, 37 NEW ENG. L. REV. 505, 511 (2002–2003). See generally DUANE CHAMPAGNE, AMERICAN INDIAN SOCIETIES: STRATEGIES AND CONDITIONS OF POLITICAL AND CULTURAL SURVIVAL (2d ed. 1989) (arguing that one survival method of contact-era Indian tribes was to assimilate outward, but maintain social and cultural traditions using less overt methods).

119. Proposed Finding for the Snoqualmie Tribe, *supra* note 111, at 20.

120. Proposed Finding for Fed. Acknowledgment of the Snoqualmie Indian Tribe, 58 Fed. Reg. 27,162 (Apr. 26, 1993).

Jerry Kanim's strong leadership, and maintenance of traditional language and religion as indicative of their lack of acculturation.¹²¹ However, while unity under a single strong leader is common in Western culture, traditionally tribal peoples had many forms of organization and leadership,¹²² and tribes that lack a history as an outwardly identifiable group like the Snoqualmie tribe often fail to satisfy the OFA's western interpretation of this regulatory criterion.

b. Required Level of Racial Difference

One significant factor considered when evaluating a tribe's resistance to acculturation or assimilation is the degree of blood quantum that the petitioner has maintained.¹²³ The OFA also considers membership requirements and kinship patterns as evidence that a petitioner meets criterion (b).¹²⁴ In the Proposed Finding for the Snoqualmie Tribe, the OFA noted that the blood degree requirement for members "establishes a requirement for the maintenance within the group as a whole of at least a minimal degree of social ties."¹²⁵ According to the OFA, membership requirements also provide evidence of the maintenance of clear social boundaries for their group, which distinguished the Snoqualmie from non-Indians.¹²⁶ However, this reasoning is suspect because blood degree requirements are not necessarily an indication of a clear-cut boundary between the petitioning group and the outside community. For instance, children of parents who barely meet the minimum blood requirement frequently take part in cultural events and are likely considered to be part of the community.¹²⁷

Blood quantum is frequently used as a proxy for racial continuity in the modern Western context.¹²⁸ In the Proposed Finding for the Duwamish Tribe,

121. *Id.* at 27,162-63.

122. See, e.g., Stephen Cornell and Joseph Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE AND RESEARCH J. 3, 202-05 (1998) (providing two examples of tribal structures—one that matches Western norms and one that differs significantly).

123. 25 C.F.R. § 83.7(b)(iii)-(iv) (2009). The term blood quantum, as used in this article, means the relative amount of ancestry one can trace back to one specific tribe.

124. *Id.* § 83.7(b)(1)(i)-(iv).

125. Proposed Finding for the Snoqualmie Tribe, *supra* note 111, at 13.

126. *Id.*

127. Robert Williams, Fed. Indian Law I, University of Arizona Rogers College of Law, course lecture on *Santa Clara Pueblo v. Martinez* (October 28, 2004). See, e.g., *YSLETA DEL SUR PUEBLO*, CONST. art. III (2007), available at http://www.ysletadelsurpueblo.org/shared_document.sstg?id=11 (discussing the ability of Honorary Members to participate in Pueblo ceremonies, which are often strictly limited to tribal members only, and in essence imbuing Honorary members with some of the benefits of full tribal members). See generally Susan Applegate Krouse, *Kinship and Identity: Mixed Bloods in Urban Indian Communities*, 23 AM. INDIAN CULTURE & RESEARCH J. 73 (1999) (commenting on how mixed blood Indians are viewed and interact in tribal communities).

128. *Rice v. Cayetano*, 528 U.S. 495, 496 (1999) (asserting that ancestry, which is equivalent to blood quantum, is a proxy for race). See also CRAMER, *supra* note 32, at 105 (citing GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990*, 134 (1997)).

the OFA determined that participation in pow-wows and commemorative events was not considered maintenance of a distinct community, and found instead that the participation was merely symbolic.¹²⁹ In addition, the OFA has been criticized for employing racist interpretations based on overvaluing the importance of Indian phenotype where the membership has high amounts of African-American blood.¹³⁰ A strict blood quantum requirement presumably strengthens the group's outwardly identifiable Indian phenotype, thereby supporting the assertion that the group constituted a distinct community.¹³¹ However, this constitutes a problematic reliance on outwardly observable racial characteristics to define the group and ignores the group's authority to define its own cultural membership.

Furthermore, the OFA is not always consistent in the use of kinship terminology. In the Final Determination of the Mohegan Indian tribe, a close-knit Connecticut tribe with a land base, the OFA defined "primary kin" as grandparents, parents, and siblings. Using the Mohegan definition, all the children of the grandparents would be linked together as primary kin. Cousins would then count as primary kin. In contrast, in the Proposed Finding of the Huron Potawatomi Tribe, a previously recognized reservation-based tribe in Michigan, the OFA did not include the grandparents' generation definition.¹³² Thus, in the Mohegan case more individuals (e.g. cousins) would count as family than in the Huron case because in Huron only brothers and sisters would be included as primary kin.¹³³ In addition to illustrating the inconsistency of OFA's implementation of the regulations, this example shows how the lines between the different criteria are blurred, making it difficult for petitioners to conduct the compartmentalized analysis that the OFA prefers.

This inconsistency in evaluating kinship ties has little effect on criterion (e), which requires descent from the historical tribe, since in either case the lineage of the individual can be traced. However, this inconsistency may make it more difficult for tribes like the Mohegan to meet criteria (b) and (c) because the OFA generally prefers nonfamilial evidence when reviewing these criteria.¹³⁴ In the

129. Proposed Finding for the Duwamish Tribe *supra* note 90, at 10.

130. Leslie Goffe, *Pequot Tribe Members Hit the Genetic Jackpot*, UTNE READER, May 2009, available at <http://www.utne.com/1999-05-01/hitting-the-genetic-jackpot.aspx>.

131. CRAMER, *supra* note 32, at 115–121.

132. Proposed Finding for the Huron Potawatomi Tribe 48 (BIA, 1995), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001280.pdf>; Final Determination for the Mohegan Indian Tribe, 56 (BIA, 1994), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001435.pdf>.

133. Final Determination for the Mohegan Indian Tribe, *supra* note 132, at 56. One potential explanation for differing kinship definitions is that there are distinct tribal kinship patterns. However, there is no evidence in the Proposed Finding for the Huron Potawatomi Tribe or Final Determination for the Mohegan Indian Tribe that this is the case.

134. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 9 (noting that it was almost exclusively family members that participated in shared economic activities such as berry picking and hunting); Proposed Finding Against the Juaneño Band of Mission Indians, *supra* note 84, at

Final Determination of the Mohegan Indian Tribe, the OFA quantitatively analyzed how many nonrelated individuals participated in a Homecoming and determined that since a high percentage of nonprimary kin were present, this provided evidence of meeting criterion (b).¹³⁵ Ultimately, the closely-knit Mohegan tribe was able to provide sufficient evidence of a distinct community under criterion (b), but tribes without a defined land base where their members reside and thus can easily commingle may have difficulty due to the OFA's inconsistency.

c. Application of Western Marriage Concepts

The OFA also accepts a high incidence of marriage between group members as evidence of a distinct community, but it is difficult to meet the OFA standards. Under Part 83, the distinct community criterion may be met if the petitioner can demonstrate that at least fifty percent of the marriages in the group are between members of the group.¹³⁶ According to the OFA's interpretation, two individuals marrying produce one marriage, making the fifty percent cut-off difficult to meet.¹³⁷ To demonstrate, suppose there are one hundred individuals in a group where fifty individuals marry each other and fifty individuals marry outside of the group. The fifty individuals that marry each other would produce twenty-five marriages while the fifty individuals that marry outside of the group produce fifty marriages. The total number of marriages for this group is seventy-five, and twenty-five of them meet criterion (b). That is, only one-third of the marriages meet criterion (b), even though half the population married within the group. Not only is this standard difficult to meet, but it also relies on a Western concept of community through marriage. Many tribal cultures practiced exogamy and those that did not would have had to have a large membership in order to support this much intermarriage.¹³⁸

2. Undervaluing Oral Tradition

A second critique of the OFA's interpretation of the regulation is that it prohibits the use of oral tradition alone as evidence for the distinct community requirement.¹³⁹ Although this prohibition applies to all of the criteria, it is most detrimental in criterion (b) because a tribe's oral history is often most probative

109–110 (BIA, 2007) (noting that having a familial connection was a factor in encouraging Juaneño to participate in community-wide events).

135. Final Determination for the Mohegan Indian Tribe, *supra* note 132.

136. 25 C.F.R. § 83.7(b)(2)(ii) (2009).

137. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 59.

138. See JAMES FRAZER, TOTEMISM AND EXOGAMY, VOL. III, 263 (Cosimo Inc. 2009) (1910) (highlighting that many tribes in the Pacific northwest practiced exogamy).

139. ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 118 (citing Proposed Finding for the Burt Lake Band of Chippewa Indians 41 (2004)).

in establishing a distinct tribal community. Furthermore, the regulation requires a petitioner to meet the distinct community requirement continuously from historic times to the present.¹⁴⁰ Prior to 2009 the use of “historic” times as a starting point meant that petitioning groups in certain regions had to show that they were a distinct community prior to the formation of the United States because the regulation defined “historic” times as “first sustained contact,” which could have been as early as 1492.¹⁴¹ The original definition of “historic times” as “first sustained contact” was a huge burden for petitioners, since the only evidence that may have survived from these early dates is likely to be oral given that the U.S. government itself may not have existed at the time.¹⁴² However, in 2009 the DOI issued guidance that reduced the evidentiary burden of the petitioners. Specifically, the guidance states that a petitioner need only submit evidence that it has met the criteria since March 4, 1789, the date the U.S. Constitution was ratified.¹⁴³ The DOI justified this position by stating that “Article 1, section 8, clause 3 [states] that Congress has the power to regulate commerce with the Indian tribes. Therefore, if the petitioner was an Indian tribe at the time that the Constitution was ratified, its prior colonial history need not be reviewed.”¹⁴⁴

Based on the examples OFA provides of acceptable ways to corroborate evidence, it appears that evidence based on oral tradition can only be corroborated with tangible evidence.¹⁴⁵ This means, for example, that if four elders comment during an interview that they recall attending monthly dances that included a large segment of the petitioning group, the OFA would not likely consider this to be dispositive unless there was some type of photograph or written documentation corroborating their statements.¹⁴⁶ This runs completely counter to Indian traditions, which focus on the oral transmission of culture.¹⁴⁷ Further, the undervaluation of oral tradition biases the process towards Western ideas of what constitutes legitimate evidence.¹⁴⁸ Without the ability to use oral

140. 25 C.F.R. § 83.7(b) (2009).

141. *Id.* See also 59 Fed. Reg. 9,280 (Feb. 25, 1994)

142. 59 Fed. Reg. 9,280 (Feb. 25, 1994)

143. OFFICE OF FED. ACKNOWLEDGMENT, GUIDANCE AND DIRECTION REGARDING INTERNAL PROCEDURES, 73 Fed. Reg. 30,146–47 (May 23, 2008).

144. *Id.*

145. OFFICE OF FED. ACKNOWLEDGMENT, OFFICIAL GUIDELINES TO THE FED. ACKNOWLEDGMENT REGULATIONS 25–26 (1997).

146. *Id.*

147. DALE TURNER, *Oral Traditions and the Politics of (Mis)Recognition*, AMERICAN INDIAN POLITICAL THOUGHT: PHILOSOPHICAL ESSAYS 233 (Anne Waters ed., 2004) (discussing the importance of oral tradition to Native American cultures).

148. See *Delgamuukw v. British Columbia*, CanLII 302 (S.C.C.) 1997 (holding that oral history is admissible as evidence where it was both useful and reasonably reliable). Prior to this ruling, Canadian courts, like American courts, tended to prohibit oral evidence in cases involving tribal issues; however, this case signifies the realignment of the Canadian judicial system with tribal values.

tradition as a form of primary evidence, it is difficult for an Indian entity to provide evidence of social interaction. This is especially true for the early nineteenth century because few records survive from that era.

3. *Favoring Large, Land-Based Tribes*

The last critique of criterion (b) is that the OFA's interpretation of the regulation indirectly favors large, land-based tribes and disfavors more scattered communities that lack control over a given territory where their members can associate and live. For example, on one hand, the OFA accepts agricultural work teams organized by a leader as evidence of criterion (b).¹⁴⁹ On the other hand, the OFA has required these labor recruiters to work exclusively within the petitioning group and trace their own heritage back to the historical tribe.¹⁵⁰ A large group living in the same area can more easily meet these requirements because it is economically practical for a labor recruiter to work exclusively within one tribe. The OFA is arguably stricter when analyzing annual berry picking and cooperative hunting given that it requires the group to consist of mostly unrelated individuals from the same tribe.¹⁵¹

In another example of a bias favoring large tribes, if a substantial portion of the petitioning group attended a single church or other institution, the OFA may consider this to be evidence of a distinct community.¹⁵² Thus, land-based tribes that can build institutions such as churches on tribal lands can rely on these edifices as a locus of community interaction while tribes who lack such a land-base face a disadvantage in establishing proof of a continuous distinct community. For example, in the Final Determination of the Narragansett Tribe, the OFA found that the Narragansett Indian Church ("NIC") was a significant and independent institution for the petitioner from its founding in 1746.¹⁵³ Leaders of the Narragansett community were both leaders in the NIC and leaders on the Tribal Council.¹⁵⁴ Not surprisingly, the NIC was located on the tribe's former state reservation in Southern Rhode Island.¹⁵⁵ The 1880 "Detribalization Act" disestablished the majority of the state reservation, save two acres surrounding the NIC.¹⁵⁶ However, the tribe had already developed strong ties to the NIC and maintained them through the years. Furthermore, the reservation

149. See, e.g., Proposed Finding for the Huron Potawatomi Tribe, *supra* note 132, at 11.

150. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 139, 145.

151. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 9.

152. See ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 120.

153. Proposed Finding for the Narragansett Tribe 10 (BIA, 1982), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001511.pdf>.

154. Final Determination for Fed. Acknowledgment of Narragansett Indian Tribe of R.I., 48 Fed. Reg. 6,177-78 (Feb. 10, 1983).

155. *Id.*

156. *Id.*

status in the formative years where evidence is usually scarce assisted the Narragansett in meeting the evidentiary burden. In 1934, the tribe incorporated under the State of Rhode Island and formalized its tribal structure while still maintaining its connection to the NIC.¹⁵⁷ Therefore, according to the OFA, throughout Narragansett history, the NIC acted as a proxy for a strong community and political relationship required by criteria (b) and (c).¹⁵⁸

Generally, a church must be controlled by the petitioning group or include a substantial number of the petitioner's membership in order to be a proxy for the community.¹⁵⁹ For example, the Juaneño who continue to attend their former mission church at San Juan Capistrano with nonmembers cannot use their mission attendance as evidence of a distinct community.¹⁶⁰ Since many Juaneño moved to neighboring towns and no longer regularly attend the Mission, the percentage of Juaneño in the Mission's population does not meet the OFA's threshold for distinct community.¹⁶¹ These interpretations of criterion (b) favor large land-based tribes that are able to control a particular institution through exclusive use of a territory or simply through the size of the membership. Smaller tribes and tribes living within a larger community have difficulty meeting the OFA's interpretation of this criterion because their traditional land base is typically infringed upon by a larger community.

Furthermore, although geographic distribution in a concentrated area is not required by the regulation, the OFA has stated that "a membership which was highly dispersed geographically would raise . . . questions and would require better and more detailed evidence to overcome a presumption against maintenance of community based on a high degree of geographic dispersion."¹⁶² This statement suggests that the OFA in effect requires petitioners who lack a large land base to overcome a presumption against their validity as a distinct community, thus altering the regulatory review standard of "reasonable likelihood of the validity of the facts found" and instead requiring certain, non-land-based petitioners to establish "better and more detailed evidence."¹⁶³

For example, in the Proposed Finding for the Duwamish Tribe, the OFA argued that the petitioner had no geographical area of concentrated settlement to provide a social core.¹⁶⁴ Similarly, in the Proposed Finding Against Acknowledgment of the Juaneño Tribe, one of the factors against finding a designation of a distinct community was the fact that many members no longer

157. Proposed Finding for the Narragansett Tribe, *supra* note 153, at 6.

158. *Id.* at 13.

159. *See, e.g., id.*

160. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 117–18.

161. *Id.*

162. Proposed Finding for the Snoqualmie Indian Tribe, *supra* note 111, at 11.

163. *Compare id.*, with 25 C.F.R. § 83.6(d) (2009).

164. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 8–9.

resided in San Juan Capistrano or the traditional barrio.¹⁶⁵

In the Proposed Finding for the Washington-based Chinook Tribe, the OFA noted in its denial of federal recognition, that the tribe's membership was comprised of three separate geographic communities (Bay Center, Dahlia, and Ilwaco), and because there was no evidence that these communities ever joined to form a single, separate, and distinct community, they could not satisfy criterion (b).¹⁶⁶ Even though these three communities maintained informal interactions since the early 1800s, the OFA found that there was not sufficient evidence of interaction involving a unifying source of social and political control to warrant a finding of a distinct community.¹⁶⁷ The OFA identified what evidence would meet criterion (b) and provided the example of holding an annual meeting, then acknowledged that an annual meeting of Chinook members occurred that included one-third of the tribal members voting.¹⁶⁸ However, because the OFA could not determine which members from each geographic community participated, they ultimately found the evidence insufficient.¹⁶⁹ Such decisions, which disregard efforts to provide the requested evidence, seem to fly in the face of the relatively low standard of reasonable likelihood of the validity of the facts.

Furthermore, OFA findings indicate that maintaining a geographically concentrated membership may still be insufficient when the land base is relatively small. The OFA has limited the extent to which it accepts evidence of residential clustering outside of a reservation as proof of a distinct community. For example, the MaChis Lower Alabama Creek claim to be an Indian group that hid in a cave near Covington County, Alabama to escape the forced migration of Creeks to Indian Territory.¹⁷⁰ However, in the Proposed Finding, the OFA found that even though the federal census and county records show residential clustering and interaction among the principal families of the group, their scattered "enclaves have never been regarded by others as being American Indian communities."¹⁷¹ This justification is tenuous, since these enclaves developed precisely to form and maintain a distinct tribal community. Such seemingly inconsistent interpretations appear too frequently in the OFA's findings and call into question the OFA's objectivity.

165. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 119.

166. Proposed Finding for the Chinook Indian Tribe, 62 Fed. Reg. 447 14-16 (Aug. 22, 1997).

167. *Id.* Interestingly, the Chinook Tribe did not have difficulty meeting criterion (e) of descent from one historic tribe, which is a consideration that often presents petitioners with difficulty, particularly when they cannot show social interaction.

168. Proposed Finding for the Chinook Indian Tribe, *supra* note 166, at 21-22.

169. *Id.*

170. Proposed Finding for the MaChis Lower Ala. Creek Indian Tribe, 52 Fed. Reg. 34,319 (Sept. 10, 1987).

171. *Id.*

Ultimately, the OFA's geographic interpretations tend to favor land-based tribes such as the Mashpee Wampanoag, Eastern and Paucatuck Pequots, and the Huron Potawatomi, since they comprise a single community within the borders of their own land base.¹⁷² Many such land-based groups have the added benefit of residing on a state reservation.¹⁷³ Thus, the state government has recognized the tribal entity and the tribal entity has recognized authority over its members. Furthermore, groups with a land base can more easily show that individual members interacted with each other because they lived near each other.¹⁷⁴

C. Criterion (c)—Political Influence

The OFA requires that the petitioner maintain political influence or authority over its members as an autonomous entity from historical times until the present.¹⁷⁵ Scholars have criticized this requirement.¹⁷⁶ The OFA's interpretation of political influence requires petitioners' leadership to have a bilateral relationship with the membership. However, a review of OFA decisions reveals that merely establishing a bilateral relationship alone is insufficient. The OFA appears to also require other evidence of what the OFA deems legitimate activities (that is, something beyond merely working towards federal recognition) by the membership and leadership.¹⁷⁷ As with the OFA's interpretation of the distinct community requirement, the OFA interprets the political influence criterion to favor large, centralized, land-based tribes. This section will analyze the OFA's interpretation of political influence.

172. *See generally* Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Mass., 72 Fed. Reg. 8,007 (Feb. 22, 2007) (finding, for example, that the Mashpee held considerable self-governing powers over their land); Final Determination to Acknowledge the Historical Eastern Pequot Tribe, 67 Fed. Reg. 44,234 (July 1, 2002) (finding that although continuous state recognition is not in itself sufficient to meet the criteria, it provides additional support for the continuity of the tribe); Final Determination for Federal Acknowledgment of the Huron Potawatomi, Inc., 60 Fed. Reg. 66,315 (Dec. 21, 1995) (noting that the existence of the Pine Creek Reservation provided a strong geographic focus).

173. *See, e.g.*, Proposed Finding for the Paucatuck Eastern Pequot Indians of Conn., 65 Fed. Reg. 17294 (Mar. 31, 2000) (discussing the petitioners residence on a State Reservation called Lantern Hill). *See also* Final Determination for Fed. Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts (BIA, 2007), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001338.pdf> (discussing the Mashpee Indian District, which later became an incorporated town).

174. *See, e.g.*, Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Mass., *supra* note 173.

175. 25 C.F.R. § 83.7(c) (2009).

176. MARK MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS, 60–61 (2004) (noting that Reid Chambers, former BIA official who participated in the development of the federal acknowledgment process and current nameplate partner at a DC based law firm focusing in Indian law, had “trouble” with one criteria and Miller agreeing that requiring political function is clearly troublesome).

177. *See, e.g.*, Proposed Finding for the Snoqualmie Indian Tribe, *supra* note 111. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 130.

In many Proposed Findings, the OFA laments that the petitioners do little more than attempt to obtain federal recognition, elect officers, and endorse attorneys' contracts.¹⁷⁸ The OFA argues that these petitioners are not engaged in important disputes such as protecting hunting and fishing rights.¹⁷⁹ The OFA's attempt to find political authority in the petitioning groups' fights to maintain hunting and gathering rights perpetuates the stereotype that Indians must be hunter-gatherers.¹⁸⁰ However, even though the OFA believes that fighting for hunting and fishing rights are topics worthy of political influence, evidence of actions related to hunting and fishing rights is not always accepted as evidence in support of criterion (c).¹⁸¹ During the acknowledgment process, the Duwamish provided evidence of hunting and fishing rights advocacy, only to have the OFA argue that those were the efforts of single individuals acting on their own behalf and not that of the tribe.¹⁸² The OFA argues this even though the hunting and fishing rights actually belong to the tribe and not the individual.¹⁸³

Equally problematic is the OFA's claim that when leaders make decisions about federal recognition on behalf of the membership, it shows a lack of interest and involvement on behalf of membership.¹⁸⁴ When a petitioner's membership has few resources, it is understandable that the petitioner would focus on obtaining federal recognition, since federal recognition brings with it the opportunity for economic development, education, and health care for the membership.¹⁸⁵ More importantly, obtaining federal recognition can serve as validation that the tribe still exists.¹⁸⁶ Federal recognition also reaffirms that the

178. See ACKNOWLEDGEMENT PRECEDENT MANUAL, *supra* note 82, at 171, 193-194. See also Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 169 (noting that there was little evidence of political influence other than in the claims).

179. Proposed Finding for the Duwamish Tribe, *supra* note 90, at 16 (arguing that the petitioner did not engage in hunting and fishing rights work, but rather the rights disputes were carried out by Duwamish individuals who acted on their own behalf).

180. See Allan Lonnberg, *The Digger Indian Stereotype in California*, 3. J. CAL. & GREAT BASIN ANTHROPOLOGY 215, 216 (1981). See also Willi D. Lempert, *Nasty Nobel Savages: The Politics of Hunter/Gatherer Representation* (2007) (unpublished M.A. thesis, Miami University) (copy on file with author).

181. See, e.g., Proposed Finding for the Duwamish Tribe, *supra* note 90, at 16; Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 156-57 (noting the efforts of Clarence Lobo to protest an inadequate outside land claim by taking up residence in a National Park that was within the tribe's historical lands prior to European contact).

182. *Id.*

183. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that the Tribe maintained its treaty-based hunting and fishing rights on ceded lands).

184. See Proposed Finding for the Duwamish Tribe, *supra* note 90, at 16.

185. 25 C.F.R. § 83.12 (2009). See, e.g., Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.; Johnson-O'Malley Program, 25 C.F.R. § 273; Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1601, et seq. (2006).

186. Jim Adams, *Pequot Leaders Plan for a United Future*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 9, 2002), <http://indiancountrytodaymedianetwork.com/ictarchives/2002/08/09/>

tribe has not given up any of the rights due to them as an Indian tribe.¹⁸⁷

In addition to fighting for hunting and fishing rights, the pooling of resources for the benefit of the entity can serve as evidence of a political relationship.¹⁸⁸ For example, the Jamestown Clallam, a Salish tribe in the Puget Sound area, were able to pool financial resources to purchase land upon which the community was established, including a church, school, and crab fishing operation.¹⁸⁹ The OFA took these facts to be sufficiently strong evidence of social and political authority to satisfy criterion (c).¹⁹⁰ In the Proposed Finding for the Juaneño Tribe, however, the OFA did not consider the contribution of funds from tribal members to send a leader to Washington, DC to argue for federal recognition or their Indian Claims Commission case to be evidence of a political relationship.¹⁹¹ The OFA argued that the leader's reliance upon the same individuals, including some nonmembers, showed a lack of interest on the part of the membership.¹⁹² Again, it seems apparent that the OFA is viewing a piece of evidence from a non-land-based tribe with the presumption that the evidence does not meet the criteria. In this example, it is equally possible that the few individuals who donated were the only ones with the means to contribute.

In addition, the OFA considers political protests that require the mobilization of a tribe's membership as evidence of political authority.¹⁹³ For instance, the federally approved Narragansett were able to prevent the draining of a cedar swamp located on their former reservation by holding a protective action meeting.¹⁹⁴ Although a single individual organized the protest, the OFA

exclusive-interview-pequot-leaders-plan-for-united-future-87955.

187. See Lisa Rathke, *Abenaki to Continue Fight for Recognition*, ASSOCIATED PRESS (Nov. 15, 2005), available at RUTLAND HERALD, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20051115/NEWS/511150382/1004>; FELIX COHEN, GOV'T PRINTING OFFICE, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941) (explaining that one of the foundational principles of Indian law is that those powers lawfully vested in tribes are not delegated by Congress, but rather inherent powers). See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a), (Nell Jessup Newton ed., 2005).

188. See Proposed Finding Against Acknowledgement of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 94, 145 (noting that a well-known member's efforts as a labor recruiter provided evidence of community and although it could possibly provide evidence of political authority, the efforts did not meet the standards because there was recruitment of Indians from other tribes).

189. Proposed Finding for Fed. Acknowledgment of the Jamestown Band of Clallam Indians of Washington, 4 (BIA, 1980).

190. *Id.*

191. See Proposed Finding Against Acknowledgement of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82.

192. *Id.* at 144, 155.

193. ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 161 (showing that a protest was accepted as evidence of political authority in the Narragansett Proposed Finding).

194. Proposed Finding for the Narragansett Indian Tribe of Rhode Island, *supra* note 153, at 13.

noted that he claimed that the tribal council called for the action.¹⁹⁵ No further evidence was found to support this claim. Even though the swamp was not drained, the OFA interpreted the action as evidence of political authority.¹⁹⁶

On the other hand, in the Proposed Finding for the Juaneño Tribe, the tribe staged a similar protest that garnered extensive media attention.¹⁹⁷ The OFA acknowledged this protest, but quickly noted that it and subsequent protests were poorly attended by Juaneño members. The OFA further characterized these protests as the leader independently obtaining lots of media attention.¹⁹⁸

The OFA requires that the petitioner show that there is a bilateral relationship between the leadership and the membership.¹⁹⁹ To this end, the OFA welcomes evidence of conflict within a petitioning group, and has found that conflict and discussion is evidence of the existence of a bilateral relationship.²⁰⁰ For example, in the Eastern Pequot and Paucatuck Pequot petitions, the heated disputes and discussions that led to the eventual split into two petitioners was successfully used to provide evidence of a bilateral political relationship.²⁰¹ The OFA pointed out that even though there was political unrest the membership still attended meetings and was politically engaged.²⁰²

A bilateral political relationship exists when individual members voluntarily participate in meetings, events, and discussions.²⁰³ However, when there is internal conflict, the OFA requires that the conflict be confined to the political arena and not seep into social relationships.²⁰⁴ Thus, while the OFA considers it acceptable that political conflict break out along family lines, it is important to be able to show that both sides of the fracture still attend the same community events and continue to interact socially.²⁰⁵ In the Eastern and Paucatuck Pequot

195. *Id.*

196. *Id.*

196. *Id.*

197. Proposed Finding Against Acknowledgement of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 47–49.

198. *Id.*

199. See ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 137.

200. See, e.g., Proposed Finding for the Snoqualmie Indian Tribe, *supra* note 111, at 29. See also Proposed Finding for the Eastern Pequot Indians of Connecticut 145 (BIA, 2000), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001430.pdf>.

201. Final Determination to Acknowledge the Historical Eastern Pequot Tribe, *supra* note 172, at 44,236 (finding that the petitioner met criterion (c), in part, due to intergroup conflicts with the subgroup consisting largely of the Sebastian family).

202. *Id.* at 44,239.

203. *Id.*

204. ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 173 (discussing an official interpretation that factions are acceptable as evidence of meeting criterion (c) if the political conflict occurs within a social community). See also Final Determination for the Miami Nation of Indians of the State of Indiana, Technical Report at 50 (BIA, 1992).

205. Proposed Finding for the Tunica-Biloxi Indian Tribe of Louisiana, Anthropological Report 3 (BIA, 1980), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001252.pdf> (noting that though a factional division partly corresponded to family lines, it was actually a break in the

petitions, it was clear that even though there were two political entities, some individuals continued to engage in political activities outside their factions.²⁰⁶

Finally, the OFA's interpretation of political influence requires the petitioners to show that they are able to control their members. Many traditional tribal governing structures do not utilize overt control of individuals' behavior.²⁰⁷ For example, in a decentralized governing structure, tribal leadership is fluid and based on whoever provides the best advice for that topic of discussion.²⁰⁸ Under this system, Indian political leaders act like philosophers, sharing their ideas with the members who make their own decisions.²⁰⁹ This type of governing structure makes it difficult to determine a single leader. In cases where the OFA cannot discern a leader because the leaders frequently change, the OFA tends to conclude that there is no evidence of political authority.²¹⁰ However, the reality may be that Indian political leaders culturally did not make decisions for members because the tribe followed this traditional decentralized governance system.

Thus, the OFA's interpretation of criterion (c) shows a significant bias in favor of large land-based tribes. In addition to cultural norms, landless tribal leaders may not have the ability to make decisions for their membership because unlike land-based, state-recognized, or large tribes with centralized governing structures, landless tribes do not have the ability to pass ordinances, enforce hunting and fishing regulations, or direct the repair of tribal buildings and roads.²¹¹ In the Eastern Pequot case, the OFA noted that this type of "control of territory and its uses is a strong form of evidence for political influence."²¹² Similarly, the Mashpee Wampanoag, a large tribe in Massachusetts, was able to convince the State of Massachusetts to establish the Mashpee Indian District.²¹³

political system rather than the community).

206. Final Determination for the Eastern Pequot Indians of Connecticut 18, 19 (BIA, 2002), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001426.pdf> (noting that despite the petitioner's political division, the petitioner maintained a distinct community by interacting as a group).

207. The Harvard Project on Am. Indian Econ. Dev. and Native Nations Inst., *Why Are Some Native Nations More Successful than Others? Nation Building: Keys to Good Governance*, NCAI Annual Convention (Oct. 22, 2008).

208. *Id.*

209. *Id.*

210. *See, e.g.*, Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 145–46 (finding no leader from 1862–1933); Proposed Finding on the Oholone/Costanoan Muwekma Tribe 39–40 (BIA 2001) <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001659.pdf> (finding no leader from 1927-present encompassing the whole entity).

211. *See, e.g.*, Final Determination for the Eastern Pequot Indians of Connecticut, *supra* note 206, at 165.

212. *Id.*

213. Proposed Finding for Fed. Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Mass., 71 Fed. Reg. 17,488, 17,490 (Apr. 6, 2006).

The Mashpee Indian District was later incorporated and the tribal members had sufficient numbers to maintain control of their city council for many years.²¹⁴ By the time the tribal members lost that control, they had built sufficient infrastructure that they were able to smoothly continue to operate many of their programs and charities for tribal members.²¹⁵ Smaller, landless tribes, on the other hand, don't have the power to pass ordinances or enforce regulations, because they have no jurisdiction. Without jurisdiction over land it is difficult for smaller tribes to exert the type of political control over dispersed tribal members that the OFA demands. The OFA's interpretation of criterion (c) seems geared towards a petitioner with a specific governing structure, issue priority, and land base.

D. Criterion (e)—Descent from a Historical Tribe

The last mandatory criterion requires the petitioner's membership to consist primarily of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity.²¹⁶ Critics have argued that the OFA's interpretation of criterion (e) is race-based, creates research difficulties, and uses a higher standard of proof than what is required by the regulations.²¹⁷ This section analyzes the OFA's interpretation of criterion (e).

To the OFA's credit, they do not require every individual member to be able to trace his or her ancestry back to the historical tribe. However, the percentage that must be able to do so is relatively high. On average, a successful petition must be able to show that at least eighty-one percent of the membership descends from the historical tribe.²¹⁸ As political entities, federally recognized Indian tribes do not have to prove a racial element in their membership requirements.²¹⁹ While it is reasonable for the OFA to require evidence of the existence of a historic tribe and that the membership be able to trace its lineage back to that tribe, it is unreasonable and unnecessary to require such a high percentage of direct descendants.²²⁰

The historical tribe is often found to exist as far back as the late 1700s, and

214. Proposed Finding for the Mashpee Wampanoag Indian Tribal Council, Inc. 58, 91 (BIA, 2007), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001338.pdf>.

215. *Id.*

216. 25 C.F.R. § 83.7(e) (2009).

217. MILLER, *supra* note 176, at 56–63. *Accord* CRAMER, *supra* note 32, at 49.

218. See ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 231–233. The author excluded the lowest percentage accepted by the OFA (eighty percent) because that number was ultimately reduced in the Final Determination to seventy-four percent.

219. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

220. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (noting that tribes have the power to regulate internal and social issues and reversing the appellate court holding that tribes do not have a sufficient interest in their membership ordinance to justify discrimination).

finding documentation extending that far back in time can be difficult.²²¹ Records dating back into the eighteenth century are subject to decay and historical accidents. For example, many Mission records useful to the Juaneño petition were destroyed in a fire following the 1906 earthquake in San Francisco.²²² In addition, records can be misplaced or scattered based on where the document creator willed her property.²²³ This creates serious access issues for Indian entities of modest means.

The OFA argues that it accepts a variety of records to establish criterion (e).²²⁴ For example, the OFA accepts Bureau of Indian Affairs reports and studies as evidence of descent from an historic tribe.²²⁵ However, these BIA reports rarely include unrecognized tribes, which are precisely the groups who need to include such data in their petitions for recognition. The OFA also suggests that petitioners review church records and other formal records, such as marriage and death records, for evidence of descent.²²⁶ However, many of these records were arguably issued in an attempt to assimilate Indians and thus are subject to an inherent bias that often complicates any analysis of tracing the ancestry of a tribe. For example, Indian naming traditions complicate tracing one's lineage prior to her first baptism. Indian individuals that first came into contact with missionaries utilized traditional names that were difficult for non-Indians to replicate and were often misspelled by the note taker.²²⁷ Upon baptism these individuals were given a new name, making it difficult to determine which traditional Indian name matched with the baptismal documents.²²⁸

221. See KORY LELAND MEYERLINK, PRINTED SOURCES: A GUIDE TO PUBLISHED GENEALOGICAL RECORDS 310 (1998) (noting that colonial era sources are difficult to work with). See generally SANDRA HARVEGREAVES LUEBKING & LORETTO DENNIS SZUCS, THE SOURCE: A GUIDEBOOK TO AMERICAN GENEALOGY (2006) (discussing some of the challenges in conducting genealogical research).

222. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 12 n. 11.

223. For example, a fair portion of Frey Junipero Serra's records are housed at Colegio Junipero Serra in Ensenada, Baja California, Mexico. Frey Serra spent years at the missions in San Diego, Monterey, Carmel, San Juan Capistrano, and San Luis Obispo, among others. MAYNARD GEIGER, LIFE AND TIMES OF FRAY JUNIPERO SERRA, VI-2: OR THE MAN WHO NEVER TURNED BACK 1713-1784, (Literary Licensing, 2011) (providing a biography of Junipero Serra).

224. 25 C.F.R. § 83.7(e) (2012). See generally ACKNOWLEDGMENT PRECEDENT MANUAL, *supra* note 82, at 216-258.

225. 25 C.F.R. § 83.7(e) (2012).

226. *Id.*

227. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-103, DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES 24 (1998) (discussing the lack of standards used in various enumerators and suggesting that historical censuses can provide useful data, but that they should be used with caution). Jennifer Jensen, *Error in Genealogy Records*, SUITE101 (Jan. 7, 2009), <http://suite101.com/article/errors-in-genealogy-records-a88527> (discussing the unreliability of old Census records amongst the general population).

228. Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, Juaneño

For some petitioners, their current membership could prove Indian descent, but not descent from the *historical* tribe. Affidavits and other identifications of Indian or tribal descent are considered insufficient unless they are contemporaneous to the individual ancestor's life and supported by other documentary evidence.²²⁹ There are many reasons why an individual may be able to trace Indian heritage, but may not be able to trace it back to a historical tribe. For example, the petitioning entity may be an offshoot of a larger tribe and an individual may be able to trace his heritage back to the larger tribe, but not necessarily the historical tribe of the petitioning entity.

In another example, in the Proposed Finding for the United Houma Nation, eighty-four percent of the petitioner's members could prove Indian ancestry, however, this ancestry "could not be reliably identified as descending from a specific historical tribe, nor from historical tribes which combined."²³⁰ Thus, the United Houma Nation failed to meet criterion (e).²³¹

Similarly, in the OFA investigation of the Juaneño Tribe, several members could show descent from an Indian that lived at the mission, but according to the OFA it was unclear whether this ancestral individual was Juaneño or Pala.²³² The ancestor and the tribal membership of the petitioners who descended from her was thus not considered "Indian,"²³³ despite the OFA's stated definition of the historic Juaneño tribe as the "Indian population at the San Juan Capistrano Mission in 1834."²³⁴ Based on this definition, the individual ancestor should have been recognized as a member of the historical Juaneño Indian tribe.

The OFA arguably uses a higher standard of proof than the reasonable likelihood of the validity of the facts standard stated in the regulations.²³⁵ Instead, the OFA requires that evidence meet genealogical standards, which calls for two documents showing the same information.²³⁶ Once the genealogical standard is satisfied, the OFA employs the "reasonable likelihood of the validity of the facts" standard to evaluate these documents.²³⁷ After satisfying the stricter

Formal Technical Assistance on the Record, *supra* note 51, at 181–187.

229. See Final Determination that the Southeastern Cherokee Confederacy, Inc., the Northwest Cherokee Wolf Band, and the Red Clay Inter-Tribal Indian Band Do Not Exist as Indian Tribes, 50 Fed. Reg. 39047 (Sept. 19, 1985).

230. Proposed Finding for the United Houma Nation, Inc. 25 (BIA, 1994), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001465.pdf>.

231. *Id.* at 25.

232. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 20 n. 32.

233. *Id.* at 240.

234. *Id.* at 178.

235. 25 C.F.R. § 83.6(d) (2009).

236. See Mills, *supra* note 50, at 165 (providing a description of the professional standards of genealogists); Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, Juaneño Formal Technical Assistance on the Record, *supra* note 51, at 181–86.

237. *Id.*

genealogical standard, meeting the reasonable likelihood standard in the regulations is all but inevitable.

The OFA does not accept most federally initiated settlement lists as evidence of tribal descent²³⁸ (with the exception of descendency rolls produced by the BIA to distribute judgment funds awarded under the Indian Claims Commission payment rolls). The OFA argues that these lists constitute self-identifications and thus do not require actual proof of tribal membership.²³⁹ It is unclear why the same type of document created by the same entity (the federal government) would be considered self-identification in certain instances and yet in other instances would be accepted as evidence of tribal descent. In fact, in the case of the Juaneño Band of Mission Indians there was little to no mention of the fact that these membership lists required a witness, that many of the individuals were challenged and had to provide additional proof of membership, that these lists were certified to issue settlement funds to Indian individuals by the U.S. Federal Court, or that several federally recognized tribes currently use this list to determine their membership.²⁴⁰

Even more problematic is that the OFA prefers census data over these federally initiated tribal claims lists.²⁴¹ However, census data, especially from early censuses, can only be considered as good as the enumerator,²⁴² and the census enumerator position was frequently awarded as a political favor so there was little guarantee of enumerator competence.²⁴³ Yet, the OFA accepted census data in the Juaneño case with little analysis of the enumerator's skill. A former OFA employee stated that the OFA does not accept government documents because "it's totally contrary to the standards of the professional disciplines that we work under."²⁴⁴ In other words, the OFA dismisses federally sanctioned

238. Proposed Finding for the Poarch Band of Creeks of Alabama, 106 (BIA, 1983), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001321.pdf>; Proposed Finding for the Grand Traverse Band of Ottawa and Chippewa Indians, 48 (BIA, 1979), <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001257.pdf>; Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 186 (noting that the 1933 Rolls were not sufficient for the purposes of criterion (c)).

239. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians Acjachemen Nation (Petitioner #84A), *supra* note 82, at 186–88 (describing the 1933 Census Rolls as a self-identification and not providing evidence of Juaneño or Indian descent).

240. *Id.* at 146, 149. Also, most notably the Pechanga Band of Luiseno Indians utilized these Indian Claims Commission Rolls to form their Base Roll. By stating that these Rolls amount to self-identification, the OFA is challenging the validity of their use for tribal enrollment and ultimately for federal benefits.

241. Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, Juaneño Formal Technical Assistance on the Record, *supra* note 51, at 194–203.

242. See generally U.S. GEN. ACCOUNTING OFFICE, *supra* note 227, at 24. According to the U.S. Census, an enumerator is "[a] Census Bureau employee who interviews people to obtain information for a census or survey questionnaire." U.S. Census Bureau, *Decennial Management Division Glossary*, <http://www.census.gov/dmd/www/glossary.html>.

243. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 227, at 24.

244. Peter Beinart, *Lost Tribes: Native Americans and Government Anthropologists Feud*

tribal rolls under the guise of stricter professional standards, even though the tribal rolls meet the standard defined in the Part 83 regulation.

Ultimately, many petitioners have met each of these four regulatory criteria, but these criteria are also subject to recurring problematic OFA interpretations that exclude other legitimate petitioners. These four criteria advantage certain types of petitioning entities over others. Small, decentralized, landless petitioning entities often find it more difficult than larger, centralized, land-based petitioning entities to meet the standards that the OFA requires.

IV.

REFORMING THE PROCESS

The question remains: what should be done to alleviate the problems associated with the federal recognition process and arising from OFA interpretations of the Part 83 regulation? Scholars have proposed several ways to improve the system. These potential solutions fall into two overarching categories: legislative solutions and regulatory solutions.

A. A Legislative Solution

Although there are not many scholars working in the field of federal recognition, several active practitioners and law professors have weighed in on the issue of problematic OFA interpretations, and most are in favor of some type of legislative reform that includes removing the federal acknowledgment process from the purview of the DOI.²⁴⁵ For example, Dr. Jack Campisi, an anthropologist expert on American Indian culture, believes that this solution must come from Congress.²⁴⁶ He argues that Congress should establish a Commission to act as a special court to hear testimony and review reports and documents.²⁴⁷ Under this system, the OFA staff would act as the research arm of that congressional court.²⁴⁸ The Commission would then provide a report on each petitioner to Congress, which would be responsible for the ultimate recognition decision regarding federal recognition.²⁴⁹

However, there are several flaws in Campisi's plan that make this option

Over Indian Identity, LINGUA FRANCA (May 1999), <http://linguafranca.mirror.theinfo.org/9905/beinart.html> (quoting Steven Austin). Austin refers to the Bureau of Acknowledgment, which was the precursor to the OFA.

245. Jackie Kim, *The Indian Federal Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 ADMIN. L.J. AM. U. 899, 932 (1995). See also Campisi, *supra* note 118, at 505, 511; Rachel Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 227 (1991).

246. Campisi, *supra* note 118, at 512-515.

247. *Id.*

248. *Id.*

249. *Id.*

politically impossible. First, the proposed process would be slow and expensive.²⁵⁰ The Commission may be able to produce a report more quickly than the OFA, but it would likely take several congressional sessions before the report would be reviewed by the Congressional Committee(s) of relevant jurisdiction, passed out of Committee(s), and voted on by both the House and the Senate.²⁵¹ Thus, Campisi's solution arguably exchanges one inefficient process for another. Second, Congress is a generalist governing body and ordinarily lacks the specific issue expertise found within agencies.²⁵² Therefore, Congress generally prefers to leave detailed lawmaking, accomplished through regulations, to the agencies that can foster the necessary expertise and provide narrow attention to certain issues. Third, a system where Congress is the ultimate decision-maker would expose the federal recognition process to flagrant lobbying, both for and against the recognition of petitioning entities, thus interfering with the intended neutral adjudication.²⁵³

Recent congressional proposals have suggested a simplified version of Campisi's proposal. In 2007 the House Natural Resources Committee held a hearing on H.R. 2837, a bill to reform the federal recognition process.²⁵⁴ This bill was reintroduced by Delegate Eni Faleomavaega in 2009 as H.R. 3690.²⁵⁵ The reform bill proposes the establishment of a congressional Commission on Recognition that would assume the OFA's workload.²⁵⁶ The bill substitutes a more formal hearing for the OFA's review by a three-person team and makes decisions directly appealable to the U.S. Federal District Courts.²⁵⁷ Arlinda Locklear and Derril Jordan, along with other influential practitioners, supported this legislative measure at the hearing.²⁵⁸

Delegate Faleomavaega's bill also includes a sunset provision that would bar potential petitioners from requesting recognition through this process eight years after the first Commission meeting.²⁵⁹ Although many scholars support a sunset provision, the reality is that practical issues could exclude tribes worthy of consideration. There will always be some legitimate entities that, for whatever

250. See generally JOHN V. SULLIVAN, *HOW OUR LAWS ARE MADE*; H.R. Con. Res. 190, 110th Cong. (2007) (providing a detailed explanation of the federal legislative process).

251. *Id.*

252. LUBBERS, *supra* note 12, at 13–19.

253. See, e.g., Scott Ritter, *Tribe Gets OK to Re-Examine Denial Process*, THE DAY (Mar. 28, 2007), <http://www.theday.com/article/20070328/DAYARC/303289938/0/Search>.

254. H.R. 2837, 110th Cong. (2007) (reintroduced as H.R. 3690 on Oct. 1, 2009).

255. H.R. 3690, 111th Cong. (2009) (as introduced by Delegate Faleomavaega, the representative of American Samoa).

256. *Id.* at 9–16.

257. *Id.* at 247

258. *Federal Recognition Administrative Procedures Act, Hearing on H.R. 2837 Before H. Comm. on Nat. Resources*, 110th Cong. 54–61 (2007) (statement of Arlinda Locklear, Attorney, Arlinda Locklear Law Office). *Id.* at 88–94 (statement of Derril Jordan, Attorney, Anderson Tuell).

259. H.R. 3690, 111th Cong. (2009) at 29.

reason, are not informed of the deadline, do not fully understand the sunset provisions, or are unable to submit their application in time. This is especially true when dealing with traditional or impoverished entities. Some entities will be more interested in maintaining their traditional culture than filing a piece of paper, but the next generation may desire federal recognition. It would be unfair to exclude these types of petitioners.

Faleomavaega's bill does improve on Campisi's proposal, if only because it streamlines the process requiring the Commission to report to Congress on an annual basis.²⁶⁰ The bill sets out detailed deadlines. For example, it requires a preliminary hearing to take place 180 days after receipt of the petitioner's request.²⁶¹ However, one glaring flaw is that the bill creates an entirely new bureaucratic process for petitioning entities to navigate.²⁶² Not only is learning a new system time-consuming, but the formal hearing process may be intimidating to petitioners.

Dr. Allogan Slagle, an expert on California Indian sociocultural history, generally supports legislative reform, but identifies certain problems that are unique to California candidates that should be addressed in any such proposals for reform.²⁶³ Many California petitioners were legislatively terminated and are thereby barred from the federal recognition process.²⁶⁴ Other California petitioners have difficulty producing evidence due to the oppressive mission system, language barriers in the documentation, and a fire in the early 1900s that destroyed many church records.²⁶⁵ Indeed, sparseness of evidence is a potential problem for all petitioners, not just California tribes. The current regulations have a provision that allows the OFA to make allowances for lack of evidence due to a legitimate reason.²⁶⁶ Unfortunately, the OFA requires the petitioner to affirmatively state and provide evidence that a generally accepted historical situation, such as racism or a documented fire that destroyed evidence, prevented

260. Compare H.R. 3690, 111th Cong. (2009), and H.R. 2837, 110th Cong. (2007) with Campisi, *supra* note 118, at 512–515 (removing the requirement to obtain congressional approval of each petition by imbuing the Commission with the authority to issue a determination).

261. H.R. 3690, 111th Cong. (2009), at 35.

262. See generally *id.*

263. See Allogan Slagle, *Unfinished Justice: Completing the Restoration and Acknowledgement of California Indian Tribes*, 13 AM. INDIAN QUARTERLY 325 (1989).

264. *Id.* at 333–34 (noting that in the 1950s Congress entered into a policy of terminating the federal relationship with certain federally recognized tribes under H. Con. Res. 108, 83rd Cong. (1953)); 25 C.F.R. § 83.7(g). Legislative termination means that the relationship between the tribe and the federal government is terminated by legislation and the Tribe then loses all status as a recognized Indian tribe.

265. Slagle, *supra* note 263, at 327–28. Proposed Finding Against Acknowledgment of the Juaneño Band of Mission Indians (Petitioner #84B), *supra* note 84, at 297 (providing several examples of records in the Spanish language housed at a variety of geographic locations, including several places across the State and in other countries, which highlights the unique challenges of gathering evidence faced by some petitioners).

266. 25 C.F.R. § 83.6(e) (2009).

the collection of evidence that would support her petition.²⁶⁷ For example, the Juaneño argued that evidence of their continuous existence under criterion (a) was limited because some Juaneño preferred to be considered Mexican by outsiders in the late nineteenth and early twentieth centuries in order to avoid racist backlash against Indians.²⁶⁸ The OFA informed the Juaneño that they had to prove that racism against Indians existed in California at the time alleged.²⁶⁹ The OFA would not consider the Juaneño tribe's argument regarding lack of evidence unless it was affirmatively proven, even if it was known or obvious to the OFA. Therefore, Slagle argues that a study of California Indian conditions should be conducted as part of the development of a legislative solution.²⁷⁰

Slagle also argues that reform legislation should clarify the definition of cultural and political existence and shift the burden to the government by requiring that it disprove a petitioner's existence.²⁷¹ Senator Abourzek's original proposal in 1977, to remove the OFA from the BIA, incorporated this shift in the burden of proof as well.²⁷² Although shifting the burden is an interesting idea, it may run afoul of the trust responsibility owed by the government to federally recognized tribes, which requires the federal government to act in the best interest of tribes.²⁷³ If the OFA or an independent commission reviewing recognition petitions actively conducted research to disprove whether an Indian entity was a tribe, the government could end up thwarting potentially legitimate tribes from obtaining the rights and benefits that they deserve due to errors resulting in false negatives.

Although legislative reform may help alleviate the problem, the process of reforming the federal recognition system through legislative means would be

267. Assistant Secretary—Indian Affairs, Office of Federal Acknowledgment, Juaneño Formal Technical Assistance on the Record, *supra* note 51, at 68–70 (noting a little known technicality in the application procedure requiring the petitioner to affirmatively argue that there is a lack of evidence).

268. *Id.*

269. *Id.*

270. Slagle, *supra* note 263, at 332–333.

271. *Id.* at 332.

272. See MILLER, *supra* note 176, at 39 (describing Senator Abourezk's bill as more inclusive, establishing an independent office within the Department of the Interior, and placing the burden on the Department to show that a petitioning entity failed to meet a set of criteria). Miller was referring to S. 2375, a bill establishing guidelines and an administrative procedure to be followed by the Department of the Interior in its decision to acknowledge the existence of certain Indian tribes.

273. See, e.g., *U.S. v. Mitchell*, 463 U.S. 206, 224 (1983) (holding that the timber leasing statute, 25 U.S.C. § 406(a), requires that sales of timber from Indian trust lands must be based on "the needs and best interests of the Indian owner and his heirs"); *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983) (finding that one consideration in determining the best interests of a tribe under the business leasing statute, 25 U.S.C. § 415, is the tribe's long-term interest in a reputation for business reasonableness and the interests of lessees in enforcing rights under BIA-approved leases).

time-consuming.²⁷⁴ In addition, legislative reform must be relevant and easy to implement in order to have a positive effect. There is not enough evidence to suggest that merely setting up an independent commission will alleviate all the problems that the OFA has been experiencing or that the commission wouldn't implement some of the same problematic interpretations of the regulation that the OFA currently employs. Similarly, there is not enough evidence that instituting a formal hearing review of petitions will alleviate the federal recognition system's problems. Finally, there is not enough evidence to suggest that the problem even requires a legislative solution, since a regulatory fix has not yet been attempted.

B. A Regulatory Solution

While many scholars support a legislative solution, a regulatory solution is more likely to achieve lasting success more quickly. Although regulations take a significant amount of time and energy for an administration to publish, it is usually a faster and more efficient option than passing legislation. In addition, the guidance documents published in 2000, 2005, and 2008 interpreting the federal recognition regulations are all examples of half-hearted attempts at regulatory solutions.²⁷⁵ Each of these documents attempted to solve one or several discrete problems that existed in the federal recognition process by altering the interpretation of the regulations.

Although issuing regulations provides a more rapid response to the current problems facing the Indian recognition process, issuing guidance documents is not a perfect solution either. For example, regulations do not provide the ability or authorization to appropriate additional funds to assist the OFA in reforming the federal recognition system. As Campisi and Starna have noted, the OFA does not have adequately trained staff.²⁷⁶ Providing additional funding will allow the OFA to hire additional trained staff or to train current staff in regulatory or legal analysis. Similarly, any reform that includes enforcing the timelines in the regulations without also providing adequate funding would have the deleterious effect of producing decisions that are not well-written or thought out. Therefore

274. See generally SULLIVAN, *supra* note 250 (setting out the lengthy procedure for a bill to become law).

275. See Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7,052 (Feb. 11, 2000) (clarifying that the BIS's review of the petition will be limited to evaluating the petitioners arguments rather than conducting additional research); Reports and Guidance Documents; Availability, etc., 70 Fed. Reg. 16, 513 (Mar. 31, 2005) (interpreting various procedural details, such as allowing OFA staff to require additional information any time prior to the release of the proposed finding in order to clarify arguments); Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30, 146 (May 23, 2008) (providing for a procedure to review splinter groups, interpreting the definition of "historical times" as beginning at the formation of the United States, and allowing for expedited findings against acknowledgement, among other things).

276. Campisi & Starna, *supra* note 39; See also MILLER, *supra* note 176, at 51.

any true reform must include adequate funding, which cannot be achieved through regulations alone.

A second challenge is that the regulatory process under the Administrative Procedure Act has become burdensome in recent years and many agencies have moved away from even informal rulemaking in favor of guidance documents and policy statements.²⁷⁷ Because the rulemaking process is so cumbersome, it may not be significantly easier to reform the recognition process through rulemaking. Current estimates state that uncontroversial rulemaking requires a minimum of two years to publish, and a controversial topic such as federal recognition regulations, is likely to require even more time.²⁷⁸ However, given the current stalemate in Congress, a regulatory solution would appear to be a preferable option to legislative reform.

C. A Proposal

To develop a workable solution, we must first determine the overarching problems plaguing the current federal recognition process. Although the administrative procedure is complex, the problems do not necessarily trace back to the original text of the regulation. Rather, problems often arise when the implementation of the regulatory text is lacking, inconsistent, or subject to extraneous and deleterious requirements due to agency interpretations. Regulatory implementation will always have a political element, but it need not follow that the regulatory outcome be unreliable.

There are two simple implementation solutions that could eliminate many of the current problems. At a minimum, returning to the legal review standard of “reasonable likelihood of the validity of the facts” enunciated in the actual regulatory text would do much to create consistency between and among petition reviews. The OFA should not validate each piece of evidence under the professional standards of the OFA team. Furthermore, requiring OFA staff to be proficient in legal analysis in order to minimize inconsistent findings is an additional necessary step in reforming the federal recognition system. However, even though these two actions will alleviate many of the problems in the review process, ideally, a comprehensive analysis of the regulatory text should be undertaken to identify all problems that need to be addressed through regulatory action.

Therefore, an impartial entity such as a congressional workgroup should be

277. *Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications, Hearing Before H. Comm. on Nat. Resources*, 110th Cong. (2008) (statement of Alexander Tallchief Skibine, Law Professor, University of Utah).

278. Cf. Peter May, *Social Regulation*, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 165 (Lester Salamon, ed., 2002) (providing one example of a rulemaking that took several years to complete).

established to conduct a detailed study of the regulation in order to determine what, if any, changes should be made to the regulatory text itself. In order to effectively conduct an analysis of the problems in the federal recognition system, it is necessary to rescind all agency guidance affecting the regulation. Because of the numerous types of guidance documents that each administration has issued, it is difficult to determine whether agency decisions adhere to the regulatory text or the subsequent guidance documents. Thus, it is only by implementing the pure text of the regulation that we can accurately determine what problems, if any, exist due to the regulatory text and how the text must be changed to resolve these issues. Furthermore, returning to a pure implementation of the regulatory text should increase the consistency in its application to petitioners in the meantime.

The congressional study should then be published and serve as a guide for DOI in the reform process. Furthermore, the potential legislation that establishes the congressional workgroup must include adequate authority to review all OFA documents and funding to allow for extensive interviewing of past petitioners in order to gain insight into the petitioners' experiences, conduct reviews of physical evidence, and evaluate whether the inclusion of oral evidence is beneficial. Finally, Congress should take the opportunity when establishing the congressional workgroup to ensure that the OFA is appropriately funded in order to achieve its mission.

Once any problems in the regulatory text are identified, the Assistant Secretary of Indian Affairs should initiate a rulemaking to address those concerns. Rulemaking provides an opportunity for the public to review the study, consider the proposed changes to the regulatory text, and respond with additional information or ideas. Implementing changes before conducting such a study could result in both unnecessary changes and the potential maintenance of faulty regulatory language.

Critics may argue that it would likely be years before the Assistant Secretary of Indian Affairs would be ready to propose regulatory changes following this reform process. However, the federal recognition process has such critical and long-lasting repercussions for Indian entities that a few years developing the appropriate solution is preferable to a decade-long legislative reform process or a shotgun approach which would only result in adding even more Band-Aids to this broken system.

V.

CONCLUSION

Given the importance of the federal recognition process for tribal entities, it is imperative that the process be legitimate and fair. By imposing guidance documents on the Part 83 regulations, the OFA has muddled the application of the regulation and undermined the validity of the process. The most effective way to reinstate a legitimate federal recognition system is to withdraw all

published guidance and undergo a systematic review of the regulations to determine what, if any, changes need to be made to the regulatory text to ensure a just recognition process. Armed with this information, Congress can direct the Secretary of the Interior to reform the process in line with the study's recommendations. Engaging in this methodical process will provide some peace of mind to tribal entities seeking recognition by informing them of exactly what will be required in order to be successful in their petitions for federal recognition.

