

**WORK OF THE DEPARTMENT OF THE INTERIOR'S
BRANCH OF ACKNOWLEDGMENT AND RE-
SEARCH WITHIN THE BUREAU OF INDIAN
AFFAIRS**

HEARING

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

TO RECEIVE TESTIMONY FROM THE BUREAU OF INDIAN AFFAIRS ON
THE PROCESS ESTABLISHED BY THE BRANCH OF ACKNOWLEDGMENT
AND RESEARCH FOR THE REVIEW OF PETITIONS OF TRIBAL GROUPS
THAT ARE SEEKING FEDERAL RECOGNITION

JUNE 11, 2002
WASHINGTON, DC



U.S. GOVERNMENT PRINTING OFFICE

80-405 PDF

WASHINGTON : 2002

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TUESDAY, JUNE 11, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 1:33 p.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Campbell.

**STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM
HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS**

The CHAIRMAN. The committee meets this afternoon to receive testimony from the Bureau of Indian Affairs [BIA] on the process established by the Branch of Acknowledgement and Research for the review of petitions of tribal groups that are seeking Federal recognition.

This hearing is the first in a series of hearings that will be held on the Federal Acknowledgement process. Today, the committee wants to develop a record and an understanding of the basic process that the Branch of Acknowledgement follows in acting upon the petitions of tribal groups. In the next hearing, the committee will receive testimony on the seven criteria that are used by the Branch of Acknowledgment and Research from experts in the field of genealogy, history and anthropology, as well as testimony on the manner in which criteria are being applied.

In a later hearing, the committee will receive testimony on various legislative initiatives that propose to revise the Federal Acknowledgement process. This committee understands that attendant to any process is criticism in the way the process works and the process of the Federal acknowledgment of petitioning tribal groups is no different.

When the challenges associated with the process become too much for some to bear, inevitably there will be those who will seek ways around the process and who will find clever ways to frustrate the process. The process entailed in the acknowledgement of petitioning tribal groups is no different in that respect either. And so, over the years tribal groups have come to the Congress seeking a legislative recognition of their status. In some instances, litigation

relating to the acknowledgement process has been initiated, and more recently the Freedom of Information Act has been used as a means of diverting the staff of the Branch of Acknowledgment away from their primary charge, as they attempt to produce thousands of pages of documents requested by interested parties.

The Congress is primarily responsible for the inadequate resources, both financial and personnel resources, that are provided for the Branch of Acknowledgment to carryout its work. Thus, today in addition to developing an understanding of the underlying process, the committee wants to know what is needed in terms of resources to assist the Branch in fulfilling its responsibilities.

With these considerations in mind, we leave for another day the issues associated with the seven criteria and the manner in which the criteria are applied, as well as the frustrations that have consistently been expressed to this committee that the acknowledgment process needs to be more transparent and more timely. The committee expresses its appreciation to the General Accounting Office for its helpful assessment of the tribal recognition process. Equally as important, we thank the Bureau of Indian Affairs for appearing before the committee today.

Before we proceed with our witnesses, may I call upon the Vice Chairman?

Senator CAMPBELL. Thank you, Mr. Chairman.

Before I make some comments, with your permission I would like to introduce for the record a letter I wrote to Solicitor Myers on May 2, 2002 relating to this subject. I have not received an answer yet, but I would like to put that in the record.

The CHAIRMAN. Without objection.

[Referenced document appears in appendix.]

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Mr. Chairman, in the years before Columbus, some estimate the Native peoples of North America numbered nearly 10 million. The Indian tribes that existed at that time, they knew who they were by way of a shared culture and a shared language, governing structure, family ties, acknowledgment by other tribes, and their common history. Needless to say, there was no "acknowledgment process" or 25 CFR Part 83 that governed who was and who was not considered an Indian tribe.

I cannot help but think, Mr. Chairman, that those considerations were given by non-Indians who just got off the boat. I sometimes wonder what the reaction would have been on the part of the European people between 1492 and 1850 if the boats had gone the other way, and the newly arrived people from this side of the Atlantic Ocean would have gotten off the boats, set about to both civilize the people who had been there for years, if not centuries, and then categorized them and given them some identity cards or identity.

These processes and regulations are creations of the U.S. Government and I think that we need to bear that in mind. They were not started by the Native peoples, and I find it somewhat ironic that the descendants of Native peoples who have lived in North

America for thousands of years are the only American citizens who must be documented to prove their status.

Indian groups can be recognized by way of the legislative route, which I have not always supported and generally tend to oppose unless there are some extenuating circumstances, or through the administrative process known as the Federal Acknowledgment Process that you mentioned. Because tribal recognition decisions were being decided inconsistently in the courts, in 1978 the Department of the Interior issued regulations to create the FAP process to be undertaken by the Branch of Acknowledgment and Research. The FAP regulations were revised in 1994 and again in 2000, but charges and counter-charges about the current system have reached a boiling point. They include the GAO, which says the BAR is not transparent enough. The House of Representatives has said it lacks integrity. Petitioners say it is biased against them and under-funded. And State attorneys general say it is biased against them and under-funded.

Third parties often say that the criteria is too loose. Petitioning groups say that the criteria is too strict. And almost everyone believes the process is too slow. And the slowness of that process has been made worse by a wave of lawsuits from third parties filed by local governments, State attorneys general, and some filed by already-recognized tribes.

In addition to its normal duties in analyzing petitions, the BAR is also being flooded with requests under the Freedom of Information Act that are resulting in a constant churning of documents and keeping the BAR from performing its core functions. All of these factors have led to a near-standstill in the processing of petitions before them.

I am anxious to hear from the witnesses, Mr. Chairman, but like you, I feel strongly that we must act in the few months that we have remaining in the 107th Congress. As you also remember, Mr. Chairman, legislation you and I introduced last year to establish an independent recognition commission that was titled S. 504 is still pending before the committee. If our collective efforts to improve BAR fail, I certainly will press for consideration of that bill.

Thank you, Mr. Chairman. I appreciate the time.

The CHAIRMAN. Thank you very much, sir.

Our first witness is the director of the Office of Tribal Services of the BIA, Department of the Interior, Mike Smith. Mr. Smith will be accompanied by the chief of the Branch of Acknowledgment and Research of BIA, Lee Fleming; and the assistant solicitor of the Branch of Tribal Government and Alaska Office of the Solicitor, Division of Indian Affairs, Department of the Interior, Scott Keep.

Mr. Smith.

STATEMENT OF MIKE SMITH, DIRECTOR, OFFICE OF TRIBAL SERVICES, BIA, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY LEE FLEMING, CHIEF, BRANCH OF ACKNOWLEDGMENT AND RESEARCH, BIA; GEORGE ROTH, CULTURAL ANTHROPOLOGIST, BIA; AND SCOTT KEEP, ASSISTANT SOLICITOR, BRANCH OF TRIBAL GOVERNMENT AND ALASKA, OFFICE OF THE SOLICITOR, DIVISION OF INDIAN AFFAIRS

Mr. SMITH. Good afternoon, Mr. Chairman and members of the committee.

My name is Mike Smith. I am the director of the Office of Tribal Services within the BIA. I am an enrolled member of the Laguna Pueblo Tribe in New Mexico. I was born on the reservation at Fort Hall, Idaho, and spent my early years in Arizona on the Navajo Reservation, growing up primarily in New Mexico, Arizona, and Colorado.

With me today is Robert Lee Fleming, who is the chief of the Branch of Acknowledgment and Research. That is within my Office. Unfortunately, Dr. George Roth could not be with us today. But also accompanying us this afternoon is Scott Keep, the Departmental Solicitor's Office. Mr. Keep is one of the attorney-advisers for the Branch of Acknowledgment and Research.

We appreciate the opportunity to appear before you today to speak on behalf of the Department about issues that are currently impacting the Federal acknowledgment process. In fact, I have the high honor and privilege of appearing before this committee and the renowned Senators who I believe have been the strongest champions of Indian people and their causes over the years I have spent working in the Government.

The Federal acknowledgment of an Indian tribe is a serious decision for the Department and the Federal Government. We feel it is important that a thorough and deliberate evaluation take place because of the status that the acknowledgment carries with it. Our decisions must be fact-based, equitable and defensible.

In 1978, regulations were issued at 25 CFR Part 83 to provide a uniform process for determining which groups are Indian tribes. The BAR was created to implement these regulations. We feel the BAR's primary mission is to process and evaluate petitions for acknowledgment. However, within the past 10 years, the BAR has found itself performing more extensive and time-consuming administrative duties, including preparing administrative records in response to appeals and litigation, and the handling of extensive Freedom of Information requests on behalf of petitioners and interested parties.

For the first one-half of this year 2002, over 84,000 pages have been released under the Freedom of Information Act, and over 4,200 pages have been withheld after careful legal analysis that have been deemed non-disclosable. In November 2001, the General Accounting Office issued its report titled, "Indian Issues: Improvements Needed in Tribal Recognition Process." The GAO recommended that Federal acknowledgment decisions be made in a more predictable and timely manner. We would like to discuss that issue today.

On page 14 of that report, GAO stated:

Because of limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, the length of time involved in reaching final decisions is substantial. The workload of BIA has increased, while resources have declined.

The current staff within the BAR, the Branch of Acknowledgment and Research, consists of 11 full-time employees. That includes two new hires—a genealogist who started in May of this year and a cultural anthropologist who began work at the Branch of Acknowledgment last week.

There are currently 15 petitions under active consideration. That is the core of the BAR's responsibilities as we see it. There are eight petitioners ready and waiting for active consideration. The regulations require that we provide informal technical assistance to petitioners and third parties. The BAR provides this in meetings, telephone conferences, and formal letters.

In 1999, we held 68 meetings. In the year 2000, there were 73 such meetings; and in 2001, 60 meetings. In addition, we issued 42 technical assistance letters during the period 1995 through mid-2001. In 2001, the BAR held four recorded technical assistance meetings, otherwise known as on-the-record meetings. The agenda for one on-the-record technical assistance meeting generated a transcript of 561 pages. The planning, organizing, implementing and controlling of these formal meetings requires substantial research and administrative time and commitment of resources.

The BAR also responds to inquiries from Members of Congress, provides technical comments on proposed legislation, and responds to extensive requests under the Freedom of Information Act for information relating to petitioners. In fact, the most time-consuming diversion of BAR researchers has been responding to requests for copies of documents under FOIA. This process requires that in order to avoid violating the Privacy Act, the BAR must make a detailed review of all documents and redact sensitive information. Over the period 1991 through 2001, we responded to 396 requests and copied thousands of pages, while withholding about 5 percent of those and redacting approximately 1 percent.

The BAR assists the Office of the Solicitor in responding to litigation. The Department ordinarily asserts that courts lack jurisdiction in our regulatory process until a final determination is made. However, in many cases courts have injected themselves into the process and have required the Department to abide by their schedules or keep the court updated on the progress regarding timelines. We currently have six acknowledgment cases before the courts. As a result, the Department is working on several court-approved timelines and court-ordered deadlines. Each negotiated schedule is unique, and one of those, the Schaghticoke Tribal Nation's petition, has resulted in a pilot project to speed the process.

Mr. Fleming will provide additional information on that pilot project.

The court orders impact other petitioners and preempt the ability of the Department to manage the Acknowledgment Program and its resources on a uniform and equitable basis. Court orders have forced us to divert our limited resources, and court orders have interrupted, delayed and adversely impacted petitioners on active consideration, and those who are high on the ready list. Court orders have also adversely impacted interested parties and petition-

ers themselves. They have abbreviated the time periods and accelerated the completion of proposed findings and final determinations.

Finally, court-imposed deadlines can be unrealistic. In two situations, the *Muwekma* and the *Connecticut* cases, the petitioners and interested parties have requested extensions from the court because they were unable to meet the shortened deadlines.

Thank you for the opportunity to testify on this issue. We will be happy to answer any questions you may have concerning the Federal Acknowledgment Process.

[Prepared statement of Mr. Smith appears in appendix.]

The CHAIRMAN. Just for the record, Mr. Smith—and I thank you—can you walk the committee through the process you follow in reviewing petitions of tribal groups?

Mr. SMITH. Yes, Mr. Chairman; I would like to turn that over to Mr. Fleming, who is most knowledgeable about this process.

The CHAIRMAN. Mr. Fleming.

Mr. FLEMING. Thank you for the opportunity to give information to the committee. My name is Lee Fleming. I am a member of the Cherokee Nation in Oklahoma. I appreciate the opportunity to share this information with the committee.

We had two very good meetings with the senior staff of the Committee on Indian Affairs just not too long ago. It was enjoyable to share with them this information as well.

Our regulation, 25 CFR Part 83, has some history. It was promulgated back in 1978. Prior to 1978, the Department was involved with litigation and policy questions, particularly in treaty fishing rights, land claims involving the non-Intercourse Act and revenue-sharing questions. All these questions seemed to come to a head at that time, which asked for a process to be developed.

So in 1978, the Department conducted extensive consultation. Participation and comments were received through notice and rule-making, and there were established uniform standards that resulted from this process. They also went into a revision of the proposed rule before it became a final rule. And so, you can understand that the current regulation had gone through extensive review.

In 1994, revisions were needed for the regulation, although the criteria remained the same. There was a lowering of the burden of evidence for petitioners who could demonstrate unambiguous Federal acknowledgment. And some of the revisions clarified what evidence was needed to meet the criteria. Clarification of roles of interested and informed parties were developed. And the regulation also was revised to provide an independent review before the Interior Board of Indian Appeals.

The seven mandatory criteria will be the study in upcoming hearings. But I needed to give you a quick overview of those seven mandatory criteria in order for you to fully understand the acknowledgment process, which is what I will then discuss. The seven mandatory criteria require the petitioner to demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900. The second criteria requires the petitioner to demonstrate that a predominant portion of the peti-

tioning group comprises a distinct community and has existed as a community from historical times to the present.

The third criterion requires that the petitioner demonstrates that it has maintained a political influence or authority over its members from historical times to the present. The fourth criterion requires the group to have structure, meaning it must have a governing document that describes its structure and its membership criteria. The fifth criterion requires the petitioner to have a membership where they can demonstrate that the group descends from the historical tribe or tribes to the present. The sixth criterion requires the group to show that it does not compose of another federally recognized tribe. And the last criterion, the petitioner must demonstrate that it is not under any congressional legislation that prohibits the group from going through the process.

As you can see, all of those criteria require a group to show continuous tribal existence. With that, then, if a group believes that it could meet those criteria, then this is when the regulation processes begin. It begins with a letter of intent. The group submits the letter and basically it states that we are interested in going through this regulated process. The Department then publishes notice in the Federal Register so that we are giving public notice that there is a group in a particular State or region that is wishing to go through the regulated process. We also send letters to the Governor and Attorney General of the State of the petitioner, and we also publish in a regional newspaper that this group has this interest in going through the process.

Then, the ball goes into the court of the petitioner. The petitioner then must research and acquire the documents that meet the seven mandatory criteria. There is no time frame in the regulation that is given for the petitioner, so the petitioner then must rely on its resources to do the research. During this time, we are available for technical assistance and have the opportunity to provide the petitioners with copies of the guidelines and the regulations.

The petitioner is able to present the evidence, yet there is no set format for presenting the evidence. There is flexibility for the petitioner in the presentation of the evidence. We at the Branch of Acknowledgment and Research must then take what is presented and then understand how the evidence then falls under the seven mandatory criteria.

Once the petitioner submits the evidence, then the Department is required to issue what is known as a Technical Assistance Review letter. This letter will point out any obvious deficiencies or significant omissions that is before the Department. The petitioner under the regulations is required to respond to the Technical Assistance Review letter. They may say, we believe that we have addressed all seven mandatory criteria and we would like to go on active consideration. Or they may take the opportunity to address any of the omissions or significant deficiencies.

Once the petitioner makes the statement that they are ready to go forward, and we believe that they are ready to go forward, then the petitioner is placed on a waiting list, called Ready, Waiting for Active Consideration. This waiting list is a first-in, first-out lineup. When our resources are available, then we are able to then place the petitioner on active consideration.

Once a petitioner goes on active consideration, this is when quite a number of regulatory time frames kick in. Active consideration is basically the formal review of the evidence. The Bureau of Indian Affairs has 12 months to review the documented petition. The documented petition is generally a voluminous petition, as you heard earlier, and it does occur during this time period that we receive a great number of Freedom of Information Act requests.

I used to say that I came to Washington, DC to work for Indian people, being a member of the Cherokee Nation. Never did I realize that I would become a glorified Kinko's operator. But it is part of the job and it has to be done.

At the end of the 12-month period, we then produce what is known as a proposed finding. This proposed finding is either to acknowledge the petitioner or not to acknowledge the petitioner. The notice is published in the Federal Register, which then begins the next regulated timeframe called the public comment period. Under the public comment period, the petitioner, interested parties, and the general public may respond to the proposed finding, and we hope to receive additional evidence and arguments that will help bring out the facts concerning the group's situation.

This comment period then ends after 6 months, at which time the petitioner then has an opportunity to address any of the comments that came in through the public comment period. After the 2-month period, then the Department has a time period in which to develop what is known as a Final Determination. We review all the comments. We review all the responses. And then, we develop the Final Determination Recommendation and submit it to the Assistant Secretary, Indian Affairs, who will make the final determination.

Once the determination is made, it is published in the Federal Register, and that begins one of the last phases, called the Independent Review Phase Consideration. The petitioner or interested parties may request reconsideration before the Interior Board of Indian Appeals. This process, if there are no extensions and the regulations do provide extensions through some of these period, if there are no extensions, the minimum processing time for a group is 2.5 years.

We understand that the time period for processing is a question, and due to these extensions that occur, once you have an extension for one petitioner, it may lead to extensions in the other petitions. Our staff working is at full capacity, and we are juggling more than one petition. We are addressing collateral duties and it is very difficult to get these recommendations prepared.

With that, I believe I have described the process fully.

Thank you.

The CHAIRMAN. Just a matter of curiosity—what do you define as “historic times”?

Mr. FLEMING. Historic times under the regulations refer back to first sustained contact that a group may have with the non-Indian communities. In some of our cases, this would be in the 1600's, in New England in particular. In California, it may be in the late 1600's or early 1700's.

The CHAIRMAN. So it would depend upon contact with the European?

Mr. FLEMING. That is right.

The CHAIRMAN. That is to fulfill your requirement that matters be in the form of written documents—the evidence be written documents?

Mr. FLEMING. Correct—written documentation.

The CHAIRMAN. So there is no flat rule—the rule being European contact?

Mr. FLEMING. First sustained contact with.

The CHAIRMAN. As a result, I suppose some tribes would have to provide documentation from the turn of the last century.

Mr. FLEMING. There are some groups that take advantage of another provision in our regulation called Unambiguous Federal Acknowledgment. If they can demonstrate that their group descends from that group that had contact at a later time period, then the evidence is what we would like to review.

The CHAIRMAN. What is the pilot program that Mr. Smith referred to? I presume you are working on that, Mr. Fleming.

Mr. FLEMING. Yes; I am, and quite a number of the staff, and quite a number of other offices within the BIA and the Department of the Interior.

This database system is called the Federal Acknowledgment Information Resource System. The acronym is FAIR—F—A—I—R. And the purpose of this database system is to speed up the analysis and the evaluation of these acknowledgment petitions. We are hoping that as we perfect this system that the factual bases of these decisions will become more transparent and readily available to the petitioners and third parties, which was what the GAO had recommended.

We will be able to provide, provided that there are some safeguards in place, we are able to provide these databases to all the parties that are associated with the petitioning group. We worked with the Schaghticoke Tribal Nation petitioner, and the interested parties, the State of Connecticut, and the court to develop this system. Basically, we are reviewing all of the documents, cataloguing all of the evidence submitted by all the parties, and also any evidence located by the Branch of Acknowledgment and Research staff. Those catalogs then are complete bibliographic references which are then available to all parties. These documents are scanned into an electronic system and it is amazing how we are able to understand what is before us when we begin a formal review.

Complete genealogical information is also a basic function of this project, and data on social and political activities are drawn from all the documentary and interview sources. So those are the basic functions of this database system.

The CHAIRMAN. How much time will the database system save in the process?

Mr. FLEMING. It definitely will save time that will allow our professional researchers to devote to the analyses and evaluations. The data that is entered into the system, which is another feature that we are working with, we had contracted out and have brought on research assistants who are able to enter this data into the system. So the time that would have been involved with our professional researchers entering in all the data, that then is given to the

research assistants, and that allows our researchers to devote quite a bit of time to their main task, which is the evaluation.

The CHAIRMAN. How many new personnel would you have to hire, and how much would the resources cost to implement this project?

Mr. FLEMING. Currently, the project that we are involved with—I will give you some information about the cost of the contract. We had budgeted the project for \$45,000. We have spent about \$42,000 already. Our research assistants that were applied to this have been working for 21 weeks. That cost is \$64,293. That is just in regard to the bare nuts and bolts of the system. We also had costs that we have not been able to ascertain with regard to the documents scanning that was done for this project. That was done by the Department of the Interior's Document Management Unit. They were able to assist us with that.

But it goes to an overall question about the Branch of Acknowledgment and Research needs. The pilot project will be applied to all the petitions in the process. We feel it is going to be a tremendous tool for this process, and as a result not only would we like to take the opportunity to use appropriate outsourcing in this pilot project, but also that we need to understand how that fits in with the overall structure of the positions needed in the Branch of Acknowledgment and Research.

The CHAIRMAN. Can you carryout the pilot project without jeopardizing the other functions of BAR?

Mr. FLEMING. Yes; we should be able to carryout all of other functions.

The CHAIRMAN. I have a few other questions, but Mr. Vice Chairman?

Senator CAMPBELL. Thank you, Mr. Chairman.

I guess, directed to whoever, but maybe just through Mr. Smith, it looks to me like that we are probably part of the problem here, too, of not providing enough resources so that you can do a good job. I was looking at the GAO report, which I am sure you are familiar with. Do you have a copy of it there? Look on page 15. I notice with interest between 1979 and 1990, you had a couple of spikes, but the number of petitioners that were being processed were up around five a year, or something of that nature. There were major budget and personnel cuts mandated by Congress in 1996.

How does your personnel—I notice you just recently hired three more people in your office?

Mr. FLEMING. Two.

Senator CAMPBELL. How does your personnel now compare before about 1990, where it begins to go up—the workload begins to go up? Did you have more people then or less people?

Mr. FLEMING. We have developed a breakdown of the staff over the years, since the beginning in 1978 to the present. And I would be happy to provide exact figures for you.

Senator CAMPBELL. Okay. Well, just looking at that chart, though, I note with interest that you really began to climb in about 1990, just two years after we passed IGRA. I may sound somewhat cynical, but I keep thinking that that huge increase in the number of people are in two categories—probably some from terminated

tribes that really we ought to reinstate; but certainly there are some others who the interest of casinos and casino money I think are the driving force. At least that is what it looks like to me. What would you think about that?

Mr. FLEMING. There may be some correlation. You also heard earlier that in 1994, we had revisions in the regulations, which brought about public awareness. There were also conferences that the White House had conducted with a great participation of many groups. And also the publicity of what has occurred in Indian country with regard to gaming may be a factor, but I think there are multiple factors for the numbers.

Senator CAMPBELL. You mentioned that of the petitioners that are denied, they can then seek a remedy through an appeals process. Is that correct?

Mr. FLEMING. That is correct.

Senator CAMPBELL. And if they are denied then, have you noticed an increase of the ones who are going to court to find some relief or coming here to try to get legislative relief?

Mr. FLEMING. The groups will take advantage of any avenue that would be available to them. So if they are denied through the administrative process, then they have the avenue of going to the court and suing under the Administrative Procedures Act, which then would—

Senator CAMPBELL. Well, I guess the question is, is that what all of them do?

Mr. FLEMING. Yes.

Senator CAMPBELL. It is just a matter of course?

Mr. FLEMING. It seems to be the direction.

Senator CAMPBELL. I see. I read the February 11, 2000 regulations. The BAR was directed to refrain from substantial research, and to conduct the research necessary to verify and evaluate submissions. Have those changes improved the process at all? Has it reduced the workload at all?

Mr. FLEMING. We expect to address this issue later this year. There are some aspects of the directive that have assisted. There are some aspects that have been difficult to work under. But we do hope to have a position on the February 11 directive later this year.

Senator CAMPBELL. And also, it is my understanding that Secretary McCaleb, as a response to the GAO report of November 2001, indicated the Bureau would develop a "strategic plan" within about 6 months dealing with the BAR process. What is the status of that strategic plan?

Mr. FLEMING. We have been working on the draft. We expect to have that prepared shortly as well. As Director Mike Smith had shared with the committee earlier, we have been under court-projected timelines and court-ordered deadlines, but we have shared our drafts with the decisionmakers and we hope to have that out soon.

Senator CAMPBELL. Okay, if you could provide the committee with a copy of that. I am certainly also concerned about what we do to try to improve the process. As I understand your testimony, or perhaps it was Mr. Smith's, that about 40 percent of the BAR staff time is spent responding to Freedom of Information Act Re-

quests. How can we deal with that at all? Is there anything that we can do legislatively without getting in trouble with the courts? Do you want to tackle that one, Mr. Keep?

Mr. KEEP. Senator, I will be glad to. I am not sure I can answer that clearly. We are concerned that we need to provide protection for the privacy of individuals. As I think you know, the BAR process involves the submission of a great deal of personal information to confirm and establish Indian ancestry, and it is important for us to be able to protect that. We have been able to make some progress, ironically, in the cases that have involved litigation by getting the parties to agree to confidentiality agreements. We are using the court's authority and powers to ensure the preservation of personal privacy.

I am not sure that the best answer would be an amendment or modification of the Freedom of Information Act. I think that performs an important service. We are not sure what would be the most appropriate way to address that. We are looking at those. Those are some of the things that are being considered in the context of the further response to the GAO report.

Senator CAMPBELL. Okay. Well, in your recommendations, you can give the committee—I would certainly appreciate it.

Mr. KEEP. We certainly would be glad to do that.

Senator CAMPBELL. And speaking of courts, too, there are court-ordered deadlines. When you get court-ordered deadlines, how does that impact your work on other petitions? Do they then, because of the deadline, "jump" the line? Do they get elevated ahead of the ones that have been waiting patiently to get through the process?

Mr. KEEP. In terms of the Solicitor's Office and I would ask Lee to cover part of this, but from our perspective, it certainly does affect the priorities. The court-ordered deadlines or in some instances we have negotiated and tried to work a compromise. We realize that these are important issues that must be dealt with. The BAR is anxious to meet with them, and we are looking for ways to deal with ones that in all fairness—but clearly, it requires a changing in priorities. In one particular case, the group that was last on the ready-for-active-consideration, was elevated to the first. And then having gotten these court-ordered deadlines, sought two extensions. That does cause disruptions in terms of planning, the staff. Every time the BAR staff or my staff in the Solicitor's Office has to review a document and then put it aside and start and look at another one because of a change in priorities, they then have to reinvent the wheel. So there is a problem of going back and picking up when you get your priorities changed.

Senator CAMPBELL. Thank you.

Mr. Chairman, I have some further questions, but I will be happy to yield and go back and forth, if that is acceptable.

The CHAIRMAN. Complying with Court orders take up to 40 percent of your staff time?

Mr. KEEP. I beg your pardon, Senator?

The CHAIRMAN. Does the work entailed in complying with court orders take up to 40 percent of your staff time?

Mr. KEEP. No; actually it is probably more at that time. There are four attorneys in my branch, and my branch is the one that handles and provides legal counsel to the branch of Acknowledg-

ment. One attorney is working almost full time on that. Another attorney, a senior attorney, Ms. Cohen, who is with us today, is spending nearly 90 percent of her time on these cases. They are not all on the actual litigation. In many instances, they are on the litigation, but the time is spent in providing legal counsel to meet the litigation-directed deadlines. So my staff, the two other attorneys and about 50 percent of my time is directed towards addressing the acknowledgment petitions which are the subject of the litigation. The actual review of the court filings and the review of briefs and whatnot does not take all of our time. But the counseling and assisting the BIA to articulate its conclusions and whatnot, that sort of legal work, takes up about 100 percent of our time now.

The CHAIRMAN. But it does affect the scheduling and the priorities?

Mr. KEEP. Yes; it does.

The CHAIRMAN. Can you provide us with a breakdown of the number of additional personnel that you could use in addressing litigation, and what levels of training for such personnel might be necessary, and if you could convert that into dollars, we would appreciate it.

Mr. KEEP. I think we could provide that, Senator. I am not quite sure how to answer it. Unfortunately, I think as is documented in the General Accounting Office report, as more decisions are issued, the trend in recent years has been to litigate almost all of them, so that in the past, even before the more recent circumstances which the vice chairman alluded to in the Indian Gaming Regulatory Act, we had been sued for declining to acknowledge groups. We have been sued by recognized tribes for acknowledging groups. And we have been sued for not issuing a decision at all.

I am afraid that that pattern is likely to increase, so that our work in the Solicitor's Office is going to be tied very closely to the staffing of the Branch of Acknowledgment and Research. The more decisions they issue, the more staff time my office will be. So we work in very close relationship with them.

The CHAIRMAN. At this moment, how many court orders are you dealing with?

Mr. KEEP. I think we referenced six cases. We have three in Connecticut, one here in the District of Columbia, and I think that is it—four court-ordered schedules.

The CHAIRMAN. Out of how many petitions?

Mr. KEEP. There are 15 on active consideration.

The CHAIRMAN. Fifteen?

Mr. KEEP. Fifteen. That is correct.

Mr. SMITH. Mr. Chairman, just as a follow-up to your previous question, previously we expressed that we had filed a response with the GAO report. In that response, we identified a strategic plan, which is in draft form. In that strategic plan, we have identified a number of positions that we feel would be ideal for the Branch of Acknowledgment and Research. That includes an Administrative Section. It also includes research assistants and staff people who would assist the professional staff. It also identifies an increase in the professional staff. We can provide that information to you.

The CHAIRMAN. We would like to have that, not just the numbers and the talent, but the sums.

Mr. KEEP. Mr. Chairman, in that regard, if I may just follow up, because of things such as the Freedom of Information Act and the requirement that under the Department's regulations all redactions or documents withheld require legal review, to the extent that the BAR Office is producing more documents in response to the Freedom of Information Act, that impacts our office. To the extent that the BAR staff is increased with research assistance, clerical staff or other trained personnel, the material is going to be more readily reviewable by our office and it will be more efficient. Because of our court-ordered deadlines, we have had to have attorneys do work that really did not require their expertise, but they were required to do it in order to meet the court-ordered deadline. So to the extent that the other staff of the BIA, the non-professional staff, that is, the research assistants and perhaps paralegals and records management staff is increased, that will also lighten to some extent the load that the Solicitor's Office has tried to fill in on.

The CHAIRMAN. Thank you.

Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman.

Perhaps Mr. Keep could answer this. I am interested in knowing what discretion the Assistant Secretary has with the BAR? I have heard some question that, not this Assistant Secretary, because I think Neal McCaleb is a very fine man, but I have heard in the past sometimes that the Assistant Secretary "overruled" the BAR, or that BAR just feels like they are being overruled. Give me the general—how does BAR work with the Assistant Secretary?

Mr. KEEP. I would be glad to address that. I think the answer to your question is more fully set out in the Solicitor's response to your letter. He is reviewing what we have proposed to him—the letter that you introduced in the record earlier.

Senator CAMPBELL. So he can provide advice and recommendation, and he can overrule the BAR?

Mr. KEEP. I think that it is his decision ultimately to make, and there is no mistake of that. I think to the extent that he has adopted regulations that define what sorts of criteria he is going to consider and the entire regulatory scheme that is built around the expertise in BAR, those are some constraints on him. The court cases have generally deferred to the political branches of government on tribal status issues, that is yourselves, the Congress of the United States, and the Executive Branch. There is long precedent in the Supreme Court on that.

They are not willing to necessarily defer indefinitely, as was decided in the *Masphee* case many years. The court said, I won't wait indefinitely for it. But subsequently, cases have indicated that the courts are willing to defer to the Department, as it has developed a special expertise. So that to some extent, the courts' willingness to defer to the Department is tied to the fact that the BAR has professional researchers who are looking at this in a very studied way, which does not mean necessarily a tedious, scholarly way, but a very methodological, sound way that is documented.

Senator CAMPBELL. I see.

The unfortunate part of our Nation's history is that many tribes were forced to break up, certainly through no action of their own, but were literally done at gunpoint. Some of them as late as the 1950's under the Termination Acts can be tracked pretty well, because it was not very long ago. But some of them were a long time ago. I remember when I was on the House side, one group that came in was looking for legislative relief to that, and they had—I asked them some questions about their traditions, their songs, their dances, their story of creation—all the things that literally anybody that is involved with a tribe knows or knows about—they did not know any of it, did not know any of it.

And I asked them what they had to make them legitimately a tribe, and they said, we formed a corporation, which probably does not fit under your criteria what a tribe is, but I can understand their point of view, too. If they were literally forced, through whatever process the government had at the time, to be broken up, there was no question that they were going to forget an awful lot of their traditional things that are now part of the criteria, as I understand it, to be reinstated or recognized as a tribe.

When you have a group of people that fall in that category, it is almost impossible to track some things, but other Indian people recognize them and know they are Indian, or through some process of association. How do you address that? Perhaps Mr. Fleming—I am thinking in terms also, for instance, in the Trail of Tears. Most of the people were moved out of the Southeast part of the country to Oklahoma, but some were not. Some hid out in the hills and would not go. You know that. You come from a tribe that knows that very well, that story. How do you deal with things like that? I know that this is a little bit maybe off the subject, but I am interested in knowing.

Mr. FLEMING. The documentation that is available, or in some cases not available, is brought out through this regulated process. A group will need to do research on the local, State, national, tribal levels. Through the research, then the documentation hopefully will answer the questions. The documentation then is applied to those seven mandatory criteria. So as the group is researching, and again we are available for technical assistance and advice as to where to go to do the research, then the groups then are able to present that documentation to us.

If you take a look at the cases that have been resolved through the regulated process, we have about 15 groups that have been denied acknowledgment, and 15 that have been acknowledged. So 15 groups have been able to find the documentation that is necessary to present to the process and meet the seven mandatory criteria.

Mr. SMITH. I would like to add also, Senator Campbell.

Senator CAMPBELL. Yes, Mr. Smith?

Mr. SMITH. Prior to coming to Washington, DC, I spent the last 15 years in California. I know exactly what you are talking about. There are many Indian people who have been disenfranchised through no fault of their own. We know those stories and we know the people are Indian people, but the question before us becomes whether or not they are a tribe, and that is I guess the crux of the problem. The mandatory criteria demands that we go through this evaluation of whether or not this is a tribe under our criteria.

Senator CAMPBELL. Yes; well, I might refer to my California days too, Mr. Smith, because there are a number of bands of the Me-Wuks, as you know, in the Valley. Some are recognized and some have not gotten recognized yet, and some of those people I know. I have known them since childhood. I went to school with them, and I know them as blood relatives of each other. But because one band, they are recognized, and because in another band, they are not. It is a difficult thing. I do not want to expand on that, because I am sure you are aware of the problem out there.

Let me go on to another thing here. That deals with conflict of interest. In the past few years, there has been a great deal of hand-wringing about supposedly undue influence by financial and political interests into the BAR process, as you know. Are those allegations accurate, to your knowledge, or have been? If they are, what can be done about it to make sure that that is not a regular matter of course?

Mr. SMITH. I would say, speaking for the Branch and the Office of Tribal Services that I have not experienced any undue influence. I do not know that the BAR has been subjected to this prior to my coming to the Office, and I have been in that Office for the past 2 years. We have made recommendations to the decisionmaker, the Assistant Secretary. We have provided all of the information to document the recommendation. So in my opinion, there is no undue influence.

Senator CAMPBELL. What are the conflict of interest rules after they leave Federal employment—the BAR employees?

Mr. SMITH. I believe they vary. But in many cases, we have people who were employed at the BAR who are now working for petitioners.

Senator CAMPBELL. Is there any timeframe? For instance, here in Congress we cannot lobby for 1 year. We cannot lobby our colleagues for 1 year. I think that is in most of the area of the Administration, too.

Mr. KEEP. Senator, if I may, I think all of the conflict of interest statutes in title 18, 207, and 208, are certainly applicable to BAR. I am not aware of any instance in which an individual has worked on a particular petition or whatnot in BAR and then gone out and worked on that same issue from another side. I think that we look to the existing criminal statutes that prohibit someone working on a particular matter they were involved in before.

Senator CAMPBELL. As I understand it, the standard in the regulations to recognize a tribe is based on what is called the “reasonable likelihood” standard. Is that the same as what you would find in a court called a “predominance of evidence” standard?

Mr. KEEP. I do not think that is the case. Preponderance of the evidence might be—it does not take into account the absence of evidence. I think what the BAR is looking for in the standard of evidence is, is there enough evidence to establish by reasonable likelihood that these facts exist, even in the absence of contrary or conflicting evidence. So we may have, as you have pointed out, one of the difficulties, particularly in some of the early histories, is there are gaps and there are absences of evidence. And so the task that BAR is confronted with is, even though there is no conflicting evidence or contrary evidence, is the evidence that is here enough to

establish that there are leaders, and that there is interaction and it has been continuous.

Senator CAMPBELL. Thank you, Mr. Chairman.

The CHAIRMAN. Well, I thank all of you very much. You have been extremely helpful. As I noted in my opening remarks, this will be the first in a series of meetings of this nature.

We hope that when we conclude, we may be able to assist you in establishing a much more robust organization that can handle the heavy load that you apparently are called upon to handle. So if you could provide us with the information we have requested, we will see what the Appropriations Committee will do to be of assistance.

Mr. SMITH. We will provide that information, Mr. Chairman, and we thank you for allowing us this opportunity.

The CHAIRMAN. With that, the hearing will stand in recess and the record will be kept open for the next 2 weeks if you have any additional questions, addendum, suggestions to make. We will be happy to receive them.

[Whereupon, at 2:36 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF MICHAEL R. SMITH, DIRECTOR, OFFICE OF TRIBAL SERVICES, DEPARTMENT OF THE INTERIOR

Good afternoon, Mr. Chairman and members of the committee. My name is Mike Smith and I am the Director of the Office of Tribal Services (Office) within the Bureau of Indian Affairs (BIA). Accompanying me today is W. Lee Fleming who is the Chief of the Branch of Acknowledgment and Research (BAR) within my Office. We appreciate the opportunity to appear before you today to speak on behalf of the Department about issues that are currently impacting the Federal acknowledgment process.

The Federal acknowledgment of an Indian tribe is a serious decision for the Department and the Federal Government. It is important that a thorough and deliberate evaluation occur before we acknowledge a group's tribal status, which carries with it certain immunities and privileges. These decisions must be fact-based, equitable, and thus defensible.

In 1978, the Department issued regulations at 25 CFR Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, to provide a uniform process for determining which groups are Indian tribes. The BAR was created to implement these regulations. Under the regulations, acknowledgment is granted to groups that demonstrate that they have a "substantially continuous tribal existence" and "have functioned as autonomous entities throughout history until the present."

BAR's primary mission is to process and evaluate petitions for acknowledgment. The BAR experts review and evaluate petitions, documentation, consult with petitioners and third parties, prepare technical assistance review letters, hold formal and informal technical assistance meetings, maintain petitions and administrative correspondence files, and make recommendations for proposed findings and final determinations to the Assistant Secretary for Indian Affairs (AS-IA). However, within the past 10 years, the BAR has found itself performing more extensive and time consuming administrative duties, including preparing administrative records in response to appeals and litigation, and the handling of extensive Freedom of Information Act (FOIA) requests on behalf of petitioners and interested parties. For example, the administrative record in *Ramapough Mountain Indians v. Norton* was 30,000 pages which had to be prepared and scanned onto 7 CD-ROMs. For the first One-half of 2002, over 94,000 pages had been released under FOIA, and over 4,200 pages had been withheld deemed, after careful legal analysis, to be non-disclosable.

In November 2001, the General Accounting Office (GAO) issued its report, *Indian Issues: Improvement Needed in Tribal Recognition Process* (Report). The GAO recommended that Federal acknowledgment decisions be made in a more predictable and timely manner. On Page 14 of the report, the GAO stated "[b]ecause of limited resources, a lack of timeframes, and ineffective procedures for providing information to interested third parties, the length of time involved in reaching final decisions is substantial. The workload of BIA staff assigned to evaluate recognition decisions has increased while resources have declined." The current staff within the BAR con-

sists of 11 full-time employees, which includes two new hires—a genealogist who started work in May 2002 and an anthropologist who started work on June 3, 2002.

There are currently 15 petitioners under active consideration, which make up the core of BAR's responsibilities and 8 petitioners ready, waiting for active consideration. Active consideration is the core responsibility of the BAR and includes the process from the time the BAR staff officially begins its review and evaluation of the petition, through the proposed finding and comment stage to the final determination. It may also include a reconsidered final determination, if requested by the Secretary of the Interior (Secretary) following review and referral by the Interior Board of Indian Appeals (IBIA).

The regulations require providing informal technical assistance to petitioners and third parties, which the BAR provides in meetings, telephone conferences, and formal letter. We held 68 meetings in 1999, 73 in 2000, and 60 in 2001. In addition, we issued 42 technical assistance letters during the 1995 to mid-2001 period.

In 2001, the BAR held four recorded technical assistance meetings concerning the process at the request of petitioners and interested parties. The agenda for one on-the-record technical assistance meeting generated a transcript of 561 pages with indices. The planning, organizing, implementing, and controlling of these formal technical assistance meetings requires substantial research and administrative time and commitment of resources.

The BAR also responds on a priority basis to inquiries from Members of Congress, provides technical comments on proposed legislation relating to the acknowledgment of tribal status generally or relating to the acknowledgment of the tribal status of specific groups of Indian descendants, and responds to extensive requests under the FOIA for information relating to a petitioner.

The most time consuming diversion of BAR researchers from their primary responsibility of evaluating petitions, is responding to requests for copies of documents under FOIA. To satisfy the acknowledgment regulations, petitioners submit a large and varied body of documentation which includes a substantial amount of genealogical and other personal information. Initial petition submissions commonly range from 25,000 to 100,000 pages. Responses to proposed findings may entail an equally extensive amount of documentation. To avoid violating the Privacy Act, the BAR must make a detailed, page-by-page, line-by-line review of all documents to redact sensitive information prior to public disclosure. Over the 1991 through mid-2001 period, we responded to 396 requests, copied and released 219,100 pages, withheld 12,966 pages, and redacted 1,426 pages. This year, BAR is responding to multiple FOIA requests for the two Nipmuck acknowledgment petitions. The Department to date has released 59,021 pages and withheld 12,703 pages.

The BAR assists the Office of the Solicitor and the Department of Justice, in responding to litigation. When faced with litigation regarding the process or timing in which a petition has been handled, the Department ordinarily asserts that the Courts lack jurisdiction to become involved in the regulatory process until a final determination is made. However, in many of the cases below, Courts have nonetheless injected themselves into the process, and have required the Department to abide by specific schedules or keep the Court updated on progress on projected timelines. Pending lawsuits include: (1) *Connecticut v. Department of the Interior*, Civil No. 3:01CV-0088 (AVC), D. Conn. (2) *United States v. 43.47 Acres of Land*, Civil No. H-85-1078 (PCD), D. Conn. (3) *Muwekma Tribe v. Babbitt*, Civil No. 99-CV-3261 (RMU), D.D.C. (4) *Burt Lake v. Norton*, Civil No. 1:01CV00703, D.D.C. (5) *Golden Hill Paugussett Tribe v. Norton*, Civil No. 3:01CV1448 (JBA), D. Conn.; and (6) the *Mashpee Wompanoag Council, Inc. v. Norton*, No. 1:01CV00111 (JR), D.D.C. Also, we just successfully defended two acknowledgment decisions in the 7th Circuit and the D.C. Circuit—*Miami Nation of Indians of Indiana v. the Department of the Interior* (petition for certiorari denied) and *Ramapough Mountain Indians v. Norton* (petition for certiorari pending). The 7th Circuit in the *Indiana Miami* case also affirmed the Department's authority to acknowledge tribes and affirmed the validity of the acknowledgment regulations. Additionally, we successfully defended a challenge to the requirement of exhaustion of the administrative process. *United Tribe of Shawnee Indians v. United States* (10th Circuit).

The Department is working on several Court approved timelines and Court ordered deadlines. Each negotiated schedule is a result of unique circumstances, such as the Schaghticoke Tribal Nation's ("Schaghticoke") acknowledgment petition, a condemnation action that had been pending since 1995. See *United States v. 43.47 Acres of Land*, Civil No. H-85-1078 (PCD), D. Conn. As a pilot project to speed the acknowledgment process, three technicians imputed data from the petition into an automated database that will be accessible to BAR researchers, petitioners, and interested parties. This demonstration project, if successful, will provide a decision

that is more readily transparent and verifiable, and will provide a more efficient decisionmaking process, as recommended by GAO.

Projected schedules for processing and evaluating the petitions of the following groups on active consideration are established by immediate regulatory deadlines, court approved settlement agreements, and court orders:

- *Petitioners with projected regulatory schedules* include the: Chinook Indian Tribe/Chinook Nation (#57) (Washington).
- *Petitioners with court approved projected schedules* include the: Eastern Pequot Indians of Connecticut (#35), Paucatuck Eastern Pequot Indians of Connecticut (#115), and the Golden Hill Paugussett Tribe (#81), the Schaghticoke Tribal Nation (#79) (Connecticut).
- *Petitioners with court ordered schedules* include the: Muwekma Indian Tribe (#111) and Masphee Wampanoag (#15) (California and Massachusetts respectively).

There are six other petitioners on active consideration awaiting the availability of a BAR research team to complete the evaluation and processing of their acknowledgment petition.

Court orders impact other petitioners in the process and preempt the ability of the Department to manage the acknowledgment program and its resources on a uniform and equitable basis. They impact: (i) the petitioner; (ii) the interested parties; (iii) the general public; (iv) the nature and quality of the review of the petition; (v) those petitioners on active consideration; (vi) those petitioners with higher priority on the ready list; and (vii) the ability of the Department to manage the acknowledgment program and its resources.

By requiring the Department to give priority to one petition over another, court orders have forced us to divert limited resources. Based upon our experience, our adherence to the Court orders has interrupted, delayed, and adversely impacted the petitioners currently on active consideration and those who are high on the ready list and entitled to priority in consideration over petitioners under Court orders.

Court orders also adversely impact interested parties and the petitioners themselves. The interested parties identified with a specific petition include the States, states attorneys general, surrounding towns, and recognized tribes. Certain court orders require the Department to prioritize petitions and truncate the timeframes in the regulations for interested parties and petitioners to submit comments on the proposed finding and to receive technical assistance. Court orders abbreviate the time period for responding to comments and accelerate the completion of the proposed findings and final determinations.

In the Mashpee litigation, the Department informed the Court that “[t]he lack of staff and truncated evaluation times will result in a proposed finding for the Mashpee petitioner that will differ substantially in both form and content from the proposed findings of petitions already processed and evaluated under the 1994 regulations.” For instance, in Mashpee the proposed finding scheduled to be issued this year, does not have a cultural anthropologist assigned to its research team, as the existing cultural anthropologists were already assigned to other cases with court schedules.

Finally, court imposed deadlines can be unrealistic. In Muwekma and in the Connecticut cases, the petitioners and interested parties have requested extensions from the court because they were unable to meet the shortened deadlines. Typically, the petitioner, interested parties, and other parties submit FOIA requests to the Department for copies of records, such as petition materials and BAR research documents that they will use to comment meaningfully on the proposed finding. Because the requested records are often extensive, the six (6) months provided for the comment period is barely long enough for the Department to review for privacy concerns and release the requested records, for the requesters to receive and review the records, and for the requesters to analyze these records and submit comments to the Department on the proposed finding. Due to these logistical factors, it is likely that the interested parties and the petitioner will need to request extensions of the comment period to obtain time for receiving and analyzing requested copies of records for the purpose of adequately responding to the proposed finding.

Thank you for the opportunity to testify on this issue. We will be happy to answer any questions you may have concerning the Federal acknowledgment process.

SENATE COMMITTEE ON INDIAN AFFAIRS,
Washington, DC, May 2, 2002

Mr. WILLIAM G. MEYERS, III
Solicitor, Department of the Interior
Washington, DC.

DEAR SOLICITOR MEYERS: I am writing with regard to the activities of the Branch of Acknowledgment and Research [BAR] and the authority exercised by the Assistant Secretary—Indian Affairs [AS–IA] with regard to the development and issuance of Proposed Findings and Final Determinations on petitions for Federal acknowledgment filed by Indian groups pursuant to 25 CFR Part 83.

As you know, in recent years there has been substantial publicity about the process by which petitions for acknowledgment are considered by the Department. Since 1987, there have been numerous congressional hearings on the Federal acknowledgment process and intermittent calls for the reform of the BAR process. As recently as this session various proposals have been introduced seeking to reform the Federal acknowledgment process. *See for example* the “Indian Tribal Federal Recognition Administrative Procedures Act of 2001” (S. 504), and the “Tribal Recognition and Indian Bureau Enhancement Act of 2001” (S. 1392).

In addition, recent decisions in the Federal courts are having an impact on the ability of the BAR to review and make recommendations on petitions for acknowledgment. The process of acknowledgment is one involving research, analysis and recommendations by BAR staff and, consideration by the Assistant Secretary in his decisionmaking process.

Clearly, the Assistant Secretary is entitled to place some degree of reliance on the recommendations of his professional staff. At the same time, it must be recognized that the acknowledgment decisions are matters that carry serious consequences for petitioning groups and their members. At bottom, what I am interested in knowing is what, as a matter of law, your office believes the legal authority and discretion of the Assistant Secretary to be in considering the recommendations of the BAR staff. I am also interested in your view of the proper role that your office should play in advising the AS–IA in these matters.

If you have questions, please contact Paul Moorehead, my staff on the Committee on Indian Affairs at (202) 224–2251. I look forward to hearing from you on these important matters.

Sincerely,

HON. BEN NIGHTHORSE CAMPBELL,
Vice Chairman.

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