ATTORNEY WORK PRODUCT:
PRIVILEDGED AND CONFIDENTIAL

BRIEFING REPORT ON THE FEDERAL TRIBAL ACKNOWLEDGMENT PROCESS AND THE STATUS OF THE JUANENO PETITIONERS

Prepared
for

CALIFORNIA CITIES FOR SELF-RELIANCE
JOINT POWERS AUTHORITY

by

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Executive Summary

Two Native American tribal groups based in Orange County, California with essentially the same name (the Juaneno Band of Mission Indians) have petitioned the U.S. Department of the Interior for Federal acknowledgment as a tribal entity. The Department began simultaneous active consideration of the documented petitions of these two groups on September 30, 2005. It is scheduled to issue Proposed Findings on whether or not the petitioners meet the mandatory criteria for Federal acknowledgment on January 29, 2007.

Federal acknowledgment of a tribal group can have a significant impact on surrounding communities and State and local governments. Newly acknowledged tribes are eligible to have land that they own or have acquired placed under Federal trust status as an Indian reservation. Federal trust status exempts reserved Indian land from certain controls and regulation by State and local governments, including taxation. Newly acknowledged tribes are also eligible to conduct casino gaming on their Federal trust land under certain conditions.

In some cases, the development of gaming operations on Indian reserved land has had a severely negative impact on surrounding communities and local governments. As demonstrated by the small towns surrounding the Foxwoods Casino of the Mashantucket Pequot Tribe in Connecticut, for example, non-Indian residents have had to cope with

increased racial strife, traffic, crime, school enrollments, and housing and commercial development, as well as greater needs for all kinds of public services. Local governments in southeastern Connecticut have been challenged to meet the new demands placed on their community infrastructures by the development of one of the nation's largest casinos at a location just off the most direct Interstate highway route between New York City and Boston.

The financial, bureaucratic, and legal hurdles that an unrecognized tribal group must successfully jump to get to casino gaming are complex and lengthy, and the odds are not in their favor. Yet, interested parties that feel threatened by the potential acknowledgment of a tribal group should at least be diligent in monitoring the progress of that group's documented petition and prepared to be aggressive in opposing the petitioner if necessary.

Interested parties have had in the past and will continue to have a significant and influential role in the Federal decision-making processes in regard to (1) the acknowledgment of tribal groups, (2) the acquisition of Federal trust land by tribes, and (3) the development of casino gaming on Federal trust land reserved for tribes. For example, interested parties have been successful in appealing and reversing the Department's decisions to acknowledge four tribal groups. Other interested parties have weighed in to influence the Department's decisions to decline acknowledgement of groups they opposed.

This briefing paper provides background information on the Federal Acknowledgment process and the Juaneno petitioners, and explains in detail

how and when interested parties can get involved in the process in regard to a particular tribal petitioner. It gives a step-by-step description of what will happen following the issuance and publication of the Proposed Findings for the Juaneno petitioners and explores the Department's options in these cases. It also provides examples of cases where interest parties have succeeded in overturning Departmental decisions, as well as cases where factional splits have been a critical handicap for Acknowledgment petitioners.

Finally, this briefing paper summarizes and evaluates the evidence presented by the Juaneno petitioners. It concludes that neither petitioner will be acknowledged because of significant gaps in evidence for the 20th century and because factionalism has splintered the two groups continuity with the historical Juaneno tribe. The petitioners have a gap in evidence for criterion 83.7(a), external identification, from 1910 to 1929. The primary gap in evidence for criterion 83.7(b), community, and 83.7(c), political influence or authority, extends from World War II to the present day. The petitioners have not demonstrated widespread participation of its members in a distinct community or the existence of a bilateral political relationship between designated group leaders and any substantial number of group members. In addition, the factionalism resulting in splinter groups will hurt the petitioners' chances of meeting criteria 83.7(b) and 83.7(c) in recent times. The Department has to date declined to acknowledge almost all petitioners (at least seven of eight) that have been the subject of a tribal split in modern times.

The petitioners' ability to meet criterion 83.7(e), descent from a historical tribe, cannot be evaluated for this analysis because the most

critical parts of the genealogical evidence have been withheld from public disclosure. The Juaneno petitioners will meet criterion 83.7(d), governing document, criterion 83.7(f), no substantial membership in federally acknowledged tribes, and criterion 83.7(g), Federal relationship not previously terminated, as do most Acknowledgment petitioners. However, the Acknowledgment regulations require that petitioners must meet all seven of the mandatory criteria (83.7(a-g)) to be acknowledged as an Indian tribe entitled to Federal benefits, services, and protection.

This briefing paper concludes with a discussion of other general issues that may be related to the Juaneno petitioners and/or other tribal groups in California.

The Department of the Interior's Federal Acknowledgment process has established mandatory requirements and systematic procedures for extending Federal acknowledgement as a tribal entity to unrecognized Indian groups. The mandatory criteria in the Federal Acknowledgment regulations place a heavy burden of proof on both petitioners and interested parties, and this burden has increased in recent years as the Department has established new evidentiary precedents. The Acknowledgment regulations are complex and convoluted and the Interior Department has been notoriously deficient in providing adequate technical assistance in explaining both the regulations and its acknowledgment decisions. The best way to gain a realistic understanding of how the Department interprets and applies the Acknowledgment regulations is to thoroughly review the acknowledgment findings and determinations it has published since 2000.

The Department's Acknowledgment process is incredibly backlogged, to the point that the acknowledgment of tribal groups is probably the slowest administrative process in all of the Federal Government. The Department has only resolved 38 cases through the Acknowledgment process since 1978. This represents a historical average of 1.4 cases per year. At this rate, it could take more than 168 years to resolve the 236 cases that remain at various stages of the Acknowledgment pipeline. A group that has a fully documented petition placed on the Department's "ready for active consideration" list today is likely to have to wait for more than 13 years for a Final Determination. The backlog of unresolved "active" petitions is such that the Department has only managed to put three new cases under active consideration in the last seven years

The Federal Acknowledgment Process

The Secretary of the Interior established the Federal Acknowledgment regulations in 1978 in order to provide standardized criteria and a systematic process for extending Federal recognition as a tribe to unrecognized Indian groups. Prior to that time, the standards used to make such determinations were often irregular. They were also inconsistently applied in a shuffling of case law, Congressional legislation, and the policies and actions of the Department of the Interior. The Department had before it at that time petitions for recognition from 40 tribal groups. These petitions all became subject to the new Acknowledgment regulations.

There is no Act of Congress that specifically authorized the Secretary of the Interior to recognize tribal groups under the general authority granted that official over Indian Affairs. However, both Congress and the Federal courts have accepted the Secretary's acknowledgment of tribal groups as federally recognized tribes.

Federal acknowledgment entitles previously unrecognized Indian groups to the powers, protections, services, and benefits that the Federal Government extends to or recognizes in tribes. Recognized tribes are entitled to special status under Federal law and procedures by virtue of their existence as sovereign entities that have a government-to-government relationship with the United States. These may include funding for governance, economic development, and health, education, and welfare services. They also often include immunities from some controls by State and local governments and unique Federal privileges for individual tribal members, such as preferential employment, business opportunities, and scholarships.

Federal acknowledgment also places responsibilities, obligations, and limitations on tribal groups. They become subject to the same authority that Congress, various Executive Branch departments, and the Federal courts have over federally recognized tribes.

The Federal Acknowledgment criteria place a heavy, and perhaps excessive, evidentiary burden on tribal groups. At their core the requirements demand that marginalized people who seldom kept good records extensively document their tribal and family histories and describe

in detail their social and political relations since first sustained contact with Euro-Americans.

The evidentiary burden for both petitioners and interested parties has increased over the years as the Department has established new precedents for analysis and evaluation in its decisions. One need only compare the size of early documented petitions, interested party submissions, and Departmental findings with those of recent years to measure the escalation of required evidence. The Department's first summary of evidence and recommendations for a Proposed Finding (Grand Traverse Band of Ottawa and Chippewa, 1979) totaled 67 pages. Its summary of evidence and recommendations for a Proposed Finding for the Nipmuc Nation in 2001 ran to approximately 455 pages. Both of these documents were in single-spaced type. In response to this negative Proposed Finding, the Nipmuc petitioner submitted narrative reports that totaled approximately 900 pages (double-spaced) and a digital database containing in excess of 15,000 documents. As interested parties, the Towns of North Stonington, Ledyard, and Preston, Connecticut submitted comments on the Proposed Findings for the Eastern Pequot/Paucatuck Pequot petitions in an August 2001 report that totaled 379 pages (double-spaced). The documents submitted by the towns in support of this report filled several binders.

In addition to establishing a heavy evidentiary burden, the Acknowledgment regulations are complex, convoluted, and beyond the ability of most readers to fully grasp. Above all, they fail to communicate how the Department really interprets the mandatory criteria and the evidence necessary to meet the requirements. To this end, the Department issued

Official Guidelines for the Acknowledgment process in September 1997. However, in its attempt to dummy down the regulations, these guidelines oversimplified the criteria and process to the point of being unrealistic. For example, the guidelines suggest that petitioners can easily document a petition through volunteer efforts of their members and that professional help is not necessary. Yet, no petitioner has ever succeeded without professional help and if professional consultation is not necessary in the process, then why does the OFA employ a staff of Ph.D.s to evaluate petitions?

The Acknowledgment regulations establish that the Department must provide technical assistance to petitioners and interested and informed parties, and the Department encourages all parties to request such assistance. However, the reality is that the Department is notoriously unresponsive and unhelpful, and it is difficult to establish any meaningful dialogue on Acknowledgment issues. It is hard to schedule meetings or conference calls and it can take weeks or months for the Department to respond to a letter.

The OFA thinks that it is providing guidance in its Technical Assistance letters to petitioners, but most readers of these TA letters probably also need a weeklong seminar with the authors to understand what the OFA is trying to communicate. Much of the OFA's advice to petitioners and interested and informed parties is neither clear, cooperative, nor realistic. The best opportunity that interested parties have to obtain technical assistance from the Department regarding a particular petition is when they or the petitioner request a formal on-the-record meeting to inquire into a Proposed Finding (see 25 CFR 83.10(j)(2). Such a meeting, held over two

days in August 2000, was particularly beneficial for the interested parties in the Eastern Pequot case that requested it and that ultimately succeeded in convincing the Department to decline acknowledgement to the petitioners.

The best way that anyone can begin to gain a realistic comprehension of how the Department interprets and applies the Acknowledgment procedures and requirements today is by thoroughly reviewing the findings and determinations it has issued since 2000, as well as the decisions issued by the IBIA since that time, and the procedural notices that the Department published in the *Federal Register* in 2000 and in 2005. The questions that remain after such a review should then be directed to the Department. Among the weaknesses of the Juaneno petitioners is the obvious fact that they have not kept abreast of changes in the way that the Department interprets and applies the Acknowledgment regulations.

On top of being burdensome and convoluted, the Acknowledgment regulations created a process that has lacked the personnel, almost since the beginning, to render timely decisions. As is explained in more detail below, the Department's caseload of documented petitions is now incredibly backlogged, to the point that the acknowledgment of tribal groups is probably the slowest administrative process in all of the Federal Government.

Federal Acknowledgment and Gaming

Federal acknowledgment has gained wider public attention in recent years because newly acknowledged tribes have the potential to develop casino gaming facilities in accordance with the Indian Gaming Regulatory Act of 1988. The Mohegan Indian Tribe, a group acknowledged through the Department's administrative process in 1994, developed one of the largest casinos in the nation, the Mohegan Sun complex in Connecticut. Some Indian gaming facilities have had a huge negative social, financial, and environmental impact on surrounding communities. Many affected communities have experienced heightened racial tensions and have struggled to meet the demands placed on their infrastructures caused by increased traffic, crime, and school enrollments, as well as the need to provide greater emergency and utility services.

However, the hurdles that an unrecognized tribal group must successfully jump to get to gaming are complex and lengthy, and the odds are not in their favor. First they must be acknowledged by the Department as a tribal entity. This process alone is perhaps the most untimely and backlogged administrative process in all of Government. A group that has a fully documented petition placed on the Department's "ready for active consideration" list today would have to wait more than 13 years for a Final Determination, based on the historical average of the Department's decisions. The original Juaneno petitioner has been in the process for nearly 18 years (since February 1988). Pharmaceutical companies can get new medicines approved by the Food and Drug Administration, and broadcasters

can get new stations licensed by the Federal Communications Commission in a fraction of this time.

The reason that the acknowledgment process is not timely is because unrecognized tribal groups do not represent a politically significant constituency. The Department is not eager to extend services to new tribes and most recognized tribes are not excited about splitting their share of the Federal budget with new groups. Some of the most aggressive opposition to the acknowledgment of groups has come from federally recognized tribes. If it becomes known that a petitioner is considering gaming in its future, the group is more often opposed than supported by State and local governments and surrounding communities. It may also be opposed by nearby tribes that already have gaming or are planning casino development.

With few exceptions, Indian gaming is only conducted on land that the Federal government holds in trust for the benefit of a recognized tribe. Newly acknowledged tribes can request the Secretary to place land they own or have acquired under Federal trust status, thereby exempting the land from taxation and other forms of regulation or jurisdiction by State and local governments. In some situations the land proposed for trust status may have been donated or otherwise conveyed to the tribe by the Federal government or by State or local governments. The Federal government does not purchase land for newly acknowledged tribes. However, if the Federal government agrees to transfer the proposed land from fee-to-trust status, the title is conveyed to the United States to be held in trust for the benefit of the tribe and its members. Trust status can only be conferred by the Secretary in accordance with regulations (set forth in Part 151 of Title 25 of the *Code of*

Federal Regulations, 25 CFR 151), or by the Congress through legislation. Since such trust land is "reserved" from the public domain, it is commonly referred to as a reservation and it has jurisdictional status as "Indian Country."

Indian trust land is usually established within an area in which the tribe has some historical relationship, such as aboriginal use and occupation. Regulations require the Secretary to consult with State and local governments prior to making a determination on taking land into trust status and the Secretary must specifically consider the impact on State and local governments of removal of the land from the tax rolls. The regulations also give State and local governments the right to appeal a Secretarial decision both within the Interior Department and in the Federal courts.

Like the Federal acknowledgment process, the Department's land-into-trust acquisition process has become lengthy and more complicated and controversial, due in large part to the advent of Indian gaming and the increased number and intensity of challenges made by interested parties. For example, it took 16 years (1990-2006) for the Lower Brule Sioux Tribe of South Dakota to gain effective Secretarial approval of its request for the trust acquisition of a 91-acre parcel of off-reservation land.[1]

[1] In 1990, the Lower Brule Sioux Tribe requested the Secretary of the Interior to place under trust status a 91-acre off-reservation parcel the Tribe had purchased near the City of Oacoma, South Dakota. The Secretary approved this acquisition in 1992. The State of South Dakota and the City of Oacoma subsequently filed suit in U.S. District Court challenging the Secretary's authority to make trust acquisitions. The Court ruled in favor of the Secretary's authority and approval, but the State appealed the decision all the way up to the U.S. Supreme Court. The Supreme Court remanded the case back to the Secretary for reconsideration. The Tribe reapplied for trust status for the land in 1997 and the Department again approved the acquisition. The State and City again filed suit

Section 20 of the Indian Gaming Regulatory Act (IGRA) generally prohibits gaming on lands acquired in trust after October 17, 1988, the date on which this statute was enacted. One of the exceptions to this general rule is if the land is "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process."

Section 20 of IGRA does not provide authority to take land into trust for Indian tribes. Rather, it is a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988. However, when a trust acquisition is intended for gaming, the Secretary simultaneously applies the requirements of IGRA to the decision whether to take the land into trust. If the land has already been taken into trust, requirements of IGRA still must be met before a tribe can engage in gaming on a trust parcel.

The National Indian Gaming Commission (NIGC) decides whether a tribe can conduct gaming on trust land. A prospective tribe must submit a tribal gaming ordinance to the Commission that meets certain criteria. The Chairman of the NIGC must approve an ordinance before gaming can occur.

The NIGC is administratively linked to the Department of the Interior. Congress enacted the IGRA to provide a statutory basis for the operation and regulation of Indian gaming and to establish within the Department an

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challenging the Secretary's authority, which was again upheld by the District and Circuit courts. Finally, in June 2006, the U.S. Supreme Court denied the plaintiffs' petition for a writ of certiorari, and the trust acquisition of the Oacoma parcel became effective.

"independent Federal regulatory authority." The Secretary has no control over the Commission's decision processes, although the Commission is highly respectful of the Department and frequently seeks the Secretary's advice, assistance, and cooperation.

Under the IGRA, casino or class III gaming can only be conducted if (1) the NIGC Chairman has approved a tribal ordinance, (2) such gaming is permitted by the state in which the tribal land is located, and (3) the gaming is conducted in conformance with a compact entered into by the Tribe and the State that has been approved by the Secretary.

Increasingly, the processes for obtaining approved tribal ordinances, negotiating compacts with the State, and obtaining Secretarial approval of Tribal-State compacts have also become lengthier and more complex, adversarial, and controversial.

In sum, unrecognized tribal groups have significant obstacles to overcome in any quest to take advantage of Federal preferences for the establishment of casino gaming. These tough hurdles include:

- Gaining Federal acknowledgment or legislative or judicial recognition,
- Acquiring land in fee title,
- Gaining approval for the Federal trust acquisition of fee-titled lands,
- Gaining the NIGC's approval to conduct gaming,
- Negotiating a Tribal-State Compact with the State,
- Gaining the Secretary's approval of a Tribal-State Compact.

The first and biggest obstacle that unrecognized groups face is garnering the human and capital resources necessary to assemble a successful Federal acknowledgment petition. No petitioner has ever been successful in gaining acknowledgment without significant professional help from scholarly researchers, lawyers, and others. Yet, it has become increasingly difficult for petitioners to obtain the funding necessary to sustain professional help. The Administration for Native Americans (ANA) of the U.S. Department of Health and Human Services no longer provides the "status clarification" grants, which helped so many unrecognized groups, including the Juanenos, launch their acknowledgment efforts. Financial backers with gaming interests have become significantly less interested in funding unrecognized groups after witnessing the losses sustained by some major players, including Donald Trump, William Koch, Lakes Gaming, and Fred DeLuca, the owner of the Subway sandwich shop chain, who squandered tens of millions of dollars in supporting petitioners that were unsuccessful. Gaming interests quest for the big jackpot, but they also want favorable odds and a quick return on investment, neither of which is realistic regarding the chances of unrecognized tribes gaining Federal acknowledgment. Few, if any, financial backers will be drawn to petitioners in the future, unless they are far along in the process with a high likelihood of success. The rub is that few, if any, petitioners can make it to that stage without significant financial backing.

The importance for this paper of highlighting the obstacles faced by unrecognized groups is to emphasize that interested parties have had in the past and will continue to have a significant and influential role in the Federal decision-making processes in regard to these groups.

The Acknowledgment Regulations and Evaluation Process

The 1978 Acknowledgement regulations were initially set forth in Part 54 of Title 25 of the *Code of Federal Regulations* (25 CFR 54). In 1982, the regulations were renumbered as Part 83 of the same title. In 1994, the Department substantially revised the regulations. The seven mandatory criteria have remained essentially the same. However, the 1994 revisions lessened the evidentiary burden on groups that could demonstrate that they met certain categories of "high" evidence in the past and/or that they had had previous, unambiguous Federal acknowledgment.

The Acknowledgment regulations set forth the mandatory criteria and timeframes, but did not establish the logistic procedures for evaluating documented petitions. These were established by executive decision within the BIA. Initially the function was organized as the Federal Acknowledgment Project (FAP) under the Bureau's Branch of Tribal Relations (BTR) and within its Division of Tribal Government Services. It was determined that a research team consisting of an anthropologist, an historian, and a genealogist would evaluate each petitioner's evidence. The draft evaluations of the research team were to be peer reviewed by other researchers and officials within the FAP and the BTR. The edited evaluations, which were essentially recommendations whether or not to acknowledge a group in a proposed finding, were then reviewed, discussed, and edited by legal counsel and various officials, including the Assistant

Secretary, before a finding was officially issued under the Assistant Secretary's signature.

Although the function has been reorganized, renamed, and somewhat modified within the Department over the years, the essential elements of evaluation by an interdisciplinary research team, whose findings and recommendations are subjected to peer, legal and official review, remain the same.

The FAP subsequently became a separate branch of the Division, first as the Branch of Federal Acknowledgment (BFA) and then as the Branch of Acknowledgment and Research (BAR), under a Branch Chief. In 2003, the BAR was reorganized and upgraded to a higher status within the Department's organizational structure. It became the Office of Federal Acknowledgment (OFA) and was moved out of the BIA's Division and placed directly under the Assistant Secretary for Indian Affairs. The BAR Branch Chief became the Director of the OFA. This reorganization was implemented to allow eventually for a larger staff and to provide closer communication with the Assistant Secretary's office.

For most of the history of the Acknowledgment process, the research teams conducted independent research as part of their petition evaluation. This purpose of this research was to validate, support, rebut or modify evidence submitted by petitioners and interested and informed parties. The research routinely included field trips to the petitioner's locale to interview tribal officials and knowledgeable tribal and community members and review documents that were not included in the petition. The team also

conducted research in relevant libraries, repositories, and collections in the petitioner's region. In addition, the team looked for further information in some of the primary research facilities in Washington, D.C, such as the Library of Congress, the National Archives, the Smithsonian Institution's National Anthropological Archives, and the Library of the Daughters of the American Revolution (DAR), a good source for family history and genealogy. This independent research often yielded more substantive evidence than was provided by the petitioners or other parties.

Revision of the Evaluation Process in 2000

On February 11, 2000, the Department published a notice in the *Federal Register* (Vol. 65, No. 29, pp. 7052-53) announcing changes in the internal processing of Acknowledgement petitions. In effect, these changes, implemented without public comment, essentially curtailed the Department's independent research on documented petitions. The notice stated that:

> The BIA's review of a petition shall be limited to evaluating the arguments presented by the petitioner and third parties and determining whether the evidence submitted by the petitioner, or by third parties, demonstrates that the petitioner meets each of the criteria. . . . In cases where petitioners or third parties submit data that they have not analyzed, the BIA shall not itself conduct extensive analysis of these data to demonstrate that the criteria have or have not been met, but shall refer the responsibility for analysis to the petitioner or third parties to be completed during the comment period.

As a result of these changes, the notice advised petitioners that "the documented petition must include thorough explanations and supporting documentation in response to all of the criteria."

Revision of the Evaluation Process in 2005

On March 31, 2005, the Department published a further notice in the *Federal Register* regarding internal Acknowledgment procedures. This notice was prepared primarily in response to a critical investigation of the process conducted by the General Accounting Office (now the Government Accountability Office) of Congress. The stated purpose of the changes and clarifications outlined by the Department was to make the Acknowledgment process more "transparent and timely."

This notice clarified that the Acknowledgment staff would conduct limited additional research where deemed necessary, but that the burden of proof remained with the petitioner. Whereas parties were previously informed that materials submitted after the date of active consideration would not be considered for the proposed finding, but would be evaluated for the Final Determination, this notice set forth the policy that materials submitted within 60 days of the date of active consideration would be evaluated for the Proposed Finding. The notice also gave the Acknowledgment staff discretion to request additional materials from any party during active consideration. All parties were advised to clearly identify their source materials and to avail themselves of technical assistance from the Acknowledgment staff. They were also encouraged to make

"voluntary, reciprocal, exchanges" of materials in order to reduce the Department's burden of making copies. For example, petitioners were encouraged to provide copies of all "non-privacy" materials in their documented petition to the Attorney General of their state and all interested parties in their case.

In addition, the notice provided information regarding the submission of computerized databases. It also announced the availability on the worldwide web of a compilation of the most important documents related to the Department's previous Acknowledgment decisions (now online at http://www.indianz.com/adc20/adc20.html).

Analysis of Acknowledgment Decisions

The Department has resolved 38 tribal petitions through the Acknowledgment process since the regulations were established in 1978.[2] This represents an historical average of approximately 1.4 cases per year. The Department claims that it has taken measures to speed the process. Yet, for the six-year period 2000-2005, it only resolved nine cases, for an average of 1.5 per year. At this rate it could take the Department 168 years to resolve the 236 petitions that remain at various stages of the Acknowledgment pipeline. The backlog of unresolved "active" petitions is such that the Department has only managed to put three new cases under active consideration in the last seven years.

[2] Based on data as of February 3, 2006.

Of the 38 petitions that have been resolved through the Acknowledgment process, the Department has acknowledged 15 petitioners and denied 23 petitioners. However, it has acknowledged only one of the ten petitioners that have received an effective Final Determination since 2000 (the Cowlitz Tribe of Washington in January 2002). The Mashpee Tribe of Massachusetts received a positive Proposed Finding in March 2006, but it still awaiting a Final Determination (due in March 2007). In February 2006, Mashpee and the two pending Juaneno petitions were among the ten cases under active consideration. The other seven cases had all been the subject of negative Proposed Findings. It is expected that Mashpee will receive a positive Final Determination that will become effective later this year. When it does, it will become one of only two groups acknowledged by the Department in this decade.

Of the 38 effective Final Determinations, only 4 represent a reversal of the initial Final Determination (Chinook, Samish, Eastern Pequot, and Schaghticoke). In the Samish case, which was decided by the Department before the IBIA appeal process was implemented as part of the revised Acknowledgment regulations in 1994, a reconsideration of a negative Final Determination was ordered by a U.S. District Court. This remains the only case in which an initial negative Final Determination was reversed. The other three decisions reversed positive determinations.

Other California Petitioners in the Acknowledgement Queue

The Tolowa Nation, the next California petitioner to be considered (petitioner #85, 2nd on the waiting list), based in Fort Dick, has been on

"ready status" (awaiting active consideration) for more than a decade. It is possible that it could be placed on active consideration in 2007 and resolved in 2009, but that it will likely take much longer. Two other California petitioners are among the nine groups on ready status: the Southern Sierra Miwuk Nation (petitioner #82, 5th on waiting list, based in Mariposa) and the Amah Mutsun Band of Ohlone/Coastanoan Indians (petitioner #120, 9th on the waiting list, based in Woodside). At the recent rate of 1.5 decisions per year, it could take the Department more than 12½ years to resolve these three petitions.

The Juaneno Petitioners

The Initial Petition (#84)

On August 17, 1982, the Juaneno Band of Mission Indians submitted to the BIA a letter of intent to file a documented petition for Federal Acknowledgment. The BIA provides every petitioner with a priority number and the Juaneno petitioner was given #84. The early research for the documented petition was funded by a grant from the Administration for Native Americans (ANA) of the U.S. Department of Health and Human Services. The Juaneno petitioner submitted its documented petition to the Bureau on February 24, 1988.

Under the Acknowledgment regulations, the BIA was then required to conduct a review of the documented petition for what was then termed

"obvious deficiencies or significant omissions." The purpose of what became known as an "OD review" was to provide the petitioner with an opportunity to strengthen its case before it was placed under active consideration. After an OD review was conducted by a research team, the BIA then sent what became known as "an OD letter" to the petitioner outlining the deficiencies and omissions in its documented petition. The Bureau provided the Juaneno petitioner with such an OD letter on January 25, 1990, nearly two years after it had received the documented petition. This letter noted many "significant deficiencies" in the documented petition and although it did not state so specifically, it strongly hinted that the existing evidence was not sufficient to meet the mandatory criteria.

The Juaneno petitioner then conducted further research to supplement its initial documentation and presented the results of this research to the BIA on September 24, 1993. The BIA determined that the documentation was now sufficient enough to at least place the petitioner on its so-called "ready list" of petitioners awaiting active consideration.

A Costly Temporary Removal

In December 1994, a splinter group, consisting of approximately 783 members, withdrew from the Juaneno petitioner. This group would later submit a separate petition to the BIA.

On May 19, 1995, the BIA removed the Juaneno petitioner from the "ready" list because the petitioner had failed to submit a final membership

roll. After finally receiving an official membership roll certified by the petitioner's governing body on September 28, 1995, the BIA placed the petitioner back on the ready list on February 12, 1996. This delay proved costly to the Juaneno petitioner, because in the interim other groups moved ahead of it on the "ready" list. Had the petition not been removed from the "ready" list it would have been placed under active consideration in July 1995. Because of its temporary removal, active consideration status was delayed until September 2005. The petition of the Cowlitz Tribe, the group that was moved up the list after Juaneno was removed, was resolved in 2002.

The Splinter Group Petition (#84b)

A few weeks after the Juaneno petitioner was returned to the "ready" list, on March 8, 1996, the splinter group submitted to the BIA both a letter of intent to petition and a documented petition. It also petitioned under the name of the Juaneno Band of Mission Indians. Because this new petitioner represented a faction of the original Juaneno petitioner, the BIA gave the new petitioner the priority number 84b and changed the number of the original petitioner from 84 to 84a.

The 1994 revision of the Acknowledgment regulations gave the former OD review and letter a more user-friendly name. It defined it as a Technical Assistance (TA) review and letter, although the purpose, process, and format remained the same. On May 15, 1996, the BIA completed a review of petitioner #84b's documented petition and sent it a TA letter. The next week, on May 23, 1996, petitioner #84b responded by requesting that

its petition be placed on the "ready" list, and the BIA complied with that request.

Both petitioners then waited for over nine years for the Department to resolve its backlog of previous active cases. In the meantime, petitioner #84b submitted further documentation to the OFA on August 2, 2004. By February 2005, petitioner #84a had moved to the top of the "ready" list and petitioner #84 was fourth on the list.

Waiver of Regulations to Put Both Petitioners on Active Consideration

On September 30, 2005, the Department placed both petitions under active consideration so that it could review their documentation simultaneously. This meant that petitioner #84b was moved ahead of other petitioners on the "ready" list with an earlier priority date so that it could be evaluated at the same time as petitioner #84a. This action was taken in accordance with a January 13, 1998 memorandum from the Department's Office of the Solicitor justifying a waiver of the Acknowledgment regulations in order to expedite the consideration of related petitions. The Department originally sought a waiver so that it might be able to consider the two Eastern Pequot petitions together.

Proposed Findings on the Juaneno petitioners were due to be published on September 30, 2006, but the Department has extended its

deadline to January 29, 2007. The Department may further extend its evaluation period if it cannot meet the January deadline.

The Juaneno petitioners appear to have suffered more damage from further fragmentation. The *Los Angles Times* reported on October 10, 2005 that the tribe was split into three factions. It stated that a second group had split from the original petitioner (#84a) and was now functioning as a group distinct and independent from the two petitioners (#84a and #84b) now under active review by the Department ("For Juaneno Indians, Unity Proves Elusive," *Los Angeles Times*, October 10, 2005).

What Happens Next ?

The Assistant Secretary will issue a separate Proposed Finding for each Juaneno petitioner summarizing the Department's decision to either acknowledge the petitioner or to decline to acknowledge the petitioner.

The Assistant Secretary could propose to:

(1) acknowledge both petitioners,

(2) decline to acknowledge both petitioners, or

(3) acknowledge one and decline to acknowledge the other.

If the Department follows the precedent of the Eastern Pequot/Paucatuck Eastern Pequot Proposed Findings of 2003, it could find that both petitioners shared a common history until recent times. In the Eastern Pequot case, two groups that shared the same Connecticut

reservation filed separate petitions and the Department chose to evaluate them together. It determined in Proposed Findings that the two groups were part of the same historical tribe until 1973 and that the historical Eastern Pequot tribe met the criteria for acknowledgment up to that date.

The Department declined to make a determination whether the two petitioners met the criteria since 1972. In effect, this proposed finding pressured the two petitioners to consolidate in order to gain acknowledgment, because otherwise they would not be able to show continuity with the historical tribe. Ultimately, as is explained in more detail below, neither petitioner gained acknowledgment because they were aggressively opposed by a coalition of interested parties that successfully appealed the Assistant Secretary's Final Determinations to acknowledge a single Eastern Pequot tribal entity.

It seems likely that the Department will similarly find that the two Juaneno petitioners were part of the same historical tribe up to some date in history. If the historical Juaneno tribe, of which both groups were once a part, is found not to meet the Acknowledgment criteria, then both petitions are doomed. If the historical tribe is found to meet the criteria, then the possible outcomes become more varied.

If it is determined that the historical tribe meets the criteria and that the petitioners did in fact stand alone as separate entities for any substantial time, it would increase their chances of continuing to be considered as separate groups. In this scenario, the options of acknowledging both, declining both, or splitting the decisions, would remain in play. However,

the evidence indicates that both petitions are claiming the same history up to the present.

If it is found that the historical tribe meets the criteria and that the split into two groups was relatively recent, the Department may have only two options. It caught a lot of flack from both petitioners and interested parties for its decision to not make a determination regarding the criteria for the post-1973 period in the Eastern Pequot/Paucatuck Pequot Proposed Findings. For that reason, it will probably try to avoid taking a similar position in the Juaneno case. In order to accomplish this, it would have to determine that:

1. one petitioner has more continuity with the historical tribe and thus meets the criteria, while the other does not, or that
2. neither petitioner has kept continuity with the historical tribe and thus both must be declined.

If the Department repeats its Eastern Pequot/Paucatuck Eastern Pequot decision and allows the petitioners an opportunity to consolidate, then this will greatly increase the chances that the Department would acknowledge a single Juaneno tribal entity. This would be especially true if the Department determines that the historical tribe meets the criteria up to the time of the factional split in the 1990s.

The Role of Interested and Informed Parties

Interested and informed parties[3] can play a key role in supporting, monitoring, or opposing the Federal acknowledgment of petitioners. The Governor and Attorney General of the state in which the petitioner is located and nearby recognized tribes and unrecognized tribal groups automatically become interested parties when the Department accepts a petition for acknowledgment. Other organizations, entities, or individuals can become interested or informed parties in an acknowledgment case upon request.

Interested parties may become active during three critical periods in the Department's Acknowledgement process:

(1) ***Between the date that a petition is officially accepted by the Department and up to 60 days after the date on which the Department places that petition on active consideration status***, a

[3] The Acknowledgment regulations define "*Interested party*" as meaning "any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. 'Interested party' includes the governor and attorney general of the state in which the petitioner is located and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination" (25 CFR 83.1). **Only petitioners and interested parties can file a request for reconsideration with the IBIA** (25 CFR 83.11(a)(1)). This appeal process is explained below.

The regulations define "*Informed party*" as meaning "any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or be kept informed of general actions regarding a specific petitioner" (25 CFR 83.1). **Informed parties have provided critical comments and evidence in prior cases, but they cannot request a reconsideration by the IBIA** (25 CFR 83.11(a)(1)).

period that may encompass many years. Interested parties may submit factual or legal arguments and evidence in support of or in opposition to the petitioner. If these materials are deemed to be substantive, the Department provides copies of the comments to the petitioner and provides the petitioner with an opportunity to respond to the comments. The petitioner's response during active consideration is not automatically shared with third parties, but may be described and addressed in the Department's Proposed Finding. Petitioners are encouraged to share all comments and responses with registered third parties in the case. Interested and informed parties can request copies of the petitioner's response from the petitioner or from the Department. Third parties are given an opportunity to comment on the petitioner's response during the 180-day response period that follows the publication of a Proposed Finding.

Under procedures established by the Department in 2005, interested and informed parties may submit comments, arguments, and evidence up to 60 days after the date on which the Department places a petition on active consideration status. These comments are considered for and addressed in the Proposed Finding. Interested and informed parties may continue to submit comments after the first 60 days of active consideration of a petition, but the Department will then consider and address these comments in its Final Determination rather than in the Proposed Finding. All third party comments submitted prior to a Proposed Finding are shared with the petitioner. The petitioner is given an opportunity to respond to third party comments and have that response considered in the Proposed Finding if it

responds within 60 days of being notified of the comments or within 60 days of the closure date for comments to be considered for the Proposed Finding (essentially within 120 days of the date of active consideration). Petitioners are encouraged but are not required to share this response with third parties. The Department may request additional information from the petitioner or interested or informed parties at any time prior to the Proposed Finding.

The Acknowledgment regulations provide that the Department will publish a Proposed Finding within one year of the active consideration date (25 CFR 83.10(h)). This evaluation period has been extended more often than not in recent years. The regulations grant discretion to extent the period up to an additional 180 days, but even this deadline has been further extended in some cases. For example, in the Little Shell Chippewa case (petitioner #31), active consideration began on February 12, 1997 and a Proposed Finding was not published until July 21, 2000 (a period of over 41 months).

(2) ***During the 180-day comment or response period that follows the Department's issuance of a Proposed Finding*** to either acknowledge or decline to acknowledge a petitioner, interested parties may submit factual or legal arguments and evidence in support of or in opposition to Department's Proposed Finding.

Interested parties must submit copies of their arguments and evidence to the petitioner as well. The petitioner is given up to 60 days to respond to these comments, a period that may be extended upon the request of the petitioner. Interested parties are not given an opportunity to rebut the

petitioner's response at this stage, but the petitioner's response may be described and addressed in the Department's Final Determination.

Interested parties and/or the petitioner may request the Department to hold a formal, open, on-the-record meeting for the purpose of explaining and discussing its Proposed Finding to all parties. In the past, the Department was also willing to hold informal meetings with interested parties, but in the wake of the Abramoff lobbying scandals, it has now become more sensitive about giving the appearance of *ex parte* communications. Now, it may agree to an informal meeting, but only if all parties, including the petitioner, are represented.

Interested parties, as well as petitioners, may request the Department to extent the 180-day comment period up to an additional 180 days. The Department has been generous in extending comment and response periods upon request, perhaps because it has so rarely been able to meet its own timelines in recent years.

The Department will not consider any comments, arguments, or evidence submitted by interested parties after the close of the comment period on the Proposed Finding. **Whether an interested party is allowed further participation in the process during the Department's preparation of a Final Determination is dependent on the discretion of the Assistant Secretary.**

After the close of the response period of 180 days or more, the Department will determine a date on which it will begin to consider any and

all submitted materials rebutting or supporting the Proposed Finding issued by the IBIA. The regulations provide that ***the Department will publish a Final Determination within 60 days of the date on which it began the consideration of response materials*** (25 CFR 83.10(l)(2). Keep in mind that this does not mean 60 days following the end of the 180-day response period. A Final Determination may not be published for several months after a Proposed Finding was published because the Department may need to extend the 60-day period for consideration of response materials.

A Final Determination becomes effective 90 days after it is published in the Federal Register, unless the Interior Board of Indian Appeals (IBIA) orders a reconsideration of the Final Determination (see below).

(3) ***During the 90-day period that follows the Department's Final Determination to acknowledge or to decline to acknowledge a petitioner.*** Interested parties and petitioners can file a request for reconsideration of the Final Determination with the Interior Board of Indian Appeals (IBIA), a panel of administrative law judges. The grounds for such requests are limited and require appellants to challenge the interpretations and evidence presented in the Department's Final Determination.

If there is no request for reconsideration, the Final Determination becomes effective 90 days after the date of its publication.

Filing a request for reconsideration is the last opportunity an interested party that has not previously submitted materials would have to become involved in the processing of a particular petition.

Whether an interested party is allowed further participation in the process following the close of the 90-day response period is dependent on the discretion of the IBIA and/or the Secretary of the Interior.

Grounds for Reconsideration

The acknowledgment regulations establish the limited grounds on which a request for reconsideration can be made. The request must be timely and must allege at least one of the following:

(1) That there is new evidence that would affect the determination,

(2) That a substantial amount of the evidence relied upon by the Department was "unreliable or was of little probative value,"

(3) That the petitioner's or the Department's research was "inadequate or incomplete in some material respect,"

(4) That there are reasonable alternative interpretations of the evidence used for the determination that have not been previously considered by the Department and that would substantially affect whether the petitioner meets the mandatory criteria (25 CFR 83.11(d)(1-4).

Requestors may allege other grounds for reconsideration, but the four specified in the regulations are the only grounds the IBIA can rule on. The IBIA can submit other grounds to the Secretary or Assistant Secretary and request the Department to reconsider the Final Determination on those grounds (25 CFR 83.11(f)(1-2).

If the IBIA determines that a request adequately alleges grounds for reconsideration and agrees to review the case, it may or may not involve interested parties in its deliberative proceedings. However, the IBIA has the discretion to request a hearing by an administrative law judge of the Office of Hearings and Appeals, at which interested parties and petitioners might be given an opportunity to present further arguments and evidence. To date, the IBIA has never utilized this hearing option.

As already noted, if the IBIA finds that there are other alleged grounds for reconsideration that it does not have the authority to rule on, it may request the Department to review these alleged grounds.

If the IBIA finds that no request for reconsideration is timely, the Final Determination becomes effective 120 days after its publication.

If the IBIA affirms the Assistant Secretary's Final Determination, but finds that there are other alleged grounds for reconsideration, it may refer these grounds to the Secretary of the Interior for review. The Secretary has the discretion to either conduct the review or request the Assistant Secretary to do so. Under the former scenario, interested parties and petitioners are granted 30 days to present comments to the Secretary. Petitioners are

granted an additional 15 days to respond to comments submitted by interested parties opposed to the petitioner's position. Although this scenario is rare, it has taken place. In the Cowlitz case, for example, the IBIA affirmed a positive Final Determination, and the Quinault Tribe, the interested party that had requested reconsideration, was given an opportunity to present further comments to the Secretary. However, after review, the Department ultimately affirmed its previous decision to acknowledge the Cowlitz in its Reconsidered Final Determination.

If the IBIA vacates the Assistant Secretary's Final Determination, as it did in the Eastern Pequot and Schaghticoke cases, then it will remand the case back to the Assistant Secretary for reconsideration. Under this scenario, neither petitioners nor interested parties are given an opportunity to submit further comments.

When the IBIA vacates and remands a Final Determination or requests the Department to consider other grounds for reconsideration, the case is essentially turned back to the Office of Federal Acknowledgment (OFA) for review. The recommendations of the OFA are then reviewed and discussed with representatives of the Office of the Solicitor (the Department's legal counsel) and officials in the Office of the Assistant Secretary. After a final determination is arrived at, the Assistant Secretary or another subordinate official signs and issues a Reconsidered Final Determination.

The regulations provide that ***the Assistant Secretary will issue a Reconsidered Final Determination within 120 days of receiving either a***