

**FEDERAL RECOGNITION AND  
ACKNOWLEDGMENT PROCESS  
BY THE BUREAU OF INDIAN  
AFFAIRS**

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**OVERSIGHT HEARING**

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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Wednesday, March 31, 2004

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**Serial No. 108-89**

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Printed for the use of the Committee on Resources



Available via the World Wide Web: <http://www.access.gpo.gov/congress/house>

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U.S. GOVERNMENT PRINTING OFFICE

92-827 PS

WASHINGTON : 2004

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**OVERSIGHT HEARING ON THE FEDERAL RECOGNITION AND ACKNOWLEDGMENT PROCESS BY THE BUREAU OF INDIAN AFFAIRS**

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**Wednesday, March 31, 2004  
U.S. House of Representatives  
Committee on Resources  
Washington, D.C.**

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The Committee met, pursuant to notice, at 10:05 a.m. in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo, [Chairman of the Committee] presiding.

Members present: Representatives Pombo, Duncan, Jones, Tancredo, Hayworth, Osborne, Flake, Rehberg, Cole, Pearce, Rahall, Kildee, Pallone, Christensen, Inslee, and Baca.

**STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

The CHAIRMAN. The Committee on Resources will come to order. The Committee is meeting today to hear testimony on the Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs.

Under Rule 4(g) of the Committee Rules, any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member. This will allow us to hear from our witnesses sooner and help Members keep to their schedules. Therefore, if other Members have statements, they can be included in the hearing record under unanimous consent.

The purpose of today's hearing is to examine the administrative process used by the Bureau of Indian Affairs to determine which groups are federally recognized tribes. This job is performed by the Office of Federal Acknowledgment, which used to be called the Branch of Acknowledgment and Research.

The theme of today's hearing is simple. Most everyone here thinks that the current system used to determine recognition is broken, so how do we fix it? This is an extremely important question because Federal recognition establishes a formal relationship between tribes and the United States which has major implications for the Federal Government, for the members of the recognized tribe, and for other tribes, states and communities.

Prior to the adoption of the administrative process in 1978, the Department of Interior and Congress usually judged petitions for recognition on a case-by-case basis. And back in the 19th Century

recognition was established through treaties and executive orders. While Congress retains its plenary power under the Constitution to recognize tribes, the BIA administrative process was established to provide an objective, uniform means of judging whether a group is really a tribe that has been in continuous existence since European settlers arrived. It was also created in order to process a large number of petitions that were pending and anticipated to be filed.

Unfortunately, as today's testimony will bear out, the system is fraught with major shortcomings. The acknowledgment process was supposed to resolve many petitions per year. In reality, less than two, on average, are completed per year.

One of today's witnesses represents a tribe that began its quest for recognition in the 1970s. In spite of having its record complete and ready, the tribe is being told it may have to wait 10 or more years for a decision. The tribe could wait a half century before obtaining a final determination. Regardless of whether the tribe's petition should be approved or denied, there needs to be a conclusion to this. It costs valuable taxpayer dollars and denies justice.

Another problem with the current system is how determinations are made. There is a set of criteria used to judge the merits of each petition for recognition but as the testimony of today's witnesses will assert, the criteria are not always objectively applied. Whether or not this is caused by a weakness in the regulations or by a personnel problem in the Department remains to be seen.

The Committee is searching for solutions, solutions that result in final determinations based on factual evidence, not on subjective whim, and final determinations made without undue delay. No one should wait three decades to process an application for anything. Many people's home mortgages are paid in that time.

Perhaps the solution is to transplant the work involved in the recognition process from the BIA into an independent commission. The final determination can still be made by the Secretary or another government official specifically assigned this duty by Congress.

I look forward to today's testimony and hearing from our witnesses and hope that we can find solutions to this serious problem.

[The prepared statement of Mr. Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,  
Committee on Resources**

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existence since European settlers arrived. It was also created in order to process a large number of petitions that were pending and anticipated to be filed.

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The CHAIRMAN. I would now like to recognize the Ranking Member, Mr. Rahall, for his opening statement.

**STATEMENT OF THE HON. NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA**

Mr. RAHALL. Thank you, Mr. Chairman, and thank you for having this very important hearing today.

As we consider the topic of the hearing, I believe that it should be put into its historical context. First the European settlers tried to exterminate all American Indians. Shortly after, the United States Government banished Indians to remote reservations and endeavored to abolish their documentation, culture and livelihood and established often unfair treaties and settlements. And in more modern times we set up a system where Indian tribes must prove to the same United States Government that made these often disreputable treaties that they are truly descendants of this country's original inhabitants and can show the documentation to prove it.

I do not think that this is what American Indians had in mind well over 100 years ago when they agreed to laying down arms and turn over to the Federal Government their land, including sacred burial grounds, places of worship, sources of livelihood.

As it stands, that is the system in place and the fact of the matter is that Federal recognition carries with it a sovereign status that is essential to a tribe's long-term survival, including control by Indians over their lands and decisions affecting the lifestyle of their members.

Further, federally recognized tribes enjoy a unique government-to-government status with the United States Government and are eligible to receive services and funding for better health care, housing, education, law enforcement, and transportation. Yet the descendants of those who agreed to lay down their arms and come to terms with the U.S. Government are now faced with a Federal

recognition process that does not work in a fair or timely fashion and it has become too complicated and too costly.

Since the Bureau of Indian Affairs was charged with the recognition process in 1978, only 16 applications have been approved and they were approved after a tribe has often had to wait up to 20 years for a decision.

Now I am by no means suggesting that every application is bona fide or that every single application has merit. At the same time, it does appear that the process is sorely in need of becoming more efficient.

I look forward to today's panel and again thank the Chairman for conducting these hearings.

[The prepared statement of Mr. Rahall follows:]

**Statement of The Honorable Nick J. Rahall, II, Ranking Democrat,  
Committee on Resources**

Mr. Chairman, as we consider the topic of this hearing, I believe that it should be put into its historical context.

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The CHAIRMAN. Thank you.

I'd now like to introduce our first witness but before I do that I just wanted to announce to those of you that are in the audience today that Room 1334, which is right down the hallway, is open and you can hear the audio of the hearing if you would like to. So if anybody gets to the point that they'd like to sit down, the other hearing room is open and the audio is open down there.

Our first witness today representing the 5th District of Connecticut, The Honorable Nancy Johnson. Let me take this time to remind all of today's witnesses that under our Committee Rules

oral statements are limited to 5 minutes. Your entire statement will appear in the record.

Congresswoman Johnson, welcome to the Committee. It is nice to have you today and when you are ready, you can begin.

**STATEMENT OF THE HON. NANCY JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT**

Ms. JOHNSON. Thank you very much. I am sorry that my voice is a little off today but I very much appreciate the opportunity to testify. I also respect the history of the tribal nations in our country but something has gone terribly wrong with the tribal recognition process.

First of all, it has become driven by casino money, big, big bucks, and in my part of the country the people affected by that are small governments, governments of towns with 2,000, 3,000, 4,000 people. Those towns are heavily impacted by a tribal recognition decision made here. Local cities and towns already with tight budgets because in Connecticut those small town budgets fund the local schools, so there's tremendous pressure on these local budgets, they also have to then deal with the traffic problems, the heavier road maintenance, the heavier traffic control, the heavier fire control, all of the things that you have to deal with if you're adjacent to a reservation, and yet they aren't being given any help to have the resources necessary to do the research that's so essential to a balanced, fair tribal decision.

When we faced this issue in the environmental area, and remember the Superfunds and the big companies were saying what the plan would be for cleaning up the site, we gave citizen groups grants so they would have the money to get the same scientific back-up, so they would know that the solution would be fair and balanced and in their interest, as well.

We need to do that with these small towns. Their mill rates are skyrocketing just to fund the litigation and the research that's necessary when there is a tribal determination going on in their area. It's unbalanced. You're letting casino dollars roll into areas where there weren't tribal traditions and overwhelm the process in the local, state, and also down here.

We cannot let big money just drive this. We have to balance that equation so the local people who know the history and also have resources locally that could give them information that would be relevant, so the balance is there, so the process is fair.

I understand the importance of timeliness, absolutely, but there's no way that the people down here can do the kind of research they need to counter the research coming in as a result of gambling money in the timeframes required.

So we need to balance the inputs. We need to have a fairer process so that both sides can offer their information about the recognition of the tribe.

And then the standards absolutely have to be clarified and adhered to. We have a terrible situation in Connecticut. A tribe in my district was recognized. The proposed recognition said it could not be recognized; then the final recognition completely reversed the decisions in the proposal and even acknowledged that there was not adequate information to make clear that for 60 years there was

any political continuity. They completely reversed precedent on the issue of whether a state reservation indicated continuity and helped to meet the standards. In some of those years there was no functional entity on the land and while the states managed the lands like they do parks and things like that, they didn't do it with Indian leadership.

So while they have criteria and in their first proposed decision they said this application doesn't meet the criteria, in their final decision, even though they recognized the additional information and said the additional information didn't close all the holes, they went ahead and proposed recognition with all the consequences for the small towns and all the consequences for the absolutely catastrophically jammed interstates in Connecticut.

There has to be clear standards. There has to be a fair process that is not arbitrary and is not controlled and run by high-paid lobbyists here in Washington.

So I call on the Committee to invalidate the Schaghticoke decision, to impose a moratorium on BIA acknowledgment decisions pending a comprehensive review of BIA process and the issuance of recommendations for improvement, that you take steps to bring into public view the financial and gaming interests behind the Federal recognition petitions, that fourth, you examine how the Federal process usurps, usurps the traditional power of local governments to control economic development, implement long-term planning policies, and provide public safety and educational services, and fifth, that you prohibit the liening of property claimed by a tribe because while the Federal law does not allow them to take land that they claim—they have no eminent domain—the way they do it is they put liens everywhere.

It brings the whole town to a standstill. Retired people cannot sell their property. Small businesses cannot sell their property. The value of the land declines. That means that the tax revenues of the town decline. The schools are still there. The kids are still there. The police still have to be paid. The roads still have to be repaired.

They have brought whole sections of Connecticut to an absolute economic state of paralysis by liening property, so as I have been told, they should be held to the standard that they buy property like anyone else, and then the issue of bringing it into trust is something that the law governs through a process down here. Fine, but in that case do not allow the liening of land claimed in Connecticut they claim five, six towns.

So what is happening is a handful of people backed by very big money are claiming lands that in some instances have been farmed by people for hundreds of years, same family.

This is a serious issue. The process has to be looked at. It has to be rebalanced. I agree it should be timely, that the tribes have a right to be addressed in a timely fashion, but we cannot do that unless the process is rebalanced so all the information can come down to Washington together and the standards can be clear and transparent.

Nothing less will do because these recognition decisions are taking people's property in our country right and left. These recognition decisions are imposing on small local governments high costs

that no local government can withstand for police, for fire, and it is wiping out public education in these towns.

So we are facing an extremely serious situation. In the small State of Connecticut we have two big, established tribes but we have lots of little ones now looking to also imitate because of the casinos. In just 1 week each of our casinos on just the slots took in \$60 million. That is what is driving this—big money. And that is just the only money we know about.

So I do not begrudge the Indians economic opportunity and help and all those things, but their economic opportunity ought to be integrated with the economics of the region, as well, because the costs that are being imposed on small towns are absolutely crushing.

So I wish you well in your work. I hope you will take seriously the need to put a moratorium on this process until we can figure out a more balanced, equitable and a process that moves more rapidly for all concerned, but a process that is more equitable and in which the standards are consistent and adhered to.

Thank you for your time. I appreciate it.

[The prepared statement of Ms. Johnson follows:]

**Statement of The Honorable Nancy L. Johnson, a Representative in  
Congress from the State of Connecticut**

Mr. Chairman and members of the Committee, thank you for inviting me to testify today on the important subject of the Bureau of Indian Affairs' federal recognition process. This subject is creating tremendous controversy in my home State of Connecticut. While this issue has stirred grave concerns in numerous other states dealing with the federal recognition process, I wish to focus on the substantial impact it is having on my constituents in Connecticut.

Over the last two years, BIA has issued final determinations granting federal recognition to two groups in Connecticut: the "Historic Eastern Pequot" tribe, located in North Stonington, a town represented by my colleague Rep. Rob Simmons. The second was the Schaghticoke Tribal Nation, in the town of Kent in my district. The Schaghticoke have expressed interest in building a casino resort in Danbury or Waterbury in my district, or in Bridgeport, represented by my colleague Rep. Christopher Shays.

In addition, BIA will also soon issue a final determination on the petition on the Golden Hill Paugussett group, located in Colchester and Bridgeport.

It is an unfortunate reality that the tribal recognition process has become for many but a means to the end of profiting from casino gambling. Petitioning tribes make it publicly known that their ultimate interest is in casino gambling, and millions of dollars are flowing in from out-of-state gaming interests to fund recognition petitions. We cannot, as a matter of public policy, fail to understand this nor the extraordinary impact recognition—often on very slender threads of evidence—is having on local governments and local taxpayers.

Casinos in Connecticut have far-reaching consequences. Our major highways are already choked during rush hour and would be completely overwhelmed with the 24-hours-a-day, seven-days-a-week traffic of a new casino in Bridgeport, Danbury, or Waterbury. Local cities and towns, already facing budget crunches, would be forced to pay for far more frequent road repairs and construction, traffic control, and increased fire and police protection. In effect, local property taxpayers would be forced to support the economic development decisions of "sovereign" entities that do not have to pay all the costs of their decisions, nor the cost of public education, which is primarily funded through local property taxes in Connecticut. When asked recently about the benefits of the existing casino in Ledyard, Connecticut, to his community, the former Mayor of Ledyard said there have been none. Yet the costs have been great.

The issue today, Mr. Chairman, is one of both ends and means. While Connecticut residents overwhelmingly oppose the goal of more casinos, they also now suspect the integrity of the recognition process. Their loss of trust in this process is a serious matter, and for good reason, they consider this process arbitrary at best, dishonest at worst.

Problems within the BIA process are well-known and have been documented by well-respected, independent agencies. In 2001, the U.S. General Accounting Office reported that the recognition process is characterized by inconsistency, unfairness, and delay. A subsequent report by the Interior Department Inspector General about the recognition process cites troubling irregularities, the use of political influence in what should be an objective process, and the questionable practice of recently-departed BIA officials lobbying for petitioning tribal groups.

Some of these problems are brought into stark relief in the case of the recognition of the Schaghticoke tribal group. In December 2002, the BIA issued a proposed finding that the recognition of the Schaghticoke group did not meet all seven criteria for federal recognition, and that its tenuous relationship with the State of Connecticut did not add evidentiary weight to the group's claim. On January 29, 2004, however, the BIA reversed itself and issued a final determination that the Schaghticoke tribe had satisfied the seven federal criteria for recognition. In reaching this conclusion, BIA contradicted its own reasoning in its proposed finding by determining that the tribal group's relationship with the state did, in fact, bolster their petition. In addition, the BIA argued in its final determination that the tribe had satisfied a previously unmet criterion while admitting insufficient evidence had been provided to justify it. This reversal left many of us in Connecticut bewildered and eager for answers. Since then, my colleagues in Connecticut and I have written to the GAO, to Interior Secretary Gale Norton, and to the Interior Department's Inspector General requesting an investigation and answers to the questions raised by this inexplicable reversal.

Shockingly, we received answers to some of our questions in the form of a disturbing decision memorandum, written by BIA staff two weeks before its final determination was handed down and only revealed this month. In it, BIA staff admit that the Schaghticoke group did not meet the criterion for continuous political influence for two periods encompassing 64 years of its history, an admission also reflected in the final determination. The memorandum says plainly, "The petitioner has little or no direct evidence to demonstrate that criterion 83.7(c)," the political influence criterion, "has been met between 1820 and 1840 and between approximately 1892 and 1936." The memorandum also admits that BIA precedent holds that the state's relationship with the group, which has essentially been a symbolic function, does not add evidentiary weight to the group's claim.

Rather than deny the Schaghticoke petition in the final determination, as it had in the proposed finding and as the regulations and precedent would suggest, the BIA memorandum lays out a strategy to overturn existing precedent and abrogate federal regulations. The memorandum admits that BIA knew the petition did not meet the standards outlined in the "regulations and existing precedent," and that they would have to be ignored or reevaluated in order to approve the petition. Indeed, the memorandum reads, recognition "would require a change in how continuous state recognition with a reservation was treated as evidence." Two weeks after that memorandum was written, the BIA issued a final determination recognizing the Schaghticoke and opening the door to casino gambling in Western Connecticut.

My constituents in Connecticut, as well as many Americans across the country, are strongly opposed to further casino gambling in their area. But they also strongly object to the clearly faulty, unfair, and arbitrary process that seems to respond more to the millions spent by casino interests than to the law. The relatively paltry sums small towns can spend with local property taxes as their sole sources of financing are simply no match for the big money behind the big business of casino gambling.

I believe immediate action is necessary to restore the credibility, predictability, and integrity of the overall tribal recognition process and address what is, in my view, a flawed and illogical decision regarding the Schaghticoke tribal group. Specifically, I recommend the Department of the Interior do the following:

1. Invalidate the Schaghticoke decision and issue a new final determination that is consistent with federal recognition regulations and existing precedent;
2. Impose an immediate moratorium on all BIA acknowledgment decisions pending a comprehensive review of BIA processes and the issuance of recommendations for improvement;
3. Take steps to bring into public view the financial and gaming interests behind federal recognition petitions;
4. Examine how the federal process usurps the traditional power of local governments to control economic development, implement long-term planning policies, and provide public safety and education services; and
5. Prohibit the liening of property claimed by a tribe as it dramatically undermines property values and paralyzes home and land sales throughout the affected region.

In conclusion, it is widely-held and well-documented that the BIA recognition process is faulty. Certainly, Connecticut residents have lost faith in that process and worry that it will result in new casinos in areas that neither want them nor can support them.

The question before this Committee and this Congress is what to do to address this problem. Congress can no longer put off its responsibility to address questions of credibility, competency, and fairness within an agency under its jurisdiction. Only through clear, concrete and effective action can Congress right this ship; restore credibility to the process; and ensure that federal recognition petitions are dealt with objectively, consistently, and fairly for both petitioning groups and local communities.

Thank you for considering my testimony today.

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The CHAIRMAN. Thank you. I know that you are very passionate about this. We have had the opportunity to discuss this in great detail in the past and the Committee does take this issue extremely seriously and it is part of the jurisdiction of this Committee that we will work through on a bipartisan basis to deal with this problem.

Ms. JOHNSON. Thank you, Mr. Chairman. I also meant to mention that Mr. Shays and Mr. Simmons would like to submit their written testimony.

The CHAIRMAN. Without objection, it will be included in the record.

[The prepared statements of Messrs. Shays and Simmons follow:]

**Statement of The Honorable Christopher Shays, a Representative in  
Congress from the State of Connecticut**

Mr. Chairman and members of the Committee, thank you for allowing me to submit testimony on the Bureau of Indian Affairs' (BIA) federal recognition process.

It has become clear that the recognition process is neither transparent nor accountable and needs to be significantly reformed.

I have long said we must live with the BIA's decisions on federal recognition, as long as they are made using the proper gauges. In recent weeks, however, evidence has surfaced that even petitioning tribes that fail to meet the seven established criteria for federal recognition may be recognized in spite of rather significant shortcomings in their petitions.

The fact is, the federal recognition process creates sovereign nations and, in doing so, has far-reaching social, political and economic consequences—even more so when casinos are involved, which is becoming more and more often the case. Without transparency and accountability in the process, the integrity of the BIA, and by extension the federal government, is eroded.

On January 29, 2003, the BIA announced its decision to recognize the Schaghticoke Tribal Nation of Kent, Connecticut, as a federal tribe, even though it seemed clear they did not meet the BIA criteria for proving continuity from pre-colonial times.

Then, on March 12, The Hartford Courant made public a memo circulated within the Department of Interior two weeks before the Schaghticokes were federally recognized indicating that the Schaghticokes were granted recognition without having met the established criteria.

The memo demonstrated the agency knew the tribe lacked political continuity for a period of 64 years in the 19th and 20th centuries. The memo also raised questions about whether several people whose names were on the petition were ever actually members of the tribe.

Even more disturbing, the memo provided BIA directions for recognizing the tribe in spite of these facts.

The unfortunate reality highlighted by this example is that the BIA quite clearly did not decide this case on its merits—and I fear this instance was not an anomaly.

Indian gaming is a \$23 billion industry, and its expansion hinges on the federal recognition process.

Private investors and powerful casino developers stand to make fortunes when a tribe is recognized. And all too often they have encouraged tribes to petition, even

when they might not otherwise have united to do so because they do not meet established recognition criteria.

Our nation has a responsibility to uphold certain unbreakable obligations to the continent's native peoples, but I believe the process has been corrupted by big money gaming interests that have literally started assembling tribes with the hopes that they can eventually reap huge profits from an Indian casino.

In this way, a process designed to afford due rights and privileges to legitimate petitioners has almost become an administrative vehicle to print money.

Furthermore, legitimate tribal interests are finding themselves in a process where they cannot hope to gain recognition without being able to spend lavish sums of money on lobbying—an obfuscation, if not a mockery, of the original intent of the federal recognition process. Simultaneously, a shadow has unfairly been cast over all of the tribes that have met the criteria and achieved due recognition.

The bottom line is, granting federal recognition is a very serious decision that requires a thoughtful and transparent process, but back in 2001, the General Accounting Office found the BIA's process for doing so to be inconsistent, slow and unfair.

The Department of Interior's Inspector General also found political influence and pervasive irregularities have corrupted the recognition process.

These factors combine to project a resounding message: a full-scale reform of the federal recognition process with the objective of restoring transparency and accountability to a system that has become quite corrupt is long overdue.

In her testimony before your Committee today, Congresswoman Nancy Johnson made several recommendations for ways to restore the credibility, predictability and integrity this broken system has come to lack.

Specifically, she recommended reevaluating the Schaghticoke decision, this time applying all established criteria to determine the validity of the petition; imposing a moratorium on future recognition decisions pending a review of the BIA process; and making public the financial forces that support petitioning tribes.

I wholeheartedly support my distinguished colleague's suggestions and hope they will be adopted by the Department of Interior.

Thank you for considering my testimony.

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**Statement of The Honorable Rob Simmons, a Representative in Congress  
from the State of Connecticut**

Mr. Chairman and members of the Committee, thank you for holding this hearing, and for allowing Rep. Nancy Johnson, the dean of the Connecticut congressional delegation, to testify on behalf of our home state. She has worked tirelessly on this issue and I appreciate her bringing this issue to the forefront.

Mr. Chairman, my home State of Connecticut has been, and continues to be, affected by our federal Indian recognition process. My district, Connecticut's Second Congressional District, is host to two of the world's largest casinos: Foxwoods Resort Casino, run by the Mashantucket Pequot Tribe, and Mohegan Sun, run by the Mohegan Tribe.

Connecticut has seen both the benefits and the adverse effects of tribal recognition. One benefit is that Indian gaming has produced jobs at a time when defense contracting and manufacturing have been on the decline. Foxwoods Resort and Mohegan Sun purchase goods and services, and contribute upwards of \$300 million a year into the state budget. Tribal members have also been personally generous with their wealth, supporting numerous community projects and charities.

But there is also a considerable negative impact. In Connecticut, recognition means the right to operate a casino and that places pressure on local municipalities who have no right to tax, zone or plan for these facilities. Small rural roads are overburdened with traffic, understaffed local police departments are routinely working overtime, and volunteer fire and ambulance services are overwhelmed with emergency calls. The small towns that host and neighbor these casinos are simply overwhelmed by this strain.

In year's prior, many in Connecticut questioned the presence of tribal casinos because they wondered whether the federal process was fair. The people of Connecticut no longer wonder. They know the federal system is broken.

BIA's recent actions involving groups in Connecticut seeking status as Indian tribes under federal law demonstrate that the acknowledgment process is unfair and corrupt. This, of course, is not the fault of the petitioning groups, some of whom I have considered friends and neighbors for many years. It is the fault of the federal government. Congress must act promptly to correct these problems.

Over the last two years, BIA has issued final determinations that would grant federal tribal status to two groups in Connecticut. The first of these was the

“Historic Eastern Pequot” tribe, located in the town of North Stonington in my congressional district. The second was the Schaghticoke Tribal Nation, in the town of Kent in the congressional district of Ms. Johnson.

The BIA also will soon issue decisions for the Golden Hill Paugussett group, located in Colchester and Bridgeport, and the two Nipmuc groups, located in Massachusetts, but targeting land in northeastern Connecticut.

With such significant decisions pending before a federal body, it is our duty in Congress to ensure that a fair and objective procedure is used to make these decisions. Tribes need to be granted the federal status they deserve and accorded their sovereign rights, but the determination to acknowledge such tribes cannot be made under false pretenses and without regard for the overall economic, social and political consequences that will result. Unfortunately, that is exactly what is happening under the flawed and biased BIA system.

Nowhere are these problems with BIA’s acknowledgment procedure more apparent than in Connecticut. The record is clear that BIA is breaking its own rules to reach their own desired outcome and that of petitioning groups and their wealthy financial backers. The recent Schaghticoke decision is a case in point. BIA specifically admits in an internal agency memorandum that the Schaghticoke group does not satisfy the acknowledgment criteria. Nonetheless, BIA violated its own regulations to reverse a previous ruling and find in favor of the Schaghticoke group.

It did so by creating a presumption in favor of acknowledgment for petitioner groups in Connecticut based simply on the fact that the State has held land for Indians. BIA equated this simple act by the State undertaken primarily as a welfare function with the existence of a continued political relationship between the State and the Indian beneficiaries of the land. BIA admits in its own internal decision document that such a result is not allowed under its regulations, but nevertheless proceeded to rule in favor of the Schaghticoke petition. Just as egregious, the memorandum went on to specifically lay out potential avenues under which regulations could be averted and final recognition could be conferred.

BIA followed a similar pattern in the Eastern Pequot decision in 2002. In that case, BIA went so far as to forcibly combine two petitioner groups who openly opposed each other. Only by doing so was BIA able to issue a favorable decision. BIA also invoked the mistaken assumption that the simple existence of a state reservation was sufficient grounds for the two Pequot petitioner groups to meet the acknowledgment criteria.

Most recently, the New York Times detailed in a front-page story the ties between powerful money interests and petitioner groups. Included in this article was a troubling reference to the business relationship between the current head of BIA, David Anderson, and the primary backer of the Massachusetts and Connecticut Nipmuc groups, Lyle Berman. Mr. Anderson and Mr. Berman were founding partners of what is now Mr. Berman’s casino development company, Lakes Entertainment. Lakes Entertainment has provided nearly \$4 million to the Nipmucs in their effort to obtain federal recognition.

There is a laundry list of other problems and abuses arising from the acknowledgment process in recent years. These include actions under the previous Administration such as changing the acknowledgment procedures without notice or public comment, discriminating against interested parties opposed to acknowledgment by not revealing critical evidentiary deadlines, issuing incomplete proposed rulings so as to prevent comment on key findings, and even signing post-dated favorable determinations after the change in Administrations.

How could so many serious problems arise? The answer starts with the most basic principle of our system of government. Congress is vested with the power to recognize tribes. That power has never been delegated to the Executive Branch.

In addition, Congress has never taken the constitutionally necessary step of defining and placing in statute the standards under which BIA could rule on tribal acknowledgment petitions. Absent this statutory guidance from Congress, BIA has simply made up its own rules. It administers those rules as it sees fit, even ignoring them when necessary to reach a desired result. The system is out of control.

For many years, the acknowledgment process has been criticized for being too slow, too expensive and too academic. While those are valid concerns, the bigger problem is that BIA’s acknowledgment process also has lost its credibility. Decisions of such importance can no longer be left to this agency.

Strong and immediate action is necessary to address those problems. In my conversations with numerous citizens throughout the State of Connecticut, including leaders like Nick Mullane, Connecticut’s State Attorney General Richard Blumenthal, Bob Congdon, Wes Johnson, Susan Mendenhall, and others, I’ve heard the following recommendations:

- Impose a moratorium on all BIA acknowledgment decisions;

- Enact a law that establishes an independent, objective process for making findings of fact regarding tribal acknowledgment requests;
- Define and place in law the acknowledgment standards that will be used in this process;
- As part of that process, require all petitioners to identify the sources of their funding, the contractual arrangements with financial backers, and the amount of money spent;
- Prohibit all ex-parte contacts between parties to an acknowledgment process and the entity responsible for review;
- Require all recommended decisions on acknowledgment petitions to be acted upon by Congress; and
- Establish a funding mechanism that assists interested party state and local governments in participating in such reviews.

In conclusion, Federal recognition policies are turning the “Constitution State” into the “casino state.” We want more control over the process. We want to close the loopholes. We want relief provided to our localities for what can be a very expensive battle on a very uneven playing field.

The victims of the situation include all parties to the acknowledgment process—petitioning groups, states, local communities, and the public. It is time for Congress to step in and solve this problem by reforming the system by statute. This is the only way to ensure fair, objective and credible decisions.

Thank you for considering this testimony.

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The CHAIRMAN. Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman.

I thank the gentlelady from Connecticut for her testimony, as well. She brings a great deal of empathy and understanding of the issue here.

I can understand the cutbacks that many state, local and city governments are facing today. We are certainly experiencing that in my area of the country, as well, with the cutbacks coming from Washington and with the tax breaks emanating from this city, it makes it very hard for the state and local governments to make ends meet these days and we are putting additional burdens upon them. There is no doubt about it.

Ms. JOHNSON. I thank you. You know, this is so difficult that the Indians living on the reservation did not support the petition because they are afraid of what it is going to mean for their reservation, their way of life, the traditions they are trying to preserve.

So we are not getting a fair record into Washington and we need to make sure we do that because we are overriding very fundamental rights granted in our Constitution to citizens of this country and that should not be. Thank you very much?

The CHAIRMAN. Mr. Pallone?

Mr. PALLONE. I respect the gentlewoman’s opinion but I have to take issue, both on a theoretical level as well as a practical level, about what she said, and then I did have a question, Mr. Chairman.

On the theoretical level, I have a real problem with the way you have addressed this because I believe that the issue of sovereignty predates states, predates local governments. The bottom line is the Constitution recognizes Indian tribes as sovereign nations and that really has nothing to do with the status of states or the status of local governments.

So I have a real problem with our government at the Federal level providing funding, if you will, to local units of government or to states to help them make a case against sovereignty once the BIA has made that decision or that preliminary decision, primarily

because the issue of sovereignty is a Federal issue. It is not a state issue. The Federal government should decide essentially on its own whether or not a tribe is sovereign.

And the problem with most of these cases is that state and local governments over the years and the Federal Government, as well, have done their best to try to terminate the rights of American Indians and to eliminate their sovereignty and for us to sit here and say that somehow the states or the local government should have some input or should be able to influence in some way the decision the BIA makes about whether a nation is sovereign and should be recognized as such I think is wrong and I think essentially violates the Constitution.

Now that is the theoretical problem. The practical problem is that I think the way the gentlewoman portrays tribes as somehow wealthy and able to have all this money to make their case is essentially just the opposite. If I could use the Eastern Pequots, and I do not know whether or not she opposes their recognition, but I know that when I visited them what I found essentially was a handful of people who had very little resources and ability to influence what goes on.

Now for all I know they may have some casino money or somebody who has promised them money that they can hire but they had a small land area historically, they have clear indications with the graves on the site and the fact that they have existed as a tribe and they are entitled to sovereign and recognition, but they had a very difficult time over the 20 or 30 years when they have been trying to get their recognition in getting the resources and being able to hire people to make the case.

So this idea that the tribes are somehow with all this money and all this power and all this ability and the local municipalities have nothing, I think it is just the opposite. I do not think it makes any sense for us to give money to towns to be able to make that case because we do not give the money to the tribes to be able to appeal decisions or make those cases.

So I think that theoretically I do not agree with the gentlewoman in terms of the state or the local role in this decision. I do not think there should be one. I think this is a Federal issue.

Second, practically speaking, I think it is just the opposite. Many of these tribes have a hard time making their case and getting the money to be able to make the record straight.

I just wanted to ask a question which sort of relates to the practical aspect. We know that the BIA does not have a lot of resources. Why is it appropriate for the Department of the Interior to foot the bill for municipal appeals, which is what I think the gentlelady is saying in her bill, but not for tribes who appeal unfavorable decisions? Would the gentlewoman who now advocates that the towns get money to take the appeal, would she have a problem with the tribes getting money in the same way to make their appeal from the government?

Ms. JOHNSON. You misunderstand me from the beginning, so let me back up a little bit.

I certainly am not challenging the concept of sovereignty. I am saying that in a part of the country where we are recognizing tribes for the first time in hundreds of years you have to look at

the facts to see if they meet the criteria. So you want advocates of recognition and opponents of recognition to be able to get their facts on the table so the Federal Government can make an honest decision about whether there is a tribe that meets the criteria to be recognized.

So I would not object to Indians being given the resources and the town being given the resources but if you accept public resources, you then would have to not accept additional resources.

My goal is to try to balance this so that when the Federal Government looks at the tribal recognition issue it looks at it with its experience but it also looks at it with local knowledge of the history and life of the people because the criteria demands some continuity of existence. So if you do not have equal resources, you are not getting equal facts.

Now I am not knowledgeable about this process in the West so much but in the East, it was not an issue until gambling made such a big hit. Now we have two big casinos, two big recognized tribes. I am not challenging that. The reason I am challenging the recognition of the Schaghticokes is because the process has been an absolute travesty. In my written statement I went through this in a far more orderly fashion than I did in my summary but for instance, there was a memorandum from staff in the BIA to the decisionmakers about how it did not meet the criteria but if you still wanted to recognize them, this is how you could do it. They say, for instance, "The petitioner has little or no direct evidence to demonstrate that criteria 83.7(c), the political influence criteria, has been met between 1820 and 1840 or between 1892 and 1936," and that is a long time. The memorandum also admits that the BIA precedent holds that the state's relationship with a group, which has essentially been a symbolic function, "does not add evidentiary weight to the group's claim."

So you have this proposed decision, then you have the final decision, and in between you have this memorandum that says they do not meet the criteria but if you still want to do it, this is how you do it.

Now to put people's property rights at risk, to put the viability of local government services at risk, is simply an outrage in the face of that kind of a memo. That is why I say you need a moratorium because you need to look back at this process. One possible component of the solution would be in every case to make sure that the sides have the resources they need to bring forward the information. If you did that you would want to ban outside money, I guess, so everybody had the same.

But you have to recognize that gambling has changed this because it is big, big money and the take is so large, they do not care how much money they invest in the recognition process. So they not only—

The CHAIRMAN. The gentleman's time has expired.

Ms. JOHNSON. You get it.

The CHAIRMAN. Are there further questions of the witness?

Well, thank you, Mrs. Johnson.

Ms. JOHNSON. Thank you for the opportunity. I do appreciate it.

The CHAIRMAN. Thank you for your testimony.

Ms. JOHNSON. I know our perspective from the Northeast is different but the impact is going to be very, very different. It is all right if they are tribes that truly meet the criteria but not if they are tribes that do not. Thank you.

The CHAIRMAN. Thank you.

I would like at this time to call up our second panel consisting of Glenn Marshall, President of the Mashpee Wampanoag Tribe, Lance Gumbs, Tribal Trustee of the Shinnecock Indian Nation, Rosemary Cambra, Chairperson of the Muwekma Ohlone Indian Tribe, and Wilford "Longhair" Taylor, Tribal Chief of the MOWA Band of Choctaw Indians. I should note that these witnesses are members of tribes that are seeking or have sought recognition but have not yet received it.

The Committee has a practice of swearing in all witnesses, so if I could ask you to please stand and raise your right hand.

[The witnesses were duly sworn.]

The CHAIRMAN. Thank you very much. Let the record show that they all answered in the affirmative.

Mr. Marshall, we are going to begin with you. I again remind our witnesses that your entire written statement will be included in the record but if you could try and keep your oral testimony to 5 minutes it will help us a great deal to stay on schedule. So Mr. Marshall, thank you.

**STATEMENT OF GLENN MARSHALL, PRESIDENT,  
MASHPEE WAMPANOAG TRIBE**

Mr. MARSHALL. Thank you, Mr. Chairman, members of the Committee. I appreciate the opportunity to testify today. My name is Glenn Marshall and I am the President of the Mashpee Wampanoags.

Our tribal offices are located on Cape Cod in Massachusetts in a town that bears our name. Most of our 1,468 members live in close proximity to our ancestral lands. Our history is rich and closely intertwined with the history of America. Our local villages have existed for 5,000 years and we are best known for having greeted the Pilgrims at that best known spot in Plymouth. Despite what you might think, we do not regret opening our arms to those settlers, although I have joked in the past that we loaned the Pilgrims the moorings to land their boats and we have been paying for it ever since.

Seriously, we are proud of our participation in that historic event and our prominent role in American history did not end there. Our tribe has answered the call to defend America, fighting in every conflict starting with the fight for independence and the war on terrorism. The first casualty of the Revolutionary War was Crispus Attucks, a Mashpee. I am joined today in the audience by my Chief, Vernon Lopez, who fought at D-Day. I myself am a survivor of the Surge of Khe Sanh and many incursions into Vietnam.

Mr. Chairman, hundreds of the Mashpees have given their country their fullest measure of devotion in battle and we have shared our land and blood and served our nation with distinction and pride. We have also been good neighbors in our local community. We maintain the oldest Christian church building on Cape Cod, the Old Indian Meeting House.

I have with me here today a book that dates prior to the Commonwealth of Massachusetts that tells us we have had a continuum of presence in the Commonwealth of Massachusetts and this great country since the beginning of time. I could have brought an older book that dates to the 1600s—it has our genealogy, it has our governance of our tribe here—but it was too fragile to travel. It makes me angry that we are not able to bring these books and show the members of Congress and the people within the BIA.

Because of that church, we are known as the praying Indians. We use this facility for special services now only. Most of our services are done in Algonquin and in dialect.

It has taken me a long time to understand the workings of the government. I am sorry that we could not bring more evidence, but I knew that our time would be short.

We are here for one simple reason. Twenty-nine years ago the Mashpees asked the Federal Government to confirm in law what everybody knows to be true, that we are a tribe, and 29 years later we are still waiting. When we filed our letter stating our intention to seek Federal recognition in 1975 the BIA's response was prompt, stating that Mashpee would be among the first to be considered. Only 14 others had filed prior to that time. Three years later the BIA finalized their recognition rules and regulations and we certainly never expected it would take more than 30 years. We immediately initiated our formal petition and it was not complete until 1990. We spent years trying to navigate through the confusing regulations, unresponsive bureaucracies of the BIA and further, just knocking on doors everywhere and getting the same answer. Looking back, it is not surprising that our tribe, with few resources and even fewer academics, struggled to understand the nuances of the process.

Since 1996 when our petition went on active, we have watched it stay dormant. We have watched other tribes who were lower on the consideration list leapfrog over us and get determinations from the BIA. We followed the rules and regulations set forth by the BIA, still with no decision.

Finally, we abandoned that and we took our case to court. We started well. In 2001 a Federal judge ordered that we would have a final decision December 21, 2002. The bureau pushed. The Court of Appeals reversed that decision and directed the court to find a new and fresh evaluation as to whether the delay had been unreasonable. Our litigation continues and they say that we will not be recognized or have a decision for seven to 14 more years within the bureau process.

Mr. Chairman, we have no desire to be in court. We would have settled this out many, many times over in the last 4 years, since 1996, since 1975.

The system needs to be fixed. There are several ways that we can do it. I have some ideas. I would love to share them with you. But the time-consuming, costly litigation helps no one. It absolutely helps no one. It does not help the tribe. It does not help the community. It does not help the Commonwealth of Massachusetts and it certainly does not help the United States of America.

When I look at the Lady of Liberty I see a black eye underneath the right eye and it says Mashpee Wampanoag for the travesty this

country has permitted to happen to us. Mr. Chairman, I beg you for your help and there are situations here that we can fix.

There are only 27 tribes left that filed for recognition prior to 1988. I say that those tribes should be the ones that are looked at first. Anyone that filed after 1988, let us go through the queue. Let us make them stand up to their regulations or let us find some outside independent folks that can do some of the legwork that they do, academics. We have some of the most wonderful colleges with academic archives for colonial history; it would not take long.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Marshall follows:]

**Statement of Glenn Marshall, President, Mashpee Wampanoag Tribe**

Mr. Chairman, members of the committee, I thank you for the opportunity to offer these remarks today. I am President of the Mashpee Wampanoags, the largest tribe in the Commonwealth of Massachusetts. Our tribal offices are located on Cape Cod, Massachusetts, in the town which bears our name. We are a tribe of 1,468 members, most of whom live in close proximity to our ancestral lands. I present myself today on their behalf in order to share our story. I hope my remarks will not only narrate the historical significance of the Mashpee and our record of service to the United States, but will also demonstrate the compelling factual case for federal recognition. It is my hope that these remarks help present a more clear picture of our tribe's experiences, and, in turn, a clear picture of the reality of the federal recognition process.

The vision of the Pilgrim forefathers disembarking from the Mayflower at Plymouth Rock is the starting point for many people's idea of significant history in the New World. More exactly, it is a pivotal point in American history. It started a new chapter, but it is only a brief moment in a much longer narrative of life on this continent. That story is one of men and women whom have lived for thousands of years prior to the arrival of Europeans. Archeologists have discovered evidence to support the claim that local Mashpee villages have existed for 5,000 years with an unbroken continuum of habitation to the present. Our extensive history, therefore, is not predicated on the single instance in which our ancestors greeted the Pilgrims as they landed upon the shores of America. Rather, this moment enriched the history of the Mashpee as a community tied to the land on which we have existed for thousands of years. We are proud to have been part of this historically significant event and many since.

Since that meeting, our history has been shared with the European settlers. However, our experience has not always lived up to the promise of that first meeting in Plymouth. In fact, our experience with the Bureau of Indian Affairs has only intensified the lingering taste of past oppression. But our commitment to this, our great country, has been and remains steadfast. We are proud to be Americans. We are proud of our country. We have not always been treated with fairness and equality. But, we know ourselves to be a significant tribe tied to the long history of this nation, and we remain firm in our faith in its commitment to justice.

The fight for freedom and development of democracy has been a tumultuous one, often calling for men and women to fight in order to secure liberty. The first casualty of the Revolutionary War, Crispus Attucks, was a member of the Mashpee. Another distinguished Mashpee, Massasoit, stands point on the state seal and flag of the Commonwealth. In fact, the Mashpee have consistently answered the call to arms, fighting in every American conflict beginning with the fight for independence from England: 21 in the Spanish American War, 145 in World War I, 5 in the Haitian Insurrection, 6 in the Philippine Insurrection, 80 in World War II (including 44 at D-Day), 61 in the Korean War, 30 during the Cuban blockade, 50 in the Vietnam War, 6 at Grenada, 11 in Panama, 13 in Desert Storm and 17 in Afghanistan and the War on Terror. I am joined today by our Chief, Vernon Lopez, who was among the Mashpee fighting at D-Day; I, am a survivor of the siege of Khe Sanh, in Vietnam. Our ties to our community at home compliment our record of service and sacrifice to the country.

Currently, sixty percent of our tribal members live in close proximity to the town of Mashpee. We maintain the oldest Christian church building on the Cape, the Old Indian Meeting House, established in 1673 by John Eliot. Our devotion to the church has earned us the name "Praying Indians," and presently we use this facility for special occasions of worship. Our services are performed in Algonquin, the

official Wampanoag language. Moreover, we assist other tribes in maintaining their traditional languages and customs. Meticulous care is given to preserving the nuances of our cultural traditions with hope of enculturation for subsequent generations. Nevertheless, the lack of a defined tribal land makes preservation of our traditions and cultural identity very difficult to maintain. Our frustration is intensified in the light of our progressive social and legislative history in the Commonwealth of Massachusetts and prior relationship with the federal government.

The significance of Mashpee history in Massachusetts is confirmed in historical texts dating back hundreds of years. As population swelled in states, the idea of westward expansion became a reality. The United States government explored the removal of Indians from eastern states through the endowment of tribal lands in the west in places such as Oklahoma. The shortsighted and thoughtless nature of such proposals aside, such a consideration was rejected when considering the relocation of the Mashpee. A document dating from 1822, *A Report to the Secretary of War of the United States on Indian Affairs*, states in regard to Mashpee relocation, "They are of public utility here as expert whalers, and manufacturers of various light articles; have lost their sympathy with their brethren of the forest; are in possession of many privileges, peculiar to a coast, indented by the sea; their local attachments are strong; they are tenacious of their lands; of course the idea of alienating them and removing to a distance, would be very unpopular. This is evident from the feelings manifested by those whom I have sounded on the subject; I have no reason therefore, to believe the scheme would take with them."<sup>1</sup>

Then, the rebuff of Mashpee removal was predicated on our strong ties to the land and sea, as well as our fierce love for the land we have inhabited for so long. Now we seek to have the federal government recognize the Mashpee and acknowledge our history in this land, a history recognized in texts such as these. Yet, this is not the singular piece of supporting evidence in our case for federal recognition.

The town of Mashpee, Massachusetts, was incorporated as a township in 1870 and common land allotted to Indians and non-Indians. Members of our tribe served in all leading roles in the town of Mashpee until 1964, serving the town in governance positions including selectman, as police and firemen, and as municipal officials. During this period, we opened to the public our traditions in hope that others could understand our culture as we had been forced to understand theirs. In 1920 we began the first community powwow, inviting citizens to participate in one of our most sacred customs. Over time, Massachusetts embraced our tribe and, most notably, recognized the Mashpee in statute. In fact, more recently, members of the Massachusetts Legislature submitted a joint resolution supporting federal recognition; "Massachusetts Legislature recommends that the Federal Government follow the Commonwealth's lead by formally recognizing the Mashpee Wampanoag Tribe."<sup>2</sup> And yet, federally we have been unable to gain recognition.

Currently, our main land base consists of 55 tribally leased acres in the town, located near the southwestern end of Cape Cod—a small sliver of the 16,500 acres originally provided by England's King George II and reaffirmed by Plymouth Colony. In the past we have struggled to survive on the Cape, and continue to do so today. As Cape development reshaped our community and the vacation-based economy boomed, the Mashpee tribal members did not benefit from the growth. One of the fastest growing communities in the State, population soared to almost 13,000 by 2000. Mashpee land continued to shrink and the challenge of retaining our identity grew.

We, as Mashpee, struggle every day to teach our Indian culture, while, concurrently teaching the mores and history of the United States. We find it hard to resolve our history on this land and our dedication to this country with the lack of recognition by the government we helped shape. Thus, in 1932 we began the federal recognition process and rejuvenated our efforts in the 1970s. We have pursued our status in court as well as through the Bureau of Indian Affairs.

The Wampanoags of Mashpee filed a letter of intent with the United States Department of the Interior's Bureau of Indian Affairs (BIA) in 1975. The BIA's response was prompt, stating the Mashpee were among the first tribes to be considered for only fourteen others had filed prior to that time. However, at the time the BIA had not adopted any regulations setting forth official criteria for federal recognition of tribes.

<sup>1</sup>Jedidah Morse, *A Report to the Secretary of War of the United States on Indian Affairs* (New Haven 1822).

<sup>2</sup>Joint Resolution Offered by State Representative Matthew C. Patrick, Representative Eric Turkington, Senator Robert O'Leary and Senator Therese Murray.

In 1978 the Bureau of Indian Affairs had solidified the criteria for achieving federal recognition. Although we understood the process was a long one, taking years, we initiated our formal petition. This process was not complete in full until 1990.

In 1990, after years of research, the Mashpee submitted its formal application, compiled without the aide of scholars due to our lack of resources. Our lack of scholarly or professional consulting in our application resulted in the BIA reply that there existed obvious deficiencies in our argument that the Wampanoag functioned as a tribal entity throughout the twentieth century. Consequently, under the leadership of Harvard-educated Tribal President, Russell Peters, we went back to work. In 1996 we resubmitted our application, supported by hundreds of pages of documentation and several boxes of vital records. Through the aid of lawyers, archaeologists, genealogists and researchers we meticulously documented our history in the Commonwealth. Less than a month after our second submission, the agency deemed the petition “ready for active consideration.”

Our petition has been ready for active consideration for seven years—since 1996. In that time, other tribes’ petitions have jumped our own for consideration. For example, the Muwekma, a tribe which was not on the ready list for consideration until 1998, has already received a ruling. The Department has also entered into settlements placing groups, including the Schaghticoke and Golden Hill Tribes, on expedited schedules for consideration. Moreover, the Department has jumped tribes such as the Pawcatuck Eastern Pequots and the Match-E-Be-Nash-She-Wish Band of Potawatomi Indians of Michigan ahead in order to consider their petition in tandem with similarly situated tribes. In contrast, the Mashpee continue to await a decision to move forward on our petition.

We have followed the rules and regulations put forth by the BIA and its predecessor, the War Department. Despite our best efforts to comply, we remain without any sense of when we can expect completion of our petition or whether the BIA will meet its obligations under the established procedures. Thus, we felt we had no choice but to proceed through the courts. We are presently seeking a court order to force the BIA to process our petition in a timely manner. We believe that we can establish that the delay in processing our petition has been egregiously unreasonable particularly in light of the other tribes whose petitions have been considered before our own.

In 2001, the U.S. District Court for the District of Columbia found the BIA had unreasonably delayed action on the Mashpee petition, and ordered the BIA to make a final finding on the petition by December 21, 2002. The District Court decision was appealed by the BIA to the U.S. Court of Appeals for the D.C. Circuit. In 2003, the Court of Appeals remanded the case back to the District Court “for a full and fresh evaluation of whether the delay Mashpee is encountering should be deemed “unreasonable.” Thus, the case is now pending once again before the District Court.

The Mashpee fully expect to be successful in demonstrating that the BIA has unreasonably delayed action on the Mashpee petition. The petition has been languishing at the BIA for seven years. Unless the Court or Congress intervenes, the Mashpee are likely to be waiting seven to fourteen more years before receiving a decision. After considering the facts surrounding the Department’s history of delay, its past actions, as well as the fundamental rights and privileges at stake in the tribal recognition process, we believe the District Court will again find that this delay—with no end in sight—is egregious and must be remedied.

Tribes which have won court decisions forcing the BIA to review their file have received negative rulings. My worry, as Tribal President, is that the Mashpee will be reprimanded in the form of a negative ruling. Seventeen tribes, winning a legally forced review, have all been denied federal recognition since 1980. Six of those had lower placement on the list for consideration. Five of the denied tribes sought litigation to no avail. Only the Schaghticoke of Connecticut won their suit and received favorable consideration.

It is our contention that the Department is adversarial at best. It is difficult for tribes to prove their case for recognition and, furthermore, there exists no readily available clarification of the rules and regulations to improve the process. The BIA only respond when something is wrong, rather than explaining their interpretation of the facts and application of the criteria.

It is not only possible for the consideration process to be improved, but also necessary. Experts have told us that the entire backlog of petitions could be completed in 2 years if the Bureau worked efficiently and with a view toward achieving equitable resolution of the various pending applications. The Mashpee application could be done in a few months given our long history of recognition by the Commonwealth of Massachusetts, substantial shared history with a tribe recognized by the Bureau, and other factors. Yet, the Bureau proceeds, year after year, with no enforced standards, no clear procedures, no commitment to completion and no effort to secure

resources to get the job done either internally or through a limited contractual program utilizing the top experts from across the country.

With the aid of scholars and the use of historical archives the time frame could be truncated considerably. Schools such as Rutgers, University of Virginia and University of Pennsylvania, with well-established and respected leaders in the field of Native studies, could review the applications of a number of tribes if each were assigned just two per year.

The lack of communication on behalf of the Bureau of Indian Affairs has been not only frustrating, but also insulting. We feel we have pursued our federal recognition through the proper channels and deserve due process of our claim. We have observed the Bureau's lack of ability to adhere to its rules and regulations; yet, the tribes seeking recognition are made to adhere to said regulations. Capriciously, the BIA has moved forward on the claims of tribes which had submitted their applications significantly after the Mashpee with little or no explanation.

Mr. Chairman, members of the committee, the denial of resolution on our petition carries real consequences for the members of my tribe. We are denied access to health care and many of the other federal benefits that recognition conveys. As a result, like many other native people, we suffer from diseases such as diabetes at levels substantially higher than most populations. More importantly, failure to complete our petition denies Mashpee tribal members the pride that only recognition of our tribe and its contributions to this country will convey.

Given our record of service to this country, the Mashpee people have earned and deserve better treatment. We have shared our land, shed our blood, and have grown together as part of this nation. Still, we struggle every day to live on the land that has always been our home. We struggle to preserve a history and language that is critical to the telling of the story of America. And, yet, we remain committed to the dream that we have so long been denied, and seek only that to which we are justly entitled.

As a representative of these hardworking, dedicated and proud Mashpee tribal members I respectfully submit these thoughts for your consideration. I would welcome the opportunity to discuss our tribe and our case for federal recognition further or furnish any requests for more information. I thank you for your time and consideration.

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The CHAIRMAN. Thank you.  
Mr. Gumbs?

**STATEMENT OF LANCE GUMBS, TRIBAL TRUSTEE,  
SHINNECOCK INDIAN TRIBE**

Mr. GUMBS. Mr. Chairman, Ranking Member Rahall, and members of the Resources Committee, thank you for inviting me to testify on this critical issue here today.

Today is the first time that a member of the Shinnecock Indian Nation has testified before Congress since the year 1900. In 1976 we were one of the first four tribes to file an application for Federal recognition. That was 25 years ago. Our recognition effort was stalled in part because we could not afford the high cost of completing our application. We were finally placed on the ready for active consideration list by the BIA on September 9, 2003. A month later we were informed that the Shinnecock petition is now 12th on the current list and according to BIA, "Without additional resources it may take the OFA up to 15 years to decide all completed applications." Thus, without a change to the current process, the Shinnecoeks will have languished in an unrecognized status for almost half-a-century.

The Shinnecock Indian Nation is one of the oldest continuously self-governing tribes in the country and was one of the first to have contact with the European settlers who sailed into Peconic Bay in 1640. From that time on, early settlers have deceived our ancestor

and illegally began taking our lands, which we repeatedly tried to prevent.

We continued our practice of self-governance until 1792 when New York State enacted a law entitled "An Act for the Benefit of the Shinnecock Tribe of Indians Residing in Suffolk County." This Act took away our traditional self-governance and established a trustee form of government. Our tribal election process has been recorded each April by the clerk of the town of Southampton from 1792 to the present.

Thus, it is well documented that the Shinnecock Indian Nation has had a continuous existence and contact with colonialists dating to the 1600s and formal relations with New York State since its creation. This history was reaffirmed in 1974 when the New York State Legislature called on Congress to grant our tribe Federal recognition.

In addition, a 1987 letter from the Secretary of the State of New York to trustees stated, "The Shinnecock tribe is one of the historic tribes of Long Island which still has tribal existence and occupies fee simple land generally within its aboriginal territory and it is clear that the Federal government deals with the Shinnecoeks as an Indian tribe."

You should also know that legal experts in the Federal recognition process from the Native American Rights Fund have stated that our application is one of the strongest documented petitions ever submitted to the OFA.

As you know, the GAO stated in November 2001, "The regulatory process is not equipped to respond in a timely manner; nor does the process impose effective time lines that create a sense of urgency." The GAO also noted that it takes the BIA an average of 15 years to resolve a petition in a system that was originally designed to take 2 years.

In response to the GAO report, then Assistant Secretary of Indian Affairs McCaleb testified before Congress in February 2002 that staff research positions remain vacant. That is completely unacceptable.

It seems each time Congress looks into this matter there is a flurry of activity at BIA but ultimately little is done and nothing changes. I hope this time this will be different.

What systems could be put in place to provide for additional funding and manpower to establish a reasonable time line for application decisions? For example, I am aware there is presently an expedited procedure to disapprove a petition. Why not develop a process that would expedite the approval of a petition if certain criteria are met, such as being continuously recognized by a state, as is the case with my tribe in New York State?

In addition, we oppose H.R. 3838 and I am appalled that the Federal government would contemplate using tax dollars to potentially oppose tribal recognition or related issues. No Federal funds have been made available to assist us or any tribe on recognition, yet some in Congress want to fund local governments to oppose us. This seems another unfair tactic to me.

In conclusion, please remember that we are among the first people of what is now New York State. Our roots have been traced back thousands of years and we have endured countless hardships

since that time. Our lands have been illegally taken and we have been forced to walk in two worlds as we fight assimilation and struggle to maintain our ancestral heritage.

At present we number 1,320 tribal members, of which 650 reside on or about 800 livable acres of our original lands. In many ways the injustices that we and our fellow indigenous people have endured for centuries continue today under this broken Federal recognition process. I am here today as a descendent of a proud and ancient people and as an elected leader who has a sacred responsibility to my nation and the unborn seventh generation. I would respectfully request that you do all in your power to fix this Federal recognition process and to correct the past indignities and to provide for our future for all time. Thank you.

[The prepared statement of Mr. Gumbs follows:]

**Statement of Lance A. Gumbs, Tribal Trustee, Shinnecock Indian Nation**

Mr. Chairman, Ranking Member Rahall and Members of the Resources Committee, thank you for holding this oversight hearing on Tribal Recognition and for inviting me to testify on behalf of the Shinnecock Indian Nation on this critical issue.

The committee will hear testimony today from other tribes who have struggled for many years with the bureaucratic morass known as the federal recognition process. Many of these tribes have waited decades while their application has languished at what is now the Office of Federal Acknowledgment or, "OFA."

Today is the first time that a member of the Shinnecock Indian Nation has testified before Congress since 1900. In 1978, we were one of the first four tribes to file an application for federal recognition—the completion of which was delayed for many years due to the cost involved. Twenty five years later, we were finally placed on the "Ready for Active Consideration" list by letter from the BIA dated September 9, 2003.

Then in an October 2003 letter, we were informed that the Shinnecock Petition is now 12th on the current list and, according to BIA, "without additional resources, it may take the OFA up to 15 years to decide all completed applications." Amazingly, it may take another 15 to 20 years before a final determination is made! Thus, without a change to the current OFA process, the Shinnecock will have languished in an unrecognized status for more than half a century—a time in which several generations have passed on—and it appears that the present and future generations will also have to wait before we, the original inhabitants of Eastern Long Island, receive acknowledgment from the federal government.

My nation, the Shinnecock Indian Nation, is one of the oldest, continuously self-governing tribes in the country and was one of the first to have contact with the European settlers when eight men, one woman and a child newly arrived from Lynn, Massachusetts, sailed into Peconic Bay in 1640. From there my Shinnecock ancestors led the group southward to what became the town of Southampton.

In 1640, early settlers deceived the inhabitants of the area and illegally began systematically taking our land, which we repeatedly tried in vain to prevent.

We continued our practice of self-governance until February 24, 1792, when the State of New York enacted a law titled "An Act for the benefit of the Shinnecock Tribe of Indians, residing in Suffolk County." This Act took away our form of self-governance and established a trusteeship form of government in which the minutes of our tribe and the elections of our trustees have been recorded each April by the Town of Southampton Clerk from 1792 to the present. During this time, the State of New York has attempted to illegally regulate our sovereignty by enacting numerous constitutional amendments, statutes, rules and regulations.

Thus, it is well-documented that we, the Shinnecock Indian Nation, have had a formal relationship with colonists dating to the 1600s and subsequently with the State of New York, which predates contact Western Tribes have had with the federal government by over 200 years. This history was reaffirmed in 1974 when the State Legislature of New York unanimously adopted a resolution calling on Congress to grant our tribe federal recognition. In addition, a 1987 letter from the Associate Counsel of the Secretary of State of New York to trustees on a zoning issue stated that "the Shinnecock Tribe is one of the historic tribes of Long Island which still has tribal existence and occupies fee simple land generally within its aboriginal

territory...(and)...it is clear that the federal government deals with the Shinnecocks as an Indian Tribe.”

Therefore, records show that we have had a continuous existence and relationship with colonial settlers and later governments for more than 400 years and formal relations with the State of New York for more than 200 years. Yet, because of a lack of resources and commitment by the government agency responsible for tribal recognition, our application will likely collect dust for at least two more decades before we are granted the recognition by the federal government that we rightly deserve.

You should also know that legal experts in the federal recognition process from the Native American Rights Fund, which have supported petitions for numerous tribes, have stated that our application is one of the strongest documented petitions ever submitted to the OFA.

As you know, the GAO issued a report in November 2001 stating that the “basis for the BIA’s...recognition decisions (are) not always clear “as to what level of evidence is sufficient to demonstrate a tribe’s continuous existence over time;” that the “regulatory process is not equipped to respond in a timely manner;” nor does the process “impose effective time lines that create a sense of urgency.” The GAO also recognized that it takes on average 15 years to resolve petitions in a system that was originally designed to take 2 years!

In response to the GAO report, then Assistant Secretary of Indian Affairs Neal A. McCaleb testified before the House Government and Reform Oversight Committee in February 2002 that then-BAR staff research positions remain unfilled. From our perspective, this is unacceptable.

I am certain that you will hear testimony later today that OFA and BIA are taking steps internally to address the GAO’s and Congress’s concerns. While these efforts are laudable, it seems a lot of noise and a flurry of activity occurs each time Congress looks into this matter and ultimately, little is done and nothing changes. I hope this time will be different. No matter what, it would appear that tribes currently “in the pipeline” will continue to wait—without recourse—for their federal status for years to come.

I would ask what mechanism exists or can be put in place to provide for additional funding and personnel resources in order to establish a reasonable time line for application decisions? For example, I am aware that there is presently an expedited procedure to disapprove a petition. Why not develop a similar process to provide for expedited approval of a petition if certain criterion, such as being continuously recognized by the state—as is the case with my tribe and the State of New York—are met?

In addition, we oppose H.R. 3838, legislation introduced by Members from Connecticut to provide federal grants of up to \$500,000 to offset costs to local governments facing acknowledgment, land trust or land claim issues. I am appalled that the federal government would contemplate using taxpayer dollars to potentially oppose tribal recognition or related issues. In fact, our recognition effort was stalled in part for the past twenty-five years because we could not afford the costs associated with completing our application. No federal funds have been made available to assist us, or any other tribe, with this costly and burdensome process, yet some in Congress want to fund local governments to oppose us? It would seem to me that there is a basic underlying issue of fairness here.

In conclusion, please remember that we are among the “First People” of what now is New York State. Our roots have been traced back thousands of years and even though the survival of that original colony can be credited to my people, we have endured countless indignities since that time. Our lands have been illegally taken and we have been forced to walk in two worlds as we fight assimilation and struggle to maintain our ancestral heritage. At present, we number 1,320 tribal members, of which 650 or so reside on about 800 acres of our original lands.

In many ways, the indignities that we and our fellow indigenous people have endured for centuries continue today under this broken federal recognition process. I am here today as the descendant of a proud and ancient people and also as an elected tribal leader who has a sacred responsibility to my people and the unborn “seventh generation”.

I would respectfully request that you do all that is in your power to help the first people of this land and our Nation by fixing the federal recognition process, not only to correct past injustices but to provide for our future, both tomorrow and for all time.

Thank you.

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The CHAIRMAN. Thank you.  
Ms. Cambra.

**STATEMENT OF ROSEMARY CAMBRA, CHAIRPERSON,  
MUWEKMA OHLONE INDIAN TRIBE, SAN FRANCISCO BAY  
AREA, CALIFORNIA**

Ms. CAMBRA. Good morning, Mr. Chairman and members of the Oversight Hearing Committee. My name is Rosemary Cambra and I am the Chairwoman for the Muwekma Tribe of San Francisco Bay region. I also Co-Chair the Recognition Task Force for the National Congress of American Indians. I have also worked on the Recognition Task Force for the congressionally created Advisory Council on California Indian Policy between 1994 through 1998.

The National Congress of American Indians (NCAI) allowed a created working group in the year 2000 and became an official National Congress of American Indian task force in the year 2001. Two Co-Chairs, the honorable Ken Hansen, who comes from a recognized tribe, and myself, Rosemary Cambra, from an unrecognized tribe. We are 100 percent supported by President Sue Maston and the honorable Tex Hall.

The NCAI task force has developed several goals and objectives that I want to share with you today. One is to support and develop reform measures either through legislation or regulatory reform or court intervention to ensure a timely, a fair and efficient recognition process, to demand full and meaningful consultation with both recognized and nonfederally recognized tribes in any proposed reform measures prior to the enactment.

The task force has heard testimony from many tribal groups expressing their frustration over the near insurmountable costs, in the millions, necessary to complete the BAR process, the enormous amount of time waiting in bureaucratic limbo, the nonresponsiveness by the negative attitudes of the BAR staff, and the obstacles and the regulations posed relative to the unique historical circumstances surrounding particular petitioning tribal groups.

The National Congress of American Indians is trying to help formulate suitable alternatives and take the recognition process out of the BIA and supports the creation of a commission, as specified in Senator Campbell's bill, S. 611. Other alternatives include legislation for those tribes that have demonstrated that they are previously recognized and who were never terminated by any Act of Congress, as is the case in the restoration of the Tlingit and Haida Tribes of Alaska in 1944—see H.R. 4180—or through Federal court systems.

The Advisory Council on Indian Policy of California was created through a passage of H.R. 2144 and was signed into law by President Bush in October of 1992. The ACCIP finalized their findings in a series of reports and submitted them in 1988, as mandated by Congress. In those ACCIP reports it was estimated that 80,000 California Indians, many of whom have BIA numbers, currently have no legal standing because their tribes, although never formally terminated by Congress, no longer appear on the list of federally acknowledged tribes. See H.R. 4180. Presently these tribal groups are no longer federally acknowledged by the Secretary of Interior due to the dereliction of duty, neglect, and gross mismanagement by the BIA.

Since the revisions of the acknowledgment regulations, 25 C.F.R., Part 83, in 1994, at least two of these California tribal groups, the

Muwekma Tribe and the Tsnungwe Council, have obtained formal determinations of previous unambiguous Federal recognition from the Office of Federal Acknowledgment.

In 1998, the ACCIP made the following statement with regard to several of the previously recognized tribes in California. "The Dorrington report provides evidence of previous Federal acknowledgment for modern-day petitioners who can establish their connection to historical bands identified therein. Clearly, the BIA recognized its trust obligations to these bands when it undertook, pursuant to the authority of the Homeless California Indian Acts and the Allotment Act, to determine their living conditions and their need for land. The fact that some were provided with land and others were not did not diminish that trust."

"Among those California Indian groups that have petitioned for Federal acknowledgment there are several who can trace their origins to one or more bands identified in the Dorrington report. The Muwekma Tribe is one whose connections to the Verona Band has been recently confirmed in a letter from BAR."

In that final report eight other tribes were also identified. These tribes are the Dunlap Band of Mono Indians, the Kern Valley Indian Community, the Tinoqui-Chalola Council, the American Indian Council of Mariposa County, the YOKo, the Shasta Nation, the Hayfork Band of Nor El-Muk Wintu Indians and the Tsnungwe Council.

In the year 2000 Congressman George Miller formulated the California Tribal Status Clarification Act. As a potential follow-up to the ACCIP recommendations, in Title II of that proposed Act the following tribal groups were included for restorations as previously recognized tribes: the Lower Lake Koi, the Muwekma Tribe, the Tsnungwe Council, the Dunlap Band of Mono Indians. That bill never got out of Committee.

The Muwekma Tribe was recognized under a series of Acts enacted by Congress beginning in the year 1906 to secure home sites for the landless Indians of California. Our tribe was identified in a special Indian census and we came known as the Verona Band of Alameda County. Our tribe fell under the jurisdiction of the Reno and later Sacramento agencies and through the dereliction of duty by Superintendent Dorrington, no land was ever purchased for our people.

Our men and women have served in the United States armed forces from World War I to the present conflict in Iraq. Our men are buried in the Golden Gate National Cemetery.

In March of 1989 the Muwekma Tribal Council submitted a letter of intent to petition, number 111, the Federal government for acknowledgment. The following month, on April 25, 1989, our tribal council received a response from the BIA Tribal Government Services acknowledging the receipt of our letter. In that letter the Acting Chief of Tribal Services informed our council that "Because of the significance and permanence of acknowledgment as a tribe, the process of evaluation is a lengthy and thorough one."

Mr. Chairman, I want to point out the word permanence. If I am not mistaken, permanence means something intended to last indefinitely, without change. When the Muwekma had obtained its determination of "previous unambiguous Federal recognition" in

1996, my tribal council had the audacity to ask the BIA the following question. Now if we are previously recognized, a recognized tribe, and have never been terminated by Congress, how then did we lose our status? The BIA could not and would not answer that question until we went to court.

In 1998, Muwekma was placed on ready status and we realized we were the only tribe with previous recognition. By our accounting, it would have taken approximately 20 more years before the BIA would look at our petition.

The tribe decided to sue the DOI and in 1999 submitted a complaint before the U.S. District Court in D.C., the result of which was the court found the BIA in violation of the Administrative Procedures Act and Justice Urbina stated that 2 years was too long to wait. This action challenged the BIA's control over this process and we have had to pay for this dearly. The overall Federal acknowledgment process, including the research for the petition, the trips to Washington, D.C., the lawsuit, has cost my tribe millions.

On September 9, 2002, the BAR denied extending the acknowledgment to my tribe, even though we had submitted evidence for each decade under each criteria. Although the BIA was predisposed to reject our petition, they never once refuted any evidence we submitted. They also failed, as promised in their response to Justice Urbina in our lawsuit, to explain how the tribe lost its acknowledgment status. We also discovered that they never referenced 87.6(d), reasonable likelihood of the facts when reviewing our petition.

The BIA did, however, conclude—

The CHAIRMAN. Ma'am, I am going to have to ask you to wrap it up on your oral testimony. We do have your entire written testimony that will be included in the record. I have tried to be lenient with the time but if I could ask you to wrap it up.

Ms. CAMBRA. Yes. I would just like to conclude that 100 percent of our living members today descend from a historical tribe. It has never been terminated and I am pleading from you today and the Committee members to grant my tribe justice, not to deny us justice but to grant us justice by proposing legislation to reaffirm my tribe. Thank you.

[The prepared statement of Ms. Cambra follows:]

**Statement of Rosemary Cambra, Chairwoman, Muwekma Ohlone Tribe**

Good Morning Mr. Chairman and Members of the Oversight Hearing:

Mr. Chairman, my name is Rosemary Cambra and I carry several badges of honor in Indian Country. I am the elected Chairwoman of the Muwekma Ohlone Tribe of the San Francisco Bay region since 1984 and I am the Co-Chair of the Recognition Task Force for the National Congress of American Indians (NCAI). I also had the good fortune to work on the Recognition Task Force for the Congressionally created Advisory Council on California Indian Policy between 1994 and 1998.

As you can tell by my commitment, Mr. Chairman, I am a person deeply concerned about the justice issues not only confronting my tribe, but the plethora of issues confronting the many disenfranchised historic tribes throughout this country that were either previously recognized or whom fell through the administrative cracks, thereby rending both groups as Unacknowledged by the Secretary of Interior today.

Today, I want to speak on four points. The first is my involvement as Co-Chair of the Recognition Task Force for NCAI. The second reports upon the implications of ACCIP reports submitted to the Congress in 1998. The third address to long, painful and costly efforts that my Tribe has been engaged in both prior to and during the Recognition Process and the adverse ramifications for my people. And lastly,

I want to discuss about the conflict of interest and violations under the Administrative Procedures Act by both BAR staff and DOI Legal Council.

*NCAI Recognition Task Force*

Since 2001, I have had the honor to serve as Co-Chair on the NCAI Recognition Task Force. My fellow Co-Chair is The Honorable Mr. Ken Hansen, Chairman of the Samish Tribe from the State of Washington, which suffered for over 20 years in the BAR Process. Together, Mr. Hansen and myself, along with a cadre of devoted Native Americans and non-Native professionals are working towards the development of a meaningful alternative to the arduous, disheartening, painful and obviously untenable Federal Recognition process as currently executed by the Office of Federal Acknowledgment (previously called the BAR).

During the course of these past several years the NCAI Task Force has heard the testimonies from many tribal groups expressing their frustration over the near insurmountable costs (in the millions) necessary to complete the BAR process, the enormous amount of time waiting in bureaucratic limbo, the nonresponsiveness by and negative attitudes of OFA/BAR staff, and the obstacles that the regulations pose relative to the unique historical circumstances surrounding that particular petitioning tribal group.

As a result of this effort, the NCAI is trying to help formulate suitable alternatives that takes the Recognition Process out of the BIA/OFA and supports the creation of a commission as expressed in the many bills considered since 1989 and specified in Senator Campbell's Bill S.B. 611. Other alternatives includes legislation for those tribes that have demonstrated that they were previously recognized and whom were never terminated by any Act of the Congress as in the case of the restoration of the Tlingit and Haida Tribes of Alaska in 1994 (see H.R. 4180) or through the Federal Court system.

As a result of the above, these issues hearken back to what Bud Shapard, the retired Bureau Chief of the Branch of Acknowledgment and Research had stated in his testimony before the Congress with regards to the then-proposed H.R. 3430 bill. Shapard stated that:

"...After fourteen years of trying to make the regulations which I drafted in 1978 work, I must conclude that they are fatally flawed and unworkable. They take too long to produce results. They are administratively too complicated. The decisions are subjective and are not necessarily accurate. The criteria are limited in scope and are not applicable to many of the petitioning groups which are in fact, viable Indian tribes; and

...To continue to operate under the present regulations or any legislative approximation will not resolve the question of unrecognized Indian tribes in this country.

The present regulations cannot be revised, fixed, patched, dabbled with, re-defined, clarified or administered differently to make them work. Additional money, staff, computer hardware, or contracts with outside organizations will not solve the problem. The problem lies within the regulations.

In short, the regulations should be scrapped in their entirety and replaced with a simpler, less burdensome, and more objective solution. They should be administered by an independent agency—

The essential element, the bottom line key to any solution to the question of serving unrecognized Indian tribes falls directly on the Congress. If there is to be any sort of permanent answer, Congress must spell out in unmistakable terms who the United States will serve as Indians and Indian tribes."

These words from former Branch Chief Shapard still ring today as they did 14 years ago and even with his testimony, little has changed in the Recognition process. Bills have been threatened to be introduced by concerned Congressional representatives to remove the process from the BIA, however, the burden on the tribes have not been alleviated, but instead have become increasingly more difficult and politicized.

*Advisory Council on California Indian Policy (ACCIP)*

As you know, the Advisory Council on California Indian Policy was created through the passage of H.R. 2144 and was signed into law by President Bush in October 1992. Under President Clinton, the ACCIP's council was in place by 1994, and having authorization to spend public moneys, the ACCIP held hearings around the state addressing the critical issues confronting the California Indians. The ACCIP finalized their findings in a series of reports, and submitted them in 1998, as mandated by the Congress. It has now been over five years since those reports

were issued to the Congress and since then, the Congress appears to be totally mute on any response in addressing those critical issues confronting California tribal groups.

In those ACCIP reports, it was estimated that approximately 80,000 California Indians (many of whom have BIA numbers) currently have no legal standing because their tribes, although never formally "Terminated" by the Congress, no longer appear on the List of Federally Acknowledged Tribes (see H.R. 4180). Presently, these historic tribal groups are no longer Federally Acknowledged by the Secretary of Interior due to dereliction of duty, neglect and gross mismanagement by the BIA. Since the revisions of the Acknowledgment regulations (25 CFR Part 83) in 1994, at least two of these California tribal groups, the Muwekma Ohlone Tribe and Tsnungwe Council, have obtained formal determinations of "previous unambiguous Federal recognition" from the Office of Federal Acknowledgment (OFA). In fact, since 1996 no other tribe has been issued such a determination, and, in fact, the OFA has decided to eliminate such determinations under the end of the review process. Previous Recognition was written into the revised regulations to supposedly lessen the burden of a tribe. With the elimination of previous recognition during the Technical Assistance phase, the OFA has ensured that tribes will indeed be once again burdened with their research.

In 1998, the ACCIP made the following statement with regards to several of the previously recognized tribes in California:

"The Dorrington report provides evidence of previous federal acknowledgment for modern-day petitioners who can establish their connection to the historic bands identified therein. Clearly, the BIA "recognized" its trust obligations to these Indian bands when it undertook—pursuant to the authority of the Homeless California Indian Acts and the Allotment Act "to determine their living conditions and their need for land. The fact that some were provided with land and others were not did not diminish that trust.

"Among those California Indian groups that have petitioned for federal acknowledgment, there are several who can trace their origins to one or more of the bands identified in the Dorrington report. The Muwekma Tribe is one whose connection to the Verona Band has been recently confirmed in a letter from the BAR..."

In that final report, eight other tribes were also identified: These tribes are the Dunlap Band of Mono Indians, Kern Valley Indian Community, Tinoqui-Chalola Council, American Indian Council of Mariposa County, Yokayo, Shasta Nation, Hayfork Band of Nor El-Muk Wintu Indians and Tsnungwe Council. In 2000, Congressman George Miller formulated the California Tribal Status Clarification Act. As a potential follow up to the ACCIP recommendations, in Title II of that proposed Act the following tribal groups were included for restorations as previously recognized tribes: Lower Lake Koi, Muwekma Ohlone Tribe, Tsnungwe Council and Dunlap Band of Mono Indians. That bill never got out of committee. Since then nothing has come out of the Congress that addresses the recognition issues confronting the previously recognized tribes of California, with the exception of the restoration of the Graton Rancheria in 2002.

*Muwekma Ohlone, A Previously Recognized Tribe and its Quest For Restoration*

Mr. Chairman, as you may already know, the Muwekma Ohlone Tribe was recognized under the series of Acts enacted by the Congress beginning in 1906 to secure homesites for the landless Indians of California. Our tribe was identified in special Indian censuses and we became known as the Verona Band of Alameda County. Our tribe fell under the jurisdiction of the Reno and later Sacramento agencies and through the dereliction of duty by Superintendent Dorrington, no land was ever purchased for our people. Nonetheless, we still maintained ourselves as a landless tribe. Our men and women have served in the United States Armed Forces from World War I to the present conflict in Iraq and our men are buried in the Golden Gate National Cemetery.

In March 1989, the Muwekma Tribal Council submitted a letter of intent to petition (#111) the Federal Government for acknowledgment. The following month on April 25, 1989, our Tribal Council received a response from the BIA Tribal Government Services acknowledging receipt of our letter.

In that letter, the Act Chief of Tribal Services informed our council that "Because of the significance and permanence of acknowledgment as a tribe, the process of evaluation is a lengthy and thorough one." Mr. Chairman, I want to point out the word "permanence." If I'm not mistaken permanence means something "intended to last indefinitely without change."

When Muwekma had obtained its determination of "Previous unambiguous Federal Recognition" in 1996, my Tribal Council had the audacity to ask the BIA the

following question. If we are a previously recognized tribe and we were never terminated by any Act of the Congress, how did we lose our "permanent" Recognized status? And the BIA could not and would not answer our question until we went to court. In 1998, Muwekma was placed on Ready Status and we realized that we were the only tribe with previous recognition. By our accounting, it would have taken the BIA approximately 20 or more years before they would look at our petition. The Tribe decided to sue the DOI and 1999 submitted a complaint before the U.S. District Court in D.C. The result was that the Court found the BIA in violation of APA and Justice Urbina stated that two years' wait was too long. This action challenged the BIA's control over this process and we have paid dearly for this. The overall federal acknowledgment process including the research for the petition, the trips to Washington, D.C. and the lawsuit has cost my tribe several millions of dollars.

On September 9, 2002, the OFA/BAR denied extending Acknowledgment to my tribe even though we had submitted evidence for each decade under each criterion. Although the BIA was predisposed to reject our petition, they never once refuted any of the evidence that we submitted. They also failed, as promised in their response to Justice Urbina in our lawsuit; to explain how our Tribe lost its Acknowledged status. Also, we discovered that they never referenced 87.6 (d) reasonable likelihood of the facts when reviewing our petition.

The BIA did however conclude that our 100% of members have demonstrated their descent from a historical tribe the Verona band of Alameda Council and that the Congress never terminated us.

When we started the Recognition process in 1984, there were around eighteen original members of the Verona Band alive, today there are only three. Today there are over 400 members enrolled in our tribe all of whom are directly descended from the Verona Band.

The Federal Acknowledgment Process clearly constitutes a war of attrition against the many disenfranchised tribal groups that have been and continue to be adversely impacted by the very Federal governmental entity that has had fiduciary responsibility over Indian tribes.

#### *BAR Staff and DOI Solicitor*

During the course of our interaction with the BIA since 1989, we found some of them to be completely evasive, fraudulent and outright hostile. For example, in November 1995, the BAR Branch Chief contacted us and we were told to come to Washington, D.C., that our letter for previous recognition would be issued. Five of us flew into Washington and when we met with this person, we were told that no such letter existed. We complained to AS-IA Ada Deer office, which apparently took action against this individual. This individual was one of the three BAR staff assigned to our petition.

During the period of our successful lawsuit against the BIA between 1999 and 2000, we discovered that the same people who bitterly opposed our Tribe in the lawsuit, were the same individuals who made the Final Determination against the Tribe. One of these people is Scott Keep, Solicitor from Interior. Presently we have been waiting for Mr. Keep to respond to our FOIA requests since the beginning of last year. We are also waiting for him to respond to Principal Deputy Aurene Martin's request for a possible alternative review of our charted petition.

On November 7, 2001, the BAR held an "On-The-Record Technical Assistance Meeting" with representatives from my tribe. During the course of the Technical Assistance meeting one of our consultants inquired if the 1997-1998 ACCIP reports "had a bearing" on the BAR decision making process. The response by one of the BAR staff was:

"Well, if you want us to consider the report, you really should submit it for the record.—That makes it part of the record. And, furthermore, when you submit it as part of the record, you can give us an explanation of how you think it applies. And the we can consider that argument and your take on how the report applies." (On-The-Record Technical Assistance Meeting, page 52)

In the Final Determination the BAR staff determined to circumvent such considerations by stating:

"Given these conclusions of the Proposed Finding under criterion 83.7(a), that the period prior to 1927 is outside the period to be evaluated and that the petitioner met this criterion during the period after 1985, it is not necessary to respond to the petitioner's comments and arguments for those two time periods. Neither the petitioner nor any third party challenged the conclusions of the Proposed Finding that the petitioner met the criterion before 1927 and after 1985. Therefore, the evaluation of criterion 83.7(a) for this

Final Determination will review the evidence and arguments for the years between 1927 and 1985.” (FD 2002 page 9)

As a result, the BAR staff avoiding reviewing and considering numerous amounts of crucial evidence that Muwekma submitted for its Final Determination. The documents that the BAR staff decided to disregard were those that dated after 1985 and before 1931. These documents included the ACCIP reports, the GAO Report of November 2001, Congressional legislation, the BAR’s own report on Recognition in California, and also the Bureau’s correspondences from 1918 to 1931, that demonstrated Superintendent Dorrington’s dereliction of duty and disregard for Office policies and the need to purchase homesites for Muwekma and other California Tribal bands).

Based upon the above statement, the (is fact, most, if not all) Technical Assistance provided by the BAR was as useless as the treaties that were made between Indian Nations and the Government. On the one hand the BAR suggests to us to submit reports and documents for “the record,” and on the other hand, although they didn’t inform us during the Technical Assistance meeting, that anything submitted as evidence prior to 1927 or after 1985 will not be considered in the Final Determination. This is Technical Assistance par excellence!

Furthermore, by circumventing any evidence dating 1985 and later, the BAR simply and unilaterally decided that not only were they not going to consider the merits contained in the ACCIP reports, but they would not consider any of the Congressional legislation (e.g., H.R. 4180), or the BAR’s own precedents and Working Paper on California Acknowledgment, or the GOA report, or even the BAR’s own directive to the ACCIP with regards to Muwekma’s previous Recognition.

#### *Solutions*

The Muwekma Ohlone Tribe supports alternatives to the current process. Clearly new directions such as pilot projects utilizing the expertise of University or Museum based scholars could be immediately implemented that are cost effect and non-partisan.

Finally, in the Tribe’s Final Determination decision the BAR staff wrote:

“When a Final Determination is negative, the regulations direct that the petitioner be informed of alternatives to this administrative process for achieving the status of a federally recognized tribe, or other means by which the petitioner’s members may become eligible for services and benefits as Indians (25 CFR 83.10(n)).—In addition, Congress may consider taking legislative action to recognize petitioners which do not meet the specific requirements of the acknowledgment regulations but, nevertheless, have merit.” (Pages 7-8) [Emphasis added.]

I am requesting of you, Mr. Chairman, to take this last BAR recommendation to heart and please introduce legislation during this session of Congress that restores the Acknowledged status to my tribe. My Elders are dying and our people just cannot afford to go through such costly litigation in order to secure their rights as a tribe.

Thank you for considering these pressing issues.

The CHAIRMAN. Thank you.  
Mr. Taylor?

#### **STATEMENT OF WILFORD “LONGHAIR” TAYLOR, TRIBAL CHIEF, MOWA BAND OF CHOCTAW INDIANS**

Mr. TAYLOR. Mr. Chairman and Committee members, good morning. My name is Wilford Longhair Taylor and I am the elected Tribal Chief of the MOWA Band of Choctaw Indians. Thank you for granting me the opportunity to testify on the Federal recognition acknowledgment process by the Bureau of Indian Affairs, the BIA.

The Choctaw Indians of Mobile and Washington Counties, Alabama, MOWA, are descendants of American Indians who occupied this territory prior to European discovery. We selected the acronym MOWA to represent our modern-day geographic area. We live in an area transacted by the county line between south Washington and north Mobile Counties. Although the State of Alabama legislature

officially recognized the MOWA Choctaw Tribe in 1979, and an official recognition proposal was approved by a U.S. Senate Committee in 1991, the Bureau of Indians Affairs later denied our petition for Federal acknowledgment.

The criteria for Federal acknowledgment which a petitioning group must satisfy were designed to provide a uniform and objective view. However, the immense latitude granted to and demonstrated by the agency in its evaluation of the evidence submitted has clearly yielded arbitrary and subjective decisions. One example is the radically different standards applied in evaluating the petitions of the MOWA Choctaw and the Jena Band. The oral history of our venerated elders were discounted as allegations while the oral histories of the Jena Choctaws were described as even more reliable than written records. Identical types of written documentation that we were required to produce for BIA were characterized as an impossible and unreasonable expectation for the Jena Choctaws. Our petitions were evaluated within just months of each other. In all fairness, the same criteria should have been applied.

The Federal recognition process was designed to take 2 years but in reality, the process often places a petitioning group in an endless loop of research and expenses that for most tribes is overwhelming. It took 7 years for our initial petition to be processed. It took 10 years for the final determination report. If you include the years needed to undertake the research the BIA requires for documentation and our continued fight today, my people are in the 23rd year of this process.

Although it is obviously not practical for me to present to you today my tribe's entire struggle with the recognition process, it is spelled out in detail in my written testimony. Therefore please allow me to share with you just a few comments of independent experts from across the country regarding our failed effort to achieve recognition.

In the words of the well-known and renowned Native American legal scholar and member of the Standing Rock Sioux, Professor Vine Deloria, Jr. writes, "The Federal acknowledgment process today is confused, unfair, and riddled with inconsistencies. Much of the confusion is due to the insistence that Indian communities meet strange criteria which, if applied to all Indian nations when they sought to confirm a Federal relationship, would have disqualified the vast majority of presently recognized groups."

He further writes, "The MOWA Choctaws have a typical profile for Southeastern Indians. Their credentials are solid and the historical data that identifies them as Indians extends back to the days when they were integral villages in the Choctaw Nation. The fragmentation of the Five Civilized Tribes before, during, and after removal makes their history a fascinating story of persistence and survival but certainly does not eliminate them from the groups of people that should rightfully be recognized as Indians."

Dr. Richard W. Stoffle, Ph.D., an anthropologist from the University of Arizona, wrote to me in response to the BIA's decision to deny recognition, saying, "I can only express my deepest disappointment in the BIA's decision. As someone who has reviewed your petition at length and has talked with your elders, there is no just argument against recognizing your status as an American

Indian tribe. After working for 27 years with more than 80 American Indian tribes, it is my considered opinion that the MOWA Choctaw people are a persistent tribal society. It is difficult for me to understand how that point could have been missed by the BIA.”

Dr. Kenneth York, Ph.D., a member of the Mississippi Band of Choctaw Indians, after critical review of our evidence writes, “It is my belief as a member of the MBCI that members of the MOWA Band are decedents of the Great Choctaw Nation which was disbanded by the U.S. Government during the Indian Removal Period. It is my professional opinion that the MOWA Band has provided the documentation regarding the history, culture and ancestral relationship as well, if not better, as any tribal petition in recent years.”

Dr. Loretta A. Cormier, Ph.D. and anthropologist at the University of Alabama at Birmingham, recently wrote, “As you are well aware, I have had the opportunity to work among the MOWA Choctaws over the course of the last 3 years and have researched your cultural history. Let me say unequivocally that I have no doubt that the MOWA Choctaws are an American Indian community. I am astounded by the BIA’s denial of Federal recognition and find the technical report they prepared to be seriously flawed in terms of its historical, cultural and even logical analysis of MOWA Choctaw history.”

The work and words of these individuals, and many other informed professionals, should provide ample support to prove that the BIA’s recognition process is flawed and riddled with inconsistencies. The Bureau of Indian Affairs, as a Federal government agency, has a duty to make decisions on a rational basis which are neither arbitrary nor capricious. I find it quite disturbing that the BIA can selectively pick and choose the evidence it uses to deny a petition and, at the same time, not even consider or, in fact, totally and completely disregard stronger, more solid compelling evidence that it normally uses as support to acknowledge other tribes.

The Federal acknowledgment process was originally designed to be fair, objective and neutral. Today the process is dehumanizing and insulting. As American Indians, we are the only people in this country who have to prove to the United States government who we are. I strongly believe that as long as the BIA has the power to serve as judge, advocate and adversary, the issues we discuss today will never be resolved and the recognition process will continue to be widely held in contempt. Thank you.

[The prepared statement of Mr. Taylor follows:]

**Statement of Wilford “Longhair” Taylor, Tribal Chief,  
MOWA Band of Choctaw Indians**

Mr. Chairman and committee members: good morning. My name is Wilford “Longhair” Taylor and I am the elected tribal chief of the MOWA Band of Choctaw Indians. Thank you for granting me the opportunity to testify on the federal recognition and acknowledgment process by the Bureau of Indian Affairs (BIA).

The Choctaw Indians of Mobile and Washington Counties, Alabama, (MOWA) are the descendants of American Indians who occupied this territory prior to European discovery. We selected the acronym, MOWA, to represent our modern day geographic location. We live in an area transected by the county line between south Washington and north Mobile Counties. Although the State of Alabama legislature officially recognized the MOWA Choctaw as a tribe in 1979, and an official recognition proposal was approved by a U.S. Senate committee in 1991, the Bureau of Indian Affairs later denied our petition for Federal acknowledgment.

The criteria for Federal acknowledgment which a petitioning group must satisfy were designed to provide a uniform and objective review. However, the immense latitude granted to and demonstrated by the agency in its evaluation of the evidence submitted has clearly yielded arbitrary and subjective decisions. One example is the radically different standards applied in evaluating the petitions of the MOWA Choctaw and the Jena Choctaw. The oral histories of our venerated elders were discounted as "allegations" while the oral histories of the Jena Choctaw were described as even more reliable than written records. Identical types of written documentation that we were required to produce for BIA were characterized as an impossible and unreasonable expectation for the Jena Choctaw. Our petitions were evaluated within just months of each other. In all fairness, the same criteria should have been applied.

The Federal recognition process was designed to take two years, but in reality, the process often places a petitioning group in an endless "loop" of research and expense that, for most tribes, is overwhelming. It took seven years for our initial petition to be processed. It took ten years for the final determination report. If you include the years needed to undertake the research the BIA requires for documentation and our continued fight today, my people are in the twenty-third year of this process.

Although it is obviously not practical for me to present to you today my tribe's entire struggle with the recognition process, it is spelled out in detail in my written testimony. Therefore, please allow me to share with you just a few comments of independent experts from across the country regarding our failed effort to achieve recognition.

In the words of the well-known and renowned Native American legal scholar and member of the Standing Rock Sioux, Professor Vine Deloria, Jr., writes "The Federal acknowledgment process today is confused, unfair, and riddled with inconsistencies. Much of the confusion is due to the insistence that Indian communities meet strange criteria which, if applied to all Indian nations when they sought to confirm a Federal relationship, would have disqualified the vast majority of presently recognized groups. He further writes, "The MOWA Choctaws have a typical profile for Southeastern Indians. Their credentials are solid and the historical data that identifies them as Indians extends back to the days when they were integral villages in the Choctaw Nation...the fragmentation of the Five Civilized Tribes before, during and after Removal makes their history a fascinating story of persistence and survival but certainly does not eliminate them from the groups of people that should rightfully be recognized as Indians."

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The work and words of these individuals, and many other informed professionals, should provide ample support to prove that the BIA's recognition process is flawed and riddled with inconsistencies. The Bureau of Indian Affairs, as a federal governmental agency, has a duty to make decisions on a rational basis, which are neither arbitrary nor capricious. I find it quite disturbing that the BIA can selectively "pick and choose" the evidence it uses to deny a petition and, at the same time, not even consider or, in fact, totally and completely disregard stronger, more solid and compelling evidence that it normally uses as support to acknowledge other tribes.

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Thank you.

*Introduction: The Choctaw of Mobile and Washington Counties, Alabama*

We, the MOWA Band of Choctaw, are a community comprised of the ancestors of American Indians who escaped the 1830 Indian removal act and remained in our traditional homeland in southwest Alabama. We chose the acronym "MOWA" to refer to our location in the area bordering Mobile and Washington Counties.

Our credentials are solid and the historical data that identifies us as Indians extends back to the days when we were integral villages in the Choctaw Nation. Few people realize that not all people were removed when the Army marched our nation to the West. Our ancestors have been documented as a distinct American Indian community since shortly after the 1830 Indian removal act. In 1835, a government Indian School was built in Mount Vernon, Alabama, and described in the Library of Congress Historic Building Survey as built for Indians by Indian labor (Russell 1935 [1835]). Census records, birth certificates, sworn court testimony, government correspondence, military records, and anthropological descriptions provide written documentation of our continuous history in the area. However, the strongest evidence of our American Indian ancestry is not found in written documents, it is found in our lives. Our ancestors passed to us our Indian identity and traditions, persevering and preserving our heritage despite a long history of injustice and persecution.

Our ancestors essentially became fugitives in their own homeland. After the Indian Removal Act of 1830, they retreated into heavily forested, marginally desirable land along the Tombigbee River, married amongst themselves, and maintained a separate community. It is critical to understanding the experience of our ancestors to know that such segregation was not only due to the amalgamation of our Indian ancestors who escaped removal: it was an imposed isolation. Isolation helped to spare our people from persecution, although not completely. Elders describe atrocities against our ancestors such as being hunted down and imprisoned; killed, dismembered and stuffed in a gopher hole; or taken West in periodic Indian round-ups by government-paid contractors. These types of events are well-documented in the literature (e.g., Debo 1972 [1934] and Forman 1982 [1932], Matte 2002).

Non-Indian settlers to the area applied the term "Cajun" to our ancestors' community, a term borrowed from a nickname given to French-Canadian immigrants to the Gulf Coast area originating in Acadia, which our ancestors clearly were not. We consider the term a pejorative, but nevertheless, this is the term often used to document our community in the literature, including a 1948 Smithsonian Institute description of the Cajun Indians of southwest Alabama (Gilbert 1948:144).

Unfortunately, such erroneous descriptions of our culture have been the rule rather than the exception in our history. The ultimate irony is that the very isolation and persecution contributing to our bonding together as an Indian community have, even today, impeded our ability to receive acknowledgment that we are who we say we are. We were denied federal recognition primarily on the basis that the BAR found insufficient written documentation by outsiders to substantiate the reality of our history and our lives.

The second section of this document entails a critique of the BAR denial of federal recognition for our people. At this juncture, it is important to make the point that we did provide the BAR with substantial documentation of the type that is acceptable to them in these matters. We maintain that we provided clear evidence to them that should have been more than sufficient to prove by their standards that we are who we are.

In brief, the BAR accepts that Indians remained in the area inhabited by the MOWA Choctaw today after the 1830 Removal Act. They also accept that our MOWA Choctaw community demonstrates clear ancestry from late 19th century core ancestors with Indian traditions. The crux of the denial is that our ancestors from the mid to late 19th century who lived as a separate community with Indian traditions cannot provide a level of documentation of Indian ancestry written by the non-Indian peoples who persecuted them that is considered acceptable to the BAR. Logically, it defies reason that non-Indians of that time period would desire to voluntarily adopt Indian traditions that would only invite persecution. Even if such self-destructive individuals were to exist, then one would have to presume that an-

other, as of yet unidentified, Indian community existed in the MOWA Choctaw area from whom these non-Indians would be able to acquire foreign traditions. This is a bizarre and irrational scenario. Our MOWA Choctaw ancestors had Indian traditions because they were Indian.

Our people are, and have always been, a self-governing community following traditional ways of our ancestors and not accommodating ourselves to the rigid institutional organization that the majority of the nation adopted. Traditional ways, our people rightly feel, are more precise and enable the community to meet the needs of our people whereas the institutional process serves only people who fit into rigidly defined categories of assistance. Thus, the political and social profile of our MOWA Band of Choctaw Indians does not always fit into the neat and narrow categories required by the federal acknowledgment process. Although the Alabama legislature officially recognized the MOWA Choctaw as a tribe in 1979, as did a U.S. Senate committee in 1991, the Bureau of Indian Affairs denied our petition. Nevertheless, as our revered elder, Mr. Leon Taylor stated to Congress in 1985,

“Today, I am Choctaw. My mother was Choctaw. My Grandfather was Choctaw. Tomorrow, I will still be Choctaw.”

This abstract and time line form the basis of the petitions and supporting documents submitted to the Bureau of Indian Affairs-Branch of Acknowledgment and Research in 1988, 1991, and 1996. A more in-depth treatment of the material summarized here can be found in Jacqueline Matte’s, *They Say the Wind is Red: The Alabama Choctaw—Lost in Their Own Land* (2002, New South Books).

#### *Critique of the BAR Technical Report*

The following is a summary critique of the BAR Technical Report denying our federal recognition. Our critique addresses four key problem areas we see in their evaluation, 1) dismissal of written documents, 2) arbitrariness in evaluating oral history, 3) failure to appreciate the historical context of the MOWA Choctaw experience, and 4) procedural errors. It should be duly noted that space limitations for this testimony do not allow us to present to the Committee on Resources a complete description of the factual errors, erroneous interpretations, and inconsistencies in the BAR technical report of our people. However, we are fully prepared to present more extensive evidence and inaccuracies of the BAR report and, more extensive documentation demonstrating that we are a legitimate American Indian people.

#### *1. The BAR Discounted Written Documents Presented as Evidence of MOWA Choctaw American Indian Ancestry*

##### **a. The Bar Discounted Written Documents of MOWA Choctaw Antebellum Ancestry**

We presented extensive written documentation to the BAR of the continuous settlement of our people in the region we inhabit today from 1813 until the present. Included were letters of correspondence to representatives of the U.S. government between 1832 and 1859, which provide a continuous record of our presence for a time period that spans approximately 30 years after the 1830 Indian removal act (Exhibit 1: Choctaw Time line). In our original petition, we described the segregation of our ancestors from the surrounding community in that they were not permitted to attend either “white” or “black” schools, and built their own. A record of the school exists in the Library of Congress that verifies that the school was built in 1835 “by Indians and for Indians” (Exhibit 2: Original Catalogue Record of Indian School). We presented to the BAR documentation of 120 records in the U.S. General Land Office from 1836 to 1936 of homesteads showing land occupation by the same names listed on the 1910 census who were described as mixed blood Indians (see Exhibit 1 for references for census data and Database of Land Records, 1836-1936). These records demonstrate 100 years of our continued occupation in the area from shortly after the Indian Removal Act until nearly the middle of the 20th century. We also provided the evidence of an 1855 “Census Roll of the Choctaw Indians,” which describes Indians living in our present-day area as well as evidence of a “Choctaw Regiment” in Mobile County during the Civil War (see Exhibit 1: references for the Cooper Roll 1855, showing Choctaws in Mobile, Alabama, and the 1862 Choctaw Regiment of Mobile, Alabama.)

The evidence above contradicts the conclusion of the BAR which states, “the petitioner’s attempt to demonstrate the existence of a continuing American Indian tribal entity, or community, in southwestern Alabama in the first half of the nineteenth century was not documented” (Technical Report: MOWA Band of Choctaw 1994:72 [cited hereafter as TR-MOWA]).

Not only did we provide such evidence, it should be duly noted that BIA regulations under which the final determination was made do not require evidence of ancestry prior to 1900. The BAR required a burden of proof in violation of BIA stand-

ards and failed to acknowledge documentary evidence that indeed met the appropriate standard they imposed upon us.

In addition, although the BAR relied most heavily on genealogical historical records, support for the material we presented is found in genetic research published in professional medical journals that characterize our contemporary MOWA Choctaw people as a community of Native American ancestry that have intermarried and been genetically isolated since antebellum times. Our community has been a subject of study by medical geneticists from the University of South Alabama due to the high frequency of Marinesco-Sjorgren syndrome, an extremely rare autosomal recessive genetic disorder. The community of these patients was described as,

“each patient was a member of an inbred population living in a well-defined area of South-Western Alabama. The ancestry of this population is Indian, with White and Black admixture” (Superneau et al. 1987:9); and

“all come from a remote, rural area of southwest Alabama that has been virtually isolated since before the Civil War” (Brogdon, Snow, and Williams 1996:461-462).

**b. The BAR Discounted 1910 U.S. Census Evidence of American Indian Ancestry**

The 1910 United States Census for Washington County, Alabama, contained marginal notes which identify MOWA Choctaw families in the Fairford and Malcolm precincts of Washington County. The original identification of Indian was written over with the word “mixed.” The interlineations were written by an official taker of the United States Census. The note explains: “These people entered as mixed are composed of Indian, of Spanish, some of them French, some with White, and some with Negro. The prevailing habits are Indian. Called “Cajun” (see Exhibit 1 references to 1910 Census Identifying Indian People and Communities in Washington County).

Despite this direct proof, the BAR concludes, “nor were the core ancestors identified as an Indian entity on the 1910 U.S. Census.” It should also be noted that the core ancestors were dead by the time of the 1910 census, and these would have been descendants of our core ancestors. Moreover, the BAR concluded that “none of the primary records demonstrate that the petitioner’s members descend from a historical tribe or tribes which combined to form an autonomous political entity” (Summary under the Criteria and Evidence for Final determination of the MOWA 1997:5 [cited hereafter as SCFD-MOWA]). We offered the report of Professor Richard Stoffle (1996), entitled, “A Persistent People: A Rapid Ethnographic Assessment of MOWA Choctaw Federal Acknowledgment Petition.” Stoffle, using an anthropological approach, concluded that we were operating as an Indian community at the time of the Treaty of Dancing Rabbit Creek in 1830.

Rather than respond to the substantive conclusions reached by Stoffle, the BAR suggested that we did not demonstrate that our core ancestors descended from persons listed on the Dawes Rolls. However, when the Curtis Act of 1898 directed the commission to enroll the Mississippi Choctaw (Mann 2003:293), some of our ancestors did make application for enrollment. They were rejected because they had no written documents to verify their Indian identity and were labeled “half-bloods.” Most of the applicants rejected lived in Alabama and traced their descendancy through Lofton and Byrd’s lineage. This information was submitted to the BAR. The basis for the exclusion from the list was not that the applicants were not Choctaw. Indeed they could speak the Choctaw language. No logical reason exists for anyone to speak the Choctaw language in 1898 in Alabama if they were not Choctaw. They were not permitted on the list because they could not supply written documentation and were deemed “half-bloods.” The BAR ignored this information.

In addition to the 1910 census, the 1920 census identified our people as “French and Indian” (see Exhibit 1 reference to the 1920 Census Identifying Indians in Washington County). We have also recently found Birth and Death Certificates from around this time period identifying our people as Indian (see Exhibit 1 references to Birth and Death Certificates Identifying MOWA Choctaw as “Indian”). Moreover, the 2000 U.S. census is unequivocal in its description of our people as Indian. In its “Race List Codes,” the MOWA Choctaw Indians are listed under the category “American Indian,” subcategory “Choctaw,” subcategory “C12-Mowa Band of Choctaw” (Exhibit 4: Federal Agencies Recognizing the MOWA Choctaw, U.S. Department of Commerce). We agree with the contemporary classification of our people as American Indian by the United States Federal government, and so should the BAR.

**c. The BAR Discounted Sworn Testimony Related to the American Indian Ancestry of Core MOWA Choctaw Families**

The MOWA Choctaws submitted minutes from “The State v. John Goodman and Jenny Reed,” dated 1881-1882 (Washington County, Alabama Circuit Court 1881-1882). We also presented a 1918 miscegenation case, “The State of Alabama v. Percy Reed and Helen Corkins [aka Calkins]” (See Exhibit 1 reference to 1920 Miscegenation Case of Percy Reed and Helen Caulkins). The BAR ignored direct evidence of Indian ancestry which arose out of these hearings and also intentionally refused to draw inferential conclusions from the trials.

First, we used the minutes from “The State v. John Goodman and Jenny Reed” to support the claim that Rose Gaines was half-Choctaw and half-white. The minutes indicated that Alabama prosecuted John Goodman and Jenny Reed under the miscegenation acts. The BAR concluded that the not-guilty verdict was non-supportive of Choctaw heritage. The BAR discredited sworn testimony of witnesses who stated that Rose was the daughter of Young Gaines and a Choctaw woman. Additionally, the BAR questioned the reference to burned records in our 1988 petition, “Initially, the petitioner claimed that “these [1880’s] court records were burned” (FD-MOWA 1997:13). The 1988 petition was based on information available at the time. That the BAR would castigate us for dutifully supplementing its submission is inconceivable, unprofessional, and insulting. We did not know that the records existed because we were told in 1988 that some of the courthouse records had burned in 1907. However, some of the records had been moved and were later found in a storage closet in Chatom, Alabama.

At the trial involving John Goodman and Jenny Reed, testimony was offered that Jenny was American Indian. The BAR ignored this testimony, which was provided in prior submissions to the BAR. They took issue with the fact that Mr. Sullivan, the foreman of the jury, had testified similarly in the 1920’s. However, that does not discredit the testimony, rather it supports the conclusion of Indian descent. The fact that the jury found the defendants not guilty in the Goodman and Reed case is strong proof that Jenny Reed was of Native American rather than African descent. This is the only defense that would have worked in the jury trial. The BAR completely and literally ignored this conclusion.

In addition, the specific reasons outlined by the BAR for not accepting this conclusion are specious. First, the BAR says that the testimony was given at a time greatly removed from the events being discussed. The BAR is acting as a super-jury in determining the Reed and Goodman case again. The original jury, hearing the evidence and seeing the witnesses, concluded that the defendants were not guilty of miscegenation. The only reasonable conclusion for that verdict can be that Jenny Reed was Native American. The credibility and weight accorded to witnesses’ testimony is to be decided by the jury in that case and not decided by a reviewing agency some 115 years after the court hearing. The BAR does not, and should not, sit as a super-reviewing agency of previous court decisions. Finally, the BAR impugns the testimony of George Sullivan because he was 74 years old. Again, this is a matter which was weighed and determined by the jury hearing that case. The BAR does not have legitimate basis for declining to believe sworn testimony evaluated by a jury.

We also presented the 1918 case of “Alabama v. Percy Reed and Helen Corkins [Calkins].” Percy was the son of Reuben Reed and the grandson of Daniel and Rose Reed. Percy Reed was originally found guilty of miscegenation; however, the Alabama Court of Appeals reversed that verdict and concluded that the evidence presented at the trial was hearsay and that the trial Judge should have directed a verdict in favor of the defendants. The Court of Appeals concluded: “Judgment entry that court ascertained ‘that defendant is of Indian or Spanish origin’ significant that state failed to make a case of miscegenation (State of Alabama 1918),” the BAR did not accord this judicial conclusion any weight at all. In fact, the BAR ignored this direct evidence of Native American descent.

**2. *The BAR Demonstrated Bias, Arbitrariness, and Inconsistency in Evaluating MOWA Choctaw Oral History***

Recording of oral histories is a key research methodology for both historians and anthropologists. It is also the traditional Native American means of transmitting family history and cultural traditions from generation to generation. Glaring problems exist in the BAR evaluation of information from oral history we provided to them. The BAR is inconsistent and arbitrary in its utilization of oral history information as evidence of Native American ancestry. Oral history information substantiating written documents is dismissed. The BAR reviewed the petitions of the MOWA Band of Choctaw and the Jena Band of Choctaw within several months of each other. However, similar types of oral history information were deemed superior

to written documents for the Jena Choctaw, but judged as inadequate evidence for the MOWA Choctaw. Second, the requirement for extensive antebellum documentation of genealogy is an unreasonable expectation for a non-literate people whose cultural norms are based on preserving cultural heritage through oral tradition.

**a. The BAR Discounted Oral History Information Substantiating Written Documents**

The BAR has completely dismissed our oral history as “vague and unreliable when tested.” The BAR refused to accept oral history “until verified from contemporary documentary sources.” As demonstrated with Nancy Fisher, contemporary documentary sources have been provided that have, for reasons beyond being described as frivolous, been discounted. The BAR concludes that oral traditions cannot be accepted at face value and must be evaluated where there are accuracy and reliability. The BAR refers to Rubicam, “consider and analyze all of the facts, regardless of the source, whether tradition or an official record, then decide if you should accept or reject those facts” (Rubicam 1980:48).

The BAR has ignored its own advice and refused to consider and analyze all of the facts. We have urged, on more than one occasion, that the strong common thread of references to Indian heritage, the 180 year-old story of our Indian ancestor who swam the river with the baby on her back and self-identification has to be given weight. Further support for the veracity of our oral tradition has been found in an 1816 Washington, D.C., newspaper which recounts the incident (Marschalk 1816). A transcript of the newspaper account is provided in Exhibit 3.

Jacqueline Matte has served as the primary historical researcher for our people. Over a twenty-year period, she collected every reference, published or unpublished, related to our ancestors. Each piece of this information has been sent to the BAR, some of it repeatedly, in the anticipation that gaps in chronology, incomplete documentation, and unanswered questions could be expected for a nonliterate people. Those gaps, however, were used offensively by the BAR to deny recognition rather than to leave open the analysis for further consideration.

While we do not discredit the value of genealogical records, the BAR has not taken into account that our earliest ancestors were not literate in English. It is unreasonable to expect that they would have kept extensive genealogical records of themselves in a language they did not know. Vine Deloria, Jr., (Lakota Sioux, Professor Emeritus at the University of Colorado) has commented on this very problem in the federal recognition process, and specifically in reference to the MOWA Choctaw stating,

“Much of the confusion is due to the insistence that Indian communities meet criteria which, if it had been applied in the past, would have disqualified the vast majority of presently recognized groups” (Deloria 2002:10).

He refers to the “catch-22” in the federal recognition process. If our ancestors had assimilated, they would have been more likely to have left the types of written documentation the BAR requires to demonstrate Indian ancestry. However, such assimilation, by the BAR rules, would disqualify a community as a legitimate Indian tribe.

A recently discovered 1960 letter written by U.S. Representative Frank Boykin also demonstrates the veracity of our oral history. An excerpt follows below:

I’ll take care of him when he gets here, because we have a lot of wild Indians. You will remember that Aaron Burr was captured there on our game preserve at McIntosh in 1806; and then a little later, Chief Geronimo, that great fighting chief, was captured here. Well, we sent them all to Oklahoma, after having them in captivity here a long time. Well, I still have a lot of them and they work for us. They can see in the dark and they can trail a wounded deer better than some of our trail dogs (Boykin 1960).

Boykin’s description of the MOWA Choctaw is that they are descendants of Indians who escaped removal and remained in the area that we currently inhabit. Although Boykin’s use of the term “wild Indian” is insulting, it is, nevertheless, an indisputable description of us as an Indian community.

**b. The BAR Applied Radically Different Standards in Evaluating the MOWA Choctaw and the Petitions of Other Tribes, Particularly in Terms of Oral History**

The BAR has applied radically different standards in evaluating the petitions of the MOWA Band of Choctaw and other tribes. We have chosen to draw comparisons between the petition of the Jena Band of Choctaw with our own since they were evaluated within months of each other and both are Southeastern Indian groups with Choctaw ancestry. The BAR applied a higher standard for the MOWA Choctaw than the Jena, in some cases, requiring the MOWAs to provide information that was described as impossible to obtain for the Jena. They were particularly inconsistent

in evaluating the oral history of these two groups. Similar types of information derived from oral history were accepted for the Jena and rejected for the MOWA Choctaw. In one instance where a discrepancy between oral history and census data existed for the Jena Choctaw, oral history was deemed more reliable. However, the exact opposite conclusion was drawn for the MOWA Choctaw for similar circumstances. We should be clear that we are in no way questioning the legitimate Indian status of the Jena band of Choctaw. Rather, we are making the point that we feel that in all fairness, the same standards should have been used in evaluating our petitions.

One example of this type of discrepancy in the BAR's evaluation of the MOWA Choctaw and Jena Choctaw petitions involves the importance of oral history in establishing ancestral links. For the Jena, the BAR recognized that their earliest Choctaw ancestors would have logically had Choctaw rather than Anglicized names and established a linkage between 1830 Choctaw based on the oral history of their 1880 descendants among the Jena. The following citation from the Jena petition is lengthy, but important for it makes clear that the federal government acknowledged the impossibility of linking Choctaw names to Anglicized names and further, argued that it was "fair and reasonable to assume" that 1880 persons living in traditional Choctaw territory who claimed descent from Choctaw ancestors through oral history, were, indeed, Choctaw:

After one commissioner visited Mississippi for several weeks, the Dawes Commission produced a roll of the Mississippi Choctaws and submitted it to the Department of the Interior in March 1899. Later in the year, however, the Commission asked that the roll be withdrawn and returned it. The roll contained 1,923 names (Dawes Commission 1899, 78; 1900, 18, 10; Commissioner of Indian Affairs 1899, 122; 1901, 157-158). The Commission had identified as Mississippi Choctaws all of the full-blood Choctaws who had appeared before it. The Commission noted that it was impossible to prove that an individual's Choctaw ancestors had made a good-faith effort to comply with the provisions of Article 14 of the treaty after 1830. The facts were not known to those living 60 years later, the Choctaws with English names could not be traced back to ancestors with Indian names; the Government's records were inadequate; and the investigations made after the treaty had demonstrated that Agent William Ward had refused to register Choctaws who sought to comply with the treaty's terms. The Mississippi Choctaws, the treaty contended could not be reasonably expected to show that their ancestors had complied with the provisions of the treaty. It was "fair and reasonable to assume," however, that the Choctaws who had remained in Mississippi had intended to declare their intention to do so and to use the treaty to assure themselves of a homestead ([Dawes Commission 1899, 78-79] from TR-Jena 1994:21). (Emphasis added.)

We provided the BAR with similar documentation in the form of an 1851 petition signed by our Choctaw ancestors that was submitted to the Commissions of Indian Affairs on our behalf by John Seawell (Mayor of Mobile) and Felix Andry (See Exhibit 1 references to Indians of South Alabama of the Choctaw Nation 1851 and Choctaws in Mobile). The BAR rejected this evidence on the grounds that 1851 Choctaw names could not be linked to Anglicized names, although this was described as an unreasonable and even "impossible" expectation for the Jena Band of Choctaw:

Evidence was presented by the petitioner to indicate that some Choctaw Indians remained in Southern Alabama between the Treaty of Dancing Rabbit Creek in 1830 and the Civil War. However, no evidence was presented by the petitioner to indicate that either the Reed or the Weaver/Rivers/Byrd family associated as colleagues or witnesses with Felix Andry, who was married to a Choctaw woman named Nancy and who submitted claims to the Federal government on behalf of the Choctaw remaining in Alabama (TR-MOWA 1994:5).

It should be noted that one of the progenitors of the MOWA Choctaw described in our petition to the BAR has been traced to a person with an Anglicized name, Chief Tom Gibson (aka Eli-Tubbee, Elah, Tubbee, or Elatatabe). He lived in Washington County, Mississippi Territory (presently Washington County, Alabama) until 1813 when the influx of whites caused him to move to Killistamaha (English Town) clan of the Six Towns located in southeastern corner of the present boundary of the State of Mississippi, just miles from the current southwest Alabama location of our MOWA Choctaw community. John Gibson, James Gibson, and Betsy Gibson were in Mobile area in 1850 as shown in U.S. government correspondence and 1880 census. However, the BAR discounted this information because the 1860 census described her probable place of birth as Georgia, her father's North Carolina, and her

mother's Virginia (TR-MOWA 1994:75-76). The BAR concluded that the link is "based on oral tradition only" (TR-MOWA 1994:75) rather than acknowledging that the census information itself was ambiguous.

The conclusion drawn here is particularly troubling given that when the Jena proposal contained ambiguous census data, oral history was described as more reliable than census data,

"The Dawes Commission testimony suggests that tribal members born before 1872 were born in Mississippi, while those who were younger than that were born in Louisiana during the 1880's. Census data on individuals' place of birth does not support this conclusion, but the census is less reliable than personal testimony" (TR-Jena 1994:16).

In multiple instances, the BAR discounts our oral history as legitimate evidence. In the first example below, it is belittled by stating that our petition "alleges" a family connection. In the second example, even sworn court testimony is treated as allegation and discounted because we were expected to produce additional written documents to support the testimony.

"The MOWA petition alleges, also on the basis of oral tradition, that a George W. Reed, supposedly the son of Hardy Reed and a Creek woman whose maiden name was Elizabeth Tarvin, was the brother of Daniel Reed, as were Amos Reed and Squire Reed, but provides no documentation for the assertion, and the BAR researchers located none" (TR-MOWA 1994:31).

"According to the witness in the 1920 trial, Mrs. Rush testified that Rose Reed, who had died in 1878, had told her that her mother was a 'Choctaw squaw.' This hearsay testimony was not documented by any contemporary evidence" (TR-MOWA 1994:6).

The oral history of the Jena is treated with more respect and regarded as legitimate in terms of both historical dates and social relationships,

"In the oral history of group members, William Bill Lewis is remembered as the group's leader from the time of his arrival from Catahoula Parish about 1917 until his death about 1933...as the eldest male among the Choctaw residents of the Jena area after the death of Bill Lewis, Will Jackson was expected to play the role of community leader..." (TR-Jena 1994:30).

Another example of information that was accepted for the Jena Choctaw and rejected for the MOWA Choctaw is the presence of Indian Schools. The Jena Choctaw petition states,

"Local authorities and private individuals made efforts to create a school specifically for the Indian population. During the 1930's the Penick Indian School operated with some funding from the Federal Office of Indian Affairs" (SUC-Jena 1994:4).

We provided the BAR with virtually identical information about a separate, federally funded Indian school for the MOWA Choctaw. In our original petition, we provided evidence of federal funding being sought in 1934, the same time period identified for the Penick Indian School of the Jena Choctaw (see time line). Moreover, as previously described, the Indian school for the MOWA Choctaw ancestors was established 100 years earlier than that of the Jena Choctaw. In addition, since 1965, we have received federal funding through the Title IV and Title IX Indian Education Programs (Exhibit 4: Federal Agencies Recognizing the MOWA Choctaw, Department of Education).

Another extraordinary example of the BAR applying wholly different criteria to the Jena Choctaw and the MOWA Choctaw is in their evaluation of virtually identical events involving a Choctaw family moving into the community around 1900. For the Jena Choctaw, the addition of the Choctaw Lewis family in the early 1900's is described as a positive event which allowed a dwindling Jena Choctaw community to remain viable. For the MOWA, the addition of the Choctaw Laurendine family is described as irrelevant because they did not marry into the community until the early 1900's. The BAR description of the Lewises states,

"Before the arrival in LaSalle Parish about 1917 of William Bill Lewis and his extended family from Catahoula Parish, the Trout Creek settlement may have shrunk to two families, those of brothers Will Jackson and Chris Jackson...At that time, the two Jackson families may have consisted of only eight people...The arrival of the Lewis family gave the Trout Creek settlement the potential to remain a viable community" (TR-Jena 1994:28).

But the description of the MOWA Choctaw states,

"The Mississippi Choctaw Laurendine family did not, apparently settle in Mobile County until after the Civil War".No Laurendine descendants married into the petitioning group until after 1900..." (TR-MOWA:87).

The inconsistency is incredible. The BAR completely dismisses the intermarriage of the Choctaw Laurendine family into the ancestral MOWA Choctaw community

as anomalous because it did not occur until around 1900. However, for the Jena Choctaw, the intermarriage of the Choctaw Lewis family around 1900 is viewed as critical to the very existence of the Jena Choctaw today.

**c. The BAR Placed little value on oral history as the traditional American Indian means of transmitting heritage.**

Finally, it is disappointing that the BAR, as an Indian agency, places so little value on oral history. For all American Indians, oral history is the traditional Indian way of transmitting our heritage from generation. Disregarding these traditions demonstrates disrespect for our venerated elders and more generally, disrespect for Indian cultural traditions. Moreover, the very existence of our oral history, passed down through generations to multiple descendants could not be been motivated by any other logical reason except as a means to preserve our heritage. Cedric Sunray's "MOWA Tribal Council Presentation" put it well,

"When elder after elder recounts the same story in a relatively similar fashion...how can we discount it? How could an entire group of elderly people be convinced to lie and falsify such a long story? They would need to go against their own collective beliefs, have meetings to get their stories 'on the same page' and then, with a straight face, lie to anthropologists and BAR officials. No one could possibly believe that the senior population of the MOWA community organized to this level with the intent to mislead the BAR" (Sunray 2002:15).

*3. The BAR failed to evaluate written documentation in its historical context*

- a. The BAR failed to recognize the widespread American Indian resistance to the Dawes Roll. The BAR equates the Dawes Roll (and similar registers) as a Native American census, failing to recognize both the widespread Native American Resistance to the Dawes Act, and the fraud and corruption in the Miriam Report of 1928 which led to its repeal.
- b. The BAR failed to recognize racism and racial designations applied to American Indians in Alabama. The BAR has characterized the documents identifying MOWA Choctaw ancestors with Indian heritage as ambiguous. We have presented clear documentation that our MOWA Choctaw ancestors were described as Indian. However, the BAR describes this evidence as ambiguous pointing to terms such as "free person of color" and "mulatto" that have sometimes been applied to them. Such an attitude demonstrates a lack of awareness of not only historical racial categories in the region, but more importantly, it indicates a lack of awareness of the racism and prejudice that our people have experienced.
- c. The BAR applied an unreasonable standard for the level of documentation required for non-literate antebellum American Indians. The requirement of the BAR for the MOWA to present extensive antebellum evidence is an unreasonable standard for an American Indian people who were not literate in the language. Applying such a standard indicates a clear failure to appreciate the cultural, historical, and linguistic history of the Indians who escaped removal in 1830.

*4. The BAR deviated from BIA protocol in evaluating the MOWA Choctaw Petition.*

- a. By the BIA's own admission, the Federal Recognition process is a confusing, ambiguous, expensive, and time-consuming process (Bureau of Indian Affairs 2001:3-4). One consequence of the confusion and delays is that we presented our petition under the set of guidelines in effect at the time but our petition was not evaluated until seven years later. The rules for federal recognition were changed just months before the BAR evaluated our proposal. We believe our petition should have been evaluated in a timely manner. Further, given that the BAR did not evaluate our petition within the recommended two-year time frame, that our petition should have at least been evaluated under the guidelines in effect when we submitted our proposal.
- b. The BAR deviated from BIA protocol in requiring pre-1900 documentation. Much of the criticism in the 1994 BAR Technical Report is directed at their evaluation of our providing insufficient antebellum documentation of our ancestry. As we have already argued, we strongly disagree with this conclusion. But leaving that aside, as a matter of procedure, the requirement for antebellum documentation deviates from protocol. By the BIA's own admission, the meaning of "historical" has been ambiguous and inconsistently applied for tribes seeking federal recognition. The BIA clarified the time frame in 1997 to mean "since 1900." However, in the Final Determination, written after the BIA clarified the appro-

priate time frame, the BAR continued to apply an antebellum standard. We find it particularly unfair, frustrating, and inconsistent that the BAR applied outdated standards in the Final Determination given that our original petition was required to meet standards that had been changed only months before.

- c. The BAR deviated from the BIA protocol in failing to provide an objective evaluation of the MOWA Choctaw petition. The BAR failed to provide an objective analysis of our petition. We base this on (1) the adversarial tone of the BAR report; (2) evidence of racial bias by the BAR evaluator; and (3) politics. Our experience has made it clear that the federal recognition process is rife with politics and bias. We were not evaluated objectively. Kevin Gover, the Assistant Secretary of Indian Affairs who signed off on the negative determination of our petition perhaps puts it better than we can. He is quoted in the Hartford Advocate as saying, "The tribal recognition process should be 'fair, open, objective, and neutral...our present system lacks these features and we need an impartial commission...Today the tribal recognition process is 'dehumanizing' and 'insulting'... imagine have to prove to the government who you are." (Miksch 2003, quoting Gover).

#### *Concluding Remarks*

With the exception of the Bureau of Indian Affairs, virtually everyone who has come into contact with our people recognizes that we are Indian. We have multiple letters of support from professionals that are all willing to provide expert testimony under oath. As previously described, we already have established relationships with numerous branches of the federal government who recognize us as Indian, even to the extent of our being given an Indian racial code for the purpose of compiling governmental statistical data. But more importantly that all of the letters and government documents that repeatedly substantiate our American Indian heritage, we simply are who we are.

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EXHIBIT 1: TIME LINE FOR CHOCTAW INDIANS IN ALABAMA FROM 1813 TO 2003

For references see: *They Say the Wind is Red: The Alabama Choctaw Lost in Their Own Land* by Jacqueline Anderson Matte, with foreword by Vine Deloria, Jr., Revised Edition, 2002, NewSouth Books, Montgomery, AL

- 1813**      **Forty-five Choctaw families join Creeks to fight against Americans in Creek War of 1813 (part of War of 1812)**
- Source: "John Pitchlynn, Ocktibbaha to Governor Blount, September 14, 1813," Roll 6; "George Smith, Pitchlands, to A. Jackson, November 23, 1813," Roll 7; "John McKee, Fort Smith Mr. Pitchlynn, to A. Jackson, January 6, 1814" and "John McKee, Campte Toote, Massatambe east bank of the Black Warrior 85 miles above its junction with the Tombigby, to A. Jackson, January 26, 1814, Roll 8, Andrew Jackson Papers, Manuscript Division, Library of Congress; "Narrative, December 5, 1813," John McKee Papers, Manuscript Division, Library of Congress; "David Holmes to Turner Brashears, August 3, 1813," RG 2, Mississippi Territorial Governor's Papers, 6:308, Mississippi Department of Archives and History; "John McKee, Mr. Pitchlynn's to GS Gaines, January 2, 1814," RG 217, Records of the Accounting Officers of the Department of the Treasurer, Records of the Fifth Auditor, box 1, account 475, National Archives; Gideon Linccum, "Life of Apushimataha, "Publications of the Mississippi Historical Society, 9(1906): p. 479 (hereafter cited PMHS).
- 1819**      **Choctaw village in Mobile and inhabitants described March 31, by James Leander Cathcart, agent for U.S. Navy, in his daily journal.**
- Source: Jean Strickland and Patricia N. Edwards, *Residents of the Southeastern Mississippi Territory—Three Journals, Book Four. "Records of the General Land Office, Journal and Report of James Leander Cathcart and James Hutton, agents appointed by the Secretary of the Navy to survey timber resources between the Mermentau and Mobile*

- Rivers, in accordance with an act of March 1, 1817, November 1818-May 1819," pp. 48-49.  
Daniel Reed worked for Young Gaines as a cattle drover. A notice in the St. Stephens, Alabama Territory newspaper, The Halcyon and Tombeckbe, proclaimed: "Lost, a red Morocco Pocket book containing a Due Bill on Mr. Young Gaines for \$60; which I forewarn all person from trading for the same. Daniel Reed. St. Stephens."  
Source: Halcyon & Tombeckbe, March 10, 1819.
- 1824 Choctaw families in Mobile described and interviewed by Gideon Lincecum, Botanist, who lived with Choctaw.**  
Source: Lincecum, "Life of Apushmataha," Publications of the Mississippi Historical Society, 1906, p. 480.
- 1830 Treaty of Dancing Rabbit Creek to remove all Choctaw Indians West of the Mississippi River.**  
Source: Charles J. Kappler, ed., Indian Affairs, Laws and Treaties, 2:310-15.
- 1832 George S. Gaines reported "A great number of Chactaw [sic] Indians for many years past have resided with the corporate limits of this city during the winters and spring months, and many families remaining through the summer, to the annoyance of the citizens..."**  
Source: NARC, RG 75, Entry 201, Letters Received, 1831-36, Records of the Commissary General of Subsistence, June 30, 1832.
- 1835 Indian Schoolhouse, County Road 96 (Old Saint Stephens Road), Mount Vernon, Mobile County, AL. Built approx. 1835; Owner: State of Alabama. Built for Government School for Indians by Indian labor. Description: Frame, one story, wood cypress siding, small porch on the front."**  
Source: Historic American Buildings Survey (HABS), Library of Congress, Prints and Photograph Division, Washington, DC 20540, Card #AL0387. <http://memory.loc.gov/ammem/hhhtml/hhhome.html>
- 1836 James Gibson, descendant of Chief Tom Gibson (Eli- tubbee/ Elah-tubbe) listed on "Muster Rolls of Choctaw Indians," and in Correspondence from Mobile.**  
Source: Records of the War Department, Office of the Advocate General, Alabama at war, 2nd Creek War, 1836, SG13379, Alabama Department of Archives & History. (ADAH)
- 1836-1936 Inclusive—120 Land Records show ownership and occupation by people with whose same names are listed on 1910 U.S. Census in Mobile & Washington counties as "Mixed...the prevailing habits are Indian."**  
Source: General Land Office, Suitland Maryland.
- 1838 Investigation into fraudulent land claims. Testimony taken to establish claims by Choctaws; 7,000 who refused to move west.**  
Source: NARC, RG 75, Entry 270 Evidence, 1837-38, U.S. Court of claims, No. 12742, The Choctaw Nation of Indians vs. the United States.
- 1844 George S. Gaines reported "The south eastern Indians known as the Six Towns under the influence of Capts. Oak-lah-be and Post Oak...number about 2,000.**  
Source: NARC, RG 75, M234, Letters Received, Choctaw Emigration, Roll 185, pp. 903-908, September 22, 1844.
- 1847 "Since the time of 1830 the Choctaws who remained...has been left to follow there own inclination, the greater part of them leading vagrant lives...in the southern part of Alabama and deriving a precarious subsistence by—hunting and fishing in swamp...about 3,000, including 2 and 300 who have wandered off to the seashore between Mobile and New Orleans."**  
Source: NARC, RG, 75, M234, Roll 188, fr. No. 226, Choctaw Agency, Emigration, April 27, 1847.

- 1851** "Several hundred Indians were determined to remain in vicinity of Mobile" 6 Nov 1851; reports that "several hundred more Indians have come to vicinity" 27 Nov 1851; "about 500 are assembled..." 15 Dec 1851; "petition signed by Choctaws: 60 men, 45 widows and 4 children." 29 Dec 1851.  
Source: NARC, RG 75, M234, Roll 171, Letters Received by OIA, Choctaw Agency, 1839-51, fr. no. 738 753.
- 1852** "Petition in behalf of all the Indians of south Alabama of the Choctaw Nation...over 400 Choctaws residing in Southern Alabama and near Mobile, who do not wish to emigrate but to remain where we are and become citizens. Signed in behalf of all the Indians of South Alabama of the Choctaw Nation."  
Source: NARC, RG 75, M234, Roll 172, Fr. no. 44-47, Letters Received, Choctaw Agency, August 17, 1852.
- 1856** "Census Roll of Choctaw Families, Residing East of the Mississippi River and in the States of Mississippi, Louisiana and Alabama made by Douglas H. Cooper, U.S. Agent for Choctaws, July 26, 1856: Original manuscript: Six Town clan located in Jasper & Newton Counties, Mississippi and Mobile, Alabama; list of Choctaw names; recapitulation, showing number of men, women and children, number of families and places of abode. The Six Town Clan was comprised of 129 men, 191 women, 194 children for a total of 514 individuals or 96 families."  
Source: NARC, RG 75, Entry No. 260.
- 1859** "Gov't has no intention to make any further removal of Choctaws..."  
Source: NARC, RG 75, M234, Roll 175, Letters Received by OIA, Choctaw Agency, Frame No. 409-417.
- 1860** Response to series of letters requesting information on name and residence of Choctaw Agent, "No such agent has been appointed by the Department..."  
Source: NARC, RG 75, M234, Roll 176, Letters Received by OIA, Choctaw Agency, Frame No.13-17 & 165-167.
- 1862** Choctaw ancestors of the MOWA remained in Alabama and were recruited for the Confederacy at the foot of Stone Street in Mobile, Alabama. The majority of the men were killed, leaving the women and children in south Alabama.  
Source: "Major S. C. Spann, Commander Dabney H. Maury Camp, No. 1312, UCV, Meridian, Miss.", Halbert Collection, Folder No. 178, ADAH; Muster Roll of this Choctaw Regiment is in Department of Archives and History, Jackson, Mississippi (cover only, roll missing).
- 1870** U.S. Census: Indians identified in Mobile County—9.
- 1880** U.S. Census: Indians identified in Mobile County—19; in Washington County—2.
- 1890** U.S. Census (manuscript burned) population totals only available. Indians identified in Washington County—0; in Mobile County -- 402 (plus 384 Apaches).
- 1898-1914** MOWA Choctaw enrollment applications in Mobile and Washington Counties for Dawes Roll, generated in response to General Allotment Act, February 8, 1887. (U.S. Statutes at Large, 24:388-91).  
Source: Applications for Enrollment of the Commission to the Five civilized Tribes 1898-1914, RG 75, M1301, roll 116, Mississippi Choctaw Roll no. 2556, MCR number 2189 and 2190.

- 1900** U.S. Census, Indians identified in Washington County—0; in Mobile County—5.
- 1907-1909** U.S. Agent, John Beck, enrolled 64 Choctaw families in Mobile and Washington Counties on Eastern Cherokee Roll (Guion Miller Roll). Ancestors of MOWA Choctaw Application Numbers 14393, 17390- 17395, 41601-41750, 43551-43700 Eastern Cherokee Roll (a.k.a. Guion Miller roll).
- Source: RG 75, Records Relating to Enrollment of Eastern Cherokees by Guion Miller, 1908-1910, M685; RG 123, M1104, Eastern Cherokee applications,
- 1909—1930s** Indians identified in Birth and Death Records, Vital Statistics; Washington county—12 births, 1 death; and Mobile County, 6 births, 0 death..
- Source: Mobile County Probate Court, Archival Birth and Death Records; Birth and Death Records, Registration No. 651200, Vital Statistics, Records of Washington County, ADAH
- 1910** U.S. Census, Indians identified in Washington County—172; in Mobile County—7. Marginal notes designated clusters of families in Fairford, (Precinct 12) and Malcolm (Precinct 13), ED 14 as: "These people entered as mixed, are composed of Indian, of Spanish, some of them with French, some with white, and some with Negro. The prevailing habits are Indian.. Called Cajun." The original identification in column, "Ind" was written over with "mixed."
- 1919** Choctaw Indians in Mobile and Washington counties "discovered" by Southern Baptists.
- Source: The 39th Annual Session of the Mobile Baptist Association, Citronelle Baptist Church, 1919.
- 1920** U.S. Census, Indians identified in Washington County—10; in Mobile County—12.
- 1921-1955** Thirty-four years of Reports by Baptist Missionaries provide continuous written documentation to Mobile and Washington Counties to teach "American Indians of Choctaw heritage, under the overall program of missions to American Indians."
- Source: Annual Reports of the Southern Baptist Convention, 1922-1955.
- 1924** Governor W. W. Brandon's report on "Cajan- Indians" in Mobile and Washington counties. Hilary Herbert Holmes, "The so-called Cajan Settlements in Southern part of Washington County, Alabama: A Survey made for Governor William W. Brandon, 1924."
- Source: Governors' Papers (1920-27: Brandon), RC2:G156, Administrative files, folders: "Cajan," ADAM.
- 1930** U.S. Census, Indians identified in Washington County—0; in Mobile County—50.
- 1930s-1990s** Several Master's theses and "scientific studies" done on Choctaw Indians in Mobile and Washington Counties.
- Source: Horace Mann Bond, "Two Racial Islands in Alabama," American Journal of Sociology 36 (1931: 552-567; Laura Frances Murphy, "The Cajans of Mobile County, Alabama" (master's thesis, Scarritt College for Christian Workers, 1935); Clatis Green "Some Factors Influencing Cajun Education in Washington County, Alabama" (master's thesis, University of Alabama, 1941); Edward Thomas Price, Jr. "Mixed-Blood Populations of Eastern United States as to Origins, Localizations, and Persistence, (Ph.D. Anomalies in School Children of an American Triracial Isolate: A Frequency Study" (master's thesis, University of Alabama at Birmingham, 1965); George Harry Stopp, Jr., "The Impact of the 1964 Civil Rights Act on an Isolated 'Tri-Racial' Group" (master's thesis University of Alabama, 1971; Duane W. Superneau, Wladimir Wertelecki, Hans Zellweger, and Frank Bastian, "Myopathy in Marinesco-Sjogren Syndrome. European Neurology 26:8-16, 1987; B.G. Brogdon, R.D. Snow, and J.P. Williams, "Skeletal Findings in Marinesco Sjogren Syndrome," Skeletal Radiology 25:461-465, 1996; "Circle of Life: University of Alabama Researchers look at how children

with developmental disabilities fit into the Circular scheme of Native American World View," UAB Magazine, Summer, 1995: 13-15.

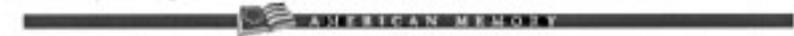
- 1930-1965 Separate school system established for "Cadians" (Indians) in Mobile and Washington counties.**  
 Source: Minutes of Mobile County Board of Education and Minutes of Washington County Board of Education.
- 1931-1966 Annual Reports of Mission Work Among the Cajan Communities 1931-66 to the Woman's Missionary Society and Woman's Society of Christian Service. Work among these communities identified by following names: Byrd's Chapel, Work Among the Cajans, Methodist Community House, Aldersgate Mission, Mobile County Rural Center, Calcedeaver School.**  
 Source: The United Methodist Church Commission on Archives and History, Alabama-West Florida Conference, Houghton Memorial Library, Huntingdon College, Montgomery, AL.
- 1934 Mrs. Elvin Byrd sought federal aid for Indian schools.**  
 Source: Indian Office File No. 55742-1934; file no. 150. Report on findings was submitted to the Commissioner of Indian Affairs by Dr. W. Carson Ryan, Jr., Director of Indian Education.
- 1940 U.S. Census—No statistics on Indians.**
- 1940-1941 School year. Miss Eva Crenshaw's Sixth and Seventh grade students of Weaver School compiled a "History of Byrd Settlement," "with the help of some of the oldest people...Mrs. Laura Byrd, Mrs. Irene Rivers, and Mr. Book Byrd." The story of the "woman who swam the river with her baby" is included.**  
 Source: "History of Byrd Settlement," typescript., 1940-41. Copy acquired in 1991 from Miss Eva Crenshaw, former Methodist Missionary to South Alabama Indians, 1937-44.
- 1940s Indians from Mobile and Washington counties served in World War II.**  
 Source: Cemetery Records, U.S. Military Identification cards, Discharge papers.
- 1948 "The 3rd major census of Indians in 1930 was the occasion for the 'discovery' of two more Indian mixed groups...These people are centered in the area of heavy woods and hills about Citronelle in upper Mobile and lower Washington Counties, and number 3,000 or more."**  
 Source: William Harlen Gilbert, Jr., "Surviving Indian Groups of the Eastern United States." Annual Report of the Board of Regents of the Smithsonian Institution for 1948 (1949): 407-438. See No. 18, Alabama.
- 1950 U.S. House of Representatives report lists all Indians in U.S. including the Cajans of Alabama [ancestors of the MOWA Choctaw] under category of "Siouans of the East."**  
 Source: "Compilation of Material Relating to the Indians of the United States and the Territory of Alaska, Including Certain Laws and Treaties Affecting Such Indians by Subcommittee on Indian Affairs of the Committee on Public Lands House of Representatives" H. Res. 66 (81st Cong., 2d Sess.) June 13, 1950, Serial No. 30.
- 1950 American Indians across the South, including MOWA Choctaw, joined "Kinsmen of Indians for Liberty, Reform and Instructions in Civic Affairs" (KILROI). As Descendants of the Creek Indians, East of the Mississippi River."**  
 Source: Docket 21, Indian Claims Commission, Bureau of Indian Affairs. Microfilmed copy of Register, Mobile County Public Library Local History Division.

- 1965 Secured federal assistance for Indian Education in schools. Title IV, Part A, Indian Education Program implemented in Reed's Chapel School, McIntosh, Washington County, Alabama and Calcedeaver School, Mt. Vernon, Alabama. The Indian Education program continues today in Mobile and Washington Counties.**  
Source: "Statement of Jack Edwards, Member of Congress for Alabama 1965-1985" in Testimony in support of S.362 (S.282) Proposed Legislation for Federal Recognition of MOWA Choctaw of Alabama.
- 1976 Choctaws in Mobile and Washington Counties, 4,000.**  
Source: Report of American Indian Policy Review Commission. Chapter 11, "Nonrecognized Tribes," p. 468,
- 1979 The MOWA Band of Choctaw Indians recognized by State of Alabama.**  
Source: Legislative Act No. 79-228, H.313—Turner, Alabama Laws of the Legislature of Alabama, 1979, Vol. I, p.350.
- 1980 U.S. Census, Washington County, Alabama: Indians—779**  
Alabama Attorney General confirms that Choctaw Indians of Mobile and Washington counties retain their rights as a sovereign tribe.
- 1981 MOWA Band of Choctaw Indians sought help of the Bureau of Indian Affairs to provide assistance to be federally recognized. Alabama Humanities Foundation—awarded a study grant.**  
Letter from Eddie L. Tullis, Chairman, Poarch Band of Creek Indians to Framon Weaver, Chairman, MOWA Band of Choctaw Indians, June 20, 1981 requesting "in the spirit of Indian brotherhood, to support our efforts for Federal Recognition....We as Native Americans must work together to protect our rights. I assure you that if you assist us with our struggle for Federal Recognition you can count on us to be there when your petition is ready for consideration by BAR."
- 1983 MOWA Choctaw hired an Executive Director as a grants writer; applied for research grant from the Administration of Native Americans, which they received. Held organizational meeting for federal acknowledgment research team. Letter of intent to petition was sent to the Branch of Acknowledgment and Research (BAR), May 19, 1983.**
- 1984-1987 Data collection—research, interviews, writing**
- 1987 S. 1142, Shelby; H.R. 3107, Callahan, Nichols, Erdreich**
- 1988 Submitted FAP to BIA/BAR, April 28, 1988; up-dated tribal roll submitted**
- 1989 S. 381, Shelby, Heflin; H.R. 1562, Callahan**
- 1990 BIA/BAR reviewed FAP and sent Obvious Deficiency letter to MOWA Choctaw, February 15, 1990.**
- 1991 S. 362 Shelby, Heflin; H.R. 2349, Callahan; BAR held technical assistance teleconference in September; MOWA Choctaw submitted response to Obvious Deficiency letter, November 8, 1991.**
- 1992 Supplementary documentation showing Choctaws in Mobile area from 1832-1860 was presented to the BAR and reported as received in the BAR's Proposed Finding. However, in a 1996 meeting with BAR officials (Virginia DeMarce, Kay Davis and Holly Reckord), they stated they did not receive them.**
- 1993 S. 282; Shelby, Heflin, Inouye; H.R. 3605, Hilliard; supplementary documentation showing MOWA Choctaw ancestors' Dawes Roll Applications and supporting evidence as to why they submitted applications for the Eastern Cherokee Roll (a.k.a. Guion Miller Roll).**

- 1994 S. 282, H.R. 4231, MOWA Band of Choctaw Indians Recognition Act; hearing May 17, 1994; BAR sent Proposed Finding Against Federal Acknowledgment of the MOWA Band of Choctaw, December 16, 1994.
- 1995 Because a new chief was elected, MOWA Choctaw requested extension of time. We applied for and received Administration for Native Americans (ANA) Grant to complete Federal Acknowledgment Petition (FAP).
- 1996 New chief, research committee and tribal council met with BAR staff in Washington for technical assistance on March 1, 1996. Research committee met with anthropologist, May 7-8. On June 27, 1996, Chief Wilford "Longhair" Taylor submitted Report and up-dated tribal roll.
- 1997 BIA/BAR issued a negative Final Determination Technical Report.
- 1998 MOWA Band of Choctaw Indians of South Alabama filed an Appeal before the Interior Board of Indian Appeals, U.S. Department of Interior. The appeal was denied.
- 2000 Kevin Gover, Assistant Secretary of Indian Affairs under President Clinton invited Chief Taylor to meet with him to discuss MOWA Choctaw Federal Recognition
- 2003 The School Board of Washington County returned Reed's Chapel School and property to the MOWA Choctaw. The first school was held in Reed's Chapel Church by missionaries. The school was built by ancestors of the MOWA Choctaw on land they donated for this purpose.

**Exhibit II Indian Schoolhouse**

The Library of Congress



**Historic American Buildings Survey/Historic American Engineering Record**

Indian Schoolhouse, County Road 96 (Old Saint Stephens Road), Mount Vernon, Mobile County, AL

STATE <b>ALABAMA</b>		COUNTY <b>MOBILE</b>		TOWN OR DISTRICT <b>MT. VERNON</b>		2r	
INDEX NUMBER <b>ALA 44-1100-4</b>		MONUMENT <b>INDIAN SCHOOL, House</b>					
REPRESENTED BY NATHAN WIL	SCALE SURVEY NO. <b>ALA-120</b>	<b>HISTORY: Built approx. 1886</b>					
INCLASSED PROVISIONAL	<b>OWNER: State of Alabama. built for Government school for Indians by Indian labor.</b>						
PUBLISHED SERVICES	<b>Description: 1 room; one story; wood frame siding; small porch at the front.</b>						
<b>REFERENCE: E.W. Burkhardt, A.P.I. Auburn, Ala.</b>							
414 8-6000		HISTORIC AMERICAN BUILDINGS SURVEY					

I. Historic American Buildings Survey E. W. Russell, Photographer, April 23,  
1935 FRONT (SOUTH) AND EAST SIDE  
HABS, ALA,49-MOUV,4-1



EXHIBIT 3: TRANSCRIPT OF WASHINGTON REPUBLICAN AND NATCHEZ INTELLIGENCER  
NEWSPAPER ACCOUNT OF THE NANCY FISHER STORY

BY THIS MORNING'S MAIL  
ST. STEPHENS, JUNE 7

We learn from the most respectable authority that two of the murderers of Johnston and McGaskey have been given up, and that diligence is promised on the part of some of the chiefs in apprehending the balance of the party. It is stated that the Seminoles and some of the lower Creeks are determined on war and have embodied 1500 warriors to cut off the supplies and provisions ordered up the Apalachicola for the use of the U.S. Troops. The most stringent measures are adopted by the commanding general to ascertain their statement and intentions as to prevent the commission of outrages on the frontier. In consequence of the reports of the Indian unrest, the surveyors of the Creek lands have suspended their labors, but we understand, under security assumed by military force, they are about to recommencing them.

June 23

The following interesting part of a letter was communicated by our friend at Fort Stoddert dated June 15, 1816.

"Left Tuesday night, about the rise of the moon, five Creek Indians came to the home of Mrs. Fisher, about fifteen miles below this place on the eastern bank of the river. Three of them fired on a Chactaw, who had been at the same time about Fort Montgomery, engaged in hunting and who was then encamped near Mrs. Fisher's house. As soon as they had killed him, they fired at the door upon which her daughter caught up a child escaped at the opposite door, and the Indians rushed in and fell upon an old woman with clubs. Her cries only excited the taunts of the Indians, whose conversation, in the Creek language, was heard by her distracted daughter. The old woman was left for dead; but the daughter got to a canoe and escaped, with the child, to the swamp on the western side of the river, where she soon saw the house buried in flames. Mrs. Fisher, however, was not actually dead, but was enabled to have—from immediate destruction.

Mr. Myric in whose employ her son was, had them all brought up in a boat yesterday evening. I have just been to see them, but found the poor old woman dead. She had been disabled in her hip, her fingers were miserably mashed, and her head con-

siderably fractured. The whole of their furniture, clothing, and provisions were destroyed with their house. Every family on the same side of the river is equally exposed. Mrs. Fisher was a sister to the later Mrs. Stiggins. Her father was a Cherokee and her mother was one of the old Natchez tribe. She has lived with the white people upwards of 20 years, and her husbands (both of who are dead) were white men. She had not seen a Creek Indian before since the commencement of the war, and had no idea who they were that killed her, except they were Creeks.

Marschalk, Andrew. 1816. By This Morning's Mail. Washington Republican and Natchez Intelligencer, Wednesday, July 10, 1816.

EXHIBIT 4: FEDERAL AGENCIES RECOGNIZING THE MOWA BAND OF CHOCTAW INDIANS

*1. U.S. Department of Commerce*

The U.S. Bureau of the Census

The U.S. Bureau of the Census recognizes the MOWA Band of Choctaw as an American Indian group. The Bureau of the Census uses a racial classification code for generating statistical profiles of the American population. The MOWA Band of Choctaw is listed under the category, "American Indian," as a Choctaw group with the racial code number C12 (See Department of Commerce, Bureau of the Census, American Community Survey Race Code List:

<http://www.census.gov/acs/www/UseData/CodeList/SSAll/2000/Race.htm>). In addition, the Bureau of the Census has also generated a map of American Indian groups resulting from the 2000 Census, and the MOWA Band of Choctaw reservation is southwest Alabama is included (See <http://www.census.gov/geo/www/maps/aian-wall-map/aian-wall-map.htm> [map can be enlarged on-line]).

*2. U.S. Department of Housing and Urban Development*

Office of Native American Programs

Indian Community Development Block Grant Program (ICDBGP)

The MOWA Band of Choctaw has received a federal grant (ICDBGP) through the Office of Native American Programs, U.S. Department of Housing and Urban Development. The criteria for receipt of the grant states,

Eligible applicants for assistance include any Indian tribe, band, group or nation (including Alaskan Indians, Aleutes, and Eskimos) or Alaskan native village which has established a relationship to the Federal government as defined in the program regulations. In certain instances, tribal organizations may be eligible to apply (<http://www.hud.gov/offices/pih/ih/grants/icdbg.cfm>)

MOWA Choctaw Chief Taylor is featured on the front cover of the June 2003 Native American Housing News, a publication sponsored by the U.S. Department of Housing and Urban Development.

*3. U.S. Department of Health and Human Services*

- a. Low Income Home Energy Assistance Program (LIHEAP)
- b. Administration for Native Americans
- c. Centers for Disease Control and Prevention

The MOWA Band of Choctaw have, in the past, received federal funding through the Administration for Native Americans (ANA) to assist them in researching their cultural history and are currently receiving federal funding through the Low Income Home Energy Assistance Program (LIHEAP). The LIHEAP grant is administered specifically to the MOWA Band of Choctaw with those eligible being, "eligible Choctaw households in Baldwin, Choctaw, Mobile and Washington Counties" (<http://www.ncat.org/liheap/Directors/Agreements/Alabama.htm>). In addition, the Centers for Disease Control and Prevention employ the same racial designation for the MOWA Band of Choctaw as does the U.S. Bureau of the census (American Indian, code C12).

*4. U.S. Department of Education*

Office of Indian Education

Title IV and Title IX

For almost 40 years, the MOWA Choctaw have received federal funding for Indian education through Title IV (beginning in 1965) and later Title IX programs through the U.S. Department of Education's Office of Indian Education. If one considers the Indian School built for MOWA Choctaw ancestors in 1835, they have a 155 year history of government sponsored Indian education for the MOWA Choctaw people.

The CHAIRMAN. Thank you.

Mr. Marshall, in your written testimony you state that 17 tribes winning a legally forced review have all been denied Federal recognition. Chairperson Cambra testified that the same people at Interior who fought her tribe's lawsuits were the ones responsible for the final determination denying recognition to her tribe.

This makes me wonder about objectivity of the people that are making a decision. Can you maybe enlighten the Committee a little bit about how you feel or how the people that you represent have dealt with the objectivity of those that are in the decisionmaking process.

Mr. MARSHALL. Thank you, Mr. Chairman. First off, the frustration of all tribes is well known. It is well documented. Not only the frustration of the process but yet when you seek remedy outside of the process, because your people do not have access to health programs, education programs, 638 programs, we are denied the process. When you seek outside remedies through the court or through congressional help, they become adversarial, at best.

Partly because there is just such a vacuum of bureaucracy up in that particular building, I do not want to go to that building. Where I come from we call it bad medicine. You do not feel human going in there. You do not feel like you are getting your just day in court. You do not feel like you are going to have your fair say. You feel like you are going there with your hat in your hand to beg for something. But I will you that we did not allow any foreign settlers to beg for anything when they came to us for help.

I think it is totally disgusting that a tribe who has been a consistent living, breathing tribe has to prove to someone else that they are a tribe. If you are of European descent and you say you are English, they do not ask you how much English you are. If you say you are Indian, they want to know what part and how much.

The sad part about it is that whole thought process goes throughout the country. But without Native Americans' contribution to this country, we would not have a country. We would not have a Constitution. We governed our people long before—our constitutions and our governance predate the Constitution of this country and we have been living in peace and harmony and planning for seven generations since the beginning of time and I find that when we do seek outside remedies, we have to pay the piper. But the frustration is do I go back and tell my elders that I cannot get the job done inside the BIA in a timely fashion and on my watch?

I will tell you this. From the time that we put in our letter of intent to today, we have lost 147 members because they did not have access to programs and I find that a little tough.

The CHAIRMAN. Mr. Marshall, you and I have had a chance to talk in the past and as I told you privately, whether the decision is to recognize you as a tribe or not recognize you as a tribe, it is unconscionable to not give you a decision. That, in my mind, is just beyond any bureaucratic mess-up. It is just something that this Committee is going to have to deal with in one way or another.

Unfortunately, as we were preparing for this hearing we found that you were not alone and that there are a lot of folks that are out there that have been waiting for decades just to get an answer.

Mr. MARSHALL. That is correct.

The CHAIRMAN. And that is uncalled-for in my mind.

I do have questions dealing with the objectivity of people in the decisionmaking process. I happen to have one of my local tribes that has gone through—in fact, it has made national news lately—quite an ordeal in terms of the leadership of that particular tribe and the accusations have been made that those that were making the decision within the BIA for one reason or another had a conflict in that decisionmaking process and listening to the testimony of this panel really makes me wonder if there is not a different way that we ought to approach the Federal recognition process and maybe have some kind of an independent process.

You heard on the first panel somebody who felt very strongly against the recognition process in one particular tribe and has the ability to have political pressure brought into bear on that particular decision. In my mind, this should not be political or bureaucratic. It is either yes or no. Either you qualify or you do not. To me, I do not understand how that can take 30 years.

Mr. MARSHALL. Mr. Chairman, we are not sure, either, but I can guarantee you that the tribal leaders sitting at this table either meet or exceed all seven of the criteria. The BIA knows it. They know we have been tribes for years.

I find it hard to believe that a governmental agency would go 50/50—16 approved, 16 denied. How does that happen? If you did that in business you would be a miracle man. But you know what the sad part about it is? That we even have to come here to tell you this.

And you know the really disgusting part is in Connecticut you have tribes there that contribute a great deal of money and resources and jobs to the State of Connecticut and I would say to you, sir, that if they lost those casinos, that the State of Connecticut would be in a financial ruin without those two tribes. Instead of embracing the tribes they fight them.

But in Massachusetts we have a resolution that says from the statehouse, please recognize this tribe, urging the Massachusetts delegation to seek recognition for this tribe. We are not saying yes or no; we are asking to have our chance at the bat. But I am afraid, like most people are, that when you seek an outside remedy that the first answer is going to be a negative, as happened to the Muwekmas, as happened to Schaghticokes, and as happened to Eastern and Pawcatuk Pequots.

The Department has taken upon itself the ability to change the rules when they want to, jumping people from behind us ahead of us, and they have done that at least five or six times. And you know the wonderful part about that is they send you this great letter that says it will not harm you as far as time is considered because we are going to short-circuit and take the time of the process. And I think they drank Reverend Jim's Kool-Aid.

The CHAIRMAN. Thank you, sir.

Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

I would like to ask Chief Taylor a question. You stated that in denying your tribe Federal recognition, the BIA failed to take into account that your earliest ancestors were not literate in English. Could you explain how this worked adversely against you?

Mr. TAYLOR. Well, our people, you know, they required us to match our Choctaw names with English names, which we could not do that. Over time, assimilation, most all Indian tribes are losing their native language. We are trying to bring ours back. So that works against us there, I believe, if I understood your question right.

Mr. RAHALL. Right.

Let me ask Chairwoman Cambra if I might, how has the Interior solicitor's involvement with your lawsuit created complications? And this could very well be a follow-up to the Chairman's questions, as well. Are there conflicting personalities here that you feel have worked against you?

Ms. CAMBRA. I believe so. I believe that they have made a process into a personal vendetta against my tribe specifically.

I also believe that it is very clear when they admit that we are a historical tribe, 100 percent of our members descend from a historical tribe, it is very clear that Congress has never terminated our tribe in any way, shape or fashion, then they automatically should come up with an alternative. And I have requested since, in fact, the earliest administration that I started working politically was with Ada Deer's administration and I asked the question, can you help us? If we are previously recognized, never terminated, how can you help us? Well, go through the process, which we did.

The BAR said we were previously recognized, never terminated, 100 percent of our membership comes from a historical tribe. They did not offer any alternative except to recommend legislation and that was their only recommendation that they offered the tribe, and I am assuming through the solicitor. And I can testify as a witness that American Indians are no friend of the solicitor.

As a taxpayer and as a grandmother and a mother and as a leader, is this what the American Federal government provides Indians? Instead of taking the fiduciary responsibility, they take a very negative pro-war process with them and that has to stop. We cannot afford that. We cannot afford that.

Mr. RAHALL. Thank you.

Thank you, Mr. Chairman.

Mr. HAYWORTH. (presiding) I thank the Ranking Member and I am going to ask your indulgence. Obviously a frog decided to take root in my throat today.

I would like to thank the witnesses for coming down here today. A couple of points. As I heard your testimony I thought back to the district I represented when I first came to Congress. Things changed because of reapportionment but in the district that I initially represented I was honored to represent the sovereign Navajo Nation, the largest of our tribes. The area the Navajo inhabit transcends the borders of four states. It itself is about as large as the Ranking Member's home State of West Virginia.

What I keep coming back to when I hear your words today remind me of a tribal elder whom I met in a town hall meeting when he said, "Congressman, as far as I am concerned, as far as the people I represent are concerned, BIA stands for bossing Indians around."

But listening today, I hear another unfortunate acronym to hear your experiences. BIA seems to now stand for bureaucratic indecision always.

If you would again, and I share Mr. Marshall's lament; it is unfortunate in the first place that this hearing even has to take place but even accepting that for a second, there is something good that comes from this because we have the chance to put into the record and to amplify for the record the challenges you face.

I would ask each of you who have testified, I know it is in your official record but again to distill and to amplify for this Committee and for the Congress and for our friends who join us here today how long have you been involved in this process? Let us begin with Mr. Marshall and just in the order of testimony, if you would tell us the number of years you have been involved in seeking recognition.

Mr. MARSHALL. Officially, 29.

Mr. GUMBS. Officially, since 1978, 25 years.

Ms. CAMBRA. Since 1989—23, 24 years.

Mr. TAYLOR. This year 24.

Mr. HAYWORTH. So an average of a quarter century for all these tribes just through the official recognition process. That is on average what we are hearing here today. A quarter century to reach some conclusion.

As the Chairman said and as I would amplify, simple respect and decency should have prompted a yes or no answer at some point during the span of a quarter century of seeking this recognition.

The Chair would recognize the gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. I thank the Chair and thank the witnesses.

You certainly have appeared before the right body. Each one of us in this body take an oath to uphold this Constitution and the Constitution, as I am sure most of you know, Article 1, Section 8 says, "The Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes." This Constitution states the three types of sovereignties that we deal with and you are one of those three.

I have two citizenships. I am a citizen of the United States and I am a citizen of the State of Michigan. Native Americans have three citizenship recognized by this Constitution. They are citizens of the United States and they have proven that over and over again by their service in our armed forces. They are citizens of their respective states and they are citizens of their sovereign tribes, recognized—not granted—recognized by this Constitution, because it is a retained sovereignty.

John Marshall in 1832, Chief Justice of the United States Supreme Court, said, "The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as the undisputed possessors of the soil from time immemorial. The very term nation so generally applied to them means a people distinct from others."

You have a retained sovereignty and our job is to make sure that we recognize—not grant—we recognize that retained sovereignty.

In my time here in the Congress I have helped some tribes in my own state get their sovereignty reaffirmed, reaffirmed their

recognition, not granted. As a matter of fact, I had three tribes one time over in the Oval Office when President Clinton was President, three tribes and the President signed those bills. I will tell you a quick story about that, too. I really believe in this sovereignty.

After President Clinton signed those three bills recognizing the retained sovereignty of three Michigan tribes I turned to the three chiefs or Chairmen, because Clinton was wandering around as he generally does in the Oval Office talking to everybody. I said, "Why do you not sit down in the President's Chair?" And one of the senators said, "Dale, I do not think we can do that." And I said, "We probably should not because we are not chief executives of sovereign tribes, sovereign nations, but these three are." So they all took their turn sitting in the President's Chair.

But it is a real sovereignty and it is a shame when we recognize foreign nations much more quickly than we recognize those who had sovereignty and are recognized by this Constitution.

You know, I have gone through the process of helping tribes go through the—I got so tired of the BAR process because it is broken, it is shattered, it just is not working. So very often, I have had to take tribes through the congressional process and, by the way, I have taken tribes through the congressional process long before IGRA, long before gaming ever came in. Now every time you think of trying to get your sovereignty recognized people think of gaming. Well, that is beside the point. The main thing is that if you are sovereign, you are sovereign, and it is a retained sovereignty.

All you are asking of the BIA or asking the Congress is to recognize again that retained sovereignty. You come before this body and I think it is more than a legal responsibility; it is a moral responsibility this Congress has to either repair the BAR process or to use the congressional path to help again recognize your retained sovereignty.

I have some prepared remarks, Mr. Chairman, I would like to submit for the record but I just wanted to speak to you. I admire your loyalty to this country, I admire your loyalty to the state in which you live, and I admire the loyalty to the sovereign tribes of which you are members.

Thank you very much and I yield back the balance of my time.

**Statement of The Honorable Dale E. Kildee, a Representative in Congress  
from the State of Michigan**

Mr. Chairman, I am pleased that you scheduled this hearing today so that we can engage in the type of dialogue that will lead to badly needed changes to the federal recognition process.

I have met with several tribes over the years who have informed me of the complaints they have about the current administrative process.

We all have heard these complaints:

- that the office of federal acknowledgment is underfunded;
- that the process is too slow as it can take decades before a petition is reviewed;
- that the process is too expensive;
- that the process is filled with conflicts of interest within the BIA; and
- that the BIA is more worried about the fiscal impacts of approving petitions than providing justice to tribes who legitimately deserve to have their status as tribes restored.

It is because of those complaints, and my commitment to provide justice to Indian tribes, that I have supported and sponsored over the years specific legislation to reaffirm the federal recognition of a tribe.

Previous attempts to revamp the federal recognition process have failed in the past because of fears by some that doing so would lead to more Indian gaming.

Just this week, the New York Times published an article about gaming investors seeking to create tribes. Certainly, I am appalled by this idea. I know it does happen. It has happened in my own state and I opposed that effort, but these few examples do not remove the fact that there are Indian groups that deserve to have federal recognition and that the federal recognition process needs to be improved.

I look forward to hearing from the witnesses today. Thank you.

The CHAIRMAN. Thank you.

Mr. Pearce?

Mr. PEARCE. Thank you, Mr. Chairman.

I appreciate your testimony and like the others, echo the response that answers should be given. I would ask if any of you happen to know the number of employees that work in the Department who are in charge of recognition, the recognition process? Just approximately.

Mr. MARSHALL. I understand there are three teams of three—an anthropologist, a genealogist, and a historian. For a long time there was one team of three but they have since hired new people.

Mr. PEARCE. Mr. Chairman, I just have some observations here that I have been working out on the calculator. If you figure 8 hours per day per person, which may be at risk, but 5 days a week per person, you get 40 hours a week times 48 weeks if they get a month's vacation. That is 1,920 hours and over 25 years, which these people have averaged, that is 48,000 hours of manpower. And if you multiply it times the nine employees, the three teams of three, we have 432,000 hours and it seems like we could give these people an answer with 432,000 hours of labor time.

On another note, if we spend 15 minutes a day on coffee breaks, that is 1,500 hours in the careers, the 25 years that these people have been waiting. If we just post a little note at the coffee table that if you will simply talk about it over a break, you have 1,500 hours, so surely we could come up with an answer for at least one of the tribes.

Thank you, Mr. Chairman.

The CHAIRMAN. If the gentleman would yield just for a second, how many hours was that?

Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman.

I was glad that Congressman Kildee brought out the Constitution and read that section where it says Congress has the power because I guess my biggest concern after listening to Mrs. Johnson on the first panel was that states and towns are looking to influence this process of recognition in a way that I think is inappropriate and I think we need to be reminded that it is a Federal issue, that Congress has the power. Congress is the one that deals with the sovereignty issue.

And in the same respect, I guess I am concerned about opening up the BIA recognition process in the sense that we would amend it or we would change it because my fear is that there is so much pressure now and maybe Connecticut is the worst example but there are others, too, that if we reopen it and try to change it, rather than it becoming a better process and less bureaucratic, that it might become more limiting and the states would, through their representatives here, exercise their ability to make it even more difficult to get recognition.

That is just by way of background. I am not saying I understand all the problems in the bureaucracy and everything you have but that is just my fear.

I guess it was Lance Gumbs, who is a Trustee. You said something about if the states have recognized the tribe, maybe there should be some expedited procedure because of the state recognition but I would fear that if states thought that was true they might just rescind it. I could see maybe Connecticut just rescinding state recognition of the Eastern Pequots or some of the others, knowing that that might have some factor.

What I really wanted to ask you is Mrs. Johnson talked about giving money to the localities to help with the recognition process or challenging recognition and I asked a question about well, what about the tribes? They do not get any money.

What would you say about—and this goes to the cost issue. I just want each of you, if you could, to tell us what would you say if there was a bill introduced—I guess I could introduce it—that mirrors Mrs. Johnson's but does not give money to the towns or the states; it gives money to the tribes and says that if a tribe is seeking recognition, we will give them money to make their case?

I think it was Mr. Gumbs and Chief Taylor who both talked about how difficult and costly it was to go through the process. Give me a little information about how difficult it is because the perception that Mrs. Johnson and some of the others are giving is that tribes have all this money from the casinos to help them with the recognition and they have no problem getting money to help the process.

Two questions. One is what would you say about legislation that would give money to tribes so that they could use it for the recognition process? And how difficult is it and where are your resources coming from to go through this 20-year process? I will start with maybe Mr. Gumbs and Mr. Taylor because they talked about how costly the process is but anybody could answer.

Mr. GUMBS. Thank you. The costs have been astronomical for us at the Shinnecock Nation. Our sole source of income within our community—and we are a community. We have health facilities. We have a family preservation center. We are an active community. The costs have been astronomical. Our sole source of income at this point has been our annual Labor Day weekend powwow and that has gone to fund our tribal offices and the various programs that we have within our community and, to say the least, it is not a lot.

To take it a step further, if it had not been for NARF coming in to give us a hand with our process, we would probably still be doing it. You know, 25 years and NARF has spent approximately, just since 1988, approximately \$800,000 on our process. The research that goes into this process is tremendous. You have to go to different places. In New York, for instance, we have had to go to Albany and some of our records are up in New Bedford, Connecticut, and some of our records are actually over in England dating back to the colonial times.

So in order to achieve what has been required of the process we have had to expend an inordinate amount of funds to get this process done. And, as I said, if it had not been for NARF coming in and

giving us a hand with that, we would still be in the process. We would not have been able to afford this based on the income that we have within our community at this present time.

Mr. PALLONE. What about having the Federal Government help you pay for it?

Mr. GUMBS. That would have been great. I mean we could have used that 25 years ago.

Mr. TAYLOR. Do you want me to answer?

Mr. PALLONE. It is up to the Chairman. Yes, I guess, sure.

Mr. TAYLOR. It has been a great burden on us. We did secure one ANA grant that gave us \$65,000 but when you look at hiring professionals to do your work, it is costly. They do not do it for thank you. They have to travel. They have to go to the archives, land records, military service records, and they have to search and search and search. They have to fly. They have paperwork and all to do and they really, like Dr. Richard Stoffle from the University of Arizona, he works for them and we had to fly him in to do some research. We had to fly him in to talk to our elders. We had to fly him back and we had to pay him for his time.

So we are looking at, for 10 years there when we were working on the process, it cost us a half-a-million dollars and we got one \$65,000 ANA grant from the government and we had to foot the other bill on our own, from our pow-wows, from fundraisers.

The CHAIRMAN. Thank you.

Mr. Flake, did you have questions?

Mr. FLAKE. No questions.

The CHAIRMAN. Mr. Baca?

Mr. BACA. Thank you very much, Mr. Chairman.

Mr. Pallone, I agree with you that it should stay in Congress as far as Congress having the power and I would hate to see the states even get the power in terms of recognizing Federal tribes or tribes within our areas because that would do away with a lot of the sovereignty and the protection for sovereignty that we have to continue to protect.

Mr. Hayworth, you mentioned what BIA stood for. I believe it stands for bureaucratic inaction versus the definition that you gave.

But it is a shame that when we look at tribes having to spend 29 years, 25, 23 and 24 years, that they are not able to be recognized, especially for many different kinds of reasons. One is when you look at dignity and respect they are very important and you cannot put a dollar price in terms of identifying who you are, where you are coming from and that tribe to also be recognized.

Government has the habit of recognizing all of us. Immediately we are labeled. I remember when we were first labeled as Caucasians and then it was changed from Caucasians to Hispanics and then from Hispanics to Latinos and from Latinos to Mexican-American, where I think we are a combination of all of them with a little bit of Indian blood that is still in us.

But it is a shame that individuals have spent so much time in trying to gain the kind of dignity and respect that we should have in identifying individuals. I would like to see hopefully some kind of a process or guidelines with time lines in terms of when a tribe asks for an application, that within a certain period of time they

should be recognized within that period of time and they should be held accountable. BIA should be held accountable to say if a tribe has filed, why has it taken so long?

It is appalling—I agree with you, Mr. Chairman—it is appalling to see them go so long and to see a tribe—can you imagine us sitting in this Committee—I do not think all of us will be here for 29 years or 25 or 23 or 24; maybe you, Mr. Chairman; you are a little bit younger—to finally recognize one of these tribes that is seeking the recognition that they rightly deserve. I think that we need to reassess what goes on there.

So my question would be to the panelists out here how do you suggest the process can be sped up? And any one of you can answer that. Then do you feel that you have been taken advantage of in your efforts to become a federally recognized tribe? That means financially or otherwise, gouged by individuals, attorneys and others, because there are a lot of people out there that are willing to gouge individuals to say I am willing to work on your application and all of a sudden for whatever reason, conflicts or others, it is still there and we are still dealing with 29 and 25 and 23 and 24 years. Any one of you can answer that.

Ms. CAMBRA. I believe, Congressman Baca, I believe that immediately this Committee and Congress should take action, immediately take that authority and power away from the BAR. Personally I believe that the tribes that are previously recognized or have merit for recognition and have spent millions of dollars on the process and have been treated with ill will and have been basically—what I think the BAR has done is that they have tried to kill our spirit in this whole process and the will to want to continue to face you men and women in Congress.

I mean what the BAR has done to our integrity or to my tribe and its integrity and even to function, it is worse than 9/11. It is actually worse than 9/11. Also, anthrax. Here we get a letter that says you no longer are to be considered a candidate for recognition; you have to follow another process. Yet we know, yet we know with the history of our people and the legal history and even a court document, Federal court document, that we were previously recognized, never terminated, and 100 percent of us are from the same group. I mean we know the truth and we carry the truth with pride but when we face the BAR and the Interior solicitors, it is like they dismiss our presence and our rights as a sovereign nation. That, in itself, their actions are insulting. And it is not only insulting to us as Indians but it is insulting to the American government.

Mr. BACA. Good. Would anybody else like to answer?

Mr. TAYLOR. Yes, I would like to say something, sir.

Mr. BACA. Yes.

Mr. TAYLOR. My personal opinion is to let the BAR continue to work but I think Congress, what they should do, they should have a watchdog Committee. Instead of appealing to the BAR, like the fox watching the henhouse, you know, so to speak, instead of appealing to the BAR, appeal it to a Committee of Congress and let the Congress decide. Let them have some expert witnesses, something like those expert witnesses that testified on my behalf. I think if they knew they had a watchdog Committee and if they denied a petition and Congress had a Committee sitting here that is

going to scrutinize their decision, I think they would be more honest and more fair. I really do. That is my opinion.

Mr. BACA. Thank you.

Mr. MARSHALL. Mr. Congressman, I would respectfully say that the BAR staff is overburdened, first off, but they have not yet asked for more money, either. They have not asked for more money for the recognition process.

In a deposition that we had we talked to one of their budget people and all of the money seems to go to the trust fund issue at this point. So that leaves the Federal recognition and the BAR or OFA in limbo. There was only one funding source for tribes that were seeking recognition and that was ANA and NARF.

And to answer your question, my tribe has not been unduly harmed by anybody that has done any work for it in any way, shape or form. We do not allow it. We are not insensitive and we are not stupid. We can find the right people to do these things. I think that sometimes people have this predisposed notion that we do not know what to do or how to do it and I would say that the BAR staff needs to be shored up. I believe that they need some help. I believe they need some guidance and they need a fresh evaluation of what their job is. Their job is to go through the process and not personally hold one decision over another and it certainly is not to jump one tribe from behind another, ahead.

Mr. BACA. Thank you.

Mr. GUMBS. I think that the process clearly was designed to have Indian tribes fail. As the Chairwoman said, the process is long, it is an exhausting process, and they constantly change the rules. Our stuff was submitted in 1998 and then there was a TA letter that was sent to us, which said that we had not met a certain criteria. We then went back and spent another couple of years working on that criteria, only to have another tribe given recognition with the same problems that we had, that they claimed that we had.

So we are looking at it as well, what is going on here? You know, here we spent all of this time doing this and then we turn around and you tell us that we did something or left something out, and then when we turn around and look, you recognize another tribe with the same problems. So there is no consistency in the process itself.

And as Glenn said, ANA was the only agency that we were able to get a small fund from and at this time now they have even taken the position that they are not going to be funding recognition anymore. So how do we do this with no money?

It is a process that is designed to have Indian nations fail and it is as simple as that.

Mr. BACA. Thank you very much. It sounds familiar because that is part of the process that happens with many individuals, immigrants who want to become citizens who accidentally somehow leave a blank or a space left and they go to the end of the line and the whole process has to begin again. That is why we have 10 million and some that are backlogged right now that they have never even processed in that area, so am hearing the same kind of problems that we have here right now.

Mr. MARSHALL. Forty percent of the tribes that enter the recognition process give up and there is nobody in this room that would understand that frustration unless you have been through it. Forty percent of the tribes do the job of the BIA by quitting because they cannot take the frustration, the pressure, and the financial responsibility that it takes to push a petition through and that is pretty sad.

Mr. BACA. Thank you very much.

Thank you, Mr. Chairman, for allowing me extra time.

The CHAIRMAN. Thank you.

Before I dismiss this panel and call up our third panel I wanted to first of all, thank all of you for your testimony. I think the entire Committee realizes how difficult it is for all of you to be here and to testify in front of a congressional panel in the way that you did and we appreciate your having the tenacity to stick with it but we really do appreciate your making the effort to be here and to share with us your experiences.

Mr. Taylor, you suggested that there be some kind of a congressional oversight, congressional watchdog. Well, that is who we are and that is the job of this Committee. I will fully admit that in the past we may not have done some of the things we should have on this Committee but that is changing. We are here to do our job and our job is to have oversight over these functions and we are doing that. That is part of the effort of this hearing here today.

Mr. TAYLOR. I know in my particular case what I was referring to, sir, was like when our petition was denied we appealed it but we appealed it back to the Bureau of Indian Affairs. Instead of appealing it back to the Bureau of Indian Affairs, if you could appeal it to the Oversight Committee it might help.

See, when someone makes a decision, then you are going to appeal it back to the same people. That is what I am trying to say.

The CHAIRMAN. Yes, which unfortunately came up, I think, in all of your testimony, that there is something wrong with this process that we are going through. I am sure that in working our way through this, that any legislative changes that we need to make, that that will definitely be part of the process that we have to go through in order to figure out if there is a better way to do this. I know in listening to your testimony and reviewing your testimony before that the process that all of you have gone through is unconscionable and we need to do something different. I do not think any of us knows exactly the way we are going to work that out but I do know that we need to change it.

I appreciate all of you being here and your testimony. Thank you very much.

I would like to call up our third panel, consisting of Tim Martin of the Poarch Band of Creek Indians, a federally recognized tribe, and Miss Kate Spilde, an expert on recognition issues for the Harvard Project on American Indian Economic Development. If you could join us at the witness table, please?

And before you take a seat if I could just have you stand and please raise your right hand.

[The witnesses were duly sworn.]

The CHAIRMAN. Thank you very much. Let the record show they both answered in the affirmative.

Welcome to the Resources Committee. I appreciate your being here today. I am going to start with Mr. Martin.

**STATEMENT OF TIM MARTIN, POARCH BAND OF CREEK  
INDIANS, NASHVILLE, TENNESSEE**

Mr. MARTIN. It is almost good afternoon but I will say still good morning, Chairman Pombo and other distinguished members of the House Resources Committee.

On behalf of the Poarch Band of Creek Indians of Alabama, I am happy to be here to have the opportunity to testify on the Federal recognition process. I extend the regrets of my tribal Chairman, Mr. Eddie L. Tullis, who is unable to be with us today but has authorized me to speak on behalf of the tribe.

My name is James T. Martin. I am an enrolled member of the Poarch Band of Creek Indians. I am Executive Director of United South and Eastern Tribes, an intertribal council representing 24 federally recognized tribes in the South and Eastern parts of the United States.

Prior to my position as Executive Director, I was employed by my tribe between 1979 and 1985. During that time I observed and took part in our tribe's endeavor to go through the Federal recognition process. Therefore today I will reflect on our tribe's experience and the current atmosphere that is surrounding the Federal recognition process.

My tribe, the Poarch Band of Creek Indians, is located in South Alabama. We have a current enrollment of roughly 2,250. And I would like to read some excerpts from the Federal Register notice of Monday, June 11, 1984, to give you a perspective of where I am coming from. Our tribe was one of the first tribes to go through the FAB and avail ourselves of the BAR and the criteria that we will be talking about today.

Evidence indicates that the contemporary Poarch Band of Creek Indians is the successor of the Creek Nation of Alabama prior to its removal to Indian Territory. The Poarch Band of Creeks remained in Alabama after the removal of the 1830s and shifted within a small geographic area until it settled permanently near the present-day Atmore, Alabama. The band has existed as a distinct political unit since before the Creek wars of 1813-1814. It was governed by a succession of military leaders and permanent men in the 19th Century from the late 1800s through 1950. Leadership was clear but informal. A formal leader was elected in 1950.

Virtually all of the band's 1,470 members can document descendancy from the historical Creek Nation. No evidence was found that the members of the Poarch Band of Creek Indians are members of any other tribe or that their tribe or its members have been subject to congressional legislation which would expressly terminate or forbid the relationship with the Federal Government.

The BAR process can work. Federal recognition of Indian tribes is a formal act that acknowledges the sovereign status of a tribe and affirms the perpetual government-to-government relationship between the tribe and the United States. Federal recognition assures the tribe the dignity it deserves and the same privileges and immunities enjoyed by other federally recognized tribes for their status as Indian tribes. Federal recognition has a tremendous

effect on the tribe, the surrounding communities, and the Nation as a whole.

Historically, tribes have been granted Federal recognition through treaties, by Congress, or through administrative decisions with the executive branch. The criteria used was not always clear and often depended upon the official who received the inquiry from the group.

The General Accounting Office in its report GAO-02-49 reports that until 1960 there were limited requests by groups to be federally recognized and the Department was able to assess these requests on a case-by-case basis.

The Poarch Band of Creek Indians recognizes that Congress has the ultimate power to recognize certain groups but in your infinite wisdom Congress has considered the Federal recognition process to be a complex one, a tedious one not to be entered into lightly. Therefore, the Congress has deferred most Federal recognition determinations to the U.S. Department of Interior.

The Department of Interior has established a set of regulations standardizing the recognition process and creating an administrative procedure to determine whether particular Indians' groups qualify as federally recognized Indian tribes. The Bureau of Indian Affairs Branch of Acknowledgment and Research procedures were established in 1978 as a result of a 2-year study by the congressionally established American Indian Policy Review Commission.

The BAR guidelines are composed of the following seven criteria for recognition, and due to the time, Mr. Chairman, I have listed in my written testimony so I will not state all of those one by one, the seven criteria.

As I said, the Poarch Creek are proud to be one of the first tribes to go through that process. We are in general agreement with the seven criteria that the groups must meet to be granted recognition. However, the length of time involved to receive recognition is increasingly becoming substantial. This is due, in part, to the workload of the BIA BAR staff, which is substantially increasing. The workload is increasing due to the detailed petitions ready for evaluation at the same time the staff at the BAR has been decreased. It has received a 35 percent decrease from 1973, a staff of 17, down to averaging no more than 11 over the last 5 years.

The GAO report continues to state that as of November 2001, of the 250 petitions received, 55 had been completed documentation to be considered for the process and the bureau finalizing 29, recognizing 14 and denying 15. Of the 10 petitions currently in ready status, six of these have been waiting at least 5 years. At the current rate of review it could take over 100 years to resolve all the petitions awaiting consideration. The initial regulations outlined a process for active consideration of a complete petition that should take approximately 2 years.

Federal recognition for the Poarch Band of Creek Indians was also slow. We began our process in 1975. A petition for Federal recognition was officially filed in January 1980 and the tribe did not receive a notice of active consideration until November 1982. Final determination for Federal acknowledgment was published in the Federal Register in June 1984.

As I said, the Poarch Band of Creek Indians were proud to be one of the first to go through the Federal recognition BAR process when the process should have been timely and the cost been appropriate. The long time lags and increased costs are a deterrent to petitioners, as you have well seen today.

Recently in a New York Times article Eric Eberhard, a lawyer specializing in Indian law, stated that roughly it took, as it was validated today, about \$100,000 to \$200,000 to go through the FAB process. Now it costs into the millions. And we in this room know why some of that is, and that is through the outside influences of third parties for economic interests.

The CHAIRMAN. Mr. Martin, I am going to have to ask you to wrap it up.

Mr. MARTIN. OK, yes, sir. I will cut to the end of my testimony to talk about the recommendations that our tribe thinks should be made.

The BAR process was intended to provide a clear, uniform and objective approach for the Department of Interior that established specific criteria. The Poarch Band of Creek Indians believes that the process could be improved and the ultimate goal of timeliness could be accomplished with the following changes. More resources allocated to the BAR staff or resources allocated to the BIA to out-source parts of the review that are fact-finding only. A defined list of information that must be submitted by the petitioners prior to the petitioners submitting a letter of intent. Provide adequate technical assistance available to petitioners to assist them in providing substantial amounts of work required to receive the letter of intent and help avoid continued submission of incomplete petitions. Expand the authority of the Assistant Secretary to review petitions and declare negative determinations on frivolous petitions. Changes in procedures to further insulate BAR staff from outside third-party influence to maximize their productivity.

The Poarch Band of Creek Indians submits these suggested changes for your consideration but reiterates that any changes that would have a significant impact on the Federal recognition process should be undertaken only after considerable review and deliberation was conducted, as it was conducted in the initial set-up of the regulations in 1978. Thank you for this opportunity to provide testimony.

[The prepared statement of Mr. Martin follows:]

**Statement of James T. Martin, Enrolled Member, Poarch Band of Creek Indians, Executive Director, United South and Eastern Tribes, Inc.**

Chairman Pombo and distinguished members of the House Resources Committee, on behalf of the Poarch Band of Creek Indians (PBCI) of Alabama, I thank you for the opportunity to provide testimony regarding the Federal Acknowledgment Process. I extend regrets from my Tribal Chairman Eddie L. Tullis who is unable to be here today and has authorized me to speak on behalf of the Tribe.

My name is James T. Martin. I am an enrolled member of the Poarch Band of Creek Indians and the Executive Director of United South and Eastern Tribes, Inc. (USET), an intertribal organization consisting of twenty-four federally recognized Indian Tribes from twelve states in the South and Eastern region of the United States. Prior to my position as Executive Director of USET, I was employed by the Poarch Band of Creek Indians from May 1979 until June 1995. During that time, I observed and was a part of the Tribe's endeavor to obtain federal recognition; therefore today I will reflect on our Tribal experience and the current atmosphere surrounding the Federal recognition process.

Federal recognition of Indian Tribes is a formal act that acknowledges the sovereign status of a Tribe and affirms a perpetual government-to-government relationship between a Tribe and the United States. Federal recognition ensures a Tribe the dignity it deserves and the same privileges and immunities enjoyed by other federally recognized Tribes by virtue of their status as Indian Tribes.

Federal recognition has a tremendous effect on Tribes, their surrounding communities, and the nation as a whole. Historically, Tribes have been granted federal recognition through treaties, by Congress, or through administrative decisions within the executive branch. The criteria used was not always clear and often depended on which official responded to the group's inquiry. The Government Accounting Office (GAO) Report GAO-02-49 reports that until the 1960's there was a limited number of requests by groups to be federally recognized and the Department was able to assess these requests on a case by case basis.

PBCI recognizes that Congress has the power to extend recognition to certain groups, but in its infinite wisdom Congress has considered the federal recognition process a complex and tedious one, not to be entered into lightly. Therefore they deferred most federal acknowledgment determinations to the U.S. Department of the Interior (DOI). The DOI has established a set of regulations standardizing the recognition process and creating an administrative procedure to determine whether particular Indian groups qualify as federally recognized Indian Tribes. The Bureau of Indian Affairs (BIA)/Branch of Acknowledgment and Research (BAR) procedures were established in 1978 as a result of a two-year study by the Congressionally established American Indian Policy Review Commission.

The BAR guidelines are composed of the following seven criteria for recognition under the 25 CFR Part 83 regulatory process:

- (1) The petitioner has been identified as an American Indian on a substantially continuous basis since 1900;
- (2) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
- (3) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
- (4) The group must provide a copy of its present governing documents and membership criteria;
- (5) The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single autonomous political entity;
- (6) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian Tribe; and
- (7) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

The Poarch Band of Creek Indians is in general agreement with the seven criteria that groups must meet to be granted recognition. However, the length of time involved to receive recognition is increasingly becoming substantial. This is due in part because the workload of the BIA/ BAR staff is substantially increasing. The workload is increasing due to more detailed petitions ready for evaluation and at the same time the number of staff assigned to evaluate the petitions has decreased by 35 percent, from 17 staff members in 1993 and in the last five years averaging no more than 11. GAO Report GAO-02-49 stated that as of November, 2001 of the 250 petitions received, 55 have completed documentation to be considered by the process with BIA finalizing only 29, recognizing 14 and denying 15. Of the 10 petitions currently in ready status, six of these have been waiting at least 5 years. At the current rate of review, it could take over 100 years to resolve all of the petitions awaiting active consideration. The initial regulations outline a process for active consideration of a completed petition that should take approximately 2 years.

Federal recognition for the Poarch Band of Creek Indians was a slow process beginning in 1975. A petition for recognition was filed in January 1980 and the Tribe did not receive notice of active consideration until November 1982. Final Determination for Federal Acknowledgment was published in the Federal Register in June 1984. Poarch Band of Creek Indians was among the first to be federally recognized through the BAR process when the process should have been timely and costs should have been appropriate. Time and cost have increased even more in the years following. The long time lags and increased costs are a detriment to petitioners. Eric Eberhard, a lawyer specializing in Indian law, stated in a New York Times interview, entitled "Would-Be Tribes Entice Investors" on March 29, 2004, that the recognition process that once cost between \$100,000 and \$200,000 now runs in the millions of dollars. A monumental factor in the increased costs is that the political climate at the time of Poarch Band of Creek Indians was totally different than now due to the onslaught of Indian gaming.

The Summary Status of Acknowledgment Cases as of February 10, 2004, compiled by the BAR office reports that 294 petitioners currently await consideration to permit processing under 25 CFR 83. There are 9 active status petitions, 13 ready petitions, 57 resolved petitions, 2 petitions in post-final decision appeal process, one decision in litigation, and 213 petitions not ready for evaluation. The not ready for evaluation petitions include 68 incomplete petitions, 130 letters of intent to petition with no documentation submitted, 9 petitions no longer in touch with the BIA, and 6 with legislative action required. There were 40 petitioners when 25 CFR 83 became effective in October 1978 and 254 new petitioners since October 1978.

Compounding the backlog of petitions awaiting review is the increased number of third parties active in the process, the increased number of administrative responsibilities that the BAR staff must assume, and the increased number of lawsuits from dissatisfied petitioners. The increasing amount of time involved in the process will continue to frustrate petitioners. Improvements that focus on fixing the time problems will improve confidence in the process. Money and politics must not be a concern of a petitioner for federal recognition. BIA resource constraints must not negate the need for thorough review of a petition.

The BAR process was intended to provide a clear, uniform, and objective approach for the DOI that established specific criteria and a process for evaluating groups seeking federal recognition in a timely manner. Poarch Band of Creek Indians believe the process could be improved and that the ultimate goal of timeliness could be accomplished with the following changes:

- more resources allotted to the BAR for staffing or resources allocated to the BIA for outsourcing parts of the review process that are fact-finding only;
- a definitive list of information that must be submitted by the petitioner prior to the petitioner submitting and receiving a letter of intent;
- with affordable technical assistance available to petitioners to assist them in providing a substantial amount of work required to receive the letter of intent and help avoid the continued submission of incomplete petitions;
- expanded authority for the Assistant Secretary to review petitions and declare negative determinations on frivolous petitions; and
- changes in procedures to further insulate BAR staff from outside third party influence to maximize their productivity.

Poarch Band of Creek Indians submits these suggested changes for consideration but the Tribe would reiterate that any changes to the criteria that would significantly impact the federal recognition process should be undertaken only after considerable review and deliberation as was conducted in the initial development of regulations that govern the recognition process to date.

Again, on behalf of the Poarch Band of Creek Indians we appreciate the opportunity to provide testimony on this critically important issue.

I would be happy to respond to questions at this time.

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The CHAIRMAN. Thank you.  
Ms. Spilde?

**STATEMENT OF KATHERINE SPILDE, PH.D., HARVARD  
PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT**

Ms. SPILDE. Mr. Chairman and distinguished members of the Committee, good morning. My name is Katherine Spilde and I am a Senior Research Associate with the Kennedy School of Government, Harvard University. My background also includes a Ph.D. in cultural anthropology, which frames my work on Indian affairs. I appear before the Committee today not as a representative of Harvard University nor of the Kennedy School of Government. Nor do I appear on behalf of any other person, corporation or organization and I have no connections with anyone with any interest in the outcome of this hearing.

I am honored to be here today to participate in this discussion of ways to improve the Federal acknowledgment process and I want to commend the Committee for undertaking the very important task of finding a solution to the substantial delays facing

Indian groups that are seeking Federal recognition and for showcasing their struggles.

Unfortunately, some of the loudest voices for reform of the Federal acknowledgment process have been those who are critical only of positive determinations and have called for a moratorium on all decisionmaking, a proposal that seems beside the point for a process that, as we have heard today, can take decades.

In undertaking a discussion of the critical importance of streamlining the processing recognition petitions, it seems meaningful to point out that the current process was established in 1978, in part to address the very issue of long delays in making recognition decisions. Today we know that the system that was created is not functioning as intended. That is, the process is not meeting the needs of the Indian groups still seeking formal recognition.

The BIA's regulations outline a process that was designed to take about 2 years. The facts show that the process is inefficient. In the 26 years since 1978 the Office of Federal Acknowledgment has made decisions in only 35 petitions, 16 of those positive and 19 negative, which amounts to an average of 1.3 decisions per year.

Since 1978, 294 Indian groups have submitted letters of intent. Nine are currently on the active list and 13 petitions are ready, waiting for active consideration. Of course, a final determination, positive or negative, is rarely the last word since lawsuits and appeals are now common.

There are a host of reasons why the current process takes so long, the most obvious being that the OFA is severely underfunded. With so many competing priorities among existing federally recognized tribes, it is a difficult decision for the Department of Interior to allocate scarce resources to this process.

One complicating factor is that there is no real constituency for unrecognized tribes so there seems to be little incentive among Federal agencies or Congress to address the needs of unrecognized Indian groups, since they have no formal relationship with the Federal Government.

Political considerations also prolong the process by overburdening the OFA staff, who must review and make recommendations on existing and incoming petitions, which is their task, while also undertaking many additional and distracting tasks, including responding to a growing number of Freedom of Information Act requests. In fact, the BIA estimates that professional OFA staff spend between 40 and 60 percent of their time on these administrative activities.

Given the range of challenges involved in streamlining the process, my suggestions fall into three general categories: first, increased appropriations, second, supplemental human resources, and third, changes in the current regulations to make it more efficient.

First, increased appropriations. The BIA estimates that the OFA would need to triple the size of its current staff in order to meet the increased demands associated with petitions and follow-up requests. At current funding levels it could take 15 years to resolve only those petitions on the active and ready-for-active lists. With adequate funding, however, this timeframe could be reduced to three to 4 years.

In addition to hiring sufficient professional staff to review petitions, OFA could contract with qualified academic researchers from independent research institutions who could be asked to provide technical assistance and additional context for petitions, potentially saving time. In addition, BIA's regional offices could be encouraged to provide the OFA with access to critical information both before and during field visits to petitioning Indian groups in that region.

After meeting both funding and staffing needs, the process itself could be streamlined by reducing the paperwork associated with each petition. There are a couple of ways to do this. First, the regulations could be adjusted to address when and how often interested parties could participate in the process. Under current political conditions, the comment and response period appears to be too involved and could be revisited.

A second recommendation for reducing paperwork would be to revisit and narrow the definition of who is eligible for interested party status. It seems reasonable to consider narrowing the definition even further at this time in the interest of streamlining the process by defining interested parties as those who have a legal or property interest in the final decision, specifically other tribes or states.

Under the current regulations, the Assistant Secretary for Indian Affairs has the authority to expedite a proposed negative finding after the technical assistance review. I would also recommend exploring a grant of authority to the Assistant Secretary to expedite a proposed positive finding in the same way. If the Assistant Secretary, after the technical assistance review, finds that a tribal group has an obviously strong case to support recognition, then the Department of Interior could recommend that Congress legislatively recognize the group based upon the research and findings of the OFA and the Assistant Secretary. This process would give Congress the opportunity of exercising its constitutional authority with regard to Indian tribes while also reducing the challenges of litigation.

Thank you for the opportunity to appear here today and once again I commend the Committee for exploring this important topic.

[The prepared statement of Ms. Spilde follows:]

**Statement of Katherine A. Spilde, Ph.D., Senior Research Associate, Harvard Project on American Indian Economic Development, Kennedy School of Government, Harvard University**

Mr. Chairman and distinguished members of the Committee, good morning. My name is Katherine Spilde and I am a Senior Research Associate with the Kennedy School of Government, Harvard University. Prior to my appointment at Harvard, I served in a number of research and policy positions here in Washington, D.C., including work with the Congress' National Gambling Impact Study Commission (NGISC) and the National Indian Gaming Association (NIGA). My background includes a Ph.D. in cultural anthropology, which frames my work on Indian affairs. I appear before the Committee today not as a representative of the Kennedy School of Government nor of Harvard University. Nor do I appear on behalf of any other person, corporation, or organization. I have no political, financial, organizational or other connections with anyone with any interest in the outcome of this hearing. I appear today at the unsolicited request of the Committee on Resources. I am honored to be here today to participate in this discussion of ways to improve the federal acknowledgment process.

I commend you on undertaking the very important task of finding a solution to the substantial delays facing Indian groups that are seeking federal recognition. In particular, I want to commend the Committee for showcasing the struggles endured

by Indian groups who are petitioning for federal recognition. This is an important event because it highlights the frustrated attempts by—and impacts of these delays on—tribal groups to receive recognition decisions from the Office of Federal Acknowledgment (OFA) (formerly the Branch of Acknowledgment and Research (BAR)). Recently, we have heard a great deal about the system for federal recognition being “broken.” However, some of the loudest voices for reform of the Federal Acknowledgment Process (FAP) have been those who are critical only of positive determinations and have called for a moratorium on all decisionmaking. I commend the Committee for holding a hearing that forwards the concerns of Indian groups seeking acknowledgment as Indian tribes, who have the most to lose if the process continues to stagnate. I am pleased that this hearing will focus on solutions, particularly on ideas for streamlining the process so that petitioning groups receive decisions in a timely manner.

*The History of and Need for a Formal Recognition Process*

In order for members of Indian tribes to be eligible for federal programs through the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS), the Indian tribal governments must have a formal government-to-government relationship with the United States. The names of all federally recognized tribes appear on a list that the Secretary of the Interior publishes annually, pursuant to the Federally Recognized Indian Tribes List Act of 1994. The latest list of tribes was published in the Federal Register on December 5, 2003, and includes 562 tribes.<sup>1</sup>

The United States government has recognized Indian tribes in various ways since its own inception. The earliest executive branch recognition of tribes occurred in the context of treaty-making and the establishment of executive order reservations.<sup>2</sup> In the twentieth century, the Department of the Interior determined which tribes were eligible for its administrative services. For example, after the 1934 Indian Reorganization Act (IRA), the Federal government’s recognition activities focused exclusively on determining which Indian nations were eligible to organize under the Act and which were not. In 1934, the BIA compiled a list of 258 recognized tribes. In 1936, two Acts were passed that also allowed the Alaska and Oklahoma tribes to organize under the IRA. Between 1936 and 1978, Indian nations would generally get “on the list” through the Department of the Interior or Congress on a case-by-case basis.<sup>3</sup>

In 1978, the Bureau of Indian Affairs (BIA) established an administrative process for federal acknowledgment of unrecognized Indian tribes.<sup>4</sup> This process, called the Federal Acknowledgment Process, originated out of concern for Indian groups that were denied rightful recognition.<sup>5</sup> In addition, there were some concerns about tribes being administratively recognized at that time without any supporting standards.

*The Process was Created to Address Considerable Delays*

In undertaking a discussion of the critical importance of streamlining the processing of recognition petitions, it seems meaningful to point out that the current process was established in 1978 precisely to address the issue of long delays in making recognition decisions and concern about the absence of a formal process of recognition. One impetus for creating a formal process derived from the findings and recommendations of Task Force No. 10 of the United States Congress’ American Indian Policy Review Commission. Specifically, the work of the 1976 Policy Review Commission found that unrecognized tribes, because they were not being served by federal programs, were among the nation’s poorest citizens. The Commission identified 133 unrecognized tribes, representing more than a hundred thousand people, and found that “the results of ‘non-recognition’ upon [those] Indian communities and

<sup>1</sup> See also 25 C.F.R. § 83.5(a).

<sup>2</sup> “The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process.” *Washington Law Review*. V. 66, January 1991 at 210. See also, *The Great Father*, by Francis Prucha. (1984)

<sup>3</sup> “Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83.” William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992. According to Quinn, the so-called “Cohen criteria” were used as the standard.

<sup>4</sup> 25 C.F.R. § 83

<sup>5</sup> TASK FORCE TEN, AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONGRESS, 2ND SESSION, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (1976). See also, “The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process.” *Washington Law Review*. V. 66, January, 1991 at 210. There were many ways to be left off “the list.” For example, many tribes in California remain unrecognized because of unratified treaties.

individuals has been devastating.”<sup>6</sup> The Commission’s report essentially chastised various departments of the United States for their neglect of “non-recognized” Indians and made six specific recommendations, including the establishment of a special office to determine tribal status by reviewing petitions submitted by unacknowledged Indian groups.<sup>7</sup>

Three court cases made the creation of a formal acknowledgment process even more urgent since the determination of tribal status stood as the threshold issue in each. The first, *United States v. Washington*, held that Indian tribes exercising treaty fishing rights were entitled to half the commercial fish catch in the State of Washington, but limited eligibility to treaty signatories and federally recognized tribes. In the second, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, two unacknowledged tribes claimed hundreds of thousands of acres of land in Maine which had been illegally ceded to the state. Following these two court cases, the Department of Interior (DOI) instituted an unofficial moratorium on acknowledging tribes until a system could be developed. Caught in the middle of this moratorium, the Stillaguamish Tribe’s petition for federal acknowledgment awaited action by the Secretary until the Tribe sought equitable relief in federal court. In *Stillaguamish Tribe v. Kleppe*, the court described the moratorium as “arbitrary and capricious” and ordered the DOI to decide on the Stillaguamish petition within thirty days.<sup>8</sup>

Regulations governing the administrative process for Federal acknowledgment first became effective October 2, 1978. The regulations were designed to provide a uniform process to review acknowledgment claimants whose character and history varied widely, placing the burden of proof on the tribal groups themselves. This presumption results in rigorous research and documentation requirements and contributes to bureaucratic delays since OFA staff, who are tasked with evaluating petitions, are aware of the possibility of legal challenges to their recommendations and findings.<sup>9</sup>

#### *Average Number of Decisions Per Year is Low*

Today, we know that the system that was created in 1978 is not functioning as intended; that is, the process is not meeting the needs of the Indian groups still seeking formal recognition and therefore these groups continue to be denied the chance to prove they should be receiving critical services. BIA’s regulations outline a process for evaluating a petition that was designed to take about two years.<sup>10</sup> The facts show that the process is inefficient and takes significantly longer than intended. In the 26 years since 1978, the OFA has made decisions on only 35 petitions (16 positive and 19 negative), which amounts to an average of 1.3 decisions per year. Since 1978, 294 Indian groups have submitted letters of intent; 9 are currently on the active list and 13 petitions are ready, waiting for active consideration. According to the BIA, under the current resources, it could take 15 years to resolve all of the currently completed petitions—those on the active and ready for active lists.<sup>11</sup> And of course a final determination is rarely the last word today, since lawsuits and appeals are common.

#### *Reasons Why the Decisions are Slow*

There are a host of reasons why the current process takes so long. For starters, the OFA is woefully underfunded. Significantly more funding is needed to ensure that the OFA is adequately staffed and provided with the resources required to address both the petitions themselves and the related work required by the contemporary political situation. Former Assistant Secretary for Indian Affairs Kevin Gover noted that one reason the OFA is consistently underfunded is because there are so many pressing Indian needs, such as police departments, schools and a solu-

<sup>6</sup>See “Lost Tribes: Native Americans and Government Anthropologists Feud over Indian Identity.” *Lingua Franca*. May/June 1999, p. 36.

<sup>7</sup>AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 480-83. See also, “Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83.” William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992 at 51.

<sup>8</sup>See “Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83.” William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992, p. 41.

<sup>9</sup>See “The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process.” Rachael Paschal. *Washington Law Review*. V. 66, January, 1991 at 210.

<sup>10</sup>“More Consistent and Timely Tribal Recognition Process Needed.” United States General Accounting Office (GAO). February 7, 2002, p.2.

<sup>11</sup> *Ibid.* p.6.

tion to the trust system.<sup>12</sup> With so many competing priorities among existing federally recognized tribes, it is a difficult decision for the DOI to allocate scarce resources to this process.

The bigger problem is that there is no real constituency for unrecognized tribes. While the National Congress of American Indians (NCAI) does have a task force dedicated to the issues raised by the FAP, there is little incentive among federal agencies or Congress to address the needs of unrecognized Indian groups since they have no formal relationship with the federal government.

In addition to being seriously underfunded, the Bureau of Indian Affairs (BIA) has acknowledged the OFA staff is also overburdened. Currently, the OFA has only eleven full-time staff, who estimate that they spend between 40%-60% of their time fulfilling administrative responsibilities.<sup>13</sup> In addition, the process itself has become overly cumbersome, essentially drowning the staff in paperwork. For example, OFA staff is taxed with having to review and make recommendations on existing and incoming petitions, which is their task, while also undertaking many additional and distracting tasks, such as responding to information requests in connection with independent review and appeals of official determinations by the Interior Board of Indian Appeals (IBIA), with pending lawsuits and with responding to growing numbers of Freedom of Information Act (FOIA) requests. For example, both negative and positive findings now generate appeals and lawsuits, whether from the petitioners themselves or other interested parties. This growing burden also results from increased interest and participation in the process by local governments and states. Some of these parties have indicated that they view these FOIA requests as a means to deliberately slow down the process.

#### *Suggestions for Improving the Process*

Given the range of challenges involved in streamlining the process, my suggestions fall into three general categories: increased appropriations, supplemental human resources and changes in the current regulations to make it more efficient.

#### **1) Increased appropriations**

A recent report by the Bureau of Indian Affairs found that the OFA would need to triple the size of its current staff in order to meet the increased demands associated with petitions and follow-up requests.<sup>14</sup> As of September 2002, the BAR consists of eleven staff members (\$1,100,000 FY2003 President's Budget). The staff members include: one (1) branch chief, one (1) secretary, three (3) cultural anthropologists, three (3) genealogical researchers and three (3) historians. Meanwhile, the DOI's analysis and response to a November 2001 GAO Report recommends a total of 33 staff members (\$3,184,000) to eliminate the current workload in three to four years.<sup>15</sup> As I mentioned, at current funding levels, it could take 15 years to resolve only those petitions on the active and ready for active lists.<sup>16</sup>

#### **2) More outside resources**

With adequate funding, OFA could hire additional staff to assist in responding to information requests, enabling OFA professional staff to focus on reviewing petitions. In short, professional staff with expertise on tribal history and genealogy should be focused exclusively on reviewing petitions, not spending their time making photocopies or preparing the administrative records for litigation in Federal Court. One additional alternative may be to contract with outside experts on particular petitions. Qualified historians, applied anthropologists and genealogists from academic institutions could be called upon as a resource, providing technical assistance and additional context for petitions, potentially saving time. OFA staff could be encouraged to utilize the expertise of scholars of the local region, which could be enormously helpful in providing critical historical context to the petitions themselves. In addition, BIA's Regional Offices could be encouraged to provide the OFA

<sup>12</sup> See Statement of Hon. Kevin Gover, Assistant Secretary, Indian Affairs, Department of the Interior, at the Hearing Before the Senate Committee on Indian Affairs on S. 611, The Indian Federal Recognition Administrative Procedures Act of 1999. May 24, 2000.

<sup>13</sup> "More Consistent and Timely Tribal Recognition Process Needed." United States General Accounting Office (GAO). February 7, 2002, p.6. See also "Strategic Plan: Department of the Interior Bureau of Indian Affairs, Office of Tribal Services, Brand of Acknowledgment and Research: Response to the November, 2001 General Accounting Office Report." September 2002. p. 9.

<sup>14</sup> "Strategic Plan: Department of the Interior Bureau of Indian Affairs, Office of Tribal Services, Brand of Acknowledgment and Research: Response to the November 2001 General Accounting Office Report." September, 2002. p. 9.

<sup>15</sup> Ibid. p., 10.

<sup>16</sup> Ibid. p., 6.

with access to critical information, both before and during field visits to petitioning Indian groups in that region.

### 3) Changes to current regulations

Reduce paper work Once funding and staffing needs are met, the process itself could be streamlined by reducing the paperwork associated with each petition. In some cases, the OFA staff is a victim of its own success. By turning out more final determinations annually (both positive and negative), they generate more FOIA requests and more appeals, resulting in additional administrative duties and generating more paperwork. There are a couple of ways to reduce the paperwork associated with each petition. First, the regulations could be adjusted to address when and how often interested parties could participate in the process. Currently, interested parties are allowed to comment on nearly each step of the petition process. The regulations were originally written to provide the maximum opportunity for comment in order to collect as much information as possible during the process and make the decisions defensible as possible. Under current political conditions, the comment and response process appears to be too involved and could be re-visited. By limiting the comment opportunities for outside parties, the paperwork and response times would both be reduced. It seems reasonable that interested parties would be notified when a letter of intent is filed, then allowed to comment only after OFA completes its work on the petition.

A second recommendation for reducing paperwork would be to re-visit and narrow the definition of who is eligible for "interested party" status. Following the 1994 regulations, some "interested parties" (i.e., scholars) were redefined as "informed parties" with diminished rights of comment and response. Of course, this change was intended to streamline the process and reduce paperwork. It seems reasonable to consider narrowing the definition even further at this time by defining "interested parties" as those who have a legal or property interest in the final decision, such as other tribes or states.

#### *Expedite Positive Findings*

Under the current regulations, the Assistant-Secretary, Indian Affairs (AS-IA) has the authority to expedite a proposed negative finding after the technical assistance review. What this means is that the AS-IA can issue a proposed negative finding before allowing the petition to enter the active consideration phase of the process. This expedited negative finding is based upon three of the required criteria (e.g.) I would recommend exploring a grant of authority to the AS-IA to expedite a proposed positive finding in the same way. If the AS-IA, after the technical assistance review, finds that the tribal group has an obviously strong case for recognition, then the DOI could recommend that Congress legislatively recognize the group based on the research and findings of the OFA and the AS-IA. This process would give Congress the opportunity of exercising its constitutional authority with regard to Indian tribes and while also reducing the challenges of litigation.

Thank you for the opportunity to present my ideas with you today.

The CHAIRMAN. Thank you.

Miss Spilde, to begin with you, you testified that placing the burden of proof on tribes results in bureaucratic delays, since the BIA staff has to thoroughly examine those petitions. How is this problematic and do you think the burden of proof should be shifted, and how?

Ms. SPILDE. That is a great question. I believe, as we have heard today, many of the tribes are coming into the process and there is the assumption that they do not have a relationship with the Federal Government and, of course, each tribe has very unique histories and challenges in trying to document the relationship that they believe they do have, hence their application.

So I believe that I am not sure how the burden of proof could be shifted but certainly I think the presumption that petitioning groups are not tribal groups makes that case very difficult to make.

The CHAIRMAN. Mr. Martin, you recommended insulating the Federal acknowledgment staff from outside third-party influence. How would we do that? What do you recommend on that?

Mr. MARTIN. I think the internal procedures of the BIA could be written and their manuals could be rewritten to isolate or give confidence to the BAR process that their decisions will not be tainted or influenced by third parties. As it stands right now, for Freedom of Information requests, answering OSHA requests, it puts a slant on the information that they are receiving. As we have heard testimony before, now that the onslaught of gaming has come in, the tribes who are in the petitioning process put together elaborate petitions and continually go into the BIA on a regular basis and tie up that staff's time. They should be isolated to be able to do their work, make their recommendations, and go to the next petition.

The CHAIRMAN. Let me ask both of you, and I wanted to ask the previous panel this question, should there come a point in time where the Federal government says this is it, that all of the tribes that are seeking recognition, to reinstitute recognition, that we are going to draw a line and say this is all of them? Or should the process just continually remain open the way it is right now? Is there ever a point in time where you would foresee that this is everybody?

Mr. MARTIN. I would say, Mr. Chairman, that tribes are not made overnight, that they had to have existed. I think the Congress can issue notification across this country that says if you want to be considered, you have this date certain to get your stuff together. You do not just develop tribes. They had to have existed. The criteria shows that you had to, as my tribe, have a definite link back to historical times.

The CHAIRMAN. Miss Spilde, did you want to answer that?

Ms. SPILDE. Are you asking about whether or not there should be some sort of sunset clause with regard to adding additional letters of intention?

The CHAIRMAN. Yes, just as Mr. Martin said, just a date certain. Just tell everybody you have to have it in within the next 3 years or 10 years or something.

Ms. SPILDE. I believe there are a couple of ways to look at that question, the first being that right now certainly there is no time-frame, which I understand contributes in some cases to the delay. But there is also imbedded in that the assumption that this is a one-shot deal, so there is no incentive to rush them because this is the one chance that each tribe has once they do apply.

But I guess if there were a sunset clause inserted in the process I would then want to also have an additional clause saying that there should then be no termination of tribes that already exist.

The CHAIRMAN. Well, thank you.

Mr. KILDEE. Mr. Chairman, I will submit some questions in writing.

I welcome both of you here. It is always good to see Tim Martin and I will give you some questions in writing. Thank you very much.

The CHAIRMAN. The bell has gone off. We have just been called for a vote on the House Floor, so we are going to temporarily recess the Committee. I am told we only have one vote, so it should just be a few minutes and we will be back.

So the Committee is going to stand in recess.

[Recess.]

The CHAIRMAN. The Committee will come to order. I apologize to the witnesses. Sometimes we have no control over when they call votes but thank you for your patience.

Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman.

I just want to say to the two panelists that your testimony is pretty much along the lines of my concerns because I think both of you made it quite clear that you think that the existing process could work and I guess in Ms. Spilde's case you made some recommendations but they did not involve legislation. I still have this great fear that if we try to open this up legislatively that I think you actually mentioned at one point that those who want to reform the BIA process legislatively seem more interested in a moratorium or making it more difficult than they do in making it easier or to expedite it.

But Tim, you mentioned that the BIA—actually, both of you mentioned the BIA needing more resources and I had two questions. One is the same question I asked the previous panel, which is, would you be in favor or could you foresee a procedure where the Federal Government actually gave money to tribes to defray the cost of their going through the process?

And second, which is really another issue that you brought up, which is if the BIA needs more money, which I definitely think it does, how are we going to go about that? We could talk about tripling the staff but if you get the money from general revenue it is probably not going to be there, given the deficit and all the problems that we have with that. So is there some other way to do it? I mean I assume that tribes that are already recognized would probably be reluctant to pay for a process to recognize new tribes but is there some way to finance the additional resources for the BIA without just coming up with general revenues?

And second, would you be in favor of actually having the Federal Government provide some funding for tribes so they do not have to rely on these outside sources?

Mr. MARTIN. Thank you, Congressman. As you look at my testimony, one of the bullet points for recommendations was TA, technical assistance. As the earlier testifiers mentioned, the tribes did get at one time grants from ANA, Administration for Native Americans, for tribes that were going through the FAB process. Our tribe was fortunate to get one of those grants, also, and it was a tremendous help for us to be able to purchase the outside resources of the historians, the genealogists, to come in and to be able to do fact-finding on what you were telling the government. It almost acted as one professional checking another professional's work. I think a mechanism where one, we could expedite petitioners before they get to the active consideration, make sure the information is in there, and there is a host of professionals that exist that could help petitioners in there to make sure that they have correct petitions, and that would expedite it.

You mentioned also about the BIA staffing. As Miss Spilde alluded to, 40 percent of the time is taken in administrative requests for the Freedom of Information Act. When I talk about insulating the staff, it should be segmented. There should be a component of the BIA that does nothing but concentrate on the review of the pe-

tioners' application. Then there could be different staff that could then answer the FOIA requests and other requests or administrative duties to free them up to maximize on nothing but the review of a petition.

Mr. PALLONE. OK. Miss Spilde, if you wanted to comment?

Ms. SPILDE. I would also be in support of funding for tribes. Partly I think this would also address the political question. When we hear those who are not in favor of the process who do have concerns about perhaps gaming interests funding tribal groups who are petitioning, that this could alleviate some of those concerns and give tribes another option. So I think it would be both an economic and possibility even a political answer.

Mr. PALLONE. And what about the BIA? Do you foresee any of funding this? It is easy to say—not that it is easy but I appreciate your saying we need three times as much money and all that, but I can almost guarantee you if I went before Appropriations and asked for three times the funding they would say well, we cannot do it.

Is there any other way to fund it maybe so the BIA has more money?

Ms. SPILDE. Well, as I did mention, I do think that there are so many competing priorities and it is a difficult decision to appear to be allocating money from federally recognized tribes to the process, but I think if there is true concern to get through a number of petitions quickly and possibly get closure to a lot of these petitions, if there is a short-term solution where there is an understanding that there would be a big allocation just for a new three to 5 years or something—I know that has been proposed—perhaps that would make it more palatable.

Mr. PALLONE. Mr. Chairman, I know the time has run out but I just wanted to say to you because I heard what you said today about maybe having some sort of sunset clause on tribes to achieve recognition in some way, I just wanted to say I do not like that, only because I think the problem historically is that a lot of tribes, in some cases because of government action, have been terminated or have lost their existence and you can always think about the fact that in the future there might be some new scientific way to achieve recognition and show that there was continuity.

So the idea of completely saying here is the deadline and if you do not apply by such-and-such a date bothers me only because I think as time goes on, there may be more ways for tribes that maybe would not have met the test to prove that they existed or that they had ancestors, maybe through new forms of DNA analysis or whatever.

I do not even know if you were expressing your opinion on that as much as asking the question but that is the only problem I would have with it.

Ms. SPILDE. Can I add something to that? In response to the sunset clause, I think also something I wanted to note was I think that the idea of sort of closing the door assumes that there are going to be increasing numbers of petitions because there is this perception that Indian groups are going to be pursuing gaming and therefore there are going to be more and more groups coming out.

I just wanted to put some of those concerns to rest by mentioning that the average number of petitions filed has remained constant since 1978. In fact, the average number of petitions filed between 1978 and 1988 when IGRA was passed was 10 per year and between 1988 and now there have been an average of 10.9 petitions filed per year.

So I think that the concern that somehow there are going to be more and more petitions filed because gaming is one of the opportunities for federally recognized tribes, if that is weighing into this decision, I just wanted to put those facts out there.

Mr. MARTIN. Mr. Chairman, I would also like to add clarity to the point I made to the Congressman earlier about technical assistance grants to the tribes. I did not want it to be construed that because you give a technical assistance grant to a tribe that State and local governments should be able to get technical assistance grants.

Technical assistance to the tribes is because they do not have the resources. Local governments would have then their State resources that they could apply to to get technical assistance if they were concerned. It is because tribes do not have the revenue or the resources to be able to do the petition that I believe technical assistance is needed for them, not for the States or local governments.

The CHAIRMAN. Just to respond to Mr. Pallone, when I talk about having some kind of a sunset clause, I have not made up my mind on that whether or not that is a good idea but I do think it is worthy of discussion. I think that it is something that we need to throw out on the table and talk to a number of people about as we move forward with this.

I have had a couple of tribes that have approached me with that and said that in order to speed up this process and at some point come to finality on this, that that may be something that we have to do in order to clear the deck, so to speak, of all these people that are waiting. And I am willing to listen to that. I am willing to pursue that.

But in terms of what happens if at some point in the future someone else comes out, I think that you would always have to leave the ability for Congress to make a decision on something like that if it does happen because it is ultimately the authority of Congress to make that decision and we would always have the ability to do it, as we have in the past when we may have disagreed with decisions that were made by the BIA or when we felt that it was taking too long to come up with the decision. This Committee has acted in the past; Congress has acted in the past in terms of recognition. I think that possibility would always be there.

But I think it is something that we need to talk about. We need to put that out there and get as much response on that, along with all of the other suggestions that have been made today.

I want to thank you both and again I apologize for the recess, for the delay. I appreciate both of you making the effort to be here and sharing your knowledge and your views with us. Thank you.

The final witness in our next panel is the Administration witness, R. Lee Fleming, director of the Office of Federal Acknowledgment of the BIA. I wanted the Administration to testify last so that

he may provide information and responses to the Committee in light of the testimony we heard from previous panels of witnesses.

Thank you for joining us. If I could have you raise your right hand?

[The witness was duly sworn.]

The CHAIRMAN. Let the record show he answered in the affirmative. Thank you very much for being here. Again I apologize to you for the delay in the hearing but it is an extremely important topic, as I am sure you are well aware, and we look to your testimony and the opportunity to discuss this with you. So Mr. Fleming?

**STATEMENT OF R. LEE FLEMING, DIRECTOR, OFFICE OF  
FEDERAL ACKNOWLEDGMENT, BUREAU OF INDIAN AFFAIRS**

Mr. FLEMING. Good morning, Mr. Chairman and members of the Committee. I am pleased to be here today to speak on behalf of the Department of the Interior about the Federal acknowledgment process.

My name is Lee Fleming, Director of the Office of Federal Acknowledgment, which is within the Department's Office of the Assistant Secretary, Indian Affairs. I am also a member of the Cherokee Nation, which is located in Oklahoma.

The purpose of my testimony is to address what reforms are being made to improve the Department's Federal acknowledgment process, specifically what is being done to improve the consistency and the reliability of the process and decision, as recommended by the General Accounting Office.

The Federal acknowledgment process regulations at 25 C.F.R. Part 83 govern the Department's administrative process for determining which groups are Indian tribes within the meaning of Federal law. A final determination that a group is an Indian tribe means, among other things, that it has continuously existed as a tribe, has inherent sovereignty, and is entitled to a government-to-government relationship with the United States. Tribal status is a political, not racial, classification. Whether to acknowledge tribal status is a decision taken seriously by the Department.

In recent years legislation has been introduced almost annually to modify the criteria for acknowledgment of tribes or to remove the process from the Department. While some parties seek to change the administrative process by speeding it up, others believe that doing so will undermine the factual basis for the decision.

The Office of Federal Acknowledgment has a high volume of work. The current workload consists of nine petitions on active consideration and 13 fully documented petitions that are ready, waiting for active consideration. The administrative records for some of these documented petitions range between 10,000 to 30,000 pages. There are also 213 groups that have submitted only letters of intent or partial documentation. These groups are not ready for evaluation and will require technical assistance. There is only one determination under review at the Interior Board of Indian Appeals.

In addition, there are currently four lawsuits directly involving the Federal acknowledgment process or the Freedom of Information Act related to Federal acknowledgment.

The GAO investigated the effectiveness and consistency of the tribal recognition process and issued its report in November of

2001. The GAO report recommended that acknowledgment decisions be made more transparent and more timely. The GAO noted that the workload of the staff assigned to evaluate recognition decisions has increased while resources have declined.

In response to the GAO report, the Assistant Secretary provided a strategic plan and a needs assessment dated September 30, 2002 to the GAO, OMB, and the pertinent Senate and House Committees. The Assistant Secretary's response to the GAO report is based on a commitment to the principle that acknowledgment decisions should continue to be based on fully documented records that have been carefully reviewed in accordance with the regulatory standards and then made available to the public in a transparent and timely manner.

In response to the GAO report, all technical assistance review letters, proposed findings, final determinations, and reconsidered decisions of completed cases made under the regulations were electronically scanned and indexed and are now available on CD-ROM from the Office of Federal Acknowledgment. This CD will be updated as necessary. Ready access to all prior decisions addresses both transparency and consistency in the decisionmaking process.

Two vacancies within the office were filled, resulting in a professional research team of three cultural anthropologists, three historians, and three genealogists. The office's full-time staff consists of one director, one secretary, and these three professional research teams. A team composed of one professional from each of the disciplines is assigned to review and evaluate each petition.

Congressional appropriations for Fiscal Year 2003 and Fiscal Year 2004 increased funding, allowing the hiring of two sets of contractors. The first set of contractors included two FOIA specialists/records managers. The second set of contractors includes three research assistants who work with a computer data base, scanning and indexing the documents to help expedite the professional research staff evaluation of a case. Both sets of contractors assist in making the process more accessible to petitioners and interested parties while increasing the productivity of the professional researchers by freeing them of these administrative duties.

A significant response by the Department to the GAO report has been the development of the use of the Federal Acknowledgment Information Research or FAIR, a computer data base system that provides on-screen access to all the documents in the administrative record of a case. These are linked to entries of information extracted from them by the professional office researchers. Documents are scanned and then the data is extracted, linked and indexed to create a searchable administrative record.

This system allows the OFA or Office of Federal Acknowledgment researchers to have immediate access to the records and allows them to make more efficient use of their time. This system also allows petitioning groups and interested parties, such as States and local governments, to have the record on CD and thus have on-screen access to the administrative record and to any data entries made by the professional researchers.

We anticipate that the next generation of scanning for FAIR will allow electronic redaction of privacy information from documents, which will save the Department a tremendous amount of time

spent photocopying cases for interested parties or FOIA requests of these voluminously documented petitions. Such steps will further improve the acknowledgment process.

This concludes my testimony. Thank you for the opportunity to testify about the Federal acknowledgment process and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Fleming follows:]

**Statement of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Secretary—Indian Affairs, U.S. Department of the Interior**

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today to speak on behalf of the Department of the Interior about the Federal acknowledgment process. My name is Lee Fleming and I am the Director of the Office of Federal Acknowledgment (OFA) within the Department's Office of the Assistant Secretary—Indian Affairs (AS-IA). OFA was formerly the Branch of Acknowledgment and Research (BAR), which was under the Bureau of Indian Affairs' Office of Tribal Services. The purpose of my testimony is to address what reforms are being made to improve the Department's Federal acknowledgment process, specifically what is being done to improve the consistency and reliability of the process and decisions, as recommended by the General Accounting Office (GAO).

*Background*

The Federal Acknowledgment regulations, known as "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," 25 C.F.R. Part 83, govern the Department's administrative process for determining which groups are "Indian tribes" within the meaning of Federal law. A final determination that a group is an Indian tribe means, among other things, that it has continuously existed as a tribe, has inherent sovereignty, and is entitled to a government-to-government relationship with the United States. Tribal status is a political, not racial, classification. Whether to acknowledge tribal status is a decision taken seriously by the Department.

In recent years, legislation has been introduced almost annually to modify the criteria for acknowledgment of tribes or to remove the process from the Department. While some parties seek to change the administrative process by speeding it up, others believe that doing so will undermine the factual basis for the decisions. For example, 20 Attorneys General collectively stated their concern that quality in the review process should not be sacrificed in the name of expediency and that "all parties benefit from a careful and comprehensive review of the evidence on each petition."

*Workload*

OFA has a high volume of work. The current workload consists of nine petitions on active consideration and 13 fully documented petitions that are ready, waiting for active consideration. The administrative records for some of these documented petitions are in excess of 30,000 pages. There are 213 groups that have submitted only letters of intent or partial documentation. These groups are not ready for evaluation and require technical assistance. There is one final determination under review at the Interior Board of Indian Appeals in response to a request for reconsideration. In addition, there are currently four lawsuits directly involving Federal acknowledgment or the Freedom of Information Act (FOIA) related to Federal acknowledgment.

*GAO Report*

The GAO investigated the "effectiveness and consistency of the tribal recognition process" in response to a request from several members of Congress, and issued its report in November 2001. The GAO report recommended that acknowledgment decisions be made more transparent and more timely. The GAO noted that the workload of the staff assigned to evaluate recognition decisions has increased while resources have declined.

In response to the GAO report, the AS-IA provided a strategic plan and needs assessment dated September 30, 2002, to GAO, OMB, and the pertinent Senate and House Committees under 31 U.S.C. 720. The AS-IA response to the GAO report is based on a commitment to the principle that acknowledgment decisions should continue to be based on fully documented records that have been carefully reviewed in accordance with regulatory standards and then made available to the public in a transparent and timely manner.

*Current Improvements*

In response to the GAO report, all technical assistance review letters, proposed findings, final determinations, and reconsidered decisions of completed cases made under the regulations were electronically scanned and indexed and are now available on CD-ROM from the OFA. This CD will be updated, as necessary. Ready access to all prior decisions addresses both transparency and consistency in the decisionmaking process.

Two vacancies within the OFA were filled, resulting in a professional research staff of three cultural anthropologists, three historians, and three genealogists. OFA's full-time staff consists of one director, one secretary, and three professional research teams. A team composed of one professional from each of the disciplines is assigned to review and evaluate each petition. Congressional appropriations for FY 2003 and FY 2004 increased funding, allowing the hiring of two sets of contractors. The first set of contractors includes two FOIA specialists/records managers. The second set of contractors includes three research assistants who work with a computer database system; scanning and indexing the documents to help expedite the professional research staff evaluation of a case. Both sets of contractors assist in making the process more accessible to petitioners and interested parties, while increasing the productivity of the OFA researchers by freeing them of administrative duties.

A significant response by the Department to this GAO report has been the development and use of the Federal Acknowledgment Information Resource (FAIR), a computer database system that provides on-screen access to all the documents in the administrative record of a case. These are linked to entries of information extracted from them by OFA researchers. Documents are scanned and then the data is extracted, linked, and indexed to create a searchable administrative record. This system allows the OFA researchers to have immediate access to the records and allows them to make more efficient use of their time. This system also allows petitioning groups and interested parties, such as States and local governments, to have the record on CD and thus have "on screen" access to the administrative record and to any data entries made by the OFA researchers. This ready access to the record addresses both the GAO report's recommendations that the decisions be made in a more transparent manner and that they be more timely. In fact, FAIR has been applauded by attorneys working for the towns in Connecticut related litigation.

We anticipate that the next generation of scanning for FAIR will allow electronic redaction of privacy information from the documents, which will save the Department a tremendous amount of time spent photocopying cases for interested parties or FOIA requests of these voluminously documented petitions. Such steps will further improve the acknowledgment process.

*Conclusion*

Thank you for the opportunity to testify about the Federal acknowledgment process and I will be happy to answer any questions you may have.

[The Bureau of Indian Affairs' response to questions submitted for the record follows:

**Responses to questions submitted for the record by the  
Bureau of Indian Affairs**

**The Bureau of Indian Affairs requires a petitioner be identified as an American Indian entity on a substantially continuous basis since 1900.**

**QUESTION 1: What types of identification are acceptable?**

ANSWER: Section 83.7(a) of the Federal acknowledgment regulations at 25 C.F.R. Part 83 lists the basic types of external identification that meet that criterion. The regulations state that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

- (1) Identification as an Indian entity by Federal authorities.
- (2) Relationships with State governments based on identification of the group as Indian.
- (3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

- (4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.
- (5) Identification as an Indian entity in newspapers and books.
- (6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

In addition, Section 83.6(g) provides that other forms of evidence, not specifically listed, may also be used. Section 83.6 (g) states: "The specific forms of evidence stated in the criteria in § 83.7 (a) through (c) and § 83.7(e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions."

**QUESTION 2: How was that year determined?**

ANSWER: The original 1978 regulations required external identification as an Indian entity throughout history until the present. The 1994 revised regulations shortened this time period to 1900 to the present. The preamble to the 1994 regulations noted there were strong concerns raised, "particularly regarding historical identification of groups in the South, that racial prejudice, poverty, and isolation have resulted in either a lack of adequate records or records, which unfairly characterized Indian groups as not being Indian."

In response, the preamble further states: "the criterion for continued identification has been revised to reduce the burden of preparing petitions, as well as to address problems in the historical record in some areas of the country. The requirement for substantially continuous external identification has been reduced to require that it only be demonstrated since 1900. This avoids some of the problems with historical records in earlier periods, while retaining the requirement for substantially continuous identification as Indian." (59 FR 9286)

**QUESTION 3: Under current recognition guidelines, when a petitioner is required to be a distinct community and have authority over its members since historical times, are historical times defined as "since 1900?"**

ANSWER: The regulations require demonstration of community and political influence "from historical times until the present" (25 C.F.R. Part 83, § 83.7(b) and § 83.7(c)). The regulations in section 83.1, Definitions, states "Historically, historical or history" as "dating from first sustained contact with non-Indians."

**In 1846, after two hundred years of documented tribal history, the Federal government split the Miami tribe into two tribes—the Indiana Miami (Eastern Miami) and the Oklahoma Miami (Western Miami).**

**QUESTION 4. Given that the Federal government split the tribe into two entities, does the requirement that a petitioning group not be part of any recognized North American Indian tribe, apply to the Indiana Miami Indians?**

ANSWER: The Federal government did not split the Miami tribe into two entities. At the time of removal, the Federal government, based on Statute and treaty requirements, allowed portions of the Tribe to remain in Indiana, and allowed some of the families that moved to Oklahoma to return to Indiana. See Federal Register, Volume 55, Number 139, pp. 92423-29425, for the proposed finding of the Miami Tribe of Indiana.

The regulations allow for historical processes where tribes have divided in the past and do not prevent recognition on this basis. As an example, see the Snoqualmie and Poarch Band of Creek findings. The language cited by the question, from 25 C.F.R. Part 83, section 83.3(d), refers to portions of currently recognized tribes that may seek to separate and be separately acknowledged. Such groups cannot be recognized under the acknowledgment regulations unless they meet the requirements of 25 C.F.R. Part 83, section 83.7(f).

**In 1897, Assistant Attorney General Willis Van Devanter administratively terminated Federal recognition of the Indiana Miami tribe.**

**QUESTION 5: How many other tribes have been de-recognized through similar bureaucratic decisions?**

ANSWER: The Department did not "administratively terminate" the Indiana portion of the Miami tribe as a result of Vandevanter's legal opinion. That opinion concluded that the Indiana Miami were no longer maintaining tribal relations and, therefore, the Department, under the laws and policies of the time, no longer had a legal responsibility for the Miamis that remained in Indiana. The decision to decline to acknowledge the Indiana Miami did not rely on Vandevanter's opinion.

We do not have a list of tribal groups that were at one time considered Federal responsibilities but subsequently lost that status. The regulations make specific provision for previously acknowledged groups, reducing the evidentiary burden on such petitioners (25 C.F.R. Part 83, section 83.8), but requiring that they demonstrate that they have continued to exist as a tribe up until the present time. Some peti-

tioners that have claimed a connection with tribes recognized in the past have, on examination, been found to have no such connection, or to be descendants of tribes who have not formed a distinct community for generations.

**QUESTION 6: How many Indian tribes have been recognized administratively by the Bureau of Indian Affairs?**

ANSWER: Since 1978, the year the Federal Acknowledgment Regulations became effective, the following tribes have been administratively recognized under 25 C.F.R. Part 83:

1. Grand Traverse Band of Ottawa & Chippewa Indians of Michigan, Administrative recognition under 25 C.F.R. Part 83 (AR), 5/27/1980
2. Jamestown S'Klallam Tribe of Washington, AR, 2/10/1981
3. Tunica-Biloxi Indian Tribe of Louisiana, AR, 9/25/1981
4. Death Valley Timbi-Sha Shoshone Band of California, AR, 1/3/1983
5. Narragansett Indian Tribe of Rhode Island, AR, 4/11/1983
6. Poarch Band of Creek Indians of Alabama, AR, 8/10/1984
7. Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, AR, 4/11/1987
8. San Juan Southern Paiute Tribe of Arizona, AR, 3/28/1990
9. Mohegan Indian Tribe of Connecticut, AR, 5/14/1994
10. Jena Band of Choctaw Indians, Louisiana, AR, 8/29/1995
11. Huron Potawatomi, Inc., Michigan, AR, 5/17/1996
12. Samish Indian Tribe, Washington, AR, 4/26/1996
13. Match-e-be-nash-she-wish Band of Potawatomi Indians of Michigan, AR, 8/23/1999
14. Snoqualmie Tribe, Washington, AR, 10/6/1999

**QUESTION 7: Were any of these recognitions a restoration of previously withdrawn recognitions?**

ANSWER: A number of acknowledgment decisions have recognized petitioners as tribes, petitioners that at some earlier point in time had been a Federal responsibility, but through laws, treaties and the operation of policy were no longer a Federal responsibility. Examples of groups acknowledged under 25 C.F.R. Part 83 include the San Juan Southern Paiute, the Cowlitz, Poarch Band of Creeks, the Grand Traverse Band of Ottawa and Chippewa, the Snoqualmie, the Huron Potawatomi, and the Jamestown S'Klallam. Congress has legislatively recognized the Little Traverse, Pokagon Potawatomi and Yavapai Tonto Apache Tribe of Arizona, among others.

**The Miami Indians were exposed to western society as early as the seventeenth century. Moreover, during the nineteenth century, the Federal government encouraged the acculturation and assimilation of native populations.**

**QUESTION 8: What standards does the BIA use when evaluating an historically distinct tribal community?**

ANSWER: The standards used to evaluate a historically distinct tribal community are embodied in the acknowledgment regulations, themselves. The Indiana Miami Proposed Finding and Final Determination describe in detail the application of those standards. See Federal Register, Volume 55, Number 139, pp. 92423-29425, and Volume 57, Number 118, pp. 27312-27313, respectively (copies enclosed).

**QUESTION 9: Is some latitude given to tribes who maintain some tribal customs and traditions but who, because of time and government policy, are largely assimilated and acculturated into the American populace?**

ANSWER: The regulations do not require the maintenance of any distinct customs or traditions, but do require the maintenance of a distinct social and political community. The regulations list a variety of forms of evidence to demonstrate community (see criterion 83.7(b)). Maintenance of distinct culture is one form of evidence to demonstrate community, but is not a required form. 25 C.F.R. Part 83, § 83.7(b)(1)(vii) and § 83.7(b)(2)(iii)

**A delineated parcel of land (i.e., reservation or tribal land) seems to be an important component in acquiring Federal recognition. In 1873, the Federal government forced the privatization of the Indiana Miami tribal lands, and by 1887 the lands of other tribes, thus effectively eliminating the reservation and tribal governments as coherent entities.**

**QUESTION 10: Are there any provisions or considerations given to tribes that lack tribal lands, due to government action, when those tribes apply for federal recognition?**

ANSWER: The acknowledgment regulations do not require that a petitioning group have retained land owned in common by the tribe, or reserved by the Federal government or a state government for the tribe. The retention of a common land base is both an aid to preservation of a tribal community, and an indicator of the group's community and political processes which have aided it in retaining a land

base. Tribes recognized which did not maintain or have maintained for them a common land base include the Snoqualmie, Jena Choctaw, Mohegan and the Cowlitz, as well as others. Among the decisions where a group has maintained or had maintained for them a common land base upon which at least a portion of the tribe has continued to reside up until the present are the Death Valley Timbi-sha Shoshone, San Juan Southern Paiute, Tunica-Biloxi, and Jamestown S'Klallam.

The regulations allow for many different, alternative, forms of demonstration of community and political processes and do not require a demonstration of tribal political functions that could only be exercised with the maintenance of a common land base.

**The Miami of Indiana, although no longer federally recognized, continue to receive payments from the Federal government under various treaties and agreements, including the 1795 Treaty of Greenville.**

**QUESTION 11: How many similarly unrecognized tribes receive money from the U.S. Government through such treaties?**

ANSWER: We are not aware of any payments currently received by the Indiana Miami under Federal treaties and agreements. The Indiana Miami did not submit evidence during the petitioning process that demonstrated such payments.

**supplemental questions submitted by representative rahall**

**QUESTION 1: Please explain the process the Office of the Federal Acknowledgment goes through once a FOIA request is received. Who handles the request and how are the research teams' anthropologists, genealogists, and historians involved?**

ANSWER: When a FOIA request is received by the Office of Federal Acknowledgment (OFA) to prepare a response, a FOIA specialist/records manager handles the majority of the tasks. The tasks involved in responding to a FOIA request include searching and compiling of documents, estimating the time it will take to complete the tasks, reviewing the documents, copying the documents once found, redacting the documents following the Privacy Act guidance, withholding documents that fit FOIA exemptions or fall under Privacy Act information, releasing and preparing responses concerning the FOIA requested documents, reviewing responses with the Office of the Solicitor, maintaining copies of all documents released to meet the FOIA request, assisting in FOIA appeals, and reporting. OFA follows the March 28, 1991, Freedom of Information Act Handbook, which is a "supplement to the requirements prescribed by Title 383 of the Departmental Manual 15 and 43 C.F.R. Part 2, Subparts A and B. OFA anthropologists, genealogists, and historians (professionals) have performed most of the tasks cited above, however, with additional appropriations within the Interior Appropriations Act for the past two fiscal years, the OFA has been able to hire outside contractors to handle these requests. On occasion, the professionals may assist with minor searches and reviews; however, under most circumstances, the hiring of contractors has allowed them time to focus on their reviews and evaluations of the documented petitions.

**QUESTION 2: The OFA is no longer part of the BIA—it is under the Office of the Assistant Secretary for Indian Affairs. How has this change brought better services to the petitioning tribes?**

ANSWER: Effective July 27, 2003, the Department began to implement the reorganization for most of the Office of the Assistant Secretary—Indian Affairs. The staff of the Branch of Acknowledgment and Research (BAR) was realigned to the new Office of Federal Acknowledgment (OFA). OFA reports directly to the Principal Deputy Assistant Secretary—Indian Affairs. Prior to the change, staff reported first, to the Director, Office of Tribal Services, second, to the Director, Bureau of Indian Affairs, and then to the Assistant Secretary-Indian Affairs. The change eliminates two layers of review and provides more direct and efficient policy guidance. Currently, there is no assessment available on whether the change provides better services to the petitioners.

**QUESTION 3: In response to a question from Chairman Pombo about whether changes that have been made at OFA have increased the Office's efficiency in the processing of petitions, you responded that productivity has increased from July 2002, to the present. You told the Committee that from July 2002, to the present, your office has issued 14 decisions. Does this number include decisions beside Proposed Findings and Final Determinations? Please explain what other decisions have been issued. A list of the 14 would be helpful.**

ANSWER: Since July 2001 to the present, the Department has issued 14 decisions: six were proposed findings, six were final determinations, and two were reconsidered final determinations. These decisions are provided in the enclosed table.

Assistant Secretary - Indian Affairs Decisions  
July 4, 2001 - Present and Projected

NAME	DECISION	DATE SIGNED/ISSUED	DATE OF FR NOTICE	FR CITATION	EFFECTIVE DATE
Mametika	Proposed Finding	July 18, 2001 <sup>1</sup>	August 3, 2001	66 Fed. Reg. 40712	
Nipmu Nation, 69a	Proposed Finding	September 25, 2001	October 1, 2000	66 Fed. Reg. 49907	
Wabiat/Dudley Band, 69b	Proposed Finding	September 25, 2001	October 1, 2000	66 Fed. Reg. 49979	
Duwamish	Final Determination	September 25, 2001	October 1, 2000	66 Fed. Reg. 49968	May 8, 2002
Cowlitz	Reconsidered Final Determination	December 31, 2001	January 4, 2002	67 Fed. Reg. 607	January 4, 2002
Eastern Pogoet	Final Determination	June 24, 2002 <sup>2</sup>	July 1, 2002	67 Fed. Reg. 44234	pending before IBEA
Piscatack Eastern Pogoet	Final Determination	June 24, 2002 <sup>2</sup>	July 1, 2002	67 Fed. Reg. 44234	pending before IBEA
Chinook	Reconsidered Final Determination	July 5, 2002	July 12, 2002	67 Fed. Reg. 46204	July 12, 2002
Mowatka	Final Determination	September 9, 2002 <sup>3</sup>	September 07, 2002	67 Fed. Reg. 58631	December 16, 2002
Schaghticoke	Proposed Finding	December 5, 2002 <sup>4</sup>	December 11, 2002	67 Fed. Reg. 76184	
Golden Hill Paganawit	Proposed Finding	January 21, 2003 <sup>5</sup>	January 29, 2003	68 Fed. Reg. 4587	
Statenland	Final Determination	December 1, 2003	December 10, 2003	68 Fed. Reg. 68942	

<sup>1</sup>Court order  
<sup>2</sup>Court approved negotiated agreement  
<sup>3</sup>Court approved negotiated agreement  
<sup>4</sup>Court order  
<sup>5</sup>Court approved negotiated agreement  
<sup>6</sup>Court approved negotiated agreement

The CHAIRMAN. Thank you. Mr. Fleming, in reviewing your testimony is it your contention that the changes that you are making in the process are making it more efficient and timely in the decisionmaking process?

Mr. FLEMING. It is my contention and I will give you an example. Our productivity for July 4 to the present, which also takes into our new contracting, we have issued 14 decisions in that 3-year period—six proposed findings, six final determinations, and two reconsidered final determinations. If you divide three into 14, you get a tremendously higher number than the average that was expressed earlier in one of the individual's testimony, which I think was 1.3 per year, which is a tremendous increase in our productivity.

The CHAIRMAN. In terms of the objectivity of those in the decisionmaking process, it appears from looking at it that when a petition is denied, a lawsuit is filed, that those that are defending that lawsuit or who originally made a decision end up being the ones that they appeal to and there is a possibility that they may not be as objective in making those determinations. How do you respond to that?

Mr. FLEMING. The regulations allow for due process throughout. One period immediately available to the petitioner and interested parties is after a proposed finding to acknowledge or not to acknowledge opens up a public comment period of 180 days and this allows a petitioner or interested party to provide evidence, argumentation to support or rebut the proposed finding.

After the final determination is issued there is another opportunity for due process, which is called reconsideration before the Interior Board of Indian Appeals and under the regulation of 83.11, this is the Department's independent review board that would look into the decision. So if the petitioner or interested party is not sat-

ified with the final determination, they have that opportunity of due process, of putting a request in for reconsideration.

Then if the final decision is final and effective for the Department, then the next avenue for a petitioner or interested party is to sue the Department under the Administrative Procedures Act in Federal court.

The CHAIRMAN. And what about the situation where a decision is not made, where someone comes in and petitions for recognition and, just to pull a number out of the air, spends 29 years waiting for an answer?

Mr. FLEMING. The process begins with a letter of intent and when the process began in 1978 after the promulgation of the regulation, we had 40 petitioning groups at that juncture.

Some groups take part of the time working on documenting their petitions and there is no limitation as to how many years they can put together a petition. So if a group is working for 20 years developing their petition and then they submit the petition, the regulations then require us to review all that information. We are sometimes blamed for that 20-year time span when indeed the evidence comes before us under the regulations we are then required to do a technical assistance review letter for any obvious deficiencies or significant omissions. This allows the petitioning group to supplement their petition in any areas that need to be supplemented. Then that may take a short period of time or it may take four or 5 years for the group to come back with additional documentation and then we move forward under the regulatory timeframes.

The regulatory timeframes in and of themselves require a minimum of at least 25 months or a little over 2 years. Once they begin those regulated timeframes, then we are under a clock generally. Those timeframes, as I said, are at a minimum. There are opportunities for the petitioner to request extensions for good cause. They may have come up with a source of evidence that they were not aware of and they would need time to consider researching out those records and sometimes they ask for extensions and they are granted.

But any time you have one extension for one group, it may mean that there is a delay with the other groups that are under the active consideration stage of the process.

The CHAIRMAN. Once a petition is filed, it's complete, all of the information requested has been given to you, they should have an answer within 2 years?

Mr. FLEMING. The regulatory timeframe allows a minimum of at least 25 months.

The CHAIRMAN. And a maximum?

Mr. FLEMING. That I would need to research on.

The CHAIRMAN. Why is there a minimum and not a maximum?

Mr. FLEMING. The regulation allows for extensions to allow the petitioner or interested party or even the Department if it needs—

The CHAIRMAN. But let me just stop you there. That is not your fault. If they ask for an extension, that is their decision to ask for an extension.

Mr. FLEMING. Correct.

The CHAIRMAN. Why is there not a maximum on how long it takes you to give them an answer? If someone comes in to you and says we are requesting an extension, we need to do more research for whatever reason, then I understand that. That is not your fault. That is not you that is asking to delay it.

But it seems to me and in my experience in dealing with most Federal agencies is that when we pass a law, we tell them you have 2 years to give them an answer and if that person asks for an extension, they waive their statutory deadline when they ask for an extension. In this one it seems like it is opposite of that and I am not sure why.

Mr. FLEMING. Well, let me clarify. Under the regulation, the first regulatory timeframe is what is known as active consideration. It is designed to allow the Department at least 12 months to review all of the evidence. So you have a deadline right there. At the end of 12 months there ought to be an answer called a proposed finding.

Then when the decision is made on the proposed finding, it is published in the Federal Register, which then starts the next regulatory timeframe called the public comment period. So there is a deadline or an end to that public comment period.

If the evidence is voluminous the petitioner or a town or state may ask for an extension. So that is their ability to add more time if needed. At the end of that period, then begins a response period for the petitioner to respond to any comments that came in during the comment period. Let us say comments were made by an interested party and they put a particular spin on that evidence but when you review that evidence, then the petitioner has the opportunity to say that is not what we see, that is not what our professionals see. So they have an opportunity to address any comments. That has an end period. That has an end date and that is in the regulation.

Then the Department has 60 days at a minimum to review all of the evidence, all of the comments, all of the responses, and come up with a recommendation for a final determination. So you do have in the regulation an end date for an answer.

The CHAIRMAN. And if you add all those periods up, where do you end up? What is that timeframe?

Mr. FLEMING. At that point 25 minus three, 22 months.

The CHAIRMAN. Twenty-two months to give them a decision?

Mr. FLEMING. At a minimum. And that is under the regulations.

The CHAIRMAN. I guess what I am having difficulty with is it is not 22 months at a minimum. It is just kind of 22 months if everything fits.

Mr. FLEMING. That is how it is designed and as the practice has been, the Department has asked for extensions due to the complexity of the case or the voluminous nature of the evidence or the petitioners may have asked for an extension or an interested party may need more time, as well. So if you have those extension requests, then the Department has to consider whether to grant them and has to take a look as to how it is going to affect the process.

The CHAIRMAN. Maybe you can answer this for the record for me. How would the Department feel if we said you have 36 months

plus whatever time the petitioner requests in extensions to give them an answer and give you a drop-dead date to give them an answer? If they ask for a year extension, you add a year to it and you have 48 months to give them an answer, but give you a deadline to give them an answer.

Mr. FLEMING. I think it would be something considered. Everyone likes to have a deadline, a beginning point and an end point. I think what has assisted us over the past 3 years is that these decisions, after recommendations were made, even the decisions were made in a timely manner and nothing was delayed in that aspect. So if there are definite dates, that could be useful.

The CHAIRMAN. Thank you.

Mr. Pallone?

Mr. PALLONE. But following up on that, Mr. Chairman, the only way that would be effective is if at the end of the period if they did not act, then the recognition was granted. Otherwise there would not be any club, really.

What would you think of that?

Mr. FLEMING. Well, if there is inaction and then there is a provision in that statute, I just know there would be tremendous pressure felt by all concerned.

Mr. PALLONE. All right. I am going to try to get through a few questions quickly because I know I do not have a lot of time.

I am very concerned about the state's pressure. I will use Connecticut. I should not pick on them but they are the obvious one to pick on in this case. We have the Eastern Pequots, we have the other tribe that was more recently granted preliminary recognition from Connecticut, and now we understand that Connecticut is appealing that.

When mention here was made of interested parties and the input of interested parties, is one of the reasons why the process is taking so long and becoming more expensive because states are now appealing? And what is the likelihood of if a state like Connecticut does object in these two tribes' cases, the Eastern Pequot and the others, what do you do? I mean do you have the power to specifically—I mean do you actually do research to specifically refute or support an interested party like Connecticut's objections? Has any interested party ever succeeded?

I mean I am just concerned that now that a state like Connecticut is putting so much pressure against and appealing, for example, those two tribes, what is going to happen? Just comment on that if you could.

Mr. FLEMING. I believe that the regulation itself offers the opportunity for interested parties to participate and right now some of the decisions are ripe for requests for reconsideration before the Interior Board of Indian Appeals. So in the regulations there are opportunities for interested parties to participate. And even if a petitioner or interested party is still not satisfied with what the final outcome may be, be it positive or negative, they still can have a remedy through the Administrative Procedures Act and that would be the proper time for the petitioner or interested party to then follow up.

Mr. PALLONE. Now the other thing is we talk about the budget. Your office's annual budget, I guess, is \$1.7 million, but in response

to the pleas about understaffing in Fiscal Year 2003, Congress appropriated an additional \$500,000. This was followed by an additional \$250,000 in Fiscal Year 2004. However, it is my understanding there has not been any new hiring of full-time anthropologists, genealogists or historians, the professional staff.

How is it that an infusion of funds, nearly half of the office's budget, has not resulted in speeding up the process?

My understanding, same question, is that the BIA's strategic plan in 2002 called for hiring 18 anthropologists, genealogists and historians to establish six teams of three persons but, as we heard from the previous panel, we only have three teams of three persons now. So what happened? Why has not this funding made a difference and why are we still at the three instead of the six that you supposedly were trying to accomplish?

Mr. FLEMING. In the Department's response to the GAO report we provided at their recommendation a needs assessment and an analysis of the workload and based on expectations, if the expectation was to eliminate the current workload in 3 years, then this is what it would take. If the expectation was to eliminate the workload in four, five, or 6 years, then this is what it would take.

And our response, and I would be happy to provide the Committee with the response, it was a way to convey what our needs indeed were based on the analysis of the workload.

Mr. PALLONE. But Mr. Fleming, what happened to this extra money and when are you going to be able to double these teams? You said you would like to go from three to six. It has not happened. What happened to the money and when is that going to happen? And how much more do you need? What do you want us to do?

Mr. FLEMING. The appropriations were indeed very helpful. It allowed us to do the contracting that I described, the two sets of contractors. We were able to take on the two FOIA specialists, records managers, and the three research assistants.

Because these were one fiscal year appropriations, we were not able to use that resource, those funds, to hire full-time employees because if they only were available to us just on an annual basis, it would not be helpful to hire somebody and then fire them because of the lack of funds, should we not have been able to get another appropriation.

Mr. PALLONE. I know the time is running out but did the money lapse? Was it used?

Mr. FLEMING. Yes, the money was used. The appropriation was used and as a result, we were able to make use of the contractors in reducing the administrative work that would normally fall on the professional staff and the professional staff was then able to focus on the cases at hand. And as I indicated, at least from the time the contractors came on board, we were able to issue eight decisions out of the 14 that I described that had been issued since the first of this Administration.

Mr. PALLONE. Thank you.

Thank you, Mr. Chairman.

Mr. Chairman, could I just ask that members have the right to submit written questions to the witnesses?

The CHAIRMAN. Yes. I was going to say both to this witness, I have a series of questions that I will submit in writing to this witness and any other witnesses who appeared today, you have the right to submit questions in writing. And to those witnesses that are still here, if you could answer those in a timely manner so that they can be included in the hearing record, I would appreciate it. Thank you.

Before I adjourn this hearing I want to thank all of our witnesses, including the Administration witness. This is obviously an extremely important issue that I do believe we need to make progress on and I will look forward to working with everybody, including the Administration, to try to move forward in a positive way with trying to deal with this in a much more timely fashion and a fair and transparent system. I think that is what all of us want out of this and that is what this Committee will word toward.

So thank you very much. Thank you to all our witnesses for being here and the hearing is adjourned.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

The following information was submitted for the record:

- Benedict, Jeff, President, Connecticut Alliance Against Casino Expansion, Inc., Statement submitted for the record
- Blumenthal, Hon. Richard, Attorney General, State of Connecticut, Statement submitted for the record
- Charley, Benjamin, Tribal Chairman, Dunlap Band of Mono Indians, Letter submitted for the record
- Jones, Laura, Ph.D., Campus Archaeologist, Stanford University, Senior Scholar, The Carnegie Foundation, Letter submitted for the record
- Mullane, Nicholas H., First Selectman, Town of North Stonington, Connecticut, Statement submitted for the record
- Towns of Ledyard, North Stonington, and Preston, Connecticut, Letter submitted for the record

[A statement submitted for the record by Jeff Benedict, President, Connecticut Alliance Against Casino Expansion, Inc., follows:]

**Statement of Jeff Benedict, President,  
Connecticut Alliance Against Casino Expansion, Inc.**

The State of Connecticut is serving as an unwilling witness to one of the most remarkable breakdowns in federalism—the relationship between the federal and state governments—in the history of the United States. The likely consequence is the complete transformation of the economic vitality, quality-of-life, and governmental structure of the State. All these changes would be for the worse, and they are being forced upon the State by the federal government.

The tool being used for this purpose is the so-called “acknowledgment process,” by which the Bureau of Indian Affairs (BIA) bestows the status of “federal Indian tribe” on groups of individuals who claim descent from tribes that existed during colonial times. The people and towns of Connecticut are rightfully outraged over what is happening, and dramatic and immediate action is needed to protect the State’s interests.

How can tribal acknowledgment have such a significant effect? And isn’t acknowledgment little more than the symbolic act of according federal status to Indian groups long ago recognized as tribes by the State? The answers to these questions demonstrate why the future of the State of Connecticut is at risk. They also show how the actions of a few federal bureaucrats, combined with the investment of tens

of millions of dollars by gambling financiers, have manipulated federal law to strip away Connecticut's inherent right to determine its own future.

*What Does Tribal Acknowledgment Mean?*

Once a group obtains status as an Indian tribe under federal law it becomes, in effect, a sovereign governmental entity. The new tribe, its members, and its businesses, are exempt from virtually all state and local laws, including taxation. Their lands are open to any kind of development. The tribe and its businesses do not need to comply with state and local environmental, land use, health and safety, labor and other laws. They cannot be sued. For many purposes, they act as foreign governments.

In Connecticut, there are two acknowledged tribes and twelve groups that are seeking tribal status. The two acknowledged tribes are the Mashantucket Pequot, who were acknowledged by Congress in 1983, and the Mohegans, who achieved tribal designation from the BIA in 1994. Of the twelve additional groups trying to become tribes under the BIA acknowledgment process, four are well-advanced in the process: the Eastern Pequot/Paucatuck Eastern Pequot, the Schaghticoke, the Golden Hill Paugussets, and the Nipmuc, who are actually located in Massachusetts, but they assert land rights in Connecticut.

These groups claim that land belonging to their historical ancestors was unlawfully taken away 200 years ago and that they are entitled to get it back regardless of its current ownership. As much as one-third of the State is potentially subject to these land claims. The Schaghticoke and Golden Hill Paugussets have already filed lawsuits against innocent landowners for this purpose.

But these tribal acknowledgment efforts have less to do with land and more to do with gambling. Each of the four groups that are furthest along in seeking recognition is bankrolled by casino moguls or developers. These groups hope to secure recognition in order to take advantage of the federal Indian Gaming Act that permits federal tribes to open massive new casinos and earn over one billion dollars a year, as the Mashantucket Pequots and Mohegan do at their existing casinos. The biggest winners in these casino ventures are not the tribes, but the wealthy non-Indian moneymen who provide the financial, legal, and political muscle to help these groups get acknowledged.

What does all of this have to do with Connecticut? Thanks to the BIA's artificially propagated and arbitrarily applied acknowledgment process, the State faces a serious risk of being transformed into a gambling hub with as many as six separate sovereign nations within its boundaries, each one of which will pursue large tracts of land to carve out from state and local control for purposes of opening new casinos.

Make no mistake about it; life in Connecticut will never be the same if this corruption is not stopped and corrected. Otherwise, the BIA will transform Connecticut from the "Constitution State" to the "Casino State." The two largest gambling halls in the world are already here. With potentially four more, already jammed highways will go into gridlock with the cars of casino patrons. The local tax base will be devastated. Land use control and planning will become a thing of the past. Environmental quality will decline due to air pollution from cars and other impacts. Crime will increase, and societal values will shift, as they always do in gambling centers. The labor base will change. Affordable housing will dissipate in towns around the casinos. Corporations and large businesses will flee the State to be replaced with low-paying, unskilled jobs, bringing attendant demographic shifts in Connecticut's population. Within a decade or so, Connecticut as we know it today will no longer exist.

For about twelve years, the small towns in southeastern Connecticut have struggled with the consequences of reservation lands, tribal sovereign immunity and Indian casinos. They have lived with the many adverse impacts of the Mashantucket Pequot Foxwoods and Mohegan Sun resorts, and they are now confronted with a third possible mega-casino on lands of the Eastern Pequot Indian group, which BIA is proposing to acknowledge as a tribe.

The problems that resulted in southeastern Connecticut have not been fully understood in other more populous and politically powerful parts of the State. Then, on January 29, 2004, the BIA issued a decision that seeks to acknowledge the Schaghticoke Tribe. Now there is the prospect for land claims throughout southwestern and western Connecticut, and the specter of a new casino resort along the already overburdened I-84 and I-95 corridors has risen.

The BIA's decision to drop yet another sovereign nation in Connecticut has finally turned a spotlight on the flawed acknowledgment process. Much of the illumination has been triggered by the BIA's own conduct. Right after the BIA announced its decision in the Schaghticoke matter, an internal BIA memorandum dated January 12, 2004, and titled "Schaghticoke Briefing Paper," surfaced. In it, the staffer from the

Office of Federal Acknowledgment responsible for reviewing the Schaghticoke petition notified the Assistant Secretary that the petitioner's "evidence of political influence and authority is absent or insufficient for two substantial historical periods." The memo also acknowledged that the petitioner's "membership list does not include a substantial portion of the actual social and political community."

Despite these gaping holes in evidence, ones which the BIA does not have authority to arbitrarily fill with substitutes for the mandatory criterion, the agency nonetheless granted acknowledgment. The BIA's brazen internal memo is a glaring illustration of how badly this process needs legal and political reform. This agency is absolutely unaccountable and by its own words acting outside its authority.

#### *BIA's Acknowledgment Process*

Much has been made recently of the role that wealthy financial backers play in helping petitioner groups obtain tribal acknowledgment. High-powered lobbyists wired to the Bush Administration have been paid huge amounts of money to lobby for the Eastern Pequots and the Schaghticoke. The sources of money paying for those lobbyists, and the numerous lawyers, consultants, and public relations firms supporting these efforts, are not fully known. Nor is the amount of money spent. It is known, however, that massive sums have been invested by the likes of Donald Trump, Fred DeLuca (the Subway sandwich shop entrepreneur), David Rosow (a Fairfield-based ski resort developer), Bill Koch (the Texas oil magnate and America's Cup racing tycoon), and Thomas Wilmot, a New York mall developer, who has spent in excess of \$10 million backing the Paugussetts. The role played by big money and big-time lobbying in tribal acknowledgment is an outrage, and undoubtedly has a corrupting influence on the process. Full investigation and immediate reform is needed.

As important as it is to get casino entrepreneurs out of the acknowledgment process, there is an equally important reform that is needed on an even more basic level. Simply put, the BIA should not have this power in the first place. The Eastern Pequot and Schaghticoke decisions have now revealed clearly the biased, result-oriented, and arbitrary manner in which BIA makes these decisions. The outrage Connecticut feels toward the lobbyists and multimillionaire financial backers should pale compared to the anger that should be directed at BIA and the political appointees who are approving these decisions.

As a starting point, it must be understood that the BIA has never been granted the power to acknowledge Indian tribes. Obviously, creating a sovereign Indian tribe is a very significant decision. The power to take such action is vested by the Constitution exclusively in the Congress. Under the U.S. Constitution, federal agencies cannot take legislative actions of this nature unless Congress expressly grants the power to do so and sets standards to govern how the agency exercises that authority. Congress has never taken either step to allow BIA to make the fundamentally political decision of whether to create new sovereign tribal entities. For years, the BIA has glossed over this problem, trying to hang its acknowledgment hat on the weakest and most general of its Indian affairs powers.

#### *The Schaghticoke Decision*

The recent Schaghticoke decision illustrates the problems of letting BIA run free to make acknowledgment decisions in the absence of tight standards set by Congress. BIA is making up the rules as it goes along, and applying its self-proclaimed tribal acknowledgment power to rule in favor of Connecticut petitioner groups.

A close look at the Schaghticoke decision reveals how BIA plays this game. One of the abiding principles of BIA acknowledgment decisions has been the need for the Indian group to prove that it has existed as a functioning political entity following identifiable leaders and as an intact social community from colonial times to the present without any significant gap in time. A break in continuity of even a generation is fatal to an acknowledgment petition.

For the Schaghticoke, the gaps in its historical record should have been insurmountable. In 1993, the Schaghticoke's own expert, a leading pro-tribal advocate, said it was "probably impossible" for the Schaghticoke to meet this test for virtually all of the 1800s and the first half of the twentieth century. In 1999, Ann McMullen, another expert hired by the Schaghticoke, agreed. In 2001, the BIA's top official Neil McCaleb reached the same conclusion when he ruled in the proposed finding against granting acknowledgment to the Schaghticoke group. McCaleb said the group failed to meet this test for a total of over 150 years.

In response to that ruling, the Schaghticoke's own "chief" during the 1960's, Irving Harris, testified that the BIA's negative proposed decision was correct because there was no tribal government in effect for most of his lifetime. That conclusion was borne out by the research conducted by the State of Connecticut, numerous

local governments, and the private landowners whose property is at risk because of Schaghticoke land claims. But the BIA ignored Chief Harris's testimony and supporting research submitted by other interested parties.

All of this information and expert opinion was in front of BIA, yet it did not matter. On January 29, 2004, the BIA reversed its 2001 negative decision and concluded that the Schaghticoke should be granted federal recognition. How did BIA reach this result? Quite simply, it made up new rules, selectively considered the evidence that would support the desired result of tribal creation, and ignored everything else.

The gimmicks used by BIA to push the Schaghticoke group over the acknowledgment finish line are too numerous and complex to describe here. They entail practices such as shifting the burden of proof from the tribal petitioner to the opposing parties, selective use of interview evidence, selective use of documentary evidence, retreat from the requirements of the 2001 negative proposed finding, and the incredible conclusion that the longstanding rift between rival Schaghticoke factions that tore the group into pieces was actually evidence of political unity and continuity.

While the specifics of the 200-page BIA decision defy simple explanation, it is possible to gain insight into the manipulative decisionmaking employed by BIA by focusing on a few aspects of the agency's final determination.

Beginning with the Eastern Pequot decision, BIA has developed a new principle of tribal acknowledgment unique to Connecticut. Because Connecticut had historically set aside small tracts of land for Indians, BIA has established the assumption that gaps in tribal continuity can be filled by the mere existence of such a land base. In other words, because Connecticut set aside land for Indians in the past, the BIA decided that it is appropriate to infer that functioning political entities and social communities must have existed at the same time.

The BIA invokes this "state recognition" assumption to fill gaps in the history of a tribal petitioner in Connecticut whenever it is necessary to do so to make up for a lack of evidence. This principle, one that BIA never developed through its rule-making or public review processes, has thus become a kind of evidentiary silly putty to be used to plug any holes in a tribal petitioner's case. In Connecticut, BIA has transformed the requirement for evidence of continuous tribal governmental authority under identified leaders and social community into one that allows for only partial evidence, so long as the petitioner group traces to a tribe for which a State reservation existed and on which some individuals lived during the period of the missing evidence.

Even with this artificial assumption, BIA had to play additional games to reach a positive result for the Schaghticoke. For example, there was no evidence of a politically functioning tribe for the period 1801 to 1876. BIA invoked one of the rules it made up under its regulations to help the Schaghticoke fill this gap. Under this rule, if fifty percent of the marriages in a group during a period of time are between tribal members, then the BIA assumes the existence of tribal political activity.

This rule, equating marriage rates with tribal political activity, is a big stretch on its own. But the BIA didn't stop there. To help the Schaghticoke fill the 1801 to 1876 gap, first the BIA changed its approach to defining who counts in defining the marriage rate. In the past, BIA looked only to ancestors of the petitioner group. For this decision, the BIA counted any individual associated with the Schaghticoke, thereby greatly expanding the universe of marriages to consider.

Second, BIA abandoned its own fifty percent rule. Even by expanding the group of people considered for intermarriage, the BIA equaled that rate for certain periods of time. Third, even after giving all of these breaks to the Schaghticoke, BIA could not fill in the entire 1801 to 1876 period. A one-generation gap still existed between 1820 and 1841. Under the BIA's previous interpretations, this gap in political authority alone should have resulted in a negative decision.

The BIA got around this problem by pulling out its "state recognition" silly putty. Because a Schaghticoke reservation existed during this time, BIA ruled it would allow this assumption of political activity to make up for the below-fifty percent marriage rate and the absence of any other evidence of tribal political activity during this extended period. Thus, by these tricks and gimmicks, the BIA found a way to make a 75-year gap in tribal political authority disappear without a shred of evidence.

Similar games were played in the Eastern Pequot decision. In that case, the BIA also used the state recognition assumption to fill major holes. In addition, BIA took the incredible step of forcibly joining two distinct Pequot groups into a single tribe, over the strong objections of the smaller group. Only by doing so was the BIA able to find enough evidence to create a new tribe. In taking that step, the BIA allowed its tribal creationism to reach an ultimate extreme. Not only did the BIA assume power never granted to it by Congress to develop its own rules for establishing sovereign nations, it slipped into the role of making new law by deciding when and how

groups of individuals claiming Indian descent should be forced to affiliate with each and form a common tribe. How arrogant, and how fundamentally at odds with the most basic principles of the U.S. Constitution.

Even more troubling is that these decisions are being made by an agency with an admitted bias in favor of Indians. The bureaucrats who make these decisions are trained in Indian anthropology, history and similar disciplines. They have a clear bias in favor of Indians, and they wear it on their sleeves. That is why they are in this profession, and that is why they work for an agency that has a duty to advance the interests of Indians and tribes.

The bottom line is that the BIA staff has made up their minds on Indians in Connecticut. The agency will not allow the facts, or lack thereof, to get in the way of their determination to establish new federal tribes in Connecticut. The same BIA official's are involved in the Nipmuc decision, so we can expect more of the same in May when that final determination is issued. The Nipmucs, like the Eastern Pequot, consist of two groups who oppose each other. They both received negative proposed findings, but the writing is on the BIA wall. The agency staff who invented the theories that achieved positive results for the Eastern Pequots and Schaghticokes can be expected to achieve the same result by combining the Nipmuc groups and devising new rules to allow them to fill their evidentiary gaps.

While the BIA staff that are at the bottom of these decisions are easy to blame, in some ways their actions are predictable. After all, they are not specialists in Indian history and anthropology because they are disinterested or objective. They are set in their ways and will do anything to protect their bureaucratic turf. We need to look elsewhere for the solution.

#### *What Should Be Done?*

The real problem here is with a political system that gives the BIA this much power in the first place. While decisions on the existence of tribes should be based on sound factual research, the consequences of those decisions are inherently political. There is no law or regulation that leads to the result BIA has now decreed for Connecticut. It is based on assumptions and leaps of faith that transparently lead to a prescribed result. The decision to rely upon these presumptions and, in so doing, create new tribal governments and change the face of Connecticut should not be left to BIA staff, or even its political appointees. One need only think back to the blatantly political acts of the Clinton appointees to BIA to realize that there is no comfort to be found in the agency leadership either.

Equipped with the facts, Congress should decide whether to recognize new tribes. While the legislative branch may not be suited to the task of fact-finding, it certainly has the prerogative and the ability to analyze the results of such reviews and make final decisions. We in Connecticut have seen how Congress can misapply this power when it is uninformed, as it did in recognizing the Mashantucket Pequot Tribe in 1983. That "tribe" now has a very dubious claim to acknowledged status. Had Congress been adequately informed of the facts, however, it could have made an educated decision as to whether to exercise the political power vested in it by the Constitution to recognize such a tribe.

In doing so, it also could have taken the appropriate actions to address the social and economic consequences such an act would have for the entire state. When BIA acknowledges a tribe, it does nothing more than give the group legal status as a federal tribe. This, in turn, leads to the horrendous results now confronting Connecticut. If Congress were in command of this issue, however, such adverse effects could be addressed at the same time that deserving Indian groups which meet strict standards are recognized as tribes.

Even if Congress believes it should not be in the acknowledgment business, it has the duty to constrain the power of the Executive Branch to make such decisions. Congress should set forth very clear standards under which the Executive Branch at the highest levels would make acknowledgment determinations. Those standards would need to instill objectivity into the process, remove decisions from career staff, and avoid situations where gimmicks and games can be played to meet the tests for tribal acknowledgment. Alternatively, Congress could follow Connecticut Attorney General Richard Blumenthal's recommendation and create a new decision-making body that would be truly objective and beyond pro-Indian bias and the influence of lobbyists.

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[A statement submitted for the record by The Honorable Richard Blumenthal, Attorney General, State of Connecticut, follows:]

**Statement submitted for the record The Honorable Richard Blumenthal,  
Attorney General, State of Connecticut**

I appreciate the opportunity to comment on the issue of federal recognition of Indian

Critically and immediately, Congress should enact a moratorium on any BIA decisions or appeals and initiate a full and far-reaching investigation of the BIA's actions in these petitions.

Congress should then enact reform creating an independent agency insulated from politics or lobbying to make recognition decisions. It must have nonpartisan members, staggered terms, and ample resources. There is compelling precedent for such an independent agency the Securities and Exchange Commission, for example, or the Federal Communications Commission, and the Federal Trade Commission, which deal professionally and promptly with topics that require extraordinary expertise, impartiality, and fairness.

Even before permanent reform -- and especially until the investigation is complete -- the Secretary of Interior should impose a moratorium or stay on all tribal recognition decisions involving Connecticut and other similar states. The need for a moratorium is demonstrated dramatically by an internal confidential BIA memorandum discovered during review of documents for our administrative appeal in the Schaghticoke decision which provides a blueprint for BIA senior officials to disregard and distort the law. This pattern and practice cannot be permitted to continue.

Far-reaching, fundamental reform is critical to restoring the integrity and credibility of the present system. Indeed, the argument may be made that the Department of Interior currently has an unavoidable conflict of interest responsible for advocating for and protecting Native American interests as trustee, and at the same time deciding objectively among different tribes which ones merit recognition.

Congress should also adopt the tribal recognition criteria in statute, reducing the likelihood that the BIA will stretch or sandbag criteria in an effort to recognize an undeserving petitioner. It should also enact measures to ensure meaningful participation by the entities and people directly impacted by a recognition decision. One of the most frustrating and startling consequences of the current review process is the potential for manipulation and disregard of the seven mandatory criteria for recognition—a potential that the GAO and Inspector General reports found has been realized in recent petitions.

Finally, Congress should provide additional much needed, well deserved resources and authority for towns, cities and Indian groups alike in an effort to reduce the increasing role of gaming money in the recognition process. Federal assistance is necessary and appropriate, in light of the increasing burdens that towns, cities and the state, must bear in retaining experts in archeology, genealogy, history and other areas all necessary to participate meaningfully in the recognition process. Because recognition has such critical, irrevocable consequences, it is essential that all involved petitioning groups, the public, local communities, states have confidence in the fairness and impartiality of the process. That confidence has been severely compromised in recent times. I urge the committee to approve these bills and begin the process of overhauling the system so that public faith can be restored.

The central principle of this reform should be: Tribes that meet the seven legally established criteria deserve federal recognition and should receive it. Groups that do not meet the criteria should not be accorded this sovereign status.

The present system for recognizing Indian tribes is fatally and fundamentally flawed. It is in serious need of reform to ensure that such decisions which have such profound ramifications are lawful, fair, objective and timely. After more than a dozen years of experience with tribal recognition issues, I strongly and firmly believe that fundamental, far-reaching reform is necessary.

The current recognition process has proven to be susceptible to improper influences of power, money and politics, documented by both the General Accounting Office (GAO), the Department of Interior's Inspector General and our own experience in Connecticut.

In a December, 2003 ruling involving the State of Connecticut, the BIA inexplicably reversed its preliminary decision to deny federal recognition to the Schaghticoke petitioner, finding that the petitioner had met the seven criteria, despite the lack of any evidence to establish that the group met two of the mandatory criteria political autonomy and social community. This decision remained a mystery until several weeks ago, when an internal staff briefing paper was released publicly. The briefing paper created a road map as close to a smoking gun as we've seen for the agency to reverse its prior finding despite the lack of credible evidence meeting

the seven standards for Indian recognition. I have attached that briefing paper to my testimony.

The briefing paper sets forth options and seeks guidance from the Acting Assistant Secretary with respect to how to address two issues staff acknowledged were potentially fatal to the Schaghticoke petition: (1) little or no evidence of the petitioner's political influence and authority, one of the mandatory regulatory criteria, for two substantial historical periods; and (2) serious problems associated with the internal fighting among the two factions of the group.

With respect to the lack of evidence, the Office of Federal Acknowledgement (OFA) shows, by its own words and analysis, its disregard for the legal standards and precedents as demonstrated by one of the four options posited by the OFA. OFA posits that one of the options is to: "Decline to acknowledge the Schaghticoke, based on the regulations, and existing precedent." In explaining this option, which the OFA and the Assistant Secretary rejected, the OFA explained: "Option 2 [declining to acknowledge the group] maintains the current interpretation of the regulations and established precedents concerning how continuous tribal existence is demonstrated." In other words, declining to acknowledge the group means following the law. Yet, despite this clearly correct legal path, the BIA chose option 1, and acknowledged the petitioner by substituting state recognition in lieu of actual evidence for large periods of time. The BIA chose this option despite its own concession that it would create a "lesser standard."

This OFA briefing paper confirms that recognition of Schaghticoke petitioner required the BIA to disregard its own regulations and long accepted precedents, and to "revise," yet again, its recent pronouncements on the meaning and import of the State's relationship with the group, as well as ignore substantial gaps in the evidence. The BIA has now revised its view of the legal import of state recognition no less than four times in only two years. It has completely, unashamedly reversed the longstanding view that federal recognition could not be based on state recognition alone, moving to its present view that it alone can actually replace or substitute for evidence on critical and mandatory criteria.

This deception is mirrored in our experience with other acknowledgment petitions. In the Eastern Pequot and Paucatuck Eastern petitions, the former head of the BIA unilaterally overturned staff findings that two Indian groups failed to provide evidence sufficient to meet several of the seven mandatory regulatory criteria. He also issued an illegal directive barring staff from conducting necessary independent research and prohibiting the BIA from considering information submitted after an arbitrary date regardless of whether the BIA's review had begun without notice to interested parties in pending recognition cases.

In June, 2002, the BIA issued a Final Determination recognizing a single Eastern Pequot tribe in Connecticut comprised of the Eastern Pequot and the Paucatuck Eastern Pequot groups, despite the fact that these groups had filed separate conflicting petitions for recognition. The two petitions were pending for years and contradicted each other. In fact, in one of their last submissions, the Paucatuck Easterns argued vigorously that the Eastern Pequots did not submit adequate proof that they were an Indian Tribe. The Final Determination reflected substantial gaps in evidence in both tribal petitions, but the BIA distorted the relationship between the State of Connecticut and the Eastern Pequot group to bridge these gaps, contrary to the BIA's own regulations.

To make matters worse, shortly after the recognition decision was released and before the appeal could even be filed, top BIA officials held a private (ex parte) meeting with representatives of the Paucatuck Eastern and Eastern Pequot groups a secret session that seems improper under the rules. At the very least, the private meeting reinforces public perception that the recognition process is unfair and biased toward petitioning groups.

In theory, present legal rules require any tribal group seeking federal recognition to meet seven distinct criteria aimed at proving the petitioning tribe's continuous existence as a distinct community, ruled by a formal government, and descent from a historical tribe, among others. In practice, as the OFA briefing paper clearly demonstrates, the BIA's political leaders have routinely distorted and disregarded these standards, misapplied evidence, and denied state and local governments a fair opportunity to be heard.

Connecticut's experience is not unique. In 2002, the GAO issued a report documenting significant flaws in the present system, including uncertainty and inconsistency in recent BIA recognition decisions and lack of adherence to the seven mandatory criteria. The GAO report also cited lengthy delays in the recognition process including inexcusable delays by the BIA in providing critical petition documents to interested parties like the states and surrounding towns.

The United States Department of the Interior's Office of the Inspector General also found numerous irregularities with the way in which the Bureau of Indian Affairs handled federal recognition decisions involving six petitioners. The report documents that the Assistant Secretary and Deputy Assistant Secretary either rewrote civil servant research staff reports or ordered the rewrite by the research staff so that petitioners that were recommended to be denied would be approved. The former Assistant Secretary himself admitted that "acknowledgment decisions are political" and later expressed concern that the huge amount of gaming money that is financially backing some petitions would lead to petitions being approved that should not be approved. Interestingly, he also advocated for reform of the current system.

To date, the BIA has done nothing to cure these dramatic defects in the recognition process.

The impacts of federal recognition of an Indian tribe cannot be understated underscoring the urgent need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public and in Connecticut's experience greatly affects the quality of life in those communities living in close proximity to Indian reservations. Federal recognition creates a government-to-government relationship between the tribe and the federal government and makes the tribe a quasi-sovereign nation. A federally recognized tribe is entitled to certain privileges and immunities under federal law. They are exempt from most state and local laws and land use and environmental regulations. They enjoy immunity from suit. They may seek to expand their land base by pursuing land claims against private landowners, or seeking to place land into trust under the Indian Reorganization Act. They are insulated from many worker protection statutes relating, for example, to the minimum wage or collective bargaining protections as well as health and safety codes.

Since the enactment of the Indian Gaming Regulatory Act (IGRA) more than a decade ago, federally recognized tribes may operate commercial gaming operations. This law has vastly increased the financial stakes involved in federal recognition. Several of the petitioning groups in Connecticut are reported to have been funded by gaming interests such as Lakes Gaming of Minnesota and some of the wealthiest businessmen in America.

Connecticut has been particularly impacted by the federal recognition process. Although geographically one of the smallest states, Connecticut is home to two of the world's largest and most profitable casinos within 15 miles of each other. We also have 12 other groups seeking recognition as federally recognized Indian tribes, most of whom have already indicated their intention to own and operate commercial gaming establishments.

The enormity of the interests at stake make public confidence in the integrity and efficacy of recognition decisions all the more essential. Unfortunately, public respect and trust in the current process have completely evaporated.

In addition, the BIA is admittedly overworked and understaffed, leading inevitably to lengthy delays in processing petitions and in providing essential documents to interested parties. Connecticut was forced to sue the BIA to obtain critical information necessary to respond to petitions—information, including petition documents the state was clearly entitled to under the FOIA. In some cases, the documents have not been provided until after the BIA has issued proposed findings in favor of recognition.

Congress must act swiftly and strongly to reform the system and restore its credibility and public confidence.

I wish to thank the committee for allowing me this opportunity to address this important issue and urge the committee's further consideration of these proposals.

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[A letter submitted for the record by Benjamin Charley, Tribal Chairman, Dunlap Band of Mono Indians, follows:]

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P.O. Box 44  
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April 15, 2004

To: The Honorable Richard Pombo, Chairman Committee on Resources,  
United States House of Representatives  
And Members of the House Committee on Resources

Subject: Comments from the Dunlap Band of Mono Indians submitted for the Record in  
the House Committee on Resources' Oversight Hearing on the Federal  
Acknowledgment Process on March 31, 2004

Honorable Chairman Pombo and Members of the House Committee on Resources:

We, the Dunlap Band of Mono Indians, concur with the testimony of Chairwoman  
Rosemary Cambra of the Muswekma Ohlone Indian Tribe presented to the Committee at  
your Oversight Hearing on the Federal Acknowledgment Process on March 31, 2004.  
Chairwoman Cambra's testimony specifically addressed the existing problems in the  
processing of petitions by the Branch of Acknowledgment and Research (BAR) under the  
Bureau of Indian Affairs, United States Department of the Interior (Department).

Since we share many similar experiences and complaints about the delays, backlog and  
unresponsive staff at the BAR, we will first address the BAR petition process, but only  
very briefly as our comments would echo those of many other voices. We will then turn  
our attention to additional reforms that we strongly recommend for the Committee's  
consideration.

The whole BAR petition process has been discouraging and has failed to provide for  
prompt recognition, continuing the injustice that denies our Tribe and our members our  
sovereign rights and privileges. The Dunlap Band of Mono Indians submitted its letter of  
intent to petition for federal recognition on January 4, 1984. In the absence of resources  
or technical assistance from the federal government and lacking our own independent  
resources, we could not compile the information required in a petition for many years.  
We were very fortunate for the compassion, interest and assistance of a doctoral student  
beginning in the 1990s as the doctoral candidate assisted us with documenting our ethno  
history as a part of her doctoral thesis. We submitted this documentation to the Office of  
Tribal Services and the BAR in April 2000, accompanied by a request for administrative  
clarification and confirmation of our federally recognized status, a process which we will  
discuss further as additional reforms.

The BAR staff has been unresponsive to the Dunlap Band's tribal representatives'  
questions and inquiries. In March 2002, after a long period of time had passed and we  
still had not received any response to our request from the Office of Tribal Services or the  
BAR, we sent two Tribal Council representatives to Washington, D.C., to personally  
meet with members of the BAR staff in the Department's Central Office. After patiently  
listening to the BAR staff's multiple excuses for why they could not help the Dunlap  
people, our Tribal Council Member-At-Large was told that we would "just have to wait"  
and that a thorough review of our submitted materials was unlikely to occur for at least  
another year. Our Tribal Council member replied, echoing the sentiment of our members

[dmnp@dobtnet.com/dmn.org](http://dmnp.dobtnet.com/dmn.org)

We now turn to the Dunlap Band of Mono Indians' recommendation for other reforms to the federal acknowledgment process. We firmly believe that the BAR petition process pursuant to part 83 of Title 25 of the Code of Federal Regulations is inadequate to remedy the continuing injustice and denial of sovereignty resulting from the Department's administrative mistakes and mismanagement of records that have effectively deprived Indian tribes such as the Dunlap Band of Mono Indians the federal recognition previously accorded to them. As mentioned above, we requested administrative clarification and confirmation of our federally recognized status in order to correct and reverse an administrative error in omitting the Dunlap Band of Mono Indians from the list of federally recognized Indian tribes. Both Congress and the Department have provided such clarification and confirmation for Indian tribes in the recent past. We recommend that the federal government adopt a policy consistent with these actions and well-established policy that only Congress has the authority to terminate the federally recognized status of Indian tribes.

This recommendation should be considered in the context of the Department's records mismanagement and oversight mistakes. It is now well established and indisputable that the Department has mismanaged records relating to Indian trust assets. We believe that the Department has mismanaged something even more important – records relating to the federal recognition of the Dunlap Band of Mono Indians and other Indian tribes, our sovereignty, and the rights, privileges and immunities accorded by the United States to federally recognized Indian tribes. This mismanagement is arguably more devastating and more permanent.

While a remedy is being fashioned to redress the Department's mismanagement of records relating to Indian trust assets, no adequate remedy exists and no such remedy is being fashioned to redress the Department's unauthorized deprivation of tribal sovereignty caused by the Department's mismanagement of its list of federally recognized Indian tribes. In the same year that Congress enacted the American Indian Trust Fund Management Reform Act of 1994, Congress also enacted the Federally Recognized Indian Tribe List Act of 1994 which directed the Secretary of the Interior to publish the Department's list of federally recognized Indian tribes on an annual basis. Under another title of the same Public Law 103-454 which contained the Federally Recognized Indian Tribe List Act of 1994, Congress clarified and reaffirmed that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe despite their omission from the list of federally recognized Indian tribes published by the Secretary of the Interior in October 1993.

This was not an isolated error by the Department. On several occasions, Congress and the Department have taken action to remedy such mistakes made by the federal government and its officials through status confirmation and clarification legislation and administrative orders, recognizing the fact that the Secretary of the Interior does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress and that the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress. Thus, in addition to reforming the BAR petition process, we urge Congress and the Administration to provide a prompt and consistent remedy to tribes such as the Dunlap Band of Mono Indians which have never been terminated by an act of Congress but were mistakenly omitted from the Department's list of federally recognized Indian tribes.

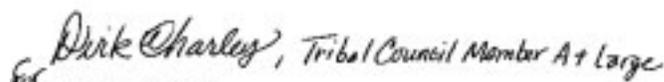
The Dunlap Band of Mono Indians continues to reside on lands within the exterior boundaries of our traditional aboriginal territory, which are held, in trust for our members by the United States. These trust lands were provided for by Congress through the 1887 General Allotment Act and subsequent amendments providing for Indian allotments outside the exterior boundaries of reservations and also

on the public domain. The subsequent amendments were intended to benefit our Tribe and our members for whom no reservation had been established. The Department required that any person applying for an Indian allotment must be a member of, or eligible to be a member of, an Indian tribe. Our ancestors were awarded such Indian allotments and the Department's records recorded their tribal affiliations with the Erzinbitch and Woposanch people from whom we are descended. Our traditional aboriginal territory is located in what is now identified as eastern Fresno County in Central California. This land is within the Sierra Nevada mountain range east of Fresno, California. We are now situated in Dunlap, which is located within our traditional aboriginal territory.

It is good to hear of your Committee's involvement and compassion for all Indian tribes' plight, especially in the area of federal acknowledgment and recognition. The Dunlap Band of Mono Indians would welcome an opportunity to work with you in developing greatly improved federal acknowledgment processes, which would be fair and just for Indian tribes. We would greatly appreciate the Committee's consideration of our Tribe's situation when dealing with matters pertaining to federal recognition. Our members, especially our elders, hope to see the day when the problems and injustices resulting from the federal government's oversight mistakes and mismanagement of tribal records are remedied and our sovereignty is reaffirmed and respected.

If you have any questions or need additional information, please feel free to contact me at (559) 338-2545 or via fax at (559) 338-2555.

Respectfully submitted,

  
 For BENJAMIN CHARLEY  
 Tribal Chairman

[A letter submitted for the record by Laura Jones, Ph.D., Campus Archaeologist, Stanford University, Senior Scholar, The Carnegie Foundation, follows:]

Representative Richard Pombo, Chair  
 U.S. House of Representatives  
 Committee on Resources  
 Washington, DC 20515  
 March 30, 2004

Dear Sir,

It has been my privilege to work with California Indian Tribes over the past twenty years in my career as a professional anthropologist. I support the equitable application of rigorous criteria for recognition and acknowledgment. I also believe in the rule of reason - when tribes invest years of effort producing substantial documentation they deserve a timely decision based on the facts of the case. What I have observed in my many years supporting the petition of the Muwekma Ohlone Tribe cannot be characterized as equitable, reasonable or timely review.

As a scientist specializing in this area I can assure you that there is no doubt of the authenticity of this California Indian community, indeed they have received confirmation from the Bureau that they have demonstrated that they are a previously recognized tribe (the Verona Band). Stanford University has enjoyed a relationship with this community since our founding in 1891, and I know that many San Francisco Bay Area schools and colleges have benefited from the support of this community in our educational, research and cultural programs. It saddens me to witness the poor treatment of this California Indian Tribe by the acknowledgment process. The Muwekma Ohlone Tribe deserve federal acknowledgment without further bureaucratic delay.

The Bureau of Indian Affairs has failed to act responsibly on this matter. While I congratulate on your efforts to reform the administrative process, justice requires a more speedy solution. I urge you to support the California Indian Bill as proposed by the Advisory Council on California Indian Policy. It is time to end the 100 year legacy of discrimination against California Indians by the Bureau of Indian Affairs.

Sincerely,

Laura Jones, Ph.D.  
 Campus Archaeologist, Stanford University  
 Senior Scholar, The Carnegie Foundation

[A statement submitted for the record by Nicholas H. Mullane, First Selectman, Town of North Stonington, Connecticut, follows:]

**Statement submitted for the record by Nicholas H. Mullane, II,  
First Selectman, Town of North Stonington, Connecticut**

*Introduction*

Mr. Chairman and Members of the Committee, I am pleased to submit this testimony for your hearing today on the tribal acknowledgment process. I am Nicholas Mullane, First Selectman of North Stonington, Connecticut. I testify today also on behalf of Susan Mendenhall, Mayor of Ledyard, and Robert Congdon, First Selectman of Preston.

As the First Selectman of North Stonington, a small town in Connecticut with a population of less than 5,000, I have experienced first-hand the problems presented by Federal Indian policy for local governments and communities. Although these problems arise under various issues, including trust land acquisition and Indian gaming, this testimony addresses only the tribal acknowledgment process.

Reform of the federal acknowledgment process must occur if valid decisions are to be made. Acknowledgment decisions that are not the result of an objective and respected process will not have the credibility required for tribal and community interests to interact without conflict. In this regard, I want to commend Senators Dodd and Lieberman and Representatives Simmons, Shays, and Congresswoman Johnson, and our Attorney General, Richard Blumenthal, for their diligent efforts to achieve the necessary reforms. As the bipartisan nature of this political response demonstrates, the problems inherent in tribal acknowledgment and Indian gaming are serious and transcend political interests. Problems of this magnitude need to be addressed by Congress, and I ask for your Committee to support the efforts of our elected leaders to bring fairness, objectivity, and balance to the acknowledgment process.

*Acknowledgment and Indian Gaming*

Federal tribal acknowledgment, in too many cases, has become merely a front for wealthy financial backers motivated by the desire to build massive casino resorts or undertake other development in a way that would not be possible under State and local law. The New York Times featured this problem in a front-page article published just two days ago. Our Town is dealing with precisely this problem. Both of the petitioning groups in North Stonington—the Eastern Pequots and the Paucatuck Eastern Pequots—have backers who are interested in resort gaming. One of the backers is Donald Trump. These financiers have invested millions, actually tens of millions, of dollars in the effort to get these groups acknowledged so casinos can be opened, and they will stop at nothing to succeed. In fact, they have even resorted to suing each other out of the desire to control the profits that would result from a new Indian casino.

The State of Connecticut has become fair game for Indian casinos, and the acknowledgment process has become the vehicle to advance this goal. For example, three other tribal groups (Golden Hill Paugussett, Nipmuc, Schaghticoke) with big financial backers have their eyes on Connecticut. Their petitions are under active acknowledgment review and the Schaghticoke have joined the two Pequot groups (now merged into one by BIA) in achieving a favorable decision from BIA. As many as ten other groups are in line. While it is unfortunate that the acknowledgment process and the understandable desire of these groups to achieve acknowledgment for personal and cultural reasons has been distorted by the pursuit of gaming wealth by non-Indian financiers, the reality remains that tribal recognition now, in many cases, equates with casino development. This development, in turn, has devastating impacts on states and local communities. Thus, the stakes are raised for every one.

North Stonington has first-hand experience with the problems that result. In 1983, the Mashantucket Pequot Tribe achieved recognition through an Act of Congress. This law, combined with the 1988 Indian Gaming Regulatory Act, ultimately produced the largest casino in the world. That casino has, in turn, caused serious negative impacts on our Towns, and the Tribe has not come forward to cooperate with us to address those problems. Having experienced the many adverse casino impacts, and understanding the debate over the legitimacy of the Mashantucket Pequot Tribe under the acknowledgment criteria, our Town wanted to assure ourselves that the recognition requests on behalf of the Eastern Pequot and Paucatuck Eastern Pequot groups were legitimate. As a result, we decided to conduct our own independent review of the petitions and participate in the acknowledgment process. It is worth noting that at no time has either petitioner come forward to present to

Town leaders any constructive proposal on how they will deal with our concerns if acknowledgment is conferred. Thus, the concerns that motivated our participation have been validated.

*The Eastern Pequot Acknowledgment Process*

The Towns of North Stonington, Ledyard, and Preston obtained interested party status in the BIA acknowledgment process. We participated in good faith to ensure that the Federal requirements are adhered to. Our involvement provides lessons that should inform federal reform initiatives.

The issue of cost for local governments needs to be addressed. Our role cost our small rural towns over \$600,000 in total over a seven-year period. This is a small fraction of the tens of millions of dollars invested by the backers of these groups, but a large sum for small local governments. The amount would have been much higher if Town citizens, and our consultants and attorneys had not generously donated much of their time. It has been said that the Eastern Pequot group alone has spent millions on their recognition, and that they spent \$500,000 on one lobbyist for one year to provide them knowledge on "how Washington, D.C. operates." This disparity in resources between interested parties and petitioners with gaming backers skews the process and must be addressed.

The fairness of the process is another problem. We discovered that achieving interested party status was only the tip of the iceberg. One of our biggest problems in participating was simply getting the documents. Our Freedom of Information Act requests to BIA for the information necessary to comment on the petitions were not answered for 2 1/2 years. Only through the filing of a successful federal lawsuit were we able to obtain the basic information from BIA when they agreed to release the information and provide adequate time for us to respond. The other claims in that lawsuit remain pending. Thus, it was necessary for us to spend even more money just to get the Federal government to meet its clear duties. I trust you will agree with me that taxpayers should not have to pay money and go to court simply to participate in a federal process.

We experienced many other problems. A pervasive problem has been the failure of the process to ensure adequate public review of the evidence and BIA's findings.

During the review of the Pequot petitions, the BIA experts initially recommended negative proposed findings on both groups. One of the reasons for the negative finding was that no determination could be made regarding the groups' existence as tribes for the critical period of 1973 through the present. Under past BIA decisions, this deficiency alone should have resulted in negative findings. Despite this lack of evidence, the negative findings were simply overruled by the then BIA Assistant Secretary, Kevin Gover. Because BIA did not rule on the post-1973 period, interested parties never had an opportunity to comment. This was part of a pattern under the last Administration of reversing BIA staff to approve tribal acknowledgment petitions and shortchanging the public and interested parties. Moreover, with no notice to us, or opportunity to respond, BIA arbitrarily set a cut-off date for evidence that excluded 60% of the documents we submitted from ever being considered for the critical proposed finding. BIA never even told us about this deadline, although they did inform the petitioner groups.

This problem occurred again with the final determination. In the final ruling, BIA concluded, in effect, that neither petitioner qualified under all of the seven criteria. Our independent analysis confirmed this conclusion.

Nevertheless, after combining the two petitioners (over the petitioners' own objections), considering new information submitted by the Eastern Pequot petitioning group, and improperly using State recognition to fill the gaps in the petitioners' political and social continuity, BIA decided to acknowledge a single "Historical Pequot Tribe." The Towns had no opportunity to comment on this "combined petitioner;" we had no opportunity to comment on the additional information provided by the Eastern Pequot petitioners; and we had no opportunity to comment on the critical post-1973 period. Thus, the key assumptions and findings that were the linchpin of the BIA finding never received critical review or comment. These types of calculated actions have left it virtually impossible for the Towns to be constructively involved in these petitions, and they have caused great concern and distrust over the fairness and objectivity of the process.

Another problem is bias and political interference. Throughout the acknowledgment review, we have continually found that politically-motivated judgment was being injected into fact-based decisions, past precedents were being disregarded, and rules were being instituted and retroactively applied, all without the Towns and State being properly notified and without proper opportunity for comment. A perfect example is the so-called "directive" issued by Mr. Gover on February 11, 2000, that fundamentally changed the rules of the acknowledgment process, including the

rights of interested parties. BIA never even solicited public input on this important rule; it simply issued it as an edict. This action is the subject of a lawsuit that will be argued by Attorney General Blumenthal in the near future. Yet another example is Mr. Gover's overruling of BIA staff to issue positive proposed findings. The massive political interference in the acknowledgment process is discussed in the recent Department of the Interior Inspector General's report, which I submit for the record.

With the recent actions of the BIA, it is questionable that this agency can be an advocate for Native Americans and also an impartial judge for recognition petitions. An example is the action by Secretary McCaleb in his recent "private meeting" with representatives of the Eastern Pequot and Paucatuck Eastern Pequot petitioners to discuss the tribal merger BIA forced upon them. This ex parte meeting with the petitioners is highly inappropriate at a time when the 90-day regulatory period to file a request for reconsideration was still in effect. How can BIA be expected to rule objectively on an appeal that contests the existence of a single tribe when the decisionmaker is actively promoting that very result?

Still another problem is the manner in which BIA addresses evidence and comment from interested parties. Simply put, BIA pays little attention to submissions from third parties. The Eastern Pequot findings are evidence of this. Rather than responding to comments from the State and the Towns, BIA just ruled that it disagrees, without explanation.

Another example is the BIA cut-off date for evidence. BIA set this date for the proposed finding arbitrarily and told the petitioners. It never informed the Towns or the State. As a result, we continued to submit evidence and analyses, only to have it ignored because of this unannounced deadline. BIA said it would consider all of this evidence, but it did not. The final determination makes clear that important evidence submitted by the Towns never got considered for this reason.

Thus, rather than our Town's involvement being embraced by the federal government, we were rebuffed. The very fact of our involvement in the process, we feel, may have even prejudiced the final decision against us. The petitioning groups attacked us and sought to intimidate our researchers. The petitioning groups called us anti-Indian, racists, and accused us of committing genocide. The petitioners publicly accused me of "Nazism" just because our Town was playing its legally defined role as an interested party. At various times throughout the process, the tribal groups withheld documents from us or encouraged BIA to do so. Obviously, part of this strategy was that the petitioners just wanted to make it more expensive to participate, to intimidate us, and to drive the Towns out of the process. They took this approach, even though our only purpose for being involved was to ensure a fair and objective review, and to understand how a final decision was to be made.

Finally, I would like to address the substance of the BIA finding on the Eastern Pequot petitions. Based upon an incorrect understanding of Connecticut history, BIA allowed the petitioners to fill huge gaps in evidence of tribal community and political authority, prerequisites for acknowledgment, by relying on the fact that Connecticut had set aside land for the Pequots and provided welfare services. These acts by the State of Connecticut, according to BIA, were sufficient to compensate for the major lack of evidence on community and political authority. By this artifice, along with the forced combination of two petitioners, BIA transformed negative findings into positive ones, with no basis in fact or law.

Clearly, the past actions by Connecticut toward the later residents of the Pequot reservation did nothing to prove the existence of internal tribal community or political authority. These actions simply demonstrated actions by the State in the form of a welfare function. If BIA does not reject this principle now, it will give an unfair advantage not only to the Pequot petitioners but possibly to other Connecticut petitioning groups as well.

BIA's seriously flawed decision on the two Pequot petitions is now on appeal. Hopefully, the Interior Board of Indian Appeals will lend some semblance of objectivity and credibility to BIA's acknowledgment process. Along with the State, we have provided compelling grounds to reverse the BIA final determination.

Even under the appeal, the petitioners continue to try and bend the rules. They recently wrote to the IBIA asking for expedited treatment of these appeals. They made the astonishing claim that its members were being subjected to human misery, poor education, and inadequate housing while waiting for a decision. In the height of hypocrisy, they made no mention of one of the true motivations behind the push for tribal acknowledgment: the desire to promptly open another massive casino and generate huge sums of money for the financial backers. I can tell you that members of these groups attend the same schools as other children in our town, that some members are paid salaries by financial backers, and that the standard of living the experience, by and large, is comparable to that of many other residents of our small town.

### *The Schaghticoke Decision*

Recently, BIA issued a positive final determination for the Schaghticoke petitioner. This decision is another example of how biased and unfair the BIA acknowledgment process is. In this case, BIA even determined that the petitioner failed to meet the criteria. It issued an internal memorandum admitting this fact, which I attach to my testimony. Despite this obvious failure, BIA still issued a favorable result. To do so, it again invoked the same state reservation principle it used to push the two Pequot groups over the acknowledgment finish line. BIA made another flawed finding and assumption to further support the positive finding. It also misrepresented facts to interested parties and even went so far as to suggest that it could change the appeal rights of interested parties established by rule and against their wishes if a different process had been agreed to in negotiation in a Schaghticoke land claim lawsuit.

While BIA was not successful in this effort, its track record of being prepared to violate its own regulations just to achieve results favorable to its own goals is now clear. Simply put, the acknowledgment process is in need of more than reform. It is time to start all over again, and to put all tribal acknowledgment requests on hold in the interim.

### *Principles for Reform*

Based upon years of experience with the acknowledgment process, our Towns now have recommendations to make to Congress.

As an initial matter, it is clear that Congress needs to define BIA's role. Congress has plenary power over Indian affairs. Congress alone has the power to acknowledge tribes. That power has never been granted to BIA. The general authority BIA relies upon for this purpose is insufficient under our constitutional system. In addition, Congress has never articulated standards under which BIA can exercise acknowledgment power. Thus, BIA lacks the power to acknowledge tribes until Congress acts to delegate such authority properly and fully. Up until now, no party has had the need to challenge the constitutional underpinnings of BIA's acknowledgment process, but we may be forced to do so because of the Eastern Pequot decisions.

Second, the acknowledgment procedures are defective. They do not allow for an adequate role for interested parties, nor do they ensure objective results. The process is inherently biased in favor of petitioners, especially those with financial backers.

Third, the acknowledgment criteria are not rigorous enough. If the Eastern Pequot, Paucatuck Eastern Pequot, and Schaghticoke petitioner groups qualify for acknowledgment, then the criteria need to be strengthened. The bar has been set too low.

Fourth, acknowledgment decisions cannot be entrusted to BIA. The agency's actions are subject to political manipulation, as demonstrated by the report of the Department's Inspector General detailing the abuses of the last Administration. Also, BAR itself will, in close cases, lean to favor the petitioner. The result-oriented Pequot and Schaghticoke final determinations are proof of this fact. For years we supported BAR and had faith in its integrity. Now that we have studied the Pequot and Schaghticoke decisions, we have come to see the bias inherent in having an agency charged with advancing the interests of Indian tribes make acknowledgment decisions. The Office of Federal Acknowledgment no longer has any credibility. Similar problems are likely to arise under an independent commission created for this purpose, unless checks and balances are imposed that ensure objectivity, fairness, full participation by interested parties, and the absence of political manipulation.

Finally, because of all of these problems, it is clear that a moratorium on the review of acknowledgment petitions is needed. It makes no sense to allow such a defective procedure to continue to operate while major reform is underway.

### *Conclusion*

Our Towns respectfully request that this Committee make solving the problems with the acknowledgment process one of its top priorities. A moratorium on processing petitions should be imposed while you do so. In taking this action, we urge you to solicit the views of interested parties, such as our Towns and State, and to incorporate our concerns into your reform efforts. Tribal acknowledgment affects all citizens of this country; it is not just an issue for Indian interests.

We are confident that such a dialogue ultimately will result in a constitutionally valid, procedurally fair, objective, and substantively sound system for acknowledging the existence of legitimate Indian tribes under federal law. With the stakes so high for petitioners, existing tribes, state and local governments, and non-Indian residents of surrounding communities, it is necessary for all parties with an interest

in Indian policy to pursue this end result constructively. Ledyard, North Stonington, and Preston look forward to the opportunity to participate in such a process.

Thank you for considering this testimony.

[NOTE: Attachments to Mr. Mullane's statement have been retained in the Committee's official files.]

[A letter submitted for the record by the Towns of Ledyard, North Stonington, and Preston, Connecticut, follows:

*Towns of*  
**Ledyard North Stonington Preston**

March 30, 2004

The Honorable Rob Simmons  
U.S. House of Representatives  
511 Cannon House Office Building  
Washington, DC 20515-0702

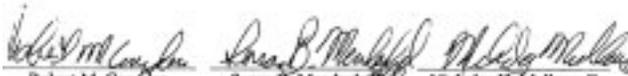
Dear Congressman Simmons:

On behalf of the Towns of Ledyard, North Stonington, and Preston, we hereby request that you submit the enclosed written testimony to the record for the hearing on tribal acknowledgment to be held before the House Resources Committee on March 31. As discussed in this testimony, the BIA tribal acknowledgment process is irreparably broken. The recent decisions involving petitioner groups in Connecticut is proof of this problem. We urge you to take whatever steps are necessary to achieve reconsideration of those seriously flawed decisions and to reform the acknowledgment process.

We also note that the panels for this hearing appear to be designed to give voice to the interests of petitioner groups, including groups with wealthy financial backers who are seeking to open casinos in partnership with petitioner groups. We are grateful to Congresswoman Johnson for appearing as a witness. We are nonetheless concerned that the other witnesses will present only the tribal petitioner perspective on these issues. For example such groups often complain about the length of time it takes to achieve a final decision. Yet they fail to mention that they often spend many years developing their own case and then only start to object after they have completed their applications. For example, the Eastern Pogo group initiated its tribal acknowledgment review in 1978 and then spent the next 17 years developing its case. From the time the petition went on "ready" status, it took BIA approximately three years to take up review and four years to reach a decision. While we share concerns over the expense and delay associated with the acknowledgment process, we consider the petitioners' objections to be misleading. Our Towns encourage you to see to it that a balanced record is presented to the Committee. Hopefully the enclosed testimony will be helpful in that regard.

Thank you for considering these views and representing our interests at this hearing.

Very truly yours,

  
Robert M. Congdon Susan B. Mendelsohn Nicholas H. Mullane, II

cc: Senator Dodd  
Senator Lieberman  
Congresswoman Johnson  
Congressman Shays  
Attorney General Blumenthal  
Governor John Rowland  
Secretary of the Interior Gale Norton  
Assistant Secretary David Anderson

