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How To Use This Book

This booklet is one of a series designed to serve as a resource for tribal officials on topics relating to:

1. Governance
2. Economic Development
3. Lands & Resources
4. Safe & Healthy Communities
5. Comparative & International Indigenous Peoples Law

Throughout this guide, the following icons may appear. These icons are visual guides to help the user identify areas that may require special attention.

Multiple options exist.
You will need to choose which direction to go

An important point to be aware of

Practical tip; helpful hint

Should you choose to address matters discussed in this guide that require the assistance of an attorney, this booklet can serve as a foundation for facilitating discussions regarding these matters. This book is not meant to constitute legal advice or to substitute for the advice of a qualified attorney on legal matters.

Introduction

Indian tribes that are federally recognized and listed on the official list published by the Department of the Interior have retained and acknowledged sovereign status. Consequently they enjoy a government-to-government relationship with the United States. In addition, the tribes qualify for funding and services from the Bureau of Indian Affairs,; funding which can be channeled into programs for the benefit of tribal members. Federal recognition exempts a tribe from state and local jurisdiction and laws including laws relating to taxation and gambling, and it sustains the trust relationship between the federal government and the tribes which allows lands to be held in trust for tribes by the US.

 You will see acronyms scattered throughout the text as you read this discussion of federal recognition. For your reference here is a list of the most frequentlly-occurring ones:

 DOI - Department of the Interior
 SOI - Secretary of the Interior
 OFA - Office of Federal Acknowledgment, housed within the office of the Assistant Secretary of the Interior for Indian Affairs, or
 AS-IA
 IBIA - Interior Board of Indian Appeals, which hears ...

Overview of the Process

The process of petitioning for federal acknowledgment is fairly straightforward under the regulations. An Indian group must file a letter of intent stating that it can satisfy the criteria in CFR § 83.7 and request acknowledgment that they exist as an Indian tribe. The letter should be addressed to the Assistant Secretary – Indian Affairs ("AS-IA") and must be signed by the governing body of that Indian group.

The Department of the Interior ("DOI") must provide written Notice of Receipt within 30 days of receiving a letter of intent. Within 60 days the Secretary must publish receipt in the Federal Register to notify the public and any potential interested parties. Furthermore, the AS-IA must notify in writing both the governor and attorney general of the state in which the petitioner is located, in addition to any other petitioner that appears to have a historical or present relationship with the petitioner

of receipt of the petition.

The onus then falls on the petitioner to compile a petition providing specific evidence in support of their request for acknowledgment. Although the petition may be in any readable form, it must be certified by the group's governing body. The 1994 revisions added the requirement that all official documents from the petitioner be certified in order to respect tribal sovereignty and to ensure that they were communicating with the legitimate governing body.

A petition is comprised of a narrative of the Indian entity supported by appropriate contemporaneous documentation (i.e. newspaper clippings, official meeting minutes, letters from the federal government, etc.) that prove that the Indian entity meets each of the seven mandatory criteria. Each of the seven mandatory criteria provide examples of some of the evidence that the OFA will accept, however, this list is not exclusive and any evidence that a petitioner submits must still meet the OFA's standard. The actual petition size, quality, and supporting documentation varies according to the means of the tribe and their historical situation. Once the OFA receives the petition, they conduct a preliminary review to provide the petitioner with technical assistance.

The technical assistance review advises the petitioner on how to improve their petition prior to active consideration. Once the review is completed the AS-IA will notify the petitioner in writing of any obvious deficiencies or significant omissions and give the petitioner the opportunity to withdraw the petition for further work or submit a supplement to the petition. At this point, the petitioner may request teleconferences or in-person meetings to query the OFA staff on how to draft a petition that will meet the requirements of the regulations.

Regardless of how serious the stated deficiencies, the petitioner has the option to request that the OFA proceed with active consideration of their petition and be placed on the "ready and waiting list." The OFA reviews each petition in order by the date of the OFA's notification to the petitioner that it is on "active consideration."

The timelines provided in the regulations are the most frequently cited areas of frustration by petitioners. Although the regulations unambiguously state that "within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register," a petition-

er generally waits decades before their petition is actually considered. The regulations go on to state that the Secretary has the discretion "to extend that period up to an additional 180 days." Under a plain reading it would appear that the Secretary can provide one extension of 180 days, however, the OFA has interpreted this to mean unlimited extensions of up to 180 days each.

In part to counteract the lengthy review process, the regulations allow for an expedited negative finding. However, under the regulations, if the OFA's initial review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria, a full review must be undertaken. Once the petition is actively reviewed the OFA will notify the petitioner and interested parties. Any substantive comments regarding the petition that the OFA receives prior to and during the preparation of the Proposed Finding will be provided to the petitioner.

Once the OFA has finished analyzing the petition and published the Proposed Finding in the Federal Register the public may submit comments to the OFA for at least 180 days from the date of publication. Here again, the AS-IA is been provided discretion to extend the comment period upon a finding of good cause. In practice, the AS-IA regularly grants extensions. During the comment period the OFA may provide technical advice to the petitioner concerning the factual basis of the Proposed Finding and suggests an appropriate response.

Upon request of the petitioner, the OFA will hold a formal technical assistance meeting on the record. Historically, only a handful of these types of meetings have been held. Because the actual team that reviewed and drafted the petitioner's Proposed Finding is present to answer questions, this meeting can be very helpful in understanding the methodology that each reviewer utilized and craft an effective response.

The petitioner has a minimum of 60 days to respond to any comments received. The AS-IA may extend this time period if the nature or quantity of the comments warrants such an extension. At the end of the comment period the OFA reviews the evidence, including new evidence submitted by the petitioner and evidence submitted by interested parties and the public during the comment period. The OFA then makes a recommendation to the AS-IA, who will signs the Final Determination regarding the petitioner's status.

A summary of the Final Determination must be published in the Federal Register within 60 days of the close of the comment period. Once again,

the AS-IA has discretion to extend the preparation period if warranted by the extent and nature of the comments. In practice, the AS-IA frequently grants itself extensions. Once a Final Determination is published it becomes effective in 90 days unless a request for Reconsideration is filed with the Interior Board of Indian Appeals ("IBIA"). If no Reconsideration is requested, the publication of the Final Determination becomes the final agency action for the Department.

The Seven Mandatory Criteria

In order for a petitioner to successfully achieve federal recognition under the Part 83 regulations, they must be able to meet all of the seven mandatory criteria. These criteria are that:

1) "the petitioner has been identified as an American Indian entity 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) petitioner must provide a copy of the group's present governing documents;
5) the petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity;
6) membership of the petitioning group is composed principally of persons who are not members of any other acknowledged group; and
7) neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship."

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

Criterion A – Outside Identification

The first criterion, which requires identification as an American Indian entity on a substantially continuous basis since 1900, may seem like an easy task for a legitimate Indian group, but it has stymied numerous petitioners. The OFA has interpreted this criterion strictly and requires a petitioner to provide evidence of outside identification of an Indian group that consists of the entire entity where identifications do not need to be factually accurate, but individual leader titles do. This section will first discuss types of evidence that the OFA accepts to prove outside identification and then will analyze the OFA interpretations of this criterion.

The regulations provide several examples of evidence that can satisfy the criterion. One example is "identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations." Participation in a pan-Indian organization should fit this criterion. However, when Clarence Lobo, a Juaneno leader, participated in the Mission Indian Federation (a California based pan-Indian group consisting of the leaders of most California Mission Indians) the OFA argued that the leader's participation was merely on his own behalf and not as a representative of the Juaneno. The OFA argued this even though Lobo was not questioned as a leader. In fact, Lobo served as a leader among the Juaneno in the 1950-70s, made several trips to Washington, D.C. to lobby on behalf of the Juaneno and other Mission Indians, and conducted extensive letter writing campaigns.

The Juaneno Band of Mission Indian's group received a negative Proposed Finding in 2007 after much internal Interior controversy due to the petitioners' membership splitting apart. As a result the OFA is analyzing the Juaneno Band of Mission Indians "Petitioner A" and "Petitioner B" simultaneously, and their petition is still pending in early 2011. Both petitions utilize largely the same evidence and both Proposed Findings were found to have the same historic tribe based at San Juan Capistrano Mission. At one time San Juan Capistrano was a completely independent town, but now is part of the urban Los Angeles sprawl and many members of both petitioners have moved outside of the San Juan Capistrano area in search of better jobs. The bitter feelings between the two petitioners resulted in each group undermining the other and may ultimately result in a negative Final Determination for the tribe.

Other examples of types of evidence that a petitioning group may use to show criterion (a) include bringing a claim before the Indian Claims Commission, providing agency reports from Indian agents and Superintendents, utilizing BIA censuses, being the subject of congressional legislation and non-taxation by states. The constant is that in all of these suggested pieces of evidence the United States or one of its subparts is involved. However, California, along with other states was not granted statehood until after 1850. The ability of tribes from these states to find and utilize the suggested documents is difficult given that a state did not exist yet. Church records as evidence of Indian identity pose problems as well since in areas where Indians were a minority, but still allowed to participate in church activities, there would be little reason for a parish to distinguish between Indian and other ethnicities.

The OFA interprets criterion (a) to mean that outside identifications must be of an Indian "group." Thus, identifications of an Indian or an Indian family, even if clearly affiliated with the petitioning group, will not satisfy the criterion. For example, in the recent Sokoki Abenaki decision, the OFA determined that photographs of an Abenaki family could not be considered evidence of criterion (a). Similarly, contemporaneous newspaper articles stating that Abenaki Indians lived in a certain part of town or that a Juaneno Indians traveled to a pan-Indian meeting were insufficient evidence of the existence of an Indian group because they only showed the existence of Indian individuals.

Another problem with using identification of an Indian entity by outsiders is that outsiders are often not the best determiners of whether a group is Indian or what tribe they were members of. This is especially true in the early part of the 20th Century, when distinctions between tribes were not considered important. At a minimum, the existence of Indian individuals claiming an affiliation with an Indian group should provide some evidence of the existence of an Indian group.

The OFA's analysis of criterion (a) frequently suffers by the application of contemporary standards to the past. For example, it is doubtful that a journalist from the early 1900s would view Indians as a political entity, and therefore, unsurprising that an article from that era would contain little or no information about the larger Indian entity. The OFA uses the lack of such modern descriptors to buttress the argument that the petitioner is not an "entity," but individual Indians. However, lack of outside identification of an Indian or group of Indians as an "entity" carries little

meaning beyond a lack of information to form a conclusion.

Not only must an identification be of an Indian group, the identification must encompass the entire entity. The Duwamish, a Washington based tribe, submitted their petition in 1977. Historically, the Duwamish consisted of two geographic localities – one based on the reservation and the other based off the reservation. The reservation-based Indians were those that descended from the Duwamish who signed the 1855 treaty with the United States. The OFA argued that the identifications of the "Duwamish" or "Duwamish and allied tribes" referred to the treaty-reservation Indians (i.e. those living on the reservation) and did not include those Duwamish that lived off-reservation in villages. The OFA determined that these identifications were limited to reservation Duwamish even though in another section of the Proposed Finding the OFA wrote that the off-reservation Duwamish appeared on lists that the Superintendent of the Tribe kept of all Duwamish Indians. Thus, even though there were outside identifications of the "Duwamish," the OFA's interpretation dismisses the weight of those identifications.

Another presumption by the OFA is that identification as an Indian entity cannot consist of merely a title or an acknowledgement as a leader. For example, the letter writing campaign of a chief on behalf of the membership is not evidence of the existence of an Indian group nor is it evidence of political authority. Even if numerous letters acknowledge by title the particular individual as the "Chief" of a tribe, the OFA will not be satisfied. Instead, the OFA argues that the individual may be claiming the title of Chief without actually having the support of the tribe. Furthermore, the OFA reasons that any responding letters made out to the "Chief" are merely copying the signature line.

Although the title of a leader must be accurate, the external identifications of the petitioning entity do not have to be factually correct. This concept was stretched to its logical limit in the United Houma PF. The United Houma Nation consists of a large decentralized grouping of Indians in Louisiana. The United Houma Nation's petition is currently undergoing comments. The OFA argued that although two contemporaneous scholars, "Swantson's and Speck's specific identification of the petitioner's ancestors as Houma Indians, [was] historically and genealogically inaccurate, . . . [it] provides evidence that the petitioner has been consistently identified by external sources as an American Indian entity since the early 1900's to the present." United Houma Nation, Proposed Finding 6 (1994). Thus according to the OFA's logic, if a newspaper

sures from non-Indian society to acculturate to non-Indian society" to be sufficient to meet the criterion. Thus, the petitioner must be able to provide evidence that it is "Indian." The Snoqualamie were considered a single social unit consisting of the descendents of 18 villages in the Puget Sound region of Washington. The OFA considered the Snoqualamie's high blood quantum, over 50 year unity under Jerry Kanim's strong leadership, and maintenance of traditional language and religion as indicative of their lack of acculturation.

Providing evidence of a distinct social unit can be problematic to some petitioners due to strategies on the part of a group's ancestors to "live underground" or to acculturate to non-Indian society on the surface, but maintain their Indian community and identity in secrecy. If their ancestors were successful in living underground, then two things are true: 1) there would be little evidence of this secret society since most of the evidence would be oral and 2) the Indian entity would still exist today since the ancestors passed the culture down.

Part of acculturation or assimilation is the degree that the petitioner has maintained a high blood quantum. The OFA also considers membership requirements and kinship patterns as evidence that a petitioner meets criterion (b). In Snoqualmie, the OFA noted that the blood degree requirement for members "establishes a requirement for the maintenance within the group as a whole of at least a minimal degree of social ties." Snoqualamie Tribe, Proposed Finding 13. According to the OFA, membership requirements also provide evidence of the maintenance of clear social boundaries for their group, which distinguished them from non-Indians. This reasoning is suspect because blood degree requirements are not necessarily an indication of a clear-cut boundary between the petitioning group and the outside community. Children of parents who barely meet the minimum blood requirement frequently take part in cultural events and are likely considered by many within and without the group to be part of the community.

Blood quantum is frequently a proxy for racial continuity. In Duwamish, the OFA determined that participation in pow-wows and commemorative events was not considered maintenance of distinct community. The OFA implied that this was because the participation was not sincere. However, a relatively strict blood quantum requirement presumably increases the petitioning group's member's Indian phenotype making it easier to come to the conclusion that their participation in traditional activities and the community is sincere. The OFA has been criticized for

Another critique of the OFA's interpretation of the regulations is that they prohibit the use of oral tradition as evidence of meeting the distinct community requirement. Although this prohibition applies to all of the criteria, it is most detrimental in criterion (b) because the evidence for this criterion would be most likely to be oral.

The regulations require a petitioner to meet the distinct community requirement from historic times to the present. Using historic times as a starting point means that petitioning groups in certain regions must show that they were a distinct community prior to the formation of the United States of America. Not only is this a huge burden, but arguably the U.S. should not be allowed to dictate Indian existence prior to its own formation since the U.S. would not have authority over tribes at that time. This is especially true since the United States itself would be hard pressed to prove that it met this criterion in the early years of the nation when states acted much more independently.

The OFA requires all evidence based on oral tradition to be corroborated with tangible evidence. This means that if four elders comment during an interview that they recall attending monthly dances that included a large segment of the petitioning group, the OFA would not consider this evidence unless there was some type of photograph or written documentation corroborating their statements. This runs completely counter to Indian traditions that focus on the oral transmission of culture. Further, the undervaluation of oral tradition biases the process towards Western ideas of what constitutes legitimate evidence. Without the ability to use oral tradition as a form of primary evidence, it is difficult for a tribe to provide evidence of social interaction, especially in the early 1800s, when phone records, letter writing, and plane tickets did not always exist or were easily available.

Lastly, the OFA's interpretation of criterion (b) indirectly favors large land-based tribes. For example, the OFA has approved evidence that a leader organized agricultural work teams constitutes proof of criterion (b). On the other hand, the OFA has also required such labor recruiters to work exclusively within the petitioning group and trace their own heritage back to the historical tribe. The OFA's interpretation is easier met if the petitioner consists of a large group all living in the same area making it economically practical for a labor recruiter to work exclusively within one tribe. Unlike labor recruiters, annual berry picking and cooperative hunting do not meet the OFA's standards unless they consist of mostly unrelated individuals from the same tribe. Hunting and gathering

In Duwamish, the OFA argued that a petitioner had "no geographical area of concentrated settlement to provide a social core." Duwamish, Proposed Finding 8-9 (1996). Similarly in Juaneno because many members no longer reside in San Juan Capistrano or, more specifically, the traditional barrio, the OFA determined that the Juaneno did not constitute a distinct community.

In the Washington based Chinook PF, the OFA noted that there were three separate communities (Bay Center, Dahlia, and Ilwaco) that appeared to draw from Chinook membership, but because there was no evidence that these communities, in their entirety, ever joined to form a single separate distinct community they could not meet criterion (b). These three communities interacted on an informal level from the early 1800s to the present, but could not provide sufficient evidence of a plan of interaction that incorporated social and political control over each other. Interestingly, this petitioner did not have difficulty meeting criterion (e) of descent from one historic tribe, which is one that frequently stifles a petitioner, especially when they cannot show social interaction.

The OFA's geographic interpretations tend to favor land-based tribes such as the Mashpee Wampanoag, Eastern and Paucatuck Pequots, and certain Michigan groups that were able to comprise a single community by having a land base of their own. Many such groups have the additional benefit of residing on a state reservation. By having a land-base, petitioning groups can more easily show that individual members interacted with each other because they lived near each other.

With that said, the OFA has put some restrictions on residential clustering when outside of a reservation. The MaChis Lower Alabama Creek claim to be an Indian group that hid in a cave near Covington County, Alabama to escape the forced migration of Creeks to Indian Territory. In the PF, the OFA found that even though the Federal census and county records show residential clustering and interaction among the principal families of the group, their scattered "enclaves have never been regarded by others as being American Indian communities." Not only was the OFA using criterion (a) to shade the analysis of criterion (b), but they seemingly contradict and disregard their own statements. The OFA failed to explain how enclaves within one county could be so scattered as to prevent meeting the distinct community element of criterion (b). Such seemingly inconsistent interpretations appear too frequently in OFA's findings and call into question the OFA's objectivity.

Criterion C – Political Influence

The third criterion frequently criticized requires the petitioner to maintain political influence or authority over its members as an autonomous entity from historical times until the present. The OFA's interpretation of political influence requires petitioners to have a bilateral relationship with the membership while focusing on what the OFA deems legitimate activities and not just the single issue of federal recognition. Similar to the OFA's interpretation of distinct community, the OFA's interpretation of political influence favors large centralized land-based tribes. This section will analyze the OFA's interpretation concerning political influence.

In many Proposed Findings the OFA laments that the petitioners do little more than attempt to obtain federal recognition, elect officers, and endorse attorney's contracts. The OFA argues that these petitioners are not engaged in important disputes such as protecting hunting and fishing rights. The OFA's attempt to find political authority in the petitioning groups' fight to maintain hunting and gathering rights unfortunately perpetuates the stereotype that Indians must be hunter-gathers. Even more unfortunate is that however much the OFA believes that fighting for hunting and fishing rights are topics worthy of political influence, they do not always accept it as evidence.

In Juaneno the petitioner provided evidence of advocating for hunting and fishing rights, only to have the OFA argue that those were the efforts of a single individuals acting on their own behalf. The OFA argues this even though, the hunting and fishing rights actually belong to the tribe and not the individual.

Equally problematic is the OFA's belief that leaders making decisions about federal recognition on behalf of the membership is insignificant. When a petitioner's membership has little resources it is understandable that the petitioner would focus on obtaining federal recognition. Obtaining federal recognition means the opportunity for economic development, education, and health care for the membership. More importantly, obtaining federal recognition can serve as validation that the tribe still exists. Federal recognition also reaffirms that the tribe has not given up any of its rights due to them as an Indian tribe.

In addition to fighting for hunting and fishing rights, the pooling of resources for the benefit of the entity can serve as evidence of political

relationship. For example, the Jamestown S'Klallam, a Salish tribe in the Puget Sound area, were able to pool financial resources to purchase land upon which the community was established, including a church, school, and crab fishing operation. The OFA took this as strong evidence of social and political authority.

In Juaneno, however, the OFA did not consider the contribution of funds from tribal members to send a leader to Washington, DC to argue for federal recognition and their Indian Claims Commission case to be evidence of political relationship. The OFA argued that the leader's reliance upon the same individuals, some of whom were non-members, showed a lack of interest on the part of the membership. Here again, the OFA views a piece of evidence with a presumption that the evidence does not meet the criteria instead of presuming that those individuals who donated were the only ones with the means to contribute.

Political protests that require the mobilization of members constitute evidence of political authority. The Narragansett were able to prevent the draining of a cedar swamp located on their former reservation by holding a protective action meeting. Although the protest was organized by one individual, the OFA noted that the individual claimed that the tribal council called for the action. No further evidence was found to support this claim. The swamp was not drained and the OFA interpreted the action as evidence of political authority.

On the other hand, in Juaneno a similarly large protest with extensive media attention was staged to protest the cutting of trees located on their traditional lands. Although the OFA accepted the initial protest, they quickly noted that the subsequent protests were not evidence of political relationship because less individual Juaneno members attended and the protest was characterized as several individual Juaneno Indians obtaining lots of media attention.

The OFA requires the petitioner be able to show that there is a bilateral relationship between the leadership and the membership. The OFA welcomes conflict within a petitioning group as evidence of the existence of a bilateral relationship. The OFA has, on numerous occasions, stated that conflict shows that the petitioning group is engaged in discussion and provides evidence of a bilateral political relationship. For example, in the Eastern Pequot and Paucatuck Pequot petitions the heated disputes and discussions that lead to the eventual split of the petition into two petitioners was used to show evidence of political bilateral relationship. The

OFA argued that even though there was political unrest the membership still attended meetings and were politically engaged.

A bilateral political relationship exists when individual members voluntarily participate in meetings, events, and discussions. However, when there is internal conflict, the OFA requires the conflict be confined to the political arena and not seep out affecting social relationships. Thus, while the OFA considers it acceptable that political conflict break amongst family lines, it is important to be able to show that both sides of the faction still attend the same community events and continue to interact socially. In the Eastern and Paucatuck Pequot petitions it was clear that even though politically there were two entities, individuals from each faction continued to participate in social gathering together.

Finally, the OFA's interpretation of political influence requires petitioners to show that they were able to control their members. Many traditional tribal governing structures do not operate on overt control of an individual's behavior. For example, in a decentralized governing structure tribal leaders are fluid and are based on whoever provides the best advice for that topic of discussion. Under this system, Indian political leaders act more like philosophers sharing their ideas with the membership who then, in turn, made their own decisions. This type of governing structure makes it difficult to determine the leader. In cases where the OFA cannot discern a leader, the OFA tends to conclude that there is no evidence of political authority. The reality may simply be that Indian political leaders culturally did not make decisions for members.

The OFA's interpretation of criterion (c) is permeated with a bias in favor of large land-based tribes. Landless tribal leaders may not have the ability to make decisions for their membership. Unlike land based, state recognized, or large tribes with a centralized governing structures, landless tribes do not have the ability to pass ordinances, such as dog control, enforce hunting and fishing regulations, or direct the repair of tribal buildings and roads. In the Eastern Pequot case, the OFA noted that this type of "control of territory and its uses is a strong form of evidence of political relationship." Similarly, the Mashpee Wampanoag, a large tribe in Massachusetts, were able to convince the State of Massachusetts to establish the Mashpee Indian District. The Mashpee Indian District was later incorporated and the tribal members had sufficient numbers to maintain control of their city council for many years. When they eventually lost that control they had enough infrastructure developed that they smoothly continued operation of many of their programs and charities

for tribal members.

The OFA's interpretation of criterion (c) seems slanted towards a petitioner with a specific governing structure, issue priority, and land base.

Criterion E – Descent from a Historical Tribe

The last mandatory criterion requires the petitioner's membership to consist primarily of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity. Critics have argued that the OFA's interpretation of criterion (e) is racially based, creates research difficulties, and uses a higher standard of proof than what is in the regulations. This section will provide an analysis of the OFA's interpretation of descent from a historic tribe.

To the OFA's credit, they do not require every individual member to be able to trace back to the historical tribe, however, the percentage that must be able to do so is still relatively high. On average a successful petition must be able to show that at least 85% of the membership descends from the historical tribe. As political entities federally recognized Indian tribes do not have to prove a racial element in their membership requirements. Similarly, a petitioner seeking federal recognition should not have to prove a racial element beyond what is required of federally recognized tribes. While it is reasonable for the OFA to require evidence of the existence of a historic tribe and that the membership be able to trace back to that tribe, it is unreasonable and unnecessary to require a high percentage of descendency.

The historic tribe is often found to exist in the late 1700s. Finding documentation extending that far back can be difficult for any individual, Indian or non-Indian. Records dating back into the 18th Century are subject to decay and historic accidents. For example, for the Juaneno petition much of the Mission records were destroyed in the San Francisco fire. In addition, records can be misplaced or placed in multiple localities frequently based on where the document creator willed their property.

The OFA argues that it accepts a multitude of records to establish criterion (e). For example, the OFA accepts Bureau of Indian Affairs reports and studies as evidence of the descent from the historic tribe. However it is rare that these BIA reports would have included unrecognized

tribes. The OFA also suggest that petitioners review church records and other formal records, such as marriage and death records for evidence of descent. However, many of these records were issued in an attempted to assimilate Indians and may have an inherent bias in them. Differences in naming traditions among many Indian entities complicates tracing one's lineage prior to the first baptism. Indian individuals that first came into contact with missionaries utilized traditional names that were difficult for non-Indians to replicate and were often misspelled by the notetaker. Upon baptism these individuals were given a new name making it difficult to determine which traditional Indian name matched with the baptismal documents.

For some petitioners, their membership could prove Indian descent, but not descent from the historic tribe. Affidavits and other identifications of Indian or tribal descent are considered insufficient unless they are contemporaneous and supported by other documentary evidence. In United Houma Nation, 84% of the petitioner's members could prove Indian ancestry; however this ancestry "could not be reliably identified as descending from a specific historical tribe, nor from historical tribes which combined." Thus, the United Houma Nation failed to meet criterion (e). Similarly, in Juaneno several members could show descent from an Indian that lived at the mission, but according to the OFA it was unclear this individual was Juaneno or Pala. Therefore, the ancestor (and all petitioner's membership descendent from her) was not considered "Indian." This is even though the OFA's stated definition of the historic Juaneno tribe was all Indians at the San Juan Capistrano Mission in 1850, which included this particular individual ancestor.

The OFA uses a higher standard of proof than the reasonable likelihood of the validity of the facts standard found in the regulations. Instead, the OFA requires evidence to meet genealogical standards, which requires two documents showing the same information. Then the OFA utilizes the "reasonable likelihood of the validity of the facts" standard. After satisfying the strict genealogical standard, meeting the reasonable likelihood standard in the regulations is all but automatic.

Although the OFA has accepted descendency rolls, which were produced by the BIA in order to distribute judgment funds awarded under the Indian Claims Commission payment rolls, they do not accept other federally initiated settlement lists as evidence of tribal descent. The OFA argues that these lists constituted self-identifications rather than requiring proof of tribal membership. It is unclear why the same type of

document created by the same entity (i.e. Federal government) would be considered self-identification in certain instances and then accepted as evidence of tribal descent in others. In fact, in Juaneno there was little to no mention of the fact that these membership lists required a witness, that many of the individuals were challenged and had to provide additional proof of membership, that these lists were certified to issue settlement funds to Indian individuals by the U.S. Federal Court, and that several federally recognized tribes currently use this list to determine their membership.

Even more problematic is that the OFA uses census data over these federally initiated tribal claims lists. Census data, especially from early censuses, can only be considered as good as the enumerator. In fact, the census enumerator position was frequently a position given as a political favor and there was little guarantee that the enumerator would be competent. Yet, the OFA accepts census data in the Juaneno case with little analysis of the enumerator's skill. Steven Austin, a former OFA employee, stated that BAR does not accept government documents because "it's totally contrary to the standards of the professional disciplines that we work under." Peter Beinart, Lost Tribe/Native Americans and Government Anthropologists Feud over Indian Identity, Lingua franca (May 1999). However, a more accurate statement may be that the OFA dismissed federally sanctioned tribal rolls under the guise of professional standards, when those standards go beyond the standard provided in the regulation.

Each of these four criteria can and have been met by certain petitioners, but each carries with it recurring problems related to the OFA's interpretation of the regulation. Problems in the historic record make it difficult for many petitioners to find the appropriate evidence to meet the standards. Although the OFA is supposed to take into consideration gaps in the historical record, they first require the petitioner to explain why there is a gap before they will consider it. These four criteria serve to advantage certain types of petitioning entities over others. Small, decentralized, landless petitioning entities will find it more difficult than larger, centralized, land based petitioning entities to meet the standard that the OFA requires.

A tribe which unsuccessfully petitioned for federal recognition is not necessarily entirely forecosed. There are several possible avenues it can pursue:

Appellate Procedure

A request for Reconsideration can be made to the Interior Board of Indian Appeals. The request must include a detailed statement of the grounds for reconsideration and include any new evidence, which is considered the opening brief. The IBIA has limited appellate authority, however, it may review all requests for Reconsideration that are timely and allege one of the following: 1) there is new evidence that could affect the determination; 2) a substantial portion of the evidence relied upon was unreliable or of little probative value; 3) the petitioner or BIA's research was inadequate or incomplete; or 4) there are reasonable alternative interpretations, not previously considered, that would substantially affect the determination. In order for the IBIA to vacate the Final Determination, the appellant must show by a preponderance of the evidence that they have met one of the four grounds. If vacated, the case would be remanded to the Secretary for reconsideration.

The IBIA may also request reconsideration on other grounds. In this situation, the Board will send a request for reconsideration to the Secretary, who has discretion whether to reconsider the Final Determination or let it stand. Once the Board has rendered a decision, interested parties may submit comments to the Secretary who must make a decision whether to reconsider the Final Determination within 60 days. If the Secretary reconsiders the Final Determination, the Reconsidered Decision must be issued within 120 days and becomes effective upon publication. If the Secretary declines to reconsider the Final Determination it becomes final and effective upon notification of the parties.

2. Congressional Action

In addition to filing a petition under the federal regulations, tribes may also obtain federal recognition through a specific act of Congress.

Periodically there is also discussion that Congress may rewrite or amend the regualtions by which federal recognition occurs.

3. Judicial Appeal

Finally, tribes may pursue a judicial appeal of an unsuccessful application for federal recognition. The average recognition petition languishes with the the federal agency for 20 years. The judicial trend in challenges

brought against the OFA includes cases brought under the Administrative Procedure Act ("APA") for delay or arbitrary and capricious application of the regulations. Aggrieved petitioners must exhaust administrative remedies prior to federal court litigation, which extends the length of the appellate process considerably. Although cases brought under the APA will be duly deferential to the DOI, some tribes have been successful.