Government Agency Tribal Relations:
Questions of Federal Recognition, Constitutionality and Fiduciary Relationships

Introduction:

The U.S. carries on a diverse and evolving legal relationship with Indian tribes, defining the term "Indian" no fewer than 33 different ways in statutory and regulatory provisions.

By the mid 1990s there were over one million Indians enrolled in over 550 federally recognized tribes throughout the nation. At the same time, however, as many as 500,000 were either unenrolled in federal tribes, or were members of terminated or unrecognized tribes.

These statistics are significant because of the variety of relationships the federal government maintains with federally recognized and unrecognized tribes.

Recognized Tribes:

Quasi-Sovereign:

Possibly the most significant difference between federally recognized and unrecognized tribes is that federally recognized tribes occupy a "Quasi-Sovereign" status with the federal government. Tribal status is "quasi-sovereign" because even recognized tribes are not denominated as foreign nations, but as domestic dependent nations in which the federal government acts as "trustee" of tribally held land. However, federally recognized tribes still remain "sovereign" nations when relating with the federal government.

Government to Government Relations:

Due to their "sovereign" status, even though they are "domestically dependent," tribes carry on relations with the federal government as a political entity and thus establish government to government relations.

Prerequisite to Protection, Services and Benefits:

Based on this political relationship with the federal government, the Code of Federal Regulations states that federal recognition is a "prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. 83.2.

Guaranteed Fiduciary Relationship of Trust:

In this way, federal recognition essentially guarantees Indian tribes a fiduciary relationship of trust with the federal government supported by their "quasi-sovereign" status. This relationship invokes the federal duty to protect Indian interests due to their "domestic dependent nation status."

Unrecognized Tribes:

Unrecognized tribes do not enjoy a guaranteed fiduciary relationship of trust with the federal government because they do not have Quasi-Sovereign status. Thus, they do not meet the "prerequisite for protection, services and benefits."

Constitutional Concerns:

Unrecognized tribes are not guaranteed a fiduciary relationship of trust because they do not maintain a political relationship with the federal government. Without a political relationship with the government, tribal recognition by the United States is based on recognition of the tribe's traditional racial and cultural status. Thus, there is danger that a "trust" relationship with an unrecognized tribe is purely a "racial" acknowledgement and may be a violation of the due process clause of the 5th and 14th Amendments.

*Note: see *Morton v. Mancari*, 417 U.S. 535 (1974), where the Supreme Court held that Indian employment preference was not unconstitutional because a recognized tribe develops a political and not racial relationship with the federal government.

Case – by – Case Relations:

However, federal recognition traditionally has not determined the full extent of the relationship between Indian tribes and the federal government. The Supreme Court has defined Indian tribes as a "body of Indians of the same or a similar race, united in a community under one leadership or government and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261. Courts have also honored treaty rights of "terminated" tribes, and legislation has also been implemented which directly applies to unrecognized or state recognized tribes, or can be implied to apply to the same.

*Note: One theory maintains that this may be constitutional as a sort of de facto recognition if the federal government has developed a "course of dealing" with the tribe as if it were recognized even if it is not officially recognized.

Treaty Rights:

Courts have honored terminated tribes' treaty rights to collectively contract, receive grants, exercise traditional hunting and fishing rights, and sue in court. *Menominee Tribe v. United States*, 931 U.S. 404 (1967); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974).

Direct Statutory Fiduciary Relationship:

The Indian Reorganization Act of 1934 explicitly recognizes recognized and unrecognized Indians as long as they maintain 50% Indian blood quantum. 25 U.S.C. § 479 (applied to the unrecognized Pit River Indians of California). The Arts and Crafts Act of 1990 recognizes "any individual who is a member of an Indian tribe." 25 U.S.C. § 305e.

Implied Statutory Fiduciary Relationship:

Some federal statutes do not explicitly apply to unrecognized tribes, but have been interpreted by courts and federal agencies to provide inclusive definitions of tribes, applying to unrecognized or state recognized tribes. Courts have consistently applied the Non Intercourse Act , 25 U.S.C. § 177, to unrecognized tribes. (prohibiting the purchase of Indian lands from Indians within the U.S. except through federal treaty). *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

Additionally, the Native American Programs Act, 42 U.S.C. § 2991a, was interpreted to apply to a landless state recognized tribe (promoting Indian economic and social self-sufficiency). *In the Matter of Lumbee Indians of North Carolina*, 58 Comp. Gen. 699 (1979).

Summary:

In light of these federal relationships with unrecognized tribes as well as the constitutional concerns of federal acknowledgement of fiduciary relationships with these tribes, how do we define federal agency relations with Indian tribes?

Felix Cohen perhaps summarizes the diverse relationships best: for federal purposes, "the term tribe has no universal legal definition…the question of tribal existence may depend in part on the context and purposes for which the term is used." Thus, this takes us back to a case by case analysis—meaning that affiliations with unrecognized tribes are determined by governing legislation or pre-existing treaties and whether relationships may be established with them is unique to agency activities and involvement with such tribes.

Current Trends:

Well defined political relationships which limit fiduciary relationships to recognized tribes:
In 1975 the Self-Determination Act was passed which defined a tribe according to its recognized status. Increasingly regulations and legislation over the past decade have adopted this definition limiting services and benefits to recognized tribes. This is beginning to standardize the terminology based on inherent constitutional concerns involved in acknowledging unrecognized tribes.

Consultation with unrecognized tribes:
Although there may be constitutional concerns implicated in extending a fiduciary relationship to unrecognized tribes, it has not been acted upon to overturn existing legislation or Indian programs. Consultation with unrecognized tribes (including state recognized and terminated tribes) may thus be a matter of discretion for federal agencies—again we see relationships form on a case – by – case basis. DoD has a history of consulting with state recognized tribes and when conducting activities which may impact unrecognized tribes, it only seems prudent and fair to involve such groups in consultation.