

Is There a Role for Local Governments in Recognizing Native American Tribes?

by Kelly M. Rabalais



Kelly M. Rabalais is chief administrative officer for St. Tammany Parish Government, which is located in southern Louisiana. Currently, Rabalais serves as the chair of the State and Local Relations Committee of the Federal Bar Association. She thanks Todd Taranto and Angel Byrum for their contributions to this article.

Local governments face a variety of issues that are regulated at the state and federal level. Determining whether to regulate a particular matter depends upon many factors, such as pre-emption, availability of local resources to adopt and then enforce regulation, benefits of local government regulation, and lack of subject-matter expertise.

One such issue is whether local governments should adopt laws or regulations to recognize Native American tribes. Below are some thoughts to consider.

Federal Process, Benefits

Federal recognition of a Native American tribe is a lengthy and arduous process, occurring through treaties, acts of Congress, presidential executive orders, other federal administrative actions, or court decisions. The Office of Federal Acknowledgment, under the purview of the U.S. Department of the Interior, is the primary agency tasked with the federal recognition process.¹

Federally recognized Indian tribes are eligible for a variety of federal services and benefits, including: (1) absolute sovereign immunity against anyone except the federal government; (2) federal aid, grants, and funding; (3) certain exemptions from federal, state, and local taxes as relating to tribal territory; (4) federal protection in controversies where states, local governments, or private citizens are adverse parties; and (5) rights to conduct gaming operations within their jurisdiction. Such tribes further have the right to consult with the U.S. Department of Housing and Urban Development and the State Historic Preservation Office to ensure no tribal artifacts or sites are disturbed by local, state, or federal projects. With few exceptions, state-recognized tribes do not enjoy these privileges. Likewise, there appears to be little consequence for parish or county recognition of an Indian tribe because such recognition would carry no direct economic or legal benefits without the local government specifically providing for same.

State recognition of Indian tribes occurs by concurrent resolution of the state legislature and appears to be an easier but less beneficial path to recognition

than its federal counterpart. A state-recognized (and non-federally recognized) tribe is still subject to state law and government and does not have sovereign control over its affairs. However, state recognition can serve as a pathway to federal recognition and related state and federal benefits and programs.² The National Conference of State Legislatures reported that, in 2010, there were 63 state-recognized tribes in 11 states (Alabama, Connecticut, Georgia, Louisiana, Maryland, Massachusetts, New York, North Carolina, South Carolina, Vermont, and Virginia).³

Local Government's Role

If federal recognition is required for broad-reaching federal services and benefits, including tribal sovereignty, and states may extend benefits to state-recognized tribes only to the extent such benefits are not pre-empted by federal law, what role should local government play? Local governments may well attempt to steer clear of any potential infringement upon the federal process. Trying to carve out any room for local recognition may create more harm than good. In addition, it is unlikely local governments would possess the subject-matter expertise to develop a fair and objective process for local government recognition. Endeavoring to establish a process would be difficult for local governments due to lack of access to historical records, inability to decipher accuracy of claims, the potential to alienate a group of citizens with competing claims, and concerns regarding arbitrary determinations. Further, adding another layer of recognition could cause confusion for tribes as to the best course of action. With no substantive benefit, tribes might not be best served with local recognition. Frustration with another layer of bureaucracy could result, adding to an already cumbersome process. However, providing historic and cultural recognition and assistance in increasing access to state and federal resources may be a role local governments can fulfill.

Mirroring the state recognition process, however, such recognition would most appropriately occur through the adoption of a resolution or proclamation by the local governing authority, and said resolution could

seek similar action in furtherance of certain purposes at the state or federal level. Local acknowledgment would appear to be primarily symbolic in nature and presumably would be sought by a tribe for cultural reasons and/or as a pathway to obtain state and/or federal recognition and the corresponding benefits therein.

Potential benefits for local recognition may lie in the resources available to local government. Local government leadership often has a direct relationship with state agencies, state legislators, federal agencies, and federal representatives. Assisting those seeking formal recognition with access to governmental groups at the state and federal level is another role local governments can play.

Perhaps of primary importance is, of course, the benefits to a local community of recognizing the historical and cultural contributions made by Native American peoples and encouraging appreciation of same. By taking the relatively simple act of issuing a resolution or proclamation, local governments may open the doors for tribes to educate others in the community regarding their role in its development.

Proposed Legislation

Support from local government entities may soon hold a more important role for tribes seeking federal recognition. Currently introduced to the U.S. House of Representatives, H.R. 3744 (also known as the Tribal Recognition Act of 2018) seeks to repeal the current process used by the Department of the Interior for recognition of Indian tribes and, instead, requires an act of Congress for same. The bill is a self-proclaimed attempt to create “a consistent and publicly transparent process” for recognition under statutorily established criteria.⁴

One such listed criteria of the proposed legislation is that the petitioning tribe provide evidence of “dealings with county, parish, or other local government in a relationship based on the group’s Indian identity.”⁵ Should H.R. 3744 become law, and until this provision is further refined through judicial or administrative interpretation, local governments can expect that they may be called upon to play a more important role in a tribe’s journey toward federal recognition. Local governments may want to begin considering their positions on local recognition now, in order to prepare for requests in the future. ☉

Endnotes

¹A federally recognized Indian tribe is a limited sovereign governmental entity not equivalent to a member state of the United States and is subject to the plenary authority of the U.S. Congress. La. Att’y Gen. Op. No. 90-379A (1990).

²La. Att’y Gen. Op. No. 92-167 (1992); La. Att’y Gen. Op. No. 79-48 (1988).

³Martha Salazar, *State Recognition of American Indian Tribes*, 24 LEGISBRIEF (Oct. 2016), <http://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx>.

⁴Mark-Up Memorandum from the House Committee on Natural Resources Majority Committee Staff to All Natural Resources Committee Members, H.R. 3744 (Bishop of Utah) (June 8, 2018), https://naturalresources.house.gov/uploadedfiles/markup_memo_-_h.r._3744_06.13.18.pdf.

⁵H.R. 3744, § 7(1)(C).

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MAY 2-3, 2019