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Tribe In Limbo As NJ Does Double Take On Recognition

Share us on: By **Andrew Westney**

Law360, New York (February 16, 2016, 3:13 PM ET) -- A suit by a New Jersey tribe claiming the state has reneged on its official acknowledgment of the group illustrates the confusion that can crop up around state recognition as tribes navigate a state's particular process to achieve and maintain that status for the sake of potentially uncertain benefits.

The Nanticoke Leni-Lenape Tribal Nation filed a complaint in July to [seek explicit state recognition](#) from New Jersey, saying state officials have failed to correct an employee's denial of the existence of the tribe and two other state-recognized tribes and claiming the Nanticoke Leni-Lenape have lost federal benefits and economic protections they've had since the 1980s based on state recognition.

Gaining recognition from the federal government is the "gold standard" for tribes to participate in federal programs and receive benefits, but "a lot of tribes can't meet that standard, either for a lack of records or land or a variety of reasons, and it is very time-consuming," according to Irene Kawanabe, director of the [National Conference of State Legislatures'](#) State-Tribal Institute.

That leaves tribes like the Nanticoke Leni-Lenape to fortify their claims to take part in federal programs through the state process to recognize tribes, which takes on many forms and can mean different things in the states that currently have such a system.

There are four basic ways to achieve recognition: enactment of a state law, a joint or concurrent resolution from a state legislature, administrative recognition by a state executive agency, or a proclamation or executive order from a governor, according to Kawanabe.

"It's the acknowledgment and the cementing of [the tribes'] presence and their relationship with the state," Kawanabe said. "In general, by having state recognition it commits the state to a government-to-government relationship to the tribe, whatever that may mean."

However recognition is achieved, the state still needs to have the administrative apparatus to develop the tribal-state relationship, according to the Kawanabe.

"Recognition would ideally lead to consultations and a relationship, but it really depends," she said. "If a state were to have state recognition yet no agencies in place that would interact with tribes, it would be harder."

The 13 states that have recognized tribes are located predominantly in the Eastern states, from New Jersey's three tribes to nearly 50 in a near-continuous belt — Mississippi is the exception — running from Virginia to Louisiana. Virginia's contingent includes the Pamunkey Indian Tribe, which in July became the first tribe in the state [to become federally recognized](#).

The Nanticoke Leni-Lenape, which is second in number in New Jersey only to the Ramapough Mountain Indians, maintains in its suit that a 1982 state legislative resolution officially recognized the tribe. It is also recognized through state statute, according to its website, and has permanent seats on the New Jersey State Commission on American Indian Affairs.

The commission, an agency of the New Jersey Department of State, currently has four vacant seats and five members, including the state's lieutenant governor, an official named by the lieutenant governor, and three tribe members — one member of the Powhatan Renape Tribe and two members of the Nanticoke Leni-Lenape, according to the commission's website.

Nevertheless, the state denies in the ongoing suit that it ever formally recognized the tribe. In [seeking to](#)

[have the complaint dismissed in October](#), acting New Jersey Attorney General John J. Hoffman said the resolution was created only to help tribes qualify for appropriate federal funding, and that the state recognized the tribe "only in the limited cognitive sense" and not as "an authentic sovereign government."

Other states — notably Texas — have provided acknowledgment of tribes through resolutions without ever establishing a formal recognition process, according to Martha Salazar, senior policy specialist at the NCSL's State-Tribal Institute.

"Although they recognize a particular tribe for their historical and cultural contribution to the state, it's not necessarily the same type of recognition that others may have received," Salazar said.

New Jersey's refusal to affirm the legislature's resolution as formal recognition has cost the Nanticoke Lenni-Lenape tribe approximately \$600,000 in grants from the [U.S. Department of Health and Human Services](#), favored contractor status meant to boost disadvantaged businesses, and authorization to label products as "Indian-made," the tribe contends.

And the suit isn't the first time the question of the Nanticoke Lenni-Lenape's state recognition has threatened to undermine its federal funding, as the U.S. [Government Accountability Office](#) discovered in a 2012 probe.

During an investigation of federal spending on nonfederally recognized tribes from 2007 through 2010, the GAO found that the Department of Health and Human Services awarded funding to the Nanticoke Lenni-Lenape tribe and the [Powhatan Renape Nation](#) under programs authorized to fund state-recognized tribes, even though New Jersey's government "does not consider these entities to be state-recognized," according to the GAO's April 2012 report.

New Jersey isn't the only battleground over the value of state recognition for federal programs, the GAO said. The Department of Education awarded funding to four state-recognized tribes under a federal Indian education program, including the United Houma Nation, the [Lumbee Tribe](#) of North Carolina, and a consortium consisting of the Choctaw-Apache Tribe of Ebarb and the Four Winds Cherokee, according to the report.

All four tribes were state-recognized, but none appeared to have a reservation that met the requirements of the statute for the department's program, the GAO said.

Those awards were among over \$100 million distributed from 2007 through 2010 to 26 nonfederally recognized tribes, most of which were eligible for the funding as state-recognized tribes or as nonprofit organizations, the GAO said. The agency called for federal agencies to take steps to make sure they aren't making grants to ineligible tribes and to enforce federal financial reporting regulations.

But the Nanticoke Lenni-Lenape continue to encounter federal confusion over their status.

In a Feb. 8 filing, the tribe [urged the court to quickly consider its suit](#), saying the federal government had questioned the tribe's eligibility for an ongoing Bureau of Alcohol, Tobacco, Firearms and Explosives contract that depends on the tribe's recognition status.

An ATF official said in an email that a tribal business, NLT Management Services LLC, needed to verify its eligibility for so-called Section 8(a) status under a [Small Business Administration](#) program for tribally owned small businesses so it can continue under an agency contract.

The tribe said that its "members rely heavily on the employment opportunities created by its 8(a) contracts for their livelihood and dozens of jobs are in immediate peril," according to the tribe's Feb. 8 letter to the court.

The tribe and the state are awaiting a ruling on the state's motion to dismiss from U.S. District Judge Renee Marie Bumb.

Nanticoke Lenni-Lenape Tribal Nation is represented by Frank L. Corrado of Barry Corrado & Grassi PC and Gregory A. Werkheiser and L. Eden Burgess of Cultural Heritage Partners PLLC.

The state is represented by acting New Jersey Attorney General John J. Hoffman, Assistant Attorney General Stuart M. Feinblatt and Deputy Attorney General Laura M. Console.

The case is Nanticoke Leni-Lenape Tribal Nation v. John Jay Hoffman, case number [1:15-cv-05645](#), in the U.S. District Court for the District of New Jersey.

--Additional reporting by Christine Powell, Vidya Kauri and Jeannie O'Sullivan. Editing by Katherine Rautenberg and Emily Kokoll.

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