United States General Accounting Office

GAO

Report to Congressional Requesters

November 2001

INDIAN ISSUES

Improvements Needed in Tribal Recognition Process

GAO-02-49

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G A O
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

November 2, 2001

The Honorable Roy Blunt
The Honorable Ernest Istook
The Honorable Nancy Johnson
The Honorable Christopher Shays
The Honorable Rob Simmons
The Honorable Frank Wolf
House of Representatives

The federal recognition of an Indian tribe[1] can have a tremendous effect on the tribe, surrounding communities, and the nation as a whole. Recognized tribes and their members have almost exclusive access to about $4 billion in funding for health, education, and other social programs provided by the federal government. Additionally, recognition establishes a formal government-to-government relationship between the United States and a tribe. The quasi-sovereign status created by this relationship exempts certain tribal lands from most state and local laws and regulations—including, where applicable, laws regulating gambling. Many recognized tribes have opened casinos and other gambling operations—some of which have developed into successful enterprises. In 1999, federally recognized tribes reported more gambling revenue than the Nevada casinos collected that year. As of May 2001, there were 561[2] recognized tribes with a total membership of about 1.7 million. In addition, several hundred groups are currently seeking federal recognition.

In 1978, the Bureau of Indian Affairs (BIA), an agency within the Department of the Interior, established a regulatory process intended to provide a uniform and objective approach to recognizing tribes. This process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria—basically that the petitioner has continued to exist as a political and social community descended from a historic tribe. Owing to the rights and benefits that accrue with recognition and the controversy surrounding Indian gambling, BIA's

[1]The term "Indian tribe" encompasses within its meaning all Indian tribes, bands, villages, groups, and pueblos as well as Eskimos and Aleuts.

[2] This number includes three tribes that were notified by the Assistant Secretary-Indian Affairs on December 29, 2000, of the "reaffirmation" of their federal recognition. The current Assistant Secretary is reconsidering these three cases.

regulatory process has been subject to intense scrutiny by groups seeking recognition and other interested parties—including already recognized tribes and affected state and local governments. Critics of the process claim that it takes too long and produces inconsistent decisions. Dissatisfaction with the process has led to an increasing number of lawsuits in federal courts concerning the recognition process. In recent Congresses, including the 107th Congress, bills were introduced to reform the recognition process. In light of the controversies surrounding the federal recognition process and the ongoing discussions on how to reform the process, you asked us to review various aspects of the tribal recognition process. As agreed with your offices, this report (1) describes the significance of federal recognition and (2) evaluates the BIA regulatory recognition process and makes recommendations for improvement, as necessary. Additionally, as requested, appendix I provides a historical overview of how tribes have been recognized; appendix II provides an explanation of the BIA regulatory process and the status of petitions for recognition; and appendix III provides information on Indian gambling operations.

Results in Brief

Federal recognition makes Indian tribes eligible to participate in billion dollar federal assistance programs and can result in the granting of significant rights as sovereign entities—including exemptions from state and local jurisdiction and the ability to establish casino gambling operations. The significance of these benefits and rights has been increasing since the inception of BIA's regulatory process for federal recognition in 1978. About $4 billion was appropriated for programs and funding almost exclusively for recognized tribes in fiscal year 2000, about a 30-percent increase in real terms from a $3-billion funding level in 1978. Today, the federal government holds title to about 54 million acres in trust for federally recognized Indian tribes and their members. Finally, the Indian gambling industry has flourished since the enactment of the Indian Gaming Regulatory Act in 1988, with 193 tribes generating approximately $10 billion in annual revenues in 1999 from their gambling operations. However, that revenue has been concentrated in a relatively few number of tribes, with 27 tribes producing two-thirds of all revenue.

Because of weaknesses in the recognition process, the basis for BIA's tribal recognition decisions is not always clear and the length of time involved can be substantial. First, while there are set criteria that petitioners must meet to be granted recognition, there is no clear guidance that explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate a

tribe's continuous existence over a period of time—one of the key aspects of the criteria. As a result, there is less certainty about the basis of recognition decisions. Second, the regulatory process is not equipped to respond in a timely manner. While workload has increased with more detailed petitions ready for evaluation and increased interest from third parties, the number of staff assigned to evaluate the petitions has decreased by about 35 percent from its peak in 1993. BIA has not maintained funding for this process in light of the increasing demands for program funding needed to provide services to currently recognized tribes. Just as important, the process lacks effective procedures for promptly addressing the increased workload. In particular, the process does not impose effective timelines that create a sense of urgency, and procedures for providing information to interested third parties are ineffective. As a result, a number of groups that have submitted completed petitions are still awaiting active consideration—some for over 5 years. It may take up to 15 years to resolve all these completed petitions, despite the fact that active consideration of a completed petition was designed to reach a final decision in about 2 years. We are making recommendations to the Secretary of the Interior aimed at ensuring a more predictable and timely process.

The Department of the Interior commented on a draft of this report and generally agreed with our findings and recommendations. The Department also provided a plan for implementing our recommendations.

Background

Historically, tribes have been granted federal recognition through treaties, by the Congress, or through administrative decisions within the executive branch—principally by BIA within the Department of the Interior. (See app. I for additional information on how tribes have been recognized.) In a 1977 report to the Congress, the American Indian Policy Review Commission found that the criteria used by the Department to assess a group's status were not very clear and concluded that a large part of its recognition policy depended on which official responded to the group's inquiries. Until the 1960s, the limited number of requests by groups to be federally recognized permitted the Department to assess a group's status on a case-by-case basis without formal guidelines. However, in response to an increase in the number of requests for federal recognition, the Department determined that it needed a uniform approach to evaluate these requests. In 1978, it established a regulatory process for recognizing

tribes.[3] In 1994, the Department revised the regulations to clarify what evidence was needed to support the requirements for recognition, although the basic criteria used to evaluate a petition were not changed.[4] In addition, in 1997 BIA updated guidelines on the process, and in February 2000, BIA issued a notice in the *Federal Register* clarifying internal processing procedures.[5]

In summary, a group enters the regulatory process and becomes a petitioner by submitting a letter of intent requesting recognition. A petitioner then must provide documentation that addresses seven criteria that, in general, demonstrates continuous existence as a political and social community that is descended from a historic tribe. The technical staff within BIA's Branch of Acknowledgement and Research (BAR) reviews the submitted documentation, provides technical review and assistance, and determines, with the petitioner's concurrence, when the petition is ready for active consideration. Once the petition enters active consideration, the BAR staff reviews the documented petition and makes recommendations on a proposed finding either for or against recognition. Staff recommendations are subject to review by the Department's Office of the Solicitor and senior officials within BIA, culminating with the approval of the Assistant Secretary-Indian Affairs. After a proposed finding is approved by the Assistant Secretary, it is published in the *Federal Register* and a period of further comment, document submission, and response is allowed. The BAR staff reviews comments, documentation, and responses and makes recommendations on a final determination that are subject to the same levels of review as a proposed finding. The process culminates in a final determination by the Assistant Secretary that, depending on the nature of further evidence submitted, may or may not be the same as the proposed finding.

Requests for reconsideration may be filed with the Interior Board of Indian Appeals within 90 days after the final determination. This review process can result in affirmation of the Assistant Secretary's decision or direction to the Assistant Secretary to issue a reconsidered determination. BIA has received 250 petitions for recognition under this process. However, many of these petitions consist only of letters of intent to petition or are

[3] 43 *Fed. Reg.* 39361 (Sept. 5, 1978).

[4] 59 *Fed. Reg.* 9280 (Feb. 25, 1994).

[5] 65 *Fed. Reg.* 7052 (Feb. 11, 2000).

petitions for which only partial documentation has been submitted. Others are no longer active because they have been withdrawn or resolved outside the regulatory process or because a petitioner has lost contact with BIA. In fact, of the 250 petitions, only 55 have completed documentation that allows them to be considered by the process. For those completed petitions, BIA has finalized 29 decisions—14 recognizing a tribe and 15 denying recognition. Of the remaining 26 completed petitions, 3 decisions are pending; 13 are under active consideration; and 10 are ready, awaiting active consideration. A complete outline of the process and the status of the 250 petitions are provided in appendix II.

Federal Recognition Confers Benefits and Sovereign Rights to Indian Tribes

With federal recognition, Indian tribes become eligible to participate in billion dollar federal assistance programs and can be granted significant privileges as sovereign entities—including exemptions from state and local jurisdiction and the ability to establish casino gambling operations. Federally recognized tribes and their members have almost exclusive access to about $4 billion annually in federal funding through direct payments and services unavailable to the general public or to Indians that are not members of recognized tribes. For example, tribal governments can receive direct payments to provide community services, such as health clinics or sewer improvements, and members of tribes may be eligible for housing programs or small business loans. The exemptions from state and local jurisdiction for recognized tribes generally apply to lands that the federal government has taken in trust for a tribe or its members. Currently, about 54 million acres of land are being held in trust.[6] The Indian Gaming Regulatory Act of 1988 (IGRA),[7] which regulates Indian gambling operations, permits a tribe to operate casinos on land in trust if the state in which it lies allows casino-like gambling and the tribe has entered into a compact with the state regulating its gambling businesses. In 1999, tribes collected about $10 billion in gambling revenue.

[6]Tribal lands not in trust may also be exempt from state and local jurisdiction for certain purposes in some instances.

[7]25 U.S.C. 2701.

Recognized Tribes Are Entitled to Benefits From the Bureau of Indian Affairs and Other Federal Agencies

Federal recognition provides a tribe with access to special Indian programs reserved almost exclusively for recognized tribes and their members. The Department of Health and Human Service's Indian Health Service (IHS) and BIA—the two main agencies that provide funding and services to tribes and their members—have a combined annual budget of over $4 billion (see table 1). The combined funding for the two agencies has increased by $1 billion (in real terms) since the regulatory recognition process was established in 1978. Both agencies have established procedures for funding newly recognized tribes. At IHS, newly recognized tribes are assigned funds on a case-by-case basis. At BIA, newly recognized tribes with 1,500 members or less are provided with base funding of $160,000; tribes with 1,501 to 3,000 members are provided $300,000; and the base funding for tribes with more than 3,000 members is determined on a case-by-case basis.

Table 1: Funding for IHS and BIA, Fiscal Year 2000

Dollars in billions	
Agency	**Funding**
IHS	$2.4
BIA	1.9
Total	**$4.3**

In addition to the funding and services from IHS and BIA, the Office of Management and Budget estimates that for fiscal year 2000 an additional $3.9 billion was appropriated for other federal programs specifically for Indians or set-asides for Indians within larger programs (see table 2). Federal recognition is not necessarily an eligibility requirement for these programs. In fact, the eligibility requirements for these programs vary widely, making it difficult to estimate the funding for programs that require federal recognition for eligibility. Tribes may have been eligible for some of these programs, or for similar programs, prior to their federal recognition. For example, the Department of Housing and Urban Development provides grant funding under the Native American Housing Assistance and Self-Determination Act to federally recognized tribes and some nonfederally recognized Indian groups. Additionally, Indians, as U.S. citizens, are eligible to receive assistance from any federal program for which they meet the eligibility requirements.

Table 2: Federal Funding Targeted at Indians Outside of IHS and BIA, Fiscal Year 2000

Dollars in billions	
Agency	**Funding**
Department of Education	$1.577
Department of Housing and Urban Development	0.693
Department of Health and Human Services (excluding IHS)	0.354
Department of the Interior (excluding BIA)	0.326
Department of Transportation	0.250
Department of Agriculture	0.198
Department of Justice	0.195
Environmental Protection Agency	0.170
Other agencies	0.179
Total	**$3.942**

Recognized Tribes May Have Land Taken in Trust

By 1886, Indian lands had been reduced to about 140 million acres largely on reservations west of the Mississippi River. The federal government's Indian policy encouraging assimilation further reduced Indian land holdings by two-thirds, to about 49 million acres in 1934. However, in 1934, the government's Indian policy changed to encourage tribal self-governance with the Indian Reorganization Act.[8] The act provided the Secretary the authority to take land in trust on behalf of federally recognized tribes or their members. Since 1934, the total acreage held in trust by the federal government for the benefit of tribes and their members has increased from about 49 million to about 54 million acres.

Much of the recent controversy over recognition decisions, whether made by the Congress or the Department, stems from events that can only occur after a tribe is recognized. With recognition, the federal government can take land in trust for tribes that may not have a land base or may want to add to their land base. This raises concerns from local communities regarding the loss of local jurisdiction over the land. For example, land taken in trust is no longer subject to local property taxes and zoning ordinances. Additionally, gambling may occur on land held in trust by the federal government for tribes or their members. However, the process of taking land in trust, like gambling, is not governed by the same laws and regulations that govern tribal recognition. Land may be taken in trust

[8] 25 U.S.C. 461.

through legislation or BIA regulations. The regulations governing the land-in-trust process became effective in October 1980 and set forth criteria, including the impact on the local tax base and jurisdictional problems, that the Secretary should consider in evaluating requests to take land in trust. At that time the regulations did not require notification of affected state and local communities, nor did they allow for outside comments. Taking land in trust became more controversial with the enactment of IGRA in 1988. In 1995, the land-in-trust regulations were revised to require that affected state and local governments be notified of each land-in-trust request and that they be given 30 days to submit written comments. The revised regulations also distinguished between on- and off- reservation acquisitions. The criteria for off-reservation acquisitions became more stringent, and state and local governments' concerns were given more weight.

Recognized Tribes May Establish Gambling Operations

Indian gambling, a relatively new phenomenon, started in the late 1970s when a number of Indian tribes began to establish bingo operations as a supplemental means of funding tribal operations. However, state governments began to question whether tribes possessed the authority to conduct gambling independently of state regulation. Although many lower courts upheld the tribal position, the matter was not resolved until 1987 when the U. S. Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*.[9] That decision confirmed the tribes' authority to establish gambling operations on their reservations outside state regulation—provided the affected state permitted some type of gambling. In 1988, the Congress passed IGRA, which established a regulatory framework to govern Indian gambling operations. One of the more important features of IGRA is that only federally recognized Indian tribes may engage in gambling. IGRA established three classes of gambling to be regulated by a combination of tribal governments, state governments, BIA, and the National Indian Gaming Commission (NIGC)—an entity created by IGRA to enforce IGRA requirements and to ensure the integrity of Indian gambling operations.

Under IGRA, Class I gambling consists of social gambling for minimal prizes or ceremonial gambling. It is regulated solely by the tribe and requires no financial reporting to other authorities. Class II gambling consists of gambling pull-tabs, bingo-like games, and punch boards. A tribe

[9] 480 U.S. 202 (1987).

may conduct, license, and regulate Class II gambling if (1) the state in which the tribe is located permits such gambling for any purpose by a person or organization and (2) the tribal governing body adopts a gambling ordinance that is approved by NIGC. Class III gambling consists of all other forms of gambling, including casino games, slot machines, and pari-mutuel betting.[10] It, too, is only allowed in states that permit similar types of gambling. The courts have interpreted this to mean, for example, that even if a state only allows charitable casino nights and state-run lotteries, tribes may operate casinos. Additionally, to balance the interests of both the state and the tribe, IGRA requires that tribes and states negotiate a compact regulating the tribal gambling operations. The Department of the Interior must approve the compact. IGRA also requires a tribe to adopt a gambling ordinance, which must be approved by NIGC.

According to the June 1999 final report of the National Gambling Impact Study Commission, gambling revenues have proven to be a critical source of funding for many tribal governments, providing much needed improvements in the health, education, and welfare of Indians living on reservations across the United States. In the 5-year span from fiscal years 1995 through 1999, gambling revenues have almost doubled from $5.5 billion to $9.8 billion—surpassing even Nevada with fiscal year 1999 revenues of $8.5 billion and Atlantic City with $4.2 billion. However, of the 561 recognized tribes, only 193 tribes, or about 34 percent, actually participate in gambling and only 27 tribes (or about 5 percent) generate more than $100 million on an annual basis. According to NIGC, during fiscal year 1999, those 27 tribes produced two-thirds of all Indian gambling revenue—$6.4 billion out of total revenues of $9.8 billion. According to the National Gambling Impact Study Commission report, some tribes have rejected Indian gambling in referenda. The report notes that other tribal governments are in the midst of policy debates about whether to permit gambling and related commercial developments on their reservations. Not all gambling facilities achieve the same benefits or success. Some tribes operate their casinos at a loss, and a few have been forced to close money-losing facilities. Appendix III provides more detailed information on Indian gambling operations.

[10]Pari-mutuel betting is generally considered to include on-track, off-track, and inter-track betting on horse racing, dog racing, and jai alai.

Weaknesses Exist in the BIA Regulatory Process for Recognizing Tribes

We have identified areas in the BIA regulatory process where changes could better ensure more predictable and timely decisions. First, clearer guidance is needed on the key aspects of the criteria and supporting evidence used in recognition decisions. In particular, guidance is needed in instances when limited evidence is available to demonstrate petitioner compliance with criteria. The Department has continued to struggle with the question of what level of evidence is sufficient to meet criteria in recognition cases. The lack of guidance in this area creates controversy and uncertainty for all parties about the basis for decisions reached. Second, the process is also hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties. As a result, there is a growing number of completed petitions waiting to be considered. BIA officials estimate that it may take up to 15 years before all these currently completed petitions are resolved, despite the fact that active consideration of a completed petition was designed to reach a final decision in about 2 years.

Clearer Guidance Needed on Evidence Required for Recognition Decisions

BIA regulations lay out seven criteria that must all be met before a group can become a federally recognized tribe. These criteria, if met, identify those Indian groups with inherent sovereignty that have existed continuously and that are entitled to a government-to-government relationship with the United States. In general, a technical staff within BIA, consisting of historians, anthropologists, and genealogists, evaluates the evidence submitted by a petitioner and makes a recommendation on whether or not to recognize the group as a tribe. After being reviewed by Bureau officials and the Department's Office of the Solicitor, the recommendation is presented to the Assistant Secretary-Indian Affairs, who may accept or reject the recommendation. The regulations also call for guidelines that explain the criteria, the types of evidence that may be used to demonstrate particular criteria, and other information. However, the guidelines, which were last updated in 1997, do not provide much guidance on the consideration of the criteria and evidence. Rather, the guidelines are generally geared toward providing petitioners with a basic understanding of the process. The following are seven criteria for recognition under the regulatory process:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(d) The group must provide a copy of its present governing documents and membership criteria.

(e) 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.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

While we found general agreement about the seven criteria that groups must meet to be granted recognition, there is great potential for disagreement when evidence to support the criteria is lacking. The need for clearer guidance on criteria and evidence used in recognition decisions became evident in a number of recent cases. The BIA technical staff, in conducting a detailed review of the evidence submitted, relies on precedents from past decisions in assessing whether a petitioner meets the criteria in order to ensure consistency in its recommendations. However, the Assistant Secretary has rejected several recent recommendations made by the technical staff, all resulting in either proposed or final decisions to recognize tribes when the staff had recommended against recognition. While the technical staff claims that its recommendations were based on precedent, transparent guidance on past precedents is not readily available to affected parties or the decisionmaker. At the same time, while the Assistant Secretary is charged with making the final decisions, it is not always clear why the Assistant Secretary differed with the technical staff recommendations. Much of the current controversy surrounding the regulatory process stems from these cases.

The regulations state that lack of evidence is cause for denial, but they note that historical situations and inherent limitations in the availability of evidence must be considered. At the heart of the recent differences between the staff's recommendations and the Assistant Secretary's decisions are different positions on what is required to support two key aspects of the criteria. In particular, there are differences over (1) what is

needed to demonstrate continuous existence and (2) the proportion of members of the petitioning group that must demonstrate descent from a historic tribe.

Concerns over what constitutes continuous existence have centered on the allowable gap in time during which there is limited or no evidence that a petitioner has met one or more of these criteria. In one case, the technical staff recommended that a petitioner not be recognized because there was a 70-year period for which there was no evidence that the petitioner satisfied the criteria for continuous existence as a distinct community exhibiting political authority. The technical staff concluded that a 70-year evidentiary gap was too long to support a finding of continuous existence. The staff based its conclusion on precedent established through previous decisions where the absence of evidence for shorter periods of time had served as grounds for finding that petitioners did not meet these criteria. However, in this case, the Assistant Secretary issued a proposed finding to recognize the petitioner, concluding that continuous existence could be presumed despite the lack of specific evidence for a 70-year period. The 1997 guidelines generally do not provide any discussion of past precedents in dealing with gaps in evidence when trying to meet the continuous existence criterion. Furthermore, while the regulations allow for the consideration of reasons that might limit available evidence, the Assistant Secretary's decision did not explain why evidence might be limited. Such an explanation would seem appropriate as part of the report called for in the regulations that summarizes the evidence, reasoning, and analyses that are the basis for proposed findings.

The Department has grappled with this issue in the past. In updating the recognition regulations in 1994, it noted that the primary question of evidence in recognition cases is usually not how to weigh evidence for and against a position, but whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion. For example, the 1994 regulations clarify the standard for demonstrating continuous existence by requiring that a petitioner demonstrate that it meets the criterion of a distinct community with political authority on a "substantially continuous basis" and by explaining that this does not require meeting the criterion at every point in time. However, the regulations specifically decline to define a permissible interval during which a group could be presumed to have continued to exist if the group could demonstrate its existence before and after the interval. BIA stated that establishing a specific interval would be inappropriate because the significance of the interval must be considered in light of the character of

the group, its history, and the nature of the available evidence. BIA also noted that its experience has been that historical evidence of tribal existence is often not available in clear, unambiguous packets relating to particular points in time. While the consideration of continuous existence in light of limited evidence in different historical circumstances will always be a difficult issue, the 1997 guidelines, which could provide guidance based on how this issue was handled in previous cases, are largely silent on this issue.

Another key aspect of criteria that has stirred up controversy and created uncertainty is the proportion of a petitioner's membership that must demonstrate that it meets the criterion of descent from a historic Indian tribe. In one case, the technical staff recommended that a petitioner not be recognized because the petitioner could only demonstrate that 48 percent of its members were descendents. The technical staff concluded that finding that the petitioner had satisfied this criterion would have been a departure from precedent established through previous decisions in which petitioners found to meet this criterion had demonstrated a higher percentage of membership descent from a historic tribe. However, in the proposed finding, the Assistant Secretary found that the petitioner satisfied the criterion. The Assistant Secretary told us that this decision was not consistent with previous decisions by other Assistant Secretaries but that he believed the decision to be fair because the standard used for previous decisions was unfairly high. Clear guidance on this aspect of the criterion is lacking. The 1997 guidelines do not provide any information on past precedents used in assessing a petitioner's ability to demonstrate descent. Further, the Assistant Secretary's written decision did not explain why evidence might be limited and perhaps cause a deviation from past precedent or why past standards were unfairly high in this case. Without such an explanation, the report, which the regulations call for to summarize the evidence, reasoning, and analyses that serve as the basis for proposed findings, is incomplete.

When the Department revised the regulations in 1994, it clarified what was required of petitioners to meet the criterion of membership descent from historic tribes to a modest extent. However, the Department stated that it intentionally avoided establishing a specific percentage of members required to demonstrate descent because the significance of the percentage varies with the history and nature of the petitioner and the particular reasons why a portion of the membership may not meet the requirements of the criterion. The current language under the criterion only states that a petitioner's membership must consist of individuals who descend from historic tribes—no minimum percentage or quantifying term

such as “most” or “some” is used; the 1997 guidelines note only that it need not be 100 percent demonstrated. Again, the 1997 guidelines provide no discussion of past precedents to provide guidance on how this issue was handled in the past.

While the 1994 revision to the regulations helped clarify what is required of petitioners to be granted federal recognition, the Department intentionally left key aspects of the criteria open to interpretation to accommodate the unique characteristics of individual petitions. However, leaving key aspects open to interpretation increases the risk that the criteria may be applied inconsistently to different petitioners. To mitigate this risk, BIA uses precedents established in past decisions to provide guidance in interpreting key aspects in the criteria. A February 2000 *Federal Register* notice concerning changes to the internal processing of recognition petitions states that the process will continue to apply the precedents established in past decisions. However, the regulations and accompanying guidelines are silent regarding the role of precedent in making decisions or the circumstances that may cause deviation from precedent. Thus, it becomes difficult for petitioners, third parties, and future decisionmakers—who may want to consider precedents in past decisions—to understand the basis for some decisions reached. If there are precedents regarding aspects of criteria like continuous existence and the proportion of membership demonstrating descent, it is not clear what they are or how that information is made available to petitioners, third parties, and decisionmakers. Ultimately, BIA and the Assistant Secretary will still have to make difficult decisions about petitions when it is unclear whether a precedent applies or even exists. Because these circumstances require the judgment of the decisionmaker, acceptance of BIA and the Assistant Secretary as key decisionmakers is extremely important. A lack of clear and transparent explanations of the decisions reached may cast doubt on the objectivity of decisionmakers, making it difficult for parties on all sides to understand and accept decisions, regardless of the merit or direction of the decisions reached.

Process Ill Equipped to Provide Timely Response

Because of limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, the length of time involved in reaching final decisions is substantial. The workload of BIA staff assigned to evaluate recognition decisions has increased while resources have declined. BIA, working in conjunction with a petitioner to ensure that all documentation is provided, determines when a petition is complete and thus ready for active consideration (ready status). Once a petition is deemed ready for active consideration, petitioners and other

interested parties must wait until BIA has staff available to begin active consideration. BIA begins active consideration of the complete petition (active status) based on the order in which petitioners entered ready status. There was a large influx of petitions placed into ready status in the mid-1990s. Of the 55 petitions that BIA has placed in ready status since the inception of the regulatory process in 1978, 23 (42 percent) were placed there between 1993 and 1997 (see fig. 1).

Figure 1: Number of Petitioning Groups in Regulatory Process by Year

Note: Status as of the last day of each calendar year.

Source: BIA.

There are currently 10 petitions in ready status—and 6 of these have been waiting at least 5 years. In addition, BIA staff is fully committed to the active consideration of another 13 petitions. According to BIA staff, the petitions under active consideration and those awaiting review are becoming more complex and detailed as both petitioners and third parties, with increasing interests at stake, commit significant resources to their petitions and comments. The chief of the branch that is responsible for

evaluating petitions told us that, based solely on the historic rate at which BIA has issued final determinations,[11] it could take 15 years to resolve all the petitions currently awaiting active consideration. In contrast, the regulations outline a process for active consideration of a completed petition that should take about 2 years.

Compounding the backlog of petitions awaiting evaluation, the increased number of related administrative responsibilities that the technical staff must assume further limits the proportion of their time spent on evaluating petitions. Although it could not provide precise data, BIA technical staff estimated that it spends up to 40 percent of its time on administrative responsibilities. In particular, there are substantial numbers of Freedom of Information Act (FOIA) requests for information related to petitions. Also, petitioners and third parties frequently file requests for reconsideration of recognition decisions that are reviewed by the Interior Board of Indian Appeals, requiring the staff to prepare the record and response to issues referred to the Board. Finally, the regulatory process has been subject to an increasing number of lawsuits from dissatisfied parties. These lawsuits include petitioners who have completed the process and been denied recognition as well as current petitioners who are dissatisfied with the amount of time it is taking to process their petitions. BIA is currently involved with 17 cases before Federal Circuit and District Courts concerning the recognition process. Eight of these cases are inactive for a variety of reasons such as the courts awaiting BIA action on pending petitions. However, depending on circumstances, these inactive cases may be reactivated at any moment.

While the workload associated with evaluating petitions for recognition has increased, the available resources have decreased. Staff represents the vast majority of resources used by BIA to evaluate petitions and perform related administrative duties. The number of BIA staff assigned to evaluate petitions peaked in 1993 at 17. However, in the last 5 years, the number of staff has averaged less than 11, a decrease of more than 35 percent. BIA, responsible for a wide variety of programs for recognized tribes, faced overall funding cutbacks in the mid-1990s. Given the need for funding to provide services to currently recognized tribes, funding for staffing the recognition process was not as high a priority. As a result, BIA made no

[11]Besides through final determinations, petitions have also been resolved in other ways. For example, when petitioners were recognized legislatively, merged with other petitioners, or withdrew from the process.

request for additional staff from fiscal years 1995 through 2000 and only requested one additional staff person for fiscal years 2001 and 2002. In contrast to other federal resources for recognition issues, less funding has been provided within BIA to process petitions than has been provided in federal grants to petitioning groups through a program administered by the Department of Health and Human Service's Administration for Native American's (ANA) program. In fiscal year 2000, estimated funding for BIA staff evaluating petitions and related costs was about $900,000, while funding for the ANA grants has averaged about $1.8 million a year for the last 9 years.

While resources have not kept pace with workload, the process also lacks effective procedures for addressing the workload in a timely manner. The process lacks any real timelines that impose a sense of urgency on the process. There are no time frames established for petitioners to submit documentation with their letters of intent to petition. While BIA has received 250 petitions for recognition, many of these are only letters of intent, and in some instances, BIA has received nothing else in over 20 years. Even when documentation is submitted, BIA has no time frames to review it in order to provide technical assistance, nor is there any schedule for the initiation of active consideration. As a result, only 55 petitions have reached the stage where they are complete and ready for active consideration. Once active consideration begins, the regulations do establish timelines that, if met, would result in a final decision in approximately 2 years. However, these timelines for processing petitions are routinely extended because of BIA resource constraints and at the request of petitioners and third parties. BIA has completed active consideration for only 32 of the 55 petitions—with only 12 of 32 petitions completed within 2 years or less.[12] Of the remaining 23 completed petitions, only 13 are currently active, with 10 more petitions waiting. All but 2 of the 13 currently active petitions have already been active for more than 2 years—2 of them longer than 10 years. Of the 10 petitions waiting active consideration, more than half have been waiting for over 5 years. Without any effective schedule for the process from the beginning to the end, it will become increasingly difficult for BIA to complete its assigned duties in evaluating petitions in a timely manner.

[12]Although 32 petitions have completed active consideration, only 29 have been finalized. The remaining three petitions are pending.

While timelines have been extended for many reasons, including BIA resource constraints and requests by petitioners and third parties (upon showing good cause), BIA has no mechanism to balance the need for a thorough review of a petition with the need to complete the decision process. The decision process lacks effective timelines that create a sense of urgency to offset the desire to consider all information from all interested parties in the process. BIA has argued that it cannot guarantee timelines because it cannot predict future workload or behavior of petitioners and third parties. However, these decisions may be taken away from BIA as petitioners, frustrated by the length of time to process petitions, successfully gain court intervention that establishes scheduled timelines. At least one petitioner filed a lawsuit in federal court just to maintain its place in line. While each petition differs, BIA may look to the model offered in one lawsuit where all parties—petitioner, third parties, and BIA—agreed to a compromise schedule encouraged and endorsed by the court. On a broader level, BIA recently dropped one mechanism for creating a sense of urgency. In fiscal year 2000, BIA dropped its long-term goal to reduce the number of petitions actively being considered from its annual performance plan because the addition of new petitions would make this goal impossible to achieve. The Bureau did not replace it with another, more realistic goal, such as reducing the number of petitions on ready status or reducing the average time needed to process a petition once it is placed on active status.

As third parties become more active in the recognition process, procedures for responding to their increased interest have not kept pace. Once BIA provides interested third parties the report summarizing the evidence, reasoning, and analysis behind a proposed finding, the parties have 180 days to submit arguments and evidence to rebut or support the proposed finding. However, based on the number of FOIA requests that BIA has received regarding recognition petitions, it appears that many parties believe this amount of time is insufficient. Third parties told us they wanted more detailed information earlier in the process so that they could fully understand a petition and effectively comment on its merits. However, there are no procedures for regularly providing third parties more detailed information. For example, while third parties are allowed to comment on the merits of a petition prior to a proposed finding, there is no mechanism to provide any information to third parties prior to the proposed finding. In contrast, petitioners are provided an opportunity to respond to any substantive comment received prior to the proposed finding. As a result, third parties are making FOIA requests for information on petitions much earlier in the process and often more than once in an attempt to obtain the latest documentation submitted. BIA has no

procedures for efficiently responding to FOIA requests. Staff members hired as historians, genealogists, and anthropologists are pressed into service to copy the voluminous records of petitions in order to respond to FOIA requests. In addition, much of the information, particularly the information related to membership lists and the demonstration of descent, involves sensitive information subject to the protections of the Privacy Act. Therefore, all information must be reviewed and redacted, as appropriate, to ensure that sensitive information is not released. While additional resources to handle FOIA requests may help, improved procedures that address the elevated interest of third parties could alleviate some of the multiple FOIA requests that third parties view as their only means to meaningful participation in the process.

Conclusions

Although the regulation-based recognition process was never intended to be the only way groups could receive federal recognition, it was intended to provide a clear, uniform, and objective approach for the Department of the Interior that established specific criteria and a process for evaluating groups seeking federal recognition. It is also the only avenue to federal recognition that has established criteria and a public process for determining whether groups meet the criteria. However, weaknesses in the process create uncertainty about the basis for recognition decisions, and the amount of time it takes to make those decisions impede the process from fulfilling its promise as a uniform approach to tribal recognition. Questions about the level of evidence required to meet the criteria and the basis for decisions reached will continue without more transparent guidance. In addition, the increasing amount of time involved in the process will continue to frustrate petitioners and third parties who have a great deal at stake in resolving tribal recognition cases. Without improvements that focus on fixing these problems, confidence in the regulatory process as an objective and efficient approach will erode. As a result, parties involved in tribal recognition may look outside of the regulatory process to the Congress or courts to resolve recognition issues, which has the potential to undermine the entire regulatory process. The end result could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving of a government-to-government relationship with the United States and more to do with the resources that petitioners and third parties can marshal to develop a successful political and legal strategy.

Recommendations to the Secretary of the Interior

To ensure more predictable and timely tribal recognition decisions, we recommend that the Secretary of the Interior direct BIA to:

- provide a clearer understanding of the basis used in recognition decisions by developing and using transparent guidelines that help interpret key aspects of the criteria and supporting evidence used in federal recognition decisions and
- develop a strategy that identifies how to improve the responsiveness of the process for federal recognition. This strategy should include a systematic assessment of the resources available and needed that leads to development of a budget commensurate with workload.

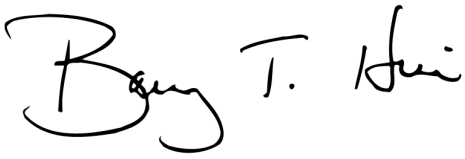
Agency Comments

We provided the Department of the Interior with a draft of this report. The Department generally agreed with our findings and recommendations and provided a plan for implementing our recommendations. These comments and the plan are reprinted in appendix IV. The Department also provided us with technical comments on the draft and we made corrections where appropriate.

We conducted our work from October 2000 through September 2001 in accordance with generally accepted government auditing standards. Appendix V explains our methodology in detail.

We are sending copies of this report to the Secretary of the Interior, the Assistant Secretary-Indian Affairs, and interested congressional committees. We will make copies available to others on request.

If you or your staff have any questions on this report, please call me or Mark Gaffigan on (202) 512-3841. Key contributors are listed in appendix VI.



Barry T. Hill
Director, Natural Resources
and Environment

Appendix I: How Tribes Have Become Federally Recognized

The United States has recognized Indian tribes under a variety of circumstances. There are 556 tribes on the Bureau of Indian Affairs' (BIA) most recent list of recognized tribes published in March 2000.[1] Since then, another five tribes have been recognized, for a total of 561 federally recognized tribes. Although BIA only published its first list of recognized tribes in 1979, the federal government has "recognized" tribes since colonial times—although the term was not used until much later. In early American history, the government acknowledged such relationships through treaties and agreements with tribal governments. Recognition means that a tribe is formally recognized as a sovereign entity with a government-to-government relationship with the United States. The basic concept underlying Indian sovereignty is that it is not granted by the Congress but rather is an inherent status of the tribe that has never been lost or extinguished. Although all recognized tribes have the same sovereignty and political relationship with the United States regardless of the means by which they were recognized, why they are on the list, or how they got on the list, varies significantly.

About 92 percent of the 561 currently recognized tribes either were part of the federal effort to reorganize and strengthen tribal governments in the 1930s or were part of a group of Alaskan tribes that were determined to have existing governmental relations with the United States when BIA's first list of recognized tribes appeared in 1979. The remaining 8 percent—47 tribes—were individually recognized between 1960 and the present by the Congress or the Department of the Interior. Of these, the Congress recognized 16 tribes and the Department of the Interior recognized 31 tribes. Of the 31 tribes that the Department of the Interior recognized, 14 were recognized through the BIA regulatory process established in 1978, 10 through administrative decisions before the regulatory process was established, and 7 through administrative decisions after the regulatory process was established and outside of the process.

There are 292 tribes on the current list of recognized tribes that can trace their federal recognition at least back to the era of the Indian Reorganization Act of 1934 (IRA) and related laws.[2] These laws helped

[1] 65 *Fed. Reg.* 13298 (Mar. 13, 2000).

[2] Although many IRA provisions did not originally apply to the Territory of Alaska or the state of Oklahoma, the Alaskan Reorganization Act and the Oklahoma Indian Welfare Act included similar provisions and explicitly extended other IRA provisions to Alaska and Oklahoma in 1936.

define and create the tribal governments that exist today. Tribal governments had been severely weakened by earlier federal Indian policy. In 1830, the federal government formally established the removal policy of exchanging federal lands west of the Mississippi for lands held by Indian tribes in the east and eventually developed a system of reservations to house them. In the ensuing dispersion, many tribes wound up splintered among two or more reservations or placed with other tribes on a single reservation. Then, beginning in the 1880s, federal Indian policy shifted to emphasize the assimilation of Indians into mainstream cultures by dividing reservation land into individual allotments, terminating historical tribal governments, and suppressing Indian customs and tribal laws. In the 1920s, federal Indian policy shifted once more; this time away from isolationism and assimilation and toward tribal self-governance, culminating in IRA.

IRA established a process to form stronger tribal governments and terminated the federal policy of breaking up reservations. Tribes on reservations were granted authority to reorganize their governments and adopt a constitution, and groups of tribes residing on the same reservation could reorganize into a single tribe by adopting a constitution. The act, however, does not apply to any reservation where the majority of adult Indians, in a special election called by the Secretary of the Interior, voted against it. In calling these elections, the Secretary of the Interior made determinations that, in effect, recognized a particular group of Indians as a tribe. In making these determinations, the Secretary considered whether the group

- had existing treaty relations with the United States or had been designated a tribe by an act of the Congress or an executive order;
- had been treated as having collective rights in tribal lands or funds, even though not expressly designated as a tribe;
- had been treated as a tribe by other tribes; and
- had exercised political authority over its members by a tribal council or other form of government.

The Secretary also considered factors of lesser importance, such as the existence of special appropriation items for the group and the social solidarity of the group. In addition to these tribes, known as historic tribes, IRA allowed Indians without a common tribal affiliation to organize into tribes. Indian residents of a reservation at the time the act was passed could organize as a tribe by adopting a constitution. Also, groups of Indians who were not residents of a reservation yet whose members were

one-half or more Indian blood were permitted to organize under the act if the Secretary of the Interior established a reservation for them.

For a brief period, federal Indian policy reverted to assimilation during the 1950s and 1960s . As a result of legislation during this time, the political relationship with some tribes was terminated. Termination by the Congress, however, did not terminate the tribes' existence, but only the U.S. government's relation with the tribes. While the Congress and federal courts restored federal recognition to 37 of these terminated tribes—the most recent in December 2000—relations with many other terminated tribes were not restored. Because the Congress terminated these tribes, the tribes are not eligible to be recognized through the regulatory process.

The names of 222 Alaskan tribes now appear on BIA's current list of recognized tribes. These were determined to have governmental relations with the United States at the time the first list was published in 1979. However, these tribes were not included in the first list because they were not completely identified and their status remained uncertain until 1993. According to one Department official involved in developing the first list, Alaskan tribes were not included in the list because of errors in the list and confusion over the political status of Alaskan tribes created by provisions of a 1936 amendment to IRA, which instructed most Alaskan tribes to be brought under the act. In 1993, the Department of the Interior's Office of the Solicitor issued a comprehensive opinion analyzing the status of Alaskan tribes and determined that they were tribes in the same sense as tribes in the contiguous 48 states. BIA then identified 222 Alaskan tribes and included them on the list of recognized tribes published in October 1993.

The remaining 47 tribes have been individually recognized since 1960 (see table 3 at the end of this appendix). The Congress has recognized 16 of these tribes through legislation. Although the Congress's power to recognize a group as a tribe is not unlimited, it is loosely defined. The Supreme Court ruled in *United States v. Sandoval* that the Congress may not arbitrarily recognize a group or a community as a tribe.[3] However, the only practical limitations upon congressional decisions as to tribal existence are the broad requirements that (1) the group have some ancestors who lived in what is now the United States before discovery by Europeans and (2) the group be a "people distinct from others." In some

[3]231 U.S. 28 (1913).

instances, the Congress recognized tribes as part of a land settlement claim in New England. In other instances, groups that had been previously considered part of an already recognized tribe were recognized as a separate tribe. In still other cases, the Congress simply granted recognition.

According to Department officials, the underlying position of the administration has always been that the executive branch can correct mistakes and oversights regarding which groups the federal government recognizes as Indian tribes but cannot create new tribes. The essential prerequisite for recognition is the tribe's continuous existence as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes. The regulatory process was established to recognize tribes whose relationship with the United States had either lapsed or never been established. Tribes recognized through the regulatory process had to provide evidence that they satisfied the seven criteria, including that the tribe has continually existed from historical times to the present and that its members descended from a historic tribe. The Department of the Interior has individually recognized a total of 31 tribes. Of these, 14 tribes were recognized through the BIA regulatory process and 17 outside of the regulatory process through administrative decisions—10 before the regulatory process was established and 7 after it was established.

Of the seven tribes recognized outside the regulatory process established in 1978, one had its continuous existence as a federally recognized tribe substantiated just months after the regulatory process was established; one was established as a "half-blood community" as defined under provisions of IRA; one was reclassified as an independent tribe that previously had been dealt with as part of another recognized tribe; and one was recognized because land had been taken in trust on its behalf, indicating that it had a political relationship with the United States. In the three other instances, the Assistant Secretary recently "reaffirmed" the tribes' federal recognition, ruling that their historical political relationship with the United States had not lapsed, citing a BIA administrative error that caused the names of the tribes not to be placed on the list of recognized tribes. Members of the BIA staff responsible for implementing the BIA regulatory process for recognizing tribes took issue with the Assistant Secretary's three recent "reaffirmations" because of factual concerns about the groups that were to be recognized and because the decisions were recognitions outside of the regulatory process. In particular, they thought that the groups should have gone through the regulatory process because the regulations provided for a review of

groups that had previously been unambiguously recognized but whose present status was now uncertain.

Table 3: Forty-seven Tribes Have Been Individually Recognized Since 1960

Tribe name	How the tribe was recognized	Date the tribe was recognized
Miccosukee Tribe of Indians of Florida	Decision by an Assistant Secretary of the Interior	Nov. 17, 1961
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon	Department of the Interior Solicitor's opinion	Nov. 16, 1967
Nooksack Indian Tribe of Washington	Department of the Interior Solicitor's opinion	Aug. 13, 1971
Upper Skagit Indian Tribe of Washington	Decision by the Deputy Commissioner for Indian Affairs	June 9, 1972
Sauk-Suiattle Indian Tribe of Washington	Decision by the Deputy Commissioner for Indian Affairs	June 9, 1972
Passamaquoddy Tribe of Maine	Administrative decision[a]	June 29, 1972
Penobscot Tribe of Maine	Administrative decision[a]	July 14, 1972
Sault Ste. Marie Tribe of Chippewa Indians of Michigan	Decision by the Deputy Commissioner for Indian Affairs/clarified by Department of the Interior Solicitor's opinion (2/27/74)	Sept. 7, 1972
Tonto Apache Tribe of Arizona	Congressional recognition (P.L. 92-470)	Oct. 6, 1972
Coushatta Tribe of Louisiana	Decision by the Assistant to the Secretary of the Interior	June 27, 1973
Stillaguamish Tribe of Washington	Decision by the Acting Secretary of the Interior responding to *Stillaquamish Tribe v. Klepp*	Oct. 27, 1976
Modoc Tribe of Oklahoma	Congressional recognition (P. L. 95-281)	May 15, 1978
Pascua Yaqui Tribe of Arizona	Congressional recognition (P. L. 95-375)	Sept. 18, 1978
Karuk Tribe of California	Decision by the Assistant Secretary–Indian Affairs	Jan. 15, 1979
Grand Traverse Band of Ottawa & Chippewa Indians of Michigan	Administrative recognition under 25 C.F.R. 83	May 27, 1980
Houlton Band of Maliseet Indians of Maine	Congressional recognition (P.L. 96-420); land claim settlement	Oct. 10, 1980
Jamestown S'Klallam Tribe of Washington	Administrative recognition under 25 C.F.R. 83	Feb. 10, 1981
Jamul Indian Village of California	Deputy Assistant Secretary-Indian Affairs designation as half-blood community	July 7, 1981
Tunica-Biloxi Indian Tribe of Louisiana	Administrative recognition under 25 C.F.R. 83	Sept. 25, 1981
Cow Creek Band of Umpqua Indians of Oregon	Congressional recognition (P.L. 97-391)	Dec. 29, 1982
Death Valley Timbi-Sha Shoshone Band of California	Administrative recognition under 25 C.F.R. 83	Jan. 3, 1983
Kickapoo Traditional Tribe of Texas	Congressional recognition (P.L. 97-429) as part of Kickapoo Tribe of Oklahoma; organized as a separate tribe on 7/11/89	Jan. 8, 1983
Narragansett Indian Tribe of Rhode Island	Administrative recognition under 25 C.F.R. 83	Apr. 11, 1983
Mashantucket Pequot Tribe of Connecticut	Congressional recognition (P.L. 98-134); land claim settlement	Oct. 18, 1983
Poarch Band of Creek Indians of Alabama	Administrative recognition under 25 C.F.R. 83	Aug. 10, 1984
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts	Administrative recognition under 25 C.F.R. 83	Apr. 11, 1987
Ysleta Del Sur Pueblo of Texas	Congressional recognition (P. L. 100-89)	Aug. 18, 1987

Tribe name	How the tribe was recognized	Date the tribe was recognized
Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan	Congressional recognition (P. L. 100-420)	Sept. 8, 1988
Coquille Tribe of Oregon	Congressional recognition (P.L. 101-42)	June 28, 1989
San Juan Southern Paiute Tribe of Arizona	Administrative recognition under 25 C.F.R. 83	Mar. 28, 1990
Aroostook Band of Micmac Indians of Maine	Congressional recognition (P. L. 102-171); land claim settlement	Nov. 26, 1991
Ione Band of Miwok Indians of California	Decision by the Assistant Secretary-Indian Affairs	Mar. 22, 1994
Mohegan Indian Tribe of Connecticut	Administrative recognition under 25 C.F.R. 83	May 14, 1994
Pokagon Band of Potawatomi Indians of Michigan	Congressional recognition (P. L. 103-323)	Sept. 21, 1994
Little River Band of Ottawa Indians of Michigan	Congressional recognition (P. L. 103-324)	Sept. 21, 1994
Little Traverse Bay Bands of Odawa Indians of Michigan	Congressional recognition (P. L. 103-324)	Sept. 21, 1994
Central Council of the Tlingit & Haida Indian Tribes, Alaska	Congressional recognition (P. L. 103-454)	Nov. 2, 1994
Jena Band of Choctaw Indians, Louisiana	Administrative recognition under 25 C.F.R. 83	Aug. 29, 1995
Huron Potawatomi, Inc., Michigan	Administrative recognition under 25 C.F.R. 83	Mar. 17, 1996
Samish Indian Tribe, Washington	Administrative recognition under 25 C.F.R. 83	Apr. 26, 1996
Delaware Tribe of Indians, Oklahoma	Decision by the Assistant Secretary-Indian Affairs; tribe previously dealt with as part of Cherokee Nation of Oklahoma	Sept. 23, 1996
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan	Administrative recognition under 25 C.F.R. 83	Aug. 23, 1999
Snoqualmie Tribe, Washington	Administrative recognition under 25 C.F.R. 83	Oct. 6, 1999
Loyal Shawnee Tribe, Oklahoma	Congressional recognition (P. L. 106-568); tribe formally part of Cherokee Nation of Oklahoma	Dec. 27, 2000
Lower Lake Rancheria, California	Decision by the Assistant Secretary-Indian Affairs (reaffirmation of recognition)	Dec. 29, 2000
King Salmon Tribe, Alaska	Decision by the Assistant Secretary-Indian Affairs (reaffirmation of recognition)	Dec. 29, 2000
Shoonaq' Tribe of Kodiak, Alaska	Decision by the Assistant Secretary-Indian Affairs (reaffirmation of recognition)	Dec. 29, 2000

[a]We determined the dates the tribes were recognized based on the Department of the Interior's position that the tribes were recognized on the date the U.S. Attorney's Office filed an action against the state of Maine on behalf of the Passamaqvoddy and the Penobscot in *U.S. v. Maine* (Civ. Action No. 1969 N.D.) and *U.S. v. Maine* (Civ. Action No. 1960 N.D.), respectively.

Appendix II: The BIA Regulatory Tribal Recognition Process

The regulatory process used by BIA to determine a group's eligibility for tribal recognition is listed in the *Federal Register*. The regulatory process, which is based on regulations that were originally promulgated in 1978 and revised in 1994,[1] is summarized in table 4.

Table 4: The Regulatory Process

Steps in the regulatory process		Timelines
BIA receives letter of intent to petition from a group wanting to be recognized as an Indian tribe	• BIA acknowledges receipt of petition.	30 days from receipt.
	• BIA publishes notices of receipt in the *Federal Register* and local newspaper(s) within 60 days from receipt.	60 days from receipt.
	• BIA notifies in writing the governor and attorney general of the state in which the petitioner is located. It also notifies any other recognized tribe or any other petitioner who appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest.	No specified time.
Petitioner provides BIA with documents and evidence	• BIA conducts a technical assistance (TA) review—a preliminary review of the documented petition to provide the petitioner an opportunity to supplement or revise the petition prior to it being placed on active consideration—when the petition is considered in full.	No specified time.
	• Petitioners have the option of responding to the TA review or requesting that BIA proceed with the active consideration of the petition using the materials already submitted.	No specified time.
	• After the group responds to the TA review and before the petition is placed on active consideration, BIA investigates the petitioner if there is little or no evidence that the group can meet criteria under (e), (f), or (g).[a] If the review finds that the evidence clearly establishes that the group does not meet one or more of these criteria, BIA can issue a proposed finding declining to recognize the tribe.	No specified time.
Ready, waiting for active consideration	• The order of consideration of petitions is determined by the date of BIA's notification to the petitioner that it considers the petition ready to be placed on active consideration.	N/A

[1] 59 *Fed. Reg.* 9280 (Feb. 25, 1994).

Steps in the regulatory process		Timelines
Active consideration	• BIA notifies the petitioner and interested parties when the petition comes under active consideration. Interested parties are third parties that can establish a legal, factual, or property interest in the recognition decision.	No specified time.
	• BIA reviews the petition to determine whether the petitioner is entitled to be recognized. BIA may also initiate other research for any purpose relative to analyzing the petition and may consider any evidence submitted by third parties.	N/A
	• BIA prepares a report summarizing the evidence, reasoning, and analyses that are the basis for the recommendation it makes to the Assistant Secretary-Indian Affairs. The Assistant Secretary then makes a proposed determination regarding the petitioner's status. A summary of this determination is published in the *Federal Register*. Copies of the BIA report are provided to the petitioner and third parties.	365 days from the time the petitioner is placed on active consideration. May be extended.
Public comment period	• Upon publication of the proposed finding, the petitioner and any third party may submit arguments and evidence to BIA to rebut or support the proposed finding. Third parties must provide copies of their submissions to the petitioner.	180 days from the publication of the proposed finding. May be extended.
Response by the petitioner to public comments	• The petitioner responds to submissions by third parties.	60 days from the close of public comment period. May be extended.
Consultation period	• At the end of the response to public comments period, BIA consults with the petitioner and the interested parties to determine an equitable time for consideration of arguments and evidence submitted during the response period.	No time specified.
Final determination	• After consideration of the arguments and evidence rebutting or supporting the proposed finding and the petitioner's response to the comments of third parties, the BIA technical staff makes a recommendation to the Assistant Secretary-Indian Affairs, who makes a final determination regarding the petitioner's status. A summary of this determination is published in the *Federal Register*.	60 days from the end of the consultation period. May be extended.

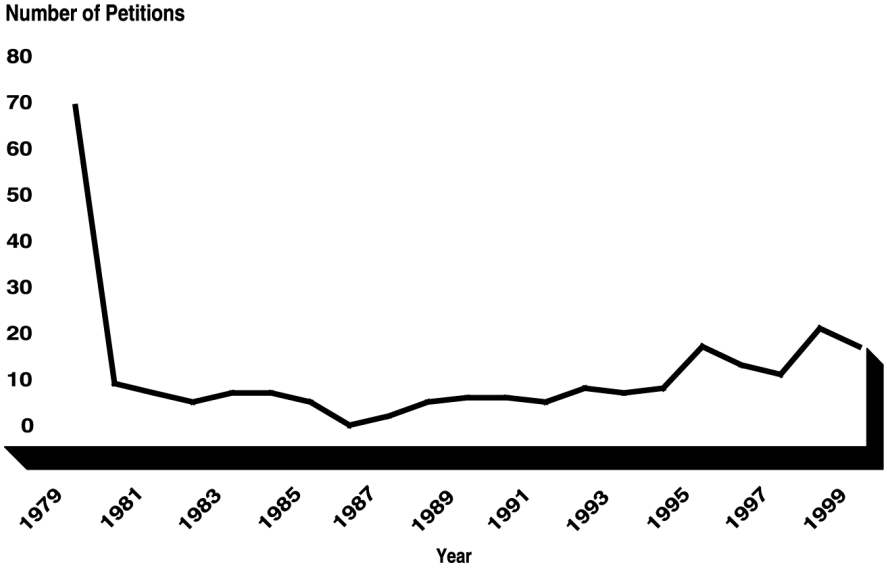
Steps in the regulatory process		Timelines
Effective date	• The determination will become effective 90 days from publication of the final determination unless the petitioner or a third party files a request for the Interior Board of Indian Appeals to reconsider the determination.	90 days from the publication of the final determination.
Requests for reconsideration	• The Board will consider requests that allege that there is new evidence, that the evidence or research used to make the final determination is faulty, or that there is a reasonable interpretation of the evidence not previously considered.	Determination on whether a request for reconsideration alleges any of these grounds made within 120 days of publication of the final determination.
Board evaluation of request	• The Board may establish such procedures, as it deems appropriate to evaluate the request for reconsideration. The Board may either affirm the decision or remand it to the Assistant Secretary for reconsideration.	No time specified.
Secretary's discretion to request reconsideration	• If the Board affirms decision, but finds request alleges other grounds, the request is sent to the Secretary of the Interior who has the discretion to request the Assistant Secretary to reconsider after receiving further comments from petitioners and interested parties.	In general, 45 days for comments. The Secretary shall decide whether to request reconsideration within 60 days of receipt of all comments.
Reconsidered determination	• The Assistant Secretary shall issue a reconsidered determination stemming from either the Board's remand or the Secretary's request for reconsideration.	Within 120 days of the Board's remand or Secretary's request.

[a] Criterion (e) is: 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. Criterion (f) is: the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. Criterion (g) is: neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

Source: 59 *Fed. Reg.* 9280 (Feb. 25, 1994).

BIA has received 250 petitions through its regulatory process. Forty of these petitions were requests for recognition made before the inception of the process in October 1978. There has been a general increase in the number of petitions received per year since the passage of the Indian Gaming Regulatory Act in 1988, which regulates Indian gambling, as shown in figure 2.

Figure 2: Receipt of Petitions for Recognition by Year



Note: BIA received 40 petitions prior to October 1978, when the regulations became effective. These and the other petitions received during 1978 are included in 1979.

Source: BIA.

BIA classifies petitions for tribal recognition in three categories: not ready for evaluation (because of incomplete documentation), ready for evaluation, and resolved. Of the 250 petitions that BIA has received, 175 are not ready to be evaluated, and of these, at least 60 are more than 10 years old. Another 20 have been resolved outside the regulatory process, either through congressional or Department of the Interior action or through the action of the petitioner—such as withdrawing from the process or merging with another petitioner. Of the remaining 55 petitions, 23 petitions are ready to be evaluated or are actively being evaluated, and 32 petitions have completed the process, although the final outcome of 3 of these petitions is pending. The Interior Board of Indian Appeals has sent two petitions back to the Secretary to determine whether they should be reconsidered, and a final determination is pending for the third. The status of all petitions is summarized in table 5.

Table 5: Status of Petitions, as of August 2001

Not ready for evaluation		**175**
Petitioner has submitted a letter of intent only	105	
Petitioner has not submitted a complete petition	55	
Petition inactive (petitioner is no longer in touch with BIA or legislative action required)	15	
Ready for evaluation		**23**
Petition is being actively considered	13	
Petition is ready, waiting to be actively considered	10	
Resolved through regulatory process		**32**
Petitioner recognized	14	
Petitioner denied recognition	15	
Decision pending	3	
Resolved outside the regulatory process		**20**
Recognized or status clarified by the Congress or the Department of the Interior	12	
Petition withdrawn	8	
Total		**250**

Source: BIA.

Appendix III: The Rise of the Indian Gambling Industry

The Indian gambling industry, a relatively new phenomenon, traces its genesis back to the late 1970s when a number of Indian tribes established bingo operations as a supplemental means of funding tribal operations. At about the same time, a number of state governments also began exploring the potential for increasing state revenues through state-sponsored gambling. By the mid 1980s, a number of states had authorized charitable gambling and some sponsored state-run lotteries. However, tribal and state governments soon found themselves at odds over whether tribal governments had the authority to conduct gambling independently of state regulation. Although many lower courts upheld the tribal position, the matter was not resolved until 1987 when the U. S. Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*.[1] That decision confirmed the authority of tribes to establish gambling operations on their reservations outside state regulation—provided the affected state permitted some type of gambling. At about the same time the Cabazon case was being litigated, there was a widespread increase of Indian bingo halls in many parts of the country. In response to state concerns that Indian gambling would present an attractive target for organized crime, the Congress took up the issue and passed legislation—the Indian Gaming Regulatory Act (IGRA) in 1988—which was a compromise between Indian and state interests. Since IGRA, Indian gambling has grown to include 193 tribes with over 300 facilities that generated close to $10 billion in revenue.

Indian Gaming Regulatory Act

With the passage of IGRA in 1988, the Congress established the jurisdictional framework that would govern Indian gambling. IGRA established a comprehensive system for regulating gambling activities on Indian lands. IGRA established the following three classes of gambling to be regulated by a combination of tribal governments, state governments, BIA, and the National Indian Gaming Commission (NIGC).

- Class I gambling consists of social gambling for minimal prizes or ceremonial gambling. It is regulated solely by the tribe, and no financial reporting to other authorities is required.
- Class II gambling consists of gambling pull-tabs, bingo-like games, and punch boards. A tribe may conduct, license, and regulate Class II gambling if (1) the state in which the tribe is located permits such gambling for any purpose by a person or organization and (2) the tribal governing body adopts a gambling ordinance that is approved by NIGC.

[1] 480 U.S. 202 (1987).

- Class III gambling consists of all other forms of gambling, including casino games, slot machines, and pari-mutuel betting.[2] Generally, Class III gambling is often referred to as full-scale casino-style gambling. Class III games are regulated as indicated below.

  Class III gambling is only allowed in states that permit similar types of gambling. However, class III gambling has been broadly defined under IGRA. For example, the allowance of charitable Las Vegas nights and state-run lotteries has sufficed to allow tribes to operate casinos. IGRA also requires that states and tribes negotiate a tribal-state compact to balance the interests of both the state and the tribe. The tribal-state compact is an agreement that may include provisions concerning standards for the operation and maintenance of the gambling facility, the application of laws and regulations of the tribe or state that are related to the licensing and regulation of the gambling activity, and the assessment by the state of amounts necessary to defray the costs of regulating the gambling activity. The Secretary of the Interior must approve any tribal-state compact and has delegated this authority to the Assistant Secretary-Indian Affairs. As of July 6, 2000, 24 states had negotiated 267 compacts with 212 Indian tribes. Tribes may have compacts with more than one state, and they may also have more than one compact for different types of games. Thirty-seven tribes had compacts without any operating gambling facilities. IGRA also authorizes NIGC to oversee and regulate Indian gambling activities. NIGC's mission is to provide fair and consistent enforcement of IGRA requirements to ensure the integrity of Indian gambling operations. Among its responsibilities, NIGC reviews tribal investigations of key gambling employees and management officials and approves tribal gambling ordinances. Additionally, all Class II and Class III gambling operations are required to submit copies of their annual financial statement audits to NIGC.

  Although the Congress intended regulatory issues to be addressed in tribal-state compacts, it left a number of key functions in federal hands, including approval authority over compacts, management contracts, and tribal ordinances. IGRA specifies that the tribal ordinance concerning the conduct of Class II or Class III gambling on Indian lands within the tribe's jurisdiction must provide that the net revenues from any tribal gambling are not to be used for purposes other than to (1) fund tribal government

[2]Pari-mutuel betting is generally considered to include on-track, off-track, and inter-track betting on horse racing, dog racing, and jai alai.

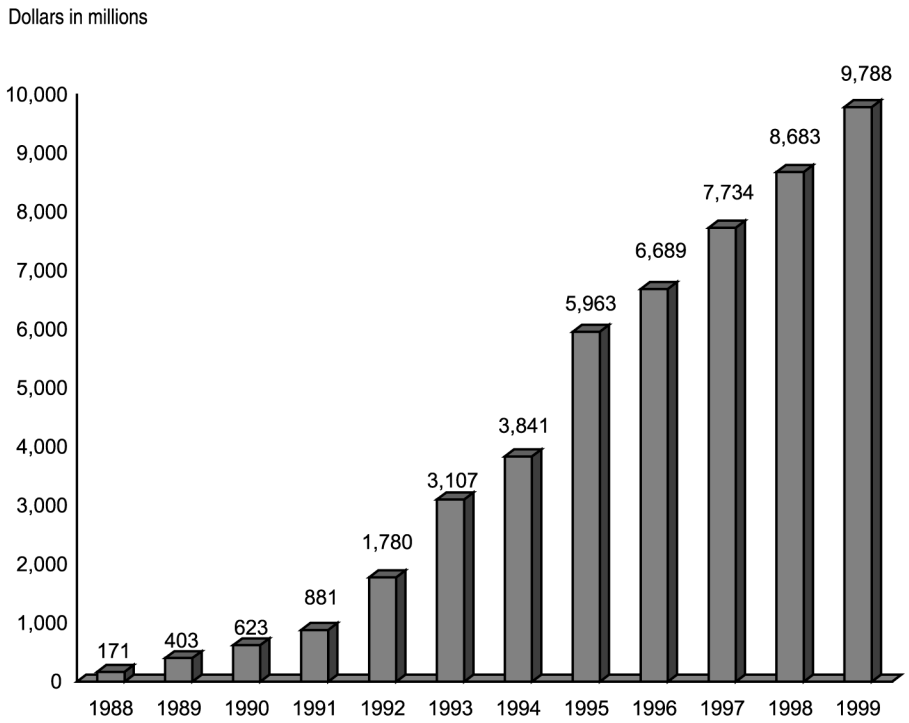
operations or programs, (2) provide for the general welfare of the Indian tribe and its members, (3) promote tribal economic development, (4) donate to charitable organizations, or (5) help fund operations of local government agencies. A tribe may distribute a portion of its net revenues directly to tribal members, provided that the tribe has a revenue allocation plan approved by BIA. This plan should describe how the tribe intends to allocate net revenues among various governmental, educational, and charitable projects, including direct payments to tribal members.

Gambling revenues generated by federally recognized tribes and their federally chartered corporations are not subject to federal income tax. The Internal Revenue Service (IRS) has determined that tribes are political agencies that the Congress did not intend to include within the meaning of the income tax provisions of the Internal Revenue Code. Any income earned by a tribe is not subject to federal income tax, regardless of whether the business activity takes place inside or outside of Indian-owned lands. On the other hand, IRS has found that individual tribal members, like all U.S. citizens, must pay federal income tax unless a specific exemption can be found in a treaty or statute. In some cases, an individual tribal member may receive general welfare payments from the tribe. Although amounts paid for general welfare may not be taxable, payments made pro rata to all tribal members are evidence that the payments are not based on need and, thus, probably will not qualify for the general welfare exclusion, according to IRS. IGRA provides that net revenues from gambling may be used to make per capita payments to members of the Indian tribe, but only if the tribe has prepared a revenue allocation plan to distribute revenues to uses authorized by IGRA. The plan must be approved by the Secretary of the Interior as adequate, especially funding for tribal government operations and promoting tribal economic development. IGRA also requires the protection and preservation of the interests of minors who are entitled to receive any of the payments. Because the payments are per capita distributions of gambling proceeds, they are generally subject to taxation.

The Indian Gambling Industry

Since the passage of IGRA in 1988, Indian gambling revenues have grown 60 fold—from $171 million in 1988 to $9.8 billion in 1999 (see fig. 3). However, a few tribes generated most of the revenues. Although 193 tribes have Class II or Class III gambling facilities, NIGC reports that just 27 tribes are responsible for generating more than $6.4 billion, or more than 65 percent, of the total $9.8 billion in revenues that tribes reported in 1999.

Figure 3: Indian Gambling Revenues in Constant Dollars, 1988-1999



Note: Conversion to 1999 constant dollars used the Consumer Price Index.

Source: *Tax Policy: A Profile of the Indian Gaming Industry* (GAO/GGD-97-91, May 5, 1997) for years 1988 to 1994 and National Indian Gaming Commission data for years 1995 to 1999.

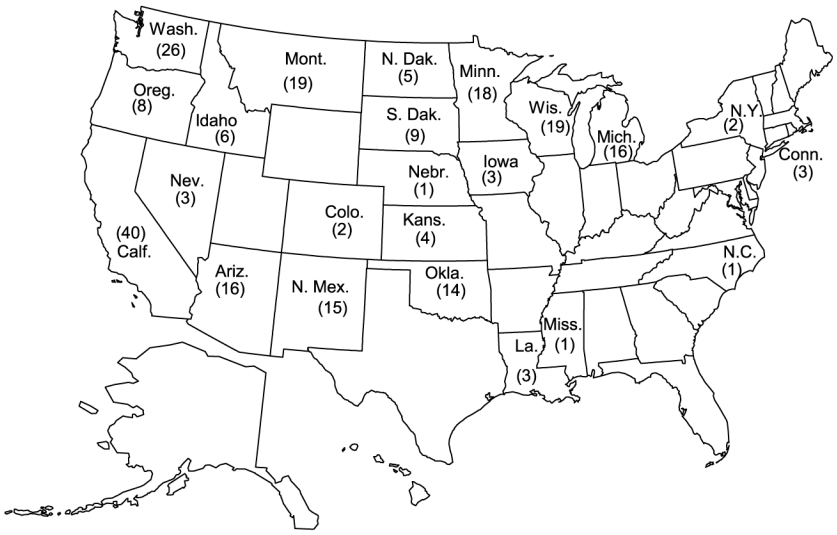
Although Indian gambling is a relatively new phenomenon, most of the 193 tribes with Class II or Class III gambling facilities can trace their existence back to the era of the Indian Reorganization Act of 1934. (See app. I for additional information on how tribes were recognized.) Almost all of the remaining tribes with Class II or Class III facilities had been individually recognized since 1960. Two tribes were recognized as part of a large group of Alaskan tribes fully identified in 1993 (see table 6).

Table 6: How Tribes With Class II or Class III Gambling Facilities Were Recognized

Recognition category	Total tribes per category	Tribes with gambling facilities by category	Percentage of tribes with gambling facilities by category
IRA era tribes	292	170	59
Tribes individually recognized since 1960	47	21	45
Alaskan tribes identified in 1993	222	2	< 1 percent
Total	**561**	**193**	**32**

As of May 15, 2001, there were about 313 Indian gambling facilities in operation. Of this number, 234 facilities conducted some form of Class III gambling, often in conjunction with Class II gambling. The remaining 79 facilities conducted only Class II gambling. Figure 4 shows the distribution of facilities with Class III gambling by state.

Figure 4: Distribution of Class III Indian Gambling Facilities



Source: GAO's analysis of NIGC data on Indian gambling facilities as of May 2001.

As shown in figure 5, Indian gambling has become a nationwide business, having operations in 23 states, with the heaviest concentration in the West and Midwest. In 1999, the Indian gambling industry generated $9.8 billion while Nevada's and Atlantic City's casinos reported revenues of about $9 billion and $4.2 billion, respectively, for the same period.

Current Indian Gambling Legal Issues

IGRA requires states to negotiate in good faith with Indian tribes when forming gambling compacts. In cases where a tribe believes that the state has not negotiated in good faith, IGRA authorizes the tribe to bring suit in federal district court. If the court finds that the state has indeed failed to negotiate in good faith, the court may order the state to conclude a compact in 60 days. However, in a case decided by the U.S. Supreme Court in March 1996, *Seminole Tribe of Florida v. Florida*,[3] the Court held that the Congress did not have the constitutional authority to make the state subject to suit in federal court and that a state could assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by the tribe.[4] The Seminole Tribe decision did not address the issue of whether a state could effectively prevent casino-type gambling within its borders by refusing to negotiate in good faith and asserting sovereign immunity if the tribe sues. Also, the Supreme Court expressed no opinion on a substitute remedy for a tribe bringing suit.

To prevent a stalemate in tribal-state compacts, the Department of the Interior issued a regulation on April 12, 1999, for dealing with tribal-state compacts when states and tribes cannot reach an agreement. The regulation prescribes alternative procedures to establish Class III gambling when a state does not waive its Eleventh Amendment immunity from a lawsuit. The regulation authorizes the tribe to submit a proposal to the Department to establish gambling procedures. The Department must notify the state of the tribe's request and solicit the state's comments on the tribe's proposed procedures, including any comments on the proposed scope of gambling. The state is invited to submit alternative proposed procedures. Based on its review of the proposed submissions, the Assistant Secretary-Indian Affairs may approve the tribe's proposal or

[3]517 U.S. 44 (1996).

[4]The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." A state, however, may choose to waive its Eleventh Amendment immunity from suit.

convene an informal conference with the state and the tribe to resolve any areas of disagreement. The states of Alabama, Florida, and Kansas have filed suit challenging the new regulation. As of September 2001, these cases were pending in federal court.

Appendix IV: Comments From the Department of the Interior

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT 10 2001

Mr. Barry T. Hill
Director, Natural Resources and Environment
General Accounting Office
Washington, D.C. 20548

Dear Mr. Hill:

Thank you for this opportunity to comment on the draft report of the General Accounting Office (GAO) entitled "Improvements Needed in Tribal Recognition Process." We have worked continuously with the GAO since November 2000 in a cooperative effort to explain the Federal acknowledgment process and its legal foundation.

The acknowledgment of the existence of an Indian tribe, which has inherent sovereignty and a government-to-government relationship with the United States, is a serious decision for the Federal Government. It is important that a thorough and deliberate evaluation occur before we acknowledge a group's tribal status, which carries with it certain immunities and privileges. These decisions must be equitable and defensible. The existing criteria should not be changed in an attempt to quicken the pace of the process. We are pleased that the GAO has recognized these points.

The GAO has recommended to the Secretary of the Interior that Federal acknowledgment decisions made in the regulatory process of the Department of the Interior be more predictable and timely. We concur with these two general recommendations. The GAO accepts the existence of an acknowledgment process within the Department of the Interior, but suggests that improvements be made to that process. We are enclosing a detailed response to the GAO's recommendations which outlines the steps the Bureau of Indian Affairs (BIA) will take to analyze the resources required for this function and to develop strategic action plans for implementing specific improvements in this process.

Your first recommendation is that the Secretary should direct the BIA to "provide a clearer understanding of the basis used in recognition decisions by developing and using transparent guidelines that help interpret key aspects of the criteria and supporting evidence used in federal recognition decisions." We believe that precedents from acknowledgment decisions, as well as from earlier court findings, statutes, and administrative actions which served as the basis for the acknowledgment regulations, provide guidance to petitioners, interested parties, the BIA staff, and the Department's decision makers. We agree that these precedents can and should be made more readily available. We will develop a plan both to make these precedents more accessible and to provide clearer guidelines to the regulations, and thus to assure consistency and improve public understanding of acknowledgment decisions.

Your second recommendation is that the Secretary should direct the BIA to "develop a strategy that identifies how to improve the responsiveness of the process for federal recognition." We have identified potential changes to improve the timeliness of the process and will develop a plan to implement effective reform. The GAO specifically recommends that the strategy "should include a systematic assessment of the resources available and needed" and the development of "a budget commensurate with workload." The GAO has found that since 1993 the resources available to the acknowledgment function decreased even as the demands on it increased. We will analyze the acknowledgment workload, prepare a needs assessment, and develop a strategy that will result in decisions being made in a more timely manner.

An enclosed paper lists steps to respond to the GAO's recommendations and to the problems it has identified. The paper specifies both immediate actions and potential actions we will consider for inclusion in our strategic action plans. In addition, this paper includes substantive comments on aspects of the GAO's report other than its specific recommendations. We are also enclosing technical comments to correct or clarify certain statements or statistics contained in the GAO report.

We share the goal of improving this important Federal function to serve Indian tribes.

Sincerely,

Neal A. McCaleb

Assistant Secretary - Indian Affairs

Enclosures

THE ASSISTANT SECRETARY - INDIAN AFFAIRS'
RESPONSE TO THE GAO REPORT: OCTOBER 2001

The Assistant Secretary - Indian Affairs (AS-IA) submits the following substantive comments and plan of action in response to the two major "Recommendations to the Secretary of the Interior" listed on page 20 of the October 2001 draft GAO report, *Indian Issues: Improvements Needed in the Tribal Recognition Process*.

Response to GAO Recommendation A

To ensure more "predictable and timely" tribal acknowledgment decisions, the GAO Draft Report recommends that the Secretary of the Interior direct BIA to:

> **Provide a clearer understanding of the basis used in recognition decisions by developing and using transparent guidelines that help interpret key aspects of the criteria and supporting evidence used in federal recognition decisions**.

We concur with the GAO recommendation that there needs to be a clear understanding and presentation of the basis for evaluating evidence when making acknowledgment decisions. In response to this recommendation, we will develop expanded guidelines which will discuss in depth specific issues raised by GAO, such as "time gaps" and the percentage of members descending from historical tribes, and other topics, including some not raised by GAO. Unlike the 1997 *Official Guidelines to the Federal Acknowledgment Regulations,* which are aimed at the general public and focus principally on how the process works, these new guidelines will be aimed at researchers for the government, third parties and petitioners and explain in detail how evidence is evaluated and how precedents are used as a guide to evaluating evidence.

In addition, we also believe that many currently available documents, including the regulations at 25 CFR Part 83, previous decisions and technical reports, the 1978 *Regulations, Guidelines and Policies*, and 1997 *Official Guidelines to the Federal Acknowledgment Regulations*, court decisions on acknowledgment issues, policy statements, and letters to petitioners or others which furnish advice and interpretations of the regulations, provide useful sources and guidance for understanding how evidence is evaluated during the decision-making process. While these records have always been available to the petitioners, all interested parties, and the public, they have not been compiled as a single body of material and made available in easily accessible locations.

In response to the above concerns, the BIA will develop a strategic plan to provide petitioners, interested parties, and the public a "clearer understanding of the basis" of acknowledgment decisions. This will include some steps which may be accomplished in a very short time and other steps that will require more time to develop. Further additional steps may be identified during the

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strategic planning process. The Branch of Acknowledgment and Research and the Office of Tribal Services will be the program offices charged with implementing the plan of action.

The Action Plan for Recommendation A

We will formulate a strategic action plan that will include developing guidelines that interpret key aspects of the criteria and the supporting evidence used in Federal acknowledgment decisions. As part of this plan, we will also compile and make easily accessible existing materials which interpret the criteria and the supporting evidence used in decisions. The development of the action plan will include careful consideration of the importance and means of implementing the following actions:

- Update and augment the 1997 *Official Guidelines to the Federal Acknowledgment Regulations*;

- Update the *Acknowledgment Precedent Manual*, and make it available on the BIA-BAR web-page; create an accompanying index system with links to discussions of topics in documents also on the BIA-BAR web-page [see below] so that researchers and evaluators can immediately access technical assistance letters, reports, decision and court documents on topics such as "gaps," "informal authority," "village-like setting," etc.;

- Develop a plan to update the *Acknowledgment Precedent Manual* as needed when new decisions are issued;

- Provide all acknowledgment decisions, including proposed findings, final determinations, reconsidered decisions, summaries under the criteria, technical reports and *Federal Register* notices, on the BIA-BAR web-page;

- Provide pertinent technical assistance letters, letters with advice, policy statements, and interpretations of the regulations, and any other guidance on the BIA-BAR web-page;

- Provide all unpublished court decisions involving acknowledgment issues and make them available on the BIA-BAR web-page; provide citations to published court decisions involving acknowledgment issues and provide links to such decisions;

- Provide all IBIA acknowledgment decisions and accompanying documents by creating links between those findings on the Department web-site and the BIA-BAR web-page;

- 2 -

• Assign a web-page manager to maintain and to add key documents to the web-page in a timely manner;

• Compile on CD-Rom the acknowledgment decisions and related documents, the 25 CFR Part 83 regulations, the updated 1997 *Official Guidelines* and the *Acknowledgment Precedent Manual*, and provide it to BIA agency and regional offices, state libraries, and other regional libraries or archives;

• Consider the creation of an official publication of acknowledgment decisions; and

• Develop any other actions relating to improving the guidance available on the acknowledgment process as may be determined through this strategic planning process.

Time line for completion of action plan: Strategic plan will be developed within six months.

Response to GAO Recommendation B

To improve the responsiveness of the Federal acknowledgment process, the GAO Draft Report recommends that the Secretary of the Interior direct the BIA to:

Develop a strategy that identifies how to improve the responsiveness of the process for federal recognition. This strategy should include a systematic assessment of the resources available and needed that leads to development of a budget commensurate with workload.

The AS-IA concurs with the GAO recommendation to improve the responsiveness of the Federal acknowledgment process. The BIA will develop strategies that will address the immediate concerns regarding the current workload, as well as address the long-term goal of making decisions on all documented petitions for Federal acknowledgment in a timely manner.

The AS-IA believes that maintaining the standards of the regulations at 25 CFR Part 83 will ensure that the acknowledgment decisions are consistent with law, and that thorough and comprehensive review will ensure fair and accurate decisions. Therefore, the action plan to improve responsiveness will not be based on any change in the present standards or on a less thorough review of petitions.

The BIA action plan for Recommendation (B) includes three parts:

(1) Perform a needs assessment of current workload and resources;

- 3 -

(2) Examine possible refinements to the procedures, some of which may require regulatory changes or legislative action; and

(3) Implement immediate actions.

Part (1) The Action Plan for Recommendation B -- Needs Assessment

As recommended by the GAO draft report, the BIA will conduct an assessment of resources to support budget proposals commensurate with workload.

The needs assessment will address and make recommendations on all pertinent matters, including but not limited to the following:

- Review current workload, estimated work, and resources required to eliminate the "backlog" of decisions pending for petitioners on active consideration and those waiting for consideration;

- Analyze current non-case workload including administration, litigation, and Freedom of Information Act (FOIA) requests;

- Estimate future workload and resources required for case work, administration, litigation, and FOIA;

- Analyze skills needed to accomplish tasks;

- Assess non-staffing resources available currently, including equipment, computer hardware and software, space, and storage;

- Assess staff training needs, particularly in the areas of technology and management;

- Review staffing needs including overall staffing levels and office organization; number of administrative, professional, and managerial staff, and skill profiles needed to perform predicted workload in a timely and thorough manner;

- Evaluate the use of research assistants, program coordinators, administrative assistants, para-legals, and records managers to deal with FOIA and with other work supporting acknowledgment, including data entry, web-page maintenance, document duplication, and other aspects of electronic technology;

- 4 -

• Consider appropriate use of contracting, and temporary and term appointments for specific functions to decrease workload on professional and administrative staff and to increase flexibility of scheduling;

• Evaluate advanced technology for case analysis and records management;

• Project future equipment and hardware and software needs;

• Project future space and storage needs; and

• Consider whether to seek a separate budget line item for the acknowledgment process.

Time line for presentation of action plan for needs assessment: Strategic Plan will be produced within six months.

Part (2) The Action Plan for Recommendation B – Procedural and Other Changes

We will develop a strategic action plan to improve responsiveness and timeliness by reviewing and examining possible changes in the procedures, in the evaluation of evidence and in the distribution of documents under FOIA. The review will evaluate actions which can be accomplished with the existing regulations, and other actions which will require revised regulations or legislation. This Strategic plan will address impediments to a responsive and timely acknowledgment process and possible resolutions of these impediments, such as those listed below. There may be other actions, not listed below, which will become more evident during this review.

The placement of the acknowledgment function at a relatively low level in the Department's organizational scheme has sometimes been given as a reason the process has lacked predictability and responsiveness. The general question of where the acknowledgment function should be located organizationally and whether a different decision-making structure would facilitate efficient administration may also be reviewed as part of this strategic plan.

The review will consider the following, in addition to other items:

• Review the acknowledgment regulations to determine whether a "sense of urgency" could be instilled in the acknowledgment process by establishing more specific and predictable deadlines for the Department in providing technical assistance and making evaluations, for petitioners in preparing petitions and responding to technical assistance, and for petitioners and third parties in filing comments;

- 5 -

• Devise a priority ranking for petitioners currently on active consideration which defines the order in which their proposed findings and final determinations will be considered; investigate impediments to orderly consideration, such as extensions and other interruptions which compete for staff resources, and propose steps for resolving these impediments;

• Review the effects of allowing negative proposed findings to be issued on a single criterion;

• Review "Changes in the Internal Processing of Federal Acknowledgment Petitions," a "directive" published in the *Federal Register* on February 11, 2000, for possible revisions;

• Eliminate letters of intent to petition and drop groups with only letters of intent from the document maintained by the BIA showing the status of petitioners for acknowledgment; or, require that letters of intent include a governing document, membership list and names of individuals in the governing body and offices they hold.

• Limit each petitioner to one technical assistance review;

• Eliminate reviews prior to active consideration for previous "unambiguous" Federal acknowledgment and expedited negative reviews;

• Require a standard, more efficient format for the submission of petitions and evidence and third party comments;

• Change the evaluation of "continuous existence" from the creation of the U.S. or from the beginning of U.S. jurisdiction rather than from first sustained contact with non-Indians;

• Allow third parties to respond to petitioner's comments during the response period that follows the comment period;

• Allow for the negotiation of time lines with the petitioner and third parties appropriate for each case;

• Impose "sunset rule" deadlines on petitioners to submit completed petitions with supporting evidence and on Department to "close down" the process;

• Address the issues of FOIA requests in the context (1) of providing materials to third parties, (2) of the increase in activity by such third parties, noted by the GAO report, and (3) of the increased load and complexity;

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- Ask Congress to provide limited statutory relief from the Privacy Act and FOIA exemptions to allow the release of all information of the documented petitioner, except membership lists and genealogical charts, to third parties;

- Explore whether to allow interested parties to receive copies of all non-privacy documents at specific periods in the process without invoking FOIA and require petitioners to provide copies of their documents directly to interested parties;

- Examine other possible changes to the procedures, the evaluation, the means of providing evidence to the government, and distributing documents to third parties.

Time line for making procedural modifications: Strategic Plan will be produced in six months.

Part (3) Immediate actions

Finally, two actions may be taken immediately, which are:

- The BIA fill the two existing vacant positions in the BAR; and

- New GPRA goals will be established to improve program performance.

Time line for immediate actions: Full current staffing will be achieved within six months. New GPRA goals will be established within six months.

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Appendix V: Scope and Methodology

In this report, we describe the significance of federal tribal recognition, including information on Indian gambling; evaluate the BIA's regulatory recognition process; and provide a historical overview of how tribes have been recognized.

In describing the significance of federally recognizing Indian tribes, we spoke with and obtained documents from BIA, the Department of Health and Human Service's Indian Health Service, and the National Indian Gaming Commission. We also analyzed pertinent legislation and other documents. Because the revenue collected from gambling by Indian tribes is proprietary information, NIGC did not provide us with any tribe-specific information. Instead, it summarized the revenue information before providing it to us.

In evaluating the BIA regulatory process, we spoke with BIA and other Department of the Interior officials familiar with the process, including the former Assistant Secretary-Indian Affairs, the former Deputy Assistant Secretary-Indian Affairs, representatives for the Department's Office of the Solicitor, and officials from BIA's Branch of Acknowledgment and Research, who are responsible for implementing the regulatory process. We also analyzed BIA records on how it processes petitions for recognition. We did not, however, evaluate the merits of individual tribes' petitions or the decisions regarding those petitions. We also spoke with tribal leaders who are current petitioners or who have completed the process, experts in Indian law and the recognition process, and representatives of state and local governments affected by tribal recognition to obtain their views of the recognition process.

In determining how tribes became federally recognized, we analyzed BIA and Department of the Interior records regarding the implementation of the Indian Reorganization Act of 1934 to identify tribes recognized at that point in time or created by that act during the early years of its implementation. We also analyzed other BIA and Department of the Interior records, as well as legislation and related documentation, to determine how other tribes became recognized. In some instances, we spoke with BIA and Department officials who played a direct role in a tribe's recognition.

We performed our work from October 2000 through September 2001 in accordance with generally accepted government auditing standards.

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Mark Gaffigan (202) 512-3168

Acknowledgments

In addition to the above named, Charles T. Egan, Robert Crystal, Jeffery Malcolm, and John Yakaitis made key contributions to this report.

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