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INDIAN ISSUES

Basis for BIA's Tribal Recognition Decisions Is Not Always Clear

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss our work on the Bureau of Indian Affairs' (BIA) regulatory process for federally recognizing Indian tribes.[1] As you know, federal recognition of an Indian tribe can dramatically affect economic and social conditions for the tribe and the surrounding communities. There are currently 562 recognized tribes with a total membership of about 1.7 million. In addition, several hundred groups are currently seeking recognition.

Federally recognized tribes are eligible to participate in federal assistance programs. In fiscal year 2002, the Congress appropriated about $5 billion for programs and funding almost exclusively for recognized tribes. Recognition also 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. Such exemptions 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 held in trust.[2] The exemptions also include, where applicable, laws regulating gaming. The Indian Gaming Regulatory Act of 1988, which regulates Indian gaming operations, permits a tribe to operate casinos on land in trust if the state in which it lies allows casino-like gaming and the tribe has entered into a compact with the state regulating its gaming businesses.[3] In 1999, federally recognized tribes reported an estimated $10 billion in gaming revenue, surpassing the amounts that the Nevada casinos collected that year. In fiscal year 2001, Indian gaming revenues increased to $12.7 billion.

Owing to the rights and benefits that accrue with recognition and the controversy surrounding Indian gaming, BIA's 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. The controversies surrounding the regulatory process for recognizing tribes continue with two highly anticipated decisions issued in July 2002. In the first decision, the

[1]In this statement the term "Indian tribe" encompasses all Indian tribes, bands, villages, groups and pueblos as well as Eskimos and Aleuts.

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

[3]25 U.S.C. 2701.

Assistant Secretary-Indian Affairs determined that two petitioners, the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, are derived from a single historical tribe and are therefore recognized as a single tribe.[4] In the second decision, the previous Assistant Secretary's January 2001 decision to recognize the Chinook Indian Tribe/Chinook Nation was reversed by the current Assistant Secretary after the decision was reconsidered at request of the Quinault Indian Nation.[5]

BIA's regulatory process for recognizing tribes was established in 1978. The process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria—basically that the petitioner has continuously existed as an Indian tribe since historic times. Critics of the process claim that it produces inconsistent decisions and takes too long. In November 2001, we reported on BIA's regulatory recognition process, including the criteria for recognizing tribes, and recommended ways to improve it.[6] In particular, we recommended that BIA develop transparent guidelines to provide a clearer understanding of the basis for recognition decisions. We testified on this report in February 2002 before the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.[7] Our testimony today is based on that report and focuses on the application of the criteria that Indian groups must meet under the regulatory process to be granted recognition.

In summary, as we reported in November 2001, the basis for BIA's tribal recognition decisions is not always clear. While there are set criteria that petitioning tribes must meet to be granted recognition, there is no guidance that clearly explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate that a tribe has continued to exist over a period of time—a key aspect of the criteria. The lack of guidance in this area creates controversy and uncertainty for all parties about the basis for decisions reached. To correct this, we recommended that BIA develop and use

[4]67 *Fed. Reg.* 44234 (July 1, 2002).

[5]67 *Fed. Reg.* 46204 (July 12, 2002).

[6]U.S. General Accounting Office, *Indian Issues: Improvements Needed in Tribal Recognition Process*, GAO-02-49 (Washington, D.C.: Nov. 2, 2001).

[7]U.S. General Accounting Office, *Indian Issues: More Consistent and Timely Tribal Recognition Process Needed*, GAO-02-415T (Washington, D.C.: Feb. 7, 2002).

transparent guidelines for interpreting key aspects of its recognition decisions. The BIA is completing a strategic plan to implement this recommendation.

Background

Historically, the U.S. government has granted federal recognition through treaties, congressional acts, or administrative decisions within the executive branch—principally by the Department of the Interior. In a 1977 report to the Congress, the American Indian Policy Review Commission criticized the department's tribal recognition policy. Specifically, the report stated that the department's criteria to assess whether a group should be recognized as a tribe were not clear and concluded that a large part of the department's policy depended on which official responded to the group's inquiries. Nevertheless, until the 1960s, the limited number of requests for federal recognition gave the department the flexibility 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 and objective approach to evaluate these requests. In 1978, it established a regulatory process for recognizing tribes whose relationship with the United States had either lapsed or never been established—although tribes may seek recognition through other avenues, such as legislation or Department of the Interior administrative decisions unconnected to the regulatory process. In addition, not all tribes are eligible for the regulatory process. For example, tribes whose political relationship with the United States has been terminated by Congress, or tribes whose members are officially part of an already recognized tribe, are ineligible to be recognized through the regulatory process and must seek recognition through other avenues.

The regulations lay out seven criteria that a group must meet before it can become a federally recognized tribe. Essentially, these criteria require the petitioner to show that it is descended from a historic tribe and is a distinct community that has continuously existed as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes. The following are the 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, and

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

The burden of proof is on petitioners to provide documentation to satisfy the seven criteria. A technical staff within BIA, consisting of historians, anthropologists, and genealogists, reviews the submitted documentation and makes its 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 BIA officials. The Assistant Secretary-Indian Affairs makes the final decision regarding the proposed finding, which is then published in the Federal Register and a period of public comment, document submission, and response is allowed. The technical staff reviews the 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, who, depending on the nature of further evidence submitted, may or may not rule the same was as was ruled for the proposed finding. Petitioners and others may file requests for reconsideration with the Interior Board of Indian Appeals.

Clearer Guidance Needed on Criteria and Evidence Used in Recognition Decisions

While we found general agreement on the seven criteria that groups must meet to be granted recognition, there is great potential for disagreement when the question before BIA is whether the level of available evidence is high enough to demonstrate that a petitioner meets the criteria. The need for clearer guidance on criteria and evidence used in recognition decisions became evident in a number of recent cases when the previous Assistant Secretary approved either proposed or final decisions to recognize tribes when the technical staff had recommended against recognition. Most recently, the current Assistant Secretary has reversed a decision made by the previous Assistant Secretary. Much of the current controversy surrounding the regulatory process stems from these cases. At the heart of the uncertainties are different positions on what a petitioner must present to support two key aspects of the criteria. In particular, there are differences over (1) what is needed to demonstrate continuous existence and (2) what proportion of members of the petitioning group 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 the 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 in which 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 previous Assistant Secretary determined that the gap was not critical and 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 regulations state that lack of evidence is cause for denial but note that historical situations and inherent limitations in the availability of evidence must be considered. 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. They further state 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. Finally, the regulations note that experience has

shown that historical evidence of tribal existence is often not available in clear, unambiguous packets relating to particular points in time

Controversy and uncertainty also surround 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 descendants. 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 although this decision was not consistent with previous decisions by other Assistant Secretaries, he believed the decision to be fair because the standard used for previous decisions was unfairly high.

Again, the regulations intentionally left open key aspects of the criteria to interpretation. In this case they avoid 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 regulations state only 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 only additional direction is found in 1997 guidelines, which note that petitioners need not demonstrate that 100 percent of their membership satisfies the criterion

In updating its regulations in 1994, the department grappled with both these issues and ultimately determined that key aspects of the criteria should be left open to interpretation to accommodate the unique characteristics of individual petitions. 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 of the criteria. 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, petitioners, third parties, and future decisionmakers, who may want to consider precedents in past decisions, have difficulty understanding the basis for some decisions. 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 judgment on the part of the decisionmaker, public confidence in BIA and the Assistant Secretary as key decisionmakers is extremely important. A lack of clear and transparent explanations for their decisions could cast doubt on the objectivity of the decisionmakers, making it difficult for parties on all sides to understand and accept decisions, regardless of the merit or direction of the decisions reached. Accordingly, in our November 2001 report, we recommended 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. In commenting on a draft of this report, the department generally agreed with this recommendation. To implement the recommendation, the department pledged to formulate a strategic action plan by May 2002. To date, this plan is still in draft form. Officials told us that they anticipate completing the plan soon.

In conclusion, BIA's recognition process was never intended to be the only way groups could receive federal recognition. Nevertheless, it was intended to provide the Department of the Interior with an objective and uniform approach by establishing 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 have created uncertainty about the basis for recognition decisions, calling into question the objectivity of the process. Without improvements that focus on fixing these and other problems on which we have reported, parties involved in tribal recognition may increasingly look outside of the regulatory process to the Congress or courts to resolve recognition issues, preventing the process from achieving its potential to provide a more uniform approach to tribal recognition. The 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 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 successful political and legal strategies.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

Contact and Acknowledgments

For further information, please contact Barry T. Hill on (202) 512-3841. Individuals making key contributions to this testimony and the report on which it was based are Robert Crystal, Charles Egan, Mark Gaffigan, Jeffery Malcolm, and John Yakaitis.