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Testimony

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INDIAN ISSUES

More Consistent and Timely Tribal Recognition Process Needed

Statement of Barry T. Hill, Director
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Mr. Chairman and Members of the Subcommittee:

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 have a tremendous effect on the tribe, surrounding communities, and the nation as a whole. There are currently 562 recognized tribes² 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 2000, about \$4 billion was appropriated for programs and funding almost exclusively for recognized tribes. 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. 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 being held in trust.³ The exemptions also include, where applicable, laws regulating gambling. The Indian Gaming Regulatory Act of 1988,⁴ 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, federally recognized tribes reported an estimated \$10 billion in gambling revenue, surpassing the amounts that the Nevada casinos collected that year.

In 1978, the BIA, an agency within the Department of the Interior, established a regulatory process for recognizing tribes. The process requires tribes 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. Owing to the rights and benefits that accrue with recognition and the controversy surrounding

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

²This number includes three tribes that were notified by the Assistant Secretary-Indian Affairs on December 29, 2000, of the "reaffirmation" of their federal recognition.

³Tribal lands not in trust may also be exempt from state and local jurisdiction for certain purposes in some instances.

⁴25 U.S.C. 2701

Indian gambling, BIA's regulatory process has been subjected to intense scrutiny. Critics of the process claim that it produces inconsistent decisions and takes too long. In light of the controversies surrounding the federal recognition process, we issued a report last November⁵ evaluating the BIA's regulatory recognition process and recommending ways to improve the process.

In summary, we reported the following:

- First, 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 recommend that the BIA develop and use transparent guidelines for interpreting key aspects of its recognition decisions.
- Second, the recognition process is hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, such as local municipalities and other Indian tribes. 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 currently completed petitions are resolved; BIA's regulations outline a process for evaluating a petition that was designed to take about 2 years. To correct these problems, we recommend that the BIA develop a strategy for improving the responsiveness of the recognition process, including an assessment of needed resources.

Background

Historically, tribes have been granted federal recognition through treaties, by the Congress, or through 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 criteria used by the department to assess whether a group should be recognized as a tribe. Specifically, the report stated that the criteria were

⁵*Indian Issues: Improvements Needed in Tribal Recognition Process* (GAO-02-49, Nov. 2, 2001)

not very clear and concluded that a large part of the department's tribal 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 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 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 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 officials within BIA. 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 as the proposed finding. Petitioners and others may file requests for reconsideration with the Interior Board of Indian Appeals.

Clearer Guidance Needed on Evidence Required for 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 the 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 staff had recommended against recognition. Much of the current controversy surrounding the regulatory process stems from these cases.

For example, 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 also 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.

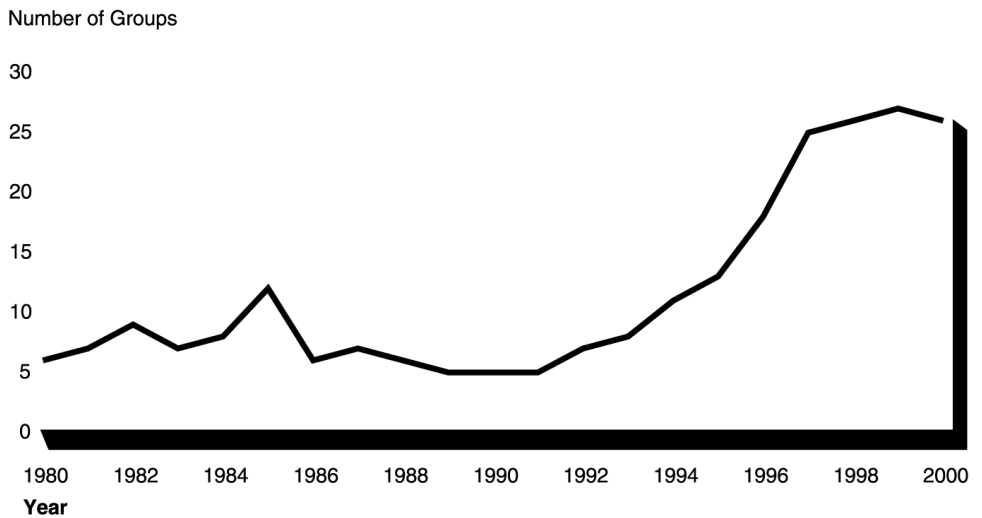
The department grappled with the issue of how much evidence is enough when it updated the regulations in 1994 and intentionally left key aspects of the criteria open to interpretation to accommodate the unique

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 in 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 the 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 report, we recommend that the Secretary of the Interior 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. The department, in commenting on a draft of this report, generally agreed with this recommendation.

Recognition 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 needed to rule on petitions is substantial. The workload of the BIA staff assigned to evaluate recognition decisions has increased while resources have declined. There was a large influx of completed petitions ready to be reviewed in the mid-1990s. Of the 55 completed petitions that BIA has received since the inception of the regulatory process in 1978, 23 (or 42 percent) were submitted between 1993 and 1997 (see fig. 1).

Figure 1: Number of Petitioning Groups in Regulatory Process



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

Source: BIA.

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

Compounding the backlog of petitions awaiting evaluation is the increased burden of related administrative responsibilities that reduce the time available for BIA's technical staff to evaluate petitions. Although they could not provide precise data, members of the staff told us that this burden has increased substantially over the years and estimate that they now spend up to 40 percent of their time fulfilling administrative responsibilities. In particular, there are substantial numbers of Freedom of Information Act (FOIA) requests related to petitions. Also, petitioners and third parties frequently file requests for reconsideration of recognition decisions that need to be 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, filed by 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.

Staff represents the vast majority of resources used by BIA to evaluate petitions and perform related administrative duties. Despite the increased workload faced by the BIA's technical staff, the available staff resources to complete the workload have decreased. The number of BIA staff members assigned to evaluate petitions peaked in 1993 at 17. However, in the last 5 years, the number of staff members has averaged less than 11, a decrease of more than 35 percent.

In addition to the resources not keeping pace with workload, the recognition process also lacks effective procedures for addressing the workload in a timely manner. Although the regulations establish timelines for processing petitions that, if met, would result in a final decision in approximately 2 years, these timelines are routinely extended, either because of BIA resource constraints or at the request of petitioners and third parties (upon showing good cause). As a result, only 12 of the 32 petitions that BIA has finished reviewing were completed within 2 years or less, and all but 2 of the 13 petitions currently under review have already been under review for more than 2 years.

While BIA may extend timelines for many reasons, it has no mechanism that balances the need for a thorough review of a petition with the need to complete the decision process. The decision process lacks effective time frames that create a sense of urgency to offset the desire to consider all information from all interested parties in the process. BIA recently dropped one mechanism for creating a sense of urgency. In fiscal year 2000, BIA dropped its long-term goal of reducing 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 BIA has not replaced 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—for example, initiating inquiries and providing information—the procedures for responding to their increased interest have not kept pace. Third parties told us that they wanted more detailed information earlier in the process so they could fully understand a petition and effectively comment on its merits. However, there are no procedures for regularly providing third parties with 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. Since 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 needed to respond to FOIA requests.

In light of these problems, we recommended in our November report 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. Such a strategy should include a systematic assessment of the resources available and needed that leads to development of a budget commensurate with workload. The department also generally agreed with this recommendation.

In conclusion, the 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. Additionally, the amount of time it takes to make those decisions continues 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, parties involved in tribal recognition may 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 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.

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