Testimony of Arlinda Locklear, Esquire
on S.611, before the
Senate Committee on Indian Affairs, May 24, 2000
on behalf of the Miami Nation of Indiana

Mr. Chairman and members of the Committee, I appreciate the opportunity to express my views on S.611, a bill to establish a commission for the processing of petitions for recognition of Indian tribes. This is an important bill that would have a dramatic impact on the Indian communities subject to its provisions, which communities are typically the poorest and least influential of all Indian country. The Chairman and Vice-Chairman of this Committee have personally committed much thought and energy to this subject. Non-federally recognized Indian tribes are mindful and appreciative of your dedication and earnestly hope that your efforts will soon bear fruit in the form of a fair and reasonable recognition process for Indian tribes to replace the present administrative recognition process.

I have a long-standing professional interest in this subject, having represented several tribes in the administrative recognition process since its inception since 1978. I have worked on successful petitions [e.g., Tunica-Biloxi Tribe of Louisiana] and unsuccessful petitions [e.g., Miami Nation of Indiana.] I have advocated reform of the administrative process before the Department of the Interior and the Congress. I have also represented tribes in court in various challenges against the administrative recognition process. I am currently co-counsel with the Native American Rights Fund and general counsel Albert Harker for the Miami Nation of Indiana in a lawsuit currently pending in federal court in Indiana, in which the Tribe challenges the Department's failure to acknowledge it. <u>Miami Nation of Indians of Indiana v. Babbitt</u>, (S92-586M, N.D. Ind.) I also have a personal interest in this subject as an enrolled member of the Lumbee Tribe of North Carolina, the largest non-federally recognized tribe in the country. This statement reflects the views of the Miami Nation of Indiana as well as my own.

<u>Non-federally recognized Indian tribes -- the issue</u>

Indian tribes that lack federal recognition are missing only federal acknowledgment of their status as native governments -- they are, in fact, native governments. Powers of self-government held by native governments do not derive from the United States, but from the will of their own people. Thus, non-federally recognized tribes can and do exist as self-governing peoples. The Congress documented the existence and identity of most non-federally recognized tribes in the Task Force Ten Report of the 1977 American Indian Policy Review Commission. In other words, the absence of federal recognition for Indian tribes is a failing on the part of the United States, not a failing on the part of non-federally recognized tribes.

Those tribes that are recognized became such usually as an accident of history. In most cases, tribes acquired the status of federally recognized as a secondary incident to some formal dealings with the United States, i.e., a treaty or statute addressing a particular federal concern with that tribe. And the United States did not seek these tribes out for the purpose of bestowing federal recognition. The United States usually sought these tribes out because the United States wanted something from them, typically peaceful relations and their land. If the United States had no cause to deal formally with a tribe (usually because a tribe was pacified or deprived of its land

or other resources early in its relations with the dominant society), that tribe never obtained federal recognition of its status as a native government.

While the absence of federal recognition is generally not purposeful, the impact of non-recognition is dramatic. Tribes' practical ability to preserve and protect their separate culture and way of life, free from interference of state or other authority, is very difficult without federal recognition of the tribes' self-governing authority. As a result, non-federally recognized tribes have for generations sought federal recognition through various means, typically a special act of Congress or administrative action.

Despite the importance of the issue to the affected Indian communities, the Congress has never adopted a tribal recognition policy or a statute establishing a process by which tribes can acquire federal recognition. Congress considered such bills upon the recommendation of the American Indian Policy Review Commission. However, the Department of the Interior at the time urged restraint and assured Congress that it intended to address the issue by regulation. The Department did so for the first time with the adoption of the federal acknowledgment regulations in 1978.

The federal acknowledgment regulations

In its 1978 regulations, the Department attempted to standardize what had been up to that point an ad hoc process. As summarized in the classic federal Indian law treatise, the Department had used a number loosely defined, alternative criteria to determine tribal existence. See F. Cohen, Handbook of Federal Indian Law, p. 271 (1942). In its 1978 regulations, the Department created an office and a process to formally review these criteria, made them all mandatory, and required that each be proved continuously from the time of white contact to the present. 43 Fed. Reg. 39361 (Sept. 5, 1978), presently found at 25 C.F.R. Part 83.

The review process established for petitions for federal recognition was a closed one. It provided for an initial review for obvious deficiencies in the petition, a substantive review resulting in a proposed finding, and a further review of comments on the proposed finding resulting in a final determination. Except for the initial review for obvious deficiencies, the Department's work takes place behind closed doors, with the petitioner not knowing the result until the proposed and final determinations are announced to the public. Even worse, the process has no firm deadlines that assure petitioners that there will be a decision on a given petition by a date certain. Fully documented petitions typically languish for years before the Department begins active consideration. Once active consideration does begin, the petitioner again typically waits years for the final determination.

In 1994, the Department revised the acknowledgment regulations. It made three sets of substantive changes. First, it added a separate provision for previously acknowledged tribes that reduces the documentary burdens for those tribes. Second, it shortened the time period for the criterion requiring tribes demonstrate continuous identification as an Indian entity; now, tribes must show such since 1900, rather than since sustained white contact. Third, it added a lists of

facts or circumstances by which the petitioner can demonstrate two of the criteria -- i.e., community and political authority; the additional circumstances are generally quantifiable facts in an effort to infuse some predictability into the process. However, the basic structure and thrust of the process and criteria are not altered.

There are serious procedural and substantive difficulties with the administrative acknowledgment process. These serious difficulties are well known to the Congress, having been the subject of multiple oversight hearings. With the exception of Administration witnesses, witnesses at these hearings have all testified that the present process is broken beyond repair. Congress has been urged for years to replace the administrative process with a new one. S.611, presently under consideration by the Committee, is such an effort.

The Commission - sections 4, 6 through 12, S.611

Procedurally, S.611 is a good start. With the creation of a commission and an adjudicatory process to rule on petitions for federal recognition, S.611 solves half the problem in the current administrative process -- that is, it requires an open decision-making process by a commission that lacks the institutional biases of the Bureau of Indian Affairs [BIA]. Because its mission is to serve federally recognized tribes, the BIA is institutionally incapable of fairly judging non-federally recognized Indian tribes, particularly through the closed decision-making process currently employed by the Bureau. The creation of an independent commission is an important step that gives non-federally recognized tribes at least the prospect of a fair assessment of their petitions.

Some fine-tuning of the procedural provisions of S.611 is in order. Mark Tilden, with the Native American Rights Fund, makes some helpful suggestions in that regard in his testimony. I will not repeat those proposals here, but do support the changes to the bill proposed by Mr. Tilden.

There is one procedural point that, because of its importance, does bear emphasis. The bill excludes certain groups from eligibility to petition the commission for recognition. Among these are groups that have previously submitted petitions and been denied or refused recognition under the regulations promulgated by the Secretary. S.611, §5(a)(C). This exclusion is unfair. As is discussed below, the present process is unduly burdensome and arbitrary. Tribes that have been subjected to this arbitrary process must be given an opportunity to establish their status in a fair and reasonable process. Otherwise, there will be created two classes of non-federally recognized tribes with unequal rights and opportunities, depending solely upon the time at which their petition for recognition was processed. Because we can have no confidence in the objectivity of petitions processed before the commission is empowered and operating, petitions processed before that time must be submitted for reconsideration by the commission.

Difficulties with the criteria, section 5, S.611

Under section 5 of S.611, the newly created commission would apply the same criteria to

the determination of tribal existence as those applied in the present administrative process.[1] As written and applied, the criteria in the present regulations are so burdensome and heavily dependent upon primary documentation and subjective determinations that many legitimate Indian tribes simply cannot meet them. If these same criteria are applied by the commission, the commission will become bogged down in expensive and time-consuming examination of minutia, much of which is unnecessary to the determination of tribal existence. Worst of all, the commission will fail to recognize legitimate Indian tribes, just as the BIA has done under the current regulations. To illustrate the poor fit between the present criteria and actual tribal existence, I'd like to highlight four provisions or aspects of the criteria for the Committee's consideration.

Extreme time depth

First, the concept of continuity since the time of sustained white contact, as applied to both political authority and community, is unnecessary and unworkable. The essential inquiry here is whether an Indian group holds and has exercised limited sovereignty. As noted above, this sovereignty does not derive from and need not be confirmed by Europeans. As a result, the time of white contact is irrelevant to the inquiry of tribal existence and an unnecessary burden to petitioning Indian groups.

When sustained white contact as a point of reference in time is combined with the requirement that political authority and community be documented continuously since that time, the requirement becomes unworkable. By definition, non-federally recognized tribes have not been the subject of extensive federal or state record-keeping. Typically, non-federally recognized tribes have no common resources (such as a land base) and received no programs that would generate records. Typically, non-federally recognized tribes did not generate historical records of their own. Discrimination and hostile policies often required that non-federally recognized tribes purposefully avoid record-keepers for their own protection. Because of this historical reality, the requirement of continuous proof since sustained white contact means that legitimate Indian tribes may fail to achieve federal recognition.

The community criterion

Second, and apart from the time depth problem, the community criterion requires proof of **?**consistent interactions and significant social relationships [exist] within its memberships and that its members are differentiated from and identified as distinct from nonmembers." 25 C.F.R. §83.1; S.611, §2(7). This can only be demonstrated through sophisticated field work and social science analysis -- an undertaking that is time consuming and expensive. The minutiae currently examined by the BIA to make this inquiry include members' telephone bills, attendance lists at members' funerals, and the like, to demonstrate the extent of contact among tribal members. The

[1] These is only one difference between the present regulatory criteria and those proposed in S.611. In the first criterion, or identification as Indian, the regulations require the petitioner to demonstrate identification as an Indian entity since 1900. 25 C.F.R. §83.7(a). However, S.611 would require such proof since 1871. Section 5(b)(1). In this respect, S.611 is even more burdensome that the existing regulatory process.

practical ability to undertake such detailed analyses is obviously affected by the size of the petitioning group. It is not surprising, for example, that the smaller groups have more often succeeded in demonstrating community while larger groups have not. Finally, this inquiry is not only highly detailed, but is also highly subjective. One researcher may see a community where another researcher does not because of the very nature of the inquiry.

In its 1994 revisions to the regulations, which revisions are also included in S.611, the Department attempted to establish definite markers for the community criterion to make it less subjective. It did not alter the community criterion or definition, but provided that certain indicia will automatically be taken as proof of community, such as 50% residence of tribal members within a geographic area, 50% in-marriage rate, etc. 25 C.F.R. §83.(b)(2); S.611, §5(b)(2)(C). As a practical matter, these clear markers can be met by very few non-federally recognized tribes. In fact, most federally recognized tribes could not establish them. For example, there are very few reservations occupied by recognized tribes where tribal members make up more than 50% of the population of the reservation or where more than 50% of the tribal members speak the language. Thus, these clear markers are only marginally helpful, still leaving most non-federally recognized tribes with the obligation to prove the extent and intensity on interaction among tribal members with data that, by its nature, is highly subjective.

The political authority criterion

Third, the political authority criterion, an interpreted by the BIA, has over time also become a highly subjective determination. The regulations (and S.611) appear to focus on structure and the existence of political leaders. However, the criterion requires not only proof of political leaders but also proof of ?bilateral political relations," i.e., that the members of tribe have a political relationship with the leaders of the tribe.[2] Presumably, this same requirement would be imported into S.611, even though not explicitly required, since S.611 lifts the political authority criterion straight out of the existing regulations.

This sophisticated concept of political authority, that is, one that reflects direct assent by tribal members through some mechanism, has little relation to political authority exercised by aboriginal communities. Political authority exercised in those communities is traditionally built on loose alliances of extended family groups, capable of acting in concert with each other as the occasion demanded. The more formal authority required by the regulations and S.611 may be in evidence on reservations with formal constitutions or other organic governing documents. But

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[2] As noted above, the term ?bilateral political relations" does not appear in the BIA regulations. However, in a lawsuit challenging the BIA decision to recognize the San Juan Paiute Tribe, the BIA interpreted the term tribal member as requiring some affirmative indication of members' intent to maintain a meaningful political relationship with the tribal government. See Masayesva z. Zah, 792 F. Supp. 1178 (D.Ariz. 1992). This appears to assume a structure of some sort with a mechanism by which members may express their assent, through voting otherwise, to representation by the political leadership. This model of political authority simply does not correspond to the political authority of non-federally recognized Indian communities.

even there, it is unlikely that the tribe could demonstrate that a majority of its members have indicated assent through individual participation in their government. See 25 C.F.R. §83.7(c); S.611, §5(b)(3)(A).

The experience of the Miami Indians of Indiana bears witness to the difficulties with both the community and political authority criteria. The Tribe had been recognized by treaty with the United States in 1854 and was acknowledged as such by the Department of the Interior up until 1897. In that year, the Department of Justice opined that, because the Miamis in Indiana had been made citizens and all their tribal land had been allotted, they were no longer tribal Indians subject to the federal trust responsibility. Based on this opinion, the Department of the Interior administratively terminated the Tribe, withdrawing all federal protection for the Tribe and remaining allotted lands. With the loss of federal protection, the Indian Miami very soon lost all allotted land to tax foreclosure sales, resulting in a dispersion of tribal members. Even though the dispersion stabilized in areas surrounding the treaty allotted lands, the Department of the Interior concluded in 1992 that it would not acknowledge the Tribe because of weakened community and political ties. 57 Fed. Reg. 27312 (1992). The Department admitted that the present day members descend from the historically recognized Indiana Miami, that the contemporary Indiana Miami maintain at least minimal social and political ties, and that there is a continuous line of tribal leaders. However, the Department declined to recognize the Tribe under the regulations because of insufficient evidence of internal social ties or networks and bilateral political relations. This decision is currently under review in federal court in Indiana.

Genealogical connection with historic tribe

A fourth example of unreasonableness in the criteria is the requirement that modern day members prove descent from members of the historic tribe. This same requirement has been in the regulations since 1978 and has come in practice to require a near impossibility. It is not enough to show descent from family names historically associated with the tribe. Members must show a genealogical connection with a member of the historic tribe. It is very rare that such complete documentation exists for Indian tribes at the time of sustained white contact. In fact, such data does not exist for many federally recognized tribes. For example, sustained white contact for plains tribes goes back at least to the time of the Louisiana Purchase. Most of these tribes have at least partial census lists of tribal members, prepared for treaty annuity payment or similar federal purposes. However, because no local governments were routinely recording births and marriages at the time, modern day members of those tribes cannot prove ancestry from an individual member listed on those early census records. It is unreasonable to require non-federally recognized tribes to prove a fact that many federally recognized tribes cannot prove.

It should also be noted that there is a considerable degree of discretion involved in this criterion as well. In some cases, the BIA has been willing to accept something less than direct genealogical evidence of descent from a historic tribe, such as, for example, statement of such connection from established ethno-historians or other experts. However, the BIA does not always accept the reliability of such evidence. Most recently, in the case of the Houma, the BIA declined to accept the word of John Swanton, a well respected expert on Indian communities, that

the present day Houma descend from the historic Houma Tribe. For that and other reasons, the BIA has proposed to decline acknowledgment of the Houmas.

For these reasons among others, I urge the Committee to reconsider the criteria set out in S.611, §5. The BIA's experience in administering the current regulations shows that these criteria are overly burdensome and subjective. By writing those criteria into law, S.611 would lock the Commission into using unworkable criteria, with the inevitable result that the Commission would also fail to bring fairness and reasonableness to the acknowledgment process.

An alternative to S.611, §4

Over the last three years and in response to concern expressed in the Senate and House of Representatives, lawyers and others representing non-federally recognized tribes have discussed informally with the Department of the Interior how the criteria might be changed to more fairly and accurately reflect the historical experience of non-federally recognized tribes. The substance of these informal discussions is reflected in H.R.361, presently pending in the House of Representatives. Mr. Faleomavaega, the original sponsor of H.R.361, has shown the same commitment to fairness for non-federally recognized Indian communities as shown by the leadership of this Committee..

Like S.611, H.R.361 proposes the creation of a commission to process petitions for federal recognition through use of an open, adjudicatory proceeding. In response to concern of the Department of the Interior, though, H.R.361 would not create an independent commission, but one that is part of the Department of the Interior. Other than this difference, the commission created in H.R.361 would process petitions very similarly to the commission proposed in S.611.

Unlike S.611, H.R.361 would not simply write the present regulatory criteria into law. H.R.361 basically adopts the same structure as the regulations and S.611 (with seven mandatory criteria). However, H.R.361 modifies those criteria in ways that reduce the unnecessary detailed and burdensome inquiry and reduces the subjectivity, and hence arbitrariness, of the criteria. The major changes in the criteria include the following:

First, H.R.361 shortens the time span for which continuous existence must be proved. Rather than beginning with first sustained white contact, H.R.361 begins with 1934. As suggested above, there is no legally required date for this inquiry. It only need be of sufficient length to assure the decision-maker that the current Indian community is not reconstituted or of recent origin. 1934 is a reasonable date for this purpose, since there were no economic or other particular incentives for an Indian community to hold itself out as such at that time. In addition, 1934 brought in the federal policy of support for tribal communities, a policy that has failed as to non-federally recognized tribes. It seems fair and fitting that if an Indian community was in existence at that time and has continued its existence since, it should be presumed to be a historic Indian community. Finally, it is important to note that proof from this date gives rise to a presumption of historic existence, so that the petitioner need not prove existence before that date.

If the Department or other interested party may demonstrate that the petitioner did not exist before that date; in this case, the petitioner is not entitled to recognition

Second, less subjective indicia of political authority and community are included in the criteria, such as long-standing state or local government recognition of a continuous line of group leaders. These indicia allow for recognition of a group without making the detailed and subjective inquiry presently required into the extent and nature of interpersonal relationships among tribal members.

Third, data other than direct genealogical connection is deemed acceptable proof of descent from a historical tribe. These include reports, research and other statements based upon first hand experience of historians and anthropologists as well as genealogists.

Conclusion

Non-federally recognized Indian communities have waited for even-handed and fair treatment from the United States for more than two hundred years now. There was the promise of such in 1978 in the form of the Department of the Interior's regulations. However, this promise was an illusion. Instead of even-handed and fair treatment, the regulations established a closed process with burdensome criteria that bear little relationship to the actual experience or reality of non-federally recognized tribes. Worst of all, the regulatory process has resulted in the denial of recognition to clearly worthy Indian tribes, such as the Miami Indians of Indiana. At this point, only Congress can solve the problem. S.611 is a step in that direction. With appropriate changes to the criteria and a reopening of the process to tribes that had been subjected to the arbitrary and unfair administrative process, S.611 will finally bring a new beginning for non-federally recognized tribes.